IN THE SUPREME COURT
APPEAL FROM THE MICHIGAN COURT OF APPEALS
HON. DAVID H. SAWYER, PRESIDING JUDGE

SKANSKA USA BUILDING, INC.,
A Delaware Corporation,

Plaintiff-Appellant,

v

M.A.P. MECHANICAL CONTRACTORS, INC., a Michigan Corporation, AMERISURE INSURANCE COMPANY, a Michigan property and casualty insurer; AMERISURE MUTUAL INSURANCE COMPANY, a Michigan property and casualty insurer; and AMERISURE PARTNERS INSURANCE COMPANY, a Michigan property and casualty insurer,

Defendants-Appellees.

MSC No. 159510-1
COA Docket Nos. 341589 and 340871
Trial Ct. Case No. 13-9864-CKB

BRIEF OF *AMICUS CURIAE* HOME BUILDERS ASSOCIATION OF MICHIGAN IN SUPPORT OF APPELLANT SKANSKA USA BUILDING, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF JURISDICTION

On October 10, 2019, this Court granted Skanska USA Building Inc.'s Application for Leave to Appeal from the Court of Appeals opinion dated March 19, 2019. Accordingly, this Court has jurisdiction pursuant to MCR 7.303(B)(1) and Mich Const 1963, Art VI, § 4.

STATEMENT OF QUESTIONS PRESENTED

1. Should a case that construes a standardized insurance contract be given precedential effect when the dispositive provisions in that contract have since been materially changed?

   Skanska says: No

   Amerisure says: Yes

   Trial Court said: Yes

   Court of Appeals said: Yes

   This Court should answer: No

2. When the undisputed and uncontested facts indicate a party did not intend an act and did not intend the consequences of that act, should the trial court have found the act to be an "accident?"

   Skanska says: Yes

   Amerisure says: No

   Trial Court said: Did Not Resolve the Question

   Court of Appeals said: No

   This Court should answer: Yes

STATEMENT OF INTEREST

The Home Builders Association of Michigan is a statewide association whose members develop and build single and multi-family homes throughout Michigan. The Association believes that the great majority of construction for residential use in Michigan is performed in whole or in part by its members. The Association thus speaks for home builders in Michigan. One of the primary goals of the association is to provide the opportunity for all Michigan residents to own or rent affordable housing. To promote this goal and others, the Association opposes laws and court decisions which delay, restrict, or otherwise impede the ability of the Association's members to construct affordable housing in Michigan.

The question in this case turns on the interpretation of a form insurance contract ubiquitous in the construction industry—the commercial general liability policy provided by the Insurance Services Office. The CGL contract provides that the insurer must cover property damage caused by an "occurrence." The parties in this case ask this Court to determine whether an "occurrence" includes damage caused by a subcontractor's defective work. That question turns on the plain meaning of the term "occurrence," as understood against the backdrop of the industry's interpretation and use of the term.

Amicus has a profound interest in that question. Insurers across the country use the ISO's standard CGL policy to govern the terms of insurance for construction projects. Members of the Association thus depend on the CGL policy to properly and adequately insure against risks in their construction projects, including the risk

that subcontractors cause damage for which they will not or cannot pay. If the CGL policy provides inadequate coverage, the builder is left to bear the cost if the less-well-capitalized subcontractor cannot or does not pay for its own mistakes. To be sure, insurance coverage presents well-known moral hazard issues. Overly broad coverage might incentivize rushed or inadequate work when the insured knows that the insurer will step in to cover losses—a result that would damage the reputations of members of the Association and harm their businesses. The Association thus has unique and uniquely balanced interests in the outcome of this appeal.[1]

ARGUMENT

History and industry practice show that the CGL policy covers damage to property caused by defective workmanship—particularly by subcontractors. To be sure, construing the words of a contract like the CGL policy starts (and may end) with careful analysis of the contract's words. But words do not exist in a vacuum. Contracts "are enacted against a background of common-sense understandings and legal principles," *Wal-Mart Stores, Inc Associates' Health & Welfare Plan v Wells*, 213 F3d 398, 402 (CA 7, 2000), and that background "qualifie[s]" and informs the meaning of the words in the contract (absent some expressed contrary intent), Restatement of Contracts, 2d, §221 (1981). That is doubly true of insurance contracts, where courts vigilantly protect "the objectively reasonable expectations of

[1] Pursuant to MCR 7.312(H), counsel for *amicus curiae* states that no counsel for a party authored this brief in whole or in part. No counsel or party made a monetary contribution to fund the preparation or submission of this brief, and no person other than members of the Association made such a contribution.

applicants and intended beneficiaries regarding . . . coverage." Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv L Rev 961, 966–967 (1970). Industry custom and usage thus inform the meaning of a contract's words—especially those of an insurance policy.

This case concerns the 1986 version of the CGL policy. Unlike traditionally negotiated bilateral contracts, the CGL policy is a form created by the Insurance Services Office—a for-profit company that provides services and standardized language to insurers. Insurers then use that form language to enter contracts (policies) with businesses—including construction companies—across the country. There is ample evidence that when the ISO created the 1986 CGL policy, it intentionally drafted the policy to include coverage for faulty subcontractor work. Prior to 1986, the ISO had provided such coverage via an endorsement—an add-on to the standard policy. Commentators reporting on the views of the industry and contemporaneous circulars published by the ISO show that the 1986 policy was drafted specifically to incorporate the endorsement's coverage of faulty subcontractor work directly into the policy.

Unsurprisingly then, court-after-court has interpreted the CGL policy to cover faulty sub-contractor work. Indeed:

> "[s]tate supreme courts that have considered the issue since 2012 have reached '***near unanimity***' that 'construction defects can constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by ***defective workmanship done by subcontractors***.'"

Black & Veatch Corp v Aspen Ins (UK) Ltd, 882 F3d 952, 966 (CA 10, 2018) (emphasis added). This Court should join this nearly unanimous group.

I. THE HISTORY OF THE CGL POLICY SUPPORTS APPELLANT

A. Contracts—Including Insurance Contracts—Must Be Interpreted Using Reasonable Industry Usage

"The primary goal in the construction or interpretation of any contract is to honor the intent of the parties." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 473 (2003). It is often said that honoring the intent of the parties requires construing a contract "according to its plain sense and meaning . . . ." *City of Grosse Pointe Park v Michigan Muni Liab & Prop Pool*, 473 Mich 188, 197–198 (2005) (citation and quotation marks omitted). Meaning, however, comes from context, and contracts "are enacted against a background of common-sense understandings and legal principles that the parties may not have bothered to incorporate expressly but that operate as default rules to govern in the absence of a clear expression of the parties' intent that they not govern." *Wal-Mart Stores, Inc Associates' Health and Welfare Plan*, 213 F3d at 402. Hence, contracts are "supplemented or qualified by a reasonable usage with respect to the agreements of the same type . . . ." Restatement of Contracts, 2d, §221. Indeed, "[i]t is standard contract law . . . that a party may be bound by a custom or usage even though he is unaware of it, and indeed even if he positively intended the contrary." *Sun Oil Co v Wortman*, 486 US 717, 731 n 4 (1988). That is because "a reasonable usage which supplies an omitted term . . . is a surer guide than the court's own judgment of what is reasonable." Restatement of Contracts, 2d, §221, cmt. a; see also *City of Wyandotte v Consol Rail Corp*, 262 F3d 581, 586 (CA 6, 2001) (applying Michigan law and looking to "the standards and practices within the relevant industry" to interpret a disputed term).

Custom and practice get double legal weight in the insurance context. "In general, courts will protect the reasonable expectations of applicants, insureds, and intended beneficiaries regarding the coverage afforded by insurance contracts . . . ." *Hansen v Ohio Cas Ins Co*, 687 A2d 1262 (Conn, 1996) (quoting R. Keeton & A. Widiss, Insurance Law (1988) §6.3(a)(3), p 633). And in the construction business, the expectations of policyholders are no doubt informed by the drafting history of the ISO's form commercial general liability policy, and the trend toward interpreting that policy to include damage caused by faulty workmanship as an "occurrence."

"[I]gnoring those rules [of contract construction] is likely to frustrate the parties' intent and produce perverse consequences." *US Airways, Inc v McCutchen*, 569 US 88, 102 (2013). But Amerisure would have this Court conduct its interpretation looking through a microscope, focusing almost exclusively on the 1986 policy's "alteration to the definition of 'occurrence'" (Appellee Br. at 8) and the meaning of the word "accident" (*id* at 9). "Because *Hawkeye's* definition of 'occurrence' was based solely on the meaning of 'accident'" (which did not change with the 1986 policy) and "not in any way on the modifying clause at the end of the definition" (which did change with the 1986 policy), this Court's construction should follow *Hawkeye*'s—or so Amerisure reasons. See *id*. at 9. That is something like telling Mary Todd Lincoln that the April 14, 1865 performance of *Our American Cousin* was just the same as any other. Context matters. Ignoring it, as Amerisure does, leads to an interpretation of the CGL policy that is at odds with the

understanding of an entire industry and courts across the country. Proper interpretation of the CGL policy requires contextual examination of its history.

B. History Requires Reading the CGL Policy To Provide Coverage Here

To understand the context of the 1986 policy changes, it is important to understand the insurance industry. "[M]ost primary insurers rely on certain outside support services for the type of insurance coverage they wish to sell." *Hartford Fire Ins Co v California*, 509 US 764, 772 (1993). The "Insurance Services Office, Inc. (ISO), an association of approximately 1,400 domestic property and casualty insurers . . . is the almost exclusive source of support services in this country for CGL insurance." *Id.* "ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms." *Id.* "For each of its standard policy forms, ISO also supplies actuarial and rating information . . . and on the basis of this data it predicts future loss trends and calculates advisory premium rates." *Id.*

The ISO's original CGL policy from 1973, like the one here, provided broad coverage for "occurrences." But unlike the 1986 policy at issue now, the 1973 policy contained an ***express*** exclusion of coverage for "property damage to the work performed by or on behalf of the named insured out of the work of any portion thereof." Christian Robertson II, Note, *Defective Construction CGL Coverage: The Subcontractor Exception*, 7 Mich Bus & Entrepreneurial L Rev 159, 162–63 (2017) (quoting 1973 policy). "This exclusion implicitly included the work of subcontractors . . . ." *Id.*

"Due to the increasing use of subcontractors on construction projects, many general contractors were not satisfied with the lack of coverage provided under [the 1973 ISO CGL] . . . where the general contractor was not directly responsible for the defective work." 9A Couch on Ins. § 129:19. So in 1976, the ISO created endorsements called "Broad Form Property Damage" to provide "coverage [that] included property damage arising out of work performed by subcontractors."[2] Lee H. Shidlofsky, *Deconstructing CGL Insurance Coverage Issues in Construction Cases*, 9 J American Coll of Constr Law 2 (August 2015). The endorsement accomplished this by replacing the broad exclusion of coverage for "work performed by or on behalf of the named insured" with a narrower exclusion. *Id.* The ISO itself confirmed that the Broad Form Property Damage endorsements included such coverage. In a circular that it published in 1979, the ISO expressly stated that with the endorsement "[t]he insured would have coverage for damage to his work" and "to a subcontractor's work arising out of the subcontractor's work." Insurance Services Office Circular, Broad Form Property Damage Coverage Explained, No. GL–79–12 (January 29, 1979) (hereinafter "1979 ISO Circular").[3] And the Circular provided examples of covered events under the endorsements, which ***include***

[2] The ISO created two such endorsements—one known as Advisory Endorsement 3005 and the other known as Advisory Endorsement 3006. One provided coverage for only ongoing "operations" and the other provided coverage for both ongoing and "completed operations." Shidlofsky, *supra*.

[3] Courts regularly rely on the ISO's publications to interpret the meaning of terms in these standard contracts. See, e.g., *Maryland Cas Co v Reeder*, 270 Cal Rptr 719 (1990); *Fireguard Sprinkler Sys, Inc v Scottsdale Ins Co*, 864 F2d 648 (CA 9, 1988).

instances of faulty subcontractor work. *Id.*[4] Hence, the Broad Form Property Damage endorsement provided coverage for claims like the one that Skanska made on Amerisure's policy here.

The ISO's actions with respect to the Broad Form Property Damage endorsement are relevant both in substance and in process. *Substantively*, the Broad Form Property Damage endorsement shows that, prior to 1986, the ISO intended to provide coverage for faulty work. Robertson, *supra*, at 163 ("According to many practitioners, the success of the Broad Form Property Damage Endorsement resulted in the insurance industry's willingness to expand coverage in exchange for higher premiums."). *Procedurally*, the ISO's means of providing that coverage shows that ***it had been there all along***. To provide coverage for faulty work, the ISO did ***not*** draft an expanded coverage provision; it drafted a ***narrower*** exclusion. The ISO thus plainly believed that "occurrences" included contractor and subcontractor mistakes, and the only barrier to coverage was a broad exclusion in

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[4] For example, the Circular provided an example of an exclusion from covered events that make clear that subcontractor work is covered, absent an express exclusion:

> Again, a general contractor engages a steel erection contractor to erect steel beams for a building. After erecting several beams, the subcontractor negligently swings another beam against the erected beams causing damage to all the beams. The damage to the beams already erected would be covered. The damage to the swinging beams would be excluded under (2)(d)(i). If, after the beam is erected, it fell because it was improperly fastened or because it proved to be inappropriate for the purpose intended, damage to the beam would be excluded either under (2)(d)(ii) or (2)(d)(iii) respectively.

1979 ISO Circular.

the policy. That is consistent with how courts would interpret the policy: An exclusion is rendered surplusage if the policy did not already cover that risk. See *Stanley Martin Companies, Inc v Ohio Cas Group*, 313 Fed Appx 609, 613 n 2 (CA 4, 2009) ("If the definition of 'occurrence' cannot be understood to include an insured's faulty workmanship, an exclusion that exempts from coverage any damage the insured's faulty workmanship causes to its own work is nugatory."); *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871, 879–880 (Fla, 2007) (same). Cf *Klapp*, 468 Mich at 468 (Michigan rules of construction of insurance contracts include requirement to "give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.").[5]

The 1986 policy at issue here simply incorporates the Broad Form Property Damage endorsement—the endorsement that provided coverage for faulty work—directly into the policy. *French v Assurance Co of Am*, 448 F3d 693, 701 (CA 4, 2006) ("In 1986 . . . the subcontractor exception aspect of the BFPD Endorsement was added directly to the body of the ISO's CGL policy in the form of an express exception to the 'Your Work' exclusion."). Again, a contemporaneous ISO Circular confirms that "the 1986 revisions . . . were intended to incorporate the 1976 Broad

[5] As one commentator aptly put it: "A court need only ask why the CGL policy specifically includes an express exception to the 'your work' exclusion for property damage arising out of the work of a subcontractor to understand that this kind of property damage must be included in the broad scope of the term 'occurrence' in the coverage grant, and that the coverage determination for this kind of property damage must be made based on the construction-specific policy exclusions." Clifford J. Shapiro, *The Good, The Bad, and The Ugly: New State Supreme Court Decisions Address Whether an Inadvertent Construction Defect Is an Occurrence*, 25 Construction Lawyer 9 (2005).

Form Property Endorsement and to make it clear that the policy 'cover[ed] damage caused by faulty workmanship to other parts of work in progress; and damage to, or caused by, a subcontractor's work after the insured's operations are completed.'" Christopher C. French, *Construction Defects: Are They "Occurrences?"*, 47 Gonzaga L Rev 1, 9 (2011) (quoting Ins. Servs. Office, Inc., Circular No. 6L-86-204, Commercial General Liability Program Instructions (1986)); see also *JSUB*, 979 So 2d at 879 (same).

The ISO's construction of the CGL policy reflects the input not just of its own experts but of the entire industry—insurers and policyholders alike. As the ISO testified to Congress:

> This policy form is the result of years of effort and the most extensive industry review of a new policy form in ISO's history. ISO distributed more than 1,500 copies of an exposure draft to a broad cross-section of industry interests—nearly 250 groups and individuals in all—for their review and comment. Insurers, producers, buyers, reinsurers, educators, lawyers, risk managers, adjustors, consumers and trade associations all provided advice, and more than 30 organizations reported the suggestions and reactions of their members.

Liability Insurance Availability: Hearing before the H. Subcomm. on Commerce, Transportation, and Tourism of the H. Comm. on Energy and Commerce, 99th Cong. 237 (1987) (statement of Mavis A. Walters, Senior Vice President, Insurance Services Office, Inc.); see also U.S. Gen. Accounting Office, GAO/HRD-87-18BR, *Liability Insurance: Changes in Policies Set Limits on Risks to Insurers* 9 (1986) (describing years-long process to develop revisions to policy). The 1986 policy thus reflects agreement by "the insurance and policyholder communities . . . that the CGL policy should provide coverage for defective construction claims so long as the

allegedly defective work had been performed by a subcontractor." French, *Construction Defects: Are They "Occurrences?"*, 47 Gonzaga L Rev at 8–9 (quoting 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.13[D], at 14-224.8 (3d ed. Supp. 2007)). "This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage." *Id.* This Court should honor that agreement and construe the CGL policy to provide coverage here.

II. THE VAST MAJORITY OF JURISDICTIONS WOULD FIND COVERAGE HERE

"State supreme courts that have considered the issue since 2012 have reached 'near unanimity' that 'construction defects can constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by defective workmanship done by subcontractors.'" *Black & Veatch Corp*, 882 F3d at 966. Amerisure claims that the majority view is that "self-damaging defective workmanship" is not "an accident." Appellee Br. at 26. That blinks reality. Examined closely, an overwhelming majority would find coverage here for faulty work that requires repair to other property. Amerisure fails to address the law of many states, relies on outdated law of some, and misconstrues the law of others:

Alabama: Amerisure (at 27) asserts that Alabama supports its view. Not so. *Nationwide Mut Fire Ins Co v David Group, Inc*, ___ So3d ___, No. 1170588, 2019 WL 2240382, at *3 (Ala, May 24, 2019) holds that "although there is no coverage for replacing poor work, there may be coverage for repairing resulting damage caused

by the poor work." Hence, the damage to the heating system caused by the backwards-installed joints here would be covered under Alabama law as an "occurrence."

Arizona: *Lennar Corp v Auto-Owners Ins Co*, 151 P3d 538 (Ariz App, 2007) holds that "the CGL policies at issue contemplate and explicitly cover damage to an insured's work resulting from work performed on the insured's behalf by a subcontractor." Amerisure does not address Arizona law.

Arkansas: Amerisure (at 26)—apparently relying on outdated case law—incorrectly claims that Arkansas law does not define an occurrence to include faulty workmanship. That is wrong. Ark Code Ann § 23-79-155(a)(2) requires that a CGL policy shall define an occurrence to include "[p]roperty damage or bodily injury resulting from faulty workmanship."

California: *Navigators Specialty Ins Co v Moorefield Constr, Inc*, 212 Cal Rptr 3d 231 (2016) held that a subcontractor's conduct was not an accident (and therefore could not be an "occurrence" under the CGL policy) because it was "not a case in which a contractor engaged in conduct only later discovered or revealed to constitute a construction defect." Rather, the subcontractor "knew about and intended to perform defective work with the hope or mistaken belief the defect would not cause property damage." *Id.* Amerisure does not address California law.

Colorado: Again relying on outdated case law, Amerisure asserts that Colorado does not define occurrence to include faulty workmanship. Wrong again.

Colo Rev Stat §13-20-808(3) (2010) expressly repudiates the decision upon which Amerisure relies.

Connecticut: *Capstone Bldg Corp v Am Motorists Ins Co*, 67 A3d 961, 976 (Conn, 2013) holds that "defective workmanship can give rise to an 'occurrence.'"[6] Amerisure does not address Connecticut law.

Florida: Amerisure acknowledges that *US Fire Ins Co v JSUB, Inc*, 979 So 2d 871 (Fla, 2007) finds that faulty workmanship can be an occurrence. Amerisure's attempt to distinguish *JSUB* on the ground that it involved a general contractor attempting to collect on its own policy is a red herring. Appellee Br. at 43. The opinion defines "occurrence" to provide coverage for faulty workmanship. Indeed, the court expressly rejected "distinction[s] that would make the definition of 'occurrence' dependent on which property was damaged." *JSUB*, 979 So 2d at 883.

Georgia: *Am Empire Surplus Lines Ins Co v Hathaway Dev Co, Inc*, 707 SE2d 369 (Ga, 2011) holds that "an occurrence can arise when faulty workmanship causes unforeseen or unexpected damage to other property." Amerisure does not address Georgia law.

Indiana: In *Sheehan Const Co, Inc v Contl Cas Co*, 935 NE2d 160 (Ind, 2010), the Indiana Supreme Court joined "those jurisdictions adopting the view that improper or faulty workmanship does constitute an accident so long as the resulting

[6] The court in *Capstone* appears to have hedged with the word "can," because determining whether there was coverage required the additional step of assessing whether there was "property damage." *Capstone Bldg Corp*, 67 A3d at 976.

damage is an event that occurs without expectation or foresight." Amerisure does not address Indiana law.

Iowa: Amerisure acknowledges that *Natl Sur Corp v Westlake Inv, LLC*, 880 NW2d 724 (Iowa, 2016) supports *Amicus*'s position.

Kansas: *Lee Builders, Inc v Farm Bureau Mut Ins Co*, 137 P3d 486, 495 (Kan, 2006) joined the majority view with a pithy example: "An insured would reasonably expect to have insurance coverage under an 'occurrence' not only for the damage caused to the passerby by the falling wall described in the dissent, but also for the damage to the falling wall itself." Amerisure does not address Kansas law.

Minnesota: *Wanzek Const, Inc v Employers Ins of Wausau*, 679 NW2d 322 (Minn, 2004) found coverage for defective subcontractor work under a CGL policy, but in fairness the parties did not dispute whether defective workmanship was an occurrence and disputed instead whether the "your work" exclusion applied.

Missouri: In *Columbia Mut Ins Co v Epstein*, 239 SW3d 667, 669 (Mo Ct App, 2007), a subcontractor poured concrete that "did not meet" the "Building Code's minimum concrete strength requirements." "In order to correct the problem, the framing and sub-floor had to be removed and the foundation had to be removed and re-poured." *Id.* The court held this was an "occurrence" within the meaning of the CGL policy. *Id.* at 672–73. Amerisure does not address Missouri law.

Mississippi: "This Court concludes that under Scottsdale's CGL policy, the term 'occurrence' cannot be construed in such a manner as to preclude coverage for unexpected or unintended 'property damage' resulting from negligent acts or

conduct of a subcontractor, unless otherwise excluded . . . ." *Architex Ass'n, Inc v Scottsdale Ins Co*, 27 So 3d 1148, 1162 (Miss, 2010). Amerisure does not address Mississippi law.

Montana: A CGL policy provides coverage "when a general contractor becomes liable for damage to work performed by a subcontractor—or for damage to the general contractor's own work arising out of a subcontractor's work . . . ." *Revelation Indus, Inc v St Paul Fire & Marine Ins Co*, 350 Mont 184, 198–99 (2009) (citation and quotation omitted). Amerisure does not address Montana law.

New Hampshire: Relying on a case from 1984, Amerisure asserts that New Hampshire law supports its view. Appellee Br. at 22. But in 2007, the New Hampshire Supreme Court limited its prior holding and determined that when faulty workmanship damages other property, it is an "occurrence":

> Unlike in *McAllister*, here, the plaintiffs' alleged defective work does not stand alone. As stated above, the writ alleges actual damage to the purlins, property other than the work of the insured, and does not merely seek damages for the defective roof. Therefore, *McAllister* is not controlling.

Webster v Acadia Ins Co, 934 A2d 567, 573 (NH, 2007).

New Jersey: *Cypress Point Condo Ass'n, Inc v Adria Towers, LLC*, 143 A3d 273, 288 (NJ, 2016) holds that "under our interpretation of the term 'occurrence' in the policies, consequential harm caused by negligent work is an 'accident.'" Amerisure does not address New Jersey law.

New York: Amerisure asserts (without citation at 25) that New York court decisions go its way, but *Black & Veatch Corp*, 882 F3d at 966, exhaustively examines New York law and holds that an occurrence includes faulty workmanship.

North Dakota: Amerisure admits that *K & L Homes, Inc v Am Family Mut Ins Co*, 829 NW2d 724 (ND, 2013) supports *Amicus*'s position. Appellee Br. at 28-29.

South Carolina: Amerisure says that South Carolina has "clearly held" that "self-damaging defective workmanship" is not an occurrence. Appellee Br. at 26. That was once true but no longer. In 2012, South Carolina passed a statute which requires that an "occurrence" includes "property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself." SC Code Ann § 38-61-70(B)(2). That statute would provide coverage here for the cost of replacing the steam heating system, exclusive of the backwards joints.

South Dakota: *Corner Const Co v United States Fid & Guar Co*, 638 NW2d 887 (SD, 2002) addressed the Broad Form Property Damage endorsement that was later incorporated directly into the CGL policy. In that case, a subcontractor's improper installation of insulation and failure to secure a vapor barrier required the general contractor to "remove the drywall, fix the vapor barrier, replace the drywall" and fix other damage. *Id.* at 895. The court held that this situation—analogous to the one here—was an "occurrence." *Id.* Amerisure does not address South Dakota's law.

Tennessee: *Travelers Indem Co of Am v Moore & Assoc, Inc*, 216 SW3d 302, 309 (Tenn, 2007) holds that faulty work is an "occurrence" if the resulting damage could not have been foreseen had the work been completed property. Amerisure's attempt to distinguish *Travelers* on the ground that it involved a general contractor

attempting to collect on its own policy is a red herring. Appellee Br. at 43. The opinion defines "occurrence" to provide coverage. Amerisure's argument goes to the scope of the exclusions in the policy.

Texas: Amerisure acknowledges that *Lamar Homes, Inc v Mid-Continent Cas Co*, 242 SW3d 1 (Tex, 2007) supports *Amicus*'s position.

West Virginia: *Cherington v Erie Insurance Property and Casualty Co*, 745 SE2d 508, 511-12 (W Va, 2013) overruled the state's prior decisions and held that defective work is an "occurrence." Amerisure does not address West Virginia law.

Wisconsin: Amerisure acknowledges that *Am Family Mut Ins Co v Am Girl, Inc*, 673 NW2d 65 (Wis, 2004) supports *Amicus*'s position.

Finally, Amerisure claims (without citation) that North Carolina and Oregon support its position. But the North Carolina case to which Amerisure apparently refers (*Prod Sys, Inc v Amerisure Ins Co*, 605 SE2d 663, 666 (NC App, 2004)) does not examine the meaning of "occurrence" at all—it construes the term "property damage." And the Oregon case (*Oak Crest Const Co v Austin Mut Ins Co*, 998 P.2d 1254, 1258 (Or, 2000)) appears to say that faulty workmanship can be an occurrence if there is proof that the defects were the result of negligence. That leaves Amerisure only with Illinois, Ohio, Kentucky, and Pennsylvania squarely supporting its position. Not at all the "majority" that Amerisure claims (at 25).

The broad consensus of courts reflects not only the views of the judiciary, but also provides further evidence of the industry's understanding that the CGL policy provides coverage for subcontractor defects. The industry is proactive about

revising policies to react to trends in caselaw. "[I]nsurers waste little time contemplating how to respond to new risks of loss that could impair their profit margins when they appear. Instead, ISO quickly drafts exclusions that are immediately added to policies to avoid insuring potentially unprofitable risks of loss." Christopher C. French, *The Role of the Profit Imperative in Risk Management*, 17 U Pa J Bus L 1081, 1114 (2015). If the insurance community truly thought the growing majority of courts was getting it wrong, it would have created exclusions to reduce the scope of coverage. No such exclusions exist, indicating that the insurance community supports the trend in the case law.

III. SOUND POLICY SUPPORTS THE INDUSTRY CUSTOM

Industry custom has given builders and proponents of construction projects settled expectations about the allocation of risk in construction projects. Most construction contracts require the general contractor to purchase commercial general liability coverage, which covers both the general contractor and sub-contractors. This assures the developer, builder, owner, or proponent of the construction that the general and sub-contractors will have the means to pay for liabilities generated by the project. An undercapitalized contractor ***cannot*** pay for its mistakes. The insurance policy assures the builder or proponent of the project that it will not be left to foot the bill if its contractor or subs cause damage and then go belly-up. Public policy favors coverage in that situation. Cf *Vigilant Ins Co v Kambly*, 114 Mich App 683, 687–688 (1982) ("[T]here is great public interest in protecting the interests of the injured party.").

What is more, it is difficult for builders to determine the financial health of contractors and near impossible to determine the financial health of sub-contractors. Without requiring the contractor to purchase insurance, the builder bears the risk of an undercapitalized contractor. But the commercial general insurance policy shifts that risk away from the builder. The insurance company bears the risk of mistakes by the contractor or its subs, and it bears no risk of an undercapitalized contractor, because the contractor must make premium payments to keep the policy in force. The Court of Appeals' decision largely removes a builder's ability to mitigate the risk of undercapitalized subcontractors. The builder can insist that the contractor obtain a commercial general liability policy, but that policy will have significant coverage gaps. If a subcontractor damages the project through negligence, and cannot bear its own costs, the builder must. See, e.g., French, *Construction Defects: Are They "Occurrences?"*, 47 Gonzaga L Rev at 44.

It is no answer to tell builders to seek insurance for this risk from other specialized sources. The CGL exists, in part, because offering more specialized lines of coverage proved unprofitable: "Prior to 1943, there were numerous different lines of liability insurance available to cover specific risks such as Public Liability Insurance and Premises Operations Insurance that were issued by various insurers with varying policy language." French, *Profit Imperative in Risk Management*, 17 U Pa J Bus L at 1097. This drew high-risk insureds into very small, discrete insurance pools, making it very expensive for insurers to provide coverage. *Id.* "The CGL policy was created to broaden the insurance pool and to address other

problems associated with splintered lines of coverage such as insurers' use of differing terms and conditions in their policies." *Id.* Hence, to insure against these risks, the CGL policy is likely the only reasonable path.

* * *

To be sure, policy goals are no reason to favor one contractual interpretation over another. But it is another thing entirely where, as here, policy considerations demonstrate the expectations of an industry. Insurance law favors providing coverage when insureds expect it. Builders and general contractors expect coverage in situations like this one. And for good reason: insurance coverage provides an essential tool in an industry that depends upon hiring numerous small businesses to complete discrete tasks on huge projects. This Court should support that reasonable expectation of coverage.

CONCLUSION

This Court should reverse the decision below.

Respectfully submitted,

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