

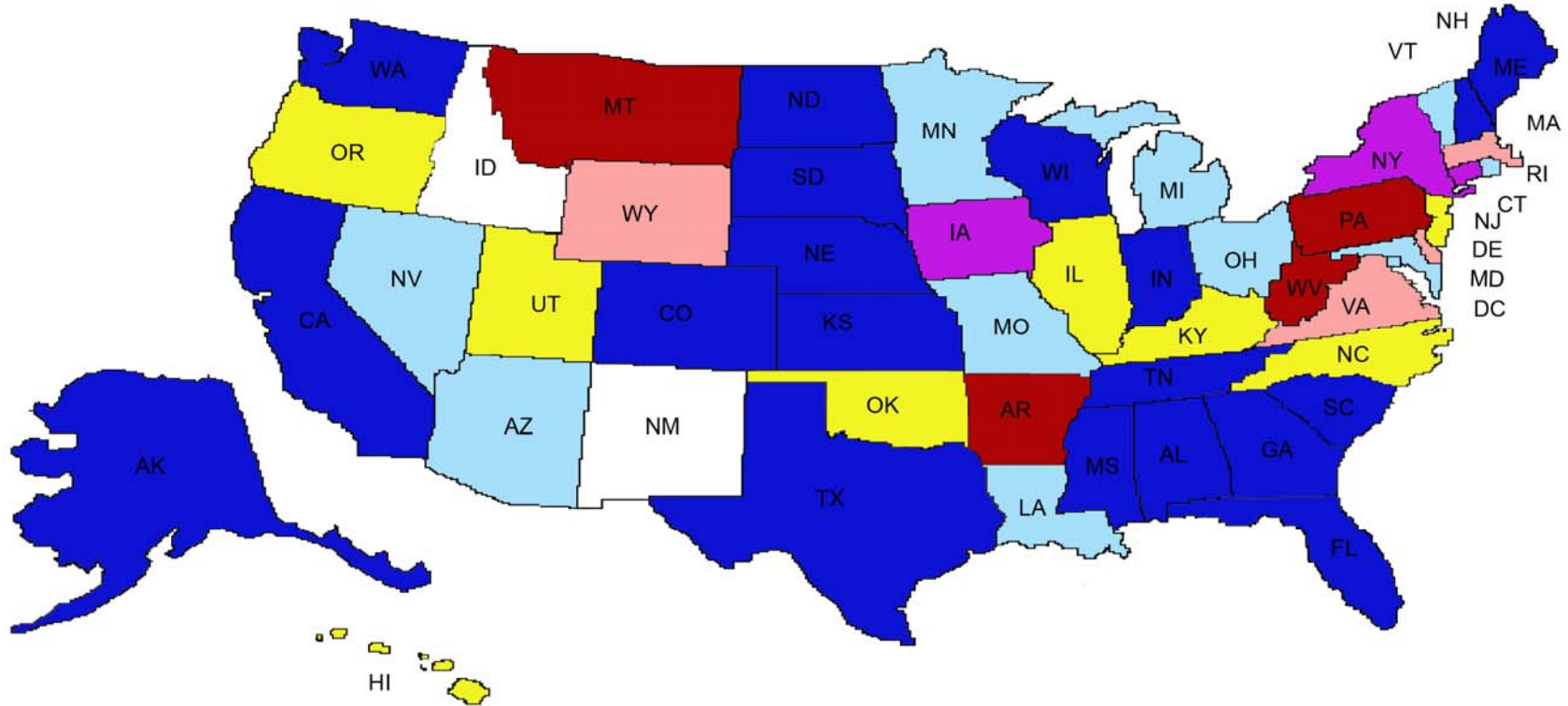


DEFECTIVE CONSTRUCTION AS AN “OCCURRENCE”

“Attorneys For Policyholders in Insurance Coverage Disputes”

www.sdvlaw.com

DEFECTIVE CONSTRUCTION AS AN “OCCURRENCE”



- Highest Court has found defective construction to 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 against coverage; only lower state court or federal court authority exists.
- Defective construction only an occurrence when there is damage to third-party property.
- Unclear, cases/legislation conflict.
- No decision

*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.
 **This survey is as of January 7, 2011, except for cases/statutes cited after that date. Courts may change their views at any time.

Commercial General Liability Coverage for Defective Construction

| Jurisdiction | Case Law |
|----------------------|--|
| Alabama | <i>U.S. Fid. & Guar. Co. v. Bonitz Insulation Co.</i> , 424 So.2d 569 (Ala. 1982); <i>U.S. Fid. & Guar. Co. v. Andalusia Ready Mix, Inc.</i> , 436 So.2d 868 (Ala. 1983). |
| Alaska | <i>Fejes v. Alaska Ins. Co.</i> , 984 P.2d 519 (Alaska 1999). |
| Arizona | <i>Lennar Corp. v. Auto-Owners Inc. Co.</i> , 151 P.3d 538 (Ariz. Ct. App. 2007). |
| Arkansas | <i>Essex Ins. Co. v. Holder</i> , 261 S.W.3d 456 (Ark. 2008); <i>Lexicon, Inc. v. Ace Am. Ins. Co.</i> , 634 F.3d 423 (8 th Cir. 2010). |
| California | <i>Hogan v. Midland Nat'l Ins. Co.</i> , 476 P.2d 825 (Cal. 1970); <i>Anthem Elecs., Inc. v. Pac. Employers Ins. Co.</i> , 302 F.3d 1049 (9th Cir. 2002). |
| Colorado | COLO. REV. STAT. 13-20-808 (2010). |
| Connecticut | <i>Times Fiber Commc'ns v. Travelers Indem. Co. of Illinois</i> , 2005 WL 589821 (Conn. Super. Ct. Feb. 2, 2005); <i>Scottsdale Ins. Co. v. R.I. Pools, Inc.</i> , 742 F. Supp.2d 239 (D. Conn. 2010). |
| Delaware | <i>Brosnahan 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), <i>but see</i> <i>AE-Newark Assocs., L.P. v. CNA Ins. Cos.</i> , 2001 WL 1198930 (Del. Super. Ct. Oct. 2, 2001). |
| District of Columbia | <i>Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley, Inc.</i> , 32 F. Supp.2d 14 (D.D.C 1998). |
| Florida | <i>U.S. Fire Ins. Co. v. J.S.U.B., Inc.</i> , 979 So.2d 871 (Fla. 2007); <i>Auto-Owners Ins. Co. v. Pozzi Window Co.</i> , 984 So. 2d 1241 (Fla. 2008). |
| Georgia | <i>Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.</i> , 707 S.E.2d 369 (Ga. 2011). |
| Hawaii | HAW. REV. STAT. § 431:1 (2011) <i>Burlington Ins. Co. v. Oceanic Design & Constr., Inc.</i> , 383 F.3d 940 (9th Cir. 2004); <i>Group Builders, Inc. v. Admiral Ins. Co.</i> , 231 P.3d 67. |
| Idaho | No decision. |
| Illinois | <i>U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.</i> , 578 N.E.2d 926 (Ill. 1991); <i>Lyerla v. AMCO Ins. Co.</i> , 536 F.3d 684 (7th Cir. 2008); <i>but see</i> <i>State Farm Fire & Cas. Co. v. Tillerson</i> , 777 N.E.2d 986 (Ill. App. Ct. 2002). |
| Indiana | <i>Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.</i> , 935 N.E.2d 160 (Ind. 2010). |

| Key | | | |
|-----|--|--|--|
| | | | Highest Court has found defective construction to 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 <u>not</u> to be an occurrence. |
| | | | Tending <u>against</u> coverage; only lower state court or federal court authority exists. |
| | | | Defective construction only an occurrence when there is damage to third-party property. |
| | | | Unclear, cases/legislation conflict. |

*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.

**This survey is as of January 7, 2011, except for cases/statutes cited after that date. Courts may change their views at any time.



Commercial General Liability Coverage for Defective Construction

| Jurisdiction | Case Law |
|---------------|--|
| Iowa | <i>Pursell Constr. Inc. v. Hawkeye-Security Ins. Co.</i> , 596 N.W.2d 67 (Iowa 1999); <i>Cont'l W. Ins. Co. v. Oaks Dev. Co.</i> , 786 N.W.2d 519 (Iowa Ct. App. 2010). |
| Kansas | <i>Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.</i> , 137 P.3d 486 (Kan. 2006). |
| Kentucky | <i>Bituminous Cas. Corp. v. Kenway Contracting Inc.</i> , 240 S.W.3d 633 (Ky. 2007); <i>but see Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.</i> , 306 S.W.3d 69 (Ky. 2010). |
| Louisiana | <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 | <i>Peerless Ins. Co. v. Brennon</i> , 564 A.2d 383 (Me. 1989). |
| Maryland | <i>Lerner Corp. v. Assurance Co. of Am.</i> , 707 A.2d 906, 912 (Md. Ct. Spec. App. 1998); <i>Harbor Court Associates v. Kiewit Construction Co.</i> , 6 F. Supp. 2d 449 (D. Md. 1998); <i>French v. Assurance Co. of Am.</i> , 448 F.3d 693 (4th Cir. 2006) (Maryland law). |
| Massachusetts | <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 | <i>Randenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan</i> , 610 N.W.2d 272 (Mich. Ct. App. 2000). |
| Minnesota | <i>O'Shaughnessy v. Smuckler Corp.</i> , 543 N.W.2d 99 (Minn. Ct. App. 1996); <i>Aten v. Scottsdale Ins. Co.</i> , 511 F.3d 818 (8th Cir. 2008). |
| Mississippi | <i>Architex Ass'n v. Scottsdale Ins. Co.</i> , 27 So.3d 1148 (Miss. 2010). |
| Missouri | <i>Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co.</i> , 645 F. Supp. 596 (E.D. Mo. 1986); <i>Amerisure Mut. Ins. Co. v. Paric Corp.</i> , 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005); <i>Columbia Mut. Ins. v. Epstein</i> , 239 S.W.3d 667 (Mo. Ct. App. 2007). |
| Montana | <i>Stillwater Condo. Ass'n v. Am. Home Assurance Co.</i> , 508 F. Supp. 1075 (D. Mont. 1981); <i>Taylor-McDonnell Constr. Co. v. Commercial Union Ins. Cos.</i> , 744 P.2d 892 (Mont. 1987); <i>Ohio Cas. Ins. Co. v. Williams</i> , 2003 ML 3341. |
| Nebraska | <i>Auto-Owners Ins. v. Home Pride Cos.</i> , 684 N.W.2d 571 (Neb. 2004). |
| Nevada | <i>Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.</i> , 459 F. Supp. 2d 1039 (D. Nev. 2006). |

| Key | | | |
|-----|---|--|--|
| | | | |
| | | | |
| | | | |
| | Highest Court has found defective construction to be an occurrence (or by state statute). | | Tending <u>against</u> coverage; only lower state court or federal court authority exists. |
| | Tending towards coverage; only lower state court or federal court authority exists. | | Defective construction only an occurrence when there is damage to third-party property. |
| | Highest Court has found defective construction <u>not</u> to be an occurrence. | | Unclear, cases/legislation conflict. |

*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.

**This survey is as of January 7, 2011, except for cases/statutes cited after that date. Courts may change their views at any time.



Commercial General Liability Coverage for Defective Construction

| Jurisdiction | Case Law |
|----------------|---|
| New Hampshire | <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 | <i>Firemen's Ins. Co. of Newark v. Nat'l Union Fire Ins. Co.</i> , 904 A.2d 754 (N.J. Super. Ct. App. Div. 2006); <i>S.N. Golden Estates, Inc. v. Cont'l Cas. Co.</i> , 680 A.2d 1114 (N.J. Super. Ct. App. Div. 1996); <i>Pennsylvania Nat'l Mut. Cas. Ins. Co. v. Parkshore Dev. Corp.</i> , 2008 U.S. Dist. LEXIS 71318 (D.N.J. Sept. 10, 2008); <i>but see Weedo v. Stone-E-Brick, Inc.</i> , 405 A.2d 788 (N.J. 1979). |
| New Mexico | No decision. |
| New York | <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>Transp. Ins. Co. v. AARK Constr. Group</i> , 526 F. Supp. 2d 350 (E.D.N.Y. 2007). |
| North Carolina | <i>Wm. C. Vick Constr. Co. v. Pennsylvania Nat'l Mut. Cas. Ins. Co.</i> , 52 F. Supp. 2d 569 (E.D.N.C. 1999); <i>NAS Sur. Group v. Precision Wood Prods.</i> , 271 F. Supp. 2d 776 (N.D.N.C. 2003); <i>ABT Bldg. Prods. Corp v. Nat'l Union Fire Ins. Co.</i> , 472 F.3d 99 (4th Cir. 2006). |
| North Dakota | <i>ACUITY v. Burd & Smith Constr., Inc.</i> , 2006 ND 187, 721 N.W.2d 33. |
| Ohio | <i>Erie Ins. Exch. v. Colony Dev. Corp.</i> , 736 N.E.2d 941 (Ohio Ct. App. 1999); <i>Acme Steak Co. v. Great Lakes Mech. Co.</i> , 2000 Ohio 2566 (Ohio Ct. App. 2000); <i>Dublin Bldg. Sys. v. Selective Ins. Co.</i> , 874 N.E.2d 788 (Ohio Ct. App. 2007). |
| Oklahoma | <i>Dodson v. St. Paul Ins. Co.</i> , 812 P.2d 372 (Okla. 1991); <i>but see Employers Mut. Cas. Co. v. Grayson</i> , 2008 WL 2278593 (W.D. Okla. May 30, 2008). |
| Oregon | <i>Oak Crest Constr. Co. v. Austin Mut. Ins. Co.</i> , 998 P.2d 1254 (Or. 2000); <i>but see MW Builders, Inc. v. Safeco Ins. Co. of Am.</i> , 267 Fed. Appx. 552 (9th Cir. 2008); <i>Wilmar Dev., LLC v. Illinois Nat'l Ins. Co.</i> , 726 F. Supp. 2d 1280 (D. Or. 2010). |
| Pennsylvania | <i>Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.</i> , 908 A.2d 888 (Pa. 2006); <i>Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.</i> , 941 A.2d 706 (Pa. Super. Ct. 2008). |
| Rhode Island | <i>Aetna Cas. & Sur. Co. v. Consulting Envtl. Engineers, Inc.</i> , 1989 WL 1110231 (R.I. Super. Ct. June 20, 1989). |
| South Carolina | S.C. CODEANN. § 38-61-70 (2011), <i>Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.</i> , 2011 WL 3667598 (S.C. Aug. 22, 2011). |

| Key | | | |
|-----|---|--|--|
| | | | |
| | | | |
| | | | |
| | Highest Court has found defective construction to be an occurrence (or by state statute). | | Tending <u>against</u> coverage; only lower state court or federal court authority exists. |
| | Tending towards coverage; only lower state court or federal court authority exists. | | Defective construction only an occurrence when there is damage to third-party property. |
| | Highest Court has found defective construction <u>not</u> to be an occurrence. | | Unclear, cases/legislation conflict. |

*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.

**This survey is as of January 7, 2011, except for cases/statutes cited after that date. Courts may change their views at any time.



Commercial General Liability Coverage for Defective Construction

| Jurisdiction | Case Law |
|---------------|---|
| South Dakota | <i>Corner Constr. Co. v. U.S. Fid. & Guar. Co.</i> , 2002 SD 2, 638 N.W.2d 887. |
| Tennessee | <i>Travelers Indem. Co. of Am. v. Moore & Assocs.</i> , 216 S.W.3d 302 (Tenn. 2007). |
| Texas | <i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007). |
| Utah | <i>H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.</i> , 248 F. Supp. 2d 1079 (D. Utah 2002); <i>Cincinnati Ins. Co. v. Linford Bros. Glass Co.</i> , 2010 U.S. Dist. LEXIS 11226 (D. Utah Feb. 9, 2010); <i>but see Great Am. Ins. Co. v. Woodside Homes Corp.</i> , 448 F. Supp. 2d 1275 (D. Utah 2006). |
| Vermont | <i>Transcont'l Ins. Co. v. Engelberth Constr., Inc.</i> , 2007 WL 3333465 (D. Vt. Nov. 8, 2007). |
| Virginia | <i>Hotel Roanoke Conference Ctr. Comm'n v. Cincinnati Ins. Co.</i> , 303 F. Supp. 2d 784 (W.D. Va. 2004), <i>aff'd</i> 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); <i>Stanley Martin Cos. v. Ohio Cas. Group</i> , 313 Fed. Appx. 609 (4th Cir. 2009). |
| Washington | <i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 608 P.2d 254 (Wash. 1980). |
| West Virginia | <i>Corder v. William W. Smith Excavating Co.</i> , 556 S.E.2d 77 (W. Va. 2001); <i>County Solid Waste Auth. v. Brackenrich & Assocs.</i> , 617 S.E.2d 851 (W. Va. 2005). |
| Wisconsin | <i>Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</i> , 673 N.W.2d 65 (Wis. 2004). |
| Wyoming | <i>Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC</i> , 2006 WL 3933078 (D. Wyo. Oct. 20, 2006). |

| Key | | | |
|-----|---|--|--|
| | Highest Court has found defective construction to be an occurrence (or by state statute). | | Tending <u>against</u> coverage; only lower state court or federal court authority exists. |
| | Tending towards coverage; only lower state court or federal court authority exists. | | Defective construction only an occurrence when there is damage to third-party property. |
| | Highest Court has found defective construction <u>not</u> to be an occurrence. | | Unclear, cases/legislation conflict. |

*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.

**This survey is as of January 7, 2011, except for cases/statutes cited after that date. Courts may change their views at any time.

