No. 129087

IN THE
SUPREME COURT OF ILLINOIS

ACUITY, a mutual insurance company,

Plaintiff/Counter Defendant-Appellant,

v.

M/I HOMES OF CHICAGO, LLC,

Defendant/Counter Plaintiff-Appellee.

On Appeal from the Illinois Appellate Court,
First Judicial District, No. 1-22-0023.
There Heard On Appeal from the Circuit Court of Cook County, Illinois,
County Department, Chancery Division, No. 19 CH 00237.
The Honorable Allen P. Walker, Judge Presiding.

BRIEF OF DEFENDANT/COUNTER PLAINTIFF-APPELLEE, M/I HOMES OF CHICAGO, LLC

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I. INTRODUCTION

The Appellate Court of Illinois, First District, applying well-established pleading standards under Illinois law, held that Plaintiff/Counter Defendant-Appellant, Acuity, a mutual insurance company ("Acuity"), owes a duty to defend Defendant/Counter Plaintiff-Appellee, M/I Homes of Chicago, LLC ("M/I Homes"), with respect to a construction defect action filed by Church Street Station Townhome Owners Association (the "Association") against M/I Homes (the "Underlying Litigation").[1] M/I Homes, one of the developers of the townhomes at issue, is an additional insured under a commercial general liability ("CGL") insurance policy issued to M/I Homes' subcontractor.

In the Underlying Litigation, the Association, through its Board of Directors (the "Board"), alleges certain construction defects caused by M/I Homes' subcontractors at the Church Street Station townhome development (the "Townhomes"). Those defects are alleged to have caused damage to "common property" and "damage to the Townhomes and damage to other property."

For this reason, the appellate court correctly reversed the circuit court's granting of summary judgment to Acuity, which failed to follow the applicable legal standard—that the duty to defend arises whenever there is a *potential* for coverage under the insurance policies. The appellate court also correctly

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[1] *Church Street Station Townhome Owners Association, by its Board of Directors v. M/I Homes of Chicago, LLC*, Case No. 2018 L 10795, pending in the Circuit Court of Cook County, Illinois.

found standing for the claims under the Common Interest Community Association Act, 765 ILCS 160/1-30(j) (the "Act"), which grants standing "in relation to matters involving the common areas or more than one unit, on behalf of the members or unit owners as their interests may appear."

This Court should affirm the appellate court's ruling because it comports with Illinois law broadly construing the duty to defend. Indeed, Illinois law has long held that a duty to defend arises unless the underlying plaintiff's allegations clearly *foreclose* any potential coverage under the insurance policy. Acuity, however, asks this Court to replace that standard with some heightened pleading requirement nowhere found in the language of the policy or this Court's precedent. Acuity's effort to narrow its duty to defend is unwarranted and should be rejected.

Most of Acuity's remaining argument is directed at a ruling the appellate court did *not* make but merely invited this Court to consider—that M/I Homes may obtain a defense as an *additional* insured of its subcontractor based on allegations of damage to the Townhomes themselves beyond the scope of the subcontractor's work. While this Court need not address that issue in order to affirm, a sound basis nonetheless exists for this Court to clarify that a developer, as an additional insured with the same coverage as its subcontractor under the subcontractor's insurance policy, should likewise obtain a defense for damage alleged beyond the scope of the *subcontractor's* project, not the project as a whole. For that matter, the appellate court also,

sua sponte, noted that nothing in this Court's *Eljer* ruling or the terms of this CGL policy compels the conclusion that a contractor's *own* defective work cannot constitute an "occurrence" under a CGL policy.

While resolution of that issue is not necessary to find that a duty to defend arises here from allegations against M/I Homes that property damage beyond the project occurred, supreme courts of other states have considered this issue—while still agreeing with the substance of *Eljer's* holding that "faulty workmanship that merely diminishes the value of the home without causing physical injury or loss of use does not involve 'property damage.'" *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 9 (Tex. 2007) ("[N]o logical basis within the 'occurrence' definition allows for distinguishing between damage to the insured's work and damage to some third party's property."). *See also United States Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 888–89 (Fla. 2007) ("[J]ust like the definition of the term 'occurrence,' the definition of 'property damage' in the CGL policies does not differentiate between damage to the contractor's work and damage to other property.").

Therefore, this Court should affirm the appellate court's ruling that Acuity owes a duty to defend M/I Homes in the Underlying Litigation.

II. ISSUES PRESENTED FOR REVIEW

1. Whether the appellate court correctly held that Acuity owes M/I Homes a duty to defend it against the Underlying Litigation, where there are claims seeking monetary damages against M/I Homes for damage to property "other than the Townhomes" (not "economic losses" as Acuity contends in its

Issue No. 3), allegedly caused by the construction defects of M/I Homes' subcontractors.

2. Whether the appellate court correctly held that the Association in the Underlying Litigation has standing to assert the claims for damage to "other property," where the Underlying Litigation expressly alleges standing for its claims under the Common Interest Community Association Act, which grants standing to an association "in a representative capacity in relation to matters involving the common areas or more than one unit, on behalf of the members or unit owners as their interests may appear."

III. STATEMENT OF FACTS

In this action, Acuity filed an Amended Complaint for Declaratory Judgment, seeking a declaration that it did not owe M/I Homes any defense or indemnity as an additional insured under certain insurance policies for the claims in the Underlying Litigation. (C287.) M/I Homes filed an Answer and Counterclaim, alleging Acuity owed M/I Homes a defense and possible indemnification in the Underlying Litigation. (C574.) Acuity filed a Motion for Summary Judgment against M/I Homes and the Association. (C787.) The Association filed a Cross-Motion for Summary Judgment, (C969), and M/I Homes filed its Cross-Motion for Partial Summary Judgment. (C1005.)

In the Underlying Litigation, the Association's amended complaint against M/I Homes seeks to recover for alleged construction defects in the Townhomes and damage to other property caused by the alleged defects. (C537-C545.) The Association brings the claims in a representative capacity on

behalf of the owners of the Townhomes pursuant to Section 1-30(j) of the Act. (C538 ¶ 3; C542 ¶ 9.)

Regarding the claimed construction defects in the Underlying Litigation, the Association alleges that the Townhomes "were constructed in a fashion that allows leakage and/or uncontrolled water and/or moisture in locations in the buildings where it was not intended or expected," including improperly installed j-channel, lack of end dams at flashings, weather resistive barrier not lapped or taped over and back pitched aluminum flashing. (C540-C541 ¶ 5(b)-(c).)

The Association further alleges that "some or all of the Defects involve common property," and "[t]he Defects have caused substantial damage to the Townhomes and *damage to other property*." (C541 ¶ 5; C543, ¶ 13) (emphasis added.) The allegedly defective work was not performed by M/I Homes but by its subcontractors, (C542 ¶ 8), and in addition to damage to other property, "[t]he work of subcontractors and the designer *caused damage to other portions of the Townhomes that was not the work of those subcontractors.*" (C542 ¶ 8) (emphasis added.) The *ad damnum* clause of the amended complaint seeks: "Damages in an amount equal to the total cost of repair or replacement of the aforesaid Defects, *and cost to repair damage to other property*". (C543; C545) (emphasis added.)

Acuity issued a CGL policy and commercial excess liability policy to H&R Exteriors Inc. ("H&R"). (C289.) H&R was a subcontractor of M/I Homes.

(C296.) Pursuant to the written agreement between M/I Homes and H&R, M/I Homes was an additional insured under the Acuity policies. (C776 ¶ 7.) The "Coverages" provision of the subject policy states, in pertinent part:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies. We will have the right *and duty to defend the insured against any suit seeking those damages*.…
>
> b. This insurance applies to bodily injury and property damage only if:
>
> (1) The bodily injury or property damage is caused by an occurrence that takes place in the coverage territory;
>
> (2) The bodily injury or property damage occurs during the policy period ….

(C305 § (I)(A)(1)(a)-(b)) (emphasis added.)

For purposes of such coverage, the policy defines "property damage" and "occurrence" as follows:

> "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful condition.
>
> "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the occurrence that caused it.

(C318-C319 §§ (V)(13), (17).)

On July 30, 2021, the circuit court granted summary judgment in favor of Acuity and denied M/I Homes' motion for partial summary judgment

(C1638-V2), and subsequently denied M/I Homes' motion to reconsider by order dated November 5, 2021. (C1692-V2.) Reversing the trial court, the appellate court granted summary judgment in favor of M/I Homes on the issue of duty to defend under the applicable insurance policies. This appeal followed.

IV. ARGUMENT

A. Standard of Review

"This court's review of an appellate court's ruling reversing a trial court's order granting summary judgment is reviewed *de novo*." *Poris v. Lake Holiday Prop. Owners Ass'n*, 2013 IL 113907, ¶ 27. "The construction of an insurance policy, which is a question of law, is also reviewed *de novo*." *Central Illinois Light Co. v. Home Ins. Co.*, 213 Ill. 2d 141, 153 (2004).

"It is within this court's power and discretion to affirm the decision below on any ground warranted, regardless of whether that ground was relied on by the lower courts or whether the reasons given by those courts were correct." *Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 347–48 (1996).

B. The Appellate Court Correctly Ruled that the Allegations of the Underlying Complaint Triggered Acuity's Duty to Defend M/I Homes

1. The Threshold for Pleading a Duty to Defend is Minimal

The primary issue before this Court is whether the appellate court correctly ruled that the allegations of the underlying complaint triggered Acuity's duty to defend M/I Homes. In finding a duty to defend, the appellate court reasoned, "[T]he underlying complaint simply alleges, in the broadest possible terms, that there was damage to 'other property.' Liberally construing

both the complaint and the policy in favor of the insured, and applying the well-established principle that '[u]nless the complaint on its face clearly alleges facts which, if true, would *exclude* coverage,' the potentiality of coverage triggering a duty to defend is present, we find those broad allegations are sufficient to trigger Acuity's duty to defend." (A16 ¶ 43) (citations omitted) (emphasis in original.)

The appellate court's ruling is well within established Illinois law broadly construing an insurer's duty to defend. This Court has instructed, "An insurer's duty to defend its insured is much broader than its duty to indemnify its insured." *General Agents Ins. Co. of Am. v. Midwest Sporting Goods Co.*, 215 Ill. 2d 146, 154 (2005). Consequently, "The threshold a complaint must meet to present a claim for potential coverage, and thereby raise a duty to defend, is minimal. Any doubts about potential coverage and the duty to defend are to be resolved in favor of the *insured*." *Lorenzo v. Capitol Indem. Corp.*, 401 Ill. App. 3d 616, 619–20 (1st 2010) (citations omitted) (emphasis in original). Courts apply the following framework in evaluating this initial inquiry:

> To determine whether an insurer has a duty to defend its insured from a lawsuit, a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy. The allegations must be liberally construed in favor of the insured. If the facts alleged fall within, or potentially within, the policy's coverage, the insurer is obligated to defend its insured. This is true even if the allegations are groundless, false, or fraudulent, and even if only one of several theories of recovery alleged in the complaint falls within the potential coverage of the policy.

Valley Forge Ins. Co. v. Swiderski Elecs., Inc., 223 Ill. 2d 352, 363 (2006) (citations omitted). "Absent *absolute clarity* on the face of the complaint that a particular policy exclusion applies, there exists a potential for coverage and an insurer cannot justifiably refuse to defend." *Lorenzo*, 401 Ill. App. 3d at 620 (citations omitted) (emphasis added).

The sound policy behind the broad construal of the duty to defend is that "[t]he question of coverage should not hinge on the draftsmanship skills or whims of the plaintiff in the underlying action." Accordingly, the "threshold an underlying complaint must meet to trigger the duty to defend is low." *Certain Underwriters at Lloyd's London v. Metro. Builders, Inc.*, 2019 IL App (1st) 190517, ¶ 28 (citations omitted). Moreover, these standards are grounded in the fundamental principle that, "An insurance policy is a contract, so the rules applicable to contract interpretation govern the interpretation of an insurance policy. A court's primary function is to ascertain and give effect to the intention of the parties, as expressed in the policy language." *Thounsavath v. State Farm Mut. Auto. Ins. Co.*, 2018 IL 122558, ¶ 17.

Here, the policy provides that Acuity "will pay those sums that the insured becomes legally obligated to pay as damages *because of bodily injury or property damage* to which this insurance applies. We will have *the right and duty to defend the insured against any suit seeking those damages*." (C305 § (I)(1)(a) (emphasis added).) The policy does not purport to impose any heightened pleading requirements upon an underlying plaintiff *who is a*

stranger to the policy to describe "property damage" with some level of specificity. Thus, the appellate court's finding of a duty to defend, based on the underlying complaint's allegations of property damage to "the Townhomes and damage to other property" due to construction defects, is correct.

2. Acuity Has a Duty to Defend M/I Homes in the Underlying Litigation for Alleged "Property Damage" Caused by an "Occurrence."

The appellate court's conclusion that allegations of damage to "other property" triggered the duty to defend is supported by cases holding that "when a complaint alleges an insured contractor's faulty workmanship caused damage to other property, there is a duty to defend." *Acuity Ins. Co. v. 950 W. Huron Condo. Ass'n*, 2019 IL App (1st) 180743, ¶ 44. That rule is derived from this Court's discussion of the purpose of a CGL policy in *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278 (2001):

> [C]omprehensive general liability policies … are intended to protect the insured from liability for injury or damage *to the persons or property of others*; they are not intended to pay the costs associated with repairing or replacing *the insured's defective work* and products, which are purely economic losses. [Citations.] Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.

Id. at 314 (holding that "property damage" under a CGL policy requires "physical injury to tangible property" beyond mere installation of a defective plumbing system that causes diminution in value) (quoting *Qualls v. Country Mutual Insurance Co.*, 123 Ill. App. 3d 831, 833–34 (4th Dist. 1984) (emphasis added)).

Based on that language, multiple appellate court rulings have applied the principle that in order to find potential coverage for property damage flowing from construction defects under a CGL policy, the alleged property damage must have occurred beyond the scope of the "project" over which the insured bore overall responsibility. "When the underlying lawsuit alleges damages *beyond* repair and replacement, and *beyond* damage to other parts of the same project over which that contractor was responsible, those additional damages are deemed to be the result of an 'accident.'" *Lloyd's London*, 2019 IL App (1st) 190517, ¶ 52 (emphasis in original) (citing *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶ 27 ("This court has repeatedly stated that damage to something other than the project itself *does* constitute an 'occurrence' under a CGL policy.") (emphasis in original)).

Contrary to Acuity's arguments, the appellate court's ruling does not conflict with the reasoning of *Eljer*.

a. The Underlying Complaint Alleges Physical Injury to Tangible Property Other Than the Insured's Allegedly Defective Work

Here, the underlying complaint alleges damage to property apart from the structures sufficient to trigger the duty to defend. Specifically, the underlying complaint alleges "physical injury" due to several "exterior defects" that "caused substantial damage to the Townhomes and damage to other property," requiring "substantial repairs to the Defects and repairs to damage to other property caused by the Defects." (C539-C541; C543 ¶¶ 5, 8, 13-14 [mis-numbered ¶¶ 13-19].) Due to those alleged defects, the complaint's *ad damnum*

clauses pray for "[d]amages in an amount equal to the total cost of repair or replacement of the aforesaid Defects, and cost to repair damage to other property." (C543; C545.)

Those allegations are sufficient to trigger a duty to defend under the broad pleading standards cited above because plaintiff seeks damages for "property damage" apart from mere economic loss. (C305 § (I)(1)(a)) ("We will pay those sums that the insured becomes legally obligated to pay as damages because of bodily injury *or property damage* to which this insurance applies. We will have the right *and duty to defend* the insured against any suit seeking those damages.") (emphasis added.)

Moreover, because the underlying complaint alleges damage that "extends to other people or things that were not part of the contractor's work product … this damage is alleged to have resulted from an 'accident,' and thus an 'occurrence' has been alleged to trigger coverage under the CGL policy." *Lloyd's London*, 2019 IL App (1st) 190517, ¶ 56.

Acuity, however, contends that the appellate court erred because "the underlying complaint neither identifies the owner of the 'other property' nor the nature of the 'other property.'" (Acuity Brief at 9.) Acuity cites no authority imposing any such heightened pleading requirement upon the underlying plaintiff.

This Court should decline Acuity's invitation to do so because, as discussed above, "The question of coverage should not hinge on the

draftsmanship skills or whims of the plaintiff in the underlying action." *Lloyd's London, Inc.*, 2019 IL App (1st) 190517, ¶ 28. Acuity offers no compelling reason to adopt the obverse of the longstanding Illinois pleading standard that, "Unless the complaint on its face clearly alleges facts which, if true, would *exclude* coverage, the potentiality of coverage is present and the insurer has a duty to defend." *Western Cas. & Sur. Co. v. Adams Cnty.*, 179 Ill. App. 3d 752, 756 (4th Dist. 1989) (emphasis added). *See also International Ins. Co. v. Rollprint Packaging Prod., Inc.*, 312 Ill. App. 3d 998, 1007 (1st Dist. 2000) ("[T]he duty to defend does not require that the complaint allege or use language *affirmatively bringing the claims within the scop*e of the policy.") (emphasis added).

At bottom, Acuity is arguing that it views the allegations of the underlying complaint as "groundless," which is not a basis to refuse to defend. *Swiderski*, 223 Ill. 2d at 363. Instead, the allegations of damage to "other property" apart from the Townhomes "falls within the *potential* coverage of the policy." *Id.* (emphasis added). That is the case even if the allegations are not pleaded with particularity. As the appellate court noted, "While the allegations of damage to 'other property' are certainly vague, even 'vague, ambiguous allegations against an insured should be resolved in favor of finding a duty to defend.'" (A18 ¶ 49) (quoting *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 26).

Indeed, the court in *Lloyd's London* ruled that a lone allegation of damage to "personal property" outside the scope of the project triggered the duty to defend—despite the underlying complaint there giving "no description whatsoever" as to the "type or nature" of the property damaged. 2019 IL App (1st) 190517 ¶¶ 78-80. In so ruling, the court "rejected the notion" that damages other than to the contractor's project "must be specifically identified in the underlying complaint to trigger coverage for an 'occurrence.'" *Id.* ¶ 82 (citing *J.P. Larsen*, 2011 IL App (1st) 101316, ¶¶ 20-21 ("Although the damages to the common elements, individual units and personal property *were not expressly described*, we must construe the pleadings liberally to allow for coverage, or, at least, the potential for coverage.") (emphasis added)).

So too here, the allegations in the underlying complaint that "exterior defects" caused damage to "other property" apart from the townhomes triggers a duty to defend. While Acuity may explore in future proceedings the factual basis of the underlying complaint with regard to any ultimate duty to *indemnify*, that is entirely separate from the inquiry here regarding the duty to *defend*.

None of the authority Acuity cites supports reversal of the appellate court. Acuity relies heavily on *Westfield Ins. Co. v. West Van Buren*, 2016 IL App (1st) 140862, which is factually distinguishable. In that case, the underlying complaint against the developer of a condominium building claimed that "construction defects in the roof caused water to infiltrate into

the building and individual condominium units and also caused damage to personal and other property in the condominium units." *West Van Buren*, 2016 IL App. (1st) 140862 ¶ 4. The developer tendered the claim for defense as an additional insured under the roofer's CGL policy, which the insurer declined to undertake. *Id.* ¶ 7. The trial court granted the insurer summary judgment. *Id.* ¶ 9.

Affirming, the court, relying on *Eljer*, found that the underlying complaint failed to make any claim for "property damage" other than the insured's own defective work: "[T]he allegations in the Condo Association's underlying complaint *sought only to hold the Developer responsible for the shoddy workmanship of its roofing subcontractor*. The complaint sought damages of some $300,000 for repair and remediation *of the roof* …. As such, these damages and the allegations related only to diminished value and economic harm." *Id.* ¶ 19.

Moreover, because "the complaint did not seek damages for any personal property damage," the court found allegations of such damages to be "purely tangential to the Condo Association's claim for damages *for repair and remediation of the roof*," which constituted economic losses. *Id.* ¶ 22 (emphasis added). As the court reasoned, "We do not believe a free-standing reference to a fact, that is not attached to any particular theory of recovery or particular party in the complaint, can trigger a duty to defend." *Id.* ¶ 20.

Unlike *West Van Buren*, the allegations of damage to property other than the townhomes in the underlying complaint, on behalf of the unit owners, are not "free-standing" because they are directly tied to claims for "the cost to repair damage to other property" under both counts' *ad damnum* clauses. (C542-C545.) Accordingly, the allegations of the underlying complaint trigger Acuity's duty to defend.[2]

Also inapposite is *G.M. Sign, Inc. v. State Farm Fire & Cas. Co.*, 2014 IL App (2d) 130593, ¶ 5, which did not involve construction defects, but rather a putative class action for sending unsolicited fax advertisements in violation of the Telephone Consumer Protection Act of 1991 (TCPA), with alternative counts under the Consumer Fraud Act and for conversion. All counts were based on the same allegations that defendant violated the TCPA by faxing unsolicited advertisements without an established business relationship, consent or opt-out notice. *Id.* ¶¶ 5-6. Defendant tendered the defense to his insurer, which it denied because the policy contained an express exclusion for claims under the TCPA. *Id.* ¶ 8.

The parties entered into a settlement whereby defendant agreed to entry of judgment that would only be satisfied from his insurance policy. *Id.* ¶

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[2] Because plaintiff in *West Van Buren* "did not purport to act on behalf of any individual condo unit owners," 2016 IL App (1st) 140862, ¶ 20, the court's discussion of standing is unnecessary to its ruling and thus dicta. Indeed, the court noted that, "While the Condo Association might have had the capacity to represent the individual unit owners, nowhere in the complaint did it purport to do so." *Id.* ¶ 22. As discussed below, the underlying complaint expressly alleges standing.

9. Plaintiff filed an amended complaint to plead insurance coverage, which purposely dropped all references to the TCPA from the alternative counts, instead merely alleging "unsolicited facsimiles." *Id.* ¶ 12-13. The trial court found a duty to defend in plaintiff's subsequent coverage suit. *Id.* ¶¶ 17-20. Reversing, the court found that "the alternative counts of G.M. Sign's amended complaint arose from the same conduct that was the basis for its TCPA claim," and that plaintiff could not avoid the exclusion by the mere expedient of selective pleading. *Id.* ¶¶ 30-33, 36-38.

This case is nothing like *G.M. Sign*, where the very premise of the parties' settlement was for plaintiff to seek recovery under defendant's insurance policy, after which plaintiff deliberately amended its pleading to avoid an express policy exclusion. Here, in stark contrast, the underlying plaintiff has alleged facts—that several "exterior defects" caused "physical injury" to "other property" apart from the Townhomes—which give rise to potential coverage and thus a duty to defend. This Court should reject Acuity's unsupported suggestion of a "ploy" on the part of M/I Homes. (Acuity Brief at 11.)

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Absolute Title Servs., Inc., No. 09 C 4165, 2011 WL 4905660, at *3 (N.D. Ill. Oct. 13, 2011) is another case where the underlying complaint was clearly based on an excluded claim—mortgage fraud—to which plaintiff tried to append negligence claims in order to avoid the policy's intentional conduct exclusion. As the court reasoned, "[t]he

scope and degree of the alleged fraud make it hard to see how the alleged fraud, for example finding straw buyers, could have happened accidentally from negligent professional services."

So too in *Farmers Auto. Ins. Ass'n v. Danner*, 2012 IL App (4th) 110461, the court found no duty to defend against plainly intentional acts excluded under the policy that were styled as "negligence." Like in *National Union*, the court concluded, "[W]hile count III was labeled a negligence count, it alleged Danner drove the truck toward Winkler at great speed in a fit of rage and struck Winkler, causing serious injuries. Considering Danner's next act (as alleged in count I but omitted from count III) was to leave the vehicle and begin beating Winkler with a golf club until the club broke, it is difficult to see how striking him with the vehicle was merely unintended and unexpected and therefore accidental." *Id.* ¶ 40 (internal punctuation omitted).

The same result obtained in *SCR Med. Transp. Servs., Inc. v. Browne*, 335 Ill. App. 3d 585, 590 (1st Dist. 2002), where the court found no duty to defend the underlying complaint against a medical transport service resulting from the driver's sexual assault of plaintiff, finding that "Count IX does not allege a negligence claim. It alleges intentional conduct that does not trigger a duty to defend."

All of the above cases thus involve scenarios where "the complaint on its face clearly alleges facts which, if true, would exclude coverage," *Adams Cnty.*, 179 Ill. App. 3d at 756, which is not present here. Therefore, the appellate court

correctly ruled that Acuity is obligated to defend M/I Homes under the allegations of the underlying complaint.

b. As an Additional Insured, M/I Homes is Also Entitled to a Defense Due To Damages Claimed Beyond the Scope of Work Performed by the Subcontractor Under The Policy

In finding a duty to defend, the appellate court noted, without deciding, that M/I Homes could also be entitled to a defense as an additional insured of H&R, a subcontractor, based on the underlying complaint's allegation that, "The work of subcontractors and the designer *caused damage to other portions of the Townhomes that was not the work of those subcontractors*." (A14-A15 ¶¶ 39-41; C542 ¶ 8) (emphasis added) (*citing Westfield Ins. Co. v. Nat'l Decorating Serv., Inc.*, 147 F. Supp. 3d 708, 717 (N.D. Ill. 2015), *aff'd*, 863 F.3d 690 (7th Cir. 2017)) (finding duty to defend developer and general contractor as additional insureds under subcontractor's CGL policy where underlying complaint alleged damage to the building outside the scope of subcontractor's work).

While unnecessary to resolution of this appeal, to the extent this Court considers the question, the appellate court's ruling may also be affirmed based on the allegation that H&R caused damage to the townhomes beyond its own work triggers a duty to defend M/I Homes as an additional insured under

H&R's CGL policy.[3] Far from asking "this court to overrule decades of Illinois case law," (Acuity Brief at 18), ruling that a developer may obtain a defense as an additional insured of a subcontractor, so long as the damage is beyond the scope of the subcontractor's work on the development, is consistent with *Eljer* and a natural extension of its progeny. *Eljer*'s admonition that a CGL policy does not act like a performance bond to cover the *insured's* defective work remains intact.

Nothing in *National Decorating* is to the contrary. In that case, the underlying complaint alleged water damage to a condominium building due to the failure of the painting subcontractor to apply enough sealant to the exterior. 863 F.3d at 692. The developer and general contractor tendered their defense to the subcontractor's insurer as additional insureds, which sought a declaration of no duty to defend. On appeal from the district court's finding of a duty to defend, the insurer argued that the failure to apply enough sealant was not an "accident" and that damage to the building itself did not constitute property damage subject to the policy. *Id.* at 692-693.[4]

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[3] As noted above, the appellate court also invited this Court to consider the view that a contractor's own defective work that causes property damage may be considered an "occurrence" under the plain terms of a CGL policy. (*See* A11-A14 ¶¶ 31-38.) While a valid argument can be made in support of that proposition, as evidenced by the fact that express policy exclusions would be rendered superfluous if the insured's work were not otherwise covered, affirming the appellate court does not require this Court to reach that issue.

[4] The insurer also argued that the condominium association lacked standing to seek recovery for damage to individual unit owners' personal property, which the court agreed with, without citation to Illinois authority. As discussed

The court rejected both arguments. First, the court found that the definition of "accident" included "continuous or repeated exposure to substantially the same harmful conditions," which included the lack of sealant. *National Decorating*, 63 F.3d at 692. Second, the court held that, "because the painting subcontractor's actions are alleged to have damaged parts of the building that were outside of the scope of the work for which it was engaged, the condominium association's complaint alleges potentially covered property damage sufficient to invoke the duty to defend." *Id.* at 693.

In ruling that damage beyond the subcontractor's work on the building could trigger a duty to defend the additional insureds, the court began with the premise that, "Under Illinois law, CGL policies are not intended to serve as performance bonds, and therefore, "economic losses sustained as a result of defects in or damage to the insured's own work or product are not covered.'" *Id.* at 697 (quoting *Ohio Cas. Ins. Co. v. Bazzi Const. Co.*, 815 F.2d 1146, 1148 (7th Cir. 1987)) (duty to defend arose from contractor's defective addition of second level to garage that damaged other parts of the structure). *Bazzi*, in turn, quoted the language of *Qualls* included in *Eljer*. 815 F.2d at 1148.

The court continued that, "[n]onetheless, 'damage to something other than the project itself *does* constitute an 'occurrence' under a CGL policy.'" *National Decorating*, 863 F.2d at 697 (quoting *J.P. Larsen*, 2011 IL App (1st)

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below, Illinois law does not require consideration of standing on a duty to defend case, but otherwise supports a finding of potential standing.

101316, ¶ 27). In considering what constitutes the "scope of the project," the court rejected the insurer's argument that the project was the entire building, which would foreclose a duty to defend, instead agreeing with defendants that, "[T]he scope of the project was National Decorating, the Named Insured's, work." *Id.*

The court reasoned that "[t]he underlying complaint seeks to recover for damages incurred to other portions of the building, not just the exterior, which was allegedly coated with an insufficient amount of paint. *It would be illogical to conclude that the scope of the project for which National Decorating contracted was the entire 200 North Building*." *National Decorating*, 863 F.3d at 698 (emphasis added).

While the insurer argued as a matter of policy that, "finding that there is a duty to defend under a subcontractor's CGL policy would obviate the need for a general contractor or developer to carry its own coverage," the court found that argument "disingenuous, as coverage would only be available for damage caused to the building as a result of an 'occurrence' *caused by the Named Insured's work*. Therefore, the policy requires a clear connection between the damage and the subcontractor's work. It would not allow for absolute coverage for any and all harm caused by a project, such that it is no longer prudent or necessary for the general contractor or developer to carry its own CGL coverage." *National Decorating*, 863 F.3d at 698 (emphasis added). The court thus ruled that the insurer had a duty to defend the additional insureds. *Id.*

This Court's precedent likewise supports the holding that Acuity has a duty to defend M/I Homes, as an additional insured of H&R, because the underlying complaint alleges damage to the Townhomes beyond the scope of H&R's work. (C542 ¶ 8.) This Court has instructed that "anyone named as an additional insured under a policy of insurance *receives the same coverage as the named insured*." *National Union Fire Ins. Co. v. Glenview Park Dist.*, 158 Ill. 2d 116, 127 (1994) (emphasis added). *See also West Am. Ins. Co. v. J.R. Const. Co.*, 334 Ill. App. 3d 75, 85 (1st 2002) (additional insured "has the same coverage as the primary policyholder").

Thus, M/I Homes stands in the shoes of H&R for purposes of its CGL policy. That being the case, the scope of M/I Homes' "project" vis-à-vis H&R's CGL policy is the same as H&R's, which renders this case no different than other Illinois cases finding a duty to defend where a subcontractor's work caused damage to other parts of a development beyond the subcontractor's area of responsibility. *See 950 W. Huron*, 2019 IL App (1st) 180743 (finding duty to defend where subcontractor's carpentry work on building envelope caused "damage that went beyond its own work"); *J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶ 28 (finding duty to defend where alleged damages due to subcontractor's defective work on window seals were "not merely construction defects, which would constitute economic losses not covered under the CGL policy," but rather included "water damage throughout a building not constructed by Larsen.").

As the court reasoned in *950 W. Huron*, where Acuity also argued against finding a duty to defend based on damage beyond the scope of a subcontractor's work, "The portions of the construction project that are completely outside the scope of the subcontractors' responsibility seem to us very similarly situated (from the subcontractors' point of view) to the 'carpeting, drywall, antique furniture, clothing, personal mementoes and pictures,' of unit owners, as to which we long ago recognized allegations of damage would trigger a duty to defend." 2019 IL App (1st) 180743, ¶ 38 (quoting *Pekin Ins. Co. v. Richard Marker Assocs., Inc.*, 289 Ill. App. 3d 819, 820 (2d Dist. 1997)). That analysis applies equally here to M/I Homes as the additional insured under H&R's policy. Consequently, Acuity's citation to cases where the developer *is* the named insured are inapposite.

Acuity also wrongly argues that *any* damage that a subcontractor's defective work causes cannot trigger a duty to defend because it is the "the natural and ordinary consequence" thereof and thus not an "occurrence" under the policy. (Acuity Brief at 32). That is not the correct standard. "Rather, the mere *repair or replacement of a contractor's poor work product* is considered to be the natural and ordinary consequences of faulty workmanship, not an 'accident.'" *Lloyd's London*, 2019 IL App (1st) 190517, ¶ 48 (emphasis added) (citations and internal punctuation omitted).

As set forth above, where, as here, the underlying complaint "alleges damages *beyond* repair and replacement, and *beyond* damage to other parts of

the same project over which that contractor was responsible, those additional damages are deemed to be the result of an 'accident.'" *Lloyd's London*, 2019 IL App (1st) 190517, ¶ 52 (emphasis in original). *See also Frankenmuth Mut. Ins. Co. v. Hodsco Constr., Inc.*, 191 F. Supp. 3d 863, 870 (N.D. Ill. 2016) (in finding duty to defend subcontractor based on damage caused by defective roof, court explained that "a party cannot reasonably expect how their defective construction will affect matters outside of the party's control. Damage to 'other property'—that is, property that was not the party's 'work'—is not a foreseeable consequence of the defective construction.").

Additionally, the policy at issue, like in *National Decorating*, defines "occurrence" as "an accident, *including continuous or repeated exposure to substantially the same general harmful condition*," which is alleged here. (C583 § 13; C541-C542 ¶ 8) (emphasis added). Those allegations likewise constitute an "occurrence" triggering a duty to defend. *See National Decorating*, 863 F.3d at 697 (defective work that results in "continuous or repeated exposure to conditions" is "sufficient to satisfy the policy's occurrence requirement when determining whether there is a duty to defend at this juncture in the litigation.").

Moreover, the underlying complaint alleges that the "property damage was an accident in that the Defendant did not intend to cause the design, material and construction defects in the Townhome, and the resulting property damage (such as damage to other building materials, such as windows and

patio doors, including but not limited to water damage to the interior of units) was neither expected nor intended from their standpoint." (C542 ¶ 8.) Those allegations also trigger a duty to defend under the policy. *See Country Mut. Ins. Co. v. Hagan*, 298 Ill. App. 3d 495, 508, 698 N.E.2d 271, 280 (2d Dist. 1998) ("[I]f an injury is not expected or intended by the insured, it is considered an accident.").

Stoneridge Dev. Co. v. Essex Ins. Co., 382 Ill. App. 3d 731, 751 (2d Dist. 2008)), relied upon by Acuity, is inapposite because it involved a general contractor responsible for the entire construction project (the home) alleged to be defective due to the failure to compact the soil beneath the foundation. Under those circumstances, the court found, "The cracks that developed in the Walskis' home were not an unforeseen occurrence that would qualify as an 'accident,' because they were natural and ordinary consequences of defective workmanship, namely, the faulty soil compaction." In so ruling, the court noted, "While defective workmanship could be covered *if it damaged something other than the project itself*, in this case the Walskis alleged damage only to the home." *Id.* at 731 (citation omitted) (emphasis added).

By contrast, the named insured in this case, H&R, was *not* responsible for the entire townhome development. Thus, damage beyond its own work triggered a duty to defend for M/I Homes as an additional insured. Indeed, the court in *950 W. Huron* observed that the cases Acuity cited in support of the same "natural and ordinary consequence" argument proffered here "involved

allegations against either a developer, a general contractor supervising construction, or a sole contractor performing the only work at a given construction site. They do not address the issue here, where a subcontractor's allegedly poor workmanship caused damage to the overall project and individual condo units within the building—damage that went beyond the scope of its own work." 2019 IL App (1st) 180743, ¶ 34.[5]

In short, Acuity does not provide any sound basis, under *Eljer* or otherwise, for this Court to hold that all insureds under a CGL policy stand in an identical position regardless of the scope of their work on the construction project at issue. Nor does Acuity's citation to this Court's ruling in *Trans States Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21 (1997), provide grounds for reversal. Leaving aside that *Trans States* is not a construction defect case and thus inapposite, by analogy it supports the conclusion that damage to "other property" may occur within the same structure (or in this case, multiple structures comprising a single development).

Trans States involved a defective aircraft engine that caused an inflight fire, resulting in damage to the engine and airframe of the aircraft. *Id.* at 24. The parties in the underlying federal suit sought certification of the question whether the engine and airframe "were an integrated unit of the plaintiff's

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[5] Acuity's reliance on two federal cases involving allegations of damage resulting solely from the contractor's work is also misplaced. (Acuity Br. at 32-22) (citing *Hartford Fire Ins. Co. v. Flex Membrane Int'l, Inc.*, No. 00 C 5765, 2001 WL 869623, at *2 (N.D. Ill. Aug. 1, 2001) and *American Fire & Cas. Co. v. Broeren Russo Const., Inc.,* 54 F. Supp. 2d 842, 850 (C.D. Ill. 1999).

airplane under the economic loss doctrine" for purposes of plaintiff's tort claims. *Trans States*, 177 Ill. 2d at 24-25. The court of appeals certified three questions to this Court "concerning the distinction between property damage and economic loss," of which the second is of particular relevance here:

> (1) "[W]hether damage to the product itself constitutes economic loss or *Moorman* property damage"; (2) "*Can a product and one of its component parts ever constitute two separate products* [?]" and (3) "[D]id the airframe and the engine that failed in this case constitute a single product or two distinct products?" If the engine constitutes a single product separate from the airframe, plaintiff's cause may fall within Moorman's property damage exception.

Id. at 27, 42 (emphasis added).

First, following the majority approach, this Court "answer[ed] the inquiry as to whether there may be tort recovery for damage to a single product resulting from a sudden and calamitous event in the negative." *Id.* at 42. Next, this Court answered the second "certified question 'Can a product and one of its component parts ever constitute two separate products' in the affirmative." *Id.* at 51. In order to make that determination, this Court adopted the "product bargained for" approach, which focuses "on the injured party's bargained-for expectation." *Id.* at 46-49. Following that approach, this Court held that "damage to the airframe caused by the defective engine constitutes damage to a single product" because "plaintiff bargained for and received a fully integrated aircraft. Plaintiff did not bargain separately for an engine and separately for an airframe." *Id.* at 50-51.

Here, however, M/I Homes stands as an additional insured of H&R, with whom underlying plaintiff had no "bargained-for expectation." Instead, H&R

provided the equivalent of a separate "component part" to M/I Homes in the construction of the overall development.

That distinction brings this case within the purview of *Lease Navajo, Inc. v. Cap Aviation, Inc.*, 760 F. Supp. 455, 459 (E.D. Pa. 1991), cited in *Trans States*. In that case, where defendant purchased component parts from a third party for the rebuild and installation of an engine into plaintiff's plane, as opposed to purchasing the engine as a whole, the court found that damage to the engine and airplane apart from the component itself was damage to "other property." So too here, H&R provided "component" services to M/I Homes incorporated into the overall townhome development, which plaintiff alleges caused damage "to other portions of the Townhomes that was not the work of" H&R. (C542 ¶ 8.) Those allegations likewise trigger a duty to defend, and this Court may affirm the appellate court on this additional ground.

C. The Appellate Court Correctly Ruled that the Underlying Plaintiff Association Could Have Standing to Assert the Claims for Damages Under the Common Interest Community Association Act

1. This Court Need Not Address Standing as Part of this Duty to Defend Action Because Standing is an Affirmative Defense

This Court should affirm the appellate court's finding of potential standing for purposes of a duty to defend. "To determine whether an insurer has a duty to defend its insured from a lawsuit, *a court must compare the facts alleged in the underlying complaint to the relevant provisions of the insurance policy*." *Swiderski*, 223 Ill. 2d at 363 (emphasis added).

Evaluating the standing of the plaintiff in the underlying action is not part of that process. Instead, "Under Illinois law, lack of standing is an affirmative defense. A plaintiff need not allege facts establishing that he has standing to proceed. Rather, it is the defendant's burden to plead and prove lack of standing." *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 22 (2004). *Accord International Union of Operating Engineers v. Illinois Dep't of Employment Security*, 215 Ill. 2d 37, 45 (2005). Consequently, Acuity cannot put the proverbial cart before the horse by attempting to litigate standing on a factual basis here.

Once Acuity takes up the defense of M/I Homes, it may challenge "standing in a motion to dismiss filed pursuant to section 2–619 of the Code of Civil Procedure." *Wexler*, 211 Ill. 2d. at 23. In declining to consider insurer's argument that association lacked standing to pursue claims for damage to personal property, the court in *Hodsco* reasoned that, "[T]he question currently before the Court *asks only whether Frankenmuth has a duty to defend Hodsco*. There is no issue regarding the extent of the damages for which Frankenmuth will ultimately bear the duty to indemnify under the Agreement. Instead, 'the only appropriate action for an insurer in such a circumstance *is to defend its insured* and then raise that affirmative defense on behalf of its insured.'" 191 F. Supp. at 873-874 (quoting *West Van Buren*, 2016 IL App (1st) 140862, ¶ 41) (Pucinski, J., dissenting) (emphasis added). So too here, the only issue before

the Court is Acuity's duty to defend M/I Homes in the Underlying Litigation. Any consideration of standing is thus irrelevant to resolution of that issue.

2. The Allegations in the Underlying Litigation Raise Potential Standing to Assert Certain Claims

To the extent this Court reviews the appellate court's ruling, the underlying complaint alleges a potential basis for standing under the Act. Section 1-30 (j) of the Act provides, in pertinent part, "The board shall have standing and capacity to act in a representative capacity in relation to matters involving the common areas or more than one unit, on behalf of the members or unit owners as their interests may appear."

The Board in the Underlying Litigation, "in its representative capacity on behalf of all the owners of the Townhomes," alleges damage to "common property" and "damage to the Townhomes and damage to other property." (C538-C539 ¶¶ 3-5; C542-C543 ¶¶ 9, 13; C544 ¶ 9.) Those allegations potentially fall within the broad statutory grant of standing, at least with regard to claims accruing after the Act's effective date of July 29, 2010. Nothing more is needed for purposes of triggering Acuity's duty to defend. *See Swiderski*, 223 Ill. 2d at 363 (duty to defend arises "even if only one of several theories of recovery alleged in the complaint falls within the potential coverage of the policy.").

Acuity, however, without citation to authority, contends "that the Townhome Association is authorized to sue for damage *only to the building itself*—either common areas or defects common to the unit." (Acuity Br. at 14)

(emphasis in original.) Acuity's contention is contrary to the plain language of the Act. To support its argument, Acuity cites *Spring Mill Townhomes Ass'n v. OSLA Fin. Servs., Inc.*, 124 Ill. App. 3d 774, 778 (1st Dist. 1983), which held that a townhome association lacked standing to bring a claim for breach of implied warranty of habitability due to defective roofs. That case, however, was decided prior to adoption of the Act conferring such standing, which as noted only impacts claims accruing before its effective date. Damage to "other property" under the Act could also include personal property (or real property) "involving" the owners of "more than one unit," "as their interests may appear." Such property need not be "expressly described" in the underlying pleading. *J.P. Larsen*, 2011 IL App (1st) 101316, ¶¶ 20.

Arguing that the Act does not confer standing for damage to personal property, Acuity cites *National Decorating*. (Acuity Br. at 15.) Unlike *National Decorating*'s reasoned analysis of an insured's duty to defend a developer as an additional insured of a subcontractor, the court does not provide any reasoning under Illinois law as to *why* "matters involving … more than one unit" cannot involve unit owners' personal property.

The court merely cites *Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n*, 850 F.3d 844, 849 (7th Cir. 2017), which also lacks any analysis to support its conclusion that "individual damage to the unit owners' privately-owned belongings is an individual loss that affects each owner separately; it is not a collective loss affecting multiple units or the 'common elements' of the

building." While *Allied* cites *Sandy Creek Condo. Ass'n v. Stolt & Egner, Inc.*, 267 Ill. App. 3d 291, 296 (2d Dist. 1994), that case does not address any requirement of a "collective loss," but instead found standing under the equivalent provision of the Condominium Property Act to pursue claims against a developer for fraudulent misrepresentations made to unit owners. If anything, *Sandy Creek* supports a finding of potential standing under the Act for claims of damage to "other property." In finding standing, the court reasoned:

> Although not all unit owners were affected by the allegedly fraudulent statements of the defendants, the Act statutorily grants the Association standing to bring an action *if more than one unit is affected*. The historical and practice notes which accompany section 9.1 of the Act state that a condominium board's standing to sue for construction defects has been broadly interpreted by the appellate court and that the Act was amended by the legislature to clarify that *boards have standing to sue on all matters affecting more than one unit*."

267 Ill. App. 3d at 296 (emphasis added). Similarly here, allegations of damage to "other property" of the "Townhomes" fall within the ambit of "all matters affecting more than one unit"—be it personal or otherwise.

Allied also cites *Poulet v. H.F.O, LLC*, 353 Ill. App. 3d 82, 100 (1st Dist. 2004), which has no application because it addressed the opposite issue: whether the condo association had *exclusive* standing to bring claims concerning mishandling of funds in its account to bar claims by individual unit owners. Thus, neither Illinois case bars a finding of potential standing to pursue claims for damage to individual unit owners' property.

Instead, applying the rule that a "court's analysis begins with the language of the statute, which is the best indication of legislative intent," *Exelon Corp. v. Dep't of Revenue*, 234 Ill. 2d 266, 274–275 (2009), the plain language of the Act does not impose any requirement of "a *collective* loss affecting multiple units or the 'common elements' of the building." *Allied Prop.*, 850 F.3d at 849 (emphasis added). To the contrary, the court in *Deerpath Consol. Neighborhood Ass'n v. Lake Cnty. Bd. of Rev.*, Act. 2021 IL App (2d) 190985, ¶ 23, *appeal denied*, 193 N.E.3d 32 (Ill. 2022), held that a townhome association had standing to challenge *individual* property tax assessments that involved "more than one unit" under the Act. *See also Sunnyside Elgin Apartments, LLC v. Miller*, 2021 IL App (2d) 200614, ¶ 26, *appeal denied*, 175 N.E.3d 120 (Ill. 2021).

Therefore, the question is not whether the underlying claim is "personal" or "collective" in nature, but whether it is "in relation to matters involving the common areas or more than one unit" of the development. Because the Underlying Litigation alleges damage to "other property" involving the "common areas" and "more than one unit," the appellate court correctly found a basis for potential standing.

D. Amicus Curiae's Argument that Allegations of Breach of Contract Cannot Give Rise to the Duty to Defend Is Erroneous and Was Not Raised by Acuity in this Appeal.

Pursuant to leave granted by this Court, an insurance industry trade association has submitted an *amicus* brief arguing that there is no duty to defend under a CGL policy where the underlying claim sounds in breach of

contract. Acuity, however, has not asserted that position in this appeal. Therefore, this Court should disregard *amicus'* arguments. "It is well settled that an *amicus curiae* is not a party to the action but is, instead, a 'friend' of the court." *Burger v. Lutheran Gen. Hosp.*, 198 Ill. 2d 21, 62 (2001) (internal quotations omitted).

In advising the court, "an *amicus* takes the case as he finds it, *with the issues framed by the parties*." *Karas v. Strevell*, 227 Ill. 2d 440, 451 (2008) (internal quotations omitted) (emphasis added). Thus, "[t]his court has repeatedly rejected attempts by *amicus* to raise issues not raised by the parties to the appeal." *Id.* (striking portion of amicus brief urging court to abandon fact pleading where not argued by parties); *see also Burger*, 198 Ill. 2d at 62 (declining to address argument raised in *amicus* brief but not by the parties); *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill. 2d 107, 117 (declining to consider argument raised by amicus but not by the parties); *In re J.W.*, 204 Ill. 2d 50, 73 (2003) (same).

Even if the Court were to consider the issue, *amicus'* arguments are misplaced because an underlying breach of contract claim can give rise to a duty to defend under a CGL policy. *See Pekin Ins. Co. v. Dial*, 355 Ill. App. 3d 516, 520 (5th Dist. 2004) ("The factual allegations of the complaint, rather than the legal theory under which the action is brought, determine whether there is a duty to defend"); *J.P. Larsen*, 2011 IL App (1st) 101316, ¶¶ 22-23 (rejecting

insurer's argument that "the allegations against Larsen are based in contract and, therefore, Milwaukee Mutual could have no duty to defend.").

As the court explained in *J.P. Larsen*, the insurer "fails to acknowledge that allegations based in contract have resulted in duties to defend as long as the damage is not to the actual property the insured was working on but, rather, is to other property caused by the insured's work product." 2011 IL App (1st) 101316, ¶ 22. The court thus concluded that "the pleadings alleged 'property damage' within, or at least potentially within, the definition of the CGL policy." *Id* ¶ 23.

In so ruling, the court cited *Richard Marker*, 289 Ill. App. at 823, in which the court found a duty to defend under a CGL policy where the underlying allegations were for breach of an architectural services agreement in which the insured failed to adequately design the placement and insulation of water and plumbing pipes, and breach of a construction contract for a faulty HVAC system. So too here, the underlying complaint alleges damage to property beyond the scope of the insured's work, which triggers a duty to defend under the terms of the CGL policy at issue here regardless of the legal theory.

The cases *amicus* cites are inapposite. For example, in *Viking Const. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 42 (1st Dist. 2005), the underlying complaint was based on the defendant's *own* defective work as the "construction manager who allegedly failed to properly supervise, allowing

faulty bracing, that resulted in a construction defect—the collapse." Similarly in *Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254, ¶ 23, *appeal denied*, 197 N.E.3d 1134 (Ill. 2022), the underlying complaint alleged breach of contract against the general contractor for its own defective installation of elevators, and plaintiff only sought "compensation for correctly completing the installation of the elevators and for economic losses the Library District sustained because of having to use the faulty elevators until they could be repaired."

The issue the court decided in *Westfield Nat. Ins. Co. v. Cont'l Cmty. Bank & Tr. Co.*, 346 Ill. App. 3d 113, 120 (2d Dist. 2003) was "whether a duty to defend or indemnify exists as to the spouse of a perpetrator who commits sexual abuse upon minors," holding that "the intentional-acts exclusion of the policies applies and precludes Westfield from owing a duty to defend or indemnify the aunt for the injuries she allegedly inflicted upon the minors."

This Court in *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 104 (1992) considered, under the "known loss" doctrine, whether insurers had no duty to defend underlying suits claiming PCB contamination where the insured "knew it was releasing waste material into the environment as early as 1959."

None of these cases or any others cited address the allegations here of a subcontractor's defective work—on behalf of its additional insured—causing property damage beyond the scope of its work on the Townhomes and beyond

the Townhomes themselves. Therefore, the duty to defend is triggered regardless of the legal theory of the Association's underlying claims against M/I Homes.

Indeed, nothing in the actual policy language precludes the duty to defend where the underlying complaint sounds in breach of contract rather than tort. *See*, *e.g.*, *Lamar Homes,* 242 S.W.3d at 13 ("[T]he label attached to the cause of action—whether it be tort, contract, or warranty—does not determine the duty to defend."); *J.S.U.B., Inc.*, 979 So. 2d at 884 ("U.S. Fire's argument that a breach of contract can never result in an 'accident' is not supported by the plain language of the policies."); *American Fam. Mut. Ins. Co. v. Am. Girl, Inc.*, 673 N.W.2d 65, 77 (Wis. 2004) ("[T]here is nothing in the basic coverage language of the current CGL policy to support any definitive tort/contract line of demarcation for purposes of determining whether a loss is covered by the CGL's initial grant of coverage. 'Occurrence' is not defined by reference to the legal category of the claim. The term 'tort' does not appear in the CGL policy.").

In rejecting the same argument *amicus* proffers here, the court in *Lamar Homes* reasoned:

> [T]he CGL policy makes no distinction between tort and contract damages. The insuring agreement does not mention torts, contracts, or economic losses; nor do these terms appear in the definitions of "property damage" or "occurrence." The CGL's insuring agreement simply asks whether "property damage" has been caused by an "occurrence." Therefore, any preconceived notion that a CGL policy is only for tort liability must yield to the policy's actual language. The duty to defend must be determined

> here, as in other insurance cases, by comparing the complaint's factual allegations to the policy's actual language.

242 S.W.3d at 13.

This Court should likewise reject any artificial distinction between "tort" and "contract" claims and instead find a duty to defend based on the allegations of the underlying complaint, which as discussed above fall within the policy's terms. Because the scope of coverage under a CGL policy may be determined based on its terms, using the ordinary tools of construction, there is no support for any bright-line rule as a matter of law that would exclude underlying claims sounding in breach of contract.

V. CONCLUSION

For the reasons set forth above, Defendant/Counter Plaintiff-Appellee, M/I Homes of Chicago, LLC, respectfully requests that this Court affirm the judgment of the appellate court that Acuity owes M/I Homes a duty of defense in connection with the claims in the Underlying Litigation.

Respectfully submitted,

M/I HOMES OF CHICAGO, LLC
Defendant/Counter Plaintiff-Appellee

By: /s/ Eric P. Sparks
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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of the brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a) is 40 pages.

/s/ *Mark D. Brookstein*

APPENDIX

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2022 IL App (1st) 220023

SIXTH DIVISION
September 9, 2022

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

No. 1-22-0023

ACUITY, a Mutual Insurance Company,	)	
	)	
Plaintiff and Counterdefendant-Appellee,	)	Appeal from the
	)	Circuit Court of
v.	)	Cook County.
	)	
M/I HOMES OF CHICAGO, LLC, and CHURCH STREET STATION TOWNHOME OWNERS ASSOCIATION,	)	No. 19 CH 00237
	)	
	)	Honorable
	)	Allen P. Walker,
Defendants,	)	Judge Presiding.
	)	
(M/I Homes of Chicago, LLC, Defendant and Counterplaintiff-Appellant).	)	

PRESIDING JUSTICE MIKVA delivered the judgment of the court, with opinion.
Justices Oden Johnson and Mitchell concurred in the judgment and opinion.

OPINION

¶ 1 Appellant M/I Homes of Chicago, LLC (M/I Homes), appeals from the circuit court's entry of summary judgment in favor of Acuity, a mutual insurance company. The circuit court found that Acuity had no duty to defend M/I Homes in an underlying lawsuit—stemming from damages caused by the allegedly defective construction work of one of M/I Homes's subcontractors—because the complaint in that case did not allege "property damage caused by an occurrence." For the following reasons, we reverse the circuit court's grant of summary judgment for Acuity and remand for it to enter summary judgment in favor of M/I Homes on the issue of a duty to defend.

¶ 2 I. BACKGROUND

¶ 3 This case stems from alleged defects in a multiple-building residential townhome development in Hanover, Illinois (the Townhomes). The Townhomes' owners association filed a suit for breach of contract and the implied warranty of habitability against M/I Homes as the successor developer/seller of the Townhomes, and M/I Homes asked Acuity to defend it in that underlying lawsuit, as the additional insured on a policy Acuity had issued to one of its subcontractors, H&R Exteriors Inc. (H&R). Acuity denied that it had a duty to defend M/I Homes under the policy and filed the declaratory judgment suit that is before the court.

¶ 4 A. The Policy

¶ 5 Acuity issued to H&R a commercial general liability and commercial excess liability policy—policy No. Z60057, effective December 13, 2016, through December 13, 2017—and renewed that policy from December 13, 2017, through December 13, 2018 (collectively, the Policy). M/I Homes was listed as an additional insured on the Policy.

¶ 6 In relevant part, the Policy provided as follows:

> "1. *Insuring Agreement*
>
> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of *bodily injury* or *property damage* to which this insurance applies. We will have the right and duty to defend the insured against any *suit* seeking those damages. However, we will have no duty to defend the insured against any *suit* seeking damages for *bodily injury* or *property damage* to which this insurance does not apply. ***
>
> * * *
>
> b. This insurance applies to *bodily injury* and *property damage* only if:

(1) The *bodily injury* or *property damage* is caused by an *occurrence* that takes place in the *coverage territory*; [and]

(2) The *bodily injury* or *property damage* occurs during the policy period; ***[.]

* * *

2. *Exclusions*

This insurance does not apply to:

* * *

j. *Damage to Property*

Property damage to:

* * *

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the *property damage* arises out of those operations; or

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

* * *

l. *Damage to Your Work*

Property damage to *your work* arising out of it or any part of it ***.

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor." (Emphases in original.)

¶ 7 The definitions section of the Policy further provided:

"13. '*Occurrence*' means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

17. '*Property damage*' means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the *occurrence* that caused it.

* * *

22. '*Your work*:'

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Material, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of *your work* *** [.]" (Emphases in original.)

¶ 8 B. The Underlying Lawsuit

¶ 9 The Church Street Station Townhome Owners Association (the Association), by its board of directors, filed the underlying lawsuit against M/I Homes on October 4, 2018. On May 1, 2019,

the Association filed an amended complaint for breach of contract (count I) and breach of the implied warranty of habitability (count II). The Association alleged that it was the governing body of the Townhomes and stated that "pursuant to its grant of statutory standing," it "assert[ed] claims on behalf of all Townhome buyers and subsequent buyers." The Association cited section 1-30(j) of the Common Interest Community Association Act (Act) (765 ILCS 160/1-30(j) (West 2020)), which provides that "[t]he board shall have standing and capacity to act in a representative capacity in relation to matters involving the common areas or more than one unit, on behalf of the members or unit owners as their interests may appear."

¶ 10 In the amended complaint, the Association alleged that M/I Homes was the successor developer/seller for the Townhomes, having succeeded to the entire remaining interests of the initial developer/seller, Neumann Homes Inc. (Neumann). The Association alleged that it "was under Developer Control until November 6, 2014 when owner elected a majority of the members of the Board of the Association." The Association alleged that "Neumann and [M/I Homes] constructed and sold Townhomes with substantial exterior defects," including moisture-damaged or water-damaged fiber board, water-damaged OSB sheathing, deteriorated brick veneer, poor condition of the weather-resistive barrier, improperly installed J-channel and flashing, and prematurely deteriorating "support members below the balcony deck boards." The Association further alleged that Neumann and M/I Homes did not perform the construction work themselves, but that all work on the Townhomes was performed on their behalf by subcontractors and the designer.

¶ 11 The Association alleged:

> "The Defects caused physical injury to the Townhomes (*i.e.*, altered the exteriors' appearance, shape, color or other material dimension) after construction of the

> Townhome[s] was completed from repeated exposure to substantially the same general harmful conditions. The property damage was an accident in that [M/I Homes] did not intend to cause the design, material and construction defects in the Townhome[s], and the resulting property damage (such as damage to other building materials, such as windows and patio doors, including but not limited to water damage to the interior of units) was neither expected nor intended from their standpoint. *** The work of the subcontractors and the designer caused damage to other portions of the Townhomes that was not the work of those subcontractors."

¶ 12 In count I, the breach-of-contract claim, the Association specifically alleged:

> "9. The Board in its representative capacity on behalf of all the owners of the Townhomes asserts a claim for breach of contract in connection with the Defects against [M/I Homes].
>
> * * *
>
> 13. The Defects have caused substantial damage to the Townhomes and damage to other property.
>
> 19. [*sic*] As a direct and proximate result of the aforesaid breaches of contract resulting in the Defects, the Association has been and will be required to make substantial repairs to the Defects and repairs to damage to other property caused by the Defects."

The Association then requested an award of "[d]amages in an amount equal to the total cost of repair or replacement of the aforesaid Defects, and cost to repair damage to other property."

¶ 13 Similarly, in count II, its claim for breach of the implied warranty of habitability, the Association alleged that "[a]s a direct and proximate result of the aforesaid breaches of warranty, the Association will be required to make substantial repairs to the Defects and to repair damage to

other property" and that it was thus seeking "damages in an amount equal to the total cost of repair or replacement of the aforesaid Defects and damage to other property caused by the Defects."

¶ 14 C. The Declaratory Judgment Action

¶ 15 Acuity filed its complaint for declaratory judgment against M/I Homes and the Association on January 8, 2019, and filed the operative amended complaint on November 20, 2019. The Association is not a party to this appeal.

¶ 16 Acuity sought a declaration that it did not have a duty to defend or indemnify M/I Homes. On February 19, 2020, M/I Homes filed a counterclaim against Acuity, asking for a declaration that Acuity did owe it a duty to defend.

¶ 17 The parties filed cross-motions for summary judgment. In Acuity's motion, it argued that it did not owe M/I Homes a duty to defend because " 'the actual property the insured was working on' does not constitute covered 'property damage' caused by an 'occurrence' under the policy" (quoting *CMK Development Corp. v. West Bend Mutual Insurance Co.*, 395 Ill. App. 3d 830, 842 (2009)), and because M/I Homes was responsible for all the Townhomes, any allegation of damages "related only to the defective construction of the townhomes and specifically not any damage to any other property beyond the townhomes themselves."

¶ 18 M/I Homes argued in its cross-motion for partial summary judgment that Acuity owed it a duty to defend because the underlying complaint's allegation that there was damage to "other property" was an allegation of damage beyond just repair and replacement of the construction work. According to M/I Homes, "property damage" caused by an "occurrence" was therefore sufficiently alleged.

¶ 19 On July 30, 2021, the circuit court granted summary judgment in favor of Acuity and denied summary judgment in favor of M/I Homes. The court noted that "only property damage

caused by an occurrence will be covered by the Policy." The court said that it was "not persuaded that, since the [P]olicy has H&R as a named insured, any damage that occurs outside of H&R's work alone is considered an 'occurrence' " because "Illinois case law considers a subcontractor's work still within the scope of work of the general contractor." The court was also not convinced that the mere mention of damage to "other property" in the underlying complaint triggered Acuity's duty to defend because the Association was focused "on recovering for damage of the townhomes, and not necessarily 'other property' that could have been damaged by M/I Homes' faulty work."

¶ 20 On August 27, 2021, M/I Homes filed a motion to reconsider.

¶ 21 The circuit court denied the motion to reconsider, and this appeal followed.

¶ 22 II. JURISDICTION

¶ 23 The circuit court denied M/I Homes's motion to reconsider on November 5, 2021, and M/I Homes timely filed its notice of appeal on December 3, 2021. We have jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994) and Rule 303 (eff. July 1, 2017), governing appeals from final judgments entered by the circuit court in civil cases.

¶ 24 III. ANALYSIS

¶ 25 This case was decided on cross-motions for summary judgment. "Summary judgment is proper when 'the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' " *Bremer v. City of Rockford*, 2016 IL 119889, ¶ 20 (quoting 735 ILCS 5/2-1005(c) (West 2008)). "The construction of an insurance policy and a determination of the rights and obligations thereunder are questions of law for the court which are appropriate subjects for disposition by way of summary judgment." *Crum & Forster Managers Corp. v.*

Resolution Trust Corp., 156 Ill. 2d 384, 391 (1993). We review the court's ruling on a motion for summary judgment *de novo*. *Beaman v. Freesmeyer*, 2019 IL 122654, ¶ 22.

¶ 26 On appeal, M/I Homes argues that the circuit court should have granted summary judgment in its favor because Acuity did owe M/I Homes a duty to defend. "The duty to defend is determined solely from the allegations of the complaint." (Emphasis added.) *ISMIE Mutual Insurance Co. v. Michaelis Jackson & Associates, LLC*, 397 Ill. App. 3d 964, 968 (2009) (citing *Thornton v. Paul*, 74 Ill. 2d 132, 144 (1978), *overruled in part on other grounds by American Family Mutual Insurance Co. v. Savickas*, 193 Ill. 2d 378, 387 (2000)). The duty to defend exists if the allegations in the underlying complaint fall within or *potentially* within a policy's coverage provisions, "even if the allegations are legally groundless, false, or fraudulent." *Id.* As we have explained,

> "[t]he insurer's duty to defend does not depend upon a sufficient suggestion of liability raised in the complaint; instead, the insurer has the duty to defend unless the allegations of the underlying complaint demonstrate that the plaintiff in the underlying suit will not be able to prove the insured liable, under any theory supported by the complaint, without also proving facts that show the loss falls outside the coverage of the insurance policy." (Internal quotation marks omitted.) *American Economy Insurance Co. v. Holabird & Root*, 382 Ill. App. 3d 1017, 1022 (2008).

Stated another way, "[u]nless the complaint on its face clearly alleges facts which, if true, would exclude coverage, the potentiality of coverage is present and the insurer has a duty to defend." *Western Casualty & Surety Co. v. Adams County*, 179 Ill. App. 3d 752, 756 (1989). In making this assessment, "[w]e liberally construe the underlying complaint and policy in favor of the insured." *Certain Underwriters at Lloyd's London v. Metropolitan Builders, Inc.*, 2019 IL App (1st) 190517, ¶ 28.

¶ 27 The Policy, which is a fairly standard commercial general liability (CGL) policy, provides that Acuity will cover "property damage" if the property damage "is caused by an occurrence." Thus, the question of M/I Home's potential for coverage, and Acuity's duty to defend, hinges on whether the underlying complaint alleges "property damage" caused by an "occurrence." The Policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "[l]oss of use of tangible property that is not physically injured," and defines an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same harmful conditions."

¶ 28 M/I Homes relies on the following allegations of the underlying complaint in support of its argument that the complaint alleged property damage caused by an occurrence: (1) the defects caused damage to the Townhomes "and damage to other property," (2) the property damage "was an accident in that [M/I Homes] did not intend to cause the design, material and construction defects in the Townhome[s], and the resulting property damage (such as damage to other building materials, such as windows and patio doors, including but not limited to water damage to the interior of units) was neither expected nor intended from their standpoint," and (3) the Association was and would be "required to make substantial repairs to the Defects and repairs to damage to other property caused by the Defects."

¶ 29 M/I Homes contends that, based on these allegations, the underlying complaint sufficiently alleges property damage caused by an occurrence. M/I Homes concedes that "property damage" as covered by the Policy must be damage to property beyond the construction project itself, here the Townhomes. M/I Homes argues that the allegation of damage to "other property" in the underlying complaint is referring to "property other than the Townhomes themselves (*i.e.* property other than the contractor's work product)" and is sufficient to qualify as "property damage." M/I

Homes also argues that this damage to other property was alleged to have been caused by an "occurrence" because the underlying complaint alleged the damage was an accident—caused by the defective work of the subcontractor—that was neither expected nor intended by M/I Homes.

¶ 30 In response, Acuity argues that the allegations of damage to "other property" are not enough to trigger its duty to defend because the allegations are unconnected to a theory of recovery and the underlying complaint fails to both identify the owner of the "other property" and explain how the Association has standing to sue for the damage to that property.

¶ 31 The parties' briefing begins with the premise that Acuity has no duty to defend under the Policy unless the Association's underlying complaint alleges property damage to something outside of the Townhomes project. The parties agree that, under Illinois law, there is no "property damage" caused by an "occurrence" under a CGL policy absent such an allegation.

¶ 32 This shared understanding, which is not directly tied to the language of the insurance policy, comes from a long line of Illinois appellate court cases that are summarized in excellent fashion by Justice Robert Gordon in *CMK Development Corp.*, 395 Ill. App. 3d at 840-41. The court there starts by acknowledging that the requirement of damage to "other property" "is not explicitly stated in the policy itself but comes instead from the case law interpreting CGL policies." *Id.* at 840. It then cites a line of decisions holding that only " 'construction defects that damage something other than the project itself will constitute an "occurrence" ' " under a CGL policy. *Id.* (quoting *Stoneridge Development Co. v. Essex Insurance Co.*, 382 Ill. App. 3d 731, 752 (2008), citing *Pekin Insurance Co. v. Richard Marker Associates, Inc.*, 289 Ill. App. 3d 819, 823 (1997), and *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, 277 Ill. App. 3d 697, 705 (1996)). The court gives examples of what has constituted "other property" in various cases, including a homeowner's furniture and personal belongings in a home constructed by the insured, cars in a

parking garage constructed by the insured, and carpets, upholstery, and drapery in a school constructed by the insured. *Id.* (citing *Richard Marker*, 289 Ill. App. 3d at 823, *Wil-Freds*, 277 Ill. App. 3d at 705, and *United States Fidelity & Guaranty Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 75, 81 (1991)).

¶ 33 While *CMK Development* focused on the "occurrence" requirement, other cases have focused on the CGL policy language requiring an allegation of "property damage" in the underlying complaint. See, *e.g.*, *Viking Construction Management, Inc. v. Liberty Mutual Insurance Co.*, 358 Ill. App. 3d 34, 54-55 (2005) ("A line of Illinois cases holds that where the underlying complaint alleges only damages in the nature of repair and replacement of the defective product or construction, such damages constitute economic losses and do not constitute 'property damage.' ").

¶ 34 Some cases have concluded that, under Illinois law, damage to "other property" is required or there is no occurrence or property damage. See, *e.g.*, *Westfield Insurance Co. v. West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶¶ 18-19 (finding no duty to defend because the defects in construction were not an accident, so there was no "occurrence," and the allegations did not include "property damage" because defective work and products were purely economic losses); *Acuity Insurance Co. v. 950 West Huron Condominium Ass'n*, 2019 IL App (1st) 180743, ¶ 30 (noting that the existence of both an "occurrence" and "property damage" turn "on whether the complaint for which the CGL insurer is asked to defend alleges damage to property that is not any part of the construction project").

¶ 35 In these appellate court cases, this court has relied on our supreme court's decision in *Travelers Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278, 308 (2001), which does not necessarily compel this limitation. There, the supreme court held that, in determining whether there

was CGL coverage, the predicate of "property damage" is satisfied only "when property is altered in appearance, shape, color or in other material dimension, and does not take place upon the occurrence of an economic injury, such as diminution in value." *Id.* Our supreme court in *Eljer* also cautioned against expanding CGL coverage such that it functioned as a "performance bond" for the contractual work of the insured. *Id.* at 314. Thus, the "other property" requirement does not come directly from the language of our supreme court's decision in *Eljer.*

¶ 36 Some of our cases have noted that the "other property" requirement is not grounded in the policy language itself. See, *e.g.*, *Metropolitan Builders*, 2019 IL App (1st) 190517, ¶ 32 ("[M]uch of our analysis in those cases has been driven less by literal textual construction and more by considering the overall purpose of CGL policies."); see also *CMK Development*, 395 Ill. App. 3d at 841. As we have acknowledged, this line of cases establishing an "other property" requirement has been criticized by some commentators. *Viking*, 358 Ill. App. 3d at 42 (quoting the observation that coverage for construction claims under CGL policies " 'lies in chaos' " (citing William D. Lyman, *Is Defective Construction Covered Under Contractors' and Subcontractors' Commercial General Liability Insurance Policies?*, 491 Practising L. Inst., Real Est. L. & Prac. Course Handbook Series, 505, 513 (April 2003))).

¶ 37 Commentators continue to criticize the Illinois appellate court's approach to CGL coverage. See, *e.g.*, 4Pt1 Philip L. Bruner & Patrick J. O'Connor, Construction Law § 11.210 (2022) ("Courts that deny coverage for failure to meet the 'occurrence' requirement simply because the injury is limited to the insured's work are making coverage determinations based on policy considerations rather than adhering to principles of contract interpretation.").

¶ 38 Bruner and O'Connor also note that, in recent years, the trend in cases throughout the country is to move away from this approach and view faulty workmanship as an "occurrence" and

damage from that faulty construction to the project itself as "property damage" triggering coverage under the standard CGL policy. *Id.* §§ 11.213-11.215. As some of these cases have noted, the "your work" exclusion and the subcontractor exception to that exclusion in standard CGL policies, including the Policy in this case, are rendered meaningless if damage to the project itself is not "property damage" caused by an "occurrence." See, *e.g.*, *Black & Veatch Corp. v. Aspen Insurance (UK) Ltd.*, 882 F.3d 952, 964 (10th Cir. 2018). At least one of those cases cited our supreme court's decision in *Eljer* with approval, suggesting that nothing in *Eljer* mandates that there must be damage to property outside of the construction project itself. *Capstone Building Corp. v. American Motorists Insurance Co.*, 67 A.3d 961, 980-81 (Conn. 2013) (holding that "project components defective prior to delivery, or those defectively installed, did not suffer physical injury" (citing *Eljer*, 197 Ill. 2d at 312) but that "faulty workmanship or defective work that has damaged the otherwise nondefective completed project has caused 'physical injury to tangible property' within the plain meaning of the definition of the policy" (internal quotation marks omitted)).

¶ 39 It does not appear that the Illinois appellate court has followed this trend of eliminating any requirement of damage to "other property" or that our supreme court has addressed the issue since *Eljer*. However, at least two recent Illinois appellate court decisions have looked at the work of the subcontractor who was seeking CGL insurance coverage as though that work was a discrete project and thus treated allegations of damage to other parts of the larger construction project as allegations of damage to "other property." *950 West Huron*, 2019 IL App (1st) 180743, ¶ 43 ("[W]hen an underlying complaint alleges that a subcontractor's negligence caused something to occur to a part of the construction project outside of the subcontractor's scope of work, this alleges an occurrence under this CGL policy language."); *Milwaukee Mutual Insurance Co. v. J.P. Larsen, Inc.*, 2011 IL App (1st) 101316, ¶ 28 ("[The window sealant subcontractor's] negligent

workmanship caused an accident in the form of significant and continuing water leakage.").

¶ 40 In at least one recent federal case, applying Illinois law, the court built on the decision in *J.P. Larsen* and held that, where the *general contractor* was seeking coverage under the subcontractor's CGL policy, as an additional insured, the underlying complaint's allegations of damage the subcontractor caused beyond the scope of its own work were sufficient to trigger a duty to defend the general contractor. *Westfield Insurance Co. v. National Decorating Service, Inc.*, 147 F. Supp. 3d 708, 717 (N.D. Ill. 2015), *aff'd*, 863 F.3d 690 (7th Cir. 2017). As the Seventh Circuit noted, in affirming the Northern District's *National Decorating* decision, "the scope of the project was [the subcontractor's], the Named Insured's, work," and the general contractor, as an additional insured under that subcontractor's policy, was entitled to coverage. *National Decorating*, 863 F.3d at 697-99.

¶ 41 The underlying complaint in this case contains allegations that could support an obligation to defend M/I Homes under the analysis of *National Decorating.* It alleges that "the work of subcontractors and the designer caused damage to other portions of the Townhomes that was not the work of those subcontractors." Just as in *National Decorating*, the defendant in the underlying case here is the general contractor who is seeking coverage as an additional insured under a subcontractor's policy. Under the reasoning of *National Decorating*, that allegation alone should be enough to trigger coverage.

¶ 42 M/I Homes does not press this argument on appeal. This is not surprising. Federal cases are not binding on this court. *Asset Exchange II, LLC v. First Choice Bank*, 2011 IL App (1st) 103718, ¶ 19. Moreover, in *950 West Huron*, 2019 IL App (1st) 180743, we took pains to distinguish the general contractor or developer from the subcontractor. Using language that Acuity quotes and relies on, we said that there was an occurrence from the subcontractor's point of view,

"*notwithstanding that it would not be an occurrence from a general contractor or developer's perspective*." (Emphasis added.) *Id.* ¶ 43. Of course, the distinction we made in *950 West Huron* between finding an occurrence and property damage for the subcontractor but not for the general contractor raises the questions of whether, when, and why these terms would mean something different for different parties insured under the same policy.

¶ 43 We need not answer those questions here, although we raise them in the hope that other courts and perhaps our supreme court may bring clarity to these nuanced issues of coverage under CGL policies in construction litigation. Here, the underlying complaint simply alleges, in the broadest possible terms, that there was damage to "other property." Liberally construing both the complaint and the policy in favor of the insured (*Metropolitan Builders*, 2019 IL App (1st) 190517, ¶ 28), and applying the well-established principle that "[u]nless the complaint on its face clearly alleges facts which, if true, would *exclude* coverage," the potentiality of coverage triggering a duty to defend is present (emphasis added) (*Adams County*, 179 Ill. App. 3d at 756), we find those broad allegations are sufficient to trigger Acuity's duty to defend.

¶ 44 Acuity argues that the "other property" allegations are not enough to trigger a duty to defend because "the underlying complaint does not identify who owned that 'other property,' nor does it explain how the Association has standing to sue for that damage." According to Acuity, section 1-30(j) of the Act (765 ILCS 160/1-30(j) (West 2020))—the statute under which the Association alleged it had standing in the underlying complaint—only gives the Association the right to sue "for damage to the townhomes themselves."

¶ 45 Section 1-30(j) provides that the Association—as "a common interest community association's board of managers or board of directors" (*id.* § 1-5)—"shall have standing and capacity to act in a representative capacity in relation to matters involving the common areas or

more than one unit, on behalf of the members or unit owners as their interests may appear." *Id.* § 1-30(j).

¶ 46 Acuity relies on several cases holding that the "standing and capacity" language of the Act does not give an association standing to sue for damage to individual unit owners' property. *West Van Buren*, 2016 IL App (1st) 140862; *National Decorating*, 863 F.3d at 696; *Allied Property & Casualty Insurance Co. v. Metro North Condominium Ass'n*, 850 F.3d 844, 849 (7th Cir. 2017). M/I Homes responds that these cases are not controlling. We also note that, as the dissent in *West Van Buren* points out, standing may not provide an appropriate basis for a refusal to defend, since standing is an affirmative defense. *West Van Buren*, 2016 IL App (1st) 140862, ¶ 39 (Pucinski, J., dissenting).

¶ 47 We do not have to decide whether these cases are controlling because the allegations of the underlying complaint in this case are not necessarily limited to such damages. Even if we agree with Acuity that the duty to defend M/I Homes cannot be triggered by claims of damage to the property of unit owners, that does not eliminate the potentiality of coverage triggering a duty to defend in this case.

¶ 48 The underlying complaint in this case alleges, in broad terms, damage to "other property." Acuity says this case is similar to *West Van Buren* where we said "[w]e do not believe a free-standing reference to a fact, that is not attached to any particular theory of recovery or particular party in the complaint, can trigger a duty to defend." *Id.* ¶ 20 (majority opinion). However, the condominium association in *West Van Buren* was relying on a specific allegation that "individual unit owners experienced damage to personal and other property as a result of the water infiltration." (Internal quotation marks omitted.) *Id.* ¶ 6. In this case, in contrast, the underlying complaint references damages to "other property" and is not limited to the property of unit owners for which

the court in *West Van Buren* found the association had no right to recover.

¶ 49 The threshold for finding a duty to defend is low and "any doubt with regard to such duty is to be resolved in favor of the insured." (Internal quotation marks omitted.) *Holabird & Root*, 382 Ill. App. 3d at 1023. While the allegations of damage to "other property" are certainly vague, even "vague, ambiguous allegations against an insured should be resolved in favor of finding a duty to defend." *Illinois Tool Works Inc. v. Travelers Casualty & Surety Co.*, 2015 IL App (1st) 132350, ¶ 26. "Unless the complaint on its face clearly alleges facts which, if true, would exclude coverage, the potentiality of coverage is present and the insurer has a duty to defend." *Adams County*, 179 Ill. App. 3d at 756.

¶ 50 Here, the Association clearly does have standing "to act in a representative capacity in relation to matters involving the common areas" (765 ILCS 160/1-30(j) (West 2020)), the allegations of damage to "other property" can be a reference to the Association's own property in the common areas, and there are no allegations that would clearly exclude coverage. Accordingly, these allegations are enough to potentially fall within the Policy's coverage requirement of "property damage" caused by an "occurrence" and thus trigger a duty to defend.

¶ 51 IV. CONCLUSION

¶ 52 For the foregoing reasons, we reverse the circuit court's grant of summary judgment in favor of Acuity, and we remand to the circuit court to enter summary judgment in favor of M/I Homes on the issue of the duty to defend.

¶ 53 Reversed and remanded with directions.

Acuity v. M/I Homes of Chicago, LLC, 2022 IL App (1st) 220023

Decision Under Review:	Appeal from the Circuit Court of Cook County, No. 19 CH 00237; the Hon. Allen P. Walker, Judge presiding.
Attorneys for Appellant:	Eric P. Sparks and Patrick J. Johnson of Gould & Ratner LLP, of Chicago, for the defendant/counter-plaintiff-appellant.
Attorneys for Appellees:	Joseph P. Postel of Lindsay, Pickett & Postell, LLC, of Chicago, for the plaintiff/counter-defendant-appellee.

CERTIFICATE OF SERVICE

I, Mark D. Brookstein, an attorney, hereby certify that on this 19th day of April, 2023, I caused a copy of the BRIEF OF DEFENDANT/COUNTER PLAINTIFF-APPELLEE, M/I HOMES OF CHICAGO, LLC, to be electronically filed with the Clerk of the Illinois Supreme Court via Odyssey eFileIL and additionally served upon the persons listed below via email through Microsoft Outlook at the email addresses indicated:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct.

By: /s/ *Mark D. Brookstein*
Mark D. Brookstein

Within five (5) days of acceptance by the Court, the undersigned states that thirteen (13) duplicate paper copies of the Brief bearing the Court's file-stamp will be delivered to the above Court.

By: /s/ *Mark D. Brookstein*
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