No. 17-

IN THE

Supreme Court of the United States

ASPEN INSURANCE (UK) LTD
AND LLOYD'S SYNDICATE 2003,

Petitioners,

v.

BLACK & VEATCH CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. FRANCO
Counsel of Record
ANDREW C. PATTON
SCOTT O. REED
FRANCO MORONEY BUENIK LLC
500 West Madison Street, Suite 2440
Chicago, IL 60661
(312) 466-7240
robert.franco@francomoroney.com

Counsel for Petitioners

281240

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

The United States Court of Appeals for the Tenth Circuit, sitting in diversity, made a prediction of state law under *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), finding that New York's highest court would decline to follow New York intermediate appellate court precedent on an issue of coverage under a general liability insurance policy. The Tenth Circuit looked to a variety of sources, including commentary and authority from courts applying the law of other states, to make its prediction that New York's highest court would not follow those intermediate appellate court decisions.

The question presented is:

1. Whether a federal court sitting in diversity must give deference to state intermediate appellate court decisions on a question of state law, absent state highest court precedent, or whether those intermediate court decisions are merely one factor among many to be considered in predicting the highest court's likely ruling on that question.

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE

Petitioners, Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003, were the appellees in the court below. Respondent Black & Veatch Corporation was the appellant in the court below.

Aspen Insurance (UK), Ltd. and Lloyd's Syndicate 2003 are non-governmental corporate parties.

Aspen Insurance (UK) Ltd.'s parent company is Aspen Insurance (UK) Holdings Limited. Aspen Insurance (UK) Holdings Limited is a wholly-owned subsidiary of Aspen Insurance Holdings Limited, a Bermuda corporation traded on the New York Stock Exchange under the ticker "AHL." Aspen Insurance (UK) Ltd. and Aspen Insurance (UK) Holdings Limited are not publicly traded companies. No one person or entity owns 10% or more of Aspen Insurance Holdings Limited, which is a publicly traded company.

Lloyd's Syndicate 2003 is a Lloyd's of London insurance syndicate managed by Catlin Underwriting Agencies Limited ("CUAL"). CUAL is a wholly-owned subsidiary of XL Group Ltd., a Bermuda corporation traded on the New York Stock Exchange under the ticker "XL." No one person or entity owns 10% or more of XL Group Ltd., which is a publicly traded company.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

CASES

Page

Page

STATUTES AND OTHER AUTHORITIES

Page

Petitioners, Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003, respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit is reported at 882 F.3d 952, and is reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for the District of Kansas is not reported in F. Supp., but is available at 2016 WL 6804894, and is reproduced at App. 49a.

JURISDICTION

The judgment of the Tenth Circuit was entered on February 13, 2018. Petitioners timely filed a petition for panel rehearing and rehearing *en banc.* On March 9, 2018, the Tenth Circuit denied Petitioners' petition for panel rehearing and rehearing *en banc,* a copy of which is reproduced at App. 116a. On March 19, 2018, the Tenth Circuit denied Petitioners' motion to stay issuance of the mandate. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

The Rules of Decision Act, 28 U.S.C. § 1652, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

INTRODUCTION

Under *Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938), a federal court sitting in diversity must strive to give the litigants the same result they would receive had they proceeded in state court. Otherwise, the principles of federalism are lost.

Where a state's highest court has not addressed the state law issue in question, but the state's intermediate appellate courts have done so, the federal courts have taken different paths. Some have deferred to those intermediate decisions, while others have treated those decisions as merely "some evidence" of what the state's highest court might do if faced with the issue. The Tenth Circuit took the latter approach and adopted a rule of decision inconsistent with numerous New York intermediate appellate court decisions rendered over the course of at least three decades.

Commentators have observed that the federal courts have reached widely differing results when attempting to predict a state supreme court decision based on existing intermediate appellate court decisions due to the divergent approaches identified above.

Making an *Erie* prediction of state law is a frequent task of the federal courts. Petitioners assert that giving

deference to intermediate appellate state court decisions in the absence of controlling state highest court authority is consistent with this Court's decisions, and more accurately implements the goals of federalism as reflected in the Tenth Amendment to the United States Constitution and the Rules of Decision Act. Clarifying the scope of such deference is a matter of nationwide importance, warranting this Court's review and pronouncement. This fundamental question of the law to be applied in cases involving the interpretation of state law has not received a significant recent treatment from this Court.

STATEMENT OF THE CASE

Black & Veatch Corporation ("Black & Veatch") sued Petitioners Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 ("the Insurers") in the district court for the District of Kansas, alleging the Insurers were required to reimburse Black & Veatch more than $70 million under a commercial general liability (CGL) insurance policy. Black & Veatch claimed that it was entitled to coverage for damage caused by its subcontractors to a project on which it was the general contractor. The district court exercised diversity jurisdiction under 28 U.S.C. § 1332, as the parties are diverse[1] and the amount in controversy was more than $75,000.

The district court granted the Insurers' motion for partial summary judgment, holding that the policy did not provide coverage. New York law governs the policy, and the court adhered to a long line of New York state cases holding that construction defects which only damage the

1. Black & Veatch is a citizen of Kansas and the Insurers are citizens of the United Kingdom.

construction project itself are not covered "occurrences" under a commercial general liability policy.

The Tenth Circuit reversed. Relying on a purported "trend" of construction defect cases in *other* states (App. 29a-31a), it held that where defective construction work performed by the subcontractor of an insured results in damage to non-defective parts of the construction project, that damage presents a covered "occurrence." It ruled that New York's highest court would decide that a "subcontractor exception" to a general contractor's liability insurance policy would be interpreted to provide coverage where the acts of a subcontractor damaged the contractor's work, and that a construction defect stands as an "occurrence" as that term is defined by a general liability insurance policy. The court remanded for further proceedings on the Insurers' other coverage defenses.

Judge Briscoe dissented. She noted that "[t]he rule among intermediate appellate courts in New York has been that" the standard definition of "occurrence" in commercial general liability policies does not provide coverage for faulty workmanship in the work product itself, but only covers faulty workmanship where it causes bodily injury or property damage to something other than the work product itself. App. 43a-44a, Briscoe, J., dissenting. Judge Briscoe explained that New York intermediate appellate courts have "developed the rule that a CGL policy using the standard definition of 'occurrence' cannot cover damage to the insured's own work product, even when errors by the insured or its subcontractors cause the damage." App. 44a.

Addressing the majority's contrary conclusion, Judge Briscoe noted that "in declining to apply the rule that New York's intermediate appellate courts have applied we exceed our proper role as a court of review in a diversity action." App. 46a, Briscoe, J., dissenting. She pointed out that the majority reached its result, "[a]rmed with … extrinsic evidence about how CGL policies are generally drafted, scholarly sources, and persuasive authority from courts applying the law of other jurisdictions." App. 46a. Judge Briscoe called this reasoning "a bridge too far," in turning to the law of other jurisdictions to determine what New York's highest court would decide. App. 47a. She stated that looking at the law of other jurisdictions to accomplish that task may be appropriate if New York law were unclear, but "[i]t is not difficult to ascertain how New York courts would decide the issue here – nor does the majority say it would be difficult." App. 47a.

REASONS FOR GRANTING THE PETITION

The Tenth Circuit made an *Erie* prediction that New York's highest court, the Court of Appeals, would interpret a commercial liability insurance policy to provide coverage where the acts of a subcontractor damage the contractor's work.[2] The New York Court of Appeals has never decided that question. Instead, decades of consistent New York intermediate appellate court precedent holds that construction defects are not "occurrences" under general liability policies. As Judge Briscoe pointed

2. As a lower court's determination of state law, the Circuit Court's ruling would be subject to *de novo* review by this Court, to ensure the policy of consistent application of state law in the federal courts under *Erie*. *See Salve Regina College v. Russell,* 499 U.S. 225 (1991).

out, "in declining to apply the rule that New York's intermediate appellate courts have applied," the Tenth Circuit "exceed[ed] [its] proper role as a court of review in a diversity action." App. 46a, Briscoe, J., dissenting.

A. The Tenth Circuit's Approach To State Intermediate Appellate Court Precedent Conflicts With That Taken By Other Circuit Courts.

When faced with a state law question addressed by intermediate state courts but not decided by a state's highest court, federal courts have taken divergent approaches:

> According to one view, where state law is to be applied in actions in federal court, in the absence of a decision by the highest court, the federal court must follow the decisions of the intermediate state courts, if they are not in conflict, even though the rule announced by such decisions may appear to be unsound or undesirable, unless it is convinced by other persuasive data that the highest court of the state would do otherwise or unless there is a compelling reason to doubt that the intermediate appellate courts have got the law right.

36 C.J.S., Federal Courts, § 201, *State Intermediate Appellate Court*, at 228-29. *E.g., Winn-Dixie Stores, Inc. v. Dolgencorp, LLC,* 881 F.3d 835, 848 (11th Cir. 2018) ("State law is what the state appellate courts say it is, and we are bound to apply a decision of a state appellate court about state law even if we think the decision is wrong.");

Community Bank of Trenton v. Schnuck Markets, Inc., 887 F.3d 803, 816 (7th Cir. 2018) ("we consider decisions of intermediate appellate courts unless there is good reason to doubt the state's highest court would agree with them") (citations omitted); *Mayes v. Summit Entertainment Corp.*, 287 F. Supp. 3d 200, 207 (E.D.N.Y. 2018) ("A federal court may not choose to ignore substantive state law if there is no indication that state courts have abandoned their precedent on the matter."); *Guilbeau v. Hess Corp.*, 854 F.3d 310, 312 (5th Cir. 2017) (federal court should "defer to intermediate state appellate court decisions, unless convinced by other persuasive data that the highest court of the state would decide otherwise.") (citations omitted); *Yates v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 808 F.3d 281, 289 (6th Cir. 2015) (same); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998) ("only if the decision of a state's intermediate court cannot be reconciled with state statutes, or decisions of the state's highest court, or both, may a federal court sitting in diversity refuse to follow it.").

Alternatively, "[a]ccording to another view,

> an intermediate appellate court's reading of state law is usually trustworthy data but is not binding on a federal court. … Under this view, where state law applies and the highest state court has not spoken, a federal court takes a predictive approach and seeks guidance from other persuasive case law, learned treatises, pertinent public policy considerations, and the general weight and trend of authority."

36 C.J.S., Federal Courts, § 201, *State Intermediate Appellate Court*, at 229. *E.g., Glendale Assocs., Ltd. v. N.L.R.B.,* 347 F.3d 1145, 1154 (9th Cir. 2003) (absent decision from the state's highest court, federal court "must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises and restatements as guidance.") (citations omitted); *In re Montreal, Maine & Atlantic Ry. Co.,* 888 F.3d 1, 8 (1st Cir. 2018) (where state's highest court has not addressed the issue, federal court must attempt to predict its ruling "by relying on the 'types of sources that the state's highest court would be apt to consult,' such as persuasive out-of-state precedents, learned treatises, and public policy considerations." (citations omitted); *Illinois Nat'l. Ins. Co. v. Wyndham Worldwide Operations, Inc.,* 653 F.3d 225, 231 (3d Cir. 2003) ("we must take into consideration: (1) what [the state's highest] court has said in related areas; (2) the decisional law of the state intermediate courts; (3) federal cases interpreting state law; and (4) decisions from other jurisdictions that have discussed the issue.") (citations omitted). The Tenth Circuit took this latter approach in predicting New York law, affording no special deference to the intermediate New York appellate court decisions and instead treating them, at best, as one of many sources of guidance.

This case warrants review to resolve how lower courts should treat intermediate state appellate court decisions in the absence of a decision from the state's highest court. This issue goes to the heart of the nature of federalism. *Erie* is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems."

Hanna v. Plumer, 380 U.S. 460, 474 (1965) (Harlan, J., concurring). And as one commentator noted, the proper use of sources of state law in federal courts is especially appropriate for this Court's review in light of the failure of lower courts to agree upon a consistent approach, and the length of time since a definitive pronouncement from this Court on the issue. *See, e.g.,* B. Glassman, "Making State Law in Federal Court," 41 Gonzaga L. Rev. 237, 263 (2005) ("Despite the long amount of time since the Supreme Court last spoke on ascertaining state law, the federal circuit courts of appeals have not developed a consensus approach to the sources of state law, nor have they truly demonstrated a consistent command of the principles involved.").

The presence of two different lines of authority in the lower courts – the "deference" standard and the "one item of evidence among many" standard – has created confusion in deciding whether to follow state intermediate court rulings in the absence of a pronouncement from the state's highest court. For example, in *In re Emerald Casino, Inc.*, 867 F.3d 743, 765 (7th Cir. 2017), the Seventh Circuit reviewed a district court's decision not to apply a state intermediate appellate court ruling "because it wasn't convinced that the Illinois Supreme Court would apply" it. The Seventh Circuit reversed the district court, stating, "[t]hat has the analysis exactly backwards." *Id.*

The Tenth Circuit's analysis is equally "backwards." The court equated itself with New York's highest court, unbound by the decisions of the intermediate New York reviewing court, stating that, "as the New York Court of Appeals has said, Appellate Division decisions 'are certainly not binding upon this court.'" App. 33a, n.18.

[3] This is a truism – a state's highest court is not bound by lower state court decisions. But this principle does not apply to a federal court and free the Tenth Circuit from applying those intermediate appellate court cases, particularly since those decisions are binding precedent under the law of New York. *See, Dufel v. Green*, 198 App. Div. 2d 640, 640, 603 N.Y.S.2d 624, 624-25 (1993) ("Once this court [the Supreme Court, Appellate Division] has decided a legal issue, subsequent appeals presenting similar facts should be decided in conformity with the earlier decision under the doctrine of stare decisis, which recognizes that legal questions, once resolved, should not be reexamined every time they are presented." *Citing*, *People v. Bing,* 76 N.Y.2d 331, 338, 559 N.Y.S.2d 474, 558 N.E.2d 1011 (1990)). Not giving those decisions their due deference results in litigants receiving a different result in the Tenth Circuit than they would in any New York state court at the Appellate Division or below, which is contrary to *Erie* and the goals of federalism.

B. The Tenth Circuit's Refusal To Give Deference To The Decisions Of The State Intermediate Appellate Courts Cannot Be Reconciled With This Court's Precedent Or The Principles Of Federalism Underlying *Erie*.

This Court's precedents confirm that giving deference to the rulings of intermediate appellate courts, rather than merely treating them as one factor among many, is more consistent with the goals of *Erie* and federalism.

---

3. This led the majority wrongly to treat the "occurrence" issue as if it "apparently raise[d] an issue of first impression," rather than one well-settled among the intermediate courts. App. 47a, Briscoe, J., dissenting.

See West v. American Tel. & Tel. Co., 311 U.S. 223, 237 (1940) ("Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is *not to be disregarded* by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise.") (emphasis added); *State of California v. Taylor,* 353 U.S. 553, 556 n. 2 (1957) (court was "constrained to accept the ruling of" state intermediate appellate court, where the position of that court on that issue was not rejected by the state's highest court); *Hicks v. Feiock,* 485 U.S. 624, 630 n. 3 (1988), *quoting, West, supra.*

Further, treating intermediate appellate court decisions as just one factor among many – on par with, *e.g.*, cases decided under the laws of other states and without any particular deference – is inimical to the principles of federalism, and threatens to revive the very drive for a uniform "general law" that *Erie* rejected. *See Erie*, 304 U.S. at 78-79.

The Tenth Circuit's ruling ignored decades of state intermediate appellate court rulings, predicting that New York's highest court would rule differently, in part, because the Tenth Circuit viewed that result as a product of the "better law," in light of the views of some commentators and the asserted trend in other jurisdictions. Yet it is not the role of a federal court to fashion "better law" for a state, particularly one not located within its own jurisdiction. *See, e.g.*, *Travelers Ins. Co. v. Carpenter,* 411 F.3d 323, 329 (2d Cir. 2005) ("[o]ur role as a federal court sitting in diversity is not to adopt innovative theories that may distort established state law.") (citation omitted); *Lehman Bros. v. Schein,* 416 U.S. 386, 391 (1974) ("When

federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the local jurisdiction.").

As the Fourth Circuit has stated, "a federal court cannot refuse to follow an intermediate appellate court's decision simply because it believes the intermediate court's decision was wrong, bad policy, or contrary to the majority rule in other jurisdictions." *Assicurazioni Generali,* 160 F.3d at 1003 (*citing West*, 311 U.S. at 237). *See also, e.g.*, 17A Moore's Federal Practice, 3d Ed., § 124.20[2] (federal court cannot disregard state caselaw based upon its view the rulings were "wrong, bad policy, contrary to the majority rule in other jurisdictions, lacking common sense, or not what 'ought to be'"). Yet that is precisely what the Tenth Circuit did, engaging in a "better law" approach and purporting to align New York law with results reached by other states and favored by certain commentators. This is not a basis for refusing to defer to intermediate court rulings.

The Insurers cited 15 intermediate state court decisions, including many from the New York Supreme Court, Appellate Division, to support the District Court's ruling. App. 37a-38a. There were so many of these decisions that the Opinion did not distinguish them individually, but distinguished them in bulk. App. 32a-33a, 38a. As the dissent correctly points out, this approach led the majority to overlook that several intermediate appellate court decisions actually decided that a contractor could not receive coverage for property damage caused by a subcontractor, as it was not an "occurrence." App. 44a-45a,

Briscoe, J., dissenting, *citing, Pavarini Constr. Co. v. Continental Ins. Co.,* 304 App. Div. 2d 501, 759 N.Y.S.2d 56 (2003); *National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.,* 119 App. Div. 3d 103, 106-108, 986 N.Y.S.2d 74 (2014).

The Tenth Circuit's refusal to apply these consistent state intermediate court decisions departed from accepted principles of federalism. A leading treatise has noted that "[a] federal court may refuse to follow an intermediate state appellate court decision if the following grounds exist:

- Subsequent statutory enactments or amendments that change state law.

- Decisions of the state's highest court in analogous or related areas that suggest that the highest court would decide the issue differently.

- A statute or statutory scheme with which the decision conflicts.

- Considered dicta of the state's highest court that contradicts lower court decisions.

- Differences between state circuit or district courts. However, a federal court may not ignore an intermediate court decision because it believes that the decision is wrong, bad policy, contrary to the majority rule in other jurisdictions, lacking common sense, or not what 'ought to be.'"

17A Moore's Federal Practice, 3d Ed., § 124.20[2], *Decisions of Intermediate State Appellate Courts Usually Must Be Followed.* None of these circumstances were present here.

The court cited no statutes or amendments that are inconsistent with the Appellate Division rulings.[4] It quoted no decisions, dicta, or other comments from the New York Court of Appeals that suggest any criticism of the rule long followed by the Appellate Division on the issue. Indeed, the Court of Appeals denied discretionary review of the leading *George A. Fuller Co.* case, where the Appellate Division stated the rule that a commercial general liability policy "does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product." *George A. Fuller Co. v. United States Fid. & Guar. Co.,* 200 App. Div. 2d 255, 613 N.Y.S.2d 152, 155 (1994), *leave to appeal denied,* 84 N.Y.2d 806, 645 N.E.2d 1215, 621 N.Y.S.2d 515 (1994). Nor was there a conflict among the Appellate Division rulings, which the district court described as showing "an established consistency up through the most recent decisions." App. 87a.

But instead of giving deference to these numerous lower state court cases, including many published

4. By statute in New York, a "fortuitous event" is defined as "any occurrence or failure to occur which is, or is assumed by the parties to be, to a substantial event *beyond the control of either party*." McKinney's N.Y. Ins. Law, §1101(a)(2) (emphasis added). This statute, cited by the Insurers but not cited by the court, supports the Appellate Division decisions the court chose not to follow.

intermediate appellate decisions, the Tenth Circuit relied on out-of-state law and commentary, and without any ruling or dicta from the state's highest court indicating any inclination to change the law. In doing so, as the dissent put it, the Circuit Court "exceed[ed] our proper role as a court of review in a diversity action." App. 46a, Briscoe, J., dissenting.

On many questions of state law faced by federal courts sitting in diversity, the state appellate courts provide the best evidence of the state's law, because many state highest courts are of discretionary jurisdiction and accept only a small fraction of the petitions for leave to appeal presented to them. The question of whether to defer to existing state intermediate appellate court decisions is one upon which the lower federal courts are entitled to clarity and consistency. Current caselaw does not provide either, as evidenced by the Tenth Circuit's decision. As such, this case merits this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. FRANCO
Counsel of Record
ANDREW C. PATTON
SCOTT O. REED
FRANCO MORONEY BUENIK LLC
500 West Madison Street, Suite 2440
Chicago, IL 60661
(312) 466-7240
robert.franco@francomoroney.com

Counsel for Petitioners

June 6, 2018

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED FEBRUARY 13, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3359

BLACK & VEATCH CORPORATION,

Plaintiff - Appellant,

v.

ASPEN INSURANCE (UK) LTD; LLOYD'S SYNDICATE 2003,

Defendants - Appellees.

February 13, 2018, Filed

Appeal from the United States District Court for the District of Kansas (D.C. No. 2:12-CV-02350-SAC).

Before **BRISCOE**, **MATHESON**, and **PHILLIPS**, Circuit Judges. **BRISCOE**, Circuit Judge, dissenting.

MATHESON, Circuit Judge.

This case is an insurance coverage dispute between Plaintiff-Appellant Black & Veatch Corporation ("B&V")

and Defendants-Appellees Aspen Insurance (UK) Ltd. and Lloyd's Syndicate 2003 (collectively, "Aspen"). The issue is whether Aspen must reimburse B&V for the costs B&V incurred due to damaged equipment that its subcontractor constructed at power plants in Ohio and Indiana. The district court held that Aspen need not pay B&V's claim under its commercial general liability ("CGL") insurance policy (the "Policy") because B&V's expenses arose from property damages that were not covered "occurrences" under the Policy. Because the only damages involved here were to B&V's own work product arising from its subcontractor's faulty workmanship, the court concluded that the Policy did not provide coverage and granted Aspen's motion for partial summary judgment. B&V appealed.

The district court had diversity jurisdiction under 28 U.S.C. § 1332. We exercise appellate jurisdiction under 28 U.S.C. § 1291. Because we predict that the New York Court of Appeals would decide that the damages here constitute an "occurrence" under the Policy, we vacate the court's summary judgment decision and remand for further consideration in light of this opinion.

I. BACKGROUND

A. *Factual Background*

B&V is a global engineering, consulting, and construction company. A portion of its work involves "EPC contracts." "EPC" stands for engineering, procurement, and construction. Under an EPC contract, B&V delivers

services under a single contract. It supervises the project and typically subcontracts most—if not all—of the actual procurement and construction work.

1. Underlying Claim Against B&V for Property Damages

In 2005, B&V entered into EPC contracts with American Electric Power Service Corporation ("AEP") to engineer, procure, and construct several jet bubbling reactors ("JBRs"), which eliminate contaminants from the exhaust emitted by coal-fired power plants.[1] For at least seven of these JBRs, which were located at four different power plants in Ohio and Indiana, B&V subcontracted the engineering and construction of the internal components to Midwest Towers, Inc. ("MTI"). Deficiencies in the components procured by MTI and constructed by MTI's subcontractors caused internal components of the JBRs to deform, crack, and sometimes collapse.

After work on three of the JBRs was completed, and while construction of four others was ongoing, AEP alerted B&V to the property damage arising from MTI's negligent construction. AEP and B&V entered into settlement agreements resolving their disputes relating to the JBRs at issue here. Under the agreements, B&V was obligated to pay more than $225 million in costs associated with repairing and replacing the internal components of the seven JBRs.

1. AEP entered the EPC contracts in its own capacity and as an agent for other power companies. We refer to these companies collectively as "AEP."

2. The B&V-Aspen CGL Policy

B&V had obtained several insurance policies to cover its work on these JBRs.[2] Zurich American Insurance Company ("Zurich") provided the primary layer of coverage for up to $4 million for damage to completed work. Under the CGL Policy at issue here, Aspen provides the first layer of coverage for claims exceeding the Zurich policy's limits.[3] The Policy limits coverage up to $25 million per occurrence and $25 million in the aggregate. The structure of the Policy consists of (a) a basic insuring agreement defining the general scope of coverage, (b) exclusions from coverage, and (c) exceptions to the exclusions.

a. Basic insuring agreement

The Policy's basic insuring agreement reads:

> We [the Insurer] will pay on behalf of the "Insured" those sums in excess of the [liability limit provided by other insurance policies]

2. B&V entered the Lloyd's of London ("Lloyd's") insurance market to negotiate an insurance policy that would cover its potential liability as an EPC contractor. Lloyd's is not an insurance company but rather a specialist insurance market within which multiple financial backers come together to pool and spread risk. U.S.-based insurance brokers cannot directly access the Lloyd's insurance market, so B&V's brokers were required to use an intermediary known as a "wholesale" broker to negotiate the insurance policy.

3. Liberty Mutual Insurance Europe (UK), Ltd. provided the second layer of excess coverage.

> which the "Insured" by reason of liability imposed by law, or assumed by the "Insured" under contract prior to the "Occurrence", shall become legally obligated to pay as damages for:
>
> > (a) "Bodily Injury" or "Property Damage"…caused by an "Occurrence" . . .

ROA, Vol. 1 at 68.

It defines the key terms as follows:

- *Occurrence*: "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in 'Bodily Injury' or 'Property Damage' that is not expected or not intended by the 'Insured'." *Id.* at 71.

- *Property Damage*: "physical injury to tangible property of a 'Third Party', including all resulting loss of use of that property of a 'Third Party' . . . ." *Id.* at 72.

- *Third Party*: "any company, entity, or human being other than an 'Insured' or other than a subsidiary, owned or controlled company or entity of an 'Insured'." *Id.*

In sum, the Policy covers damages arising from an "occurrence," which includes an accident causing damage to the property of a third party. It does not define "accident."

b. Exclusions

Following the basic insuring agreement, the Policy then scales back coverage through several exclusions, two of which are relevant here. The first, known as the "Your Work" exclusion, or "Exclusion F," excludes coverage for property damage to B&V's own *completed* work. It reads:

> This policy 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.'

Id. at 74. "Products/Completed Operations Hazard" refers to property damage or bodily injury arising out of completed work. *Id.* at 72. "Your Work" is defined as "work operations performed by you or on your behalf" by a subcontractor. *Id.* at 73. References to B&V's own work thus include work done by B&V as well as MTI.

The second exclusion, known as "Endorsement 4," excludes coverage for property damage to the "particular part of real property" that B&V or its subcontractors were working on when the damage occurred. *Id.* at 83. This exclusion pertains only to *ongoing*, rather than completed, work.

c. Exception

The "Your Work" exclusion is subject to an exception, thus restoring some coverage. The exception provides that "[the 'Your Work' exclusion] does not apply if the damaged

work or the work out of which the damage arises was *performed on [B&V's] behalf by a subcontractor*." *Id.* at 74 (emphasis added). In other words, the Policy does not cover property damage to B&V's own completed work *unless* the damage arises from faulty construction performed by a subcontractor. We refer to this as the "subcontractor exception."

B. *Procedural History*

B&V submitted claims to its liability insurers for a portion of the $225 million it cost to repair and replace the defective components. After B&V recovered $3.5 million from Zurich, its primary insurer,[4] it sought excess recovery from Aspen. Aspen denied coverage. B&V sued Aspen in federal district court for breach of contract and declaratory judgment as to B&V's rights under the Policy. B&V sought coverage for approximately $72 million, a portion of the total loss. On cross-motions for partial summary judgment on the coverage issue, the court sided with Aspen, holding that damage arising from construction defects was not an "occurrence" under the Policy unless the damage occurred to something *other* than B&V's own work product. Because the damages here occurred only to the B&V's own work product—the JBRs—the court found they were not covered.[5] This appeal followed.

---

4. Zurich paid its full completed operations aggregate limit of $4 million, less the $500,000 deductible, for the damages incurred.

5. As described above, the Policy defines B&V's "work" as work performed by B&V or by a subcontractor on B&V's behalf. *See* ROA, Vol. 1 at 73.

II. DISCUSSION

We begin with our standard of review. We then discuss standard-form CGL policies, relevant New York law regarding CGL policies and insurance contract interpretation, and the relevance of our decision in *Greystone Construction, Inc. v. National Fire & Marine Insurance Co.*, 661 F.3d 1272, 1289 (10th Cir. 2011), which addressed a similar coverage issue. Interpreting the Policy in light of applicable law, we conclude the district court erred in determining that a subcontractor's faulty workmanship causing damage to an insured's own work can never be an "occurrence."

The threshold and primary question is whether the New York Court of Appeals, the highest court in the State of New York, would hold that the Policy's basic insuring agreement covers the property damage to the JBRs as an "occurrence." *Greystone*, 661 F.3d at 1282 (explaining that in the absence of a decision by the highest court of a state, we follow a decision by an intermediate court unless we find a convincing reason to do otherwise). We conclude the damages constitute an "occurrence" under the Policy because they were accidental and harmed a third party's property. Further, a contrary reading would render the "subcontractor exception" and "Endorsement 4" mere surplusage, in violation of New York law. The subcontractor exception does not create coverage. Only the basic insuring agreement can do that. But the subcontractor exception informs our understanding of an "occurrence" based on New York's rule that we should read the insurance policy as a whole and avoid interpretations that render

provisions meaningless. Applying these analytical tools, we predict the New York Court of Appeals would conclude that the damages at issue here are "occurrences" under the Policy's basic insuring agreement.

New York state court decisions have not resolved whether subcontractor damages can be deemed an "occurrence" under a CGL policy containing a subcontractor exception. The district court and Aspen contend that New York courts have answered this question, relying heavily on *George A. Fuller Co. v. United States Fidelity and Guaranty Co.*, 200 A.D.2d 255, 613 N.Y.S.2d 152, 153 (N.Y. App. Div. 1994), and other intermediate appellate court decisions. But they ignore a critical distinction between *Fuller* and the present case. The court in *Fuller* considered a CGL policy that *excluded* coverage for damages to an insured's own work, whether the damage was caused by the contractor or a subcontractor. Unsurprisingly, *Fuller* concluded that the particular policy in that case was not intended to insure against faulty workmanship in the work product itself. *Id.* at 155. The decision offered no analysis regarding policies, such as the one here, explicitly stating that damages to an insured's own work *are* covered when a subcontractor, rather than the contractor itself, performed the faulty workmanship. In other words, *Fuller* does not stand for the proposition that damages caused by a subcontractor's faulty workmanship can never constitute an "occurrence" under a CGL policy. For this and other reasons more fully explained below, *Fuller* and the cases that rely on it are inapt and distinguishable. We thus reverse the district

court's holding that denied coverage and remand for further proceedings in light of this opinion.[6]

A. *Standard of Review*

We review summary judgment de novo and apply the same legal standard as the district court. *Cornhusker Cas. Co. v. Skaj*, 786 F.3d 842, 849 (10th Cir. 2015). A court "shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Cornhusker*, 786 F.3d at 850. We also review legal questions de novo, including the district court's interpretation of New York law, which the parties agree governs here. *See Bird v. West Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016). "Where the state's highest court has not addressed the issue presented, the federal court must determine what decision the state court would make if faced with the same facts and issue." *Id.* (quotations omitted).

B. *Standard-Form CGL Policies*

A CGL policy covers the costs a policyholder incurs due to property damage and bodily injury. *See* Donald S. Malecki, *Commercial General Liability Coverage Guide*, The National Underwriter Company at 9 (10th ed. 2013)

6. The district court held only that the damages at issue here could not constitute a coverage-triggering "occurrence" under the Policy, so it did not proceed to the next step of determining the effect of any Policy exclusions or exceptions to the exclusions. It should do so on remand.

("*CGL Coverage Guide*"). In this section, we describe: (1) the structure and (2) the history and development of CGL policies.

1. Structure of Standard-Form CGL Policies

Most CGL policies are drafted using standardized forms developed by the Insurance Services Office, Inc. ("ISO"), an association of insurance carriers. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 772, 113 S. Ct. 2891, 125 L. Ed. 2d 612 (1993). ISO maintains a large portfolio of "endorsements," language that can be used to amend a standard CGL policy to suit the needs of the insured or insurer. *CGL Coverage Guide* at 177. Policies that deviate from the standard CGL policy forms and endorsements are called "manuscript" policies. *See Gabarick v. Laurin Mar. (Am.), Inc.*, 650 F.3d 545, 554 (5th Cir. 2011) (explaining that manuscript policies are tailored to the unique coverage needs of the insured); *Bangert Bros. Constr. Co. v. Americas Ins. Co.*, 66 F.3d 338, at *2 [published in full-text format at 1995 U.S. App. LEXIS 25702] (10th Cir. 1995) (unpublished table decision).

The basic structure of standard CGL policies mirrors the three-part structure of the B&V-Aspen Policy described above. CGL policies begin with the "basic insuring agreement" defining the initial scope of coverage. An insured cannot recover for property damages that fall outside this definition. The basic insuring agreement is then subject to exclusions, which narrow the scope of coverage. The exclusions are then subject to exceptions,

which restore coverage—but only to the extent coverage was initially included in the basic insuring agreement.

a. Basic insuring agreement

CGL policies begin with a broad grant of coverage in the basic insuring agreement. An "occurrence" triggers coverage. CGL policies—including the Policy here—define an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *CGL Coverage Guide*, App. K: 2013 Claims-Made Form, at 558. Neither the standard CGL policy nor the Policy in this case defines the term "accident."

b. Exclusions—and exceptions to exclusions

i. Overview

The scope of the basic insuring agreement for damages caused by an "occurrence" is then limited by any exclusions from coverage that the parties include in the policy. In other words, a CGL policy starts with a broad grant of coverage for damages arising from an "occurrence." Exclusions narrow the scope of coverage. For example, CGL policies generally exclude coverage for damages that the insurer "expected or intended." *See id.* at 543. Exceptions to the exclusions may restore—but do not create—coverage.

ii. The "Your Work" exclusion and "subcontractor exception"

One of the standard-form CGL exclusions and its corresponding exception is identical to the "Your Work" exclusion and "subcontractor exception" in the Policy here. *See CGL Coverage Guide*, App. K: 2013 Claims-Made Form, at 547.[7] In the standard-form CGL policy, this exclusion is listed as "Exclusion L." *Id.* In the Policy, it is listed as "Exclusion F." For consistency, we refer to this provision as the "Your Work" exclusion.

As in the Policy and the standard-form CGL policy, the "subcontractor exception" follows the "Your Work" exclusion. This exception provides that the "Your Work" 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." *Id.*

2. History and Development of CGL Policies

The history and development of CGL policies guide our interpretation of the Policy at issue here.[8] The standard-form CGL policy has undergone several revisions since the

---

7. Under this exclusion, a CGL insurance policy does not apply to "'[p]roperty damage' to 'your work' arising out of it or any part of it and included in the 'products-completed operations hazard.'" *CGL Coverage Guide*, App. K: 2013 Claims-Made Form, at 547.

8. As explained above, the key policy language at issue in this case is materially identical to the language used in standard-form CGL policies.

first one was promulgated in 1940. The 1973 standard-form CGL policy precluded coverage for property damage to an insured's own completed work, regardless of whether the damages were caused by work completed by the contractor or "on [its] behalf" by a subcontractor. *CGL Coverage Guide*, App. A: 1973 CGL Form (excluding coverage for "property damage to work performed by *or on behalf of* the named insured" (emphasis added)); *see* Christopher C. French, *Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies*, 19 U. Pa. J. Bus. L. 101, 107 (2016) ("French"). The 1973 version of the "Your Work" exclusion did not contain a subcontractor exception. Instead, subcontractor-caused damage was considered a risk inherent to the construction business and explicitly excluded from coverage in CGL policies.

By 1976, general contractors, who were increasingly reliant on subcontractors' work, had become dissatisfied with the lack of CGL policy coverage when the general contractor was not directly responsible for defective work. *See* Steven Plitt et al., 9A Couch on Ins. § 129:19 (3rd ed. 2017) ("Plitt"). In response, the 1976 standard-form CGL policy eliminated the phrase "or on behalf of" from the "Your Work" exclusion. The policy thus broadened coverage by no longer excluding damages arising from faulty subcontractor work. Contractors could pay a higher premium to add additional coverage for property damage arising from completed work that had been performed by subcontractors. *Id.; see also* French at 107. This optional coverage provision was known as the "Broad Form Property Damage Endorsement" ("BFPD

Endorsement") and provided that the policy only excluded "property damage to completed work performed by the named insured." *CGL Coverage Guide*, App. A: Broad Form Endorsement, at 295; *see also* Plitt at § 129:19. "Unfortunately, the courts [have failed to] recognize the importance of this language change." Philip L. Bruner, et al., § 11:259 *Completed operations work exclusion—Generally*, Bruner & O'Connor Construction Law (2017) ("Bruner").

In 1986, the ISO attempted to clear up this confusion by expressly stating in the standard-form CGL policy that the "Your Work" exclusion does not apply "if the damaged work . . . was performed . . . by a subcontractor." *See CGL Coverage Guide*, App. B: 1986 Occurrence Form, at 299; *see also* Bruner at § 11:259. Since then, the ISO standard-form CGL policy has contained materially identical language to the "Your Work" exclusion and "subcontractor exception" language that appears in the Policy here. The ISO explained that this revision was intended to clarify that CGL policies "cover[ed] . . . *damage to, or caused by*, a subcontractor's work after the insured's operations are completed." Ins. Servs. Office, Inc., *Commercial General Liability Program Instructions Pamphlet*, Circular No. GL-86-204 (July 15, 1986) ("ISO 1986 Circular") (emphasis added). The "Your Work" exclusion, in other words, is inapplicable when damage arises from a subcontractor's faulty workmanship.

As one commentator explained, by 1986, insurance carriers and policyholders agreed that CGL policies should cover defective construction claims "so long as

the allegedly defective work had been performed by a subcontractor rather than the policyholder itself." French at 108 (quoting 2 Jeffrey W. Stempel, *Stempel on Insurance Contracts* § 14.13[D], at 14-224.8 (3d ed. Supp. 2007) ("Stempel")). "This resulted both because of the demands of the policyholder community (which wanted this sort of coverage) and the view of insurers that the CGL was a more attractive product that could be better sold if it contained this coverage." *Id.* (quoting Stempel at 14-224.8).

In the context of *ongoing* work, the standard-form CGL policy excludes coverage for property damage to "[t]hat particular part of real property on which you or any contractors or subcontractors working . . . on your behalf are performing operations, if the 'property damage' arises out of those operations." *CGL Coverage Guide*, App. B: 1986 Occurrence Form, at 298; *see also* ISO 1986 Circular (explaining that the policy covers "damage caused by faulty workmanship to . . . parts of work in progress" other than what the contractor or subcontractors were working on). In other words, the policy excludes damage to "that particular part" of the project upon which the insured's operations were being performed at the time the damage occurred, but it covers damage to property other than "that particular part." This is the current understanding of the phrase "that particular part" in the insurance industry today. Scott C. Turner, *"That particular part" limitation, Insurance Coverage of Construction Disputes* § 29:7 (2d ed. 2017).

In sum, since 1986, the standard-form CGL policy has covered the cost of property damage to (1) completed projects, when the damage is due to subcontractors' faulty work, and (2) ongoing work, when faulty workmanship damages property other than "that particular part" on which the contractor or subcontractor was working at the time the damage occurred. Again, this assumes that a CGL policy's basic insuring agreement provides coverage for such damages in the first instance.

C. *New York Law Interpreting CGL Policies*

1. Definition of "Accident"

Neither the standard-form CGL policy nor the Policy here defines the term "accident." The New York Court of Appeals has held that damages are accidental so long as they are "unexpected and unintentional." *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506, 510, 593 N.Y.S.2d 966 (N.Y. 1993). These terms are to be construed as barring coverage "*only* when the insured *intended* the damages." *Id.* (emphases added). The fact that an insured might have foreseen the possibility that its subcontractor would build a defective product does not render the resulting damages intentional—and thus not covered—under the policy. *See id.* (acknowledging that a policyholder might take a "calculated risk" without expecting or intending the resulting damages).

2. General Principles of Contract Interpretation

New York courts recognize that "[a]n insurance agreement is subject to principles of contract interpretation." *Burlington Ins. Co. v. NYC Transit Auth.*, 29 N.Y.3d 313, 57 N.Y.S.3d 85, 79 N.E.3d 477, 481 (N.Y. 2017) (quotations omitted). "[I]n determining a dispute over insurance coverage, [courts] first look to the language of the policy." *Roman Catholic Diocese of Brooklyn v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 21 N.Y.3d 139, 991 N.E.2d 666, 671, 969 N.Y.S.2d 808 (N.Y. 2013) (quotations omitted). In doing so, they must "construe the [CGL] policy in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *Id.* at 671-72 (quotations omitted) (applying the rule in determining whether separate incidents constituted one or multiple "occurrences" under a CGL insurance policy). The New York Court of Appeals recently reiterated this rule in *In re Viking Pump, Inc.*, explaining that an interpretation of a contract that renders a provision surplusage is one "that cannot be countenanced under [New York courts'] principles of contract interpretation." 27 N.Y.3d 244, 33 N.Y.S.3d 118, 52 N.E.3d 1144, 1154 (N.Y. 2016) (citing *Roman Catholic Diocese*, 991 N.E.2d at 666).

D. *Relevance of* Greystone

The parties discuss this court's *Greystone* decision in their briefs, and we wish to address its relevance to this case. In *Greystone*, the issue was "whether property damage caused by a subcontractor's faulty workmanship

is an 'occurrence' for purposes of a [CGL] policy." 661 F.3d at 1276. Homeowners had sued a general contractor, asserting defective construction by a subcontractor that had installed the foundation of the home. The claim was premised on the theory that the house was damaged due to a subcontractor's negligent design and construction of the home's soil-drainage and structural elements, which exposed the foundation to shifting soils. *Id.* Over time, soil expansion caused the foundation to shift, resulting in extensive damage to the upper living area. *Id.* The contractor sought coverage from its insurer. *Id.* We determined that some of the damages constituted an "occurrence" under the policy.

Although Colorado law applied, a significant portion of the opinion was not tied to Colorado law. Interpreting the policy, which was materially the same as the Policy here, this court followed the strong trend of state supreme court case decisions interpreting the term "occurrence" to encompass accidental damage to property resulting from poor workmanship. *Id.* at 1282-83 (collecting cases). The panel also relied on general principles of contract interpretation—such as construing the policy in accordance with its plain meaning and avoiding surplusage—which are the same principles under New York law and equally applicable here. In this regard, *Greystone* is relevant and helpful to our analysis in this case.[9]

9. *Greystone*, however, is inapplicable here to the extent it relied on Colorado law that varies from New York law. Colorado, for example, defines "accident" more narrowly—damages are accidental when they are "unanticipated" or "unforeseeable." *See Greystone*,

E. *Analysis*

The issue is whether the New York Court of Appeals would find that B&V's policy with Aspen covers a portion of the payments that B&V made to AEP to repair and replace the damaged JBRs. Our analysis concludes that it would, based on (1) the Policy's language and New York's rule against surplusage, (2) the history and development

---

661 F.3d at 1285 (citing *Union Ins. Co. v. Hottenstein*, 83 P.3d 1196, 1201 (Colo. App. 2003)). Because a contractor's "obligation to repair defective work is neither unexpected nor unforeseen," damage to the contractor's work arising from defective construction was not accidental. *Id.* at 1286. Applying Colorado law, *Greystone* concluded that such damages—i.e., to the home's soil-drainage and structural elements—were not a covered "occurrence" under the policy. *Id.* "Conversely, when a subcontractor's faulty workmanship causes unexpected property damage to otherwise *nondefective* portions of the builder's work, the policies provide coverage." *Id.* (emphasis added). *Greystone* defined "nondefective property" as "property that has been damaged as a result of poor workmanship." *Id.* at 1284. The damage to the home's upper living areas was thus a covered "occurrence."

New York law, by contrast, provides that damages are non-accidental "*only* when the insured *intended* the damages." *Cont'l Cas. Co.*, 609 N.E.2d at 510 (emphases added). Thus, even if damages were anticipated or foreseeable, they would still be accidental—unless the contractor intended that they occur. Greystone's definition of "accident," and its resulting distinction between defective and nondefective work, is thus linked to Colorado law that differs from New York's broader construction of the term "accident." In any event, counsel for B&V said at oral argument that "all of the damage [B&V] seek[s] in this case is to nondefective work," *see* Oral Arg. at 2:41-46, so any distinction between defective and nondefective work is immaterial here.

of CGL policies, (3) the trend among state supreme courts, and (4) the lack of New York appellate court decisions precluding a finding of "occurrence" under this particular Policy.[10]

1. Damage to the JBRs Was an "Occurrence" Under the Policy

We first address whether, under New York contract law, B&V is seeking payment from Aspen for a covered "occurrence"—the first step necessary for obtaining coverage under a CGL insurance policy. *See Greystone*, 661 F.3d at 1281. CGL insurance policies are contracts, *see Roman Catholic Diocese*, 991 N.E.2d at 671, which New York courts interpret in light of their plain meaning, *Callahan v. Carey*, 12 N.Y.3d 496, 909 N.E.2d 1229, 1233, 882 N.Y.S.2d 392 (N.Y. 2009). We start with the Policy terms and definitions, which are materially identical to the ISO's standard-form CGL policy. Under the Policy, an "occurrence" is an "accident . . . that results in 'Bodily Injury' or 'Property Damage' that is not expected or not intended by the 'Insured.'" An occurrence triggers coverage. We examine each part of this definition.

---

10. The dissent contends that in determining how the New York Court of Appeals would decide this case, "we must apply relevant New York case law," Dissent at 3. We agree. The dissent overlooks that this opinion draws from cases decided by the New York Court of Appeals to support its analysis, including cases defining "accident" for purposes of determining CGL policy coverage and providing principles of contract interpretation to understand CGL policy terms. For example, in *Viking Pump*, the New York Court of Appeals reaffirmed the key principle that contracts must be read to avoid rendering any provision surplusage.

a. Accidental damages

The Policy does not define "accident," but the New York Court of Appeals has explained that a CGL policy covers damages only when they were "unexpected and unintentional." *Cont'l Cas. Co.*, 609 N.E.2d at 510 (holding that these terms are to be construed narrowly as barring coverage "only when the insured intended the damages"); *see also Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 774 N.E.2d 687, 692, 746 N.Y.S.2d 622 (N.Y. 2002) ("Insurance policies generally require 'fortuity' and thus implicitly exclude coverage for intended or expected harms."). A policyholder might take a "calculated risk"—such as hiring a subcontractor—without "expecting" damages to occur. *See Cont'l Cas. Co.*, 609 N.E.2d at 510. "[I]n fact, people often seek insurance for just such circumstances." *Id.*

Whether or not B&V took a "calculated risk" by delegating work on the JBRs to a subcontractor, Aspen does not argue—nor does the record support—that B&V "expected or intended" MTI or any other subcontractor to cause damage. Nor is there evidence that B&V increased the likelihood of such damages through reckless cost-saving or other measures. *See Fuller*, 613 N.Y.S.2d at 155 (finding no "occurrence" where damages arose from "intentional cost-saving or negligent acts"). Thus, the damages at issue here satisfy the Policy's accidental requirement.[11]

11. We acknowledge that the definition of "occurrence" in the Policy at issue here differs slightly from the definition in ISO's standard-form CGL policy, but this difference is not substantive and

b. Property damage to a third party

The Policy covers costs arising from property damage.[12] "Property Damage" is defined as "physical injury to tangible property of a 'Third Party.'" ROA, Vol. 1 at 72. A "Third Party" is defined as "any company, entity, or human being other than an 'Insured.'" *Id.* The damage to the JBRs was physical injury to tangible property. Aspen argues, however, that the Policy designates AEP—the energy company that hired B&V to construct the JBRs—as an "Additional Insured," and thus AEP cannot be a third party. *See* Aplee. Br. at 45 (citing ROA, Vol. 7 at 1311). This argument fails.

Under the Policy, an "Insured" is defined as any entity listed as a "Named Insured" or designated as an "Additional Insured." The Policy lists B&V as the "Named Insured."[13] ROA, Vol. 1 at 63. Under Endorsement 33, AEP

---

is immaterial to our analysis. The Policy here defines "occurrence" as an accident that was not "expected or intended." The "expected or intended" language is part of the definition of "occurrence." Until 1986, standard-form CGL policies also included the "expected or intended" language as part of the definition of "occurrence." *See CGL Coverage Guide*, App. A: GL Policy Jacket Provisions, at 287. But because courts had been treating the language as an exclusion, in 1986 the ISO formally moved the language out of the "occurrence" definition and into the exclusions section of CGL policies. *See id.* App. B: 1986 Occurrence Form, at 297; *see also* French at 106. "This move, however, did not change the analysis of whether there has been an occurrence." French at 106.

12. The Policy also covers "bodily injury." *See* ROA, Vol. 1 at 81.

13. Endorsement 34 adds additional entities to the "Named Insured" list (e.g., Black & Veatch Europe Inc., Black & Veatch (UK) Limited, and Black & Veatch Thailand Limited). AEP is not listed.

is designated as an "Additional Insured," thereby adding AEP to B&V's existing insurance policy. *See id.* at 114. Granting one party additional insured status on another's CGL policy is a "common risk-shifting technique" used in construction contracts. Samir Mehta, *Additional Insured Status in Construction Contracts and Moral Hazard*, 3 Conn. Ins. L.J. 169, 170 (1997). But it does not mean the Policy precludes coverage of the damages at issue here.

First, AEP is an "Additional Insured" only with respect to liability for property damage "arising out of operations performed *by the Named Insured*." ROA, Vol. 1 at 114 (emphasis added). But here the work performed by a *subcontractor* (MTI), not by the "Named Insured" (B&V), caused the damages.[14]

Second, Endorsement 33 contains a "separation of insureds" condition, which provides that the Policy "applies separately to each Insured against whom claim is made or suit is brought." *Id.* Its purpose is to preserve coverage for damage claims made by one insured (here, AEP) against another (B&V). *See West Am. Ins. Co. v. AV&S*, 145 F.3d 1224, 1227 (10th Cir. 1998) (providing that under a "separation of insureds" condition, each insured is "entitled to have the [p]olicy construed as to it as if the [p]olicy were issued only as to it alone"); *see also Greaves v. Pub. Serv. Mut. Ins. Co.*, 5 N.Y.2d 120, 155 N.E.2d 390, 392, 181 N.Y.S.2d 489 (N.Y. 1959) (same). In other words, when AEP claimed damages against B&V, the separation

14. Endorsement 34 does not add MTI as another "named insured," and thus the endorsement is immaterial to our analysis.

of insureds clause rendered AEP a third party with respect to its claims for property damage against B&V. This understanding of the Policy aligns with common sense: The principle risk B&V faced as an EPC contractor, and thus a main reason for obtaining CGL insurance, was the potential for claims alleging damages made by the property owner—AEP.

c. Rule against surplusage

The foregoing discussion establishes that the property damage to the JBRs constitutes an "occurrence" under the Policy. Concluding otherwise would violate the New York Court of Appeal's rule against surplusage—a point the dissent ignores. In other words, Aspen's interpretation of "occurrence" as excluding the damages at issue here would render several Policy provisions meaningless in violation of New York contract interpretation rules. *See Roman Catholic Diocese*, 991 N.E.2d at 671.

i. The "Your Work" exclusion and "subcontractor exception"

The "Your Work" exclusion (listed as "Exclusion F") in the Policy excludes coverage for property damage to the insured's own completed work. ROA, Vol. 1 at 74 (providing that the Policy "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'"). The next sentence, however, provides an exception—the "subcontractor exception"—restoring some coverage. *Id.* It states that the "Your Work" 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." *Id.*

Aspen's interpretation of "occurrence" would render these provisions superfluous in violation of New York law requiring that CGL policies be construed "in a way that affords a fair meaning to all of the language . . . in the contract and leaves no provision without force and effect." *Roman Catholic Diocese*, 991 N.E.2d at 671-72 (quotations omitted) (applying rule against surplusage to CGL policies); *see Viking Pump*, 52 N.E.3d at 1154. It would be redundant to say the Policy does not cover property damage to B&V's own work (as stated in the "Your Work" exclusion) if the definition of "occurrence" categorically and preemptively precludes coverage for such damages in the first instance.[15]

Similarly, there would be no reason for the Policy to state that it covers damages to the insured's work when "the damaged work . . . was performed . . . by a subcontractor" if the basic insuring agreement does not encompass these damages. *See* ROA, Vol. 1 at 74; *see also Greystone*, 661 F.3d at 1289 ("[T]he only way [the 'Your Work' exclusion and 'subcontractor exception' have] effect is if we find that physical injury caused by poor workmanship . . . may be an occurrence under standard CGL policies."); *see also Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 12 (Tex. 2007)

15. Again, the Policy defines "Your Work" as work performed either by B&V or its subcontractors. The JBRs are thus B&V's "work" under the Policy, even though MTI engineered and constructed them.

("By incorporating the subcontractor exception into the 'your-work' exclusion, the insurance industry specifically contemplated coverage for property damage caused by a subcontractor's defective performance."); *Great Am. Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp. 2d 1275, 1282 (D. Utah 2006) ("[I]t is undeniable that excluding faulty subcontractor work from the definition of 'occurrence' would reduce the operation of the subcontractor exception so drastically that the language would virtually cease to be of any meaningful effect.")

Aspen argues B&V cannot rely on the "subcontractor exception" because—as an exception to an exclusion—it cannot *create* coverage that does not already exist under the Policy's basic insuring agreement. But as we have explained, the "subcontractor exception" does not create coverage, the Policy's basic insuring agreement does. Its definition of "occurrence" encompasses damage to B&V's own work arising from faulty subcontractor workmanship. The "Your Work" exclusion and "subcontractor exception," which would lose their meaning under Aspen's definition of "occurrence," only provide further evidence that our reading of the Policy is correct. Neither Aspen nor the district court adequately squares their position with New York's rule against surplusage.

ii. "Endorsement 4"

Aspen's interpretation of an "occurrence" would also render "Endorsement 4" surplusage. As described above, "Endorsement 4" pertains to ongoing work and excludes coverage for property damage to "*that particular part* of

real property" on which B&V or its subcontractors were actively working. *See* ROA, Vol. 1 at 83 (emphasis added). If faulty workmanship resulting in damage to B&V's own work could never trigger coverage as an "occurrence," this part of "Endorsement 4" would be meaningless. In other words, there would be no reason for "Endorsement 4" to exclude coverage only for damage to a "particular part" of the JBRs if the Policy could never cover damage to the insured's work in the first instance.

* * * *

In sum, the property damages at issue were caused by an "occurrence," as that term is defined in the Policy, because (1) B&V neither intended nor expected that its subcontractor would perform faulty work, so the damages were accidental, (2) the damages involved physical harm to the property of a third party, and (3) a contrary conclusion would render various Policy provisions meaningless in violation of New York's rule against surplusage.

2. History of CGL Policies Supports Finding of "Occurrence"

The history of standard-form CGL policies further demonstrates that the Policy covers the costs arising from the property damages here. As described in greater detail above, early versions of the "Your Work" exclusion precluded coverage for property damages due to the faulty work of the general contractor or its subcontractor. By 1976, general contractors had become more reliant on subcontractors and were frustrated by the lack of

coverage offered by CGL policies for damages caused by subcontractor's work. Plitt § 129:19. In response, the ISO narrowed the exclusion by removing the reference to subcontractors and thus implicitly extending coverage for contractors when the property damage alleged was caused by the work of subcontractors. *Id.*

After courts failed to recognize the importance of this language change, the ISO attempted to clarify its 1976 revisions by adding the "subcontractor exception" to standard-form CGL policies. *See id.*; Bruner § 11:259; French at 108 (explaining this change was driven by agreement between contractors and insurers that CGL policies should cover defective construction claims "so long as the allegedly defective work had been performed by a *subcontractor* rather than the policyholder itself" (quoting Stempel at § 14.13[D]) (emphasis added)). Aspen and the cases it cites, which we discuss below, ignore these changing dynamics and ISO's own explanation that the 1986 changes clarified that CGL policies covered "*damage to*, or *caused by*, a subcontractor's work after the insured's operations are completed." ISO 1986 Circular (emphases added).

3. Trend Among State Supreme Courts Supports Finding of "Occurrence"

State supreme courts that have considered the issue since 2012 have reached "near unanimity" that "construction defects *can* constitute occurrences and contractors have coverage under CGL policies at least for the unexpected damage caused by defective workmanship

done by subcontractors." French at 122-23 (emphasis added); *see* Thomas E. Miller, et al., § 6.02 *Third Party Coverage, Handling Construction Defect Claims: Western States* 123 (2018) ("The majority of state supreme courts that have decided whether inadvertent faulty workmanship is an accidental 'occurrence' potentially covered under the CGL policy have ruled that it can be an 'occurrence.'") ("Miller"). According to Miller, 21 state supreme courts have adopted this position, with some of these courts reversing their own contrary precedent. Miller at § 6.02; *see, e.g., Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470, 745 S.E.2d 508, 517 (W. Va. 2013) (reversing court's precedent precluding faulty workmanship from constituting an "occurrence," finding it "outdated").

Before 2012, state supreme courts adopted "wildly" different approaches. *See* Miller at § 6.02. A minority of states—14, according to Miller—had determined that "defective workmanship (i.e., construction defects) do[es] not constitute an 'occurrence.'" *Id.* But at least one, New Jersey, has since migrated to the majority view that faulty workmanship by a subcontractor can be an occurrence under CGL insurance policies. *See Cypress Point Condo. Ass'n v. Adria Towers, LLC*, 226 N.J. 403, 143 A.3d 273, 287 (N.J. 2016). Miller also notes that some of these state decisions finding no "occurrence" have been superseded by local statutes requiring CGL policies issued in those states to include coverage for defective workmanship. Miller at § 6.02; *see, e.g., Essex Ins. v. Holder*, 370 Ark. 465, 261 S.W.3d 456, 460 (Ark. 2008) (holding that defective construction resulting in damage only to the insured's work product itself is foreseeable and thus not

an "occurrence" under the CGL policy), *superseded by statute*, Ark. Code Ann. § 23-79-155(a)(2) (2011) (requiring CGL insurance policies to define "occurrence" to include "[p]roperty damage or bodily injury resulting from faulty workmanship").[16]

4. New York Intermediate Appellate Court Decisions Do Not Preclude Coverage

The Policy language and other state supreme court decisions support a finding of "occurrence." Would the

16. The dissent criticizes the majority opinion for "'turning to the law of other jurisdictions' to determine what the New York Court of Appeals 'would probably' decide in this case." Dissent at 4 (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 389, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1976)) (brackets omitted). But *Lehman* does not preclude us from considering other jurisdictions in attempting to predict how the New York Court of Appeals would decide this case. Moreover, we are aware of no rule that would prevent the New York Court of Appeals from considering—as it has before and as we have here—"how CGL policies are generally drafted, scholarly sources, and persuasive authority from courts applying the law of other jurisdictions," *id.* at 4, to assist in determining an issue on which it has not ruled. *See, e.g., Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 708 N.E.2d 167, 169, 685 N.Y.S.2d 411 (N.Y. 1996) (discussing standard form CGL policy); *Cont'l Cas. Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 609 N.E.2d 506, 508, 510-11, 593 N.Y.S.2d 966 (N.Y. 1993) (same); *Davis v. S. Nassau Cmty. Hosp.*, 26 N.Y.3d 563, 26 N.Y.S.3d 231, 46 N.E.3d 614, 622 (N.Y. 2015) (relying on legal treatise); *Viking Pump*, 52 N.E.3d at 1152 (relying on law review articles); *People v. Leonard*, 19 N.Y.3d 323, 970 N.E.2d 856, 860, 947 N.Y.S.2d 821 (N.Y. 2012) (relying on supreme court decisions from other states); *In re Daniel D.*, 27 N.Y.2d 90, 261 N.E.2d 627, 630, 313 N.Y.S.2d 704 (N.Y. 1970) (same).

New York Court of Appeals agree? We think it would, though it has yet to address this question. Where, as here, "jurisdiction rests solely on diversity of citizenship and there is no controlling decision by the highest court of a state, a decision by an intermediate court should be followed by the Federal court, absent convincing evidence that the highest court would decide otherwise." *Greystone*, 661 F.3d at 1282 (quotations omitted). We therefore consider decisions of New York intermediate appellate courts interpreting standard-form CGL policies and conclude they do not preclude coverage under the Policy here.[17]

Aspen relies on decisions from New York's intermediate appellate courts, contending they preclude coverage for the damages at issue here. But these cases (1) did not involve or failed to analyze the "subcontractor exception," (2) involved CGL policies that predated the critical revisions ISO made in 1986, (3) relied on cases that have since been

17. B&V suggests the Policy is different from the standard-form CGL policy, and thus New York cases interpreting the standard policy are inapplicable. *See* Aplt. Br. at 10 (stating that the parties' negotiation resulted in a "manuscript policy," meaning that it "contains negotiated terms and is not a standard ISO form policy"); *see also id.* at 27. But as Aspen points out, B&V never explains how the Policy's language differs from the standard language. *See* Aplee. Br. at 32; *see also Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*, No. 12-2350-SAC, 2016 U.S. Dist. LEXIS 159679, 2016 WL 6804894, at *8 (D. Kan. Nov. 17, 2016) ("The parties do not argue that [the 'occurrence'] definition is unusual or atypical for a CGL policy."). We find that the Policy's language is materially the same as the language found in ISO's standard-form CGL policies. We nevertheless agree with B&V that New York case law does not foreclose coverage.

overturned, (4) involved faulty work by a contractor rather than a subcontractor, or (5) contained some combination of the above. These distinguishing factors provide ample "convincing evidence" that New York's Court of Appeals would decline to find no "occurrence" under the Policy here. *See id.* The remainder of this section discusses—and distinguishes—the cases on which Aspen relies.[18]

a. George A. Fuller Co. v. U.S. Fiduciary & Guaranty Co.

Aspen relies heavily on *Fuller* for the proposition that CGL insurance policies are "not intended to insure against faulty workmanship or construction" and thus cannot cover the damages at issue here. *See* Aplee. Br. at 21. But *Fuller* is inapplicable here, and it relied on cases that involved CGL policies drafted before ISO's 1986 changes.

---

18. The dissent refers to New York intermediate appellate court decisions carrying "precedential weight," Dissent at 3, which they do in appropriate circumstances. But a court decision does not necessarily carry precedential weight when it is materially distinguishable from the case at hand. As we have shown, the New York cases that Aspen relies on, starting with *Fuller*, contain no discussion of CGL policies that contain a "subcontractor exception." Moreover, as the New York Court of Appeals has said, Appellate Division decisions "are certainly not binding upon this court." *People v. Roche*, 45 N.Y.2d 78, 379 N.E.2d 208, 216, 407 N.Y.S.2d 682 (N.Y. 1978). Nor are we required to follow such decisions when "other authority convinces us that the state supreme court would decide otherwise." *Daitom, Inc., v. Pennwalt Corp.*, 741 F.2d 1569, 1574 (10th Cir. 1984); *see also Comm'r v. Estate of Bosch*, 387 U.S. 456, 465, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967).

Fuller involved a coverage dispute over damages to a building that a developer had hired a contractor to build. 613 N.Y.S.2d at 154. Due to a subcontractor's faulty workmanship, the building suffered water damage. *Id.* The contractor's CGL insurance carrier refused to pay the claim, and the contractor sued. *Id.* The question was whether the contractor's faulty workmanship constituted an "occurrence," which was defined under the policy as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Id.* at 153. The court determined the damages were not an "occurrence" because they were not accidental but rather had been caused by "intentional cost-saving" acts. *Id.* at 155. *Fuller* is inapposite here for four reasons.

First, *Fuller* does not address the issue here—whether damages caused by a subcontractor are covered by a CGL policy that expressly provides coverage for damages to an insured's work arising from a subcontractor's faulty workmanship. The policy in *Fuller* excluded damages to "that particular part of any property that must be restored, repaired or replaced" due to work that was performed incorrectly either by "you [the insured] or on your behalf [by a subcontractor]." *Id.* at 153. The court thus concluded that the CGL policy in that case did not intend to cover damages to an insured's own work, regardless of whether the contractor or its subcontractor caused the damages. The dissent reads *Fuller* to mean that *any* CGL policy employing the standard definition of "occurrence" necessarily excludes subcontractor-caused damages to an insured's own work. *See* Dissent at 1. But this is overly broad. *Fuller* says only that *the*

particular policy in that case "d[id] not insure against faulty workmanship in the work product itself." *Fuller*, 613 N.Y.S.2d at 155. The dissent takes this single passage out of context and concludes that New York intermediate appellate courts have held that the damages at issue here can never be an occurrence, *see* Dissent at 2, ignoring this critical distinction between the two cases.[19]

Second, *Fuller* relied on two cases from New York's intermediate appellate courts to support its statement that CGL policies are not intended to cover damages to the insured's own defective work product—*Village of Newark v. Pepco Contractors, Inc.*, 99 A.D.2d 661, 472 N.Y.S.2d 66 (N.Y. App. Div. 1984), *aff'd*, 62 N.Y.2d 772, 465 N.E.2d 1261, 477 N.Y.S.2d 325 (N.Y. 1984), and *Parkset Plumbing & Heating Corp. v. Reliance Ins. Co.*, 87 A.D.2d 646, 448 N.Y.S.2d 739 (N.Y. App. Div. 1982). But both of these cases were decided before 1986, when the ISO clarified that standard-form CGL policies covered insureds for property damage to—or caused by—subcontractors' work.

Third, *Fuller*'s primary rationale for finding no "occurrence" is absent here. *Fuller* held that the damages at issue were not accidental but rather resulted from intentional cost-cutting measures and thus could not

19. The dissent also reads too much into this opinion's discussion of *Fuller* when it says "the majority concludes the *Fuller* rule only applies where the CGL policy does not include a Subcontractor Exception, even though no New York court has limited the rule in this way." Dissent at 3. Our holding is not so prescriptive. We conclude only that *Fuller* does not preclude the damages at issue here from constituting a coverage-triggering "occurrence" under the Policy.

constitute an "occurrence." Here, Aspen does not argue—nor does the record suggest—that the damage to the JBRs arose from any intentional or negligent acts by B&V or MTI.

Fourth, Aspen cites *Fuller* to argue that B&V's interpretation would transform the Policy into a surety for the performance of B&V's work. Aplee. Br. at 21; *see Fuller*, 613 N.Y.S.2d at 155 (holding that the CGL policy was not "intended to insure [the general contractor's] work product"). But allowing CGL policies to cover damage from subcontractor-caused construction defects would not convert insurance policies into surety performance bonds. *See* French at 139-40; *see also Greystone*, 661 F.3d at 1288-89. Both insurance policies and performance bonds are used to spread risk, but they differ in fundamental ways. An insurance policy spreads the contractor's risk. A performance bond guarantees completion of the contract upon the contractor's default. *See* French at 139-40 ("Performance bonds protect the property owner, while liability insurance protects the contractor."). The "principal purpose[]" of insurance is to transfer financial responsibility from the policyholder to an insurer for damage caused by the policyholder's negligence. *Id.* at 140. Allowing CGL policies to cover construction defects caused by a subcontractor comports with the purpose of liability insurance—to protect the contractor, not the property owner.

b. Other New York cases

Aspen also cites *Baker Residential Limited Partnership v. Travelers Insurance Co.*, 10 A.D.3d 586, 782 N.Y.S.2d 249, 250 (N.Y. App. Div. 2004), for the proposition that an "occurrence" happens under CGL policies only when damage to property is "distinct from the plaintiffs' own work product." *See* Aplee. Br. at 23. The *Baker* opinion, which consists of two paragraphs, cites only two cases. The first, *Fuller*, is inapt for the reasons explained above. The second, *Pavarini Construction Co. v. Continental Insurance Co.*, relies solely on *Fuller. See* 304 A.D.2d 501, 759 N.Y.S.2d 56, 57-58 (N.Y. App. Div. 2003). Neither of these opinions provides any discussion or guidance on interpreting policies with a "subcontractor exception."

Aspen next cites *Ohio Casualty Insurance Co. v. Lewis & Clinch, Inc.*, No. 7:12-CV-1872, 2014 U.S. Dist. LEXIS 159720, 2014 WL 6078572, at *9 (N.D.N.Y Nov. 13, 2014), for the same proposition—that damage to the insured's own work is not a covered "occurrence" under CGL policies. Once again, however, *Ohio Casualty* relied entirely on the inapposite language in *Fuller. See id. Ohio Casualty* is also an unpublished case from a federal district court rather than a New York state court. Further, it did not involve a subcontractor's faulty workmanship.

Finally, Aspen provides a three-page string cite of cases from New York's intermediate appellate courts and federal district courts, but these cases are unavailing for largely the same reasons addressed above. Every one of

the 15 cases relied on *Fuller*. *See, e.g., Eurotech Constr. Corp. v. QBE Ins. Corp.*, 137 A.D.3d 605, 26 N.Y.S.3d 703, 703 (N.Y. App. Div. 2016); *Nat'l Union Fire Ins. Co. of Pittsburgh v. Turner Constr. Co.*, 119 A.D.3d 103, 986 N.Y.S.2d 74, 77 (N.Y. App. Div. 2014) ("*National Union*"); *Maxum Indem. Co. v. A One Testing Labs., Inc.*, 150 F. Supp. 3d 278, 284 (S.D.N.Y. 2015). One of the cases, *Exeter Building Corp. v. Scottsdale Insurance Co.*, 79 A.D.3d 927, 913 N.Y.S.2d 733, 735 (N.Y. App. Div. 2010), did not cite to *Fuller* directly but rather cited to *Baker*, which in turn relied on *Fuller*.

Another of Aspen's aforementioned cases, *National Union*, relied heavily on what used to be the seminal case regarding the issue of whether CGL policies cover construction defects—the New Jersey Supreme Court's opinion in *Weedo v. Stone-E-Brick, Inc*, 81 N.J. 233, 405 A.2d 788 (N.J. 1979). *See National Union*, 986 N.Y.S.2d at 77; *see also* French at 117. But *Weedo* has been overturned. *Weedo* held that CGL policies "do not cover an accident of faulty workmanship but rather faulty workmanship which causes an accident." 405 A.2d at 796. The New Jersey Supreme Court "effectively overruled" *Weedo* in *Cypress Point*, holding that damages caused by the subcontractor's faulty workmanship *can* constitute property damage under CGL policies. *See* French at 119 ("For numerous reasons, the *Weedo* decision is obsolete and of little value today in analyzing whether construction defects can constitute occurrences.").[20]

20. In *Revisiting Construction Defects*, French further explains why *Weedo* is obsolete:

In sum, we conclude that New York intermediate appellate court decisions would not persuade the New York Court of Appeals to find that the damages at issue here were not an "occurrence"—particularly in the face of the other reasons discussed above. The dissent submits that if there is "any debate regarding the clarity of New York Law, we should certify the question." Dissent at 5 n.6. In *Lehman*, the Supreme Court said that when a federal court faces a novel state law question in an area where

---

> One, the [*Weedo*] court did not analyze the definition of "occurrence" in the policy at issue and did not even address whether the faulty stucco work constituted an occurrence.
>
> Two, the court did not analyze the definition of "property damage" in the policy at issue and did not address whether the faulty stucco work was property damage or caused property damage.
>
> Three, [a 1971 law review article] on which the court relied, did not analyze or address the issues of whether construction defects constitute occurrences or property damage. Instead, [the] article focused on the business risk exclusions contained in the 1966 CGL policy form, and [] then offered . . . unsupported conclusions regarding the intent of the exclusions.
>
> Four, . . . the business risk exclusions at issue in the case were redrafted in 1986 to provide much narrower reductions in coverage than the earlier versions of such exclusions.

French at 119 (paragraph breaks added) (citations omitted).

state law is highly unsettled, it *may* be appropriate to certify the question to the state's highest court. 416 U.S. at 390-91 ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory.") As noted in *Lehman*, whether to certify a question "rests in the sound discretion of the federal court." *Id.* at 391. We have declined to do so here.

5. Second Circuit Case Law is Distinguishable

Aspen also relies on a Second Circuit decision, *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98 (2d Cir. 1993), which applied New York law to a construction dispute. *See* Aplee. Br. at 22. In *J.Z.G.*, a real estate developer sued a contractor for building roads at the wrong elevation and location. 987 F.2d at 100. The contractor sought coverage for damage to the roads themselves. *Id.* The Second Circuit held the contractor's CGL policy did not encompass the road damage, explaining that "this circuit has held that a CGL policy did not provide coverage for a claim against an insured for the repair of faulty workmanship that damaged only the resulting work product." *Id.* at 102-03.

J.Z.G. is not persuasive here. First, it did not involve faulty subcontractor work. Second, it relied on cases and commentary either predating or failing to take into account ISO's 1986 changes.[21] In particular, it relied on the

21. As explained above, in 1986, ISO revised the standard CGL insurance policy to clarify—in ISO's words—that the policy "cover[ed] . . . damage to, or caused by, a subcontractor's work after the insured's operations are completed." ISO 1986 Circular.

following passage from a 1971 law review article: "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." *Id.* (quoting Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations-What Every Lawyer Should Know*, 50 Neb. L. Rev. 415, 441 (1971)).

But this article analyzed the business risk exclusion contained in the ISO's 1966 standard-form CGL policy, which *precluded* coverage for damage to construction projects caused by subcontractors. *See* French at 107, 118. By 1986, the ISO had acceded to contractors' demands to provide coverage for faulty subcontractor work and replaced that exclusion with the current language. Commentators have noted that this article is outdated and "of little value today in understanding . . . whether construction defects can constitute occurrences." *Id.* at 119. "Following [ISO's] 1986 changes . . . , one would expect that . . . [the] 1971 law review article would be cited by courts only as a historical note regarding the evolution of the policy language and law in this arena." *Id.* "Surprisingly, however, . . . [the] article continue[s] to be relied upon by some courts from time to time, particularly in decisions where the court misinterprets the issue before it." *Id.* The analysis underlying *J.Z.G.* is therefore outdated and of no use here.

III. CONCLUSION

Under the Policy, the damages at issue here were caused by a coverage-triggering "occurrence." First, the damages were accidental and resulted in harm to a third-party's property, thus meeting the Policy's definition of an "occurrence." Second, the district court's interpretation would violate New York's rule against surplusage by rendering the "subcontractor exception" meaningless. Third, the changes ISO has made to standard-form CGL policies demonstrate that the policies can cover the damages at issue here. Fourth, the overwhelming trend among state supreme courts has been to recognize such damages as "occurrences." Fifth, New York intermediate appellate decisions are distinguishable, outdated, or otherwise inapplicable. We predict the New York Court of Appeals would decline to follow these decisions and instead would join the clear trend among state supreme courts holding that damage from faulty subcontractor work constitutes an "occurrence" under the Policy. For the foregoing reasons, we vacate the district court's summary judgment decision and remand for reconsideration in light of this opinion.[22]

22. We grant Appellees' August 4, 2017 motion for leave to file additional authority.

BRISCOE, Circuit Judge, dissenting.

I

I respectfully dissent because I believe New York law forecloses insurance coverage for damage to the work product of an insured, which is precisely the type of damage at issue here. Therefore, because I agree with the district court's conclusion that "New York law's governing definition of 'occurrence' does not recognize liability coverage" in this instance, D. Ct. Order at 56, I would affirm the district court.

The rule among intermediate appellate courts in New York has been that a CGL policy that includes a standard definition of "occurrence":

> does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product.

George A. Fuller Co. v. U.S. Fid. & Guar. Co., 200 A.D.2d 255, 613 N.Y.S.2d 152, 155 (N.Y. App. Div. 1st Dep't. 1994).[1]

1. *See also Eurotech Constr. Corp. v. QBE Ins. Corp.*, 137 A.D.3d 605, 26 N.Y.S.3d 703 (N.Y. App. Div. 1st Dep't. 2016); *Bonded Concrete, Inc. v. Transcon. Ins. Co.*, 12 A.D.3d 761, 784 N.Y.S.2d 212, 213 (N.Y. App. Div. 3d Dep't. 2004); *Baker Residential Ltd. P'ship v. Travelers Ins. Co.*, 10 A.D.3d 586, 782 N.Y.S.2d 249, 250 (N.Y. App. Div. 3d Dep't. 2004).

In recent years, New York courts have applied this rule to hold that the insured can only recover when the "damage caused by faulty workmanship [is] to something other than [to] the work product." *I.J. White Corp. v. Columbia Cas. Co.*, 105 A.D.3d 531, 964 N.Y.S.2d 21, 23 (N.Y. App. Div. 1st Dep't. 2013) (coverage applied because the damage was to cakes, not the freezer that the insured built). Further, intermediate state appellate decisions have held that even when a subcontractor caused the damage, an insured general contractor cannot be covered for damage to its own work product because it is "responsible for the entire project[,] and all work done by [any] subcontractor was done on" behalf of the general contractor. *Pavarini Constr. Co. v. Cont'l Ins. Co.*, 304 A.D.2d 501, 759 N.Y.S. 2d 56, 57 (N.Y. App. Div. 1st Dep't. 2003); *see also Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Turner Constr. Co.*, 119 A.D.3d 103, 986 N.Y.S.2d 74, 77 (N.Y. App. Div. 1st Dep't. 2014).

New York intermediate appellate courts have therefore developed a rule that a CGL policy using the standard definition of "occurrence" cannot cover damage to the insured's own work product, even when errors by the insured or its subcontractors cause the damage. Applying that rule to this case, there was no "occurrence"—which would trigger coverage—because the damage was to the jet bubbling reactors, which were B&V's own work. Because B&V has not satisfied its "initial burden of proving that the damage was the result of an 'accident' or 'occurrence,'" we need not proceed to examine whether an exclusion and an exception to that exclusion apply. *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 774 N.E.2d 687, 692, 746 N.Y.S.2d 622 (N.Y. 2002).

Given this analysis, I would affirm the district court.

II

The majority, however, reverses the district court. In doing so, the majority concludes there is an insured "occurrence" in this case, in part because it does not apply the New York cases. It instead determines that the rule applied in *Fuller, Pavarini, I.J. White* and other New York appellate cases is "outdated" and inapplicable to this case because the rule's logic preceded the Insurance Services Office, Inc.'s 1986 revisions to the standard CGL policies, Op. at 37, making the cases "materially distinguishable." *Id.* at 29 n.19. In other words, the majority concludes the *Fuller* rule only applies where the CGL policy does not include a Subcontractor Exception, even though no New York court has limited the rule in this way. *See* D. Ct. Order at 31 (concluding there is no indication in New York law that a Subcontractor Exception would alter New York law, and noting that an unpublished federal district court case involving a Subcontractor Exception "does not reflect any argument or discussion of this exception as having the effect of modifying New York's law") (citing *Ohio Cas. Ins. Co. v. Lewis & Clinch, Inc.*, No. 7:12-CV-1872 (GTS/TWD), 2014 U.S. Dist. LEXIS 159720, 2014 WL 6078572 (N.D.N.Y. Nov. 13, 2014)).[2]

2. *See also Thruway Produce, Inc. v. Mass. Bay Ins. Co.*, 114 F. Supp. 3d 81, 97 (W.D.N.Y. 2015) (denying coverage, despite a Subcontractor Exception); *Aquatectonics, Inc. v. Hartford Cas. Ins. Co.*, No. 10-CV-2935 (DRH) (ARL), 2012 U.S. Dist. LEXIS 41185, 2012 WL 1020313, at *8 (E.D.N.Y. Mar. 26, 2012) (relying on *Fuller* to deny coverage, despite a Subcontractor Exception).

I conclude, however, that in declining to apply the rule that New York's intermediate appellate courts have applied we exceed our proper role as a court of review in a diversity action. Our role is to determine how the New York Court of Appeals would decide this case. To accomplish this task, we must apply relevant New York case law. If the New York courts have held that damage to the insured's own work product is not an "occurrence," even if the damage results from a subcontractor's error, it is not our role to tell the New York courts that their rulings do not carry any precedential weight or are limited to their facts.

Instead, in the circumstances presented here, where "there is no controlling decision by the highest court of a state, a decision by an intermediate court should be followed by the Federal court, absent convincing evidence that the highest court would decide otherwise." *United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 957 (10th Cir. 2011) (quotation omitted). The majority, however, believes we *do* have convincing evidence that the New York Court of Appeals would not apply the *Fuller* rule to a CGL policy with a Subcontractor Exception. The majority reviews extrinsic evidence about how CGL policies are generally drafted, scholarly sources, and persuasive authority from courts applying the law of other jurisdictions. Armed with these authorities, the majority "predict[s] the New York Court of Appeals would decline to follow [the *Fuller* rule] and instead would join the clear trend among state supreme courts holding that damage from faulty subcontractor work constitutes an 'occurrence.'" Op. at 37.

This is a bridge too far. In reaching its conclusion, the majority takes the sort of step the Supreme Court has criticized by "turn[ing] to the law of other jurisdictions" to determine what the New York Court of Appeals "would probably" decide in this case. *Lehman Bros. v. Schein*, 416 U.S. 386, 389, 94 S. Ct. 1741, 40 L. Ed. 2d 215 (1974). This might be acceptable if existing New York law were "difficult or uncertain." *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1235 (10th Cir. 2012) (quotation omitted). But that is not the case here. It is not difficult to ascertain how New York courts would decide the issues presented here—nor does the majority say it would be difficult. The majority merely attempts to distinguish New York case law, and then describes New York law as if "this case apparently raises an issue of first impression." *Walker v. BuildDirect.com Techs., Inc.*, 733 F.3d 1001, 1005 (10th Cir. 2013).[3]

Even assuming, *arguendo*, that we could legitimately distinguish Fuller and its progeny, meaning there are "no controlling precedents," *Elkins v. Moreno*, 435 U.S. 647, 662, 98 S. Ct. 1338, 55 L. Ed. 2d 614 (1978),[4] and "a state court has not yet had the opportunity to interpret the pertinent" question, *Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1119 (10th Cir. 2008) (quotation omitted),[5]

---

3. *Certified question answered*, 2015 OK 30, 349 P.3d 549 (Okla. 2015).

4. *Certified question answered sub. Nom., Toll v. Moreno*, 284 Md. 425, 397 A.2d 1009 (Md. 1979).

5. *Certified question answered*, 287 Kan. 450, 196 P.3d 1162 (Kan. 2008), *opinion after certified question answered*, 562 F.3d 1240 (10th Cir. 2009).

I do not believe we should exercise our discretion to decide how the New York Court of Appeals would rule.[6] Rather, if there are truly no New York cases to guide us, certifying the question to the New York Court of Appeals acknowledges that "[w]hen federal judges [outside New York] attempt to predict uncertain [New York] law, they act . . . as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.*, 416 U.S. at 391. In other words, I do not believe federal courts should predict what a state court will likely do, without any state guidance, because "a State can make just the opposite [determination of what the federal court predicts] her law" to be. *Id.* at 389.[7]

Therefore, even if New York law were distinguishable—which, as stated above, I do not believe it is—I would not reverse the district court, but would certify the question to the New York Court of Appeals.

---

6. The majority is correct that, as an initial matter, we are tasked with discerning what the New York Court of Appeals would decide if this case came before it. Op. at 9 n.7 (citing *Bird v. W. Valley City*, 832 F.3d 1188, 1199 (10th Cir. 2016)). Yet, if—hypothetically—a review of New York cases does not indicate what the New York Court of Appeals would likely decide, it is not our place to guess about the result. Though the majority portrays this dissent as treating the two forms of analysis interchangeably, *see id.*, I emphasize that I believe we can discern how the New York Court of Appeals would rule based on existing New York case law. But if there is any debate regarding the clarity of New York law, we should certify the question.

7. The parties have not moved to certify, but it is within our authority to certify *sua sponte*. *See State Farm Mut. Auto. Ins. Co. v. Fisher*, 609 F.3d 1051, 1058 (10th Cir. 2010).

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, FILED NOVEMBER 17, 2016

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

No. 12-2350-SAC

BLACK & VEATCH CORPORATION,

Plaintiff,

v.

ASPEN INSURANCE (UK) LTD., *et al.*,

Defendants.

November 17, 2016, Decided
November 17, 2016, Filed

MEMORANDUM AND ORDER

The case comes before the court on four pending motions for partial summary judgment, two by the plaintiff Black & Veatch Corporation ("B&V"), (Dk. 283) and (Dk. 298), and two by the defendants, Aspen Insurance (UK) Ltd. ("Aspen") and Lloyd's Syndicate 2003 ("Lloyd's") (collectively as "defendants" or "liability insurers"), which are a motion for partial summary judgment on the coverage issues (Dk. 296) and a motion for partial summary judgment on the attachment and

quantum issues (Dk. 309). B&V has filed a motion for leave to file a sur-reply (Dk. 318) in response to the defendants' motion for partial summary. To say that the motions have been thoroughly briefed would be an understatement. They span hundreds of pages with boxes of exhibits. Nonetheless, the court has reviewed all matters submitted and arguments presented, including B&V's requested sur-reply (Dk. 318) and the defendants' response (Dk. 319). And though all arguments and authorities have been considered and weighed at some expense in time and effort, this order will address only those which are directly relevant to the immediate disposition here.

The case involves a relatively straightforward factual setting. The plaintiff B&V is a global engineering, consulting, and construction company. It is suing its first layer excess umbrella liability insurer for claimed coverage under a manuscript commercial general liability ("CGL") policy for its liability for damages to internal components of seven Jet Bubble Reactors (JBRs) which B&V engineered, procured and constructed as wet flue gas desulfurization systems for coal-fired boilers. The litigation of this case has been contentious and extensive. The parties dispute numerous terms of the manuscript policy and offer widely varying interpretations of these terms. Thus, the issues are numerous and complex. Simply put, the parties' summary judgment filings ask the court to interpret and apply the manuscript policy's different terms in deciding claims amounting to millions of dollars.

Appendix B

Procedural Matters

"Summary judgment is appropriate only if 'the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law.'" *Tolan v. Cotton*, U.S., 134 S.Ct. 1861, 1866, 188 L.Ed.2d 895 (2014)(quoting Fed. R. Civ. P. 56(a)). A factual dispute is "material" only if it "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). A "genuine" factual dispute requires more than a mere scintilla of evidence in support of a party's position. *Id.* at 252.

The moving party has the initial burden of showing "the absence of a genuine issue of material fact," and, if carried, the non-moving party then "must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof." *National American Ins. Co. v. American Re-Insurance Co.*, 358 F.3d 736, 739 (10th Cir. 2004) (internal quotation marks and citation omitted). At the summary judgment stage, the court is not to be weighing evidence, crediting some over other, or determining the truth of disputed matters, but only deciding if a genuine issue for trial exists. *Tolan*, 134 S. Ct. at 1866. The court performs this task with a view of the evidence that favors most the party opposing summary judgment. *Id.* Summary judgment may be granted if the nonmoving party's evidence is merely colorable or is not significantly probative. *Liberty Lobby*, 477 U.S. at 250-51. Essentially, the inquiry is "whether the evidence presents a sufficient

disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52.

A procedural matter deserves some attention. The court's time spent on these summary judgment proceedings was unnecessarily extended by the parties' failure to comply with the letter and the spirit of the district's rules governing summary judgment filings. Specifically, D. Kan. Rule 56.1(a) and (b) require memoranda filed in summary judgment proceedings to begin with a section that contains a "concise statements of material facts." Unfortunately, what the parties submitted here was neither concise nor just statements of material fact. Instead, the parties argued extensively and repeatedly over what conclusions and inferences should be properly drawn from these facts. The court will not extend this order with the all too many instances of these violations other than to say that both sides were guilty.

Nonetheless, because of the egregious nature of the violations in this case, the court will set out the relevant portions of the governing rule below, make a few general comments, and then summarily enforce these plain provisions without further discussion later:

> **(a) Supporting Memorandum**. The memorandum or brief in support of a motion for summary judgment must begin with a section that contains a concise statement of material facts as to which the movant contends no genuine issue exists. The facts must be numbered and must refer with particularity to those

portions of the record upon which movant relies. All material facts set forth in the statement of the movant will be deemed admitted for purpose of the summary judgment unless specifically controverted by the statement of the opposing party.

(b) Opposing Memorandum.

(1) A memorandum in opposition to a motion for summary judgment must begin with a section containing a concise statement of material facts as to which the party contends a genuine issue exists. Each fact in dispute must by numbered by paragraph, refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, state the number of movant's fact that is disputed.

(2) If the party opposing summary judgment relies on any facts not contained in the movant's memorandum, that party must set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by section (a), above. All material facts set forth in this statement of the non-moving party will be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply of the moving party.

(c) Reply Memorandum. In a reply brief, the moving party must respond to the non-moving party's statement of additional material facts in the manner prescribed in subsection (b)(1).

> **(d) Presentation of Factual Material**. All facts on which a motion or opposition is based must be presented by affidavit, declaration under penalty of perjury, and/or relevant portions of pleadings, depositions, answers to interrogatories, and responses to requests for interrogatories. . . .
>
> **(e) Duty to Fairly Meet the Substance of the Matter Asserted**. If the responding party cannot truthfully admit or deny the factual matter asserted, the response must specifically set forth in detail the reasons why. All responses must fairly meet the substance of the matter asserted.

D. Kan. Rule 56.1.[1]

This rule speaks to "material facts." A party who seeks to controvert a statement of material fact must do so specifically by disputing the asserted fact and then by citing those particular portions of the record on which it relies. A party also has the option of seeking relief under paragraph (e). In addressing only facts and the controverting of them, the rule does not invite a party to expand this section of its memorandum into arguing contentions or issues associated with a fact or arguing inferences to be drawn from a fact. Such a practice undermines one of the rule's promoted purposes of having a "concise" statement of facts and leads to memoranda

1. In addition, the District's summary judgment guidelines direct that, "Legal arguments should not be set forth in a party's statement of facts." Summary Judgment Guidelines, http://www.ksd.uscourts.gov/summary-judgment/ ¶ 6.

longer than necessary due to redundant and repetitive presentations in the first instance and in refutation. It cannot be overstated that arguments and inferences are topics reserved for the parties' arguments and authorities sections of summary judgment memoranda. *See Leathers v. Leathers*, 2012 U.S. Dist. LEXIS 167581, 2012 WL 5936281 at *2 (D. Kan. Nov. 27, 2012); *cf. Mitchael v. Intracorp, Inc.*, 179 F.3d 847, 856 (10th Cir. 1999) (Affirmed district court striking a party's responsive documents on five different grounds, with one of those grounds being, "intermixed their responses and their own statements of 'facts' with legal arguments and asserted inferences to be drawn from the facts."). Finally, paragraph (e) imposes a "duty" to submit responses that "must fairly meet the substance of the matter asserted." The court reads this as saying that a party should not be disputing a fact because it disagrees with the relevance and force of the legal argument for which the fact may be offered. The fact is the substance of the matter asserted, not what a party could argue or infer from it. The court will enforce these rules and treat any properly supported statements of fact as undisputed for purposes of the motions unless the statement of fact is properly addressed and disputed on substantive grounds. *See Kirch v. Embarq Management Co.*, 702 F.3d 1245, 1250 (10th Cir. 2012), *cert. denied*, 133 S. Ct. 2743, 186 L. Ed. 2d 208 (2013).

Factual Background

This background comes from the parties' stipulations in the pretrial order ("PTO") and from some of the general uncontroverted facts stated in the parties' summary

judgment pleadings. As for the other facts, uncontroverted or not, that are relevant to this order, the court will address those specific statements when pertinent to its analysis.

American Electric Power ("AEP"), on its own behalf and as an agent for the power company owners ("Owners"), entered a series of agreements with B&V for it "to engineer, procure and construct ["EPC"] wet flue gas desulfurization systems (aka, jet bubbling reactors ("JBRs")) for eight installations." (Dk. 294, ¶ 1, PTO). B&V "subcontracted the engineering, procurement and construction of the internal JBR components to MTI (Midwest Towers, Inc.)" who, in turn, subcontracted much of the manufacturing and installation of these components to lower-tier subcontractors. (Dk. 284, ¶ 94). The JBRs were to remove sulfur pollutants from the exhaust gas produced by coal-fired power plants. The parties have stipulated to this description of the process:

> 5. Exhaust gas from the coal-fired power plant enters the JBR through the inlet plenum, where it is cooled and moisturized, to begin the removal of sulfur and other contaminants. The gas is drawn from the inlet plenum to the middle section where it is forced down through PVC pipes known as sparger tubes . . . and into a bath of limestone slurry in the lowest section of the JBR tank. There, a chemical reaction occurs between the exhaust gas and the slurry that removes sulfur dioxide and other constituents from the exhaust gas.

> 6. The cleaned gas that bubbles up out of the slurry is forced upward through fiberglass reinforced plastic ("FRP") tubes (known as gas risers . . .) into the exhaust plenum (the upper level) of the JBR, from which it is forced out of the JBR through the plant exhaust stacks and released into the atmosphere.

(Dk. 294, p. 3-4).

B&V procured commercial general liability insurance to cover its work on these JBRs. (Dk. 294, PTO, ¶ 7). This lawsuit is a coverage dispute over the damage claims arising in connection with seven of these JBRs which have been referred to by the parties as, Cardinal 1, Cardinal 2, Cardinal 3, Conesville, Kyger Creek 1-2, Kyger Creek 3-5, and Clifty Creek 1-3. As to the liability policies, the parties have stipulated only to the following:

> 8. Zurich provided the primary layer of general liability coverage underlying the Aspen/Catlin Policy, with per occurrence limits of $2,000,000, general aggregate limits of $4,000,000, and products-completed operations aggregate limits of $4,000,000.
>
> 9. Defendants Aspen/Catlin provided first layer excess/umbrella liability coverage with per occurrence limits of $25,000,000, general aggregate limits of $25,000,000, and products-completed operations aggregate limits of $25,000,000.
>
> 10. The Aspen/Catlin Policy is a negotiated policy.
>
> . . . .

> 20. Black & Veatch has paid all premiums due on the Aspen/Catlin policy.

Id. at pp. 4-5).

As for the construction of the JBRs and the subsequent claims, the parties did stipulate to the following:

> 11. After Black & Veatch completed construction of the Cardinal 1 and 2 and Conesville JBRs, the Owners alleged deficiencies in the work.
>
> 12. Cardinal 1 was completed and began operating in March 2008. Deficiencies in the JBR components were discovered as early as August 2008, and Cardinal 1 had to be shut down and repaired.
>
> 13. Cardinal 2 was completed and began operating in December 2007. Deficiencies in the JBR components were discovered as early as May 2008, and Cardinal 2 had to be shut down and repaired.
>
> 14. Conesville was completed and began operating in January 2009. In the fall of 2009, it was determined that the gas risers installed at Conesville, as well as the gas risers installed at each of the other six JBRs, were deficient and required removal.
>
> 15. Because of defective gas risers and other deficiencies in the JBRs, the Owners demanded that Black & Veatch make repairs.

> 16. At the time the Owners made their demands on Black & Veatch, the Cardinal 1 and 2 projects, and the Conesville project were completed operations.
>
> 17. During the summer of 2010, Black & Veatch and the Owners of the JBRs, entered into settlement agreements resolving their disputes relating to eight JBRs, including the seven at issue here.
>
> 18. As part of the settlements, Black & Veatch agreed, among other things, to replace most internal components of the JBRs.
>
> 19. In replacing the internal components, Black & Veatch has obtained contribution from various parties responsible for the costs incurred.

(Dk. 294, pp. 4-5).

Initial Summary of Positions

B&V contends the Aspen/Catlin Commercial General Liability ("CGL") policy covers its liability, legal and contractual, for property damage claims, unless there is an exclusion that applies. B&V argues the coverage extends to liability both for property damage done to the completed JBRs engaged in operations and for property damage done to the JBRs still undergoing construction. Having incurred costs exceeding $225 million to repair and resolve the Owner's claims, B&V seeks coverage for $72 million from the defendants. B&V recognizes the defendants deny coverage contending that the damages

to B&V's work are not covered as "property damage" of a "third party" caused by an "occurrence" as those terms are defined and applied in the policy and under New York law. B&V seeks judgment as a matter of law on having sustained physical damages constituting "property damage" caused by an "occurrence" that is covered by the policy's basic insuring agreement. More specifically, B&V seeks judgment on the following propositions:

> (i) The internal components of the JBRs constitute tangible property of a Third Party, as defined in the Policy;
>
> (ii) For the three projects in commercial operation when the damage was sustained, the Policy provides coverage for physical injury to the JBRs where the damaged work or the work out of which the damage arises was performed on B&V's behalf by subcontractors;
>
> (iii) For the four projects where work by B&V was ongoing, the Policy provides coverage for physical injury to the JBRs' internal components other than "that particular part" which is defective;
>
> (iv) Under Endorsement 27, the Policy provides coverage on each project for physical injury to the JBRs' internal components resulting directly from errors in Professional Services provided by B&V or on its behalf; and

> (v) The limits of liability afforded by Endorsement 27 apply separately to the projects insured by the Policy and to each "Large Work" project identified in Endorsements 35 and 36 of the Policy.

(Dk. 284, pp. 30-31).

The defendants argue the policy is unambiguous and defines "occurrence" and "property damage" as to cover only third party property damage and to not cover claims for deficient work that kept the system from working as contracted, which is all that allegedly happened here. The defendants maintain the owners' claims here were not for damage claims but in the nature of a performance guaranty and were brought to recover for frustrated commercial expectations from deficient work.

Claims

The parties' contentiousness keeps them from agreeing to the general nature of the plaintiff's claims. The court will defer to the plaintiff's characterization of its own claims. In that respect, the court understands the plaintiff is claiming coverage for property damage resulting directly from: (1) the work of the subcontractors on behalf of B&V and B&V's failure to deliver professional services as a contractor that caused the *operation of the completed JBRs* (Cardinal 1, Cardinal 2 and Conesville) to damage many of the JBR's internal components which required repairs to the damaged components, the cost of which were backcharged to B&V by the owners and the extensive nature of which caused the owners to demand

complete replacement of the JBR's internal components; (2) the work of the subcontractors in installing the defective gas risers and the failure of B&V to deliver professional services as a contractor in connection with the gas risers that required the removal of the risers from *the non-completed JBRs* which resulted in unavoidable "rip and tear" damage to other internal components that had to be removed to repair the risers.

Governing Law--New York

The insurance contract here is a manuscript which means it is not a standard form regularly issued by the insurer but may differ in language and terms from the standard liability insurance policies. The parties' summary judgment filings consistently reflect their somewhat remarkable agreement over the insurance policy provisions being unambiguous and capable of judicial interpretation as a matter of law. The parties are steadfast in holding to this shared position despite their significant disagreements over what the provisions mean.

In cases of diversity jurisdiction, like this one, the court follows the forum state's choice of law rules. *See BancOklahoma Mortgage Corp. v. Capital Title Co.*, 194 F.3d 1089, 1103 (10th Cir.1999). When the parties have incorporated a choice of law provision in the agreement, "Kansas courts generally effectuate the law chosen by the parties to control the agreement." *Brenner v. Oppenheimer & Co. Inc.*, 273 Kan. 525, 539, 44 P.3d 364 (2002). "When sophisticated parties possessed of roughly equivalent bargaining power negotiate a set of

understandings covering a commercial transaction, the courts commonly will enforce the arrangement the parties have crafted for themselves. *See Hall v. Sprint Spectrum L.P.*, 376 Ill.App.3d 822, 826, 315 Ill.Dec. 446, 876 N.E.2d 1036 (2007) (discussing freedom to contract in context of choice-of-law clause)," *appeal denied*, 226 Ill. 2d 614, 882 N.E.2d 77, 317 Ill. Dec. 503, *cert. denied*, 555 U.S. 814, 129 S. Ct. 50, 172 L. Ed. 2d 23 (2008); *Enterprise Bank & Trust v. Barney Ashner Homes, Inc.*, 2013 WL 1876293, at *8, 300 P.3d 115 (Table), Kan. App. Unpub. LEXIS 408 (Kan. App. May 3, 2013). Only in those rare situations when the parties' self-chosen law runs completely afoul of a prominent Kansas public policy is a court justified in refusing the parties' choice. *See Alexander v. Beech Aircraft Corp.*, 952 F.2d 1215, 1223 (10th Cir. 1991); *Brenner*, 273 Kan. at 540-41. The parties have not directly advocated any such Kansas public policy in their filings. The pretrial order sets out Endorsement 32 of the Aspen/Catlin policy which provides in relevant part that, "Any dispute concerning the interpretation of the terms of this policy is understood and agreed to by both you and us to be subject to New York law." (Dk. 294, p. 2). As the parties' dispute here principally concerns the interpretation of that policy and its application, the court will look to New York law in resolving these interpretation issues in the absence of arguments to the contrary.

"Insurance policies are, in essence, creatures of contract, and accordingly, subject to principles of contract interpretation." *In re Estates of Covert*, 97 N.Y.2d 68, 76, 761 N.E.2d 571, 735 N.Y.S.2d 879 (N.Y. 2001). "The initial interpretation of a contract is a matter of law

for the court to decide." *Parks Real Estate Purchasing Group v. St. Paul Fire and Marine Ins. Co.*, 472 F.3d 33, 42 (2nd Cir. 2006). In New York, the insurance contract is to be "interpreted according to common speech and consistent with the reasonable expectation of the average insured." *Dean v. Tower Ins. Co. of New York*, 19 N.Y.3d 704, 708, 979 N.E.2d 1143, 1145, 955 N.Y.S.2d 817 (N.Y. 2012) (internal quotation marks and citation omitted). "'[C]ontracts of insurance are to be interpreted so as to give effect to the intention of the parties as expressed in the unequivocal language employed. The best evidence of what the parties to an agreement intended is the language of the agreement itself, especially where, as here, the parties to the insurance policy were sophisticated entities." *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc.*, 52 Misc. 3d 455, 28 N.Y.S.3d 800, 806 (N.Y. Sup. Ct. 2016) (quoting *Broad Street, LLC v. Gulf Ins. Co.*, 37 A.D. 3d 126, 130, 832 N.Y.S.2d 1 (1st Dept. 2006)). "It is hornbook law that the terms of the insurance contract as a whole shall be examined in determining the intent of the parties." *In re Hanover Ins. Co.*, 119 A.D.2d 529, 532, 501 N.Y.S.2d 347, 350 (1st Dept. 1986) (citation omitted), *appeal dismissed*, 68 N.Y.2d 751, 497 N.E.2d 703, 506 N.Y.S.2d 336 (1986).

The critical opening inquiry for interpreting policy language "is whether the contract is unambiguous with respect to the question disputed by the parties." *Law Debenture Trust Co. of New York v. Maverick Tube Corp.*, 595 F.3d 458, 465 (2nd Cir. 2010) (internal quotation marks and citation omitted). "[T]he threshold determination as to whether an ambiguity exists is a question of law to be

resolved by the court." *Agor v. Board of Educ.*, 115 A.D.3d 1047, 981 N.Y.S.2d 485, 487 (3d Dept. 2014) (citations omitted). "Only where the language is unambiguous may the district court construe it as a matter of law and grant summary judgment accordingly." *Palmieri v. Allstate Ins. Co.*, 445 F.3d 179, 187 (2d Cir. 2006) (internal quotation marks and citation omitted). "It is well settled that a contract is unambiguous if the language it uses has 'a definite and precise meaning, unattended by danger of misconception in the purport of the agreement itself, and concerning which there is no reasonable basis for a difference of opinion." *White v. Continental Cas. Co.*, 9 N.Y.3d 264, 265, 848 N.Y.S.2d 603, 605, 878 N.E.2d 1019, 1021 (N.Y. 2007) (internal quotation marks and citations omitted). "Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity." *Id.* If unambiguous, "interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement." *National Granite Tit. Ins. Agency v. Cadlerock Prop. Joint Venture*, 5 A.D.3d 361, 362, 773 N.Y.S. 2d 86 (2d Dept. 2004) (internal quotation marks and citation omitted). More fully stated, "[i]t is well settled that resolution of the rights and liabilities of parties to an insurance contract is a question of law for a court to determine based upon the specific provisions of the policy at issue, unless the terms of the policy are ambiguous and require consideration of extrinsic evidence as an aid to construction." *Selective Ins. Company of America v. County of Rensselaer*, 51 Misc. 3d 255, 268, 27 N.Y.S.3d 316, 326 (N.Y. Sup. Ct. 2011) (citation omitted). In such a

case, the policy should be construed in a way "that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." *Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 162, 833 N.E.2d 232, 800 N.Y.S.2d 89 (N.Y. 2005).

"[I]f 'the language in the insurance contract is ambiguous and susceptible to two reasonable interpretations, the parties may submit extrinsic evidence as an aid in construction, and the resolution of the ambiguity is for the trier of fact.'" *City of New York v. Starnet Ins. Co.*, 27 Misc. 3d 1235[A], 910 N.Y.S.2d 761, 2010 NY Slip Op 51042[U], 2010 WL 2425981 at *2 (N.Y. Sup. Ct. 2010) (quoting *State of N.Y. v. Home Indemnity Co.*, 66 N.Y.2d 669, 486 N.E.2d 827, 829, 495 N.Y.S.2d 969 (N.Y. 1985)). "Absent any relevant extrinsic evidence or the anticipation of the availability thereof, the resolution of any ambiguity in the written contract between the parties is to be determined by the court as a matter of law." *Schuler-Haas Elec. Co. v. Aetna Cas. & Sur. Co.*, 40 N.Y.2d 883, 357 N.E.2d 1003, 1003, 389 N.Y.S.2d 348 (N.Y. 1976) (citations omitted). At the same time, "if the tendered extrinsic evidence is itself conclusory and will not resolve the equivocality of the language of the contract, the issue remains a question of law for the court." *Home Indemnity Co.*, 486 N.E.2d at 829. "Under those circumstances, the ambiguity must be resolved against the insurer which drafted the contract." *Id.* (citations omitted).

When terms appear separately in a policy, "each term must be deemed to have some meaning." *Spoleta Constr.,*

LLC v. Aspen Ins. UK Ltd., 119 A.D.3d 1391, 991 N.Y.S.2d 183, 185 (4th Dept. 2014), *appeal granted, reargument denied*, 122 A.D.3d 1346, 996 N.Y.S.2d 202 (4th Dept. 2014), and *aff'd*, 27 N.Y.3d 933, 30 N.Y.S.3d 598, 50 N.E.3d 222 (N.Y. 2016) (internal quotation marks and citations omitted). "[A] policy's terms should not be assumed to be superfluous or to have been idly inserted." *Wirth v. Liberty Mut. Ins. Co.*, 122 A.D.3d 1364, 997 N.Y.S.2d 552, 554 (4th Dept. 2014) (internal quotation marks and citation omitted). "[P]rinciples generally applicable to contract interpretation apply equally to insurance contracts." *State of New York v. American Mfrs. Mut. lns. Co.*, 188 A.D.2d 152, 155, 593 N.Y.S.2d 885 (3rd Dept. 1993).

"'Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage.'" *Ment Bros. Iron Works Co., Inc. v. Interstate Fire*, 702 F.3d 118, 121 (2nd Cir. 2012)(quoting *Consol. Edison Co. of N.Y. v. Allstate Ins. Co.*, 98 N.Y.2d 208, 218, 774 N.E.2d 687, 746 N.Y.S.2d 622 (N.Y. 2002)). "To negate coverage by virtue of an exclusion, an insurer must establish that the exclusion is stated in clear and unmistakable language, is subject to no other reasonable interpretation, and applies in the particular case." *Village of Sylvan Beach, N.Y. v. Travelers Indem. Co.*, 55 F.3d 114, 114-16 (2nd Cir. 1995) (internal quotation marks and citation omitted). "[A]fter an insurer establishes that a policy exclusion applies, the burden shifts to the policyholder to prove that an exception to that exclusion applies." *Ment Bros. Iron Works Co. Inc. v. Interstate Fire*, 702 F.3d at 122 (internal quotation marks and citations omitted).

Appendix B

Basic Policy Terms

The coverage issues for a CGL policy on construction projects turn on generally applying three basic questions: "(1) Were the damages caused by an occurrence? (2) Were the damages the result of property damage resulting from the occurrence? and (3) Are the damages excluded under one or more of the policy exclusions?" William Schwartzkopf, *Prac. Guide Construction Cont. Surety Claims* § 22.03 (2016). This court finds this order of questions to be workable and consonant with the parties' presentations.

The central policy terms framing these issues are as follow. The contract's "Insuring Agreements," and, in particular, the terms under the heading of "I. Coverage" are:

> (1) We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit" which the "Insured" by reason of liability imposed by law or assumed by the "Insured" under contract prior to the "Occurrence", shall become legally obligated to pay as damages for:
>
> (a) . . . "Property Damage" occurring during the Policy Period . . . and caused by an "Occurrence" . . . .

(Dk. 284-1, p. 7). Summarized for relevance here, the insurance covers the insured's liability that is imposed by law or is assumed by the insured under contract and that makes the insured legally obligated to pay property

damage as defined by the policy and as caused by an occurrence covered under the policy. The parties do not argue that this insuring agreement is unique for a CGL policy. The plaintiff does highlight the additional liability clause, "assumed by the 'Insured' under contract prior to the 'Occurrence,'" as unusual and significant.

As to what constitutes an "Occurrence," the policy reads:

> H. "Occurrence" means:
>
> (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in "Bodily Injury" or "Property Damage" that is not expected or not intended by the "Insured."
>
> All damages that arise from continuous or repeated exposure to substantially the same general conditions are considered to arise from one "Occurrence."

Id. at p. 10. The parties do not argue that this definition is unusual or atypical for a CGL policy.

The dispute in this case concerns coverage of property damage liability. The policy defines the same as follows:

> K. "Property Damage" means:
>
> (1) physical injury to tangible property of a "Third Party", including all resulting loss of use of that

> property of a "Third Party" (all such loss of use shall be deemed to occur at the time of the physical injury that caused it); or
>
> (2) loss of use of tangible property of a "Third Party" that is not physically injured (all such loss being deemed to occur at the time of the "Occurrence" that caused it).

Id. at 11. The parties do not show this definition to be unique to this contract.

Coverage is limited to injury or loss to property "of a 'Third Party." The relevant definition of "Third Party" is:

> N. "Third Party" means any company, entity, or human being other than an "Insured" or other than a subsidiary, owned or controlled company or entity of an "Insured." Notwithstanding paragraph 2(d) of Insuring Agreement III of this Policy, an employee of an "Insured" shall be treated as a "Third Party."

Id. The Policy's Declarations list B&V as the "NAMED INSURED." (Dk. 284, p. 2).

OCCURRENCE ISSUES

The initial coverage agreement basically provides that the insurer shall pay on behalf of the insured those sums for which the insured is liable by law or by assumption under contract prior to the occurrence and is legally obligated to pay as damages for property damage occurring during

the policy period and caused by an occurrence. The policy issues of first importance turn on whether the loss claims here are for property damage caused by an occurrence, that is, by an accident, including continuous or repeated exposure to substantially the same general harmful conditions, that results in property damage that is not expected or not intended by the insured.

From the summary judgment filings, the court understands that B&V's position as to the occurrence for the completed and operating JBRs is consistent with the following testimony from its CEO Steven Edwards:

> A. So I believe the occurrence at Cardinal 1 and 2 was the leakages through seal plates that disrupted the flows to the right places. I believe it was the—some construction defects that allowed parts to come loose and clog strainers that then caused other problems or plugged nozzles, and then that ended up causing uneven amounts of water to flow in various places that caused buildup of both—on the decks and in the tubes themselves.
>
> Q. So the accident as regards Cardinal 1 and 2 is leakage through seal plates, plugging—
>
> A. Components coming loose and plugging up certain areas, and then other areas disrupting the water flows, causing further plugging.
>
> Q. And disruption of water flows?

> A. Uneven water flows.
>
> Q. Is there anything else about Cardinal 1 or 2 that, in your mind, is an occurrence?
>
> A. Components that suffered damage and fell and broke other pieces and parts, buildup that caused excessive loading on beams and columns.
>
> Q. Anything else?
>
> A. That's my recollection.

(Dk. 312, pp. 37-38, quoting Dk. 297-13, Edwards Dep. pp. 80-81). The plaintiff also relies on the testimony of its Senior Vice President/Senior Project Director in the Energy Division, Sheldon Wood, in describing the occurrence to encompass the resulting property damage due to the buildup of deposits, "[d]eflection and cracking of the decks, plugged spargers, damaged and clogged wash headers, damaged support grid, damaged oxidation air piping, collapse of the module, deck module." (Dk. 312, p. 38, quoting Dk. 297-3 Wood Dep, p. 17). In sum, the occurrence for the completed JBRs was the construction defects consisting of leaks and loose parts that disrupted water flowage and clogged strainers which resulted in the buildup of deposits on other parts causing damage and excessive loading which led to more damages to the components of the JBRs.

Regarding the non-completed JBRs, B&V identifies the occurrence with the fit-up or installation of the defective

gas risers and, more specifically, points to the occurrence happening "when the gas risers were incorporated into the JBR such that they could not be removed or replaced without making a hole in the steel tank and/or physically damaging other internal components of the JBRs." (Dk. 312, p. 36 citing Dk. 297-15, B&V's Response to Interrogatory No. 4). In other words, the plaintiff alleges the occurrence for the non-completed JBRs happened when the defective gas risers were installed within the JBRs such that their subsequent removal and replacement meant damaging the JBRs and its internal components. For both the completed and the non-completed JBRs, the alleged occurrences are defective construction work either in the design or installation being defective or in the parts themselves being defective.

In deciding this "occurrence" issue, the court realizes it is not blazing any new territories on CGL policies covering construction activities. Instead, it is traveling down a path that from a broad perspective has many forks and conflicting markers but from the narrow perspective of New York law is uniquely well-marked and well-maintained. Here is how one commentator described the broader judicial landscape in 2013 on the issue of what is an occurrence under a CGL policy for construction services:

> Courts have long struggled with the "occurrence" element of the CGL policy. The standard form policy's insuring clause obligates the insurer to pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage," if

the injury is caused by an "occurrence" that takes place in the "coverage territory" and occurs during the policy period. The concept of "occurrence" is key to CGL coverage. If the "bodily injury" or "property damage" is not caused by an "occurrence," there is no coverage. The standard policy defines "occurrence" as "an accident, including continuous and repeated exposure to substantially the same general harmful conditions." Just what is accidental in the context of construction services? There is no simple answer. Every year, numerous courts wrestle with this question. And every year, the analysis and conclusions become more disquieting and disparate.

Judicial reflection on this issue is marked by a number of shortcuts intended to truncate the analysis in order to arrive at some acceptable conclusion. Some courts choose to focus on policy, often adopting the view that insurers are not in the business of guaranteeing that contractors perform their contractual obligations properly and contractors should bear the responsibility for properly selecting and supervising their subcontractors. Other courts find analogizing to other frequently misunderstood financial instruments, such as performance bonds to be a useful analytical tool. Other courts prefer to "weigh" the conflicting authority and adopt what they construe to be the majority rule. Still other courts look to the nature of the damages

> caused by the purported "occurrence" in determining whether this policy condition had been met. And still other courts analyze this issue in terms of fortuity.

Patrick J. O'Connor, Jr., *Recent Developments in Insurance Law*, 7 No. 1 Journal of the American College of Construction Lawyers 121 (Jan. 2013). While the author did not analyze any New York cases from 2012, he did note and cite the following 2010 case, "*400 15th Street, LLC v. Promo-Pro, Ltd.*, 28 Misc. 3d 1233[A], 960 N.Y.S.2d 341, 2010 WL 3529466, 2010 NY Slip Op 51580[U] (N.Y. Sup 2010) (faulty workmanship is not an occurrence and to hold so is to turn the CGL policy into a performance bond)." Another commentator a couple years later cautioned contractors, "[t]he divergence in views of the occurrence requirement is one reason insureds need to carefully analyze which state's law will apply to a coverage dispute." Lee H. Shidlofsky, *Deconstructing CGL Insurance Coverage Issues in Construction Cases*, 9 No. 2 Journal of the American College of Construction Lawyers n. 37 (Aug. 2015). Mr. Shidlofsky also noted that New York decisions were against the trend of "finding that physical damage resulting from inadvertent construction defects constitutes an occurrence under a CGL policy" and cited, "*National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 119 A.D.3d 103, 986 N.Y.S.2d 74 (1st Dep't 2014); *Rosewood Home Builders, LLC v. National Fire & Marine Ins. Co.*, 2013 U.S. Dist. LEXIS 45374, 2013 WL 1336594 (N.D.N.Y. 2013)." *Id.* at n. 62. The court's impression is that there is much debate over the "accidental" character of construction defects and that

New York law runs against the growing trend followed in other jurisdictions of expanding coverage. It may be that the court's resolution of this issue will be disquieting to one side, but the court's goal is to reach a conclusion that is not disparate with New York law. Indeed, the court is not writing on a clean slate but is construing and applying the plain law which the parties agreed would govern their dispute. Policy arguments on either side of this issue are of no moment, for this court's role is simply to construe and apply New York law as it is found to the facts of this case.

Consistent with New York law, the court believes it is important here to presume that the contracting parties, being as knowledgeable and sophisticated as they are, did understand or, at the very least, are held accountable for understanding the consequences in agreeing that "[a]ny dispute concerning the interpretation of the terms of this policy is understood and agreed by both you and us to be subject to New York Law." (Dk. 294, p. 2); *see Quantum Chem. Corp. v. Reliance Group, Inc.*, 180 A.D.2d 548, 580 N.Y.S.2d 275, 276 (1st Dep't) (per curiam) (citations omitted), *leave to appeal denied*, 79 N.Y.2d 760, 594 N.E.2d 942, 584 N.Y.S.2d 448 (1992). With this being a dispute on the meaning and application of the "occurrence" term in a general liability policy, the court's decision is controlled by New York's approach to interpreting and applying an "occurrence" in liability policies:

> Courts have construed an "occurrence" to be an accident that is unexpected and is evaluated irrespective of the acts leading up to the resulting injury so long as the injury or damage is not intended.

> *See, e.g., Cont'l Cas. Co. v. Rapid-Am. Co.*, 80 N.Y.2d 640, 649, 593 N.Y.S. 2d 966, 609 N.E.2d 506 (N.Y. 1993). The New York Court of Appeals has reasoned that such policy terms are generally construed narrowly, "barring recovery only when the insured intended the damages . . . . A person may be engaged in behavior that involves a calculated risk without expecting that an accident will occur." *Id.* (citing *City of Johnstown v. Bankers Standard Ins. Co.*, 877 F.2d 1146, 1150 (2d Cir. 1989) (holding that "ordinary negligence does not constitute an intention to cause damage")).

Rosewood Home Builders v. National Fire & Marine Ins. Co., 2013 U.S. Dist. LEXIS 45374, 2013 WL 1336594 at *4 (N.D.N.Y. Mar. 29, 2013); *see Continental Cas. Co. v. Rapid-American Co.*, 80 N.Y.2d at 649 ("Resulting damage can be unintended even though the act leading to the damage was intentional." (citations omitted)). In short, the New York Court of Appeals uses the "transaction as whole" test in determining the accidental character of an occurrence. *See McGroarty v. Great Am. Ins. Co.*, 36 N.Y.2d 358, 364, 329 N.E.2d 172, 368 N.Y.S.2d 485 (1975). The New York Court of Appeals found an accident when excavation and construction services which had continued for months caused damage to adjacent property:

> We agree that this "transaction as a whole" test should be applied by the fact finder when determining whether the term accident is applicable to a given situation. We agree also that it is not legally impossible to find accidental results flowing from

> intentional causes, i.e., that the resulting damage was unintended although the original act or acts leading to the damage were intentional.

36 N.Y.2d at 364.

When the occurrence is faulty workmanship in construction, the New York courts have recognized an additional accidental character in the meaning of "occurrence" through the following rule. The Second Circuit interpreting New York law held that an "occurrence" is more than a simple claim "for faulty workmanship" but must include "consequential property damage inflicted upon a third party as result of the insured's activity." *J.Z.G. Resources, Inc. v. King*, 987 F.2d 98, 102 (2nd Cir.), *cert. denied*, 510 U.S. 993, 114 S. Ct. 553, 126 L. Ed. 2d 454 (1993); *see Rosewood Home*, 2013 U.S. Dist. LEXIS 45374, 2013 WL 1336594 at *4. The Second Circuit in *J.Z.G. Resources* quoted from its earlier decision which had "held that a CGL policy did not provide coverage for a claim against an insured for the repair of faulty workmanship that damaged only the resulting work product":

> "Were we to construe the words 'accident' or 'continuous or repeated exposure to conditions' as encompassing damage to a product resulting from the product's failure to perform according to contract specifications, we would expand the agreed-upon coverage. An accident, given its dictionary meaning, is 'an event or condition occurring by chance or arising from unknown or remote causes.' *Webster's Third New*

> *International Dictionary* 11 (1981). We might add that in common parlance an external force of some kind is usually involved."
>
> 961 F.2d at 389. We distinguished our earlier decision in [*Aetna Casualty & Sur. Co. v.] General Time [Corp.*], 704 F.2d [80] at 83 [(2d Cir.1983)], on the basis that the defective motors sold by the insured in that case had caused damage to other property of the purchaser. (citation omitted).

Id. at 102 (quoting *Jakobson Shipyard, Inc. v. Aetna Cas. and Sur. Co.*, 961 F.2d 387, 389 (2nd Cir. 1992)). The Second Circuit also observed that its approach was consistent with the purpose of such policies:

> The *Jakobson* ruling is consistent with the general concept of PCOH insurance, which has been described in these terms:
>
> > The products hazard and completed operations provisions are not intended to cover damage to the insured's products or work project out of which an accident arises. 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.
>
> Roger C. Henderson, *Insurance Protection for Products Liability and Completed Operations-What Every Lawyer Should Know*, 50 Neb.L.Rev. 415, 441 (1971) (footnote omitted).

Id. a 102-103. Thus, "under New York law, a Commercial General Liability policy like the one involved here 'does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to *something other than work product.*'" *James River Ins. Co. v. Power Management, Inc.*, 55 F. Supp. 3d 446, 454 (E.D.N.Y. 2014) (quoting *George A. Fuller Co. v. U.S. Fidelity & Guar. Co.*, 200 A.D.2d 255, 259, 613 N.Y.S.2d 152, 155 (1st Dept.), *leave to appeal dismissed*, 84 N.Y.2d 806, 645 N.E.2d 1215, 621 N.Y.S.2d 515 (1994) (emphasis added in *James River*).

New York courts have grounded this approach on several fundamental concepts. "An insurer of a CGL policy

is not a surety for a construction contractor's defective work." *Transportation Ins. Co. v. AARK Constr. Group, Ltd.*, 526 F. Supp. 2d 350, 356 (E.D.N.Y. 2007) (citing *Bonded Concrete, Inc. v. Transcon. Ins. Co.*, 12 A.D.3d 761, 762, 784 N.Y.S.2d 212 (3rd Dept. 2004)); *see James River Ins. Co. v. Power Management, Inc.*, 55 F. Supp. 3d at 454. "CGL policies do not insure against faulty workmanship in the work product itself." *I.J. White Corp. v. Columbia Cas. Co.*, 105 A.D.3d 531, 532, 964 N.Y.S.2d 21 (1st Dept. 2013). "[A]n 'occurrence' of property damages under a commercial general liability policy cannot exist where a general contractor's 'negligent acts only affect[] [the property owner's] economic interest in the building.'" *Continental Ins. Co. v. Huff Enterprises, Inc.*, 2010 U.S. Dist. LEXIS 71272, 2010 WL 2836343, at *4 (E.D.N.Y. Jun. 21, 2010) (quoting *George A. Fuller*, 200 A.D.2d at 259), *adopted report and recommendation*, 2010 U.S. Dist. LEXIS 71269, 2010 WL 2836312 (Jul. 15, 2010); *see James River Ins. Co.*, 55 F. Supp. 3d at 454. While one can find in these decisions, or ones cited by them, some mention that coverage of CGL policies was intended for tort, not contract, liability, *see, e.g., Transportation Ins.*, 526 F. Supp. 2d at 357 n. 3, this court is more persuaded by the analysis of New York law found in *Thruway Produce, Inc. v. Massachusetts Bay Ins. Co.*, 114 F. Supp. 3d 81, 92 (W.D.N.Y. 2015), which includes:

> The Court cannot agree with Defendant's reading of the case law. Defendant has not cited a single case where a New York court or a federal court applying New York law has held that an insured's breach of contract cannot constitute an occurrence where there

> is actual physical damage to property other than the defective property of the insured. In the cases upon which Defendant relies, the primary of which are discussed below, where the courts held that an insured's breach of contract cannot constitute an occurrence, the only damages claimed were to the defective product supplied by the insured.
>
> . . . .
>
> Defendant's position that a breach of contract or warranty can never constitute an "occurrence" was expressly rejected by the Second Circuit in its unpublished opinion affirming the district court's grant of partial summary judgment in *Chubb Ins. Co. of New Jersey v. Hartford Fire Ins. Co.*, No. 97 CIV. 6935 LAP, 1999 U.S. Dist. LEXIS 15362, 1999 WL 760206 (S.D.N.Y. Sept. 27, 1999), *aff'd*, 229 F.3d 1135 (2d Cir. 2000) ("[W]e reject Hartford's argument that a breach of contract or warranty can never constitute an 'occurrence.'"). As stated by the Second Circuit, "a breach of contract or warranty can be an 'occurrence' if, as a result of the breach, property sold by the insured to a third party, which was then incorporated into other property belonging to the third party, caused damage to this other property." 229 F.3d 1135.

Id. at 92-93. In short, New York law recognizes an "occurrence" even if it is only a contractual breach so long as it has caused damage liability for property other than the defective product itself. Another federal district

court applying New York law similarly observed, "This is consistent with the 'purpose of a [CGL] policy[,] which is to provide coverage for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product or completed work is not what the damaged person bargained for.'" *Rosewood Home Builders, LLC*, 2013 U.S. Dist. LEXIS 45374, 2013 WL 1336594 at *4 (quoting *Hartford Acc. & Indem. Co. v. A.P. Reale & Sons, Inc.*, 228 A.D.2d 935, 644 N.Y.S.2d 442, 443 (App. Div. 1996)). In sum, New York law generally construes CGL coverage as not extending to the "occurrence" of faulty workmanship, unless the damage liability is for property other than the insured's own defective product/work.

The court has considered B&V's presentation of New York case law in arguing for a different meaning of "occurrence." Without addressing here each of those citations, the court will indicate that it has read and considered them and finds them distinguishable either as not involving the context of a construction defect/faulty workmanship or as involving damages to property other than the insured's own defective work. To the latter distinction, which is the most significant here, there is the plaintiff's citation of *Ohio Cas. Ins. Co. v. Lewis & Clinch, Inc.*, 2014 U.S. Dist. LEXIS 159720, 2014 WL 6078572 (N.D.N.Y. 2014), for the general proposition that, "property damage resulting from defective construction was caused by an 'occurrence.'" (Dk. 312, p. 92). A closer look at that decision reveals the following:

To be sure, the Policies "do[] not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product." *George Fuller Co. v. U.S. Fid. & Guar. Co.*, 613 N.Y.S.2d 152, 155, 200 A.D.2d 255, 259 (N.Y.App. Div. 1994). *See also I.J. White Corp. v. Columbia Cas. Co.*, 964 N.Y.S.2d 21, 105 A.D.3d 531 (N.Y.App.Div. 2013); *Transp. Ins. Co. v. AARK Constr. Grp., Ltd.*, 526 F. Supp. 2d 350 (E.D.N.Y. 2007)).

In *Fuller*, the court held that the underlying complaint did not allege an "occurrence" resulting in "property damage" as those terms are defined by the defendant's CGL policy because there, the insured property owner claimed that certain construction work was done improperly, necessitating unnecessary construction costs and resulting in diminished value of the property. *See Fuller*, 613 N.Y.S.2d 152, 200 A.D.2d at 256-259. The court there found that the allegations "do not involve damage caused by a 'continuous or repeated exposure to substantially the same general harmful conditions,' which, in accordance with the policy's terms, would constitute an 'occurrence' but, rather, intentional cost-saving or negligent acts only affecting [the insured property owner's] economic interest in the building." *Id.*, at 259.

Conversely, in *I.J. White*, the court, distinguishing *Fuller*, found that the claimed damages were covered

by the CGL policy in that case. *See I.J. White*, 964 N.Y.S.2d 21, 105 A.D.3d at 532 (citing *Fuller*, 613 N.Y.S.2d at 155, 200 A.D.2d at 259). There, the insured, a bakery, claimed damages to its cake products resulting from the improper operation of a freezer system due to the cakes emerging from the freezer at the wrong temperature, resulting in damage during the cutting process. *See I.J. White*, 964 N.Y.S.2d 21, 105 A.D.3d at 531. The insured further claimed damages in the form of its loss of use of the freezer and the facility it constructed to house the freezer during the eight months it took to repair the equipment. *See id.*, at 532, 964 N.Y.S.2d 21. The court noted that there, as here, but unlike in *Fuller*, the insured was seeking coverage for damage caused by faulty workmanship to something other than the work product. *See id.* In other words, the court noted, in *Fuller*, the claimed damage occurred to the work product itself, whereas in I.J., the claimed damage occurred to the cakes, not the freezer. *See id.*

Similarly, here, Northbrook's claims of damage to the draft tube gate seals is "property damage" resulting from an "occurrence" under the terms of the Policies. Damage to the Ringfeders and wicket gates, resulting from Lewis & Clinch's faulty work product, does not fall under the Policies' definition of "property damage." Consequently, damages to Unit 2's Ringfeders and wicket gates are not covered under the insuring grants of the policies, but damages to the draft tube gate seals are covered.

2014 U.S. Dist. LEXIS 159720, [WL] at *9. In short, this decision actually supports the general rule that faulty workmanship or a construction defect is not an "occurrence" under New York law unless it damages something other than the work product. It is also worth noting that the CGL policy in *Ohio Cas. Co.* included a subcontractor exception to the "Your Work" exclusion. 2014 U.S. Dist. LEXIS 159720, [WL] at *5. The decision, however, does not reflect any argument or discussion of this exception as having the effect of modifying New York's law on the meaning of "occurrence."

B&V's reliance on the *I.J. White* decision which is discussed in the above quotation similarly fails to show a different meaning of "occurrence" in New York law. The plaintiff also cites *Royal Ins. Co. of America v. Ru-Val Elec. Corp.*, 1996 U.S. Dist. LEXIS 3094, 1996 WL 107512 at *2 (E.D.N.Y. Mar. 8, 1996), which noted that the important distinction for an "occurrence" in a construction setting "is not whether the complaint states a contract or tort theory, but whether the damage to be remedied is the faulty work or product itself or injury to person or other property." As for *Saks v. Nicosia Contr. Corp.*, 215 A.D.2d 832, 625 N.Y.S.2d 758 (1995), this decision also applied the rule from *Fuller* finding coverage for a claim because it was not for damages to the constructed home itself but for damages to the real property where the home was negligently placed.

B&V believes that New York case law on this issue is inconsistent and that the New York Court of Appeals has never squarely addressed this meaning of "occurrence."

B&V follows this with asking the court to follow case law from other jurisdictions and, in particular, decisions from the Second and Tenth Circuits. The court's impression of New York law on an "occurrence" in faulty workmanship cases is that there is an established consistency up through the most recent decisions. *See, e.g., Maxum Indemnity Company v. A One Testing Laboratories, Inc.*, 150 F. Supp. 3d 278, 285 (S.D.N.Y. Dec. 10, 2015) ("The *George A. Fuller* decision accurately captures New York law."). As shown in the prior citations, this case law is also firmly based on and consistent with the Second Circuit's interpretation and analysis of New York case law. The absence of a direct decision by the New Court of Appeals in itself certainly does not justify this court defying the authority of a well-recognized line of New York precedent consisting of both state and federal courts. When faced with similar pleas to look to other jurisdictions for a different meaning of "occurrence," the courts charged with applying New York law have rejected these pleas. *See National Union Fire Ins. Co. of Pittsburgh, PA v. Turner Constr. Co.*, 119 A.D. 3d 103, 108-09, 986 N.Y.S.2d 74 (1st Dept. 2014) (a claim of faulty workmanship in itself "simply does not involve fortuity" absent damage to third-party property); *Aquatectonics, Inc. v. Hartford Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 41185, 2012 WL 1020313, at *7-*8 (E.D.N.Y. Mar. 26, 2012) (Rejected request to follow authority outside of New York and cited *Amin Realty, L.L.C. v. Travelers Property Cas. Co.*, 2006 U.S. Dist. LEXIS 40867, 2006 WL 1720401 at *7 (E.D.N.Y. Jun. 20, 2006) (Did not follow other cited jurisdictions as "the case is governed by the law of New York, which has adopted the majority rule: to wit, that defective workmanship,

standing alone, is not an occurrence under a CGL policy." (citation omitted))).

As it has been stated before, these are sophisticated parties who agreed that any disputes over policy interpretations would be subject to New York law. B&V is the EPC contractor and its work product is nothing short of the entire JBRs. Consequently, New York law's governing definition of "occurrence" does not recognize liability coverage for B&V arising from the claimed property damage to the JBRs, completed or in progress, resulting from the defective or faulty construction of the JBRs performed by B&V or one of its subcontractors:

> There is no "occurrence" under a commercial general liability policy where faulty construction only damages the insured's own work (*see Pennsylvania Gen. Ins. Co. v. Menk Corp.*, 2011 U.S. Dist. LEXIS 134086, 2011 WL 5864109, *4-5 [D.N.J. Nov. 21, 2011]), and faulty workmanship by subcontractors hired by the insured does not constitute covered property damage caused by an "occurrence" for purposes of coverage under commercial liability insurance policies issued to the general contractor, since the entire project is the general contractor's work (*see Firemen's Ins. Co.*, 387 N.J.Super. at 446, 449, 904 A.2d at 760-761, 762-763). In *Baker Residential v. Travelers Ins. Co.*, 10 A.D.3d 586, 587, 782 N.Y.S.2d 249 (1st Dept.2004), where a developer delivered and installed defective structural beams that deteriorated from water penetration due to improper installation, flashing and waterproofing, this Court

held that the damages sought by the developer did not arise from an "occurrence" resulting in damage to third-party property distinct from the developers' own "work product."

. . . .

"[T]he requirement of a fortuitous loss is a necessary element of insurance policies based on either an 'accident' or 'occurrence'" (*Consolidated Edison Co. of N.Y. v Allstate Ins. Co.*, 98 NY2d 208, 220, 774 N.E.2d 687, 746 N.Y.S.2d 622 [2002]; Insurance Law § 1101 [a] [1]; *see also Victory Peach Group, Inc. v Greater N.Y. Mut. Ins. Co.*, 310 NJ Super 82, 87, 707 A2d 1383, 1385 [1998]). As the motion court recognized, the addition of "event" or "happening" to the definition of "occurrence" did not alter the legal requirement that the "occurrence" triggering the coverage must be fortuitous. "[A] claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident" (9A Steven Plitt et al., *Couch on Insurance* 3d § 129:4 [2008]; *Pennsylvania Natl. Mut. Cas. Ins. Co. v Parkshore Dev. Corp.*, 2008 WL 4276917, *4, 2008 US Dist LEXIS 71318, *9-12 [D NJ 2008], *affd* 403 Fed Appx 770 [3d Cir 2010]).

National Union Fire Ins. Co. of Pittsburgh, PA. v. Turner Constr. Co., 119 A.D. 3d at 108; *see Maxum Indemnity Company*, 150 F. Supp. 3d at 285 (The "'no occurrence,

no coverage' rule for commercial liability policies under New York law" meant no coverage for "the cost of repairing the allegedly defective work in order to bring it into compliance with the underlying contracts, industry standards, and legal requirements.").

Of course, this ruling does not address whether the sophisticated parties here could not have contracted for CGL insurance with an "occurrence" element that had an agreed meaning different from that otherwise applicable under New York law. In deciding if this happened here, the court still looks to New York law to evaluate the evidence and arguments on the parties' intent. As only a factual background, the court accepts as undisputed that the Aspen/Catlin CGL policy was the product of negotiations between underwriters in the Lloyd's insurance market in London. Like other American companies seeking access to this insurance market, B&V employed retail brokers who, in turn, relied on wholesale brokers in London. The wholesale brokers negotiated with the underwriters in the brokering of insurance placement for the company. Galen Brislane was the principal broker from Jardine Lloyd Thomas which served as B&V's wholesale broker. For the underwriters Aspen/Catlin, John Henderson with Ian Grimes negotiated with Brislane over the terms of the deal. These negotiations included Brislane submitting to Henderson an insurance policy written by Westchester which was expiring, and the negotiations involved the parties' marking up this policy with suggested changes, comments and endorsements. Endorsement 37 to the final policy, as noted by the defendants, includes, however, the significant handwritten term that, "This agreed

wording supersedes any previous agreed wording for this placement." (Dk. 284-1, p. 61).

Though negotiated, modified and written by their representatives, the Aspen/Catlin CGL policy is also recognized by the parties as generally resembling other standard liability policies both in organization and in terms. This complicates efforts at determining the parties' intent because of the intersection and interaction between provisions common to CGL policies which have been interpreted and applied under New York law and other provisions which may be distinct in location and wording. B&V's general position on this interaction is that:

> The unambiguous terms of the Policy resulted from detailed negotiations between the insured and insurers concerning the scope of coverage. The negotiated terms of the Policy provide B&V coverage for liability arising from damages to B&V's completed operations, as well as liability arising from damages to B&V's work in progress.

(Dk. 284, p. 3). The defendants deny that this negotiated contract is intended to be more than a CGL policy offering third-party liability coverage. The policy is intended to offer no coverage for the insured's own defective work unless the resulting property damage liability is attributable to damage done to third parties. The defendants articulate their general position as follows:

> In seeking coverage, B&V ignores clear New York precedent. B&V ignores policy features that the

> business risk of construction defects is not covered. Due to the clear New York precedent that there is no coverage for claims of this type, B&V seeks to re-negotiate the Policy in a manner which was never intended. But where there is no issue of ambiguity, as here; the Policy is to be enforced as written.

(Dk. 297, p. 78). It cannot be overlooked that both sides argue from the position that the policy is unambiguous.

In addressing the dispute over whether the parties agreed to a definition of "occurrence" different from New York law, the court's analysis must be consistent with New York law insofar as it guides the interpretation and application of contracts. Thus, it is a "basic principle" of New York contract law "that insurance contracts, like other agreements, will ordinarily be enforced as written." *J.P. Morgan Securities Inc. v. Vigilant Ins. Co.*, 21 N.Y.3d 324, 334, 992 N.E.2d 1076, 970 N.Y.S.2d 733 (N.Y. 2013) (citation omitted). Consistent with the public policy favoring the freedom of contract, "parties to an insurance arrangement may generally contract as they wish and the courts will enforce their agreements without passing on the substance of them." *Id.* (internal quotation marks and citations omitted). "The best evidence of what the parties to an agreement intended is the language of the agreement itself, especially where, as here, the parties to the insurance policy were sophisticated entities." *National Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. TransCanada Energy USA, Inc.*, 52 Misc. 3d 455, 28 N.Y.S.3d 800, 806 (N.Y. Sup. Ct. 2016) (quoting *Broad Street, LLC v. Gulf Ins. Co.*, 37 A.D. 3d 126, 130, 832

N.Y.S.2d 1 (1st Dept. 2006)). This echoes the general rule that, "[a] court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case." *Cruden v. Bank of New York*, 957 F.2d 961, 976 (2d Cir. 1992) (citations omitted). For when a contract is executed by sophisticated, counseled business persons, "a presumption that a deliberately prepared and executed agreement manifests the true intention of the parties . . . appl[ies] with even greater force." *See Quantum Chem. Corp. v. Reliance Group, Inc.*, 180 A.D.2d 548, 580 N.Y.S.2d 275, 276 (1st Dep't 1992) (per curiam) (citations omitted), *leave to appeal denied by*, 79 N.Y.2d 760, 594 N.E.2d 942, 584 N.Y.S.2d 448 (May, 12, 1992). But this also means that, "[i]nsurance policies must be construed . . . in a way that affords a fair meaning to all of the language employed by the parties in the contract and leaves no provision without force and effect." "*Selective Ins. Co. of America v. County of Rensselaer*, 26 N.Y.3d 649, 655, 27 N.Y.S.3d 92, 47 N.E.3d 458 (2016) (internal quotation marks and citation omitted). "Coverage, however, is not determined merely on the basis of the insuring clause, but must be determined upon the basis of the combination of the insurance clause and exclusions." *General Acc. Ins. Co. v. U.S. Fidelity and Guarantee Ins. Co.*, 193 A.D.2d 135, 137, 602 N.Y.S.2d 948 (1993) (citing *Schiff Assocs. v. Flack*, 51 N.Y.2d 692, 697-98, 417 N.E.2d 84, 435 N.Y.S.2d 972 (1980)). The New York Court of Appeals in *Schiff Assocs.* observed:

> We start our analysis by noting that the coverage under the policies in this case is not merely what is found under the heading "insuring agreement". Just as this clause affirmatively indicates the coverage which is included, so does the "exclusion" clause tell us expressly what is not. In policies so drawn, the protection the insured has purchased is the sum total, or net balance, however one labels it, of a coming together of the two. For it is not either alone, but the combination of both, which defines the scope of the protection afforded no more and no less.

51 N.Y.2d at 697. Simply put, policies are to be interpreted such that all terms are afforded a fair meaning in keeping with the general notions that insuring agreements affirmatively state coverage and exclusions define what are not covered.

Also in keeping with these rules, the court is mindful that sophisticated parties contracting under New York law would recognize that a CGL policy of insurance is generally distinguishable in purpose from first-party property insurance:

> The policy under which The Gap is named as an additional insured is a standard commercial general liability insurance policy, written on a standard Insurance Service Office (ISO) form. Since the purpose of general liability insurance is to provide coverage for liability to third parties (see Holmes' *Appleman on Insurance* 2d § 129.1[B], at 4), the standard CGL policy

> does not cover damage to property owned by the insured (*id.* at 166, Commercial General Liability Coverage Form, Exclusion j). A CGL policy pays a third-party claimant according to a judgment or settlement against the insured (see *Great N. Ins. Co. v. Mount Vernon Fire Ins. Co.*, 92 N.Y.2d 682, 688, 685 N.Y.S.2d 411, 708 N.E.2d 167, citing Holmes, *supra*, § 3.2).
>
> In contrast, insurance coverage for damage to property owned by the insured, or "first-party coverage," pays the insured the proceeds when the damage occurs (*Great N. Ins., supra* at 687, 685 N.Y.S.2d 411, 708 N.E.2d 167); it protects an interest "wholly different" from that protected by third-party coverage (*id.* at 688, 685 N.Y.S.2d 411, 708 N.E.2d 167). "The principal distinction between liability and property insurance is that liability insurance covers one's liability to others for bodily injury or property damage, while property insurance covers damage to one's own property" (Postner & Rubin, *New York Construction Law Manual*, § 10.06, Coverage, at 380 [emphasis in original]).

Gap, Inc. v. Fireman's Fund Ins. Co., 11 A.D.3d 108, 111-12, 782 N.Y.S.2d 242, 244 (1st Dept. 2004). It necessarily follows that sophisticated parties who are wanting to contract for coverage outside the standard and expected parameters of liability insurance would want to exercise care in expressing and making evident their unique intentions in the written agreement such that the

parties' agreed understanding is open, meaningful, and understandable.

B&V argues that the policy's meaning of "occurrence" here is not constrained by how New York courts have interpreted this term in other CGL policies. It claims, instead, that the policy here covers liability for "Property Damage" done to AEP's work and that the "Occurrence" is the "unexpected and not intended Property Damage resulting from either: work performed on behalf of B&V by a subcontractor, or error in the delivery of 'Professional Services' in connection with work by B&V as an EPC contractor." (Dk. 284, pp. 4-5). B&V attaches significance to the following words in the policy's "coverage" insuring agreement that are italicized here:

> (1) We will pay on behalf of the "Insured" those sums in excess of the "Retained Limit" which the "Insured" by reason of liability imposed by law or *assumed by the "Insured" under contract prior to the "Occurrence"* shall become legally obligated to pay as damages for . . . "Property Damage" occurring during the Policy Period stated in Item 4 of the Declarations . . . and caused by an "Occurrence"; . . . .

(Dk. 284-1, p. 7) (italics added). B&V infers that such assumed contractual liability claims could only be brought by the owners with whom B&V had contracted and that the claims would necessarily involve damages sustained by the project. (Dk. 312, p. 90). Therefore, B&V reads this italicized language as evidencing the parties' intent, "that damages arising from faulty workmanship of

subcontractors to otherwise non-defective work constitute an occurrence and are covered." (Dk. 318-1, p. 2).

The defendants believe B&V is isolating this italicized language and then ignoring its context. First, this language does not purport to remove the requirement of an "occurrence" but rather affirms it. Second, the language does not reflect any intent or understanding between the parties to abandon the meaning of "occurrence" otherwise applicable under New York law. Third, the language appears within a sentence that limits coverage to "property damages" occurring during the policy period which is inconsistent with an argued intent to cover construction defects which are typically latent and would not be manifested until after the policy's expiration.

The court is not persuaded by B&V's arguments for attaching general interpretative significance to this particular clause in the insuring agreement. The clause itself is not unusual for CGL policies. B&V rightly identifies it as an "assumption of liability clause." (Dk. 318-1, p. 2, n.1). Such a clause "provides coverage for liability incurred pursuant to indemnification agreements which are also typically contained in construction contracts." Dwight G. Conger, et al., *Construction Accident Litigation*, § 10.4 (2d ed. 2015). Instead of placing this clause in an endorsement or attachment, the parties here included it in the insuring agreement. *See id.* A CGL policy may even include this clause as an exclusion. *See, e.g., City of New York v. Lexington Ins. Co.*, 735 F. Supp. 2d 99, 109 (S.D.N.Y. 2010); *QBE Ins. Corp. v. Adjo Contracting Corp.*, 32 Misc. 3d 1231[A], 934 N.Y.S.2d 36, 2011 NY

Slip Op 51508[U], 2011 WL 3505475 (Sup. Ct. Apr. 5, 2011), *aff'd in part and rev'd in part on other grounds*, 121 A.D.3d 1064, 997 N.Y.S. 2d 425 (2d Dept. 2014). In interpreting this clause, the courts do not gloss over the words, assume or assumption, but read the clause to address coverage in those circumstances when the insured has contractually assumed another's liability, as in an indemnification agreement or hold harmless agreement. *See QBE Ins. Corp.*, 32 Misc. 3d 1231[A], 2011 WL 3505475 at *50; *American Family Mut. Ins. Co. v. American Girl*, 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65, 81 (Wis.), *reconsideration denied*, 2004 WI 50, 271 Wis. 2d 114, 679 N.W.2d 548 (Wis. 2004). Stated another way, "'assumption of liability' means that the insured has assumed a liability for damages that exceeds the liability it would have under general law." *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 37 (Tex. Sup. Ct. 2014); *see American Girl*, 673 N.W.2d at 80-81 ("The term 'assumption' must be interpreted to add something to the phrase 'assumption of liability' in a contract or agreement. Reading the phrase to apply to all liabilities sounding in contract renders the term 'assumption superfluous."). B&V does not cite any authorities for giving the phrase here, "liability . . . assumed by the Insured under contract," a broader and different meaning than what is found in these well-reasoned cases. Nor does this policy afford any reason for reading over "assumed" as superfluous in order to construe this clause as signifying coverage of all liabilities sounding in contract rather than those sounding in indemnification or in the assumption of some extra liability. The court agrees with the defendants that this assumption of liability clause and its location in

the insuring agreement does not reasonably express an intent or understanding between the parties to abandon the accepted New York meaning of "occurrence" in CGL policies involving faulty construction work.

The defendants also contend the plaintiff's efforts to broaden the meaning of the assumption of liability clause are thwarted by Endorsement 4. It provides, "With respect to . . . 'property damage', . . . arising out of liability you assume under any contract, this policy is limited to the coverage provided by the 'underlying insurance.'" (Dk. 284-1, p. 23). With the Zurich policy being the undisputed underlying insurance, the defendants note this assumption of liability clause is not part of the Zurich's insuring agreement, and instead, appears as an exclusion. (Dk. 303-16, pp. 57-58). Notwithstanding the plaintiff's creative efforts at reading the Zurich policy, the terms at issue likewise speak only to indemnification and do not yield any reasonable reading of coverage for other direct contractual liability between B&V and AEP. The defendants' arguments (Dk. 319-1) are persuasive on this point.

B&V lifts up other provisions in the policy as showing the parties' intention to have coverage for damages to its own work product caused by faulty workmanship. Of course, these arguments must be framed by whether they show the parties intended "occurrence" to mean something different from what is found in New York law. Before embarking on this analysis, it should be noted that New York law asks courts to construe language as to afford all terms a fair meaning and to not void any

provision of force and effect. This does not mean that for purposes of this case the court must conceive of a separate meaning and effect for each term under a given set of circumstances. Parties, even sophisticated ones, should be granted the leeway of being repetitive and overly careful in spelling out and limiting coverage. In this regard, the defendants say the contract reflects the parties took a "belt and suspenders" approach, and a quick read of the policy shows the defendants have made a valid point. In their arguments over interpreting the policy, both sides emphasize that the negotiated policy was written to address those foreseeable risks which they agreed to be covered. It would seem to follow that if certain risks would be plainly foreseeable from engaging in anticipated activities, then a court should be able to expect that sophisticated and knowledgeable parties contracting for insurance would be deliberate and plain in preparing a contract with language that manifested their true intention on the agreed and plainly foreseeable risks covered or not. *Cf. Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d 157, 162, 833 N.E.2d 232, 234, 800 N.Y.S.2d 89 (N.Y. 2005) ("We will 'not disregard clear provisions which the insurers inserted in the policies and the insured accepted, and equitable considerations will not allow an extension of coverage beyond its fair intent and meaning in order to obviate objections which might have been foreseen and guarded against.' *Caporino v. Travelers Ins. Co.*, 62 N.Y.2d 234, 239, 465 N.E.2d 26, 476 N.Y.S.2d 519 (1984))

The first of these other provisions, and the one most strongly argued by B&V, is exclusion F, which reads:

Appendix B

> "Property Damage" to "Your Work" arising out of it or any part of it and included in the "Products/Completed Operations Hazard". This Exclusion F does not apply if the damages work or the work out of which the damage arises was performed on your behalf by a subcontractor.

(Dk. 284-1, p. 14). B&V offers extended evidence, depositions and declarations, and asks the court to consider the same as showing its intent in seeking coverage for subcontractors' work and in then entering this manuscript which speaks to damage liability arising from work done by subcontractors. B&V denies that their negotiations involved the "occurrence" requirement not including damages to its own work product from defective construction work performed by it or by subcontractors. B&V's negotiators and representatives point to notes on earlier drafts of the contract as some proof of their intent and of their expectation in having this subcontractor coverage incorporated into exclusion F. Specifically, B&V contends the subcontractor exception to exclusion F could not be more clear that there is liability coverage for damages to B&V's completed work when the damaged work or the work out of which the damages arise was performed on B&V's behalf by a subcontractor. B&V further argues that if "occurrence" is defined so as to preclude damage liability to its own work product, then "there was no reason to include exclusion F, much less negotiate the subcontractor exception to the exclusion." (Dk. 284, p. 41). B&V couches this last argument in this way, "while the 'your work' exclusion (Exclusion F) cuts

back on the scope of coverage otherwise provided by the basic insuring agreement, the 'subcontractor exception' clause expressly excepts from the exclusion and preserves coverage in circumstances like those here." *Id.*

The defendants counter that the evidence of B&V's intent, the parties' negotiations and their earlier drafts is irrelevant as the final contract is unambiguous and the best evidence. The parties expressly agreed that the contract's final wording supersedes any previous wording. With respect to the subcontractor exception, the defendants point to the general rule followed in New York that an exception to an exclusion does not create coverage and that this exception, by itself or in combination with other provisions, does not show the parties intended to contract for a unique meaning to "occurrence."

B&V does not present any ambiguity in the policy or argue for one which would allow or require the introduction and consideration of extrinsic evidence of the parties' intent. *American Home Products Corp. v. Liberty Mut. Ins. Co.*, 748 F.2d 760, 765 (2nd Cir. 1984); *Nichols v. Nichols*, 306 N.Y.490, 119 N.E.2d 351, 353 (N.Y. 1954) ("The first and best rule of construction of every contract, and the only rule we need here, is that, when the terms of a written contract are clear and unambiguous, the intent of the parties must be found therein." (citation omitted)). "New York courts interpret integration clauses 'to require full application of the parol evidence rule in order to bar the introduction of extrinsic evidence to vary or contradict the terms of the writing.'" *Oquendo v. CCC Terek*, 111 F. Supp. 3d 389, 412 (S.D.N.Y.) (quoting *Matter*

of Primex Intl Corp. v. Wal-Mart Stores, 89 N.Y.2d 594, 599, 679 N.E.2d 624, 657 N.Y.S.2d 385 (N.Y. 1997)). By dint of these rules, the court will look to the relevant terms of the negotiated contract to determine the parties' intent on the meaning of "occurrence."

B&V argues for the court to consider the subcontractor exception because it "preserves coverage" otherwise provided but for exclusion F. (Dk. 284, p. 41). It does so apparently recognizing what is regarded as the general rule that an exception does not create coverage but may preserve it. This is the general rule in New York where courts understand that "exclusions or exceptions from policy coverage . . . are not to be extended by interpretation or implication." *Cragg v. Allstate Indem. Corp.*, 17 N.Y.3d 118, 122, 950 N.E.2d 500, 926 N.Y.S.2d 867 (2011) (internal quotation marks and citations omitted). Applying New York law, courts also have held that "exclusions and exceptions in an insurance policy cannot expand the scope of the agreed coverage." *Continental Cas. Co. v. Marshall Granger & Co., LLP*, 921 F. Supp. 2d 111, 123 (S.D.N.Y. 2013) (quoting *Bryan Bros. Inc. v. Continental Cas. Co.*, 660 F.3d 827, 831, 419 Fed. Appx. 422 (4th Cir. 2011)); *Raymond Corp. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 5 N.Y.3d at 163 ("The dissent would discover coverage for vendor negligence in negative inferences from the policy's exclusions, but 'an exclusion from insurance coverage cannot create coverage.'" (quoting *Continental Cas. Co. v. Pittsburgh Corning Corp.*, 917 F.2d 297, 300 (7th Cir. 1990)). "[T]he basic principle [is] exclusion clauses *subtract* from coverage rather than grant it" and that an exception is limited by

the scope of the specific exclusion. *See Jakobson Shipyard, Inc. v. Aetna Cas. and Sur. Co.*, 775 F. Supp. 606, 613 (S.D.N.Y. 1991) (quotation marks and citation omitted), *aff'd*, 961 F.2d 387 (2d Cir. 1992). New York law precludes B&V from successfully arguing that the subcontractor exception results in a different meaning of "occurrence." As already stated above, there is nothing in the insuring agreement or in the relevant policy definitions to support giving "occurrence" any meaning different from what New York law requires here, and this results in no "occurrence" and no coverage in the first instance. Therefore, B&V is effectively asking the court to use the subcontractor exception to exclusion F to extend coverage rather than preserve it. To construe the manuscript as argued by B&V would be contrary to New York law.

It is this rule of construction which has kept courts applying New York law from looking at any argued exclusions when there has not been a covered "occurrence." *See Aquatectonics, Inc. v. Harford Cas. Ins. Co.*, 2012 U.S. Dist. LEXIS 41185, 2012 WL 1020313 at *7 ("Because the Court has determined that the property damage to the pool did not arise out of an 'occurrence' pursuant to the Policy, it need not determine whether any exclusions from coverage would apply."); *Transportation Ins. Co. v. AARK Constr. Group, Ltd.*, 526 F. Supp. 2d 350, 356 n.2 (E.D.N.Y. 2007) ("This Court need not discuss whether these exclusions would apply because, as explained below, accidents involving damage to a contractor's work product alone does not constitute an occurrence under a CGL policy."). In *Aquatectonics*, the court discussed the authorities for its holding and rejected the coverage

argument based on the subcontractor exception to the "damage to your work exclusion":

> Loebs argues that it would be incorrect for the Court to restrict its analysis to the presence or absence of an "occurrence" without also considering the effect of any Policy exclusions or exceptions to those exclusions. (*See Pl.'s Mem.* at 13-14.). The case cited by Loebs as support for this assertion, however, specifically states that "[t]he insured has the *initial burden* of providing that the damage was the result of an 'accident' or 'occurrence,' to establish coverage" and that "*[o]nce coverage is established*, the insurer bears the burden of proving that an exclusion applies." *Consol. Edison Co. of N.Y.*, 98 N.Y.2d at 220, 746 N.Y.S.2d 622, 774 N.E.2d 687 (emphases added) (cited by Pl.'s Mem. at 14).
>
> Loebs urges that, rather than follow the lead of the numerous New York and Second Circuit courts outlined above, the Court should rely upon decisions made by courts in other jurisdictions. Loebs directs the Court to an article published in the Fall 2008 volume of The Construction Lawyer "for an overview of how the issue presented here has been playing out across the nation." (Pl.'s Mem. at 3 n. 3 .) The article provides the following overview of its opinion as to the appropriate framework for determining the scope of a CGL policy's coverage:
>
> > Like most insurance policies, [CGL] policies begin with a broad grant of coverage, which is

> then limited in scope by exclusions. Exceptions to exclusions narrow the scope of the exclusion and, as a consequence, add back coverage. However, it is the initial broad grant of coverage, not the exception to the exclusion, that ultimately creates (or does not create) the coverage sought .... The legal obligation to pay [ ] must arise from an 'occurrence,' ... [thus,] construction defect coverage litigation often boils down to a dispute first over the meaning of the word 'accident' within the definition of 'occurrence' and then the scope and application of the 'your work' exclusion.

David Dekker, Douglas Green, Stephen Palley, *The Expansion of Insurance Coverage for Defective Construction*, The Construction Lawyer, Fall 2008, at 20 (emphasis added). Overall, this initial opinion seems to be in accord with the principles set forth by this Court here.

The article goes on to discuss court decisions from, inter alia, Florida, Texas, and South Carolina that, "[w]hile cautioning that [exceptions to] exclusionary clauses cannot be relied upon to create coverage," decided to read policy language initially granting coverage together with exclusions and exceptions to exclusions (such as the Subcontractor Exception) in order to determine whether costs to repair property damage resulting from faulty workmanship should be covered. Id. at 221, 746 N.Y.S.2d 622, 774 N.E.2d 687. The article concludes by warning readers to "Check

Your Jurisdiction" because "contrary authority" exists in some states and, in those jurisdictions, "practitioners need to take extra care to address risks associated with subcontractor construction defects . . . ." Id. at 23, 746 N.Y.S.2d 622, 774 N.E.2d 687.

Based upon this article and cases from other jurisdictions, Loebs argues that it is entitled to coverage (or there is a reasonable possibility that it is entitled to coverage) because a subcontractor (Top Tile) performed the tile work on the pool and Hartford was on notice that Top Tile had caused the damage at issue. According to Loebs, therefore, even though the "Damage to Your Work" exclusion in the Policy would ordinarily exclude coverage for damage to the pool, the Subcontractor Exception to the "Damage to Your Work" exclusion (pursuant to which coverage for damage arising out of Top Tile's work would not be excluded) comes into play. Loebs argues that the Court should follow the lead of courts in other jurisdictions and consider all of this information together when determining whether there was a "reasonable possibility of coverage" sufficient to trigger Hartford's duty to defend.

Unfortunately for Loebs, however, it has cited no authority within either New York State or the Second Circuit that would support its position. In fact, as set forth at length above, New York and Second Circuit courts addressing this issue have come down squarely on the opposite side. There is, simply put,

> no authority from within this jurisdiction that would support Loebs's argument, and the Court is not persuaded by the cited outside authority. *See Amin Realty*, 2006 U.S. Dist. LEXIS 40867, 2006 WL 1720401 at *7 (declining to adopt the view of courts in other jurisdictions that "negligent acts of the insured causing unexcepted damage" to the work product "are within the definition of an accident/occurrence in the context of a CGL insurance policy" because "this case is governed by the law of New York, which has adopted the majority rule: to wit, that defective workmanship, standing alone, is not an occurrence under a CGL policy").

2012 U.S. Dist. LEXIS 41185, 2012 WL 1020313 at *7-*8 (footnote omitted). *See Illinois Nat. Ins. CO. v. Tutor Perini Corp.*, 2012 U.S. Dist. LEXIS 165939, 2012 WL 5860478 at *6 (S.D.N.Y. Nov. 15, 2012) (No "occurrence" resulting from damages to general contractor's work even if the work was performed by subcontractors and even if the policy had a subcontractor exception), *judgment aff'd*, 564 Fed. Appx. 618 (2nd Cir. May 6, 2014). Other courts have observed that, "[r]eliance upon a CGL's 'exclusions' to determine the meaning of 'occurrence' has resulted in 'regrettably overbroad generalizations' concerning CGLs. . . . We decline to base our analysis of the 'occurrence requirement upon the 'exclusions' in a CGL." *Travelers Indem. Co. of America v. Moore & Associates, Inc.*, 216 S.W.3d 302, 307 (Tenn. 2007) (quoting *Am. Family Mut. Ins. Co. v. Am. Girl, Inc.*, 2004 WI 2, 268 Wis.2d 16, 673 N.W.2d 65, 76 (2004)); *see Sheehan Constr. Co., Inc. v. Continental Cas. Co.*, 935 N.E.2d 160, 167 (Ind. 2010),

opinion adhered to as modified on reh'g, 938 N.E.2d 685 (2010). From its review of New York law, the court is persuaded that it should not be singling out exclusions as impacting the construction of basic terms of the insuring agreement in order to extend coverage where none would otherwise exist.

It is worthy of repeating that this court's role is not to look past the plain terms of the policy or to redraft them so that New York's law on the meaning of "occurrence" is avoided and thereby some arguable equity on the facts of this case is reached. There is nothing in B&V's many pages of arguments that addresses what kept them from negotiating and expressing in the manuscript their meaning of "occurrence" which is unique and different from New York law. Sophisticated and counseled commercial entities are presumed to act deliberately in preparing and executing an agreement that manifests their true intentions. Neither on the express terms of their agreement nor on the preponderance of their arguments is B&V able to overcome this presumption on the face of this policy.

B&V repeatedly questions what reason would the parties have had for including the exception to exclusion F if "occurrence" were defined following New York law. The simple answer is that the exception was intended to operate in the hypothetical situation of coverage existing under the insuring agreement and the exclusion then being applied. The plain terms of the exception are that, "Exclusion F does not apply if the damaged work or the work out of which the damage arises was performed

on your behalf by a subcontractor." (Dk. 284-1, p. 14). The exception does not create coverage but only makes exclusion F inapplicable. On its face, the exception's operation is expressly limited to the exclusion, and it does not refer to any other terms of the negotiated contract. Reliance upon this exception to construe "occurrence" would contradict the plain terms of the exception.

B&V appears to contend that unless someone can come up with a workable hypothetical operation of the exception in relevant circumstances then the exception should be read to modify the meaning of "occurrence" here. The plaintiff does not cite New York authority persuasively supporting this approach. Nor does it come forward with New York authority for a court redefining a basic term of the insuring agreement in order to preserve the hypothetical operation of an exception to an exclusion. The reasonableness of such being a rule of construction is not only questionable, but it seems inconsonant with New York's rule that, "[e]xclusions in policies of insurance must be read seriatim, not cumulatively, and if any one exclusion applies there can be no coverage since no one exclusion can be regarded as inconsistent with another." *Zandri Constr. Co. v. Firemen's Ins. Co. of Newark*, 81 A.D.2d 106, 109, 440 N.Y.S.2d 353, 356 (3d Dept. 1981), *aff'd*, 54 N.Y.2d 999, 430 N.E.2d 922, 446 N.Y.S.2d 45 (N.Y. 1981).

As the defendants counter, the plaintiff's approach would undermine the primary purpose of what appears to be a general third-party liability policy. It would transform an exception whose express operation is limited to the exclusion into a primary insuring provision. It would mean

that a single exception could change a liability insurance policy covering third party risks into one that essentially gives B&V, who subcontracts nearly all of its work, first party coverage for any damages to its work product because of the subcontractors' defective work or failure to perform. Such a significant change in the policy's function does not seem to be consonant result from the wording of a single exception. If this is what these sophisticated, commercial parties intended by their negotiated agreement, then why is that intent to expand the definition of "occurrence" to include subcontractors' faulty work performance no more than an arguable inference that cannot be made without contradicting New York's rules of construction governing insurance contracts.

B&V also points to other provisions as evidencing the parties' intent for coverage of property damages to B&V's work caused by an occurrence arising from faulty workmanship. Exclusion H excludes property damage "claimed for any loss" to B&V's work if the work is "withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect . . . ." (Dk. 284-1, p. 14). There is Endorsement 4 that amends exclusion D for property damage to the insured's property as only "that particular part of real property on which 'Insured' or any contractors or subcontractors working directly or indirectly on the 'insured's' behalf are performing 'your work', if the 'property damage' arises out of 'your work'." (Dk. 284-1, p. 23). B&V notes Endorsement 13 that excludes coverage for property damage arising out of the "Exterior Insulation and Finish System," *Id.* at p. 32, as well as Endorsement 20 that excludes residential

construction from the definition of the insured's work, *id.* at p. 40. Finally, B&V refers to Endorsements 35 and 36 which establishes particular policy periods and aggregates for certain projects.

None of these provisions, individually or together, persuasively show that the parties to this manuscript intended by its terms for "occurrence" to have a meaning different from that provided by New York law. Upon closer look, most of these provisions address only specific scenarios or circumstances. Their contexts preclude them from being read as general terms impacting the insuring agreement. Their application does not require in the first instance that there be the kind of expansive first-party coverage sought by B&V. Instead, most of these provisions can be consistently construed as affirming the intended lack of coverage even under these specifically described circumstances. Nor do any of these provisions expressly state or embody the parties' intent to modify the New York meaning of "occurrence." There is nothing in the wording of these provisions that demonstrates the parties' intent to have "occurrence" in their contract mean something different from New York law. Finally, Endorsements 35 and 36 address additional premiums assessed based on contract values for increased liability limits and extended policy periods. These contract values not only reflect B&V's work but also indicate the relative value of the work to and its impact upon adjacent coal-fired power plant property. The court cannot say that these Endorsements make sense only if there is liability coverage for damage done B&V's own work.

The court construes B&V's memoranda as also arguing that the incorporation of the defectively manufactured gas risers into the JBRs caused property damage to other JBR components which would be covered as an occurrence under the policy. New York law does define "occurrence" in incorporation cases as to recognize that, "'where the insured unintentionally sells a product that is allegedly defective and that is incorporated into a third-party's finished product, the resulting impairment to the finished product is an "occurrence."'" *Thruway Produce, Inc.*, 114 F. Supp. 3d at 91 (quoting *Chubb Ins. Co. of New Jersey v. Hartford Fire Ins. Co.*, No. 97 CIV. 6935 LAP, 1999 U.S. Dist. LEXIS 15362, 1999 WL 760206, at *4 (S.D.N.Y. Sept. 27, 1999) (collecting cases), *aff'd*, 229 F.3d 1135 (2d Cir. 2000)). The incorporation doctrine is inapplicable here, because B&V's work is the entire JBR and all the damage claims here are from the remediation of B&V's own work product performed within the scope of the general contractor's responsibility. *See Illinois Nat. Ins. Co. v. Tutor Perini Corp.*, 2012 U.S. Dist. LEXIS 165939, 2012 WL 5860478 at *6. There are no damages here distinct from B&V's work product. *See Ohio Casualty Ins. Co. v. Lewis & Clinch, Inc.*, 2014 U.S. Dist. LEXIS 159720, 2014 WL 6078572 at *9 (N.D.N.Y. 2014). Thus, there is no occurrence here. *See James River Ins. Co. v. Power Management, Inc.*, 55 F. Supp. 3d at 454.

In sum, the court finds that the defendants are entitled to summary judgment based on the following rulings that have been fully explained above. B&V's claims are not covered as "occurrences." New York law's governing definition of "occurrence" does not recognize

liability coverage for B&V arising from the claimed property damage to the JBRs, completed or in progress, resulting from the defective or faulty construction of the JBRs performed by B&V or one of its subcontractors. The governing language of the Aspen/Catlin policy is unambiguous and does not show that the parties intended "occurrence" to mean something different from what New York law provides. Thus, the "no occurrence, no coverage" rule for commercial liability policies under New York law entitles the defendants to summary judgment. The court understands that the parties filed motions for "partial summary judgment" in order to divide the coverage and damage issues. The pretrial order shows the plaintiff's only legal claims for recovery are declaratory relief and breach of contract for failure to pay under the Aspen/Catlin policy. Additionally, the defendants' motion (Dk. 296) recognizes that a favorable ruling on the coverage motion would terminate "all issues in dispute." *Id.* at p. 1. Thus, by determining that there is "no occurrence and no coverage" under the Aspen/Catlin policy, the court concludes the defendants are entitled to summary judgment and orders the clerk to enter judgment for the defendants accordingly.

IT IS THEREFORE ORDERED that B&V's motion for leave to file a sur-reply (Dk. 318) is granted;

IT IS FURTHER ORDERED that on the exclusive basis of the court's ruling on the coverage determination of no "occurrence," the plaintiff B&V's motions for partial summary judgment (Dk. 283) and (Dk. 298) are denied, and the defendants' motions for partial summary judgment (Dk. 296) and (Dk. 309) are granted.

Appendix B

Dated this 17th day of November, 2016, Topeka, Kansas.

/s/ Sam A. Crow
Sam A. Crow, U.S. District Senior Judge

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3359

BLACK & VEATCH CORPORATION,

Plaintiff-Appellant,

v.

ASPEN INSURANCE (UK) LTD, *et al.*,

Defendants-Appellees.

LLOYD'S MARKET ASSOCIATION, *et al.*,

Amici Curiae.

ORDER

Before **BRISCOE, MATHESON**, and **PHILLIPS**, Circuit Judges.

Appellees' petition for rehearing is denied.

Appendix C

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk

APPENDIX D — CORRECTED DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED MARCH 12, 2018

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 16-3359

BLACK & VEATCH CORPORATION,

Plaintiff-Appellant,

v.

ASPEN INSURANCE (UK) LTD, *et al.*,

Defendants-Appellees.

LLOYD'S MARKET ASSOCIATION, *et al.*,

Amici Curiae.

ORDER

Before **BRISCOE, MATHESON**, and **PHILLIPS**, Circuit Judges.

The Court, in order to correct a clerical error in the issuance of this order dated March 9, 2018, hereby reissues the order to reflect that Judge Briscoe voted to grant panel rehearing.

Appendix D

The order is reissued *nunc pro tunc* and is to read as follows:

Appellees' petition for rehearing is denied. Judge Briscoe voted to grant panel rehearing.

The petition for rehearing *en banc* was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

ELISABETH A. SHUMAKER, Clerk