

Defective Construction as an “Occurrence”

Monday, September 9, 2024

Standard commercial general liability (“CGL”) policies cover bodily injury and property damage caused by an “occurrence,” which is in turn defined as an “accident.” For claims arising out of defective construction, courts have applied different interpretations of the “occurrence” definition.

There are many nuances among the states on this issue, although generally most fall into one of three analytical camps:

- (1) Some states hold that defective or faulty workmanship is an “occurrence,” provided the construction contractor did not intend to cause damage. This analytical framework reserves the analysis concerning whether certain aspects or items of damage (for example, the faulty work itself) are uncovered due to exclusionary provisions.
- (2) Many states have held that defective or faulty workmanship which causes damage to other work or property is an “occurrence.” This framework can often lead to coverage for most damage that results from the faulty work – for example, the cost to replace wet dry wall as a result of faulty window installation. However, the analysis may be complicated by court interpretation of what constitutes “other work or property.” For general contractors in some states, the entire construction project might be considered their work, leaving them without coverage despite the fact that, at first glance, the case law seems favorable.
- (3) Finally, a small number of states find that defective or faulty workmanship is never an “occurrence.” Courts taking this approach typically cite to one of two rationales: either the contractor was contractually obligated to provide work free from defect; or the contractor should have foreseen that it would be responsible for correcting defects in its work. Courts will often cite to the concept that correcting deficient work is a “business risk” for contractors which is not intended to be covered by insurance.

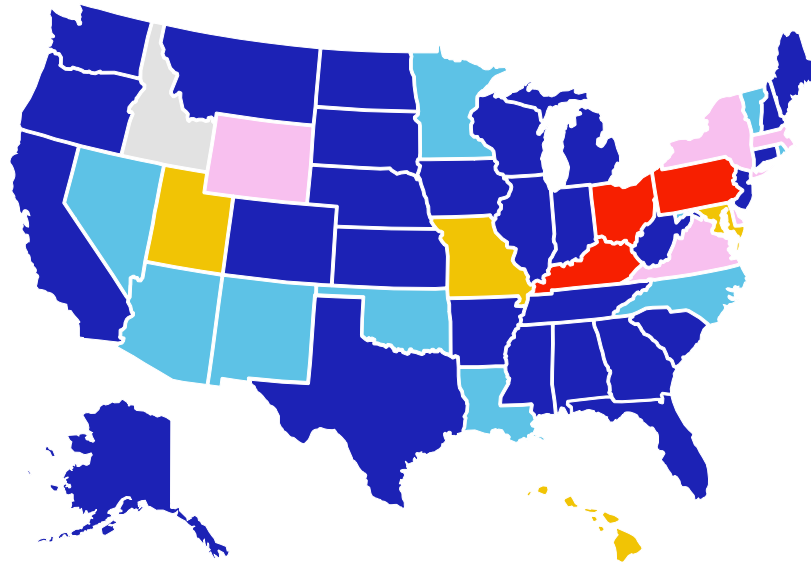
The map on the following page identifies how each state has analyzed the issue of whether defective construction qualifies as an “occurrence.” A state colored dark blue indicates that the jurisdiction’s highest court has found defective construction to be an “occurrence.” These states, almost universally, follow the reasoning set forth in number 1, above. States with statutes to the same effect are likewise shaded dark blue, and the statute identified in the table under Relevant Authority.

A state colored dark red, conversely, indicates that the jurisdiction’s highest court has held that defective construction is never an occurrence. These states generally follow the framework set forth in number 3, above.

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Light blue and light red shading show trends, based on lower court or federal court authority. In these jurisdictions, courts may take the “middle of the road” approach set out in number 2, above. Often, in these states, whether the insured has coverage is dependent upon other factors, such as whether the court views the entire project as the contractor’s work.

Lastly, where caselaw and/or statutes are conflicting or unclear, the state is shaded yellow.



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- Highest Court found defective construction be an occurrence (or by state statute).
- Tending towards coverage; only lower state court or federal court authority exists.
- Highest Court has found defective construction not to be an occurrence.
- Tending <u>against</u> coverage; only lower state court or federal court authority exists.
- Unclear, cases/legislation conflict.
- No decision.

Disclaimer: This survey is current as of 08/2024. This material is made available for general informational purposes only. The field of insurance law is ever-evolving, and courts may change their views at any time. Readers are advised to verify the information contained herein independently. This material is not intended to, and does not constitute, legal advice, nor is it intended to constitute a solicitation for the formation of an attorney-client relationship. For more information or questions on defective construction as an "occurrence", please contact us at coverage@sdvlaw.com.

STATE	POLICYHOLDER IMPACT	RELEVANT AUTHORITY
 Alabama	Favorable	<i>Owners Ins. Co. v. Jim Carr Homebuilder, LLC</i> , 157 So.3d 148 (Ala. 2014).
 Alaska	Favorable	<i>Fejes v. Alaska Ins. Co.</i> , 984 P.2d 519 (Alaska 1999).
 Arizona	Favorable	<i>Lennar Corp. v. Auto-Owners Ins. Co.</i> , 151 P.3d 538 (Ariz. Ct. App. 2007).
 Arkansas	Favorable	Ark. Code Ann. § 23-79-155; <i>J-McDaniel Co., Inc. v. Mid-Continent Cas. Co.</i> , 761 F.3d 916 (8th Cir. 2014); <i>Lexicon, Inc. v. Ace Am. Ins. Co.</i> , 634 F.3d 423 (8th Cir. 2011); <i>Essex Ins. Co. v. Holder</i> , 261 S.W.3d 456 (Ark. 2008).
 California	Favorable	<i>Navigators Specialty Ins. Co. v. Moorefield Constr., Inc.</i> , 6 Cal. App. 5th 1258 (2016); <i>Anthem Elecs., Inc. v. Pac. Employers Ins. Co.</i> , 302 F.3d 1049 (9th Cir. 2002); but see <i>Hogan v. Midland Nat'l Ins. Co.</i> , 476 P.2d 825 (Cal. 1970).
 Colorado	Favorable	Colo. Rev. Stat. § 13-20-808; <i>Greystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.</i> , 661 F.3d 1272 (10th Cir. 2011)
 Connecticut	Favorable	<i>Capstone Bldg. Corp. v. Am. Motorists Inc. Co.</i> , 67 A.3d 961 (Conn. 2013); <i>Scottsdale Ins. Co. v. R.I. Pools Inc.</i> , 710 F.3d 488 (2d Cir. 2013).
 Delaware	Unfavorable	<i>Builders, Inc. v. Harleysville Mut. Ins. Co.</i> , 137 F. Supp.2d 517 (D. Del. 2001), <i>aff'd</i> 2003 WL 146486 (3rd Cir. Jan. 21, 2003).
 Florida	Favorable	<i>Auto-Owners Ins. Co. v. Pozzi Window Co.</i> , 984 So. 2d 1241 (Fla. 2008); <i>U.S. Fire Ins. Co. v. J.S.U.B., Inc.</i> , 979 So.2d 871 (Fla. 2007).
 Georgia	Favorable	<i>Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.</i> , 707 S.E.2d 369 (Ga. 2011).
 Hawaii	Unclear	<i>Evanston Ins. Co. v. Nagano</i> , 891 F. Supp. 2d 1179 (D. Haw. 2012); Haw. Rev. Stat. § 431:1-217 (2011); <i>State Farm Fire & Cas. Co. v. Vogelgesang</i> , 834 F. Supp. 2d 1026 (D. Haw. 2011); <i>Group Builders, Inc. v. Admiral Ins. Co.</i> , 231 P.3d 67 (Haw. 2010); <i>Burlington Ins. Co. v. Oceanic Design & Constr., Inc.</i> , 383 F.3d 940 (9th Cir. 2004).
 Idaho	No authority	N/A
 Illinois	Favorable	<i>ACUITY v. M/I Homes of Chicago, LLC</i> , 234 N.E.3d 97 (Ill. 2023), <i>reh'g denied</i> (Jan. 22, 2024).
 Indiana	Favorable	<i>Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.</i> , 935 N.E.2d 160 (Ind. 2010).
 Iowa	Favorable	<i>Nat'l Sur. Corp. v. Westlake Invs.</i> , 880 N.W.2d 724 (Iowa 2016).

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 Kansas	Favorable	<i>Wilson v. Farmers Ins. Exch.</i> , 233 P.3d 767 (Kan. Ct. App. 2010); <i>Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.</i> , 137 P.3d 486 (Kan. 2006).
 Kentucky	Unfavorable	<i>Martin/Elias Properties, LLC v. Acuity</i> , 544 S.W.3d 639 (Ky. 2018); <i>Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.</i> , 306 S.W.3d 69 (Ky. 2010); <i>but see Bituminous Cas. Co. v. Kenway Contracting Inc.</i> , 240 S.W.3d 633 (Ky. 2007).
 Louisiana	Favorable	<i>Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of Louisiana</i> , 912 So.2d 400 (La. Ct. App. 2005); <i>McMath Constr. Co. v. Dupuy</i> , 897 So.2d 677 (La. Ct. App. 2005).
 Maine	Favorable	<i>Baywood Corp. v. Maine Bonding & Cas. Co.</i> , 628 A.2d 1029 (Me. 1993); <i>Peerless Ins. Co. v. Brennon</i> , 564 A.2d 383 (Me. 1989).
 Maryland	Unclear	<i>French v. Assurance Co. of Am.</i> , 448 F.3d 693 (4th Cir. 2006); <i>Lerner Corp. v. Assurance Co. of Am.</i> , 707 A.2d 906 (Md. Ct. Spec. App. 1998); <i>but see Harbor Court Assocs. v. Kiewit Constr. Co.</i> , 6 F. Supp. 2d 449 (D. Md. 1998).
 Massachusetts	Unfavorable	<i>All Am. Ins. Co. v. Lampasona Concrete Corp.</i> , 120 N.E.3d 1258, 1261-62 (Mass. App. Ct. 2019); <i>Am. Home Assurance Co. v. AGM Marine Contractors, Inc.</i> , 379 F. Supp.2d 134 (D. Mass. 2005); <i>Davenport v. U.S. Fid. & Guar. Co.</i> , 778 N.E.2d 1038 (Mass. App. Ct. 2002).
 Michigan	Favorable	<i>Skanska USA Building Inc. v. MAP Mechanical Contractors, Inc.</i> , 939 N.W.2d 446, (Mich. 2020); <i>Radenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan</i> , 610 N.W.2d 272 (Mich. Ct. App. 2000).
 Minnesota	Favorable	<i>King's Cove Marina, LLC v. Lambert Commer. Constr. LLC</i> , 937 N.W.2d 458 (Minn. Ct. App. 2019); <i>Aten v. Scottsdale Ins. Co.</i> , 511 F.3d 818 (8th Cir. 2008); <i>O'Shaughnessy v. Smuckler Corp.</i> , 543 N.W.2d 99 (Minn. Ct. App. 1996).
 Mississippi	Favorable	<i>Architex Ass'n v. Scottsdale Ins. Co.</i> , 27 So.3d 1148 (Miss. 2010).
 Missouri	Unclear	<i>Am. Family Mut. Ins. Co. v. Mid-American Grain Distributors, LLC</i> , No. 19-2050, 958 F.3d 748 (Mo. Ct. App. 2020); <i>Village at Deer Creek Homeowners Ass'n, Inc. v. Mid-Continent Cas. Co.</i> , 432 S.W.3d 231 (Mo. Ct. App. 2014); <i>D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.</i> , 316 S.W.3d 899 (Mo. 2010); <i>Columbia Mut. Ins. v. Epstein</i> , 239 S.W.3d 667 (Mo. Ct. App. 2007).
 Montana	Favorable	<i>21st Century N. Am. Ins. Co. v. Frost</i> , 516 P.3d 148 (Mont. 2022); <i>Farmers Ins. Exch. v. Wessel</i> , 477 P.3d 1101 (Mont. 2020); <i>Employers Mut. Cas. Co. v. Fisher Builders, Inc.</i> , 371 P.3d 375 (Mont. 2016).
 Nebraska	Favorable	<i>Drake-Williams Steel, Inc. v. Cont'l Cas. Co.</i> , 883 N.W.2d 60 (Neb. 2016); <i>Cizek Homes v. Columbia Nat'l Ins. Co.</i> , 853 N.W.2d 28 (Neb. App. 2014); <i>Auto-Owners Ins. v. Home Pride Companies</i> , 684 N.W.2d 571 (Neb. 2004).

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 Nevada	Favorable	<i>Big-D Const. Corp. v. Take it for Granite Too</i> , 917 F. Supp. 2d 1096 (D. Nev. 2013); <i>Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.</i> , 459 F. Supp. 2d 1039 (D. Nev. 2006).
 New Hampshire	Favorable	<i>Concord Gen. Mut. Ins. Co. v. Green & Co. Building & Develop. Corp.</i> , 8 A.3d 24 (N.H. 2010); <i>High Country Assocs. v. New Hampshire Ins. Co.</i> , 648 A.2d 474 (N.H. 1994); <i>Webster v. Acadia Ins. Co.</i> , 934 A.2d 567 (N.H. 2007).
 New Jersey	Favorable	<i>Cypress Point Condo Ass'n, Inc. v. Adria Towers LLC</i> , 143 A.3d 273 (N.J. 2016).
 New Mexico	Favorable	<i>Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.</i> , 367 P.3d 869 (N.M. Ct. App. 2015).
 New York	Unfavorable	<i>Transp. Ins. Co. v. AARK Constr. Group</i> , 526 F. Supp. 2d 350 (E.D.N.Y. 2007); <i>George A. Fuller Co. v. U.S. Fid. & Guar. Co.</i> , 613 N.Y.S.2d 152 (N.Y. App. Div. 1994); <i>J.Z.G. Resources, Inc. v. King</i> , 987 F.2d 98 (2d Cir. 1993); <i>but see Black & Veatch Corp. v. Aspen Ins. (Uk) Ltd.</i> , 882 F.3d 952, 954 (10th Cir. 2018).
 North Carolina	Favorable	<i>Builders Mut. Ins. Co. v. Mitchell</i> , 709 S.E.2d 528 (N.C. Ct. App. 2011); <i>ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.</i> , 472 F.3d 99 (4th Cir. 2006); <i>Travelers Indem. Co. v. Miller Bldg. Corp.</i> , 97 Fed. Appx. 431 (4th Cir. 2004).
 North Dakota	Favorable	<i>K&L Homes, Inc. v. Am. Family Mut. Ins. Co.</i> , 2013 ND 57, 829 N.W.2d 724 (2013); <i>ACUITY v. Burd & Smith Contr., Inc.</i> , 2006 ND 187, 721 N.W.2d 33 (2006).
 Ohio	Unfavorable	<i>Ohio Northern University v. Charles Construction Services, Inc.</i> , 155 Ohio St.3d 197, 120 N.E.3d 762 (Ohio 2018); <i>Allied Roofing, Inc. v. W. Reserve Group</i> , 2013 Ohio 1637 (2013); <i>Westfield Ins. Co. v. Custom Agri Sys., Inc.</i> , 2012 Ohio 4712, 979 N.E.2d 269 (Ohio 2012).
 Oklahoma	Favorable	<i>MTI, Inc. v. Empls. Ins. Co. of Wausau</i> , 913 F.3d 1245 (10th Cir. 2019); <i>Essex Ins. Co. v. Sheppard & Sons Constr.</i> , 2015 WL 4132919 (W.D. Okla. 2015); <i>Employers Mut. Cas. Co. v. Grayson</i> , 2008 WL 2278593 (W.D. Okla. 2008).
 Oregon	Favorable	<i>Twigg v. Admiral Ins. Co.</i> , 568 P.3d 156 (Or. 2025). However, this interpretation only applies where the contractor's liability exists based on tort theories, such as negligence. If liability arises solely out of contractual obligations, then it is not <i>caused</i> by an 'occurrence'.
 Pennsylvania	Unfavorable	<i>MMG Ins. Co. v. Floor Assocs.</i> , 2017 WL 3394619 (E.D. Pa. Aug. 8, 2017); <i>Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.</i> , 908 A.2d 888 (Pa. 2006).

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 Rhode Island	Favorable	<i>General Acc. Ins. Co. of America v. American Nat. Fireproofing, Inc.</i> , 716 A.2d 751 (RI 1998).
 South Carolina	Favorable	S.C. Code Ann. § 38-61-70, <i>retroactive application held unconstitutional by Harleysville Mut. Ins. Co. v. State</i> , 736 S.E.2d 651 (Nov. 21, 2012); <i>Auto-Owners Ins. Co. v. Rhodes</i> , 748 S.E.2d 781 (S.C. 2013); <i>Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.</i> , 717 S.E.2d 589 (S.C. 2011).
 South Dakota	Favorable	<i>Owners Ins. Co. v. Tibke Constr., Inc.</i> , 901 N.W.2d 80 (S.D. 2017); <i>Corner Constr. Co. v. U.S. Fid. & Guar. Co.</i> , 638 N.W.2d 887 (S.D. 2002).
 Tennessee	Favorable	<i>Travelers Indem. Co. of Am. v. Moore & Assocs.</i> , 216 S.W.3d 302 (Tenn. 2007).
 Texas	Favorable	<i>United States Metals, Inc. v. Liberty Mut. Grp., Inc.</i> , 490 S.W.3d 20 (Tex. 2015); <i>Ewing Constr. Co. v. Amerisure Ins. Co.</i> , 420 S.W.3d 30 (Tex. 2014); <i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007).
 Utah	Unclear	<i>Cincinnati Ins. Co. v. AMSCO Windows</i> , 921 F. Supp. 2d 1226 (D. Utah 2013); <i>Cincinnati Ins. Co. v. Linford Bros. Glass Co.</i> , 2010 WL 520490 (D. Utah Feb. 9, 2010); <i>H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.</i> , 248 F. Supp. 2d 1079 (D. Utah 2002); but see <i>Great Am. Ins. Co. v. Woodside Homes Corp.</i> , 448 F. Supp. 2d 1275 (D. Utah 2006).
 Vermont	Favorable	<i>Fine Paints of Europe, Inc. v. Acadia Ins. Co.</i> , No. 2:08-CV-81, 2009 WL 819466 (D. Vt. Mar. 24, 2009); <i>Transcont'l Ins. Co. v. Engelberth Constr., Inc.</i> , 2007 WL 3333465 (D. Vt. Nov. 8, 2007).
 Virginia	Unfavorable	<i>Stanley Martin Cos. v. Ohio Cas. Group</i> , 313 Fed. Appx. 609 (4th Cir. 2009); <i>Hotel Roanoke Conference Ctr. Comm'n v. Cincinnati Ins. Co.</i> , 303 F. Supp. 2d 784 (W.D. Va. 2004), aff'd 119 Fed. Appx. 451 (4th Cir. 2005); <i>Travelers Indem. Co. of Am. v. Miller Bldg. Corp.</i> , 142 Fed. Appx. 147 (4th Cir. 2005).
 Washington	Favorable	<i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 608 P.2d 254 (Wash. 1980).
 Washington, D.C.	Favorable	<i>Commonwealth Lloyds Ins. Co. v. Marshall, Neal & Pauley, Inc.</i> , 32 F. Supp.2d 14 (D.D.C. 1998).
 West Virginia	Favorable	<i>Cherrington v. Erie Ins. Prop. & Cas. Co.</i> , 745 S.E.2d 508 (W. Va. 2013).
 Wisconsin	Favorable	<i>Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</i> , 673 N.W.2d 65 (Wis. 2004).
 Wyoming	Unfavorable	<i>Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC</i> , 2006 WL 3933078 (D. Wyo. Oct. 20, 2006).