No. 129087

In the

Supreme Court of Illinois

ACUITY, a mutual insurance company,

Plaintiff-Appellant,

v.

M/I HOMES OF CHICAGO, LLC,

Defendant-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 AND APPENDIX OF PLAINTIFF-APPELLANT

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NATURE OF THE CASE

This is a declaratory judgment action by Acuity, a mutual insurance company ("Acuity"), against M/I Homes of Chicago, LLC ("M/I Homes"). M/I Homes asked Acuity to defend it against a suit filed by Church Street Townhome Owners Association ("the Townhome Association") alleging construction defects. M/I Homes was an additional insured on an insurance policy issued by Acuity to M/I Homes' subcontractor H&R Exteriors, Inc. ("H&R").

The Circuit Court of Cook County entered summary judgment for Acuity, finding and declaring that Acuity had no duty under its insurance policy to defend or indemnify M/I Homes with respect to the underlying construction defect suit. In order to trigger a duty to defend, the Townhome Association's lawsuit against M/I Homes needed to allege facts of damage to "other property" other than the construction project itself. The circuit court held that vague allegations of damage to "other property" did not trigger coverage.

M/I Homes appealed. The Appellate Court, First District reversed. 2022 IL App (1st) 220023 (hereinafter "App. Ct. dec."). The appellate court found that the vague and unspecified allegation of damage to "other property" was enough to trigger coverage. In doing so, the appellate court departed from established Illinois law while simultaneously inviting the Illinois Supreme Court to "bring clarity to these nuanced issues of coverage under CGL policies in construction litigation."

This court allowed Acuity's petition for leave to appeal.

ISSUES PRESENTED FOR REVIEW

(1) Does the underlying complaint's conclusory allegation of "damage to other property" require Acuity to defend M/I Homes?

(2) Does the Townhome Association have standing to sue for damage (a) to the personal property of individual unit owners or (b) to the Association's own property, under the Common Interest Community Association Act, 765 ILCS 160/1-30(j) ("the Common Interest Act"), which confers only representative standing to act on behalf of the townhome owners relative to "matters involving the common areas or more than one unit?"

(3) Do allegations of defective construction work, causing only the economic loss of the cost of repairing and replacing the defective work, require Acuity to defend M/I Homes?

JURISDICTIONAL STATEMENT

The appellate court's judgment was entered on September 9, 2022. On September 28, 2022, Acuity filed a timely Petition for Rehearing pursuant to Supreme Court Rule 367 or in the alternative for a Certificate of Importance pursuant to Supreme Court Rule 316. The appellate court denied that petition on October 6, 2022. On November 10, 2022, Acuity timely filed a Supreme Court Rule 315 Petition for Leave to Appeal to this court. This court granted the petition on January 25, 2023. This court has jurisdiction pursuant to Supreme Court Rule 315.

STATUTE INVOLVED

With respect to issue (2), the Common Interest Community Association Act (hereinafter "the Common Interest Act"), 765 ILCS 160/1-30(j), provides in pertinent part as follows:

> 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.

STATEMENT OF FACTS

THE UNDERLYING LITIGATION

On October 4, 2018, the Townhome Association filed its complaint against M/I Homes in the Circuit Court of Cook County ("the underlying litigation") seeking to recover damages for latent construction defects in the townhomes constructed and sold by M/I Homes. (C18 *et seq.*) On May 1, 2019, the Townhome Association filed an amended complaint ("the underlying complaint"). (C536 *et seq.*)

The underlying complaint alleges that Neumann Homes Inc. ("Neumann") was the initial developer of the townhomes and that M/I Homes later constructed more townhomes, sold all the townhomes, and assumed all of Neumann's assets and liabilities, making M/I Homes liable for defects in the townhomes constructed by Neumann, and in townhomes constructed by M/I Homes. (C538-39 at ¶4). The underlying complaint further alleges that the townhomes were built with "substantial exterior defects." (C539-40 at ¶5). The Townhome Association alleges defects to the townhomes built by Neumann, including water-damaged fiber board,

deteriorated brick veneer, and improperly installed j-channel and flashing. (*Id.*) The Townhome Association further alleges that the townhomes constructed by M/I Homes contain similar construction defects. (*Id.*) For the purposes of this appeal only, Acuity acknowledges that some of the defects alleged in the complaint could involve the work of its named insured, H&R, which was M/I Homes' subcontractor.

At Count I (Breach of Contract), ¶ 19 of the underlying complaint (C-543), the Townhome Association alleges, in pertinent part, as follows:

> 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*.

(Emphasis supplied.) In the prayer for relief in Count I (also at C543), the underlying complaint requests damages for the "cost to repair *damage to other property*." (Emphasis supplied.)

Count II (Breach of Implied Warranty of Habitability), ¶ 12 (C544), alleges that "the Association will be required to make substantial repairs to the Defects and to repair *damage to other property* caused by the defects." (Emphasis supplied.) In the prayer for relief in Count II (C545), the underlying complaint requests damages for "the total cost of repair or replacement of the Defects and *damage to other property*." (Emphasis supplied.) No facts are pleaded concerning the identity or the owner of the "other property" allegedly at issue. (*See generally* C536 *et seq.*)

THE ACUITY POLICY ISSUED TO H&R INCLUDING M/I HOMES AS AN ADDITIONAL INSURED

Acuity issued a commercial general liability ("CGL") and commercial excess liability policy to H&R, policy no. Z60057, effective at all times material ("the Acuity policy"). Generally, the Acuity policy provides coverage for "bodily" injury or "property damage" arising out of an "occurrence" pursuant to the following text:

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

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*;

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

* * *

SECTION V – DEFINITIONS

* * *

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

* * *

16. "*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.

PROCEEDINGS BELOW

Acuity filed its complaint for declaratory judgment on January 8, 2019. (C6 *et seq.*) Acuity filed an amended complaint for declaratory judgment on November 20, 2019. (C287 *et seq.*) The parties filed motions for summary judgment. (C787 *et seq.* (Acuity's motion); C988 *et seq.* (M/I Homes' motion), and C1005 *et seq.* (M/I Homes' cross-motion for partial summary judgment)).

The circuit court disposed of the cross-motions in its Memorandum Opinion and Order of July 30, 2021, finding and declaring that Acuity has no duty to defend or indemnify M/I Homes. (C1631 *et seq.*) The circuit court explained that the focus of the underlying complaint was on "recovering for damage [to] the townhomes and not necessarily 'other property' that could have been damaged by M/I Homes' faulty work."

(C1637.) Thus, the mention of "other property" in the underlying complaint was insufficient to trigger a duty to defend. (*Id.*) The circuit court further explained that Illinois law supports the proposition that "property damage resulting from the contractor or subcontractor's own work is not an "occurrence" within a CGL policy, and, therefore, an insurance company does not have a duty to defend." (C1638.)

M/I Homes filed a motion to reconsider. (C1639 *et seq.*) The circuit court denied that motion. (C1688 *et seq.*) M/I Homes appealed. (C1696 *et seq.*)

On September 9, 2022, the appellate court reversed the judgment of the circuit court. While conceding that this court clearly stated in *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 197 Ill. 2d 278 (2001), that CGL coverage should not be expanded to function as a "performance bond" for contractual work (App. Ct. dec., ¶ 35), the appellate court concluded that a duty to defend was triggered because the underlying complaint alleged "damage to other portions of the Townhomes that was not the work of those subcontractors." (App. Ct. dec., ¶ 41.) More broadly, the appellate court held that the vague allegation of damage to "other property" was enough to trigger a duty to defend. (App. Ct. dec., ¶ 43.)

The appellate court further found that the Townhome Association had standing to sue because the unspecified "damage to other property" allegation could potentially include damage to common areas. (App. Ct. dec., ¶ 47.) In other words, the appellate court believed that the

complaint's failure to identify the alleged "other property" or its owner *aided* M/I Homes' plea for a duty to defend. (App. Ct. dec., ¶ 48.)

On October 6, 2022, the appellate court denied Acuity's Petition for Rehearing or in the alternative for a Certificate of Importance. Acuity timely filed a Rule 315 Petition for Leave to Appeal to this court on November 10, 2022, which this court allowed on January 25, 2023.

ARGUMENT

DUTY TO DEFEND STANDARD

To determine an insurer's duty to defend its insured, Illinois courts look to the allegations of the underlying complaint. *U.S. Fidelity & Guar. Co. v. Wilkin Insulation Co.*, 144 Ill. 2d 64, 73 (1991). An insurer owes a duty to defend its insured if the facts alleged in the underlying complaint potentially fall within the policy's coverage. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 193-94 (1976). An insurer owes no duty to defend, however, where it is clear from the facts of the underlying complaint that the allegations fail to state facts which bring the case within, or potentially within, the policy's coverage. *See Crum & Forster Managers Corp. v. Resol. Tr. Corp.*, 156 Ill. 2d 384, 395 (1993).

STANDARD OF REVIEW

This is an appeal from a summary judgment in a declaratory judgment action. The circuit court declared the rights and obligations of the parties by determining that the factual allegations of the underlying complaint did not trigger a duty to defend according to the text of the policy

and Illinois law. The appellate court disagreed as a matter of law. This court reviews that coverage determination *de novo*. *See Valley Forge Ins. Co. v. Swiderski Electronics, Inc.*, 223 Ill. 2d 352, 360, 363 (2006).

I. The underlying complaint's conclusory allegation of "damage to other property" does not require Acuity to defend M/I Homes.

Acuity and M/I Homes agree that Acuity owes no coverage to M/I Homes for *the damage to the townhomes themselves*, as held in this court's seminal decision in *Travelers Ins. Co. v. Eljer Mfg., Inc.,* 197 Ill. 2d 278, 314 (2001) ("*Eljer*") and its progeny. In *Eljer*, this Court stated that CGL 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." *Id.* (emphasis added.) Acuity will refer to this as the "*Eljer* standard" or the "other property rule." The dispute between the parties is whether Acuity owes a duty to defend because the Townhome Association's complaint against M/I Homes vaguely seeks to recover for "damage to other property." Acuity owes no duty to defend M/I Homes.

There are certain unavoidable facts that must guide this court's decision. The underlying complaint neither identifies the owner of the "other property" nor identifies the nature of the "other property." The underlying complaint fails to allege how the Townhome Association would have standing to seek recovery for damage to the unspecified "other

property." These facts are consistent with those of *Westfield Ins. Co. v. West Van Buren LLC*, 2016 IL App (1st) 140862. In *West Van Buren*, the developer sought additional insured coverage on a subcontractor's CGL policy. The complaint against the developer alleged that "individual unit owners experienced damage to personal *and other property* as a result of the water infiltration." *Id.* at ¶ 6 (emphasis supplied). The developer contended that this "other property" allegation triggered the duty to defend, but the appellate court disagreed, explaining as follows:

> The individual condo unit owners themselves were not parties to the complaint, and the Condo Association did not purport to act on behalf of any individual condo unit owners. [Citation omitted.] As Westfield Insurance notes, "factual allegations certainly are important to a coverage determination, but only if those allegations are directed to a theory of recovery." *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. at ¶ 20 (emphasis supplied, citations omitted).

Consistent with *West Van Buren*, the circuit court in this case recognized that the factual omissions regarding "other property" in the underlying complaint cannot trigger a duty to defend. M/I Homes cannot use the underlying complaint's lack of factual specificity about the "damage to other property" as a sword to trigger the duty to defend. That approach was also rejected in *G.M. Sign, Inc. v. State Farm Fire & Cas. Co.*, 2014 IL App (2d) 130593, ¶¶ 32-33. The affirmative allegation of facts triggers a duty to defend and not the omission of facts. *See id.* (rejecting ploy by plaintiff of "deliberately and strategically leaving its complaint so

bereft of factual allegations that myriad unpleaded scenarios could fall within its scope," which "renders meaningless a court's duty to compare the 'facts' alleged in the complaint to the relevant policy language").

The ploy of using vague factual allegations to trigger a duty to defend is not new. "In several cases, Illinois courts have expressed concern that certain claims, especially if they are conclusory and boilerplate, may have been purposefully inserted into the complaint in order to trigger insurance coverage, thereby increasing the chance of a higher recovery for the plaintiff in the underlying lawsuit." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Absolute Title Services, Inc.*, No. 09 C 4165, 2011 WL 4905660, *2 (N.D. Ill. Oct. 13, 2011). The "transparent attempt to trigger insurance coverage" is a "device without substance." *Farmers Auto. Ins. Ass'n v. Danner*, 2012 IL App (4th) 110461, ¶ 39 (citing cases). Yet, M/I Homes relies upon the "device without substance" to assert that Acuity has a duty to defend M/I Homes. That argument must fail.

In determining the duty to defend, the court does not merely accept the conclusions of the pleader, but rather performs a "textual exegesis," or critical examination, of the underlying complaint. *SCR Medical Transp. Services, Inc. v. Browne*, 335 Ill. App. 3d 585, 590 (1st Dist. 2002), quoting *Lexmark Int'l, Inc. v. Transportation Ins. Co.*, 327 Ill. App. 3d 128, 136-137 (1st Dist. 2001). The court's task is not limited to simply scanning the underlying complaint to determine whether the phrase "personal property" or the phrase "other property" appears, but instead to determine what

claims are being made, and whether one or more of those claims, if successful, would result in a judgment which is covered by the policy. Simply tacking the phrase "other property" onto a claim of damage does not trigger a duty to defend.

The holding of *Certain Underwriters at Lloyd's London v. Metro. Builders, Inc.*, 2019 IL App (1st) 190517, upon which M/I Homes has relied, does not change the analysis. In *Metro. Builders*, the underlying complaint allegations *did* identify the owner of the damaged property: the building owner. The underlying plaintiff in that case, AIG Prop. & Cas. Co., insured certain real property that collapsed while under construction, paid the owner for the damage, and then as the owner's subrogee, sought recovery from the builder, Metropolitan, alleging that "as a result of the aforementioned negligence, the property owner suffered losses including, but not limited to, *damage to its real and personal property*." *Id.* at ¶ 13 (emphasis supplied).

Metropolitan tendered the defense of the suit to its insurer, Lloyd's, which filed a declaratory judgment action contending that the complaint alleged neither "property damage" nor an "occurrence." *Id.* at ¶ 15. The appellate court held that the allegation that the owner's personal property was damaged was sufficient to trigger Lloyd's duty to defend, because, as relevant here, "while we may not know much about this personal property, we do know to whom it belonged—the property owner. That, in itself, distinguishes this case from [*West Van Buren*], where the 'personal

property' alleged to be damaged was not the building owner's, leaving the majority to question how the building owner even had the right to sue for such damages." *Metro. Builders*, 2019 IL App (1st) 190517 at ¶ 81.

This dispute is factually similar to *West Van Buren* but factually dissimilar to *Metro. Builders*. The "other property" that was allegedly damaged in this case is unidentified – as is its owner. These factual omissions leave Acuity and this court to wonder how the Townhome Association even has the right to sue for such damages. To maintain a sound body of precedent, this court should apply *West Van Buren* to the facts of this case and clarify that an underlying complaint's naked allegation of "damage to other property" cannot trigger a duty to defend under a CGL policy like Acuity's.

II. Under the Common Interest Act, the Townhome Association has limited standing to sue, which does not include suing for damage to "other property."

The scope of an association's standing to sue under the Common Interest Act has not been addressed by Illinois courts of review. This court should provide guidance and determine that a townhome association suing in a representative capacity under the Common Interest Act lacks standing to sue for damages to individual unit owner personal property or personal property possibly owned by the association.

A. The Common Interest Act does not allow the Townhome Association to sue for damage to "other property" like individual unit owner personal property but only for damage to the building itself.

The Common Interest Act limits what a community association can sue for to "matters involving the common areas or more than one unit." 765 ILCS 160/1-30(j). The plain meaning of this text is that the Townhome Association is authorized to sue for damage *only to the building itself*—either common areas or defects common to the units. But as conceded by M/I Homes, and as acknowledged by the appellate court, damage to the building itself is not covered under settled Illinois law and does not trigger a duty to defend. App. Ct. dec., ¶¶ 31-34, citing, *inter alia, CMK Dev. Corp. v. West Bend Mut. Ins. Co.,* 395 Ill. App. 3d 830 (1st Dist. 2009); *Stoneridge Dev. Co. v. Essex Ins. Co.*, 382 Ill. App. 3d 731 (2d Dist. 2008); *Pekin Ins. Co. v. Richard Marker Assoc., Inc.*, 289 Ill. App. 3d 819 (2d Dist. 1997); *Monticello Ins. Co. v. Wil-Freds Constr., Inc.*, 277 Ill. App. 3d 697 (2d Dist. 1996); *Viking Constr. Mgmt., Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34 (1st Dist. 2005). Here, the Townhome Association's standing to sue M/I Homes is limited to damages to the building itself, which are *not* covered—and do not trigger a duty to defend.

As the Townhome Association's standing to sue is limited to damage to the building itself, the Common Interest Act does not give the Townhome Association standing to sue for damage to the unit owners' *personal property*. This conclusion is supported by authorities construing standing

to sue under the Condominium Property Act, 765 ILCS 605/9.1(b) ("the Condo Act"), which, like the Common Interest Act, allows for representative capacity action involving "the common elements or more than one unit." Compare 765 ILCS 605/9.1(b) with 765 ILCS 160/1-30(j).

In *Allied Prop. & Cas. Ins. Co. v. Metro N. Condo. Ass'n*, 850 F.3d 844, 849 (7th Cir. 2017) (a duty to indemnify case), the Seventh Circuit Court of Appeals held the condominium board of directors lacked standing to sue on behalf of individual unit owners for damage to their personal property. The seventh circuit further explained that individual damage to individual unit owners' belongings is not a collective loss affecting the "common elements" of the building. *Id.*

Likewise, in *Westfield Ins. Co. v. Nat'l Decorating Serv., Inc.*, 863 F.3d 690, 696 (7th Cir. 2017) (a duty to defend case), the seventh circuit held that the condominium association lacked standing to pursue individual unit owner claims for damaged personal property. Thus, the seventh circuit concluded that "because the Association cannot legally recover for this alleged damage, these allegations are insufficient to invoke the duty to defend." *Id.*

Consequently, here, the Townhome Association lacks standing to sue for damage to unit owners' personal property. The unit owner retains an individual direct right against the tortfeasor. *See Poulet v. H.F.O., L.L.C.*, 353 Ill. App. 3d 82, 94 (1st Dist. 2004). This court need not consider such

hypothetical damage to individual unit owner personal property in determining whether Acuity has a duty to defend M/I Homes.

B. Even assuming the underlying complaint's allegation of damage to "other property" includes property owned by the Townhome Association, there is no standing to sue to recover damage owned by the Townhome Association as pleaded in this case.

The Townhome Association's underlying complaint was brought solely in a *representative capacity*—not directly by the Townhome Association to advance its *own* interests. The underlying complaint contains two counts, Count I for Breach of Contract (C542) and Count II for Breach of the Implied Warranty of Habitability (C544). Paragraph 9 of both counts alleges as follows: "The Board in its *representative capacity* on behalf of all owners of the Townhomes asserts a claim for breach of contract [or breach of the implied warranty of habitability as the case may be] in connection with the Defects against M/I." C542 and 544, respectively (emphasis supplied).

The Townhome Association's complaint is based *exclusively* on the statute cited in paragraph 3 of the complaint: § 1-30(j) of the Common Interest Act, 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." C537 (emphasis supplied).

The Townhome Association's complaint does not claim damage to its own property (if the Association even owns property in its own name), as

the appellate court improperly speculated that it did. App. Ct. dec. at ¶ 48 (stating that the underlying complaint's reference to "other property" is not limited to individual unit owner's property, and therefore suggesting that it could encompass personal property owned by the Townhome Association). There is no allegation in the underlying complaint here that the Townhome Association seeks to act "in its individual capacity" to recover for its own, directly owned, personal property. While a statutory basis to assert standing as a representative "enable[s] the Association to act with great latitude in order to serve its members, it is not possible to allow the Association to transcend legal precedent by conferring standing on itself." *Spring Mill Townhomes Ass'n v. OSLA Fin. Services, Inc.*, 124 Ill. App. 3d 774, 779 (1st Dist. 1983).

Since the Townhome Association is suing solely in a representative capacity under the Common Interest Act, it is necessarily *not* suing for damage to its own property. If the Townhome Association were suing for damage to its own property, it would not have brought both counts of its complaint solely in a *representative capacity* under the statute. *See West Van Buren*, 2016 IL App (1st) 140862, ¶ 20 ("we cannot read into the complaint something that is not there, but rather we are confined to what was actually alleged"). The Appellate Court's judgment, based on its *sua sponte* speculation that the Townhome Association may be suing for damage to its own personal property, is misguided and unsupportable.

III. Allegations of defective construction work, causing only economic loss in the form of the cost of repairing and replacing the defective work, which is the natural and ordinary consequence of poorly executed construction work, does not require Acuity to defend M/I Homes.

The appellate court implicitly asks this court to overrule decades of Illinois case law, including at least one Illinois Supreme Court decision (*Eljer*), concerning the scope of a duty to defend where coverage is sought under a CGL policy for a suit alleging construction defects. This court should reject that request.

The appellate court opinion sowed confusion and uncertainty regarding decades' worth of case law in which the appellate court has quoted *Eljer*, 197 Ill. 2d at 314, as the authoritative statement of Illinois law that CGL 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." *Korte & Luitjohan Contractors, Inc. v. Erie Ins. Exch.*, 2022 IL App (5th) 210254, ¶ 22; *Metro. Builders,* 2019 IL App (1st) 190517, ¶ 52; *Milwaukee Mut. Ins. Co. v. J.P. Larsen, Inc.,* 2011 IL App (1st) 101316, ¶ 19; *W. Bend Mut. Ins. Co. v. People*, 401 Ill. App. 3d 857, 866 (1st Dist. 2010); *CMK Dev. Corp.,* 395 Ill. App. 3d at 844; *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App. 3d 404, 410 (5th Dist. 2002). *See also Acuity Ins. Co. v. 950 W. Huron Condo. Ass'n*, 2019 IL App (1st) 180743, ¶ 29 ("We have repeatedly

recognized that while a CGL policy will not insure a contractor for the cost of correcting construction defects, damage to something other than the project itself does constitute an 'occurrence' under a CGL policy"); *Stoneridge,* 382 Ill. App. 3d at 755 (citing *Eljer* for the proposition that "costs associated with repairing or replacing the insured's defective work and products are purely economic losses and are not covered by CGL policies *** though there would still be coverage if the construction defect results in damage to something other than the project itself"); and *West Van Buren,* ¶ 20 ("While construction defects that damage something other than the project itself can constitute an occurrence and property damage (citing *Stoneridge*) they do not in this case").

Illinois courts' assessment of the extent of CGL policy coverage predates even *Eljer* when clarifying the distinction between damage to the construction project itself and damage to property outside the scope of the construction project. *See, e.g.*, *Richard Marker,* 289 Ill. App. 3d at 822 ("[CGL] policies are intended to provide coverage for injury or damage to the person 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. Consequently, when the underlying complaint alleges only damage to the structure itself, courts have found that there was no coverage"), citing *Western Cas. & Sur. Co. v. Brochu*, 105 Ill. 2d 486, 496 (1985); *Wil-Freds*, 277 Ill. App. 3d at 704 (finding no duty to defend because "the underlying action *** is *** a

breach of contract claim alleging the defective construction of a building which resulted in damage to the building itself. *** [T]he underlying complaint here does not include a claim for damage to property other than the building itself"); and *Qualls v. Country Mut. Ins. Co.*, 123 Ill. App. 3d 831, 833 (4th Dist. 1984) ("comprehensive general liability policies like the one here 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"), quoted in *Eljer*, 197 Ill. 2d at 314.

The appellate court has found a duty to defend when applying the *Eljer* standard because either: (1) there was an allegation of damage to other property brought by the owner of the other property or its insurer, such as in *Metro. Builders,* where a property insurer sued in subrogation for damage to the building owner's *personal property*, and in *Richard Marker*, 289 Ill. App. 3d at 822, where the underlying complaint alleged damage to the *personal property* of the homeowners, including furniture, or (2) where it was a subcontractor's coverage that was in dispute, and the underlying complaint alleged that the subcontractor's defective work caused damage to other parts of the construction project *beyond the subcontractor's scope of work*, as in *950 West Huron* and *J.P. Larsen*.

Neither scenario exists here. First, the Townhome Association's underlying complaint in this case does not identify the owner of the

allegedly damaged "other property," and there is no basis to conclude that the Townhome Association has standing to seek recovery for the owner in a representative capacity. Second, a subcontractor's coverage is not in dispute here, but rather a general contractor or developer's coverage, and the general contractor or developer was responsible for the entire construction project. Therefore, any defects in the construction were necessarily to the insured's own work.

This State's precedent regarding the scope of coverage afforded by CGL policies in construction defect cases is well-settled and should remain so. The questions raised by the appellate court in its opinion in this case about the correctness of longstanding Illinois law on construction defect coverage furnish no basis for a sea change in Illinois law in this important area intersecting construction and insurance law. The appellate court raised five issues, but none of those issues warrant a drastic departure from precedent.

A. The CGL policy is not a performance bond.

The appellate court stated that "this shared understanding" of the *Eljer* "other property" rule (the CGL policy covers only damage to "other property," not to the building itself) "is not directly tied to the language of the insurance policy" but comes from "a long line of Illinois appellate court cases." App. Ct. dec., ¶ 32. The appellate court's comment is misplaced. As this Court said in *Eljer*, "In order to ascertain the meaning of the policy's language and the parties' intent, the court must construe the policy as a

whole and 'take into account the type of insurance purchased, the nature of the risks involved, and the overall purpose of the contract.'" 197 Ill. 2d at 292, quoting *Am. States Ins. Co. v. Koloms*, 177 Ill. 2d 473, 479 (1997). The *Eljer* standard is based on precisely those considerations, recognizing that it has been understood for decades by both the insurance and construction industries that performance bonds serve the purpose of guaranteeing the performance of a builder's work, not CGL policies, which are designed to protect against claims for bodily injury and for damage to the property of others. The scope of the CGL policy was succinctly stated in *Eljer*:

> Comprehensive 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. Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.

Eljer, 197 Ill. 2d at 314, quoting *Qualls*, 123 Ill. App. 3d at 833–34. (Emphasis supplied.)

The limited scope of the CGL policy makes sense for additional reasons including avoiding a contractor's double recovery. As the appellate court has correctly recognized: "if insurance proceeds could be used for damages from defective workmanship, a contractor could be initially paid by the customer for its work and then by the insurance

company to repair or replace the work." *Stoneridge,* 382 Ill. App. 3d at 752, citing *Wil-Freds,* 277 Ill. App. 3d at 709.

B. Contrary to the appellate court's myopic view of the holding in *Eljer*, this court did address the coverage limitations of CGL policies, which do not include mere economic loss.

The appellate court said that despite its long line of previous decisions that relied on the *Eljer* standard, "*Eljer* does not necessarily compel this limitation." App. Ct. dec. at ¶ 35. But on the contrary, the 'other property' requirement does indeed come directly from the language of this court's decision in *Eljer*: "Comprehensive general liability policies * * * are intended to protect the insured from liability for injury or damage to the *persons or property of others*." *Eljer*, 197 Ill. 2d at 314 (emphasis supplied). Thus, the CGL policy does not supply coverage for economic loss to the construction project.

Indeed, in the development of the economic loss doctrine itself, this court has held that where one part of an integrated product injures another part of that same product, even though the two components may have been supplied by different entities, the resultant loss to the plaintiff constitutes mere "economic loss," as that phrase is used in *Eljer*, compensable only in contract, and not "property damage," compensable in tort. *Trans State Airlines v. Pratt & Whitney Canada, Inc.*, 177 Ill. 2d 21, 50-51 (1997). The issue of whether a product has become "integrated" is determined by inquiring "[w]hat is the object of the contract or bargain that governs the rights of the parties?" *Id.* at 50.

In *Trans State Airlines*, the purchase contract for the aircraft specified that it was to be delivered with engines attached. *Id.* at 23. Therefore, this court held that "damage to the airframe caused by the defective engine constitutes damage to a single product," though the engine and the airframe had been manufactured by two different entities. Accordingly, the plaintiff "has lost no more than it bargained for in the sublease agreement." *Id.* at 50.

That same reasoning applies here. The Townhome Association and its constituent owners bargained with M/I Homes for completed homes, not the individual components completed by one subcontractor or another.

Claims for "economic loss" are mutually exclusive from those for "property damage," as that term is used in standardized CGL policies. *Eljer*, 197 Ill. 2d at 314. The appellate Court held in *West Van Buren*, a nearly identical case, that the insurer did not have a duty to defend claims of water infiltration damage to a new-construction condominium building, reasoning that such claims "do not fall within the definition of property damage under the policy's plain language," because "the allegations in the Condo Association's underlying complaint sought only to hold the Developer responsible for the shoddy workmanship of its roofing subcontractor." *West Van Buren, LLC*, 2016 IL App (1st) 140862, ¶ 19 (citing *Eljer*). "Defective work and products," it explained, "are purely

economic losses." *Id.* "Otherwise, the policy would function as a performance bond." *Id.* (citing *Eljer*).

As applied in construction defect cases like this one, to determine that the claim is one for "property damage," as opposed to mere economic loss, "[t]here must be damage to something other than the structure, *i.e.*, the building, in order for coverage to exist." *CMK Development*, 395 Ill. App. 3d at 842; *see also Lagestee-Mulder, Inc. v. Consolidated Ins. Co.*, 682 F.3d 1054, 1057 (7th Cir. 2012) (describing as "settled" the rule under Illinois law that "[w]here the underlying suit alleges damage to the construction project *itself* because of a construction defect, there is no coverage," and instead, "there must be damage to something other than the structure, i.e., the building…"). (Emphasis in original.)

C. The appellate court's reliance upon commentary and foreign cases to support rejection of Illinois precedent is misguided.

The appellate court noted criticism from some commentators of *Eljer's* "other property" requirement as "making coverage determinations based on policy considerations rather than adhering to the principles of contract interpretation." App. Ct. dec. at ¶¶ 36 and 37, quoting 4Pt1 Bruner & O'Connor, CONSTRUCTION LAW, § 11.210. The appellate court also noted that 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."

App. Ct. dec. at ¶ 38, citing Bruner & O'Connor at §§ 11.213-11.215. The appellate court said that "some of these cases have noted that 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.'" App. Ct. dec. at ¶ 38, citing *Black & Veatch Corp. v. Aspen Ins. (UK) Ltd.*. 882 F.3d 952 (10th Cir. 2018); and *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961 (Conn. 2013).

This commentary and these foreign cases fail to recognize that unless the complaint against the insured alleges "property damage" caused by an "occurrence" to begin with, the policy's exclusions are irrelevant, and so are any exceptions to these exclusions. This prerequisite was explained by the appellate court in *Stoneridge,* 382 Ill. App. 3d at 756–57 (emphasis supplied) as follows:

> To be fair, the aforementioned cases did not specifically discuss the subcontractor provision relied on by appellees, and we recognize that there is case law in other jurisdictions that supports appellees' position. [Citation omitted.] However, such a position does not take into account the principle that *an exception to an exclusion does not create coverage or provide an additional basis for coverage* [citations omitted] *but, rather, merely preserves coverage already granted in the insuring provision* [Citation omitted.] Thus, some cases have held that, where the damage does not fall within the policy's coverage, there is no need to consider the applicability of any exclusions. [Citations omitted.] At the same time, we are cognizant that the policy must be construed as a whole. [Citation omitted.]
>
> In any event, 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." Therefore, the subcontractor exception does not alter our conclusion that appellees have failed to meet their burden of showing that Stoneridge's liability falls within the policy's terms, because they have failed to show that the damage to the Walskis' home was "property damage" caused by an "occurrence."

See also Korte & Luitjohan Contractors, 2022 IL App (5th) 210254, ¶ 20 ("]i]f both an 'occurrence' and 'property damage' have been established, only then do we need to establish whether any exclusions apply"); *Bituminous Cas. Corp. v. Gust K. Newberg Const. Co.*, 218 Ill. App. 3d 956, 966 (1st Dist. 1991) ("Because we held that there was no 'occurrence' and therefore plaintiff is not covered for this claim under the policy, we need not decide the exclusion issue."); *Ohio Northern University v. Charles Constr. Servs., Inc.,* 2018-Ohio-4057, ¶ 28, 155 Ohio St. 3d 197, 205, 120 N.E.3d 762, 770 (Ohio 2018) (discussed at length *infra*) ("But unless there was an 'occurrence, the PCOH and subcontractor [exception] has no effect, despite the fact that Charles Construction had paid additional money for it").

The trend identified by the appellate court, "to 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," is not unanimous. In *Ohio Northern University*, the Ohio Supreme Court specifically rejected the holding in *Black & Veatch Corp.* (one of the two cases cited by the appellate court in this case on this subject), and other cases following the so-called trend.

Review of *Ohio Northern University* may be helpful to this court. In that case, the Ohio Supreme Court addressed the question of "whether the general contractor's CGL policy covers claims for property damage caused by a subcontractor's faulty work." 2018-Ohio-4057,¶ 2. The Ohio court had previously addressed coverage for a contractor under its CGL policy "for property damage caused by the contractor's own faulty workmanship," and determined that it did not provide coverage. *Id.* at ¶ 1, citing *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 2012-Ohio-4712, 133 Ohio St.3d 476, 979 N.E.2d 269 (Ohio 2012) ("*Custom Agri*"). *Custom Agri* "turned on the CGL policy's definition of 'occurrence' as an 'accident, including continuous or repeated exposure to substantially the same general harmful conditions." *Ohio Northern University*, 2018-Ohio-4057 at ¶ 1. "Because the CGL policy did not define 'accident,' we looked to the word's common meaning and concluded that an 'accident' involves 'fortuity.' We held that under the language of the CGL policy, property damage caused by a contractor's own faulty work is not accidental and is therefore not covered." *Id.* at ¶ 1.

To answer the question before it—whether the general contractor's policy furnishes coverage for *a subcontractor's* faulty work—the Ohio Supreme Court in *Ohio Northern University* said:

> To answer that question, we must address the effect of additional portions of the CGL policy, including a products-completed-operations-hazard ("PCOH") clause, which covers

> damages "arising out of completed operations," and terms that specifically apply to work performed by subcontractors.[1]
>
> To resolve this matter, we need only apply the holding of *Custom Agri*. *Property damage caused by a subcontractor's faulty work is not an "occurrence" under a CGL policy because it cannot be deemed fortuitous*. Hence, the insurer is not required to defend the CGL policyholder against suit by the property owner or indemnify the insured against any damage caused by the insured's subcontractor.

Ohio Northern University, 2018-Ohio-4057 at ¶¶ 2-3 (emphasis supplied).

The Ohio court further stated:

> If the subcontractors' faulty work were fortuitous, the PCOH and subcontractor-specific terms would require coverage. But as we explained in *Custom Agri*, *CGL policies are not intended to protect owners from ordinary "business risks" that are normal, frequent or predictable consequences of doing business that the insured can manage*. *Custom Agri* at ¶ 10. Here, we cannot say that the subcontractors' faulty work was fortuitous.

Ohio Northern University, 2018-Ohio-4057 at ¶ 29 (emphasis supplied). The Ohio Supreme Court acknowledged the policyholder's assertions that CGL policies have changed over time to assure that subcontractor work is covered. 2018-Ohio-4057, ¶ 30. The Ohio court further acknowledged that its reasoning contrasted with recent decisions of other courts. 2018-Ohio-4057, ¶ 31, citing, *inter alia, Black & Veatch, supra,* 882 F.3d 952 (10th Cir. 2018) (cited by the appellate court in this case). But the court declined to follow those cases, stating in pertinent part as follows:

> But the language requiring that "property damage" be caused by an "occurrence" remains a constant in the policies. And

[1] The "terms that specifically apply to work performed by subcontractors" was the subcontractor exception to the "your work" exclusion—the same subcontractor exception referenced by the appellate court in this case.

> under our precedent, faulty workmanship is not an occurrence as defined in CGL polices like the one before us.
>
> Regardless of any trend in the law, we must look to the plain and ordinary meaning of the language used in the CGL policy before us. [Citation omitted.] When the language of a written contract is clear, we may look no further than the writing itself to find the intent of the parties.

2018-Ohio-4057, ¶¶ 31-32.

The Ohio Supreme Court's analysis is consistent with Illinois law on at least two crucial points. First, if the complaint against the insured does not allege "property damage" caused by an "occurrence," then there is no need to consider the "your work" exclusion or its subcontractor exception. That exclusion and its exception are relevant only if there was "property damage" caused by an "occurrence" in the first instance. *Stoneridge,* 382 Ill. App. 3d at 756–57.

Second, the Ohio Supreme Court's discussion of "fortuity" and its statement that "policies are not intended to protect owners from ordinary 'business risks' that are normal, frequent or predictable consequences of doing business that the insured can manage" are analogous to the proposition of Illinois law that no "occurrence" is at issue in a typical construction defect case like this one, because "even if the person performing the act did not intend or expect the result, if the result is the rational and probable consequence of the act or, stated differently, the natural and ordinary consequence of the act, it is not an accident." *Stoneridge,* 382 Ill. App. 3d at 751; *see also Tillerson*, 334 Ill. App. 3d at 409 ("the natural and ordinary consequences of an act do not constitute

an accident"); *Wil-Freds,* 277 Ill. App. 3d at 703 (same); *Indiana Ins. Co. v. Hydra Corp.*, 245 Ill. App. 3d 926, 930 (2d Dist. 1993) (same); *Bituminous Cas. Corp.,* 218 Ill. App. 3d at 966 (same).

Although "accidents" happen at construction sites, causing bodily injury and damage to property other than the work itself, the underlying complaint here does not allege any such accident. This court should remain true to its precedential treatment of CGL policies. CGL policies, like Acuity's, do not provide coverage for construction defects and do not provide coverage for building defects that are not accidental. As stated by the appellate court in *Stoneridge*, "even if the person performing the act did not intend or expect the result, if the result is the rational and probable consequence of the act or, stated differently, the natural and ordinary consequence of the act, it is not an accident." *Stoneridge*, 382 Ill. App. 3d at 751.

D. This court should reject application of *950 West Huron* or *J.P. Larsen*, which fail to correctly apply Illinois law.

The appellate court acknowledged that no Illinois reviewing court, post-*Eljer*, had followed the trend away from the "other property" rule, but gave undue weight to two appellate court decisions which "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.'" App. Ct. dec. at ¶ 39, citing *950 West Huron*

and *J.P. Larsen*. These "discrete project" cases were wrongly decided and should be disregarded, because their conclusions are divorced from the concept of fortuity and from the economic loss rule. This is so because they concluded that damage to portions of the construction project beyond the subcontractor insured's scope of work was an "occurrence." But the standard under Illinois law is "if the result is the rational and probable consequence of the act or, stated differently, the natural and ordinary consequence of the act, it is not an accident." *Stoneridge*, 382 Ill. App. 3d at 751.

This principle of Illinois law was aptly observed in *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), where the federal district court observed:

> A roofer should expect that if it installs a defective roof, the natural and ordinary consequence is that the roof will leak and damage interior portions of the building. The failure of a product to perform as warranted is foreseeable; indeed that is exactly why a warranty is provided. Moreover, the shattering and leaking of a roof are the natural and ordinary consequences of defective roof construction. The natural and ordinary consequences of an act do not constitute an accident.
>
> Flex argues that the roof and the building are distinct and that the case is therefore similar to *Pekin Insurance*. The Court does not agree. The roof is part of the building: it depends on the building for structure and support, and the building depends on the roof for protection from the elements. As in *American Fire*, which concerned damage to a building caused by the failure to an exterior insulation finish system designed to prevent water from leaking to the interior, the only damage in this case was to the structure that Flex worked on. *American Fire*, 54 F.Supp.2d at 842. Thus there was no "occurrence" within the meaning of the insurance policy.

Flex Membrane, 2001 WL 869623, at *2.

Another federal court reached the same conclusion in *Am. Fire & Cas. Co. v. Broeren Russo Const., Inc.*, 54 F. Supp. 2d 842, 848 (C.D. Ill. 1999), where an installer of "external insulation finishing systems" (Broeren Russo) sought coverage for a suit by a building owner (KDB) alleging that the system was improperly installed and thereby allowed moisture intrusion into the building:

> In this case, the KDB complaint alleged that Defendant was in breach of a contract to furnish, install and deliver the System, the purpose of which was to prevent water from leaking to the interior of the Building. The KDB complaint alleged that the System was not installed properly, allowing water to leak into the Building. The damages claimed in the KDB complaint were damages caused solely by Defendant's alleged breach of contract in failing to properly install the System and in failing to remedy the problem. This court concludes that the damages alleged were the natural and ordinary consequences of the alleged breach of contract. This court notes that it is inconceivable that the parties would not have foreseen damage from water leaking into the building as a possible result of the failure of the System to prevent such leaking. [Citation omitted.] Accordingly, this court concludes that the facts alleged in the KDB complaint fall squarely within the analysis of *Monticello Ins. Co.* and *Hydra Corp.* As a result, this court concludes that the damages alleged in the underlying KDB complaint were not the result of an "occurrence" and are not covered, or potentially covered, under the CGL policy issued by Plaintiff.

Broeren Russo Const., 54 Supp.2d at 848.

Stoneridge, *Flex Membrane*, and *Broeren Russo Const.* expose the misguided rationale in *J.P. Larsen* and *950 West Huron*. A window sealant subcontractor should expect that if it improperly or inadequately seals the

windows of a building, the natural and ordinary consequence is that the windows will leak and damage interior portions of the building. *Contra, J.P. Larsen*. And a carpenter subcontractor should expect that if it installs improper flashing at the windows it installs, the result will be moisture intrusion into the interior of the building, beyond its scope of subcontractor work. *Contra, 950 West Huron*.

Because *J.P. Larsen* and *950 West Huron* are contrary to settled law that "if the result is the rational and probable consequence of the act or, stated differently, the natural and ordinary consequence of the act, it is not an accident," neither case should guide this court's decision here. Moreover, because those cases conflict with this court's decision in *Trans State Airlines,* holding that damage caused by one component part of a product to another constitutes mere economic loss, *J.P. Larsen* and *950 West Huron* should not be followed.

E. M/I Homes has failed to plead damages outside the scope of its project, thus, there are no damages alleged to trigger a duty to defend.

The appellate court placed undue emphasis on *Westfield Ins. Co. v. Nat'l. Decorating Svc.,* 147 F.Supp.3d 708, (N.D. Ill. 2015), *aff'd*, 863 F.3d 690 (7th Cir. 2017) (*National Decorating*), a case "that built on the decision in *J.P. Larsen* and held that, where the *general contractor* was seeking coverage under the subcontractor's 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." App. Ct. dec. at ¶ 40 (emphasis original). The appellate court said: "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." App. Ct. dec. at ¶ 41. This analysis should be rejected.

The appellate court acknowledged in this case that in *950 West Huron* (authored by the same Justice), it "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's or developer's perspective.*'" App. Ct. dec. at ¶ 42 (emphasis in original), quoting *950 West Huron* at ¶ 43. But the appellate court then shifted abruptly from its reasoning in *950 West Huron* and found that the distinction it made in that case "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." App. Ct. dec. at ¶ 42.

This line of reasoning is erroneous. The damage at issue must be judged from the end-user's perspective. *See Trans State Airlines* (rejecting the "discrete project" approach in determining whether a loss is merely

economic in nature). But even if a subcontractor or component parts supplier could nonetheless gain CGL coverage based upon the "discrete project" reasoning of *J.P Larson* and *950 West Huron*, there is simply no basis in logic for why such a benefit should be extended still further to a developer or general contractor like M/I Homes, which is indisputably responsible for the *entire* project.

Even if this court were to recognize a so-called "discrete project" exception to the economic loss doctrine, it should also, at a minimum, clarify that where a general contractor or developer (or anyone else responsible for the construction of the *entire* building, such as a construction manager or architect) is sued for construction defects, damage to any part of the construction is not an "occurrence" because it is, by definition, "the natural and ordinary consequence of the act" of performing construction work improperly. *Stoneridge,* 382 Ill. App. 3d at 751; *Tillerson*, 334 Ill. App. 3d at 409; *Wil-Freds*, 277 Ill. App. 3d at 703; *Hydra*, 245 Ill. App. 3d at 930; *Bituminous Cas. Corp.,* 218 Ill. App. 3d at 966. Such "damage," moreover, is not "property damage" as that phrase is used in a CGL policy, but rather mere economic loss. Accordingly, *National Decorating* is inconsistent with Illinois law, and should not be applied here.

CONCLUSION

This court should affirm the circuit court's summary judgment and vacate or reverse the first district appellate court's judgment.

The precedent of this State preceding and following *Eljer* is sound concerning the scope of coverage afforded by CGL policies in construction defect cases. That precedent should be reinforced here to avoid any confusion harbored by the appellate court. Additionally, this court should clarify that an association suing in a representative capacity under the Common Interest Act lacks standing to sue for damages to personal property of an individual owner or for damage to property owned by the association itself.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 315(h) and 341(b). The length of this brief is 37 pages, excluding pages and 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).

/s/ Joseph P. Postel
Joseph P. Postel

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.

No. 1-22-0023

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.

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

ACUITY, a Mutual Insurance Company, Plaintiff and Counterdefendant-Appellee, v. M/I HOMES OF CHICAGO, LLC, and CHURCH STREET STATION TOWNHOME OWNERS ASSOCIATION, Defendants, (M/I Homes of Chicago, LLC, Defendant and Counterplaintiff-Appellant).	)	No. 1-22-0023

ORDER

Presiding Justice Mikva, and Justices Oden Johnson and Mitchell order as follows:

This matter coming to be heard on the plaintiff and counterdefendant-appellee Acuity's petition for rehearing and request for a certificate of importance the court being fully advised in the premises;

IT IS HEREBY ORDERED that the petition and request for a certificate of importance are both DENIED.

ORDER ENTERED

OCT 06 2022

APPELLATE COURT FIRST DISTRICT

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APPEAL TO THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT
FROM THE CIRCUIT COURT OF THE COOK JUDICIAL CIRCUIT
COOK COUNTY, ILLINOIS

ACUITY, ET AL.
Plaintiff/Petitioner

Reviewing Court No: 1-22-0023
Circuit Court/Agency No: 2019CH00237
Trial Judge/Hearing Officer: ALLEN P. WALKER

v.

M/I HOMES OF CHICAGO, LLC.,
Defendant/Respondent

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NOTICE OF FILING and PROOF OF SERVICE

In the Supreme Court of Illinois

ACUITY, a mutual insurance company, *Plaintiff-Appellant,*	)	
v.	)	No. 129087
M/I HOMES OF CHICAGO, LLC, *Defendant-Appellee.*	)	

The undersigned, being first duly sworn, deposes and states that on March 15, 2023, there was electronically filed and served upon the Clerk of the above court the Brief and Appendix of Appellant. On March 15, 2023, service of the Brief will be accomplished 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/ Joseph P. Postel
Joseph P. Postel

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

/s/ Joseph P. Postel
Joseph P. Postel