**STATE OF MICHIGAN**

**IN THE SUPREME COURT**

SKANSKA USA BUILDING, INC

Plaintiff-Appellant,

Case No. 159510, 159511

v.

COA Nos. 34087, 341589

M.A.P. MECHANICAL CONTRACTORS, INC, AMERISURE INSURANCE COMPANY, and AMERISURE MUTUAL INSURANCE COMPANY,

Midland County Circuit Ct Case No. 13-009864

Defendants-Appellees.

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# AMICI CURIAE BRIEF OF THE INSURANCE ALLIANCE OF MICHIGAN

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*Submitted by:*

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## Statement of Interest of Amici Curiae

The Insurance Alliance of Michigan is a government affairs and public information association consisting of more than 75 insurers, groups, and related organizations operating in the State of Michigan. Its members include insurers providing auto, home, and business insurance in the state. Its purpose is to serve the industry and consumers by providing educational, media, legislative, and public information on significant issues affecting the insurance business in this state.

Counsel for the Insurance Alliance of Michigan is the sole author of this amicus brief, which has been prepared without monetary contribution from any party in this case and without monetary contribution from any counsel for a party in this case. MCR 7.212(H)(3).

## Response to Skanska's Claim of Error

This Court has directed the parties to address the meaning of "occurrence" as defined in the commercial general liability (CGL) policy issued to Skanska USA Building, Inc. That CGL policy incorporates a standard coverage form produced by the Insurance Services Office (ISO). And that form defines occurrence just as it does in every other occurrence-based liability policy produced by ISO. Occurrence means an "accident," not only for purposes of CGL coverage, but for every other form of occurrence-based coverage, including homeowners insurance, personal liability insurance, personal umbrella insurance, businessowners insurance, commercial umbrella insurance, owners and contractors protective liability insurance, and more. Occurrence-based policies cover an insured's liability for property damage and bodily injury caused by an accident. How this Court defines accident will have far-reaching consequences for the insurance industry in this state.

*Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369; 460 NW2d 329 (1990) applied the ordinary and established meaning of the word "accident" to a claim for faulty workmanship. The Court of Appeals did not, as Skanska claims, announce a "principle of law" unconnected to the contract terms. *Appellant's Brief*, p 1. The Court did not, as Skanska claims, apply "a definition of 'occurrence' that differs from, and does not give effect to, the actual words of the insurance contract that was before it." *Id*. The Court in *Hawkeye-Security* stayed true to the contract definition of occurrence, defined as an accident, and concluded that faulty workmanship or defective work product is not an accident under the ordinary meaning of the term. Contrary to

Skanska's opening statement, the Court of Appeals did not undermine the core principles for construing contracts under *Rory v Continental Ins Co*, 473 Mich 457; 703 NW3d 23 (2005).

*Hawkeye-Security* applied settled law and held that an accident means something more than a mistake or an unintended result. Accidents are fortuitous and unpredictable chance happenings, which "'is not what is commonly meant by a failure of workmanship,'" 185 Mich App at 378, quoting *McAllister v Peerless Ins Co*, 124 NH 676; 474 A2d 1033 (1984). A contractor's failure to heed plan specifications is no more an "accident" than an attorney's failure to heed statutes of limitations. The omission may be a mistake, but it is not a fortuitous, chance happening outside the insured's control. Nor is such a happening unforeseeable or unpredictable. *Hawkeye-Security* properly rejected the idea that faulty workmanship alone qualifies as an accident.

Skanska alternatively claims that even assuming *Hawkeye-Security* was properly decided, everything changed "in 1986 [when] the Insurance Services Office significantly revised" the 1973 comprehensive general liability into the commercial general liability form. Skanska claims that the "net effect" of those changes was "to extend coverage to certain types of construction defects – including the defects at issue in this case." *Appellant's Brief*, pp 2, 3-4. But the ISO publication cited by Skanska for that proposition says exactly the opposite: "[e]xclusions have been completely rewritten and clarified ***with no change in overall scope of coverage***." *Attachment A*, ISO Circular, Commercial General Liability Program Instructions Pamphlet, No. GL-86-204 (July 15, 1986) (emphasis added). And more importantly for this appeal, there was virtually no change

to the insuring agreement's requirement of an occurrence, still defined as an accident. While there were some changes to the exclusions, exclusions do not create coverage.

Skanska is really asking this Court to overrule 30 years of precedent on occurrence-based insurance coverage and nearly 100 years of precedent on the meaning of accident. Skanska and its amici contend that an accident includes mistakes and unintended results or events, which would mean that CGL policies cover liability for all resulting defects or damage to property, unless an exclusion applies. Skanska cites the Florida Supreme Court's decision in *US Fire Ins Co v J.S.U.B., Inc*, 979 So2d 871 (2007) as an example of this alleged trend in CGL coverage. But the court's approach in that case is directly at odds with *Rory v Continental,* a case that Skanska acknowledges as controlling law in Michigan. The Florida court ignored the requirement of an "accident" when it concluded that CGL "policies provide coverage not only for "'accidental events,' but also for injuries or damage neither expected nor intended from the standpoint of the insured.'" 979 So2d at 883. That holding is not supported by the language of the insuring agreement.

To afford coverage for unintended construction defects would effectively transform general liability policies into warranties of workmanship. It would profoundly alter the landscape for insurers and contractors in this state. Insurers would have to revise their underwriting standards to account for the additional risks and increased exposures presented by such warranty obligations. Premiums would necessarily increase, likely dramatically, which would be particularly detrimental to smaller contractors operating with more limited resources than Skanska. Alternatively,

and perhaps more likely, Michigan insurers would have to stop relying on ISO forms when writing coverage for contractors. They would have to develop their own unique policy forms or endorsements.[1] Contractors would be required to compare and contrast all of the different coverage forms in purchasing insurance rather than rely on the established coverage that ISO forms have effectively provided for decades. And if mere mistakes are accepted as accidents, it will fundamentally alter all occurrence-based insurance coverage, not just CGL coverage.

The Insurance Alliance of Michigan urges the Court to adhere to Michigan precedent in this area of insurance law and apply the ISO form CGL insuring agreement as it was always intended – to protect insureds against liability for property damage and injuries caused by accidents, meaning, fortuitous, unpredictable, chance happenings outside the insured's control. Poor workmanship is not an accident and the resulting defects in work product are not accidental property damage, if the true meaning of accident is applied. CGL policies do not cover the cost of repairing or replacing an insured's unsatisfactory work.

[1] As acknowledged by amicus curi Associated General Contractors of Michigan and Associated General Contractors of America, insurers like Amerisure "would have to revise policy forms that it has marketed and used for decades." *Amicus Brief*, p 3.

## Statement of Material Facts and Proceedings

The Insurance Alliance of Michigan relies on the statement of facts and proceedings presented by Amerisure, briefly summarized as follows. Skanska USA Building was the construction manager on a project for the Mid-Michigan Medical Center in Midland. Skanska hired Amerisure's named insured, MAP Mechanical Contractors, to install the steam boiler and piping for the heating system. MAP employees installed some of the expansion joints backwards, which caused a malfunction and resulted in extensive damage to the system installed by MAP.

Skanska was an additional insured under MAP's commercial general liability (CGL) policy with Amerisure at the time, and commenced this action to recover the $1.4 million it took to repair MAP's heating system. Amerisure moved for summary disposition because of the lack of coverage under the insuring agreement in its standard, ISO form commercial general liability policy. MAP's faulty installation of the expansion joints was not an accident, as that term is commonly understood, and so the cost to repair and restore the system was not covered. The trial court denied Amerisure's motion but the Court of Appeals granted leave and reversed, holding that faulty workmanship in itself is not an accident.

On October 18, 2019, this Court granted Skanska's application for leave to appeal and directed the parties to "address whether: (1) the definition of "occurrence" in *Hawkeye-Security Ins Co v Vector Construction Co*, 185 Mich App 369 (1990), remains valid under the terms of the commercial general-liability policy at issue here; and (2) the

plaintiff has shown a genuine issue of material fact as to the existence of an 'occurrence' under those terms."

The Insurance Alliance of Michigan will show that the definition of occurrence as used in all standard form ISO liability policies has not changed. An occurrence continues to be defined as an accident. Occurrence-based policies protect insureds against liability for property damage and bodily injury caused by accidents. Decades of case law in Michigan and elsewhere have held that "accident" means something more than a mistake or an unintended result or event. Mistakes such as a contractor's failure to follow contract specifications, or an attorney's failure to check the statute of limitations, are not accidents within the ordinary meaning of that term. Skanska and its amici fail to make the case for overturning 30 years of Michigan precedent. An insured's liability for the cost of repairing or replacing its own faulty and possibly damaged work is not covered by an occurrence-based liability policy.

## Argument

### A. ISO forms providing occurrence-based liability coverage.

The Insurance Services Office (ISO), formed in 1971, is a nationally based company specializing in insurance products and services. It supports a wide range of customers, including not only insurers, but also insurance agents and brokers, insurance regulators, and risk managers. Services include the collection and dissemination of claims information and statistics, as well as underwriting and actuarial data. Products include compliance tools, and of particular relevance here, standard policy forms.[2] See also, *Travelers Property Cas Co of America v Peaker Services, Inc*, 306 Mich App 178, fn 2; 855 NW2d 523.

This Court has asked the parties to address a key element of one of the most common forms of insurance: occurrence-based liability coverage. This type of coverage is different from other types of liability coverage, such as professional liability insurance and errors and omissions (E&O) or directors and officers (D&O) insurance, which tend to base coverage on wrongful acts. Occurrence-based forms like the 2007 ISO commercial general liability (CGL) form involved here,[3] include ISO's Businessowners form, *Attachment B*,[4] Homeowners form, *Attachment C*,[5] Personal Liability form, *Attachment D*,[6] Commercial Umbrella form, *Attachment E*,[7] Personal Umbrella form,

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[2] https://en.wikipedia.org/wiki/Insurance_Services_Office (accessed February 22, 2020).
[3] CG 0001 1207.
[4] BP 0003 0713, Section II Liability Coverage, pages 35, 49 of 53.
[5] HO 0005 0511, Definitions, page 1 of 23; Section II Liability Coverage, page 16 of 23.
[6] DL 2401 0714, pages 2-3 of 8.

*Attachment F*,[8] and the Owners and Contractors Protective Liability form, *Attachment G*.[9] In all of these forms, liability coverage applies to claims of bodily injury or property damage only if caused by an "occurrence," with occurrence expressly defined in each policy as an accident.[10]

**B. "Occurrence" is an "an accident" in the standard occurrence-based policy.**

The insuring agreement in this CGL policy mirrors the insuring agreement in all of the other occurrence-based policies produced by ISO. It covers "those sums the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies." The insuring agreement goes on to state that the insurance applies to bodily injury or property damage only if caused by an "occurrence."

This CGL policy defines "occurrence" much like the definitions of "occurrence" in all of the other occurrence-based policies. Occurrence means "an accident, including continuous and or repeated exposure to substantially the same harmful conditions." The policy in *Hawkeye-Security* similarly defined "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." 185 Mich App at 373. So in order for faulty workmanship to trigger coverage under the occurrence-based policy, that faulty workmanship must be an accident. "If an insurance contract sets forth definitions, the policy language must be interpreted according to those definitions." *Century Surety Co v Charron*,

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[7] CU 0001 0413, pages 1, 16 of 18.
[8] DL 9801 1215, pages 2-3 of 9.
[9] CG 0009 0413, pages 1, 9 of 9.
[10] Relevant language is highlighted in each of the foregoing policy forms.

230 Mich App 79, 82; 583 NW2d 486 (1998). Coverage is limited to sums the insured must pay due to property damage or bodily injury caused by an accident.[11]

*Hawkeye-Security* was the first case in Michigan to apply the concept of "accident" to faulty workmanship. But the meaning of accident was nothing new to Michigan jurisprudence at the time. This Court explained the concept of accident nearly a hundred years ago in *Klein v Len Darling Co*, 217 Mich 485, 492; 187 NW 400 (1922), as a happening by chance or a fortuitous event. The panel in *Hawkeye-Security* relied on similar precedent, *Frankenmuth Mut Ins Co v Kompus*, 135 Mich App 667; 354 NW2d 303 (1984), in addressing the meaning of an accident. It fully understood that an accident is more than a mistake or unintended result. And the definition of accident applied in *Hawkeye-Security* has been repeatedly confirmed by this Court as "an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected." *Frankenmuth Mutual Ins Co v Masters,* 460 Mich 104, 114; 595 NW2d 832 (1999); *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 598; 489 NW2d 444 (1992); *Allstate v Freeman*, 432 Mich 656, 670; 443 NW2d 734 (1989).

A contractor's faulty workmanship or work product by itself does not qualify as an "accident." The manner in which the contractor performs its work, and the product it produces, is not an unforeseeable event. Whether performed correctly or incorrectly, and regardless of intent, the contractor controls the course of conduct; it controls the

[11] In the current CGL form, property damage must be neither expected nor intended or coverage is excluded. See exclusion (a) in Amerisure's CGL liability policy.

manner in which the work is performed. The contractor may not intend to deviate from contract specifications or deliver a defective product but the manner in which the contractor performs its work is not a fortuitous, undesigned, chance happening, occurring outside the contractor's control. If that work turns out to be performed improperly, the result is predictable and to be expected: a defect in the final product and the need for remediation or even repair or replacement. Where the contractor has control over the method and manner of work and proceeds in a certain manner, the manner in which it proceeds is not an accident and the resulting damage is not a happening by chance.

The meaning of "accident" would apply in the same way to all of the other occurrence-based forms of liability insurance. Assume a homeowner helps a neighbor construct a fence along their shared property line. The homeowner's job is to dig the holes for the fence posts but the holes are too shallow and the result is an unstable fence. That homeowners' insurance policy will not cover the cost of correcting the insured's mistake. It will not pay to reconstruct the fence or replace it. The manner in which the homeowner dug the hole was not a fortuitous, chance happening; it was not an accident within the ordinary meaning of the word.

Another example is the storeowner who sells an outdoor grill in a previously opened box that is missing the manufacturer's instructions for assembly. The customer proceeds to assemble the grill without the instructions and ends up with a grill that doesn't work. The occurrence-based businessowners policy for that storeowner will not pay to replace the grill. It will not refund the customer's money. The sale of the grill

without the manufacturer's instructions was not an accident within the ordinary meaning of the term, even though it may have been a mistake.

**C. The key is fortuity, a necessary element of "accident."**

It's the fortuity of an injury or property damage that triggers coverage under an occurrence-based policy. By defining an "occurrence" as an "accident," the insurance contract makes fortuity an essential condition of coverage. The term accident is infused with concepts of chance and fortuity, unpredictability and happenstance. "Fortuity" is part of every judicial discussion of the meaning of "accident," e.g., *Frankenmuth v Masters*, 460 Mich at 114. In its common and ordinary sense, "fortuitous" means "occurring by chance." *Webster's Universal Encyclopedia Dictionary* (Merriam-Webster, 2002). And "chance" means "something that happens unpredictably . . . without observable cause," in other words, outside one's control. *Id*. Occurrence-based coverage is written to protect the insured against the uncertain and unpredictable risks created by events outside the insured's ability to control. There must be a "happening of some event that is not certain to occur and that is not within the control of either party." *Kingston v Marward & Karafilis*, 134 Mich App 164, 172; 350 NW2d 842 (1984). The fact that an insured did not intend backward expansion joints, or shallow fence post holes, or the sale of a product without the manufacturer instructions, does not mean the event was an accident, i.e., a chance happening without observable cause, something outside the insured's control. When a contractor fails to use proper construction methods, either by design or by mistake, the result is in no sense a fortuity.

The requirement of fortuity is so entrenched in the concept of occurrence-based liability insurance that it has spawned the "known loss" doctrine in Michigan and elsewhere. The court writing in *Aetna Cas & Sur Co v Dow Chem Co*, 10 F Supp 2d 771, 789 (ED Mich 1998), quoting *Pittson Co Ultramar America, Ltd v Allianz Ins Co*, 124 F3d 508 (CA 3 1997), explained that:

> [T]he known loss doctrine is a common law concept that derives from the fundamental requirement of fortuity in insurance law. Its basic premise is that insurance policies are intended to protect insureds against risks of loss; not losses that have already taken place *or are substantially certain to occur* [emphasis added].

*See also, American Bumper v Hartford Ins*, 452 Mich 440; 550 NW2d 475 (1996).

**D. Faulty workmanship alone is not fortuitous.**

The use of inferior materials, failure to comply with industry standards, shoddy work methods, and failure to perform as required by the terms of a contract are not fortuitous events or chance happenings outside the insured's control. Nor are the results of such conduct unpredictable, unexpected, or outside the usual course of events. The contractor understands its contractual obligations going into a project. The defects that result when those obligations are breached are the inevitable consequence of that insured's failure to properly perform. Inferior materials, shoddy work methods, and failure to comply with contract specifications or industry standards will lead to construction defects of one sort or another. The fact that an insured did not intend bad construction but only allowed it to occur through inattentiveness does not make it fortuitous.

Skanska contends that "backward expansion joints are 'unusual' and 'not anticipated.'" *Appellant's Brief*, p 16. But backward joints are not a fortuity, a chance happening, or an event over which the insured had no control. Skanska also argues that the result of "broken concrete, bent steel, and a thousand feet of ruined pipe are a 'casualty' . . . and an undesigned contingency." *Appellant's Brief*, pp 16-17. But there is nothing unpredictable or fortuitous about the fact that backward expansion joints will result in a defective heating system. The specific property damage may be uncertain, depending on how quickly the defect is discovered and corrected. But the result of a faulty heating system due to improperly installed expansion joints was predictable and expected.

An insistence on fortuity does not result in illusory insurance or skew coverage in favor of insurers. Construction sites are rife with opportunities for accidents. Workers routinely deal with buildings and structures that are not yet complete, often working at extreme heights, in environments that are constantly changing. CGL policies protect contractors against the liability they frequently face as a result of injuries to workers on the construction site, where the worker is not an employee, or where the worker is an employee but the contractor agreed to indemnify others for any claims arising out of its work. See, for example, *Wausau Underwriters Ins Co v Ajax Paving Industries, Inc*, 256 Mich App 646 (2003) (occurrence-based policies applied to construction site accident claims of bodily injury; dispute was over which insurer had primary coverage).

CGL policies also cover claims of accidental property damage. Contrary to what amici Turner Construction Company and Gilbane Building Company are suggesting,

no insurer would argue that "property damage to construction project work caused by a subcontractor's faulty/defective construction can [never] be considered an occurrence". *Amicus Brief*, p 3. A contractor might use a crane to move heavy beams across the job site. The chain used to carry the beams might break while the beam is in the air, causing the beam to fall and damage property below. The broken chain and the falling beam would be a fortuitous chance happening and the resulting property damage unpredictable and uncertain to occur. That would be an accident and the CGL insuring agreement would be triggered.

The next step would be to look at the exclusions. The above hypothetical helps show how Skanska and its amici are wrong in contending that there is some disconnect between the insuring agreement and the exclusions, requiring the two to be read together rather than as step one and then step two in the coverage analysis. If the property that was accidentally damaged by the falling beam was the insured's own work, coverage would be excluded under the "your work" exclusion because CGL policies do not pay an insured to repair or redo its own work, even if the damage is the result of an accident. But if the property damaged was property other than the insured's work, such as the property owner's vehicle, or another contractor's equipment, or a building on which the insured was not working, there would be coverage.

CGL insurance serves an important function in the construction business, particularly when it comes to workers who are injured on the job site due to the acts or omissions of other contractors. A departure from the current meaning of "accident" and

the potential abandonment of standard ISO forms could have far-reaching consequences in this state.

**E. Similar national perspectives.**

Jurisdictions that share Michigan's commitment to the language of the insurance contract tend to share Michigan's approach to assessing CGL coverage for construction defect claims. The focus in these jurisdictions is on the requirement of a true "accident," which requires some element of fortuity. That's in direct contrast to the jurisdictions that find coverage based on the expected or intended nature of the damage. Amerisure has provided case law from at least 16 other jurisdictions that align with *Hawkeye-Security* and current Michigan law (Alabama, Arkansas, Arizona, Hawaii, Illinois, Kentucky, Maine, Maryland, Nebraska, Nevada, New York, Ohio, South Carolina, Utah and Wyoming). To that list, the Insurance Alliance adds the following.

In *Kvaener Metals Div v Commercial Union Ins Co*, 589 Pa 317; 908 A2d 888 (2006), the insured designed and constructed a coke oven for Bethlehem Steel, but failed to comply with contract specifications. Bethlehem sued for the cost of replacing the coke oven or for the difference in value between what it received and what was promised. In denying CGL coverage for the claim, the Pennsylvania Supreme Court pointed out that "[t]he key term in the ordinary definition of 'accident' is 'unexpected.' This implies a degree of fortuity that is not present in a claim for faulty workmanship." 589 Pa at 333. Citing cases that involved the defective work of subcontractors, the Court adopted a principle, dictated by the language of the insuring clause, that denies coverage to the insured for defects in construction that it is charged with overseeing:

> We hold that the definition of "accident" required to establish an "occurrence" under the policies cannot be satisfied by claims based upon faulty workmanship. Such claims simply do not present the degree of fortuity contemplated by the ordinary definition of "accident" or its common judicial construction in this context.

589 Pa at 335-336. See also, *Nationwide Mutual Ins Co v CPB International, Inc*, 562 F3d 591 (3rd Cir 2009) (following *Kvaener).*

The Supreme Court of Minnesota addressed this issue prior to the Michigan Court of Appeals in *Hawkeye-Security*. In *Knutson Construction Co v St. Paul Fire and Marine Ins Co*, 396 NW2d 229 (Minn 1986), the owner of a large apartment complex sued the general contractor after discovering that exterior bricks and prefabricated brick panels were becoming detached from the building. The apartment owner also complained of problems with the HVAC system and the windows, which did not seal out moisture and air and did not open and close properly. Subcontractors performed virtually all of the work and the general contractor looked to its own insurers for liability coverage. While not specifically addressing the definition of an "occurrence," the Minnesota Supreme Court held that the policies at issue did not cover the owner's claim for the cost of repairing defective work because the risk of faulty workmanship is a normal, foreseeable and controllable feature of construction, as opposed to an unanticipated or unexpected risk. Coverage was afforded only for risks that were fortuitous:

> In every construction project, the owner and contractor incur risks or exposure to loss. Some of these risks can be shifted to insurers – others cannot. . . . [T]he contractor likewise has a contractual business risk that he may be liable to the owner resulting from failure to properly complete the building project itself in a manner

> so as to not cause damage to it. This risk is one the general contractor effectively controls and one which the insurer does not assume because it has no effective control over those risks and cannot establish predictable and affordable insurance rates.

396 NW2d at 234. The Minnesota Supreme Court understood that the insured was responsible for all phases of the project – even the work subcontracted to others. Any departure from the contract specifications and industry standards could not be viewed as fortuitous or happenstance.

In *St. Paul Fire and Marine Ins Co v Building Construction Enterprises, Inc*, 484 F Supp 2d 1004 (WD Mo 2007), the insured contracted with the Army Corps of Engineers to build a training facility designed to withstand the weight of military tanks and equipment. Certain duct banks were inadequately installed by the insured's subcontractors and had to be repaired at the insured's expense, who then submitted a claim to its CGL insurer. Applying Missouri law, the federal district court concluded that the subcontractor's failure to comply with the contract specifications was not an "accident," because it was not "[a]n event that takes place without one's foresight or expectation; an undesigned, sudden and unexpected event." 484 F Supp 2d at 1010, quoting *American States Ins Co v Mathis*, 974 SW2d 647 (Mo App 1998). A breach of a contract-defined duty to comply with a specification is not an accident. 484 F Supp 2d at 1010, citing *Cincinnati Ins Co v Venetian Terrazzo, Inc*, 198 F Supp 2d 1074, 1079 (ED Mo 2001).

Finally, though Amerisure has already identified Illinois as a jurisdiction that compares to Michigan, an earlier case out of that state is particularly instructive here. In

*Viking Construction Mgt Inc v Liberty Mutual Ins Co*, 358 Ill App 3d 34; 831 NE2d 1 (2005), the Illinois Court of Appeals determined there was no coverage for the construction manager faced with claims of faulty workmanship on the part of the subcontractors it hired to perform the work. The Court explained that because the CGL insuring clause limited coverage to claims arising out of an occurrence, and because the collapse of an improperly braced wall was an ordinary, natural, and predictable result of the faulty construction methods used, there was no occurrence, and thus no coverage for the construction manager. 358 Ill App at 53.

**F. A word about *American Family Mut Ins Co v American Girl.***

Amerisure has accurately distinguished Skanska's contrary authority, in which the courts generally equate "accident" with "lack of intent." This was the reasoning in *US Fire Ins Co v J.S.U.B., Inc, supra,* mentioned earlier, where the Florida Supreme Court held that occurrence-based "policies provide coverage not only for "'accidental events,' [properly applying the insuring agreement] but also injuries or damage neither expected nor intended from the standpoint of the insured [improperly applying an exclusion as though it created coverage].'" 979 So2d at 883.

One of the cases cited by Skanska deserves particular attention because a panel of the Michigan Court of Appeals once noted that it would have applied the same analysis had it been "writing on a clean slate." See *Groom v Home-Owners Ins Co*, unpublished per curiam opinion of the Court of Appeals, issued April 19, 2007 (Docket No. 272840). The case is *American Family Mut Ins Co v American Girl,* 268 Wis 2d 16; 673 NW2d 65 (2004), in which three of seven justices on the Wisconsin Supreme Court

signed onto an opinion that deviated from precedent in that state (notably, two judges dissented and two judges did not participate). Plaintiff had issued a CGL policy to the general contractor responsible for constructing a large warehouse for American Girl merchandise. The general contractor relied on erroneous information from its soil engineer, and as a result, the building sustained serious structural damage as it settled, and ultimately had to be torn down and rebuilt.

The Wisconsin Supreme Court found coverage for the claim but not by applying the relevant contract terms. The three justices first reasoned that "[t]he CGL insuring agreement is a broad statement of coverage and insurers limit their exposure to risk through a series of specific exclusions." 268 Wisc 2d at 34. In fact, the occurrence-based insuring agreement is not so broad as to essentially create "all-risk" coverage, as the majority in *American Girl* seemed to suggest. The CGL insuring agreement, by its clear terms, only applies to property damage caused by an accident. The Wisconsin Supreme Court was clearly wrong to begin its analysis of coverage by assuming that all risks are covered unless expressly excluded. And it was that erroneous presumption that led to the insupportable conclusion that "although CGL policies generally do not cover contract claims arising out the insured's defective work or product . . . this is by operation of the CGL's business risk exclusions." 268 Wis 2d at 39.

Because the majority viewed the exclusions as the basis for coverage, the opinion in *American Girl* gave short shrift to the requirement of an occurrence in the first instance. It acknowledged the need for an accident but engaged in no discussion of fortuity or lack of control. It simply concluded that "[n]o one seriously contends that the

property damage . . . was anything but accidental (it was clearly not intentional), nor does anyone argue that it was anticipated by the parties." 268 Wisc at 38.

*American Girl* is based on a misunderstanding of the way occurrence-based liability policies are constructed and how coverage applies. The court essentially looked to the "business risk" exclusions first, and decided that to the extent the exclusions did not apply, there was coverage, which is Skanska's argument here. That's not the way Michigan construes an insurance contract. Rather, every coverage analysis begins with the insuring agreement because if that insuring agreement doesn't apply, none of the other terms of the insurance contract matter. "[W]e first determine whether coverage exists [under the insuring agreement in that policy], and then whether an exclusion precludes coverage." *Allstate Ins Co v Freeman*, 432 Mich 656, 668; 443 NW2d 734 (1986). This Court should not be misled by Skanska's citation to *American Girl* and similar cases.

## Conclusion and Relief Requested

Skanska begins its discussion of coverage by claiming that "the pertinent parts of the insurance policy in this case are the initial insuring clause and two of the exclusions." *Appellant's Brief,* p 12. But the question posed by this Court focuses on the insuring agreement. The October order asks the parties to address the definition of "occurrence," which is a specific condition of the insuring agreement and is completely unrelated to any policy exclusions.

Skanska and amici fail to point to any material change in the insuring agreement of the policy discussed in *Hawkeye-Security* and the current ISO forms for occurrence-based coverage. "Occurrence" is defined as an accident in all occurrence-based policies. Skanska fails to explain why this Court should depart from the plain and ordinary meaning of the word accident as applied in *Hawkeye-Security*.

Skanska's main argument is that certain 1986 changes *to exclusions*, known as the business risk exclusions, fundamentally altered the coverage granted by the CGL insuring agreement. Exclusions can certainly alter the coverage provided by an insuring agreement by narrowing that coverage. But as pointed out in Amerisure's brief, "exclusionary clauses never grant coverage," they can only "limit the scope" of coverage provided by the insuring agreement. *Fresard v Michigan Millers Mut Ins Co*, 414 Mich 686, 697; 327 NW2d 286 (1982).

The Insurance Alliance of Michigan asks this Court to confirm decades of Michigan law on the meaning of "accident" and hold that faulty workmanship alone does not qualify. Most importantly, the Insurance Alliance of Michigan asks this Court to decide this case mindful of the broad use of occurrence-based insuring agreements in a host of different

forms of coverage, with a clear eye on the far-reaching effect of its decision on the meaning and application of the word "accident."

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