

**CASE NO. 04-51074**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**LAMAR HOMES, INC.,**  
*Plaintiff-Counter Defendant-Appellant,*

**v.**

**MID-CONTINENT CASUALTY COMPANY,**  
*Defendant-Counter Claimant-Appellee*

---

**Appeal from the United States District Court for  
the Western District of Texas, Austin Division  
CA No. 1:03-CV-553**

---

**AMICUS CURIAE BRIEF OF  
AMERICAN SUBCONTRACTORS ASSOCIATION, INC.  
AND ASA OF TEXAS, INC. IN SUPPORT OF  
APPELLANT LAMAR HOMES AND  
REVERSAL OF THE DISTRICT COURT'S JUDGMENT**

---

Patrick J. Wielinski  
State Bar No. 21432450  
Cokinos, Bosien & Young  
2221 E. Lamar Blvd., Suite 120  
Arlington, Texas 76006  
Telephone: 817-608-9534  
Telecopier: 817-649-3300

COUNSEL FOR AMERICAN  
SUBCONTRACTORS  
ASSOCIATION, INC. AND ASA OF  
TEXAS, INC.

**CASE NO. 04-51074**

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

---

**LAMAR HOMES, INC.,**  
*Plaintiff-Counter Defendant-Appellant,*

**v.**

**MID-CONTINENT CASUALTY COMPANY,**  
*Defendant-Counter Claimant-Appellee*

---

**SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS**

---

The undersigned counsel of record certifies the following listed persons or entities have an interest in the outcome of this case. These representations are made in order that Judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae:

American Subcontractors  
Association, Inc.

ASA of Texas, Inc.

Attorneys:

Patrick J. Wielinski  
Cokinos, Bosien & Young  
2221 E. Lamar Blvd., Suite 120  
Arlington, Texas 76006

By: \_\_\_\_\_  
Patrick J. Wielinski

**CERTIFICATE OF CONSENT OF PARTIES**

The undersigned counsel of record certifies that both Appellant, Lamar Homes, Inc. and Appellee, Mid-Continent Casualty Company, through their respective counsel of record, consent to the filing of this amicus curiae brief.

---

Patrick J. Wielinski

**TABLE OF CONTENTS**

	<u>Page</u>
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS .....	i
CERTIFICATE OF CONSENT OF PARTIES .....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES .....	iv
IDENTITY AND INTEREST OF AMICUS CURIAE.....	1
ARGUMENT AND AUTHORITIES.....	4
I.    THE CGL POLICY COVERS PROPERTY DAMAGE ARISING OUT OF THE WORK OF SUBCONTRACTORS OF THE NAMED INSURED .....	4
A.    The Subcontractor Provision Applies .....	5
B.    The Historical Development of the Subcontractor Provision Establishes Coverage Under the Mid- Continent Policy .....	10
C.    The Authorities Relied Upon by Mid-Continent Do Not Apply to the Subcontractor Provision .....	16
II.   UNEXPECTED AND UNINTENDED PROPERTY DAMAGE IS AN “OCCURRENCE” UNDER A CGL POLICY.....	23
A.    Mid-Continent’s Argument is a Departure from Texas Law .....	24
B.    There is No “Third Party Property” Requirement.....	30

CONCLUSION..... 31

CERTIFICATE OF SERVICE ..... 32

CERTIFICATE OF COMPLIANCE..... 33

## TABLE OF AUTHORITIES

### Federal Cases

<i>ACS Constr. Co., Inc. v. CGU f/k/a General Accident Ins. Co.</i> , 332 F.3d 885 (5th Cir. 2003) (Miss. Law) .....	22
<i>Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.</i> , 197 F.3d 720 (5 <sup>th</sup> Cir. 1999).....	22, 28
<i>First Texas Homes, Inc. v. Mid-Continent Cas. Co.</i> , 2001 WL 23811 (N.D. Tex. Mar. 7, 2001), <i>aff'd</i> , 32 Fed. Appx. 127, 2002 WL 334705 (5th Cir. Feb. 19, 2002) .....	7, 31
<i>Harken Exploration Co. v. Sphere Drake Ins. PLC</i> , 261 F.3d 466 (5 <sup>th</sup> Cir. 2001).....	28
<i>Hartford Accident &amp; Indemnity Co. v. Pacific Mut. Life Ins. Co.</i> , 861 F.2d 250 (10th Cir. 1988) .....	24
<i>Hartford Cas. Co. v. Cruse</i> , 938 F.2d 601, 605 (5th Cir. 1991).....	23, 24, 27
<i>Jakobson Shipyard, Inc. v. Aetna Cas. &amp; Sur. Co.</i> , 961 F.2d 387 (2nd Cir. 1992) .....	22
<i>McDowell-Wellman Eng'g Co. v. Hartford Accident &amp; Indem. Co.</i> , 711 F.2d 521 (3rd Cir. 1983) .....	22
<i>Mitchell, Best &amp; Visnic, Inc. v. Travelers Prop. Cas. Corp.</i> , 35 Fed. Appx. 75 (4th Cir. 2002) .....	22
<i>Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co.</i> , 246 F.3d 1132 (8th Cir. 2001) .....	23
<i>Ohio Cas. Ins. Co. v. Bazzi Constr. Co., Inc.</i> , 815 F.2d 1146 (7th Cir. 1987) .....	22
<i>Ross Island Sand &amp; Gravel Co. v. General Ins. Co. of America</i> , 472 F.2d 750 (9th Cir. 1973) .....	23

**Texas Cases**

*CU Lloyds of Texas v. Main Street Homes, Inc.*, 79 S.W.3d 687  
(Tex. App.—Austin 2002, no pet.)..... 7, 9

*Gehan Homes v. Employers Mut. Cas. Co.*, 146 S.W.3d 833,  
840-841 (Tex. App.—Dallas 2004, pet. filed)..... 26

*Hartrick v. Great American Lloyds Ins. Co.*, 62 S.W.3d 270  
(Tex.App.--Houston [1st District] 2001, no pet.)..... 24, 25, 29

*Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (1998) ..... 24

*King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002)..... 25, 26, 27, 29

*Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*,  
416 S.W.2d 396 (Tex. 1967) ..... 27

*McCord, Condron & McDonald, Inc. v. Twin City Fire Ins. Co.*,  
607 S.W.2d 956 (Tex. Civ. App. 956 (Tex. Civ. App.—  
Fort Worth 1980, writ refused n.r.e.)..... 12, 17

*Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co.*,  
754 S.W.2d 824 (Tex. App.—Fort Worth 1988, writ denied) ..... 7, 12

*T. C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*,  
784 S.W.2d 692 (Tex. App.—Houston [14th Dist.]  
1989, writ denied) ..... 12, 17

*Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501  
(Tex. Civ. App. – Texarkana 1979, no writ) ..... 25, 27

*Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828  
(Tex. 1997) ..... 27

**Cases from Other States**

*Aetna Cas. & Sur. Co. v. M & S Indus., Inc.*,  
827 P.2d 321 (Wash. Ct. App. 1992) ..... 21

<i>American Family Mut. Ins. Co. v. American Girl, Inc.</i> , 673 N.W.2d 65 (Wis. 2004) .....	8, 10, 29
<i>American States Ins. Co. v. Martin</i> , 662 So.2d 245 (Ala. 1995) .....	20
<i>Century Indem. Co. v. Golden Hills Builders, Inc.</i> , 561 S.E.2d 355 (S.C. 2002) .....	20
<i>Charles E. Brohawn &amp; Bros., Inc. v. Employers Commercial Union Ins. Co.</i> , 409 A.2d 1055 (Del. 1979) .....	19
<i>Bush v. Shoemaker-Beal</i> , 987 P.2d 1103 (Kan. Ct. App. 1999) .....	21
<i>Davenport v. United States Fid. &amp; Guar. Co.</i> , 778 N.E.2d 1038 (Mass. App. Ct. 2002) (unpublished opinion) .....	20
<i>Erie Ins. Prop. &amp; Cas. Co. v. Pioneer Home Improvement, Inc.</i> , 526 S.E.2d 28 (W. Va. 1999) .....	21
<i>George A. Fuller Co. v. United States Fid. &amp; Guar. Co.</i> , 613 N.Y.S.2d 152 (N.Y. App. Div. 1994) .....	20
<i>Graber v. State Farm Fire &amp; Cas. Co.</i> , 797 P.2d 214 (Mont. 1990) .....	22
<i>Hawkeye-Security Ins. Co. v. Davis</i> , 6 S.W.3d 419 (Mo. Ct. App. 1999) .....	20
<i>Hawkeye-Security Insurance Co. v. Vector Constr. Co.</i> , 460 N.W.2d 329 (Mich. Ct. App. 1990) .....	20
<i>Haugan v. The Home Indem. Co.</i> , 197 N.W.2d 18 (S.D. 1972) .....	22
<i>Hawaiian Holiday Macadamia Nut Co. Inc. v. Industrial Indem. Co.</i> , 872 P.2d 230 (Haw. 1994) .....	21
<i>Heile v. Herrman</i> , 736 N.E.2d 566 (Ohio Ct. App. 1999) .....	20
<i>Hobson Constr. Co., Inc. v. Great American Ins. Co.</i> , 322 S.E.2d 632 (N.C. Ct. App. 1984) .....	20

<i>Indiana Ins. Co. v. DeZutti</i> , 408 N.E.2d 1275 (Ind. 1980).....	19
<i>Indiana Ins. Co. v. Hydra Corp.</i> , 615 N.E.2d 70 (Ill. App. Ct. 1993).....	19
<i>Knutson Construction Company v. St. Paul Fire and Marine Ins. Co.</i> , 396 N.W.2d 299 (Minn. 1986).....	17, 20
<i>Kyllo v. Northland Chemical Co.</i> , 209 N.W.2d 629 (N.D. 1973) .....	22
<i>L. Ray Packing Co. v. Commercial Union Ins. Co.</i> , 469 A.2d 832 (Me. 1983) .....	21
<i>LaMarche v. Shelby Mut. Ins. Co.</i> , 390 So.2d 325 (Fla. 1980) .....	19
<i>Mapes Ind. Inc. v. United States Fid. &amp; Guar. Co.</i> , 560 N.W.2d 814 (Neb. 1997) .....	20
<i>McAllister v. Peerless Ins. Co.</i> , 474 A.2d 1033 (N.H. 1984) .....	20
<i>Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc.</i> , 647 P.2d 1249 (Idaho 1982).....	19
<i>Nova Cas. Co. v. Able Constr. Inc.</i> , 983 P.2d 575 (Utah 1999) .....	21
<i>O’Shaughnessy v. Smuckler Corp.</i> , 543 N.W.2d 99 (Minn. App. 1996) <i>review denied</i> (Minn. Mar. 28, 1996).....	8
<i>Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.</i> , 596 N.W.2d 67 (Iowa 1999).....	19
<i>Sapp v. State Farm Fire &amp; Cas. Co.</i> , 486 S.E.2d 71 (Ga. Ct. App. 1997) .....	19
<i>Solcar Equip. Leasing Corp. v. Penn Mfg. Ass’n Ins. Co.</i> , 606 A.2d 522 (Pa. Super. Ct. 1992) .....	20
<i>Standard Fire Ins. Co. v. Chester-O’Donley &amp; Assoc., Inc.</i> , 972 S.W.2d 1 (Tenn. Ct. App. 1998) (applying Kentucky law) .....	19

<i>State Farm Fire &amp; Cas. Co. v. Superior Court</i> , 264 Cal. Rptr. 269 (Cal. Ct. App. 1989) .....	19
<i>Swarts v. Woodlawn, Inc.</i> , 610 So.2d 888 (La. Ct. App. 1992).....	19
<i>Temco Metal Prod. Co. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 543 P.2d 1 (Or. 1975) .....	22
<i>Union Ins. Co. v. Kjeldgaard</i> , 820 P.2d 1183 (Colo. Ct. App. 1991) .....	19
<i>U. S. Fire Ins. Co. v. Colver</i> , 600 P.2d 1 (Alaska 1979) .....	18
<i>United States Fid. &amp; Guar. Corp. v. Advance Roofing &amp; Supply Co., Inc.</i> , 788 P.2d 1227 (Ariz. 1989) .....	18
<i>United States Fid. &amp; Guaranty Co. v. Omnibank</i> , 812 So.2d 196 (Miss. 2002) 812 So.2d 196 (Miss. 2002) .....	21
<i>Vernon Williams &amp; Son Constr., Inc. v. The Cont'l Ins. Co.</i> , 591 S.W.2d 760 (Tenn. 1979) .....	21
<i>Vogel v. Russo</i> , 613 N.W.2d 177 (Wis. 2000) .....	21
<i>Wanzek Constr., Inc. v. Employers Ins. Of Wausau</i> , 679 N.W.2d 322 (Minn. 2004) .....	17, 19, 21
<i>Weedo v. Stone-E-Brick, Inc.</i> , 405 A.2d 788 (N.J. 1979).....	16, 17, 20
<i>Western Exterminating Co. v. Hartford Accident &amp; Indem. Co.</i> , 479 A.2d 872 (D.C. 1984) .....	21
<i>Woodfin Equities Corp. v. Hartford Mutual Ins. Co.</i> , 678 A.2d 116 (Md. Ct. Spec. App. 1996).....	19

**Statutes and Rules**

F.R.APP.P. 29 .....	4
---------------------	---

**Other Authorities**

G. H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED’N INS. COUN. Q. 217, 226 (1975)..... 15

Insurance Services Office, Inc., ISO COMMERCIAL LINES POLICY AND RATING SIMPLIFICATION PROJECT INTRODUCTION AND OVERVIEW: COMMERCIAL GENERAL LIABILITY (1985), p. 16..... 13

J. D. O’Connor, *What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 WTR CONST. LAW 15, 16 (2001)..... 11

Maureen McLendon, Jack Gibson and W. Jeffrey Woodward, COMMERCIAL LIABILITY INSURANCE, (IRMI 2003), at <http://www.irmi-online.com> ..... 14-15

CASE NO. 04-51074

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

LAMAR HOMES, INC.,  
*Plaintiff-Counter Defendant-Appellant,*

v.

MID-CONTINENT CASUALTY COMPANY,  
*Defendant-Counter Claimant-Appellee*

---

AMICUS CURIAE BRIEF OF  
AMERICAN SUBCONTRACTORS ASSOCIATION, INC.  
AND ASA OF TEXAS, INC.

---

AMICI CURIAE, AMERICAN SUBCONTRACTORS ASSOCIATION, INC. and ASA OF TEXAS, INC. (collectively “ASA”) submit this brief in support of APPELLANT, LAMAR HOMES, INC. (“Lamar”), urging the Court to reverse the district court’s judgment and declare that Lamar is entitled to a defense under the insurance policy issued to it by APPELLEE, MID-CONTINENT CASUALTY COMPANY (“Mid-Continent”).

**IDENTITY AND INTEREST OF AMICI CURIAE**

American Subcontractors Association, Inc. is a non-profit corporation supported by the membership dues paid by approximately 5,000 members nationally. ASA of Texas, Inc. serves as the statewide organization for 500 Texas

members in six local chapters in Austin, El Paso, Houston, North Texas, Rio Grande Valley, and San Antonio. All ASA member businesses are construction subcontractors and suppliers. ASA is dedicated to the equitable treatment of its members by promoting legislative action and by intervening in significant legal actions that affect the construction industry at large. Because of its unique perspective as an influential representative of a significant segment of the construction industry, ASA has submitted amicus curiae briefs in many jurisdictions.

The member businesses of ASA have an interest in this appeal because it involves an attempt by Mid-Continent, and other insurers like it, to rewrite and significantly reduce coverage provided by the standard commercial general liability (“CGL”) insurance policy. That policy provides coverage for virtually all players in the construction industry, including ASA members and general contractors, together with all other parties that are affected by defective construction—including project owners and homeowners. The homebuilding industry is one of the driving forces behind this nation’s economy, and subcontractors and suppliers provide a major portion of the labor and materials that are utilized by homebuilders. Mid-Continent’s disingenuous interpretation of the definition of “occurrence” as used in the CGL policy amounts to a fraud upon the purchasers of CGL policies, including ASA members, that were misled by the

marketing of the policy by the insurance industry that it provides coverage for property damage arising out of the work of subcontractors. Policy provisions providing that coverage are rendered mere surplusage by the “bait and switch” argument of Mid-Continent as described below.

Oftentimes, the sterility of legal pleadings, particularly in insurance coverage cases, obscures the gravity of the underlying dispute in which homeowners allege that they have been deprived of peaceful enjoyment of their home due to construction defects. At the other end of the spectrum are the homebuilders, and involved subcontractors, who are often faced with bet-the-company liability in the event the cost of the repair of those defects cannot be paid. The CGL policy has traditionally provided a degree of coverage for property damage caused by those defects. The denial of this coverage to builders will not only prevent homeowners from obtaining a source of funding to repair serious construction defects, but it will also prevent the repair of defects that result in unsafe and uninhabitable homes. At the same time, the denial of coverage will prevent the builders of quality homes from remaining in business due to the inability to procure adequate insurance.

Because of these serious issues, ASA has been authorized by its Task Force for the Subcontractors Legal Defense Fund to pay for and to file this *amicus curiae* brief pursuant to F.R.APP.P. 29.

## ARGUMENT AND AUTHORITIES

### **I. THE CGL POLICY COVERS PROPERTY DAMAGE ARISING OUT OF THE WORK OF SUBCONTRACTORS OF THE NAMED INSURED**

The dispute before this Court presents a typical set of facts for determination of coverage under the standard form CGL insurance policy, the policy that is purchased and relied upon by most Texas businesses, including contractors and ASA members. The existence of coverage under the CGL policy sold to Lamar presents no real issue under the language of the policy itself, since subcontractors performed the defective work of which the DiMares complain in the underlying lawsuit.

Nevertheless, Mid-Continent raises other tangential issues in its brief, issues by means of which Mid-Continent hopes to divert this Court's attention from the terms of the policy itself. Mid-Continent relies upon vague generalizations, most particularly the uninsurability of defective construction, a "business risk" of the insured contractor. The standard form upon which Mid-Continent's policy is written was a culmination of revisions undertaken in 1986, revisions specifically intended to make clear the fact that the "business risk doctrine" is carefully circumscribed by the property damage exclusions in the policy. In turn, the business risk doctrine has been significantly limited by relevant case law. As a

result, Mid-Continent's policy covers property damage arising out of the work of the insured's subcontractors.

**A. The Subcontractor Provision Applies**

Mid-Continent seeks to avoid any rational discussion of the effect upon this claim of the exclusions contained in the CGL policy. The obvious reason is that none of these exclusions apply and Exclusion (1), the "Your Work Exclusion," actually preserves coverage under the facts of this case. Briefly, that exclusion states that the insurance does not apply to:

'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. [Emphasis added.]*

This exclusion denies coverage for property damage to "your work," a term that is defined in relevant part as:

- a. Work or operations performed by you or on your behalf; and
- b. Materials, parts or equipment furnished in connection with such work or operations.

The terms "you" and "your" refer to the named insured. Moreover, the exclusion only applies to property damage that is included in the "products-completed operations hazard," defined as follows:

- a. Includes all ‘bodily injury’ and ‘property damage’ occurring away from premises you own or rent and arising out of ‘your product’ or ‘your work’ except:
  - (1) Products that are still in your physical possession; or
  - (2) Work that has not yet been completed or abandoned. However, ‘your work’ will be deemed completed at the earliest of the following times:
    - (a) When all of the work called for in your contract has been completed.
    - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
    - (c) When that part of the work done at the job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Here, there is no dispute that the DiMares home, at the time the extensive property damage occurred, was a “completed operation,” since all work had been completed under Lamar’s contract and the home had been put to its intended use.

The Your Work Exclusion excludes coverage for property damage to Lamar’s own work on the home. Nevertheless, the Your Work Exclusion does not apply to this claim, because of the second sentence of the exclusion, as emphasized

above. That provision, the “Subcontractor Provision,” explicitly states that the exclusion does not affect coverage for damaged work or the work out of which the damage arises if it was performed by a subcontractor on the named insured’s behalf.<sup>1</sup>

The clear and unambiguous intent to provide coverage to an insured contractor or builder for property damage arising out of the defective work of its subcontractors is recognized by the courts, including, of course, the courts of Texas. *See, First Texas Homes, Inc. v. Mid-Continent Cas. Co.*, 2001 WL 238112 (N.D. Tex. Mar. 7, 2001), *aff’d*, 32 Fed.Appx. 127, 2002 WL 334705 (5th Cir. Feb. 19, 2002) (Subcontractor Provision upheld to provide coverage to insured homebuilder for property damage arising out of the work of structural engineer/subcontractor that designed defective foundation); *CU Lloyds of Texas v. Main Street Homes, Inc.*, 79 S.W.3d 687 (Tex. App.—Austin 2002, no pet.) (a plain reading of the exclusion demonstrated that the Subcontractor Provision applied and the exclusion did not preclude coverage for defective foundations designed by a subcontractor to the homebuilder); *Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co.*, 754 S.W.2d 824 (Tex. App.—Fort Worth 1988,

---

<sup>1</sup> Many subcontractors, in turn, subcontract out a portion of their work to lower tier subcontractors, sometimes referred to as sub-subcontractors. These subcontractors also benefit from the coverage provided by the Subcontractor Provision. For simplicity’s sake, the analysis in this brief shall refer to the upper tier participant as the “contractor” and the lower tier participant as the “subcontractor,” even though the upper tier may in fact be a subcontractor to a general subcontractor. Moreover, that subcontractor will likely be an ASA member.

denied) (Subcontractor Provision contained in the prior 1973 edition of the CGL policy, equivalent of the Subcontractor Provision to the Your Work Exclusion in the Mid-Continent policy, applied to preserve coverage for the insured general contractor for property damage to masonry panels installed by subcontractor).

One of the clearest explications of the intent to provide this coverage is set out by the court in *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. App. 1996), *review denied* (Minn. Mar. 28, 1996). In that case, the insured homebuilder constructed a home with all of the actual work being performed by subcontractors. Defects in the home surfaced after completion. In specifically addressing the application of the Subcontractor Provision to the claim, the Court stated as follows:

Here, we are faced not with an omission, but an affirmative statement on the part of those who drafted the policy language, asserting that the exclusion does not apply to damages arising out of the work of a subcontractor. ***It would be willful and perverse for this court simply to ignore the exception that has now been added to the exclusion.*** [Emphasis added.]

*Id.* at 104. Likewise, it is willful and perverse for Mid-Continent to ask this Court to ignore the Subcontractor Provision.

Another recent case sets out the broadening effect of the Subcontractor Provision, in stark contrast to the dated authorities relied upon by Mid-Continent. In *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004), the court applied the plain language of the policy, upholding coverage under

circumstances substantially similar to this case. There, the insured contractor, Renschler, contracted to build a warehouse. A subcontractor gave Renschler faulty site preparation advice, resulting in excessive settlement and eventual demolition of the warehouse. The Wisconsin Supreme Court upheld coverage for the property damage attributable to the actions of the subcontractor, stating as follows:

This subcontractor exception dates to the 1986 revision of the standard CGL policy form. Prior to 1986 the CGL business risk exclusions operated collectively to preclude coverage for damage to construction projects caused by subcontractors. Many contractors were unhappy with this state of affairs, since more and more projects were being completed with the help of subcontractors. In response to this changing reality, insurers began to offer coverage for damage caused by subcontractors through an endorsement to the CGL known as the Broad Form Property Damage Endorsement, or BFPDE. Introduced in 1976, the BFPDE deleted several portions from the business risk exclusions and replaced them with more specific exclusions that effectively broadened coverage. Among other changes, the BFPDE extended coverage to property damage caused by the work of subcontractors. In 1986 the insurance industry incorporated this aspect of the BFPDE directly into the CGL itself by inserting the subcontractor exception to the “your work” exclusion.

*Id.* at 82-83. In support of its holding, the Wisconsin Supreme Court relied upon case law from other states, including *CU Lloyds of Texas v. Main Street Homes, Inc., supra*.

Mid-Continent argues that applying the explicit terms of the Subcontractor Provision in this case amounts to an impermissible creation of coverage by an

exclusion. It is nothing of the kind. This same ineffectual argument was made by the insurer in the *American Girl* case and rejected:

This interpretation of the subcontractor exception to the business risk exclusion does not ‘create coverage’ where none existed before, as American Family contends. There is coverage under the insuring agreement’s initial coverage grant. Coverage would be excluded by the business risk exclusionary language, except that the subcontractor exception to the business risk exclusion applies, which operates to restore the otherwise excluded coverage.

*Id.* at 83-84.

All of the prerequisites for the application of the Subcontractor Provision to the property damage caused to the DiMare home apply here. That property damage occurred after completion and arose out of the work of subcontractors.

**B. The Historical Development of the Subcontractor Provision Establishes Coverage Under the Mid-Continent Policy**

This Court should not depart from the plain language of the Mid-Continent policy in favor of Mid-Continent’s reliance on overly broad platitudes such as “a CGL policy is not a performance bond” or that a CGL policy is not intended to cover any cost of defective construction. Numerous of the cases relied upon by Mid-Continent to support these propositions address the issue in terms of “business risk,” in that a CGL policy is not designed to cover an insured’s ordinary business risks, including a contractor’s own defective construction. Obviously, that doctrine has some support in insurance underwriting, case law interpreting older policy

forms and common sense. Nevertheless, that doctrine is carefully circumscribed and limited in the CGL 1986 policy form upon which the Mid-Continent policy is written.

A historical tension has existed between CGL coverage for defective construction work and what insurance underwriters have traditionally referred to as an uninsured “business risk.” This tension gained momentum with the 1966 revisions to the CGL form promulgated by the Insurance Services Office (“ISO”), the industry organization responsible for drafting the industry-wide standard forms used by insurers. The 1966 revisions separated the exclusion for property damage arising out of work performed by the named insured from the exclusion for property damage arising out of the named insured’s product. Then, in 1973, ISO promulgated the Broad Form Property Damage Endorsement (“BFPDE”) to the standard policy form. That endorsement expanded the coverage under the 1973 form by modifying the “work performed” exclusion to delete the exclusion for work performed “on behalf of” the named insured, so as to provide an insured contractor coverage for property damage arising out of the defective work of its subcontractors. The only caveat was that the property damage must occur after the completion of the work. *See, J. D. O’Connor, What Every Construction Lawyer Should Know About CGL Coverage for Defective Construction*, 21 WTR CONST. LAW. 15, 16 (2001).

The Fort Worth Court of Appeals, in *Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co.*, 754 S.W.2d 824 (Tex. App.--Fort Worth, 1988, writ denied), upheld the underwriting intent behind the subcontractor exception contained in the 1973 BFPDE, finding coverage for the insured general contractor for damage to masonry panels caused by its subcontractor. Not surprisingly, Mid-Continent does not rely upon *Mid-United Contractors*, and in contrast, other Texas cases cited by it in support of its *carte blanche* pronouncement that CGL policies are not intended to cover faulty workmanship did not involve CGL policies containing BFPDE. See, *T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co.*, 784 S.W.2d 692 (Tex. App.--Houston [14th Dist.] 1989, writ denied); *McCord, Condron & McDonald, Inc. v. Twin City Fire Ins. Co.*, 607 S.W.2d 956 (Tex. Civ. App.--Fort Worth 1980, writ refused n.r.e.). As such they did not include broadened coverage provided through a Subcontractor Provision, as does the policy before this Court.

Mid-Continent's cases have little bearing on the outcome of this case since they address coverage under earlier CGL forms and not the forms before this Court serving to illustrate the difference in the coverage between the policy forms. The Mid-Continent policy is written on a form that was revised in 1986, and through those revisions to the CGL form, ISO sought to clarify the limitations on the business risk concept previously introduced in 1973 by the BFPDE. Due to the

popularity of the extra coverage provided by the BFPDE, one major revision was the insertion of the Subcontractor Provision into Exclusion (l), the Your Work Exclusion, in the standard coverage of the policy. That revision clarified the existence of completed operations coverage for property damage arising out the work of subcontractors, and in the process, reduced the possibility of contrary results in cases such as those relied upon by Mid-Continent.

Authoritative commentary summarizes the intent of the insurance industry to eliminate the confusion over CGL coverage for subcontractor work through the 1986 revisions. ISO itself, when it promulgated the 1986 revisions, stated as follows with regard to the coverage in the 1986 policy form:

Exclusions have been completely rewritten and clarified with no change in overall scope of coverage. ‘Broad Form’ coverage has been incorporated in the new provisions. Real property is specifically eliminated from the definition of ‘your product,’ *so that the broad form coverage for work and completed operations clearly applies*. Care, custody, or control exclusion has been restricted to personal property to clarify further the application of these provisions. A new definition of ‘impaired property’ clarifies the application of the “failure to perform” and ‘sistership’ exclusions (m and n). [Emphasis added.]

Insurance Services Office, Inc, ISO COMMERCIAL LINES POLICY AND RATING SIMPLIFICATION PROJECT INTRODUCTION AND OVERVIEW: COMMERCIAL GENERAL LIABILITY (1985), p. 16.

Moreover, International Risk Management Institute Inc. (IRMI), a source universally relied upon by insurers and insureds alike, sets out the effect of the Subcontractor Provision, stating as follows:

When the 1986 commercial general liability coverage form replaced the 1973 CGL, the subcontractor exception was reformatted and made more explicit:

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.

\* \* \*

By virtue of the subcontractor exception, the insured has coverage, despite exclusion 1., with respect to the following exposures.

- ***Property damage to work performed by the insured when the damage results from the work of the insured's subcontractor.***
- ***Property damage to work performed by the insured's subcontractor when the damage results from that subcontractor's work.***
- Property damage to work performed by the insured's subcontractor when the damage results from work performed by the insured.
- Property damage to work performed by the insured's subcontractor when the damage results from the work of another contractor or subcontractor. [Emphasis added.]

Maureen McLendon, Jack Gibson and W. Jeffrey Woodward, COMMERCIAL LIABILITY INSURANCE, (IRMI 2003), at <http://www.irmi-online.com>. The facts of this case fall within the emphasized bullet descriptions.

The notion that a CGL policy should not cover a contractor's business risk of defective construction may have a proper, but limited place in the analysis of insurance coverage under a CGL policy. It sets the outer limit, but any coverage analysis must begin and end at the same point: the plain language of the policy. That recognition is in full accord with the intent of the drafters of the policy. A landmark commentary, published shortly after the 1973 revisions to the CGL policy were promulgated, stated as follows:

The foregoing is designed to be a descriptive, not a definitive, treatment of an important underwriting concept [the business risk doctrine]. It is recognized that regardless of what concepts underwriters may employ and regardless of what their intent may be, the scope of coverage is found in the four corners of the contract. Nonetheless, an awareness of the business risk concept helps to give dimension and understanding to some of the key provisions of the policy.

G. H. Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUN. Q. 217, 226 (1975).

Thus, even the drafters of the 1973 revisions of the CGL policy recognized that the policy language itself shapes and limits underwriting concepts such as the business risk doctrine. That is exactly what the Subcontractor Provision in the

1986 form accomplishes, as did the predecessor BFPDE attached to the 1973 form. They circumscribe and limit the business risk concept and Mid-Continent cannot now evade that coverage.

**C. The Authorities Relied Upon By Mid-Continent Do Not Apply to the Subcontractor Provision**

Mid-Continent relies upon foreign case law to support its plea to this Court to abandon the terms of its policy in favor of vague notions that defective workmanship can never amount to an occurrence of property damage under a CGL policy. Unfortunately for Mid-Continent, those authorities are inapposite or distinguishable in that they address coverage under policy forms other than the one before this Court. Alternatively, Mid-Continent's authorities simply do not stand for the proposition cited.

For example, one of those authorities, one that is frequently cited by insurers for similarly nebulous propositions, is a dated New Jersey case, *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). In that case, claim was made against the insured contractor for work on two homes. In the course of ultimately denying coverage, the court engaged in an extended analysis of insurable versus uninsurable risks. However, that analysis applied to the limited coverage under the 1966 CGL policy form before the court. That policy form was *not endorsed with a BFPDE* so it was not intended to provide coverage for a subcontractor's work. As

such, the court's analysis was relatively uncomplicated, though inapplicable to other cases, including this one.

Thus, much of the analysis of *Weedo*, together with similar Texas cases relied upon by Mid-Continent such as *T.C. Bateson Construction v. Lumbermens Mutual, supra*, and *McCord, Condron & McDonald v. Twin City Fire, supra*, has been drafted out of the newer policy forms by insurers like Mid-Continent, willing to expand coverage in order to sell policies and collect premiums from insured contractors.

Nevertheless, cases such as *Weedo* serve as the cornerstone of arguments by insurers to support a *carte blanche* denial of coverage for defective workmanship claims, *regardless* of the fact that the policy language has changed dramatically over the years. That approach is being resoundingly rejected. For example, In *Wanzek Constr., Inc. v. Employers Ins. of Wausau*, 679 N.W.2d 322 (Minn. 2004), one of the most recent cases to address the broad coverage provided to a contractor by virtue of the Subcontractor Provision, the court held that authorities dealing with prior policy forms, including the 1973 form interpreted in many of the cases cited by Mid-Continent, including *Knutson Construction v. St. Paul*, 396 N.W.2d 229 (Minn. 1986), simply do not apply to the language of the 1986 form. The court stated as follows:

Consequently, the suggestion by Wausau that the principles of *Bor-Son* and *Knutson*, in combination with

the general principles of the business-risk doctrine, should drive the interpretation of the words of the 1986 standard-form exclusions, is incorrect. We conclude that the extent to which Wausau’s CGL policy covers the business risk of Wanzek must be determined by the specific terms of the insurance contract.

*Id* at 4.

Before the district court, Mid-Continent cited to no fewer than 50 cases for the overly broad proposition that 30 jurisdictions have adopted the argument that faulty workmanship does not constitute an occurrence or property damage, **R340-343**. Nothing could be further from the truth. For the Court’s convenience, the following chart illustrates that in most of these cases, the courts were called upon to interpret policy exclusions in older policy forms, none of which included a Subcontractor Provision. Some cases do not even involve CGL policies. Moreover, even the cases that address the 1986 policy form are distinguishable in that, in those cases, the insured was seeking coverage for its defective work it performed itself, and not the defective work of its subcontractors.

Mid-Continent’s Cases	
Case	Distinguishing Factor
<i>U.S. Fire Ins. Co. v. Colver</i> , 600 P.2d 1 (Alaska 1979)	1973 form; work and product exclusions applied.
<i>United States Fid. &amp; Guar. Corp. v. Advance Roofing &amp; Supply Co., Inc.</i> , 788 P.2d 1227 (Ariz. 1989)	1973 form; insured’s own faulty work is not property damage.
	Property policy.

<i>State Farm Fire &amp; Cas. Co. v. Superior Court</i> , 264 Cal.Rptr. 269 (Cal. Ct. App. 1989)	
<i>Union Ins. Co. v. Kjeldgaard</i> , 820 P.2d 1183 (Colo. Ct. App. 1991)	Nonstandard policy; contractual liability exclusion.
<i>Charles E. Brohawn &amp; Bros., Inc. v. Employers Commercial Union Ins. Co.</i> , 409 A.2d 1055 (Del. 1979)	1973 form, product recall exclusion applied.
<i>LaMarche v. Shelby Mut. Ins. Co.</i> , 390 So.2d 325 (Fla. 1980)	1973 form; work and product exclusions applied to insured's own work.
<i>Sapp v. State Farm Fire &amp; Cas. Co.</i> , 486 S.E.2d 71 (Ga. Ct. App. 1997)	1986 form; insured's own work.
<i>Millers Mut. Fire Ins. Co. of Texas v. Ed Bailey, Inc.</i> , 647 P.2d 1249 (Idaho 1982)	Damage occurs after policy terminates.
<i>Indiana Ins. Co. v. Hydra Corp.</i> , 615 N.E.2d 70 (Ill. App. Ct. 1993)	1973 form; breach of contract not occurrences.
<i>Indiana Ins. Co. v. DeZutti</i> , 408 N.E.2d 1275 (Ind. 1980)	1973 form; insured's own work exclusions applied.
<i>Pursell Constr., Inc. v. Hawkeye-Security Ins. Co.</i> , 596 N.W.2d 67 (Iowa 1999)	1986 form; insured's own work.
<i>Standard Fire Ins. Co. v. Chester-O'Donley &amp; Assoc., Inc.</i> , 972 S.W.2d 1 (Tenn. Ct. App. 1998) (applying Kentucky law)	1986 form; insured's own work; impaired property exclusion applied.
<i>Swarts v. Woodlawn, Inc.</i> , 610 So.2d 888 (La. Ct. App. 1992)	1973 form; work and product exclusions applied.
<i>Woodfin Equities Corp. v. Harford Mut. Ins. Co.</i> , 678 A.2d 116 (Md. Ct. Spec. App. 1996)	1973 form; insured's own work; work and product exclusions applied.

<i>Davenport v. United States Fid. &amp; Guar. Co.</i> , 778 N.E.2d 1038 (Mass. App. Ct. 2002) (unpublished opinion)	1986 form; insured's own work; Exclusion (1) applied.
<i>Hawkeye-Security Ins. Co. v. Vector Constr. Co.</i> , 460 N.W.2d 329 (Mich. Ct. App. 1990)	1986 form; insured's own work; products exclusion applied.
<i>Knutson Constr. Co. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 396 N.W.2d 229 (Minn. 1986)	1973 form; work performed exclusion applied; abrogated as to 1986 form in <i>Wanzek v. Employers, supra</i> .
<i>Hawkeye-Security Ins. Co. v. Davis</i> , 6 S.W.3d 419 (Mo. Ct. App. 1999)	1986 form; not a completed operations loss; exclusion (j) applied.
<i>Mapes Indus., Inc. v. United States Fid. &amp; Guar. Co.</i> , 560 N.W.2d 814 (Neb. 1997)	1973 form; insured manufacturer, not contractor; products and work performed exclusions applied.
<i>McAllister v. Peerless Ins. Co.</i> , 474 A.2d 1033 (N.H. 1984)	1973 form; insured's own work.
<i>Weedo v. Stone-E-Brick, Inc.</i> , 405 A.2d 788 (N.J. 1979)	1973 form; insured's own work; work and products exclusions applied; no BFPDE.
<i>George A. Fuller Co. v. United States Fid. &amp; Guar. Co.</i> , 613 N.Y.S.2d 152 (N.Y. App. Div. 1994)	1986 form; contract dispute over insured's supervision of project; Exclusions j(5) and (6) applied.
<i>Hobson Constr. Co., Inc. v. Great American Ins. Co.</i> , 322 S.E.2d 632 (N.C. Ct. App. 1984)	1973 form; insured's own work; no physical injury to tangible property. alleged, only unsafe condition.
<i>Heile v. Herrman</i> , 736 N.E.2d 566 (Ohio Ct. App. 1999)	Business risk analysis applied.
<i>Solcar Equip. Leasing Corp. v. Penn Mfg. Ass'n. Ins. Co.</i> , 606 A.2d 522 (Pa. Super. Ct. 1992)	Manuscript form; property damage exclusions applied.
<i>Century Indem. Co. v. Golden Hills Builders, Inc.</i> , 561 S.E.2d 355 (S.C. 2002)	1986 form; Exclusion (j)(6) applied to operations in progress loss.

<i>Vernon Williams &amp; Son Constr., Inc. v. The Cont'l Ins. Co.</i> , 591 S.W.2d 760 (Tenn. 1979)	1973 form; insured's own work; work and product exclusions applied; no BFPDE.
<i>Nova Cas. Co. v. Able Constr., Inc.</i> , 983 P.2d 575 (Utah 1999)	1986 form; fraud, negligent misrepresentation and loss of business alleged.
<i>Aetna Cas. &amp; Sur. Co. v. M &amp; S Indus., Inc.</i> , 827 P.2d 321 (Wash. Ct. App. 1992)	1986 form; <b>upholds</b> coverage for insured manufacturer of defective plywood panels that damaged concrete forms.
<i>Erie Ins. Prop. &amp; Cas. Co. v. Pioneer Home Improvement, Inc.</i> , 526 S.E.2d 28 (W. Va. 1999)	Manuscript policy; insured's own work; faulty workmanship exclusion applied.
<i>Vogel v. Russo</i> , 613 N.W.2d 177 (Wis. 2000)	1973 form; work and product exclusions applied.
<i>American States Ins. Co. v. Martin</i> , 662 So.2d 245 (Ala. 1995)	Real estate investment fraud scheme; pure economic loss of investments not property damage or occurrence.
<i>Western Exterminating Co. v. Hartford Accident &amp; Indem. Co.</i> , 479 A.2d 872 (D.C. 1984)	1973 form; diminution in value of home due to negligent termite inspection not property damage.
<i>Hawaiian Holiday Macadamia Nut Co., Inc. v. Industrial Indem. Co.</i> , 872 P.2d 230 (Haw. 1994)	1986 form; allegations of fraud and intentional conduct in connection with failed macadamia nut growing venture.
<i>Bush v. Shoemaker-Beal</i> , 987 P.2d 1103 (Kan. Ct. App. 1999)	Negligent misrepresentations as to termite damage in homes sold by insured; negligent misrepresentations did not cause property damage.
<i>L. Ray Packing Co. v. Commercial Union Ins. Co.</i> , 469 A.2d 832 (Me. 1983)	Price-fixing scheme did not allege property damage.
<i>United States Fid. &amp; Guar. Co. v. Omnibank</i> , 812 So.2d 196 (Miss. 2002)	Lender liability for failure to place collateral protection insurance is not an occurrence.

<i>Graber v. State Farm Fire &amp; Cas. Co.</i> , 797 P.2d 214 (Mont. 1990)	Economic loss from insured's plagiarism is not property damage.
<i>Kyllo v. Northland Chem. Co.</i> , 209 N.W.2d 629 (N.D. 1973)	1973 form; decreased crop yields where insured's pre-emergent herbicide spray failed to work as expected were excluded under failure to perform exclusion.
<i>Temco Metal Prod. Co. v. St. Paul Fire &amp; Marine Ins. Co.</i> , 543 P.2d 1 (Or. 1975)	1973 form; cashing forged checks issued by insured does not constitute injury to or destruction of tangible property.
<i>Haugan v. The Home Indem. Co.</i> , 197 N.W.2d 18 (S.D. 1972)	1966 form; work and products exclusions applied.
<i>Jakobson Shipyard, Inc. v. Aetna Cas. &amp; Sur. Co.</i> , 961 F.2d 387 (2d Cir. 1992)	1973 form; cost of repairing defective steering mechanisms installed by insured into ships is not an occurrence.
<i>McDowell-Wellman Eng'g Co. v. Hartford Accident &amp; Indem. Co.</i> , 711 F.2d 521 (3d Cir. 1983)	1966 form; products exclusion applied to damages arising out of collapse of ore bridge constructed by insured.
<i>Mitchell, Best &amp; Visnic, Inc. v. Travelers Prop. Cas. Corp.</i> , 35 Fed. Appx. 75 (4th Cir. 2002)	1986 form; claims for loss of enjoyment of property due to insured's negligent misrepresentations as to restrictive covenants applicable to custom home did not constitute property damage.
<i>ACS Constr. Co., Inc. v. CGU</i> , 332 F.3d 885 (5th Cir. 2003) (Mississippi law)	1986 form; applies Mississippi law to determine that the unintended results of intentional actions cannot constitute occurrences in direct conflict with Texas law. See <i>King v. Dallas Fire Ins. Co.</i> , 85 S.W.3d 185 (Tex. 2002); <i>Federated Mutual Ins. Co. v. Grapevine Excavation, Inc.</i> , 197 F.3d 720 (5 <sup>th</sup> Cir. 1999).
<i>Ohio Cas. Ins. Co. v. Bazzi Constr. Co., Inc.</i> , 815 F.2d 1146 (7th Cir. 1987)	1973 form; work and product exclusions applied.

<i>Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Cos.</i> , 246 F.3d 1132 (8th Cir. 2001)	1986 form; negligence of party other than insured is not an occurrence.
<i>Ross Island Sand &amp; Gravel Co. v. General Ins. Co. of America</i> , 472 F.2d 750 (9th Cir. 1973)	Pre-1966 form; affirming denial of motion for summary judgment of insured for costs of replacing non-conforming concrete; products exclusion applied.
<i>Hartford Accident &amp; Indemnity Co. v. Pacific Mut. Life Ins. Co.</i> , 861 F.2d 250 (10th Cir. 1988)	1966 form; <b><i>upholds</i></b> coverage for diminution in value of building arising out of deterioration of curtain wall installed by insured.

There is no universal proposition that CGL policies do not provide coverage for defective construction. In the event coverage is denied, it is usually under the language of an applicable exclusion. Here, no exclusion applies in light of the Subcontractor Provision.

## **II. UNEXPECTED AND UNINTENDED PROPERTY DAMAGE IS AN “OCCURRENCE” UNDER A CGL POLICY**

Mid-Continent asserts that the damage to the DiMare home was not caused by an “occurrence,” defined in the Mid-Continent policy as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” That definition is satisfied here. Nevertheless, Mid-Continent insists that defective workmanship of the insured’s subcontractors cannot involve an occurrence under a CGL policy. Of course, this argument is made in the face of

the carefully tailored Subcontractor Provision specifically intended by the insurance industry to provide coverage for this type of claim.

Mid-Continent is engaging in a “bait and switch.” They charge contractors a premium for a standard CGL policy recognized to provide coverage for the defective workmanship of subcontractors, but through the “lack of occurrence” argument, they cut short the analysis *and* the coverage. By claiming there is no occurrence, i.e. that somehow builders expect or intend for their subcontractors to perform their work defectively, the coverage determination is cut off at the knees and major elements of the CGL policy are ignored. This truncated analysis is impermissible under Texas law, in that an insurance contract must be interpreted as a whole, so as to give meaning to *all* of its provisions. *Kelley-Coppedge, Inc. v. Highlands Ins. Co.*, 980 S.W.2d 462 (Tex. 1998).

**A. Mid-Continent’s Argument is a Departure from Texas Law**

In support of its argument, Mid-Continent places heavy reliance upon *Hartrick v. Great American Lloyds Ins. Co.*, 62 S.W.3d 270 (Tex. App.--Houston [1st District] 2001, no pet.), and several other court of appeals opinions and federal district court decisions that have followed it. That court’s analysis, unfortunately, is out of step with traditional Texas law, since a breach of warranty can constitute an occurrence, where, even though the insured’s actions were intentional, the resulting injury or damage was unexpected or unintended. *Hartford Cas. Co. v.*

*Cruse*, 938 F.2d 601, 605 (5th Cir. 1991); *Travelers Ins. Co. v. Volentine*, 578 S.W.2d 501 (Tex. Civ. App.–Texarkana 1979, no writ).

Mid-Continent’s argument is also inconsistent with *King v. Dallas Fire Ins. Co.*, 85 S.W.3d 185 (Tex. 2002), a case decided after *Hartrick*. In that case, the court upheld coverage for an insured employer, King, under its CGL policy for King’s derivative liability for the intentional acts of its employee, Lopez, in assaulting another worker on a construction job site. Since Lopez had committed an assault, there could be no occurrence as to Lopez, even though Lopez, as an employee, was insured under the policy.

As to King, the derivatively liable employer, Dallas Fire argued that because Lopez acted intentionally, the injuries were reasonably foreseeable from his actions, so that there was no occurrence. The court flatly rejected this argument, holding that the allegations of negligent hiring, training, and supervision were to be evaluated from the standpoint of King, the insured, and these unintentional acts were an occurrence under a CGL policy, regardless of whether Lopez acted intentionally.

The court supported its holding with the traditional Texas occurrence cases summarized above, as well as the evolution of “occurrence” under the current CGL form, the identical form and occurrence provisions as in the Mid-Continent policy. The court stated:

The definition of ‘occurrence’ in CGL policies in 1966 read: “‘Occurrence’ means an accident, including continuous or repeated exposure to substantially the same general harmful condition, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.” . . . In 1986, the CGL form was again modified. The language “expected or intended from the standpoint of the insured” was removed from the definition of “occurrence” and reinserted as an exclusion from coverage. The reason for the 1986 modification was so that courts would not be forced to construe the definition of “occurrence” as if it were an exclusion. Instead, the 1986 revision creates an express exclusion for intentional acts. And whether the act was intentional was to be determined from the “standpoint of the insured.” . . . From our review of *Appleman*, we note that there is a relationship between the policy’s definition of “occurrence” and the exclusion for intentional acts. *Appleman*, in fact, suggests that the 1986 redraft was designed to shift the intentional injury inquiry into an exclusion. As well, the construction given to the word “occurrence” by Dallas Fire renders the exclusion for intended injury surplusage.

*Id.* at 192-193.

*King* is the Texas Supreme Court’s most comprehensive treatment of “occurrence” under the CGL policy form currently in use. It reaffirms the existence of an occurrence under a CGL policy where, even though the insured may have acted voluntarily, the resulting property damage or bodily injury is neither expected nor intended. The *King* rationale has been most recently applied in *Gehan Homes v. Employers Mut. Cas. Co.*, 146 S.W.3d 833, 840-841 (Tex. App.—Dallas 2004, pet. filed). There, the court held that a complaint against the

insured homebuilder for negligent construction of a defective foundation that resulted in unexpected and unforeseen property damage to a home alleged an “occurrence” under a standard CGL policy.

The *King* opinion mirrors existing case law as to the determination of whether events constitute occurrences under Texas law where the focus is not on the act giving rise to the damage, but whether the property damage itself is expected or intentional. *Hartford v. Cruse*, 938 F.2d at 605 (occurrence takes place where the resulting injury or damage was unexpected or unintended, regardless of whether the policyholder's actions were intentional). Simply because an actor intended to engage in the conduct which gives rise to the injury, it does not mean that there can be no “accident” under the definition of occurrence. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997). Of course, where the negligent acts of the insured cause damage which is undesigned and unexpected, there is a covered accident and occurrence under a liability policy. *Cowan*, 945 S.W.2d at 828; *Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co.*, 416 S.W.2d 396 (Tex. 1967) (negligent application of pesticide in rice mill facilities constitutes an accident); *Travelers Ins. Co. v. Volentine*, *supra*, (insured mechanic's defective performance of valve job resulting in destruction of entire engine; even though defective performance of the work itself

might not be an accident, destruction of the entire engine was certainly unexpected and unintended).

This Circuit has confirmed that Texas courts focus upon the unexpected or unintended nature of the injury, rather than the actions giving rise to the injury, when considering defective work claims. In *Federated Mut. Ins. Co. v. Grapevine Excavation Inc.*, 197 F.3d 720 (5th Cir. 1999), the insured installed defective select fill as part of a parking lot. The court held that the term “occurrence” included the consequences of inadvertent construction defects, including “claims for damage caused by an insured’s defective performance or faulty workmanship...” *Id.* at 726. *See also, Harken Exploration Co. v. Sphere Drake Ins. PLC*, 261 F.3d 466 (5th Cir. 2001) (property damage arising out of insured oil exploration company’s everyday drilling operations constitutes an “occurrence” under Texas law where the damage was unexpected nor unintended).

As in *Federated v. Grapevine*, the underlying petition alleges no intentional act on the part of the builder. The construction defects that resulted in the foundation damage to the DiMare home are the work of subcontractors, and none of those defects are alleged to be the result of intentionally poor workmanship on the part of the builder, or on the part of the subcontractors. Likewise, the property damage is not alleged to be expected or intended. Under these circumstances, the

property damage that is the subject of the underlying petition arose out of an “occurrence” under the Mid-Continent policy.

Mid-Continent’s misreading of the occurrence requirement at the expense of other provisions of the policy was rejected by the Texas Supreme Court in *King v. Dallas Fire, supra*. There, the court pointed out the dangers of focusing on a narrow reading of occurrence in derogation of the exclusions, stating as follows:

Finally, to read ‘occurrence’ as narrowly as Dallas Fire suggests obviates the need for many other standard exclusions often contained in CGL policies. For instance, under *Dallas Fire’s* construction, there would be no need for exclusions covering assault and battery or sexual misconduct claims. For these claims would not constitute ‘occurrences’ under Dallas Fire’s narrow interpretation.

*Id.* at 193. *See also, American Family Mutual v. American Girl*, 673 N.W2d at 78 (rejecting the same argument and inquiring why the insurance industry included the property damage exclusions in the policy, if the defective work of subcontractors could never be an occurrence).

Likewise, Mid-Continent’s reading of the definition of occurrence, as accepted by the court in *Hartrick*, obviates the need for numerous policy provisions, including Exclusions (j), (k), (m) and (n). In light of Mid-Continent’s sweeping definition of “occurrence,” the question before this Court boils down to, “Who needs exclusions?”

This Court should also reject the attempt of Mid-Continent to eliminate coverage by engaging in an impermissible application of the occurrence definition. Mid-Continent's bait and switch position must be rejected as contrary to the express provisions of its own policy and the case law that has fully considered this issue.

**B. There is No "Third Party Property" Requirement**

Since the entire home constitutes work of a homebuilder under a CGL policy, Mid-Continent contends that there can be no "occurrence" of "property damage," as defined in the policy, even where the defective work causing that property damage arises out of the defective work of subcontractors. Neither of those definitions imposes a third party property requirement for coverage under the policy. As relevant to this claim, "occurrence" is defined as "an accident," and "property damage" as "physical injury to tangible property."

In order to sort out coverage under the policy for property damage to the insured's own work versus third party property, resort must be had to the exclusions in the policy. Particularly as to defective work, those exclusions will determine whether the property damage constitutes an uninsurable business risk, or whether it falls within one of the risks for which there is coverage under the policy. The risk of property damage, even to the insured contractor's own work, arising out of a subcontractor's defective workmanship is covered by virtue of the

Subcontractor Provision. This Court has so held in *First Texas Homes v. Mid-Continent Cas. Co.* Therefore, Mid-Continent’s “third party property” argument is simply another example of its bait and switch strategy and should not be accepted by this Court.

**CONCLUSION**

ASA requests that this Court reverse the district court’s denial of the motion for summary judgment of Lamar Homes and the granting of the motion for partial summary judgment of Mid-Continent. Therefore, this Court should reverse and render judgment in favor of Lamar.

Respectfully submitted,

COKINOS, BOSIEN & YOUNG  
2221 East Lamar Boulevard  
Suite 120  
Arlington, Texas 76006  
(817) 608-9533  
(817) 649-3300 (fax)

By: \_\_\_\_\_  
Patrick J. Wielinski  
State Bar No. 21432450

COUNSEL FOR AMICI CURIAE  
AMERICAN SUBCONTRACTORS  
ASSOCIATION, INC. AND ASA OF  
TEXAS, INC.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing Amicus Curiae Brief of American Subcontractors Association, Inc. and ASA of Texas, Inc. and a computer readable copy of the brief on computer disk was sent certified mail, return receipt requested, on this the \_\_\_\_\_ of January, 2005, to the following:

John Engvall, Jr.  
ENGVALL & HLAVINKA, L.L.P.  
2603 Augusta Drive, Suite 1200  
Houston, Texas 77057-5639

Richard P. Hogan, Jr.  
HOGAN & HOGAN  
Bank of America Center  
700 Louisiana, Suite 4200  
Houston, Texas 77002-2793

Lee H. Shidlofsky  
NICKENS, KEETON, LAWLESS, FARRELL & FLACK, L.L.P.  
327 Congress Avenue, Suite 490  
Austin, Texas 78701

---

Patrick J. Wielinski

## **CERTIFICATE OF COMPLIANCE**

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. Exclusive of the exempted portions in 5th Cir. 32.2, the brief contains 6987 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word in Times New Roman (TrueType) 14 pt for text and Times New Roman (TrueType) 12 pt for footnotes.

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7), may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

---

Patrick J. Wielinski