AMERICAN BAR ASSOCIATION FORUM ON THE CONSTRUCTION INDUSTRY
and
TIPS FIDELITY & SURETY LAW COMMITTEE

I GOT YA' COVERED:INSURANCE AND SURETY BONDS IN THE '90s

Priorities Between Bonds and Insurance:
The CGL Policy as a Revenue Source
for the Construction Surety

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January 26, 1995
Waldorf=Astoria
New York, New York

I. Introduction

The duties and obligations of a commercial general liability ("CGL") insurer and a construction surety are dramatically different from both a legal and conceptual standpoint. Often times, however, the distinctions between the two aren't clearly understood and recognized by either courts or lawyers.

Generally, the CGL policy provides coverage (or indemnity) for the negligence of the contractor which results in injury to the person or property of another. The policy is not intended to provide coverage for the intentional actions of, or pure breaches of contract by, the insured, e.g., damages arising out of a contractor's faulty workmanship. The policy usually terminates on a specific date set forth in the policy or when the work is completed, unless completed operations coverage is purchased.

On the other hand, upon contractor default, the performance bond surety is obligated to assure, in some fashion, performance of the construction and payment of any claims by persons or entities who furnished labor, materials or supplies for the project. Typically, the surety's obligations are statutory, although these obligations imposed by law do not differ substantially from the duties imposed on the surety under "private works" bonds. The surety's obligations also extend beyond completion of the project either for a set term established in the bond itself or for a time period established by law.

Historically, the conceptual differences between bonds and insurance have been maintained and any overlap of obligations is rare. In a few instances, however, courts have decided that a performance bond provides "coverage" for tort liability arising out of the negligent operations of the contractor.1 However, these cases, for the most part, hinged on specific language in the owner/contractor agreement which bound the surety to hold harmless the owner for the contractor's negligent acts. Putting these few exceptions aside, maintaining the distinction preserves the traditional concept of suretyship and prevents the bond from being exhausted by tort claims to the detriment of those for which the bond is intended to protect, i.e., the owner and those entities or persons furnishing labor and materials for the project.2

In comparison, the standard CGL policy is not intended to cover the "business risk" or contractual risks for which the performance bond surety might be liable if the contractor defaults. The term "business risk" is not specifically defined in the policy but is well understood in insurance law. "Business risks" are defined as:

Those risks which management can and should control or reduce to manageable proportions; risks which management cannot effectively avoid because of the nature of the business operations; and risks which relate to the repair or replacement of faulty work or products. These risks are a normal, foreseeable and expected incident of doing business and should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others.3

When a construction contractor purchases a CGL insurance policy:

The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law, to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.4

Also, from a practical standpoint, keeping these concepts separate does not frustrate the underwriting criteria which is used to establish premiums for both bonds and insurance. The bond underwriter doesn't consider third-party tort liability as a criteria in establishing the appropriate bond premium. The underwriter for the CGL policy, on the other hand, does not factor into the premium contractual business risks "because it has no effective control over those risks and cannot establish predictable and affordable insurance rates."5 As is often stated, the CGL policy is not intended to serve as a performance bond or a guaranty of goods or services.6

There are, however, instances where these concepts are blurred and both the performance bond and CGL carrier are called on to respond to a third party's or owner's claim for property damage arising out of the contractor's poor workmanship. Many of these claims involve an owner's demand on the contractor's CGL policy and the surety's performance bond seeking coverage of damages to the work performed by the contractor. This then becomes the major focus of this paper: an in depth analysis of the CGL policy as a potential source of coverage for damages arising out of defective workmanship of the contractor. This inquiry is especially important to the surety who may be able to look to the CGL carrier as a possible coobligor for claims by the owner arising out of the contractor's negligent performance.

Our journey begins with a review and analysis of the provisions of the CGL policy. Not surprisingly, the standard policy forms have been revised repeatedly and the specific policy at issue in a particular case will have a significant effect on the final outcome of a court's decision on coverage. The standard CGL policy is a maze of phrases and exclusions which courts and lawyers have found difficult to interpret and apply. These key provisions and exclusions will be discussed and explained and their impact explored and developed.

II. The CGL Policy

A. Background

The commercial7 general liability policy is a standardized liability policy developed by casualty rating bureaus over a period of more than 60 years.8 The Insurance Services Office (ISO), formed in 1971, merged five of these national rating and statistical organizations.9 The ISO has promulgated several standard forms, including the CGL policy form, which are customarily used by most United States insurers. These standard

forms are revised and updated periodically. The ISO, and the rating bureaus and associations before it, revised the CGL form in 1943, 1955, 1966, 1973, 1986 and 1988, since its initial promulgation in 1940.

As a result of these revisions, and because a particular policy may deviate from these standard forms, the legal practitioner must examine carefully the case decisions since each are based on the specific language of the policy and the policy form at issue. Cases construing policy coverages "... are not authoritative if they do not involve the same language or the same version of the standard form embodied under consideration."10 This paper will focus on the 1973 policy form and the subsequent policy revisions in 1986 and 1988. These are the policy forms which you will most commonly encounter.

The coverage clause of the 1973 ISO form provides:

We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury'" or "property damage" to which this insurance applies, caused by an occurrence....

Coverage is triggered by an occurrence as defined by the policy. The 1973 policy defined occurrence as an "accident, including continuous or repeated exposure to conditions, which results in ... property damages neither expected nor intended from the standpoint of the insured." The 1986 and 1988 policy revisions eliminated the phrase "neither expected nor intended from the standpoint of the insured" from the definition, but instead incorporated the phrase into a policy exclusion. This change, however, has had no substantive impact on the application of the occurrence trigger.

Also, for coverage to exist, the damages claimed must be "property damage" as that term is defined in the policy. The 1973 ISO form defined "property damages" as follows:

(1) Physical injury to or destruction of tangible property which occurs during the policy period including the loss thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

The 1986 and 1988 policy forms contain similar definitions, but specify when the property damage is deemed to have occurred.

The broad coverage clause, however, is severely limited by several exclusions. The exclusions germane to our inquiry include "your product" and "your work" exclusions, along with the broad form property damage ("BFPD") endorsement made available in conjunction with the 1973 policy form, for an additional premium, presumably to provide expanded property damage coverage. The specific language of these exclusions and the BFPD endorsement will be discussed and developed in more detail later. We will focus now on the occurrence and property damage definitions and what effect they have on limiting coverage for damages arising out of a contractor's defective work.

B. Does Poor Workmanship
Constitute "An Occurrence"?

Generally, when the liability of a contractor is based solely on improper construction, courts refuse to find an occurrence.11 Simply stated, faulty work is not an "accident".12 For example, a contractor who knowingly used inferior brick and intentionally installed out-of-plumb walls "contrary to contract standards of workmanship" should have expected the resulting property damage and, therefore, no occurrence was triggered.13 Similarly, where a builder improperly constructed a house on unstable soils causing numerous and varied defects, the contractor's faulty construction was not an occurrence to trigger coverage under the

policy.14

This general principle, however, has not been uniformly followed. Critics of the rule argue that the term "accident" includes events other than those "happening suddenly and violently",15 and that the contractor's faulty workmanship or negligent performance of the work is accidental because it "happens by chance or fortuitously, without intention or design, and ... is unexpected, unusual, and unforeseen."16 Some courts have even held that, in interpreting the standard definition of an occurrence, "... coverage is avoided only when an act results in an intentional injury."17 More than one court reasoned that because the builder's conduct was not "reckless or intentional", the resultant damage came within the policy definition of occurrence which included an event "neither expected nor intended from the standpoint of the insured".18

Most case decisions, however, simply ignore or downplay the occurrence analysis and focus instead on an analysis of the policy's work/product exclusions. Often, the case opinions are devoid of any decision about whether poor workmanship is, in and of itself, an occurrence. One can only assume that lawyers arguing those cases on behalf of the insurer have overlooked this critical inquiry and emphasized instead the applicable exclusions. This approach is dangerous since, without an occurrence, coverage is never triggered whereas if an occurrence is established, coverage is available unless the insurer can establish that one or more exclusions apply. In the latter instance, the burden is on the insurer to prove the applicability of the exclusion.19

C. Is the Damage Claimed "Property Damage"?

If you can successfully establish an occurrence, the next inquiry is whether the damages asserted constitute property damage as defined by the policy. Courts have interpreted the definition of property damage by differentiating between "damage to the product of the insured, and damage to other property caused by that product."20 The prevailing view is damage to the product or work of the insured is not covered21, but physical damage to other property is covered.22

Further, as an extension to this general rule, where a defective product or work is installed by the insured and integrated with someone else's property, the damage to the property as a whole, excluding the cost of repairing or replacing the defective item, is property damage under the policy.23 Does this rule apply, however, where the contractor insured, although contractually responsible for the entire project, is sued by the owner for damage caused by the installation of a defective component furnished and installed by a subcontractor? Stated another way, isn't the entire project the contractor's work product and therefore damage to the work itself not considered property damage?. As we will discuss later, some courts have adopted this broad interpretation while other courts simply aren't willing to extend its application to exclude coverage for damages to the subcontractor's work or damages caused by a subcontractor's defective work.24

If you succeed in crossing this hurdle, just what types or categories of property damage are covered? Pure property damage is usually covered, but in many instances, the claimant is requesting reimbursement or indemnity for "economic losses". The definition of property damage requires that the damage be "tangible". Tangible, in this context, refers to the completed work or project. Courts have consistently concluded that loss of investment, loss of anticipated profits, loss of good will, damage to business reputation, damage to business standings, waste of corporate or partnership assets, lost investment value, loss of aesthetic value, and other similar "economic damages" are not property damage.25

But what if the claim is for the diminution in value of the completed project even though no actual physical injury to the property occurs? The definition of property damage does contemplate loss of use of the property, even when no physical injury occurs, but is diminution in value really the same as loss of use?

In American Motorists Insurance Company v. Trane Company,26 the issue was whether a 25% reduction of a plant's operations caused by a contractor's defective work represented property damage under the applicable CGL policy. The court concluded that property damage does not require physical damage to property and may instead take the form of diminished value or loss of use. This holding appears to be the majority view.27

Usually, however, those jurisdictions in the majority have limited coverage to the amount of the diminution in excess of the cost of replacing the products and/or work of the insured, since the latter cost is not a covered loss.28

Can diminution in value alone, without actual physical injury to tangible property or some loss of use, constitute property damage? In other words, must the diminution in value be tied directly to actual property damage?

Some courts say diminution in value alone is "property damage"29 while others say no.30

At least one commentator believes that this analysis misses the point since diminution in value is simply a measure of damages, not the physical injury.31 If there has been no physical injury and no loss of use then the more reasoned view is that diminution in value is not property damage. However, when either physical injury or loss of use results from the integration of defective work or products, the courts are more likely to conclude that diminution in value of the entire building or project constitutes property damage.

For example, damages for a building's diminution in value due to the contractor installing a brick rather than a stone veneer is not likely to be construed as property damage since there has been no physical injury to tangible property or any loss of use therefrom. On the other hand, when a contractor installs steel studs of an improper gauge within a wall system which results in a loss of use of the property as well as a diminution in value, the courts are likely to hold that the owner of the facility has suffered property damage as defined by the policy.

Having traversed the mine fields of the coverage clause of the policy, our attention now turns to the numerous exclusions which drastically limit the policy's coverage.

D. "Your Product" Exclusion

Paragraph (n) of the l973 ISO policy excludes coverage for "property damage to the named insured's products arising out of such products or any part of such products." Faced with this exclusion and its application to a contractor, some courts have held that the definition of "product" does include a general contractor's work product,32 thereby excluding coverage for damages to a building or structure, while other courts have held that a building is not the contractor's product and thus refuse to apply the exclusion.33 It would seem that the definition of product, although not specifically defined in the "your product" exclusion, should take on the same definition of product as is typically utilized in product liability law or in the "product hazard" coverage contained in most CGL policies. The "product hazard" coverage typically defines "named insured's products" as "goods or products manufactured, sold, handled or distributed by the named insured ..."

The importance of utilizing this analysis is that an "injury to product" exclusion applies only when "a product, rather than a service, is the cause-in-fact of damages or injury to a third person."34 (Emphasis added).

There has been a modern trend, however, to extend products liability law to builders engaged in the mass production of residences and prefabricated buildings.35 However, despite this trend, the insurance industry, in construing its own policy form, has confirmed that the "injury to product" exclusion applies only to

products as that term is defined in product liability law, i.e., "[T]he 1986 CGL form defines product so as not to include real property."36 Further, the mere ambiguity of the word "product" in the exclusion and the phrase "named insured's products" in the product hazard coverage "is itself enough to construe the policy provision in favor of ... the insured."37

E. "Your Work" Exclusion

Exclusion (o) of the 1973 ISO policy excludes property damage to work "performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of material, parts or equipment furnished in connection therewith." If that policy also included the BFPD endorsement, Exclusion (o) is replaced with the faulty workmanship exclusion. That particular endorsement excluded coverage for the following:

to that particular part of any property, not on premises owned by or rented to the insured, ... the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured.

The 1986 and 1988 policy revisions merged the BFPD endorsement into the body of the policy and made other minor revisions to the "injury to work" exclusion. Those revisions replaced the term faulty workmanship with "incorrectly performed work" as follows:

"(j)(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations" hazard.

The purpose of the exclusion is to exclude coverage for those "business risks" which the insured contractually assumes and which the contractor is in the best position to prevent. As noted earlier, the insurer did not intend to cover these risks and no additional premium charge was included.

A vast majority of courts have concluded that exclusion (o) and its replacement in the 1986 and 1988 policy forms, unambiguously exclude coverage for the "business risk" of the contractor arising out of the contractor's faulty workmanship prior to project completion.38 This majority rule applies even if the damages result from work performed by a subcontractor or if the damages are to the subcontractor's work. Sometimes, however, what constitutes "faulty workmanship" is disputed. The term is not specifically defined in the policy. Does the term contemplate both the defective quality of the finished work and the improper method of installation?

In Allstate Insurance Company v. Smith,39 a building lessee brought a declaratory action against its "all risk" insurer claiming damages due to water infiltration arising out of a roofing contractor's failure to temporarily cover a portion of the building which the roofer had removed. The policy, although not a CGL policy, contained a "faulty workmanship" exclusion. The Ninth Circuit concluded that the exclusion only applied to "the flawed quality of the product" and not "flawed processes of construction" or "faulty methods of construction." Declaring the exclusion ambiguous, and applying the interpretation most favorable to the insured, the Court found coverage since the damage was caused by the contractor's faulty method of construction.40

The BFPD endorsement arguably restricts the scope of the "your work" exclusion in several particulars. First, the exclusion only applies "to that particular part of any property being restored, repaired or replaced by reason of faulty workmanship thereon". Thus, by applying the "thereon" limitation, damage to property other

than the insured's own work or that particular part of the property which the insured is working on is not excluded.41

Second, the BFPD endorsement appears to limit the exclusion "to that particular part" of the property being worked on. If interpreted literally, the exclusion should only apply to that portion of the project where work is being performed in the area where the damage arises.

This restrictive interpretation has been adopted by some courts. For example, in Continental Insurance Company v. Asarco, Inc.,42 the insured contracted with Asarco to construct a conveyor belt assembly. Asarco furnished certain parts of the system, including bents and trusses which were used in constructing the conveyor system. During construction, the conveyor collapsed resulting in damage to the bents, trusses and an existing structure attached to the conveyor. The court refused to apply the BFPD exclusion so as to exclude the replacement cost of the bents and trusses furnished by the owner and the damage to the adjacent structure since none of these items constituted "that particular part" of the property being worked on by the insured. 43

Unfortunately for the contractor insured, many courts have simply refused to adopt this limited interpretation and have chosen instead to characterize the phrase "that particular part" as including all of the property being worked on or to be worked on by the contractor.44 For example, in Vinsant Electrical Contractors v. Aetna Casualty & Surety Co.,45 the insured, an electrical contractor, installed two circuit breakers within an existing switchboard. During installation, the switchboard exploded. The court concluded that the switchboard, and not just the circuit breakers, were "that particular part" of the property the insured was performing work on, thereby excluding from coverage damage to the switchboard.

If faced with interpretation of this faulty workmanship exclusion contained in the BFPD endorsement, you should attempt to segregate specific component parts of the contractor's work and then argue that the policy only excludes that particular part of the work on which the contractor is performing work. This will enhance your chances of a court finding coverage for damages to other parts of the contractor's work.

E. "Completed Operations"Exclusion

The broad from property endorsement also included a "completed operations" exclusion. This provision, which applies only to work already completed, seems to broaden property damage coverage under the standard policy and significantly narrows the "injury to work" exclusion. The language of the "completed operations" exclusion, which replaces exclusion (o), is set out below:

VI(A)(3) With respect to the completed operations hazard and with respect to any classification stated in the policy or in the company's manual as "including completed operations", to property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith.

The phrase "or on behalf of" which was included in exclusion (o) is conspicuously absent in this endorsement. This lends credence to the argument that the contractor has coverage under the BFPD endorsement for damage to its work arising out of work performed "on behalf of the named insured", e.g., by a subcontractor. Also, if the property damage is to work other than that performed by the named insured, e.g., the subcontractor's work is damaged, coverage is also available. Most jurisdictions have endorsed this interpretation.46

This interpretation is also supported by industry comment.47 According to the August, 1982 Fire Casualty & Surety Bulletin ("FC&S Bulletin"):

The exclusion eliminates coverage for property damage to work performed by the named insured if the property damage arises out of the named insured's work or any portion of it.

Thus, an insured has coverage for his completed work when the damage arises out of work performed by someone other than the named insured, such as a subcontractor ... The usual Completed Operations coverage (no Broad Form Property Damage endorsement attached) flatly excludes property damage to work performed by or on behalf of the named insured arising out of the work. Under the usual coverage, then, the insured has no insurance whatsoever for damage to a subcontractor's work or for damage to his own work resulting from a subcontractor's work. Therein lie the advantages of Broad Form Property Damage coverage including Completed Operations. Consequently, if an insured does not anticipate using subcontractors, the value of purchasing Broad Form Property Damage coverage with Completed Operations is questionable, in view of the additional premium required for it.48

More recently, the insurance industry has indicated:

When an insured purchases broad form property damage (including completed operations) coverage, one effect is that exclusion (o) is deleted and replaced by an exclusion of "property damage to work performed by the named insured arising out of such work or any portion thereof, or out of such materials, parts or equipment furnished in connection therewith." This is a deletion of the wording "or on behalf of" from Exclusion (o).

The meaning of this deletion is to restrict the exclusion's operation to property damage to the insured's own work that arises out of the insured's own work. By this interpretation, a general contractor would be covered for damages to work performed by itself or any other contractor if the damage arose out of another contractor's work on the project. And, even if damage arose out of the insured's own work, the insured would be covered for damage to work performed by any contractor other than itself.49

Ironically, this has not prevented insurers from taking a contrary position in most cases. Not surprisingly, the industry has had only marginal success. As one court stated, the industry's interpretation of the exclusion "is strong evidence of the intent of the parties."50

Two Minnesota cases are cited often as the minority view that the BFPD endorsement has no substantive effect on the "injury to work" exclusion.51

In Bor-Son Building Corporation v. Employers Commercial Union Insurance Company,52 the Minnesota Supreme Court denied coverage to a contractor who claimed that damages were caused by a subcontractor's work and concluded that the CGL policy is to protect against "tort liability for physical damage to others, not for contractual liability of the insured for economic loss because the ... completed work is not that for which the damaged person bargained."53 The key distinction adopted by the Court as controlling was the difference between business risk, which the general contractor assumes sole responsibility for, and risk of tort liability to third parties, which the insurer assumes.

In the second Minnesota case, Knutson Construction Company v. St. Paul Fire & Marine Insurance Company,54 the contractor argued that Bor-Son was distinguishable since the court was not requested to construe the "completed operations" hazard of the BFPD endorsement which the contractor contended did provide coverage for property damage arising out of the work of subcontractors.55

Siding in favor of the insurer, the Supreme Court disagreed concluding that the general contractor had "responsibility for all construction work - its own as well as it's subcontractors."56 In finding no particular difference between the "injury to work" exclusion and the exclusion in BFPD endorsement, the court stated:

[W]hether the work was "done by" or "on behalf of" the general contractor is irrelevant to the analysis. The completed product is to be viewed as a whole, not as a "grouping" of component parts. ... Slight difference in wording in the work performed exclusion in the [broad form property damage] endorsement does not affect this exclusion.57

The court went on to explain why it thought the phrase 'or on behalf of' was deleted from the endorsement:

The deletion of the phrase relating to subcontractors and the exclusion in the completed operations policy makes sense because the insured contractor has presumably accepted the subcontractor's work as his own (at least so far as his potential tort liability is concerned), and has turned the completed work over to the owner by the time such a completed operations is operative.58

This explanation seems to ignore the careful drafting of the broad form endorsement and its deletion of the phrase "or on behalf of", as well as industry comment. Further, this view isn't consistent with the construction process. In reality, a general contractor has little or no effective control over the manner in which subcontractors perform work. In criticizing the analysis of the court in Knutson, at least one court found "... unpersuasive the argument that because the prime contractor's control makes the work of a subcontractor a contractual business risk, the prime contractor should not be able to obtain insurance against that risk."59

The more reasoned view is that the broad form endorsement intentionally limits the scope of the "your work" exclusion and provides coverage, at an added premium, for damages arising out of the work performed by subcontractors. Insurers could have simply inserted the phrase "or on behalf of" in the broad form endorsement "to make its intent crystal clear."60 Sometimes, "[w]ords deleted from a contract may be the strongest evidence of the intention of the parties."61

In order to address the divergent results arising out of the interpretation of the scope of the "completed operations" exclusion, the 1986 and 1988 ISO forms incorporate the "completed operations" exclusion from the BFPD endorsement and include an exception to the exclusion which addresses damages arising out of the subcontractor's work. The exclusion is set out below:

1. "Property 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.

In summary, a lawyer faced with the thorny issue of whether the CGL policy covers damages arising out of a contractor's poor workmanship should perform an orderly analysis of the coverage issues to determine if, at any stage, coverage is not available. If the work is not completed, and you are dealing with the recent policy revisions (1986 and 1988), damage to that particular part of the property being worked on by either the general contractor or its subcontractors resulting from either the general contractor's or the subcontractor's work is not covered. If damage results from the general contractor's or subcontractor's work on another part of the property the damage is covered. Also, if the damage claimed is to that particular part of any property, whether being worked on or not, which must be restored, repaired or replaced because of the general contractor's or any subcontractor's faulty work on that particular part, the damage is not covered. Finally, if the damage to that particular part of any property, whether being worked on or not, results from the general contractor's or any subcontractor's faulty work on another part of the property, the damage is covered.62

If the work is completed, and you are dealing with the 1986 or 1988 policy forms (or the majority view of the BFPD endorsement to the 1973 policy), damage to the general contractor's work which is caused by the

general contractor's own work is not covered. All other scenarios involving damage to the contractor's work by the subcontractor's work or damage to a subcontractor's work caused by the general contractor's or another subcontractor's work are covered.63

F. Is the Surety's General Indemnity Agreement an "Insured Contract"?

Not only should the surety look to a contractor's CGL policy as a possible revenue source for sharing the costs of correcting defective work of the contractor or its subcontractors, it should also carefully analyze the CGL policy to see if it will cover defense costs arising out of claims asserted against the surety due to the contractor's negligent performance of the work.
A question seldom posed is whether the contractor's CGL policy provides coverage for the contractor's indemnity obligation owed to its surety, including legal and investigative costs? Interestingly, two separate appellate courts in Louisiana have analyzed and answered this question.

In Merrick Construction Co., Inc. v. Hartford Fire Ins. Co.64 the contractor, Merrick, contracted with the Department of Transportation and Development ("DOTD") to perform certain construction work on a section of roadway owned and operated by the DOTD. After work was complete, a car accident occurred on the completed section of the roadway and a suit was filed against Merrick, among others, claiming that Merrick was negligent in the performance of its work.

Hartford, Merrick's CGL insurer, undertook Merrick's defense of the claim. DOTD, also named as a defendant, filed a third-party demand against Merrick for which Hartford again provided a defense. However, DOTD also filed a third-party demand against Merrick's surety, St. Paul Fire & Marine Ins. Company ("St. Paul"), the defense of which was tendered to Merrick who, in turn, tendered it to Hartford who refused to defend since St. Paul was not a named insured under Hartford's policy. St. Paul then filed a third-party demand against Merrick which Merrick tendered for defense to Hartford. Hartford refused and Merrick then hired its own attorney to defend this third-party demand.

DOTD and Merrick were dismissed at the trial. Merrick then filed suit to recover the attorney's fees it paid for its own defense as well as the fees incurred in St. Paul's defense.

The Hartford policy included the following exclusion:

This insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement, except an incidental contract, but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner.65

The policy also included a provision covering "contractual liability assumed by him under any written contract of the type designated in the schedule for this insurance."66

The Court concluded that the defense costs were covered under the Hartford policy since Merrick, by contract, had warranted that its work would be performed in a workmanlike manner thereby triggering the exception to the policy exclusion. The Court further explained that:

The liability of Merrick to St. Paul arises not just from the guaranty but from the legal provisions governing suretyship, and the general purpose of liability insurance is to cover this type of legal liability. We find that Merrick was responsible and that the general liability provisions covered this type of risk. The fact that St.

Paul is a stranger to the policy is irrelevant; it is the liability of Merrick that Hartford insured and was required to defend.67

Nine years later, a second Louisiana appellate court, citing Merrick with authority, ruled in favor of a contractor's claim against its CGL carrier for the legal and investigative costs incurred by its surety in defending a suit arising out of the contractor's performance. In Nachitoches Parish School Board v. H. C. Shaw,68 the general contractor, H. C. Shaw ("Shaw"), entered into a contract with the Nachitoches Parish School Board ("School Board") for the replacement of a junior high school roof. Shaw's surety, Meritplan Insurance Company ("Meritplan"), issued a performance and payment bond to Shaw for the project. Meritplan and Shaw had previously executed a general indemnity agreement which obligated Shaw to "... indemnify and save harmless the Surety from and against any and all demands, liabilities, loss, costs, damages, or expenses of whatever nature or kind, including fees of attorneys and all other expenses, including but not limited to cost and fees of investigation ..."69

Almost immediately after the roof was installed, the School Board complained of numerous leaks. Shaw made several attempts to stop the leaks, but none were successful. Ultimately, Shaw refused to make any further attempts to fix the roof. The owner never paid Shaw for the work. The school building, which was rendered unusable, was eventually abandoned by the School Board.

Suit was filed by the Board against Shaw, Meritplan and others. Meritplan requested a defense from Shaw, who then tendered the request to its CGL carrier, American Indemnity Company ("American"). American refused to defend, requiring Meritplan to hire its own defense counsel. Later, Meritplan filed a crossclaim against Shaw and American seeking recovery of its defense and investigative expenses. Prior to trial all claims were settled, except Shaw's third-party demand against another defendant and Meritplan's crossclaim against Shaw and American.

The trial court held that Shaw assumed the obligation of providing for the cost of defending Meritplan. The court further concluded that American's CGL policy issued to Shaw covered this cost because the indemnity agreement qualified as a covered "incidental contract" as that term was defined in the policy. The pertinent provision of the policy read as follows:

The insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement except an incidental contract; but this exclusion does not apply to a warranty of fitness or quality of the named insured's products or a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner; ...70

Incidental contract was defined in the policy as follows:

... any written (1) lease of premises, (2) easement agreement, except in connection with construction or demolition operations on or adjacent to a railroad, (3) undertaking to indemnify a municipality required by municipal ordinance, except in connection with work for the municipality, (4) sidetrack agreement, (5) elevator maintenance agreement, or (6) easement or license agreement in connection with vehicle or pedestrian private railroad crossings at grade; ...71

That definition was extended and modified by the BFPD endorsement "... to include any oral or written contract or agreement relating to the conduct of the named insured's business".72

The Appellate Court affirmed the trial court's judgment by concluding that the expanded definition of incidental contract in the broad form endorsement included, within its scope, the indemnity agreement in

which Shaw specifically assumed the responsibility to pay for Meritplan's attorney's fees and investigative costs. The court further concluded, as the court had in Merrick, that the contractual liability provisions of the American policy also provided coverage. As the court appropriately concluded:

American did not owe Meritplan a direct defense as an insured under the policy because Meritplan did not qualify as such. American's liability is based on the fact that it undertook to cover liability assumed by its insured, Shaw, in an incidental contract.73

The holdings in these two cases illustrate the benefits derived from creative arguments conceived by lawyers who are trying to find coverage for their contractor insureds. Although the surety did not qualify as a named insured under the contractor's policy, the cost incurred by the surety's lawyer which the contractor ultimately pays, is damage covered under the contractor's CGL policy. As most practitioners know, defense costs in cases like these can be substantial and, if uninsured, could result in a contractor's insolvency or bankruptcy.

III. Conclusion

We have now weaved our way through two key issues which arise in construing and interpreting the CGL policy as a potential source of revenue for the construction surety. What we have gained from this exercise is a better understanding of the critical issues and the proper analysis necessary in order to determine if coverage is available for damages arising out of the contractor's negligent performance of its work. Be warned that the resolution of these issues is dependent upon the specific provisions of the policy and how the policy provisions apply to each case.

1 See, e.g., Sanitary Dist. of Chicago v. United States Fidelity & Guar. Co., 392 Ill. 602, 65 N.E.2d 364 (1946).
2 See, e.g., Healy Plumbing & Heating Co. v. Minneapolis-St. Paul Sanitary Dist., 284 Minn. 8, 169 N.W.2d 50,55 (1969), where the Minnesota Supreme Court explained, in upholding the traditional role of suretyship:

"There is good reason for so holding. If a party not included within the class for whose protection the bond is given is permitted to sue on a tort claim or on a claim not connected with the performance of the contract, it is conceivable that the amount of the bond might be so dissipated that those for whose protection it is given would be left without any protection at all."
3 George H. Tinker, Comprehensive General Liability Insurance - Perspective and Overview, 25 Federation of Insurance and Corporation Counsel Quarterly, 217, 224 (1975) (hereinafter Tinker).
4 See Bor-Son Bldg. Corp. v. Employers Commercial Union Ins. Co., 323 N.W. 2d 58, 63 (quoting Roger C. Henderson, Insurance Protection for Products Liability and Completed Operations - What Every Lawyer Should Know, 50 Neb. L. Rev. 415, 441 (1971)).
5 See Knutson Constr. Co. v. St. Paul Fire & Marine Ins. Co., 396 N.W.2d 229, 234 (Minn. 1986).
6 See Gulf Mississippi Marine Corp. v. George Engine Co., 697 F.2d 668, 670 (5th Cir. 1983); Indiana Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1279 (Ind. 1980).
7 Prior to 1986, the policy was entitled "Comprehensive General Liability". The change from "Comprehensive" to "Commercial" was presumably made to minimize the impression that the policy provided coverage for all liability risks.
8 Note, Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy, 68 Minn. L. Rev. 795, 798 (1984); see also Tinker at 218-19.
9 Insurance Services Office, Highlights: ISO's first decade, Inside ISO 2 (Spring 1980).
10 Tinker at 219; see also Hartford Accident & Indem. Co. v. Pacific Mut. Life Ins. Co., 861 F.2d 250, 252 (10th Cir. 1988).
11 See, e.g., Fredeman Shipyard, Inc. v. Weldon Miller Contractors, Inc., 497 So.2d 370, 374 (La. App.

1986); Swarts v. Woodlawn, Inc., 610 So.2d 888, 890 (La. App. 1992); United States Fidelity & Guar. Co. v. Advance Roofing, 788 P.2d 1227 (Ariz. App. 1989); Gene Harvey Builders, Inc. v. Pennsylvania Mfrs. Ass'n Ins. Co., 517 A.2d 910 (Pa. 1986); Hull v. Berkshire Mut. Ins. Co., 427 A.2d 523 (N.H. 1981).
12 As succinctly stated by one judge, "[T]he policy in question does not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident." Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 249, 405 A.2d 788, 796 (1979); see also Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co., 508 F.2d 417, 420 (7th Cir. 1975).
13 Bituminous Casualty Corp. v. Bartlett, 307 Minn. 72, 240 N.W.2d 310 (1976).
14 Swarts v. Woodlawn, Inc., 610 So.2d 888 (La. App. 1992).
15 J. Appleman, 7A Insurance Law and Practice § 4492 (1979).
16 Missouri Terrazzo Co. v. Iowa Nat. Mut. Ins. Co., 566 F. Supp. 546, 552 (E.D. Mo. 1983); see also Hauenstein v. St. Paul-Mercury Indem. Co., 242 Minn. 354, 358-59, 65 N.W.2d 122, 126 (1954) (where the Minnesota Supreme Court defined accident "... as a source and cause of damage to property ... is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause."); Colard v. American Family Mut. Ins. Co., 709 P.2d 11 (Colo. App. 1985); Boggs v. Aetna Casualty & Sur. Co., 252 S.E. 2d 565 (S.C. 1979); Yakima Cement Products Co. v. Great Am. Co., 590 P.2d 371 (Wash. App. 1979).
17 Spruill Motors, Inc. v. Universal Underwriters Ins. Co., 212 Kan. 681, 512 P.2d 403, 408 (1973).
18 See Ohio Casualty Ins. Co. v. Terrace Enter. Inc., 260 N.W.2d 450, 452-53 (Minn. 1977); Green Constr. Co. v. National Union Fire Ins. Co., 771 F.Supp. 1000,1003 (W.D. Mo. 1991).
19 "Where an insured has shown that his loss occurred while an insurance policy was in force, but the insurer relies on exclusionary language in the policy as a defense, the burden is upon the insurer to prove that the exclusion applies to the facts of the case." See Johnson v. Insurance Co. of No. America, 232 Va. 340, 345, 350 S.E.2d 616, 619 (1986); White v. State Farm, 208 Va. 394, 396, 157 S.E. 2d 925, 927 (1967); Bituminous Casualty Corp. v. Sheets, 389 S.E.2d 696, 698 (Va. 1990). Also, policy language "purporting to exclude certain events from coverage will be construed most strongly against the insurer." Sheets at 698.
20 Economy Lumber of Oakland v. Insurance Co. of N. Am. 157 Cal. App. 3d 641, 649, 204 Cal. Rptr. 135, 139 (1984); W. E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F.Supp. 984, 991 (N.D. Ill. 1989); Marathon Plastics, Inc. v. International Ins. Co., 161 Ill. App. 3d 459, 462-63, 514 N.E.2d 479, 485 (1987).
21 See, e.g., Dreis & Krump Mfr. Co. v. Phoenix Ins. Co., 548 F.2d 681 (7th Cir. 1977); Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co., 508 F.2d 417 (7th Cir. 1975); Ludwig Candy Co. v. Iowa Nat. Mut. Ins. Co., 78 Ill. App. 3d 306, 396 N.E. 2d 1329 (1979).
22 See, e.g., Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co., 508 F.2d 417, 419-20 (7th Cir. 1975); United States Fidelity & Guar. Co. v. Nevada Cement Co., 93 Nev. 179, 561 P.2d 1335 (1977).
23 Pittway Corp. v. American Motorists Ins. Co., 56 Ill. App. 3d 338, 341, 370 N.E. 2d 1271, 1274 (1977); W. E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F.Supp. 984 (N.D. Ill. 1989).
24 See discussion and cases cited in the sections entitled "Your Product" and "Your Work" Exclusions, infra.
25 S. Turner, Insurance Coverage of Construction Disputes 102-103 (1992); Dries & Krump Mfg. Co. v. Phoenix Ins. Co., 548 F.2d 681 (7th Cir. 1977); W. E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F.Supp. 984 (N.D. Ill. 1989); Hartford Accident & Indem. Co. v. Pacific Mut. Life Ins. Co., 861 F.2d 250 (10th Cir. 1988); Hartford Casualty Co. v. Cruse, 938 F.2d 601 (5th Cir. 1991).
26 544 F.Supp. 669 (W.D. Wis. 1982).
27 See, e.g., McDowell-Wellman Eng'g. Co. v. Hartford Accident & Indem. Co., 711 F.2d 521 (3rd Cir. 1983); Marathon Plastics, Inc. v. Int'l Ins. Co., 161 Ill. App. 3d 459, 462-63, 514 N.E.2d 479 (1987); W. E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F.Supp. 984 (N.D. Ill. 1989); but see Baugh Constr. Co. v. Mission Ins. Co., 836 F.2d 1164 (9th Cir. 1988).
28 Goodyear Rubber & Supply Co. v. Great Am. Ins. Co., 471 F.2d 1343 (9th Cir. 1973); Hartford Accident & Indem. Co. v. Pacific Mut. Life Ins. Co., 861 F.2d 250 (10th Cir. 1988); Aetna Casualty & Surety Co. v. PPG Indus., Inc., 554 F.Supp. 290 (D. Ariz. 1983); Western Casualty & Sur. Co. v. Polar Panel Co., 457 F.2d

957 (8th Cir. 1972).
29 See Aetna Casualty & Sur. Co. v. PPG Indus., Inc., 554 F.Supp. 290 (D. Ariz. 1983); W. E. O'Neil Constr. Co. v. National Union Fire Ins. Co., 721 F.Supp. 984 (N.D. Ill. 1989); Western Casualty & Sur. Co. v. Polar Panel Co., 457 F.2d 957 (8th Cir. 1972).
30 Federated Mutual Ins. Co. v. Concrete Units, 363 N.W.2d 751 (Minn. 1985); Stone & Webster Eng'g. Corp. v. American Motorist Ins. Co., 458 F.Supp. 792 (E.D. Va. 1978), aff'd mem. 628 F.2d 1351 (4th Cir. 1980); SLA Property Management v. Angelina Casualty Co., 856 F.2d 69 (8th Cir. 1988); Aetna Casualty & Sur. Co. v. McIbs, Inc., 684 F.Supp. 246 (D. Nev. 1988); Milgard Mfr. Inc. v. Continental Ins. Co., Inc., 759 P.2d 1111 (Or. App. 1988); Qualls v. Country Mut. Ins. Co., 462 N.E.2d 1288 (Ill. App. 1984).
31 S. Turner, Insurance Coverage of Construction Disputes 131 (1992).
32 Westman Indus. Co. v. Hartford Ins. Group, 51 Wash. App. 72, 751 P.2d 1242 (1988); Indiana Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1280 (Ind. 1980); J.G.A. Constr. Corp. v. Charter Oak Fire Ins. Co., 66 A.D.2d 315, 414 N.Y. Supp. 2d 385 (1979); Home Indem. Co. v. Miller, 399 F.2d 78,83-84 (8th Cir. 1968); Vobill Homes, Inc. v. Hartford Accident & Indem. Co., 179 So.2d 496, 497-498 (La. App. 1965); Kendall Plumbing, Inc. v. St. Paul Mercury Ins. Co.,189 Kan. 528, 531-532, 370 P.2d 396, 398-399 (1962); Federated Serv. Ins. Co. v. R.E.W., Inc., 53 Wash.App. 730, 735-736, 770 P.2d 654, 657 (1989); Home Indem. Co. v. Wil-Freds, Inc., 601 N.E.2d 281 (Ill. App. 1992).
33 Green Constr. Co. v. National Union Fire Ins. Co., 771 F.Supp. 1000 (W.D. Mo. 1991); Johnson v. National Union Fire Ins. Co., 56 Misc.2d 983, 289 N.Y. Supp. 2d 852 (Sup. Ct. 1968), aff'd, 33 A.D.2d 924, 309 N.Y. Supp. 2d 110 (N.Y. App. Div. 1970); Kissel v. Aetna Casualty & Sur. Co., 380 S.W.2d 497 (Mo. App. 1964); Friestad v. Travelers Indem. Co., 260 Pa. Super. 178, 393 A.2d 1212 (1978); Owens Pacific Marine, Inc. v. Insurance Co. of N. Am., 12 Cal. App. 3d 661, 90 Cal. Rptr. 826 (1970); Maryland Casualty Co. v. Reeder, 221 Cal. App. 3d 961, 270 Cal. Rptr. 719 (1990); Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Kammeyer v. Concordia Telephone Co., 446 S.W.2d 486 (Mo. App. 1969); Kirchner v. Hartford Accident & Indem. Co., 440 S.W.2d 751 (Mo. App. 1969); Morris v. Western Casualty and Sur. Co., 421 S.W.2d 19 (Mo. App. 1967). See also McKellar Dev. of Nev., Inc. v. Northern Ins. Co. of N.Y., 837 P.2d 858 (Nev. 1992) where the Court concluded that site preparation and soil compaction was a "service" and not a "product" .
34 Id., Friestad at 1217.
35 See, e.g., Vobill Homes, Inc. v. Hartford Accident & Indem. Co., 179 So.2d 496 (La. App. 1965); Kaneko v. Hilo Coast Processing, 654 P.2d 343 (Haw. 1982); Schipper v. Levitt & Sons, Inc., 207 A.2d 314 (N.J. 1965); Oliver v. Superior Court (Regis Bldrs., Inc.), 217 Cal. App. 3d 86, 259 Cal. Rptr. 160 (1989); Papp v. Rocky Mountain Oil & Materials, 769 P.2d 1249 (Mont. 1989).
36 Fire Casualty & Surety Bulletins, Prf. 15 (Rearranged Feb. 1989).
37 Anderson v. Nationwide Life Ins. Co., 6 Kan. App. 2d 163, 627 P.2d 344 (1981); Green Constr. Co. v. National Union Fire Ins. Co., 771 F.Supp. 1000, 1005, fn. 10 (W.D. Mo. 1991).
38 Ross Island Sand & Gravel Co. v. General Ins. Co. of Am., 315 F.Supp. 402 (D.Or. 1970), affd., 472 F.2d 750 (9th Cir. 1973); B. A. Green Constr. Co. v. Liberty Mut. Ins. Co., 213 Kan. 393, 517 P.2d 563, 565-67 (1973); Adams Tree Serv., Inc. v. Hawaiian Ins. & Guar. Co., Ltd., 117 Ariz. 385, 573 P.2d 76, 79-80 (Ariz. App. 1977); Engine Serv. Inc. v. Reliable Ins. Co., 487 P.2d 474, 475-76 (Wyo. 1971); Timberline Equip. Co., Inc. v. St. Paul Fire and Marine Ins. Co., 281 Or. 639, 576 P.2d 1244, 1247-48 (1978); Overson v. United States Fidelity & Guar. Co., 587 P.2d 149, 150-51 (Utah 1978); Vobill Homes, Inc. v. Hartford Accident & Indem. Co., 179 So.2d 496 (La. App. 1965); Home Indem. Co. v. Miller, 399 F.2d 78,83-84 (8th Cir. 1968); Haugan v. Home Indem. Co., 197 N.W.2d 18, 22 (S.D. 1972); Eulich v. Home Indem. Co., 503 S.W.2d 846, 849 (Tex. App. 1973); Biebel Bros., Inc. v United States Fidelity & Guar. Co., 522 F.2d 1207, 1211 (8th Cir. 1975); St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal. App. 3d 888, 145 Cal.Rptr. 836, 839 (1978); Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 249, 405 A.2d 788, 796 (1979); Western World Ins. Co. v. Carrington, 369 S.E.2d 128 (N.C. App. 1988); Owings v. Gifford, 697 P.2d 865 (Kan. 1985); Dodson v. St. Paul Ins. Co., 812 P.2d 372 (Okla. 1991); Bateson Constr. Co. v. Lumbermens Mut. Casualty Co., 784

S.W.2d 692 (Tex. App. 1989).
39 929 F.2d 447 (9th Cir. 1991).
40 Id. at 450.
41 See Gardner v. Lakvold, 521 So.2d 818 (La. App. 1988), where the court held that the insured's negligent removal of old paint which destroyed the new paint applied by another contractor was not damage to the insured's own work or to that particular part of the property which he was performing work "thereon".
42 738 P.2d 368 (Ariz. App. 1987).
43 See also Blackfield v. Underwriters at Lloyds, 53 Cal. Rptr. 838 (Cal. App. 1966); W. E. O'Neil Constr. Co v. National Union Fire Ins. Co., 721 F.Supp. 984 (N.D. Ill. 1989).
44 Clark Lumber Co. v. Lumberman's Mut. Casualty Co., 313 S.E.2d 132 (Ga. App. 1984); Jet Line Services, Inc. v. American Employers Ins. Co., 537 N.E.2d 107 (Mass. 1989); Vandivort Constr. Co. v. Seattle Tennis Club, 552 P.2d 198 (Wash. App. 1974); Goldsberry Operating Co., Inc. v. Cassity, Inc., 367 So.2d 133 (La. App. 1979); Gar-Tex Constr. Co. v. Employers Casualty Co., 771 S.W.2d 639 (Tex. App. 1989).
45 530 S.W.2d 76 (Tenn. 1975).
46 Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648 (9th Cir. 1988); Green Constr. Co. v. National Union Fire Ins. Co., 771 F.Supp. 1000 (W.D. Mo. 1991); Maryland Casualty Co. v. Reeder, 221 Cal. App. 3d 961, 270 Cal. Rptr. 719 (1990); Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co., 754 S.W.2d 824 (Tex. App. 1988); Southwest Louisiana Grain, Inc. v. Howard A. Duncan, Inc., 438 So.2d 215 (La. App. 1983); Harbor Ins. Co. v. Tishman Constr. Co., 578 N.E.2d 1197 (Ill. App. 1991); McKellar Dev. of Nev., Inc. v. Northern Ins. Co. of N.Y., 837 P.2d 858 (Nev. 1992); M. Mooney Corp. v. United States Fidelity & Guar. Co., 618 A.2d 793 (N.H. 1992).
47 See J. Gibson, Broad Form Property Damage Coverage: Analysis, Application and Alternatives 12-15 (2d ed. 1982); M. Audet, Broad Form Completed Operations: An Extension of Coverage or a Trap?, Canadian Underwriter 36 (1984).
48 FC&S Bulletin, Epb-7-8 (August, 1982).
49 FC&S Bulletin, Prf-12 (Rearranged Feb. 1989).
50 Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 653 (9th Cir. 1988).
51 See also United States Fidelity & Guar. Co. v. Bonitz Insulation Co., 424 So.2d 569 (Ala. 1982); Tucker Constr. Co. v. Michigan Mut. Ins. Co., 423 So.2d 525 (Fla. App. 1982); Hawkeye-Security Ins. Co. v. Vector Constr. Co., 460 N.W. 2d 329 (Mich. App. 1990); Vari Builders, Inc. v. United States Fidelity and Guar. Co., 523 A.2d 549 (Del. 1986); Baywood Corp. v. Maine Bonding & Casualty Co., 628 A.2d 1032 (Me. 1993); Blaylock and Brown Constr. Co., Inc. v. AIU Ins. Co., 796 S.W.2d 146 (Tenn. App. 1990).
52 323 N.W.2d 58 (Minn. 1982).
53 Id. at 63.
54 396 N.W.2d 229 (Minn. 1986).
55 The Knutson court pointed out that the BFPD endorsement had, in fact, been considered in Bor-Son. Id. at 236.
56 Id. at 236.
57 Id. at 237.
58 Id. at 237 (quoting Tucker Constr. Co. v. Michigan Mut. Ins. Co., 423 So.2d 525, 528 (Fla. App. 1982)).
59 Fireguard Sprinkler Systems, Inc. v. Scottsdale Ins. Co., 864 F.2d 648, 654 (9th Cir. 1988).
60 Id. at 651.
61 Id. at 651 (citing Royal Indem. Co. v. John W. Cawrse Lumber Co., 245 F.Supp. 707, 711 (D. Ore. 1965)).
62 See, generally, S. Turner, Insurance Coverage of Construction Disputes (1992).
63 Id.
64 449 So. 2d 85 (La. App. 1st Cir. 1984).
65 Id. at 88.
66 Id.
67 Id.

68 620 So.2d 412 (La. App. 3rd Cir. 1993).
69 Id. at 412-13.
70 Id. at 414.
71 Id.
72 Id.
73 Id. at 415.