IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-2102

STANLEY MARTIN COMPANIES, INC.,

Plaintiff-Appellant,

v.

OHIO CASUALTY GROUP,

Defendant-Appellee.

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF APPELLANT STANLEY MARTIN COMPANIES, INC. IN SUPPORT OF REVERSAL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA,
ALEXANDRIA DIVISION
Case No. 1:1:06-cv-01035-JCC
The Honorable James C. Cacheris

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	*	
STANLEY MARTIN COMPANIES, INC.,	*	
Plaintiff-Appellant,	*	
v.	*	
	*	**No. 07-2102**
	*	
OHIO CASUALTY GROUP,	*	
Defendant-Appellee.	*	
	*	

* * * * * * * * * * * *

NOTICE OF CORPORATE DISCLOSURE

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, the National Association of Home Builders, as amicus curiae, makes the following disclosures:

1. Is the party a publicly held corporation or other publicly held entity?

   ( ) Yes (**X**) No

2. Is the party a parent, subsidiary, or affiliate of, or a trade association representing, a publicly held corporation, or other publicly held entity (see Local Rule 26.1(b))?

   ( ) Yes (**X**) No

3. Is there any other publicly held corporation, or other publicly held entity, that has a direct financial interest in the outcome of the litigation (see Local Rule 26.1(b)(3))?

( ) Yes (**X**) No

Date: February 5, 2008

Respectfully submitted,

____

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Introduction and Summary of Argument

The National Association of Home Builders ("NAHB") respectfully submits this brief as amicus curiae in support of plaintiff-appellant Stanley Martin Companies, Inc. ("Stanley Martin" or "the builder"). NAHB represents the nation's home builders. NAHB urges the Court to reverse the district court's grant of summary judgment to the insurer, defendant-appellee Ohio Casualty Group ("Ohio Casualty" or "the insurer"), and to hold that the property damage to the builder's work at issue in this case was caused by an "occurrence" within the meaning of the builder's commercial general liability ("CGL") insurance policy.

Virginia law applies to this case. The Virginia Supreme Court has not yet had the opportunity to rule on the "occurrence" issue. In French v. Assurance Co. of America, 448 F.3d 693, 706 (4th Cir. 2006) (applying Maryland law), this Court held that property damage to a home that was not expected or intended by the builder was accidental, i.e. was caused by an "occurrence," within the meaning of the builder's CGL insurance policy. The terms of the builder's CGL policy in French were essentially the same as the terms of Stanley Martin's policy in this case. The home at issue in French was located in Virginia, but the case was decided under Maryland law.

There is no reason to think that the Virginia Supreme Court would not agree with the reasoning of this Court in French and with the thoughtful and well-reasoned opinions of most other courts around the country that have recently addressed the "occurrence" issue. These courts have enforced the terms of the builders' CGL policies as written and have held that a claim against the builder for property damage to the builder's work caused by a subcontractor is covered by the builder's policy. These courts have drawn a distinction between faulty work standing alone, which is not covered, and faulty work that causes property damage to the structure, which is covered.

These decisions have also explained that their holdings enforce the subcontractor exception to the policy's "your work" exclusion. Before 1986, the "your work" exclusion in the standard CGL policy excluded from coverage property damage to the builder's work itself. But in 1986 the insurance industry amended this exclusion to specifically except from the exclusion property damage to the builder's work that was caused by a subcontractor. The insurer's position that property damage to the builder's work can never be caused by an "occurrence" would render the subcontractor exception to the "your work" exclusion meaningless, and it would erroneously deprive builders of insurance coverage for property damage that was caused by the defective work of subcontractors and that was neither expected nor intended by the builder.

Statement of Interest

NAHB has a substantial interest in this matter. NAHB is a nonprofit trade association that represents over 235,000 builder and associate members organized into approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. These affiliated associations include 18 state and local associations in Virginia, which have approximately 6,135 members consisting of contractors, subcontractors, developers and other related occupations that build and develop houses, apartments, and condominiums for residential use in Virginia. NAHB is the voice of the American housing industry. NAHB's goals are to promote home ownership; foster a healthy and efficient housing industry; and promote policies that will keep safe, decent, and affordable housing a national priority. Its members construct over 80% of the housing in the United States. NAHB's website address is www.nahb.org.

NAHB can offer this Court a broad view of (i) the role that liability insurance plays within the home building industry, (ii) the evolution of the standard general liability policy to include damage to the builder's work caused by subcontractors, (iii) the lack of justification for the retrenchment of coverage that the insurer is seeking in this case, and (iv) the disruptive effect that the insurer's position would have on Virginia home builders and Virginia homeowners alike.

Argument

I. LIABILITY INSURANCE PROTECTS HOME BUILDERS FROM THE RISK OF CLAIMS FOR PROPERTY DAMAGE TO THE BUILDER'S WORK CAUSED BY THE WORK OF SUBCONTRACTORS.

One of the risks faced by a residential builder is that, following completion of construction, the homeowner may assert a claim against the builder for damage to the home caused by an alleged construction defect. One of the ways a builder manages the risk of such construction defect claims is by purchasing comprehensive general liability ("CGL") insurance. The last major revision of the standard, pre-printed CGL insurance form took place in 1986. The policy at issue in this case is typical of post-1986 CGL insurance policies.

In construing the coverage provided by a CGL insurance policy, it is important to focus on the terms of the insurance policy itself. Parties to insurance coverage disputes may cite such vague sources as "general principles of insurance law," the "purpose" of insurance, or supposed insurance "doctrines" rather than the actual terms of the policy that the insurer and the policyholder agreed on. Such references often mask the party's unhappiness with the terms of the policy as written. The Virginia Supreme Court in particular has been a champion of the bedrock principle that the courts must enforce insurance policies as written, and of the corollary principle that the courts are not free to make a new contract for the parties. See National Housing Bldg. Corp. v. Acordia of Virginia Ins. Agency,

Inc., 267 Va. 247, 251 (Va. 2004); Partnership Umbrella, Inc. v. Federal Ins. Co., 260 Va. 123, 133 (Va. 2000).

The insuring agreement in a standard CGL insurance policy provides a broad grant of insurance coverage, which is then trimmed by the policy's exclusions, several of which apply specifically to the construction industry. See, e.g., Lamar Homes, Inc. v. Mid-Continent Cas. Co., 239 S.W.3d 236, 246 (Tex. 2007) (construction defect claims allege an occurrence, leaving coverage to be determined by "exclusions that have specific application to the construction industry"); American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65, 74, 76 (Wis. 2004) (construction defect claims allege an "occurrence," although exclusions in the policy determine whether there is coverage).

The policy's insuring agreement imposes three main requirements for coverage: (i) the claim against the builder must be for damages because of "property damage"; (ii) the property damage must take place while the policy is in effect; and (iii) the property damage must be caused by an "occurrence," which is defined to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

To be caused by an "occurrence," the property damage must be fortuitous, that is, neither expected nor intended from the standpoint of the insured. Utica Mutual Ins. Co. v. Travelers Indem. Co., 223 Va. 145, 147 (Va. 1982); Carpet

Palace v. Salehi, 26 Va. App. 357, 361 (Va. App. 1998). Accord Lamar Homes, 239 S.W.3d at 251; Bituminous Cas. Corp. v. Kenway Contracting, Inc., 2007 WL 1790685, at *4-*5 (Ky. June 21, 2007); American Family, 673 N.W.2d at 70; High Country Associates v. New Hampshire Ins. Co., 648 A.2d 474, 478 (N.H. 1994).

Several construction-specific exclusions in a standard CGL policy exclude from coverage certain types of property damage. The principal such exclusion is the "your work" exclusion, which provides:

> "This insurance does not apply to:... '[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.' This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (Emphasis added.)

Hence, even though the property damage is to the builder's own work, the "your work" exclusion does not apply and the CGL policy provides coverage if the damaged work or the work out of which the damage arises was performed on the builder's behalf by a subcontractor. Lamar Homes, 239 S.W.3d at 246-47; French v. Assurance Co. of America, 448 F.3d 693, 703-05 (4th Cir. 2006) (applying Maryland law); Limbach Co. v. Zurich American Ins. Co., 396 F.3d 358, 361-63 (4th Cir. 2005) (applying Pennsylvania law); American Family, 673 N.W.2d at 82; Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 653-54 (9th Cir. 1988) (applying Oregon law); P. O'Connor, Commercial General Liability Coverage, 19 The Construction Lawyer 5, 6 (April 1999); J. Blute, Analyzing

Liability Insurance Coverage for Construction Industry Property Damage Claims, 7 Coverage 1, 17-18 (May/June 1997).

It is important to understand the evolution of the "subcontractor" exception to the "your work" exclusion. Prior to 1986, most CGL policies excluded property damage to the builder's work (e.g. the house), regardless of whether the damage was caused by work done by the builder or by a subcontractor. In response to builder demand, in 1976 insurers began to offer an endorsement, known as the Broad Form Property Damage ("BFPD") endorsement, that had the effect of providing coverage for damage to the builder's work if it was caused by a subcontractor. See French, 448 F.3d at 701. See also Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co., 754 S.W.2d 824, 827 (Tex. App. - Fort Worth 1988, writ denied) (construction defect claims against builder based on faulty workmanship are covered by builder's CGL policy with BFPD endorsement because the faulty work was done by a subcontractor); Fireguard Sprinkler Systems, 864 F.2d at 651-54 (explaining rationale for the development of the BFPD endorsement, which provides coverage for losses caused by the work of subcontractors).

In 1986, the insurance industry incorporated this aspect of the BFPD endorsement directly into the standard CGL policy by inserting the subcontractor exception into the "your work" exclusion. See United States Fire Ins. Co. v.

J.S.U.B., Inc., 2007 WL 4440232, at *5 (Fla. Dec. 20, 2007); Lamar Homes, 239 S.W.3d at 247-48; French, 448 F.3d at 701; Limbach, 396 F.3d at 361-63. In examining the case law regarding insurance coverage for construction defects claims, it is important to bear in mind that cases and articles dealing with the older versions of the "your work" exclusion are no longer applicable to policies containing the modern "your work" exclusion and its exception for work done by subcontractors. J.S.U.B., 2007 WL 4440232, at *6-*9; Lamar Homes, 239 S.W.3d at 249-50; American Family, 673 N.W.2d at 83.[1]

By incorporating the subcontractor exception into the "your work" exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance. J.S.U.B., 2007 WL 4440232, at *5; Lamar Homes, 239 S.W.3d at 248; French, 448 F.3d at 706. Accord Limbach, 396 F.3d at 362-63 (discussing history of the addition of the

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[1] For example, in the article by Roger C. Henderson, Insurance Protection for Products Liability and Completed Operations - What Every Lawyer Should Know, 50 Nebraska L. Rev. 415, 441-43 (1971), which is often cited by insurers, the author argues that property damage to the builder's work was not intended to be covered by the builder's CGL insurance policy. But the author's conclusion was based on the old "your work" exclusion, which at the time did exclude property damage to the builder's work, and not on the policy's "occurrence" requirement. Id. at 441-43. Now that the insurance industry has amended the "your work" exclusion to include the subcontractor exception, the author's conclusion is no longer valid with respect to property damage to the builder's work caused by the work of a subcontractor.

"subcontractor" exception to the "your work" exclusion); Kalchthaler v. Keller Const. Co., 591 N.W.2d 169, 173-74 (Wis. App. 1999) (reviewing insurance industry publications stating that the subcontractor exception results in coverage if the damaged work or the work out of which the damage arose was performed by the insured's subcontractor).

II. THE INSURER'S PROPOSED INTERPRETATION OF THE INSURANCE POLICY'S "OCCURRENCE" REQUIREMENT WOULD RENDER MEANINGLESS THE SUBCONTRACTOR EXCEPTION TO THE POLICY'S "YOUR WORK" EXCLUSION.

The facts of this appeal present a straightforward case of property damage that was caused by the work of the builder's subcontractor and that is covered by the builder's CGL insurance policy. The requirements of the insuring agreement in Stanley Martin's insurance policies have been met. The defective floor trusses (supplied, delivered, and installed by subcontractors) caused property damage in the form of mold growth throughout the homes at issue. The property damage took place during the policy periods of Stanley Martin's insurance policies. And the property damage was caused by an "occurrence," i.e. the damage was not expected or intended by Stanley Martin. The "your work" exclusion, which might have applied if Stanley Martin itself had performed the defective work, does not apply because the work was performed by subcontractors. Accordingly, Stanley Martin's insurers, including Ohio Casualty, are obligated by the terms of their policies to

indemnify Stanley Martin for its "damages because of property damage," which in this case is the cost of remediating the mold growth.

Ohio Casualty's principal argument for denying coverage is that the property damage caused by the subcontractors' defective work was not caused by an "occurrence." Although there is no claim that the builder expected or intended the damage to the homes that resulted from the subcontractors' work, Ohio Casualty argues that property damage to the builder's work caused by a construction defect can never be caused by an "occurrence" within the meaning of the builder's insurance policy.

If a claim for damage to the builder's work could never assert property damage caused by an "occurrence," the "your work" exclusion in the builder's insurance policy -- and the exception for damage caused by subcontractors -- would be rendered meaningless. This would violate the venerable principle that insurance policies are to be construed to give effect to all their provisions so that none will be rendered meaningless. See PMA Capital Ins. Co. v. US Airways, Inc., 271 Va. 352, 358 (Va. 2006); Hitachi Credit American Corp. v. Signet Bank, 166 F.2d 614, 624 (4th Cir. 1999) (applying Virginia law). Accord King v. Dallas Fire Ins. Co., 85 S.W.3d 185, 192-93 (Tex. 2002) (the term "occurrence" may not be interpreted so broadly as to obviate the need for one or more of the policy's exclusions).

But that is exactly what the insurer would have this Court do. The insurer is arguing that property damage to the builder's work can never be caused by an "occurrence" in the first place. If that were the case, however, the "your work" exclusion in the policy would be rendered superfluous. There would be no need for the "your work" exclusion, because any construction defect claim for property damage to the work itself, to which the exclusion would apply, would never be covered in the first place because the claim would not satisfy the policy's "occurrence" requirement. J.S.U.B., 2007 WL 4440232, at *12; Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486, 493-94 (Kansas 2006); French, 448 F.3d at 705-06; American Family, 673 N.W. 2d at 78. In this way, the insurer would eliminate the coverage for construction defects that it added to its policies through the subcontractor exception to the "your work" exclusion.

This result does not "create coverage" based on an exception to an exclusion. Rather, there is coverage under the insuring agreement's initial grant of coverage, because the complaint alleges property damage caused by an occurrence. Coverage might be excluded by the "your work" exclusion, but the subcontractor exception to that exclusion makes the exclusion inapplicable to this case, thereby restoring coverage. See, e.g., Lamar Homes, 239 S.W.3d at 247-48; French, 448 F.3d at 706; American Family, 673 N.W.2d at 83-84.

In addition, coverage for property damage to a builder's work would not turn the builder's insurance policy into a performance bond. See J.S.U.B., 2007 WL 4440232, at *13; Lamar Homes, 239 S.W.3d at 245-46; Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 309 (Tenn. 2007). A performance bond is quite different from liability insurance. The bond protects the owner from the builder's failure to perform. The bond does not protect the builder. The surety on the bond will seek indemnity from the builder if the owner makes a claim under the bond. In addition, a bond is much broader than liability insurance. For example, it is not restricted to claims for property damage, and the builder's intent or expectation to cause damage is irrelevant. See, e.g., O'Shaugnessy v. Smuckler Corp., 543 N.W.2d 99, 105 (Minn. App. 1996). Finally, the extent to which a builder's liability insurance policy coincides with a builder's performance bond is irrelevant. The terms of the insurance policy control. Lamar Homes, 239 S.W.3d at 246. And as one court put it, in explaining its duty to interpret the policy as written: "We have not made the policy closer to a performance bond for general contractors, the insurance industry has." Kalchthaler v. Keller Const. Co., 591 N.W.2d 169, 174 (Wis. App. 1999).

Finally, finding coverage for the builder's cost of repairing property damage caused by a subcontractor's defective work does not somehow exonerate the subcontractor whose work caused the damage. The builder's insurer is able to

recover the amount of the loss from the culpable subcontractor through a subrogation action against the subcontractor. O'Shaughnessy v. Smuckler Corp., 543 N.W.2d 99, 102 (Minn. App. 1996) (builder's insurer may bring subrogation action against subcontractor who performed the defective work). The builder has purchased insurance coverage against the risk of loss resulting from property damage caused by a subcontractor, and hence it is appropriate that the builder's insurer -- not the builder -- pursue recovery from the subcontractor.

III. AS THIS COURT AND OTHER COURTS HAVE DONE, THE VIRGINIA SUPREME COURT WOULD RECOGNIZE THE DISTINCTION BETWEEN DEFECTIVE CONSTRUCTION AND PROPERTY DAMAGE CAUSED BY DEFECTIVE CONSTRUCTION.

For purposes of insurance coverage, there is a big difference between a construction defect, standing alone, and property damage that may be caused by a construction defect. Many courts have held that a construction defect, standing alone, does not constitute an occurrence within the meaning of a builder's CGL policy. This Court and other courts, however, have been careful to distinguish between defective construction, on the one hand, and property damage caused by defective construction, on the other hand. These courts have held that the property damage caused by defective construction -- whether to the builder's work itself or to other property -- can be caused by an "occurrence" within the meaning of the builder's CGL policy if the property damage was not expected or intended by the

builder. There is no reason to think that the Virginia Supreme Court would not reach the same logical conclusion.

In French v. Assurance Co. of America, 448 F.3d 693 (4th Cir. 2006) (applying Maryland law), this Court was asked to decide whether property damage to a home caused by a subcontractor's defective work was covered by the builder's CGL policy. The Court held that the builder's policy provided coverage for the cost of remedying unexpected and unintended property damage to the home caused by the subcontractor's defective work. Id. at 706. In reaching this conclusion, this Court distinguished Lerner Corp. v. Assurance Co. of America, 707 A.2d 906 (Md. App. 1998), in which the Maryland Court of Special Appeals had held that the cost of correcting defective construction that did not meet contractual requirements of the sale was not covered by the builder's CGL policy. Id. at 702. This Court observed that the Lerner court had addressed only defective construction as such -- the defective construction had not caused property damage to the structure. Indeed, the Lerner court had opined in dicta that any damage resulting to property beyond the defective object itself may be covered. Id. at 702.

Other courts have also drawn the same distinction between faulty work standing alone and faulty work that causes property damage to other parts of the structure. These courts have held that damages because of property damage to a builder's work caused by the defective work of a subcontractor are covered by the

builder's CGL policy. As did this Court in French, these courts all distinguished prior precedents that had held that faulty construction alone -- without resulting property damage -- is not covered by a builder's CGL policy. See Webster v. Acadia Ins. Co., 934 A.2d 567, 571-73 (N.H. 2007) (alleged property damage to ceiling beams allegedly caused by roofer's negligent installation of roof membrane was caused by an occurrence within the meaning of roofer's CGL policy, distinguishing prior case holding that "defective work, standing alone, did not result from an occurrence");[2] Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 309-10 (Tenn. 2007) (property damage caused by subcontractor's defective installation of windows constitutes property damage caused by an occurrence within the meaning of builder's CGL policy, distinguishing prior cases involving faulty workmanship alone); Lennar Corp. v. Auto-Owners Ins. Co., 151 P.3d 538, 545 (Ariz. App. 2007), petition for review filed (cost of repairing wall, tile, and baseboard cracks and sticking doors caused by subcontractor's defective work was covered by builder's CGL policy, despite precedent that faulty workmanship standing alone is not covered); Okatie Hotel Group, LLC v. Amerisure Ins. Co., 2006 WL 91577, at *5-*6 (D.S.C. Jan 13, 2006) (builder's

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[2] The same court had previously distinguished the same prior case, McAllister v. Peerless Ins. Co., 474 A.2d 1033 (N.H. 1984), on the same grounds in High Country Associates v. New Hampshire Ins. Co., 648 A.2d 474, 477 (N.H. 1994).

CGL policy does not cover the cost of repairing faulty work as such, but the policy does cover damages because of property damage caused by the faulty work, distinguishing South Carolina Supreme Court precedent regarding faulty work that did not cause damage to other parts of roadway); Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873, at *7 (E.D. Mo. Oct. 21, 2005) (moisture damage to hotels caused by subcontractor's defective synthetic stucco siding was covered by builder's CGL policy, distinguishing precedent that installing defective materials into a home, without more, did not constitute covered property damage).

Although it did not need to distinguish any prior precedent, the Florida Supreme Court also recently recognized the distinction between defective work and property damage caused by defective work. See United States Fire Ins. Co. v. J.S.U.B., Inc., 2007 WL 4440232, at *14-*16 (Fla. Dec. 20, 2007). The court concluded that a claim for repairing or removing defective work is not a claim for "property damage," but that a claim for the cost of repairing damage caused by the defective work is a claim for "property damage." Id. at *14. The court held that such property damage -- whether to other property or to the house itself -- can be caused by an "occurrence" within the meaning of a builder's CGL policy. Id. at *16.

As these courts have all held, there is a distinction between faulty work standing alone, which is not covered, and faulty work that causes property damage.

The property damage caused by faulty work -- regardless of whether it is to other property or to the builder's own work -- is caused by an occurrence where, as here, the damage is not expected or intended by the builder. The property damage at issue in the instant case -- mold growth throughout the homes -- was caused by an "occurrence," i.e. it was accidental, because it was not expected or intended from the standpoint of the builder. Accordingly, the builder's costs to remediate the mold growth in this case constitute damages because of "property damage" caused by an "occurrence" within the meaning of the builder's CGL policy.

IV. MOST OF THE RECENT CASES DECIDED BY OTHER JURISDICTIONS HAVE HELD THAT INADVERTENT PROPERTY DAMAGE TO THE BUILDER'S WORK IS CAUSED BY AN "OCCURRENCE."

The courts of most other jurisdictions, especially in recent years, have held that inadvertent property damage caused by construction defects is caused by an occurrence -- even if the damage is limited to the structure itself. These courts have recognized that (i) the insuring agreement in the CGL policy contains no requirement that the property damage be to other property, and (ii) the exclusion for damage to the builder's own work (and its exception for the work of subcontractors) would be rendered meaningless if damage to the builder's work could never be caused by an occurrence in the first place.

Just last December, the Florida Supreme Court in United States Fire Ins. Co. v. J.S.U.B, Inc., 2007 WL 4440232, at *9-*16 (Fla. Dec. 20, 2007), held that

structural damage and damage to personal property caused by a subcontractor's defective soil preparation constituted "property damage" caused by an "occurrence" within the meaning of the builder's CGL policy. Id. at *16. The court also commented that there was no exclusion for the homeowners' claims for breach of contract, id. at *10, and that the exclusion for property damage to the builder's own work, with its exception for damage caused by subcontractors, would be rendered meaningless if property damage to the builder's work could never be caused by an occurrence in the first place. Id. at *12.

In addition, the Texas Supreme Court recently held in Lamar Homes, Inc. v. Mid-Continent Ins. Co., 239 S.W.3d 236 (Tex. 2007), that allegations of damage to a home caused by the home's defective foundation were covered by the builder's CGL policy. The court held that there was no requirement in the policy that the property damage be to other property (id. at 245), that there was no contract versus tort distinction in the policy (id. at 244, 248), and that the policy should be enforced as written. Id. at 249. The court also held that the subcontractor exception to the "your work" exclusion restored coverage for property damage to the builder's work that would otherwise be excluded. Id. at 247.

This Court itself held under Maryland law that the builder's CGL policy covered damage to a home caused by defective synthetic stucco siding that had been applied by a subcontractor. French v. Assurance Co. of America, 448 F.3d

693 (4th Cir. 2006). In so holding, this Court reviewed the history of the "your work" exclusion and the history of its exception, which applies "if the damaged work or the work out of which the damage arises was performed on [the insured contractor's] behalf by a subcontractor." Id. at 701. The Court explained that this exclusion, and its exception, would be rendered meaningless if property damage to the builder's work could never be caused by an occurrence in the first place. Id. at 705-06.

The Wisconsin Supreme Court engaged in similar reasoning and reached the same conclusion in American Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004). That case has become a seminal decision on the occurrence issue. In a thorough and well-reasoned opinion, the Wisconsin Supreme Court held that buckling and cracking of a warehouse resulting from a subcontractor's defective soils report was caused by an "occurrence" within the meaning of the builder's CGL policy. Id. at 69-70.

The Kansas Supreme Court reached a similar result in Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006). The court held that water damage caused by defective windows installed by subcontractors was caused by an "occurrence" and hence was covered by the builder's CGL policy. Id. at 495. In explaining its holding, the Kansas Supreme Court observed that the "your work" exclusion, and its subcontractor exception, would be rendered meaningless if

property damage to the builder's work could never be caused by an "occurrence." Id. at 493-94.

Courts in numerous other jurisdictions have recently come to the same conclusion and have held that damage to a structure caused by the work of a subcontractor can constitute "property damage" caused by an "occurrence" within the meaning of the builder's CGL policy. See Aten v. Scottsdale Ins. Co., 2008 WL 65595, at *2-*3 (8th Cir. Jan. 8, 2008) (applying Minnesota law); Webster v. Acadia Ins. Co., 934 A.2d 567, 572-73 (N.H. 2007); Travelers Indem. Co. v. Moore & Associates, Inc., 216 S.W.3d 302, 308-10 (Tenn. 2007); Lennar Corp. v. Auto Owners Ins. Co., 151 P.3d 538, 544-48 (Ariz. App. 2007), petition for review filed; Dublin Building Systems v. Selective Ins. Co., 2007 WL 353675, at *3-*4 (Ohio App. Feb. 6, 2007); Great American Ins. Co. v. Woodside Homes Corp., 448 F.Supp.2d 1275, 1281-83 (D. Utah 2006); Lennar Corp. v. Great American Ins. Co., 200 S.W.3d 651, 663-76 (Tex. App. -- Houston [14th Dist.] 2006); Broadmoor Anderson v. National Union Fire Ins. Co., 912 So.2d 400, 405-06 (La. App. 2005); Hoang v. Monterra Homes (Powderhorn) LLC, 129 P.3d 1028, 1034 (Colo. App. 2005), aff'd. in relevant part and reversed on other grounds, 149 P.3d 798, 802-03 (Colo. 2007); Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873, at *4-*7 (E.D. Mo. Oct. 21, 2005). Accord Corner Constr. Co. v. USF&G, 638 N.W.2d 887, 891-95 (S.D. 2002); Fejes v. Alaska Ins. Co., 984 P.2d 519, 522-24 (Alaska

1999). Of this litany of cases, the recent opinions by the Tennessee Supreme Court in Travelers, the Arizona Court of Appeals in Lennar, and the Texas Court of Appeals in a different Lennar case, are particularly thorough and instructive.

Although a few courts have taken a contrary view, see, e.g., cases cited in J.S.U.B., 2007 WL 4440232, at *11, in none of these cases did the court consider the effect of the subcontractor exception to the "your work" exclusion on its "occurrence" analysis. See Lennar, 200 S.W.3d at 670 (leveling same criticism at insurers' cases). None of these cases analyzed their holdings -- that a builder necessarily "expects" damage to its own work -- in light of the subcontractor exception to the "your work" exclusion. If a builder is always deemed to "expect" damage to the building, the "your work" exclusion for damage to the builder's own work would be superfluous and the subcontractor exception to that exclusion would be rendered meaningless. The Virginia Supreme Court would not follow these few cases into such a violation of well-settled principles of insurance policy construction.

V. DEPRIVING BUILDERS OF INSURANCE COVERAGE FOR INADVERTENT CONSTRUCTION DEFECTS WOULD HAVE A SIGNIFICANT ADVERSE EFFECT ON THE VIRGINIA HOME BUILDING INDUSTRY AND ON VIRGINIA HOMEOWNERS.

If Ohio Casualty were to prevail in its argument that property damage to the builder's work resulting from the work of a subcontractor can never be caused by an "occurrence," Virginia home builders and Virginia homeowners alike would

feel the effects of the Court's holding. Home builders have paid premiums to insurance companies to buy liability insurance to protect themselves, inter alia, against claims for unintended and unexpected property damage caused by inadvertent construction defects that can occur in the homes they build. If the property damage results from work performed by the builder's subcontractors, the builder's liability insurance policy provides coverage for the builder's damages resulting from such property damage, including the cost of any judgment or settlement of the homeowners' claims. Builders have bought liability insurance -- and have paid substantial premiums -- to protect against the risk of such losses.

Depriving builders of such valuable insurance protection would disrupt an industry that is a vital part of a healthy economy. Housing is a critical component of local economic development -- creating jobs and demand for goods and services, generating revenues, and providing affordable housing. Given the vital role the housing industry plays in the Virginia economy, it is important to consider the impact of the insurer's position that a builder's damages because of property damage caused by inadvertent construction defects are never covered by the builder's insurance.

The ability to operate efficiently in the home building industry and to price a home competitively depends on the degree to which the builder's overall costs are certain and predictable. The insurer's position would expose home builders to the

uncertainty of additional costs and litigation expenses. This increased exposure by builders to claims of inadvertent construction defects would lead to an increase in the cost of building homes in Virginia. Builders would have to increase the price of their homes to cover these costs. Increased prices would adversely affect the housing industry, with ripple effects on construction-related industries and the Virginia economy in general.[3]

Home buyers in Virginia would also suffer as the result of the insurers' efforts to deny insurance coverage for property damage caused by inadvertent construction defects. Not only would the cost of purchasing a new home increase, but also the homeowner may have no effective remedy for claims of construction defects against small or insolvent builders, or against builders who have ceased doing business by the time the homeowner's claim is litigated. The liability

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[3] The impact would be greatest on buyers and builders of low to moderate income housing. Builders with this increased exposure would be forced to raise their prices to cover the increased cost and risk associated with reduced insurance coverage. Consequently, low and moderate income home buyers, who often only marginally qualify for financing necessary for them to buy a house, could be priced out of the market. Accordingly, those who are on the cusp of qualifying for a new home purchase might no longer be able to afford to purchase a new home. Similarly, builders who build affordable housing would be negatively affected -- they would build fewer homes because fewer people would qualify to purchase them.

insurance policies that stood behind such builders and remodelers in the past would no longer do so.

Conclusion

The National Association of Home Builders, as amicus curiae, respectfully requests that this Court reverse the district court's entry of summary judgment for Ohio Casualty and remand this case to the district court for further proceedings consistent with the Court's opinion.

Date: February 5, 2008

Respectfully submitted,

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I hereby certify that on this 5th day of February, 2008, two copies of the Brief of Amicus Curiae National Association of Home Builders in Support of Appellant Stanley Martin Companies, Inc. in Support of Reversal were mailed by overnight delivery to:

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