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## Georgia Recognizes Defective Construction as an "Occurrence" for Liability Insurance Purposes

The highest court in Georgia has recently added that jurisdiction to the growing list that considers defective construction, including defects in the work of a general contractor, to be an "occurrence" under the general contractor's commercial general liability (CGL) insurance policy. The key takeaways are:

- Defective construction can be an "occurrence" under a CGL insurance policy.
- Property damage resulting from an occurrence (caused by defective work or otherwise) must be to other nondefective work or property (or loss of use).
- Business risk exclusions (such as the "Your Work" exclusion) may still apply.
- The entire insuring agreement (occurrence, property damage, and no exclusions) must be met for an insurer to have the obligation to indemnify and defend.

In *Taylor Morrison Services, Inc. v. HDI-Gerling America Insurance Company*, --- S.E.2d ---, 2013 WL 3481555 (Ga. 2013), the Supreme Court of Georgia ruled that damage to the insured's completed work constitutes an "occurrence" under a standard CGL policy. The case involved a class action by homeowners in California against Taylor Morrison, a residential homebuilder, regarding improper construction of concrete foundations, including lack of a gravel base, failure to use adequate moisture barriers, and building foundations with water-to-cement ratios that were too high. HDI-Gerling, Taylor Morrison's CGL carrier, sought a declaratory judgment in federal court in Atlanta that the defective construction could not constitute an "occurrence" under the policy. The District Court issued such a declaration, Taylor Morrison appealed, and the U.S. Court of Appeals for the Eleventh Circuit certified the question to the highest court in Georgia.

The Supreme Court of Georgia, after analyzing recent Georgia decisions regarding CGL insurance and construction defects, as well as noting cases from other jurisdictions, held that "an 'occurrence,' as the term is used in a standard CGL policy, does not require damage to the property or work of someone other than the insured." *Id.* at \*3. In answering an additional certified question, the Supreme Court held that an "occurrence" must arise from liability for a cause of action that is consistent with the concept that the "occurrence" is "accidental." Thus, an alleged breach of warranty cause of action may constitute an "occurrence." A fraud cause of action, however, will usually not constitute an "occurrence" because the theory of fraud liability, which includes elements of scienter (knowledge of falsity) and intention to defraud, is "mutually exclusive" with the idea of an "accident." *Id.* at \*6. The opinion, therefore, clarifies a murky area of insurance coverage under Georgia law.

The Supreme Court opinion in *Taylor Morrison* also clarifies two other important considerations for CGL insurance coverage in the context of construction defects. First, the Supreme Court recognized that, although defective construction causing damage to the insured's own work can be an "occurrence" under a CGL policy, the insuring agreement still limits the insurer's liability to "property damage" (or bodily injury). Property damage "may be found only when the faulty workmanship causes physical injury to, or the loss of use of, nondefective property or work." *Id.* at \*7. Second, the Supreme Court acknowledged the certain "business risk" coverage exclusions common in many standard CGL policies may apply to exclude coverage for defective construction even though such defective construction constitutes an "occurrence." The Supreme Court emphasized that "limits of coverage do not all have to be found in the

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word ‘occurrence,’ inasmuch as the other words of the insuring agreement—as well as the policy exclusions—have their own roles to play in marking the limits of coverage. The sounder analytical approach is to avoid conflating the several requirements of the insuring agreement and the exclusions, and instead, to let each serve its proper purpose.” *Id.* at \*3.



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