NO. 09-11075

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

ADVANCED ENVIRONMENTAL RECYCLING TECHNOLOGIES, INC.,
Appellant

vs.

AMERICAN INTERNATIONAL SPECIALTY LINES INSURANCE COMPANY,
Appellee.

On Appeal from the United States District Court
for the Northern District of Texas
Dallas Division
Civil Action No. 3:08-CV-0837

BRIEF OF *AMICUS CURIAE*, UNITED POLICYHOLDERS

Dated: March 18, 2010

John N. Ellison, Esquire
REED SMITH LLP
1650 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 851-8100
Facsimile: (215) 851-1420

ATTORNEYS FOR *AMICUS CURIAE*
UNITED POLICYHOLDERS

CERTIFICATE OF INTERESTED PERSONS

1) No. 09-11075; Advanced Environmental Recycling Technologies, Inc. v. American International Specialty Lines Insurance Company (U.S.D.C. No. 3:08-CV-0837).

2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal:

- Advanced Environmental Recycling Technologies, Inc.;
- American International Specialty Lines Insurance Company;
- Haynes and Boone, L.L.P.;
- Tucker, Taunton, Snyder & Slade, P.C.; and
- Bates & Carey, L.L.P.

3 Pursuant to Rule 26.1 United Policyholders has no parent corporation, and no publicly held corporation owns more than ten percent (10%) of the stock of United Policyholders.

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STATEMENT OF AMICUS CURIAE'S INTEREST

United Policyholders ("UP") is a not-for-profit corporation founded in 1991 as an educational resource for the public on insurance issues and insurance consumer rights. The organization is tax-exempt under Internal Revenue Code § 501(c)(3). UP is based in California but operates nationwide and is funded by donations and grants from individuals, businesses, and foundations and governed by an eight-member Board of Directors. UP contributes on an ongoing basis to the formulation of insurance-related public policy at both the national and state level.

UP exists because businesses and individuals rely on the insurance they buy to protect themselves, their property, and their livelihoods against the risk of loss, and insurance companies are in business to earn profits by assuming that risk. Insurance is a regulated industry because the financial security that insurance policies provide is an integral part of the fabric of our society and economy. UP monitors the insurance sector, works with public officials, has a nationwide network of volunteers and affiliate organizations, publishes written materials, files *amicus* briefs in cases involving coverage and claim disputes and is a general information clearinghouse on consumer issues related to commercial and personal lines insurance products. UP provides disaster aid to property owners across the United States via educational activities designed to illuminate and demystify the claim process.

In this brief, UP seeks to fulfill the "classic role of *amicus curiae* by assisting in a case of general public interest, supplementing the efforts of counsel, and drawing the Court's attention to law that escaped consideration."[1] This is an appropriate role for *amicus curiae.* As commentators have often stressed, an *amicus* is often in a superior position to "focus the court's attention on the broad implications of various possible rulings."[2]

UP has filed a Motion for Leave of Court to File Brief in Support of Appellant in conjunction with this proposed brief.[3]

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[1] *Miller-Wohl Co. v. Commissioner of Labor & Indus.*, 694 F.2d 203, 204 (9th Cir. 1982).
[2] R. Stern, E. Greggnian & S. Shapiro, Supreme Court Practice, 570-71 (1986) (quoting Ennis, Effective Amicus Briefs, 33 Cath. U.L. Rev. 603, 608 (1984).
[3] Fed. R. App. P. 29(a); 5th Cir. R. 29.

I. SUMMARY OF ARGUMENT

Throughout the nation, courts have disagreed about whether construction defects are "occurrences" in cases where the construction defect causes no damage beyond the faulty work itself. State high courts are nearly equally divided on the issue. Arkansas is on one side of the divide, while Texas is on the other. Compare Essex Ins. Co. v. Holder, 261 S.W.3d 456 (Ark. 2007) ("Holder") with Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007). [4]

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[4] When there is no damage beyond the defect itself, some high courts hold categorically that a construction defect is not, in and of itself, an occurrence. See Essex Ins. Co. v. Holder, 261 S.W.3d 456 (Ark. 2007); Pursell Constr., Inc. v. Hawkeye-Security Ins. Co., 596 N.W.2d 67 (Iowa 1999); Auto-Owners v. Home Pride Cos., 684 N.W.2d 571, 575 (Neb. 2004); McAllister v. Peerless Ins. Co., 474 A.2d 1033 (N.H. 1984); Oak Crest Constr. Co. v. Austin Mut. Ins. Co., 998 P.2d 1254 (Or. 2000); Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 908 A.2d 888, 897 (Pa. 2006); L-J, Inc v. Bituminous Fire & Marine Ins. Co., 621 S.E.2d 33 (S.C. 2005); Erie Ins. Prop. & Cas. Co. v. Pioneer Home Improvement, Inc., 526 S.E.2d 28 (W. Va. 1999). Other high courts either explicitly reject the categorical approach of the courts above or adopt a factual approach in the construction defect context that considers whether the property damage was intentional. See Moss v. Champion Ins. Co., 442 So. 2d 26, 27 (Ala. 1983); Fejes v. Alaska Ins. Co., 984 P.2d 519 (Alaska 1999); U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871 (Fla. 2007); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006); Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322 (Minn. 2004); Ohio Cas. Ins. Co. v. Terrace Enters., Inc., 260 N.W.2d 450 (Minn. 1977); Architex Ass'n, Inc. v. Scottsdale Ins. Co., No. 2008-CA-01353-SCT, 2010 WL 457236 (Miss. Feb 11, 2010); Corner Constr. Co. v. United States Fid. & Guar. Co., 638 N.W.2d 887 (S.D. 2002); Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302 (Tenn. 2007); Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007). Other courts are more difficult to categorize. See, e.g., ACUITY v. Burd & Smith Constr., Inc., 721 N.W.2d 33 (N.D. 2006). While the court in Holder stated that it "appears that the majority of states" find no "occurrence" for a construction defect, standing alone without damage to other property, that position now appears to be in the minority and against the recent trend. Within the past five years, the Supreme Courts of Texas, Florida, Tennessee, Kansas and Mississippi all reached the opposite conclusion, engaging in a fact-specific analysis into the intent and expectation of the policyholder that is fully consistent with the general Arkansas approach. See United States Fid. & Guar. Co. v. Continental Cas. Co., 120 S.W.3d 556, 563 (Ark. 2003) (remanding for consideration of the fact question of whether workmanship constituted an accident, *i.e.*, an event that takes place without the policyholder's foresight or expectation).

home was completed, the Baumgartners sued. Id. Bringing claims for breach of contract, breach of express warranty, breach of implied warranties, and negligence, the Baumgartners alleged economic damages relating to "Holder's delays, employment of incompetent subcontractors, and defective or incomplete construction." The Arkansas Supreme Court provides no more factual background about the alleged occurrence in Holder.

b. The Insurance Policy in Holder Specifically Addressed Construction Defects in the Definition of "Occurrence."

Three insurance policies were at issue in Holder. The first defined "occurrence" simply as an "accident." Id. at 457. The other two insurance policies in Holder were unusual, as they explicitly stated that construction defects were not an occurrence:

> "Occurrence" means an accident, including the continuous or repeated exposure to substantially the same general harmful conditions; however, the following is not an "occurrence" under this policy:
>
> a. Actual and/or alleged defective work; and/or
>
> b. Actual and/or alleged defective workmanship; and/or
>
> c. Actual and/or alleged defective construction; and/or
>
> d. Actual and/or alleged negligent construction.

Id. at 457.[7]

[7] Unlike in Holder, where the policy language in two of the insurance policies specifically addressed construction defects in the definition of "occurrence," there is generally no "plain meaning" rationale for categorically excluding all liabilities for construction defects from

c. AERT Involved Property Damage to a Completed Product.

The present case involves property damage caused by mold and mildew, not the failure to complete construction or a defect in construction. Two purchasers of AERT's ChoiceDek products filed a putative class action lawsuit against AERT seeking damages because of mold and mildew to which their decks were allegedly susceptible. Shortly thereafter, a separate putative class action lawsuit was initiated, alleging "discoloration" and "black and gray spots" caused by mold, mildew, and or fungal growth in and on the ChoiceDek products. The complaints sought compensatory damages for the property damage to the ChoiceDek products.

Unlike Holder, the insurance policy language in the present case is more typical, simply defining "occurrence" as "an accident, including continuous or repeated exposure to substantially the same generally harmful conditions." The term "construction defect" does not appear in the insurance policy.

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coverage. The term "construction defect" typically does not appear in the policy, either in the definition of "occurrence" or in any exclusion. Some courts, including the New Jersey Supreme Court, have ruled unequivocally that, in determining the existence of ambiguity, "courts should consider whether more precise language by the insurer, had such language been included in the policy, 'would have put the matter beyond reasonable question.'" Gibson v. Callaghan, 730 A.2d 1278, 1282-83 (N.J. 1999) (quoting Doto v. Russo, 659 A.2d 1371, 1377 (N.J. 1995) (quoting Mazzilli v. Accident & Cas. Ins. Co., 170 A.2d 800, 803 (N.J. 1961)). In the present case, when drafting its insurance policy, the insurance company chose ***not*** to use clear and unambiguous language addressing construction defects even though the split in precedent nationwide has existed for many years. In the end, however, the bigger issue is that the present case does not involve a "construction defect" that would be addressed by a performance bond but property damage involving a completed product, which is addressed by the products-completed operations hazard of general liability and umbrella insurance.

2. Nature of Performance Bonds and General Liability Coverage

The Arkansas Supreme Court in Holder defined "construction defect" in the question presented as including "failure to complete work, delays in construction, or failure to procure qualified subcontractors." Holder, 261 S.W.3d at 456. So defined, the Court held that a "construction defect" was a "foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work." Id. at 460. The present case does not involve the failure to complete work, delays in construction, or failure to procure qualified subcontractors, and no performance bonds exist in the marketplace to protect against the claims made in the present action.

a. Performance Bonds Guarantee The Completion of Work.

The purpose and effect of a performance bond is far different than an insurance policy.[8] A performance bond is a contract entered into between a contractor and a bonding company whereby the bonding company guarantees the contractor's faithful performance of its contractual duties and completion of the project. See 1 COUCH ON INSURANCE 3d §1:15.[9] A performance bond guarantees performance of a contract upon a default by the contractor.[10] Performance bonds do not exist to protect the contractor against legal liability for property damage

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8 See, e.g., J.S.U.B. 979 So. 2d at 887-88; Moore & Assocs., 216 S.W.3d at 309.

9 See also Bruce M. Jervis & Paul Levin, CONSTRUCTION LAW: PRINCIPLES AND PRACTICE 96 (1998).

10 Am. Home Assur. Co. v. Larkin Gen. Hosp., Ltd., 593 So. 2d 195, 198 (Fla. 1992).

liability arising out of the contractor's work, as does insurance. The beneficiary of the performance bond is not the contractor, but the person or entity with whom the contractor has promised its performance. Under a performance bond, if the contractor does not perform the construction contract, such as if the contractor were to stop work on a project, then the surety must step in to ensure the completion of the contract for construction. If the surety does so, then the surety may seek recovery from the contractor under a separate indemnity agreement, which provides that the contractor will hold the surety harmless from all loss and expenses the surety incurs under the performance bond. For that reason, the performance bond offers no protection to the contractor. Rather, the performance bond ensures the customer that construction will be completed.

The high courts of several states have recognized the distinction between commercial general liability policies and performance bonds.[11] The Supreme Court of Texas accurately explained this distinction:

> [T]he protection afforded by a performance bond is, in fact, different from that by [a] CGL policy . . . . [A]n insurance policy spreads the contractor's risk while a bond guarantees its performance. An insurance policy is issued based on an evaluation of risks and losses that is actuarially linked to premiums . . . . In contrast, a surety bond is underwritten based on what amounts to a credit evaluation of the particular contractor and its capabilities to perform its contracts, with the expectation that no losses will occur. ***Unlike insurance, the***

[11] See United States Fire Ins. Co. v. J.S.U.B., Inc., 979 So.2d 817, 887–88 (Fla. 2007); Travelers Indem. Co. of Am. v. Moore & Assocs., Inc., 216 S.W.3d 302, 309 (Tenn. 2007); Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 104 P.3d 997, 1003 (Kan. 2005).

performance bond offers no indemnity for the contractor; it protects only the owner.

Lamar Homes, Inc., 242 S.W.3d at 19 & n.7 (emphasis added).[12]

b. General Liability and Umbrella Insurance Covers Property Damage and Bodily Injury Arising From a Completed Product.

Unlike performance bonds, general liability and umbrella insurance provide insurance coverage for amounts the insured becomes legally obligated to pay for property damage or bodily injury caused by an occurrence. The term "property damage" is broadly defined in the insurance policy to include "physical injury to tangible property, including all resulting loss of use of that property." Any loss of use of tangible property that is not physically injured also falls within the insurance policy's definition of property damage. The definition of property damage is not restricted to what property is injured, and when a product is sold or otherwise released to a third party, that third party has standing to sue for property damage to that product. The insurance company is obligated to assume a duty to defend litigation seeking to impose such liability. That duty to defend is broad, applying whenever there is a "possibility" that the injury or damage may fall within the

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[12] See also Fid. & Deposit Co. of Md. v. Hartford Cas. Ins. Co., 189 F. Supp. 2d 1212, 1218 (D. Kan. 2002) ("[A] performance bond does not 'insure' the contractor, it runs to the benefit of the third party owner only."); Cates Constr., Inc. v. Talbot Partners, 980 P.2d 407, 412 (Cal. 1999) (discussing the difference between surety and insurance); Lennar Corp. v. Great Am. Ins. Co., 200 S.W.3d 651, 673–74 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("[A]llowing coverage for some 'property damage' resulting from defective construction does not transform a CGL policy into a performance bond and require a CGL carrier to pay anytime an insured fails to complete, or otherwise comply with, its contract.").

policy coverage. See Commercial Union Ins. Co. of Am. v. Henshall, 553 S.W.2d 274, 277 (Ark. 1977).

Unless specifically excluded or limited, the broad coverage afforded under the standard CGL form extends to suits seeking damages for bodily injury and property damage arising out of the insured's product. See Steven L. Plitt, et al., 9A COUCH ON INSURANCE 3d § 130:1 (West 2006). The "products-completed operations hazard" is a defined term in the form insurance policy and includes "[a]ll 'bodily injury' and 'property damage' occurring away from premises you [the insured] own or rent and arising out of 'your product' or 'your work' except: [p]roducts that are still in your physical possession; or [w]ork that has not yet been completed or abandoned . . . ." See ISO Form CG 00 01 12 07, Definition 16. Typically, the "products-completed operations" language is applied to various exclusions within the policy to extend coverage for property damage liability arising from the policyholder's completed work and products, in other words, those that have left the policyholder's possession.

B. The Historical Development of the Occurrence Language Shows Its Intended Breadth.

Insurance policies are typically written on standard forms, and the same language is interpreted by numerous courts across the country. The Insurance Services Office ("ISO") drafts many of the standardized form insurance

policies and makes them available to insurance companies.[13] The history of the form commercial general liability policy drafted by the Insurance Services Office ("ISO") has been used by many courts to construe the "occurrence" language.[14] Before 1966, the word "occurrence" was not at issue, because standardized policies used the word "accident." In the first standard-form general liability policy drafted in 1940, a covered event was required to be "caused by accident." The policy excluded "bodily injury or property damage caused intentionally by or at the direction of the insured."[15] In 1966, the standard policy deleted the "caused by accident" language as well as the "intentional injury or damage exclusion."[16] Instead, those concepts were merged into the definition of "occurrence" which was defined as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor

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13 See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 772 (1993). ISO was formed in 1971. Prior to that, other rating bureaus (such as the Insurance Rating Board) developed standard liability insurance policies. The first standardized comprehensive general liability policy was drafted in 1940 through the cooperation of the National Bureau of Casualty Underwriters (representing stock insurance companies) and the Mutual Insurance Rating Bureau (representing mutual insurance companies). See 16 HOLMES' APPLEMAN ON INSURANCE § 117.1 (2000). The standardized general liability policy went through major revisions in 1966, 1973, and 1986.

14 See, e.g., J.S.U.B. 979 So. 2d at 878 n.5; Lamar, 242 S.W.3d at 5 n.1; Am. Family Mut. Ins. Co. v. Am. Girl, Inc., 673 N.W.2d 65 (Wis. 2004). The facts in this section are taken from these decisions and from Appleman on Insurance Law and Practice, particularly Chapter 117 of Holmes' Appleman on Insurance 2d (2000). For additional historical information, see Clifford J. Shapiro, Point/Counterpoint: Inadvertent Construction Defects Are An "Occurrence" Under CGL Policies, 22 Construction Lawyer 13, 13-15 (Spring 2002).

15 16 HOLMES' APPLEMAN ON INSURANCE 2d § 117.1 (2000).

16 Id.

intended from the standpoint of the insured."[17] This was a broadening of coverage. As explained by New York's highest court, "[t]he insurance industry changed to occurrence-based coverage in 1966 to make clear that gradually occurring losses would be covered so long as they were not intentional."[18]

In 1973, the definition of "occurrence" was amended to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage neither expected or intended from the standpoint of the insured." In 1986, the definition of "occurrence" was amended again, this time more significantly, by removing the "neither expected nor intended from the standpoint of the insured" language and, instead, adding an exclusion to address intentional injury or damage. The idea was to clarify the language by "making the negative implied exclusion [in the occurrence definition] into a positive, clearly worded, express exclusion" for injury or damage that is expected or intended from the standpoint of the insured.[19] A major treatise addresses the interplay between the "occurrence" language and the intentional injury exclusion:

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17 Id. The "standpoint of the insured" language was added because some courts considered whether the resulting injury was accidental from the victim's standpoint, rather than the insured's standpoint. Id.

18 Continental Cas. Co. v. Rapid-Am. Corp., 609 N.E.2d 506, 509 (N.Y. 1993).

19 16 HOLMES' APPLEMAN ON INSURANCE 2d § 117.1 (2000).

> In the 1973 CGL insurance policy, there was no exclusion comparable to the 1986 Exclusion "a". It might appear that the definition of "occurrence" in the insuring agreement of the 1966-86 CGL forms as revised is sufficient to preclude liability insurance coverage for an insured's intended (i.e. intentionally caused) or expected harm to others especially if opinions interpret and construe "occurrence" as primarily meaning "accident" which is a fortuitous event. However, Exclusion "a" provides clarification in that an insured's deliberate or intentionally caused bodily injury or property damage to another is not deemed to be accidental.
>
> Instead of the 1966-86 CGL revisions' definition of "occurrence" as the chief excluder (from liability insurance coverage) of an insured's intentionally caused harm to others, the chief excluder is the 1986 Exclusion "a" which is the main focus of this chapter.[20]

Current policies typically follow the 1986 definition of "occurrence" and include separately the intentional injury exclusion. The definition of "occurrence" must be read in tandem with the intentional injury exclusion. A policyholder has the burden to prove that there was an occurrence, which in most instances means proving an "accident." However, insurance companies bear the burden to prove the exclusion for intentional injury. The conscious movement of the "expected or intended" language from the coverage grant into an exclusion shows an awareness by the insurance industry drafters that the insurance company was to bear the burden to prove expected or intended injury. Indeed, even when the "expected or intended" language was embedded in the "occurrence" definition, courts ruled that it was exclusionary in nature and, therefore, the insurance

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20 Id.

company was required to prove that loss was expected or intended to avoid coverage.[21] This drafting history supports interpreting the term "occurrence" broadly to include most events, conditions, and happenings, particularly those in which it is questionable whether the property damage or bodily injury was intended or expected from the standpoint of the insured. It also demonstrates that the existence of an "occurrence" is a factual question that should not, in most instances, be resolved on summary judgment.

Following Arkansas law, the District Court noted that an "occurrence" is "an event that takes place without one's foresight or expectation." AERT, 2009 WL 3177604, at *11 (citing United States Fid. & Guar. Co. v. Continental Cas. Co., 120 S.W.3d 556, 563 (Ark. 2003) ("USF&G")). The USF&G case cited by the District Court was discussed in Holder. Holder, 261 S.W.3d at 458. In USF&G, the Arkansas Supreme Court remanded the "occurrence" issue to the trial court to resolve the "remaining fact question" which was whether workmanship constituted an "accident" meaning "an event that takes place without one's foresight or expectation – an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected." Id. (quoting USF&G). The court in USF&G noted the "split in jurisdictions over whether

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[21] United. Pac. Ins. Co. v. McGuire Co., 281 Cal. Rptr. 375, 378-79 (Ct. App. 1st Div. 1991).

defective workmanship is an accident and therefore an occurrence which is covered under the terms of an insurance policy." Id.

The relevant question is whether the injury or damage was intended, not whether the action causing injury was intended.[22] Courts apply a subjective test, requiring that the policyholder actually intend or engage in actions substantially certain to cause the injury before coverage will be precluded. See, e.g., Sheets v. Brethren Mut. Ins. Co., 679 A.2d 540, 549 (Md. 1996). The burden falls to the insurance company to prove, under the intended injury exclusion, that particular damage or injury was actually expected or intended by each particular insured in order to exclude coverage for that particular insured for that particular loss. This is in accord with the drafting history, which moved the "expected or intended" language from the coverage grant into an exclusion, and with the black-letter law that the exclusion (not the occurrence definition) is the "chief excluder" of expected or intended loss.[23]

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[22] Am. Family Ins. Co. v. Walser, 628 N.W.2d 605, 612 (Minn. 2001) (where there is "no intent to injure, the incident is an accident, even if the conduct itself was intentional.").

[23] See, e.g., 16 HOLMES' APPLEMAN ON INSURANCE 2d § 117.1 (2000) ("the chief excluder is the 1986 Exclusion "a"); id. ("It appears that the term 'occurrence' in the insuring agreement of the new CGL forms should be sufficient to preclude liability insurance coverage of claims or suits for bodily injury or property damage expected or intended by the insured, especially if 'occurrence' is construed by courts as meaning 'accident' which, in turn, means a fortuitous event. However, rather than necessitating judicial construction of the word 'occurrence' like an exclusion of an insured's intentionally caused harm, the 1986 revision expressly created such an exclusion in Exclusion 'a'.").

Most importantly for the present case, the examination of whether damage was expected or intended, or instead was accidental, is an intensely factual question focused on the subjective intent and expectations of the policyholder. In the present case, there is no evidence, let alone undisputed evidence, that AERT manufactured its product with the intent that it be damaged by mold or mildew, or even that AERT knew that its product was unusually susceptible to such damage, or that such damage was substantially certain to occur. As such, the District Court erred in granting summary judgment against AERT on the duty to defend and by finding, in essence, that there was no possibility that the property damage caused by mold and mildew was unintentional and unexpected from AERT's standpoint.

C. The Term "Accident" Should Be Broadly Construed.

As explained above, high courts are nearly equally divided on the approach to the interpretation of the occurrence language in the construction defect context.[24] The existence of disparate judicial opinions themselves may demonstrate ambiguity in the insurance policy. See New Castle County DE v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 243 F.3d 744, 754-56 (3d Cir. 2001). This proposition seems self-evident if one accepts the premise that judges are reasonable, because if there are two or more reasonable interpretations of the same language, that is the very essence of ambiguity. The insurance industry's

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[24] *Supra*, note 1.

continued use of the word "accident" in the "occurrence" definition should be subject to particular scrutiny because, as a major treatise notes, "[t]here are few insurance words that have provoked more controversy and litigation than the word 'accident.'"[25]

The interpretation of "occurrence" and "accident" urged by AERT is fully consistent with both Texas law and Arkansas law. The question of whether damage was caused intentionally with an expectation of harm, or instead was accidental or negligent, is ultimately for the finder of fact. If there is any possibility that the property damage here was accidental, then the insurance company owes a duty to defend. As such, the District Court's decision finding no duty to defend must be reversed and the matter remanded.

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[25] 16 HOLMES' APPLEMAN ON INSURANCE 2d § 116.4 (2000).

PRAYER

For the foregoing reasons, *Amicus Curiae* United Policyholders respectfully requests that this Court reverse the trial court's grant of summary judgment in favor of Appellee American International Specialty Lines Insurance Company.

Dated: March 18, 2010

Respectfully Submitted,

John N. Ellison, Esquire
REED SMITH LLP
1650 Market Street, Suite 2500
Philadelphia, PA 19103
Telephone: (215) 851-8100
Facsimile: (215) 851-1420

COUNSEL FOR *AMICUS CURIAE*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 (a)(7)(C) and 5th Cir. R. 32.3, I hereby certify that the foregoing amicus brief is set in a plain, proportionally spaced roman-style typeface (Times New Roman), with the text set in 14-point type and footnotes set in 12-point type, using Microsoft Word 2003. Excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii) and 5th Cir. R. 32.2, it contains 3010 words, less than half the maximum length authorized by the rules for the principal brief of the party being supported (13,889 words), as counted by Microsoft Word 2003, the word processing software used to prepare this brief. *See* Fed. R. App. P. 28.1(e) and 29(d).

John N. Ellison, Esq.
REED SMITH LLP
2500 One Liberty Place
1650 Market Street
Philadelphia, PA 19103
Tel. 215-851-8100
Fax. 215-851-1420

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of *Amicus Curiae*, United Policyholders has been served upon the following counsel by First Class Mail, on this 18th Day of March, 2010:

Counsel for Plaintiff-Appellant
Ernest Martin, Jr., Esq.
Micah Skidmore, Esq.
Haynes and Boone, L.L.P.
2323 Victory Avenue, Suite 700
Dallas, Texas 75219

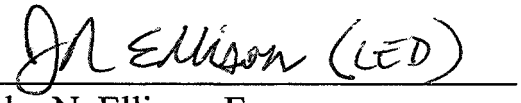
Counsel for Defendant - Appellee

Barbara I. Michaelides, Esq.
Agelo L. Reppas, Esq.
Kelly Stoltz, Esq.
Bates & Carey, LLP
191 N. Wacker Drive, Suite 2400
Chicago, IL 60606-0000

Christopher Ferragamo, Esq.
Jackson & Campbell P.C.
1120 20th Street, N.W.
1 Lafayette Center, S. Tower
Washington, D.C. 20036-3437

Keith R. Taunton, Esq.
Tucker, Taunton, Snyder & Slade, P.C.
10370 Richmond Avenue, Suite 1400
Houston, TX 77042-0000

Randall G. Walters, Esq.
Walters, Balido & Crain, LLP
900 Jackson Street, Suite 600
Dallas, TX 75202-0000



John N. Ellison, Esq.
Attorneys for *Amicus Curiae* United Policyholders