No. 129087

IN THE

Supreme Court of Illinois

ACUITY,

Plaintiff-Petitioner,

v.

M/I HOMES OF CHICAGO, LLC,

Defendant-Respondent.

On Petition for Leave to 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,
Count Department, Chancery Division, No. 19 CH 00237.
The Honorable Allen P. Walker, Judge Presiding.

AMICUS CURIAE BRIEF OF COMPLEX INSURANCE CLAIMS LITIGATION ASSOCIATION AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION IN SUPPORT OF PLAINTIFF-PETITIONER

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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

The Complex Insurance Claims Litigation Association ("CICLA") is a trade association of major property and casualty insurance companies in Illinois and across the country. CICLA appears as *amicus curiae* to assist courts in understanding and resolving important coverage issues. CICLA has participated as *amicus curiae* in state and federal appellate cases across the United States, including important cases before this Court.[1]

American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. With a legacy dating back 150 years, APCIA promotes and protects the viability of private competition to benefit consumers and insurers. APCIA's member companies represent 65% of the U.S. property-casualty insurance market and write more than $19 billion in premiums in the State of Illinois, including nearly 78% of the liability insurance market. APCIA members represent all sizes, structures, and regions—protecting families, communities, and businesses in the United States and across the globe. APCIA's interests are in the clear, consistent, and reasoned development of law that affects its members and the policyholders they insure. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public

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[1] *See, e.g.*, *W. Am. Ins. Co. v. Yorkville Nat'l Bank*, No. 108285, 2009 WL 7451275 (Ill. Sept. 22, 2009); *Kajima Constr. Servs., Inc. v. St. Paul Fire & Marine Ins. Co.*, No. 103588, 2007 WL 5087269 (Ill. Apr. 10, 2007); *Cent. Ill. Light Co. v. Home Ins. Co.*, No. 96978, 2004 WL 3244009 (Ill. Mar. 9, 2004).

policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including before this Court.[2]

This appeal poses important questions about the role of commercial general liability ("CGL") policies in construction defect cases, whether faulty work can trigger coverage, and what constitutes insured property damage caused by an occurrence. The Court is tasked with deciding whether the insurer has a duty to defend an additional insured, a townhome developer, Respondent M/I Homes of Chicago, LLC, in an underlying lawsuit for breach of contract and the warranty of habitability. M/I Homes allegedly delivered townhomes with damage resulting from the defective construction work of its subcontractor. *Amici*'s members have issued a large percentage of the CGL coverage in Illinois and nationwide. Thus, *Amici* have a significant interest in the judicial interpretation of these policies and a wealth of experience and knowledge about their content and meaning. CICLA and APCIA submit this *amicus* brief to address key insurance law principles that should guide resolving claims involving breach of contract arising from construction defects and faulty work.

[2] *See, e.g.*, *Sproull v. State Farm Fire & Cas. Co.*, No. 126446, 2021 WL 1669548 (Ill. Jan. 28, 2021).

BACKGROUND

This case stems from a suit brought by a townhomes' owners association, in a representative capacity for the townhome buyers and subsequent buyers, for a breach of contract and the implied warranty of habitability against the townhomes' developer and seller, M/I Homes. The association relied on § 1-30(j) of the Common Interest Community Association 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."

The association alleged that M/I Homes did not meet its contractual obligation to deliver the townhomes in a habitable condition, as a result of allegedly defective work of M/I Homes' subcontractors, resulting in water damage to the townhomes.[3] The water damage allegedly caused physical injury to the townhomes and damaged portions of the townhomes that were not the work of the subcontractor.[4] Elsewhere, without elaboration, the complaint also

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[3] The allegations were that the townhomes were defective and not habitable due to 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.

[4] The complaint 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

alleged there was substantial damage to the townhomes and "damage to other property." C-543, ¶ 19.

As the additional insured on an insurance policy issued to one of its subcontractors, M/I Homes sought coverage for the suit from Acuity. Acuity denied coverage, contending the association did not seek to recover for covered property damage caused by an occurrence under the policy. As the developer and seller on whose behalf the townhomes were constructed, M/I Homes was contractually responsible for delivering all the townhomes in habitable condition.

The Circuit Court agreed, holding that M/I Homes was sued for breach of contract, that Illinois case law considers a subcontractor's work within the scope of the general contractor's work, and that the allegedly damaged condition of the townhome project did not constitute property damage caused by an occurrence.

The Appellate Court reversed. Relying on the bare allegation that there was substantial damage to the townhomes and damage to "other property," the Appellate Court found a potential for coverage and a duty to defend. The

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> [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.

Appellate Court believed the complaint alleged damage to property other than to the townhouse project, although the association's claim was for breach of contract, and it had the capacity to act only with respect to matters involving the common area or more than one unit of the development (*i.e.*, only with respect to the interests of owners in relation to the townhouse development). Although it did not reach the issue, the Appellate Court also questioned the understanding that a duty to defend M/I Homes would require that the underlying complaint allege property damage to something outside of the townhomes project.

This Court granted review.

SUMMARY OF ARGUMENT

Under Illinois law, the policyholder bears the burden of proving that its claim falls within the insuring agreement's terms. *Addison Ins. Co. v. Fay*, 232 Ill. 2d 446, 453 (2009). The Acuity policy affords coverage for "*property damage* . . . caused by an *occurrence*," and "property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property" and "loss of use of tangible property that is not physically injured." Occurrence is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions."

The language of the Acuity CGL insuring agreement has been construed uniformly by Illinois courts to encompass a policyholder's exposure to tort liability for third-party property damage, not damages arising from a policyholder's breach of its contractual obligations, like delivering a home in

defective condition. This Court's longstanding precedent in *Traveler's Insurance Co. v. Eljer Manufacturing, Inc.*, 197 Ill. 2d 278 (2001), controls here. Illinois law is clear: costs incurred to repair or replace a policyholder's faulty workmanship or defective product are not damages because of "property damage" caused by an "occurrence." As this Court explained, "without a 'harmful change in appearance, shape, composition, or some other physical dimension' to the claimants' property," there is no covered property damage and no occurrence. *Id.* at 304 (citation omitted). Delivering property in an unacceptable condition is not an "occurrence" and does not involve covered property damage, whether the defective work was that of the general contractor or its subcontractor. *Bituminous Cas. Corp. v. Gust K. Newberg Constr. Co.*, 218 Ill. App. 3d 956, 965–66 (1st Dist. 1991).

As the Appellate Court noted:

> [T]he 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."

Acuity v. M/I Homes of Chi., LLC, 2022 IL App (1st) 220023, ¶ 9, *appeal allowed*, 201 N.E.3d 595 (Ill. 2023). The association had the power to act only on behalf of homeowners' interests in the townhomes and brought suit only for failure to deliver the townhomes in habitable condition.

CGL policies do not allow policyholders to pass off their voluntarily assumed contractual obligations to their insurers. General liability insurance

provides clearly delineated coverage that does not replace a performance bond or guarantee. It covers physical injury to tangible property caused by unexpected accidents outside the insured's control, not breaches of contract or poor workmanship. M/I Homes did not, and cannot, meet its burden of establishing coverage within the policy terms.

ARGUMENT

I. CGL POLICIES ARE NOT DESIGNED TO PROVIDE COVERAGE FOR DAMAGES ARISING FROM A BREACH OF CONTRACT.

Part of assuming a contractual obligation is understanding the consequences of a breach and considering those consequences when contracting. It is within a policyholder's control to meet or breach its voluntarily assumed contractual obligations. Therefore, losses arising from an insured's failure to meet its contractual obligations fall outside the scope of liability insurance coverage. *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 42 (1st Dist. 2005) ("It has generally been held that a CGL policy will not cover a general contractor's suit for breach of contract and there is no occurrence when a subcontractor's defective workmanship necessitates removing and repairing work") (internal quotation marks and citation omitted).

Several CGL insurance policy provisions demonstrate that CGL insurance is designed to provide coverage only for unexpected events that injure third parties. For example, general liability insurance contracts do not provide coverage for damage expected or intended by the

policyholder. *Westfield Nat'l Ins. Co. v. Cont'l Cmty. Bank & Tr. Co.*, 346 Ill. App. 3d 113, 118 (2d Dist. 2003) (if the policyholder "'expected or intended' to cause bodily injury . . ., her actions are not an 'accident' and are not covered under the 'occurrence' provision, which triggers coverage") (citation omitted). In addition, general liability insurance contracts do not provide coverage for losses known to the policyholder when the insurer issues the policy. *Outboard Marine Corp. v. Liberty Mut. Ins. Co.*, 154 Ill. 2d 90, 103 (1992) ("Where the insured has evidence of a probable loss when it purchases a CGL policy, the loss is uninsurable under that policy (unless the parties otherwise contract) because the 'risk of liability is no longer unknown.'") (citations omitted). Similarly, general liability insurance does not cover a policyholder's breach of a contractual obligation agreed to by the policyholder and a third party.[5]

A. There Was No Property Damage as Defined Under the Insuring Provisions, and Thus There is No Coverage.

The insuring provision in the Acuity policy, as in most CGL insurance contracts, provides that the insurer agrees to pay sums a policyholder "becomes legally obligated to pay as damages because of *bodily injury* or *property damage*"[6] "caused by an *occurrence*." *Acuity*, 2022 IL App

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[5] *See* 7A Steven Plitt, Daniel Maldonado, Joshua D. Rogers, & Jordan R. Plitt, *Couch on Ins.* § 103:19 (3d ed. 2022). Some contractual coverage is available but only when specifically bought with the standard coverage grant. *Id.*; *see also* 7af-190f *Appleman on Insurance Law & Practice Archive* § 4493 (2d ed. 2011) ("Exposure to contractual liability requires separate coverage.").

[6] Acuity has "the right and duty to defend the insured against any *suit* seeking those damages" and has "no duty to defend the insured against any *suit*

(1st) 220023, ¶ 6. Property damage is defined as "[p]hysical injury to tangible property." *Id.* ¶ 7.

The term physical injury requires a harmful change in appearance, shape, composition, or some other physical dimension of the property. *Eljer*, 197 Ill. 2d at 304. The association's claim for breach of contract alleges the townhomes were delivered in a defective condition, alleging economic losses. The failure to deliver the product contracted for is not covered property damage. There is no *change* in the property's condition at issue. Rather, the association claimed the townhomes were defective due to poor workmanship and a failure to perform as promised under the contract on the part of M/I Homes.[7]

Illinois courts have long held that delivering property in an unacceptable condition is not an occurrence and does not involve covered property damage. *Gust K. Newberg Constr. Co.*, 218 Ill. App. 3d at 965–66; *Diamond State Ins. Co.* v. *Chester-Jensen Co.*, 243 Ill. App. 3d 471, 484 (1st Dist. 1993). It is a well-settled principle that the purpose of CGL insurance policies for a builder is "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

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seeking damages for *bodily injury* or *property damage* to which this insurance does not apply." *Id.* ¶ 6.

[7] This brief takes no position on whether tort claims—for instance, alleged fraud in representations about the property being sold—could be covered third-party claims against the general contractor.

products, which are purely economic losses." *Eljer*, 197 Ill. 2d at 314 (citation omitted); *see also St. Paul Guardian Ins. Co. v. Walsh Constr. Co.*, No. 15 C 10324, 2023 WL 2375126, at *6 (N.D. Ill. Mar. 6, 2023) (repair and replacement of subcontractor's defects were "purely economic losses"—not property damage) (internal quotation marks and citation omitted). Federal courts interpreting Illinois law have similarly held that a CGL policy does not cover allegations arising out of contractual obligations. *E.g.*, *Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n*, 850 F.3d 844, 847–48 (7th Cir. 2017) (implied warranty claims are contract claims not covered by a CGL policy); *Walsh Constr.*, 2023 WL 2375126, at *7 (claims sounded *only* in contract and therefore did not trigger coverage under the policy).

M/I Homes is accused of nothing other than failing to develop and sell the quality of townhome it was contractually obligated to provide—with or without the help of its subcontractors. The association's claims arise directly from M/I Homes' contractual obligation to manufacture a townhome meeting contractually promised standards. The defects that resulted from this failure to comply with a contract are not insured property damage under CGL contracts.

B. Courts Agree That CGL Insurance Policies Do Not Provide Coverage for Damages Arising from a Breach of Contract Because It Is a Volitional Act, Not an Accident or Occurrence.

General insurance law principles dictate that a CGL policy responds to accidents, not to volitional acts such as a breach of contract. A quintessential

example of a risk policyholders can control is whether they meet their *voluntarily* assumed contractual obligations.

An occurrence is an accident, and an accident must be unforeseen, fortuitous, and unexpected. *Pekin Ins. Co. v. McKeown Classic Homes, Inc.*, 2020 IL App (2d) 190631, ¶ 37 (an "accident" is "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned sudden or unexpected event of an inflictive or unfortunate character") (internal quotation marks and citation omitted). "The natural and ordinary consequences of an act do not constitute an accident." *Id*. (internal quotation marks and citation omitted). Here, "occurrence" is defined as "an accident, including continuous or repeated exposure to substantially the same harmful conditions." *Acuity*, 2022 IL App (1st) 220023, ¶ 27. A breach of contract, unlike an occurrence, is not an accident, but the logical result of a party failing to fulfill its voluntarily assumed contractual obligations. *See Am. Fire & Cas. Co. v. Broeren Russo Constr., Inc.*, 54 F. Supp. 2d 842, 848 (C.D. Ill. 1999) (breach of contract claim did not result from an "occurrence" and not covered under the CGL policy).

Repeatedly, Illinois courts have held that a CGL policy does not cover a breach of contract claim because "it does not result from a fortuitous event," *i.e.*, an occurrence. *Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254, ¶ 21 (quoting *Viking Constr. Mgmt.*, 358 Ill. App. 3d at 42). Other courts agree. For instance, the Wyoming Supreme Court held that the insurer had no duty to defend an action when the policyholder's liability

arose from its breach of contract. *Action Ads, Inc. v. Great Am. Ins. Co.*, 685 P.2d 42 (Wyo. 1984). In *Action Ads*, the policyholder contracted to provide a medical insurance program for its employee but failed to do so. *Id.* at 43. When a salesman sustained injuries, he sued the company for damages. *Id.* The court held that the coverage clause, where "occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured," encompassed liability for tortious conduct only and referred "to liability sounding in tort, not in contract." *Id.* at 43–44; *see also City of Burlington v. Nat'l Union Fire Ins. Co.*, 655 A.2d 719, 722–23 (Vt. 1994) ("we would distort the purpose of the liability insurance policy in this case by applying it to commercial litigation arising out of [the insured]'s breach of a contract" when the policy contained the same definition of the term "occurrence").[8]

Here, the Acuity policy specifies that an "occurrence" is foremost an "accident." As this Court has long recognized, the CGL policy "does not cover an accident of faulty workmanship but rather faulty workmanship which

[8] *Accord Redevelopment Auth. of Cambria Cnty. v. Int'l Ins. Co.*, 685 A.2d 581, 583 (Pa. Super. Ct. 1996). There, the policyholder sought coverage for a suit brought against it by a township with whom the policyholder had contracted. The township claimed the policyholder breached its contract to supervise constructing improvements to the water system. *Id.* at 584. The court determined that the claims arose out of the "duties imposed upon the [policyholder] solely as a result of the contract between" it and the township. *Id.* at 589. They therefore were outside the scope of coverage of a CGL insurance policy.

causes an accident." *W. Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 498 (1985) (citation omitted). Faulty work is not an occurrence, and Illinois law considers a subcontractor's work within the scope of a general contractor's work. *Viking Constr. Mgmt.*, 358 Ill. App. 3d at 53–54 (additional insured construction management company's claims not covered because the damage resulted from faulty construction work and did not constitute an occurrence under the CGL policy).[9]

Here, the Appellate Court held that the mention of damage to the townhomes and "other property" in the complaint meant that the association alleged damage to property beyond the townhome project. The association was empowered to act in a representative capacity with respect to damage to common areas or to more than one unit, but any such action still concerned damage to the townhome project. It could not sustain a claim for damage to property "other than" the townhome project, even if it had made one. Moreover,

[9] Other courts agree. *See, e.g.*, *ACS Constr. Co. of Miss. v. CGU*, 332 F.3d 885, 889–91 (5th Cir. 2003) (repair costs for faulty workmanship did not arise from a covered "occurrence"); *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Com. Union Ins. Co.*, 908 A.2d 888, 899 (Pa. 2006) ("the definition of 'accident' required to establish an 'occurrence' under the policies cannot be satisfied by claims based upon faulty workmanship" because they "simply do not present the degree of fortuity contemplated by the ordinary definition of 'accident'"); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co.*, 998 P.2d 1254, 1257–58 (Or. 2000) (faulty workmanship claims for repair and replacement costs were not caused by an accident); *Am. Mfrs. Mut. Ins. Co. v. Seco/Warwick Corp.*, 266 F. Supp. 2d 1259, 1266 (D. Colo. 2003) (noting that "'an occurrence does not include the normal expected consequences of poor workmanship'") (quoting *Bangert Bros. Constr. Co. v. Ams. Ins. Co.*, 66 F.3d 338 (10th Cir. 1995)).

it is unreasonable to read the complaint as making an allegation of damage to property other than the townhomes, since the association's complaint was for breach of contract in delivering the townhomes and breach of the warranty of habitability. The only reasonable reading of the complaint is that its claims against M/I Homes, as alleged, concerned damage to the townhome project, including damage to property other than the work of the subcontractor.

Illinois insurance law provides that costs incurred to repair or replace any aspect of the defective townhomes that M/I Homes contracted to develop and sell are not damages for property damage caused by an occurrence. It was error to speculate about other harm which, in any event, was not a basis for liability in the complaint against M/I Homes.

The Appellate Court decision must be reversed. Under Illinois law, costs incurred to repair or replace an insured's faulty workmanship or defective product are economic losses, not damages for "property damage," and do not arise from a covered "occurrence" under a liability policy. *See Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731, 749 (2d Dist. 2008) ("natural and ordinary consequences of an act do not constitute an accident") (internal quotation marks and citation omitted).

II. POLICYHOLDERS CANNOT USE EXCLUSIONS OR EXCEPTIONS TO EXPAND COVERAGE.

M/I Homes cannot create additional insured coverage for itself under its subcontractor's policy by invoking an exclusion or an exception to an exclusion, particularly when it has not shown there is coverage in the first place. An

exclusion eliminates coverage. It does not grant coverage. *Westfield Ins. Co. v. Walsh/K-Five JV*, 2022 IL App (1st) 210802-U, ¶ 36. So too, "an exception to an exclusion does not create coverage or provide an additional basis for coverage." *Stoneridge*, 382 Ill. App. 3d at 756. Instead, an exception "merely preserves coverage already granted in the insuring provision." *Brochu*, 105 Ill. 2d at 498. When a suit against an additional insured does not fall within the policy's coverage grants, courts need not consider whether an exclusion applies. *Stoneridge*, 382 Ill. App. 3d at 756.

Courts around the country have recognized that an exclusion cannot create coverage when the policyholder or additional insured has not shown there was coverage under the initial grant of coverage in its policy. *E.g.*, *U.S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So. 2d 871, 877 (Fla. 2007) ("exclusionary clauses cannot be relied upon to create coverage"). Nor can an exception to an exclusion create coverage in the first instance. Thus, "the subcontractor exception cannot negate the lack of an 'occurrence' here, as the damage arose from the natural and ordinary consequence of defective workmanship rather than from an 'accident.'" *Stoneridge*, 382 Ill. App. 3d at 756–57.

III. FORCING INSURERS TO BEAR THE COSTS OF CONTRACTUAL BREACHES WOULD EXPOSE THEM TO EXCESSIVE, UNPREDICTABLE RISKS AND IMPROPERLY EXPAND COVERAGE FOR UNBARGAINED-FOR RISKS.

The decisions cited above are rooted in a clear understanding of the insurance mechanism and sound public policy. Providing coverage for breach of contract claims would create an incentive for policyholders to do poor work

and then seek reimbursement from their insurer to fulfill their contract terms. This coverage extension would erode the need for the policyholder to fulfill its obligations. With increased risk to insurers, the availability and affordability of insurance would be imperiled for all policyholders, creating difficulties for all contractors, including the many who honor their contractual agreements.

Allowing policyholders to obtain indemnification for losses arising from their contractual breaches would force liability insurers to assume potentially large risks for which they did not bargain. Insurers agree to bear certain defined risks for the consideration of a premium. In CGL policies, an insurer expressly agrees to pay damages for "property damage caused by an occurrence." The CGL insurance system provides coverage for liability to third parties because of unintentional, unexpected injury resulting from an accident. A liability policy is not intended to cover the ordinary costs of doing business, including costs incurred to repair or replace defectively manufactured products or faulty workmanship.

If courts forced insurers to provide coverage for breach of contract claims under CGL policies, policyholders could breach contracts freely because they would not bear the cost of their breach. Allowing indemnification for losses arising from breach of contract would externalize the cost of the breach onto a liability insurer, increasing the policyholder's incentive to breach.[10] As one

[10] This fear of encouraging breaches of contract prompted one court to rule that obligations stemming from contractual relations are "uninsurable" risks

court noted, allowing indemnification for a policyholder's breach of contract makes "the insurer a sort of silent business partner subject to great risk in the economic venture" with no "prospects of sharing in the economic benefit. The expansion of the scope of the insurer's liability would be enormous without corresponding compensation." *Toombs NJ Inc. v. Aetna Cas. & Sur. Co.*, 591 A.2d 304, 306 (Pa. Super. Ct. 1991).

Extending coverage to breach of contract claims, including breach of implied warranties, would fundamentally change the CGL policy by turning the insurer into a surety for the policyholder's work and make the policy a performance bond. *See Kvaerner Metals*, 908 A.2d at 899. "These types of insurance policies involve risks that are limited in nature; they are not the equivalent of a performance bond on the part of the insurer." *Snyder Heating, Co. v. Pa. Mfrs.' Ass'n Ins. Co.*, 715 A.2d 483, 487 (Pa. Super. Ct. 1998). As Illinois courts have repeatedly noted, the insurance agreement does not have the qualities of a performance bond because a performance bond requires the contractor to reimburse the surety, a requirement not present in an insurance policy. *Certain Underwriters at Lloyd's London Metro. Builders, Inc.*, 2019 IL App (1st) 190517, ¶¶ 35–40 (citing cases). In *Ryan Homes, Inc. v. Home Indemnity Co.*, the court noted that:

> General liability insurance policies are intended to provide coverage where the insured's product or work causes personal injury or damage to the person or property of another. . . . Such

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because insuring them would invite "misbehavior." *WDC Venture v. Hartford Accident & Indem. Co.*, 938 F. Supp. 671, 679 (D. Haw. 1996).

> policies are intended to protect against limited risks and are not intended to act as performance bonds.

647 A.2d 939, 942 (Pa. Super. Ct. 1994) (citations omitted); *U.S. Fid. & Guar. Corp. v. Advance Roofing & Supply Co.*, 788 P.2d 1227, 1233 (Ariz. Ct. App. 1989) ("If the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured's performance of the contract, and the policy takes on the attributes of a performance bond.").

As noted by the court in *Redevelopment Authority*, providing coverage would result in an enormous risk of liability for the insurer without corresponding compensation. 685 A.2d at 590. The court said the policyholder "could not have reasonably expected that the [insurer's] policy was to act as a performance bond insuring the performance of the contractual duties" it undertook. *Id.* at 592; *see also George A. Fuller Co. v. U.S. Fid. & Guar. Co.*, 613 N.Y.S.2d 152, 155 (N.Y. App. Div. 1994) ("To interpret the policy as did the . . . court would transform [the insurer] into a surety for the performance of [the insured]'s work. [The insurer]'s liability policy was never intended to insure [the insured]'s work product or [the insured]'s compliance, as a general contractor or construction manager, with its contractual obligations.").

The difference between insurers and sureties is significant. Unlike an insurer, a surety enters into the contractual risk knowing it has many legal rights if it must pay, including a super priority right to any remaining contract's funds and a right to be paid back by the bond principal. And a surety

responds only if the bond principal cannot or will not. An insurer has none of these protections.

Had M/I Homes or its subcontractor sought expanded coverage, they could have obtained a performance bond or some other surety or guarantee arrangement for their work. *Kvaerner Metals*, 908 A.2d at 899 (court unwilling to "convert a policy for insurance into a performance bond" because performance bonds "are already readily available for the protection of contractors").

CONCLUSION

This is solely a claim for breach of contract and implied warranty of habitability, which is not what CGL insurance protects against. The Appellate Court's decision should be reversed, as it is out of step with this Court's decision in *Eljer* and other Illinois precedent making clear that a CGL policy cannot be treated as a performance bond for construction work.

Dated: March 15, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 341(a) and (b), and Rule 345. The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and 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 19 pages.

/s/ Rachel A. Jankowski
Rachel A. Jankowski

NOTICE OF FILING AND PROOF OF SERVICE

The undersigned, being first duly sworn, deposes and states that on March 15, 2023, there was electronically filed and served upon the Clerk of Court the *Amicus Curiae* Brief of the Complex Insurance Claims Litigation Association and American Property Casualty Insurance Association. On March 15, 2023, service of the *Amicus Curiae* Brief will be accomplished by email, as well as electronically through the filing manager, Odyssey EfileIL, to the following counsel of record:

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Brief bearing the court's file-stamp will be sent to the above court.

/s/ Rachel A. Jankowski
Rachel A. Jankowski

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

/s/ Rachel A. Jankowski
Rachel A. Jankowski