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State By State Survey: Defective Construction as an "Occurrence"



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Defective Construction as an "Occurrence"

Standard commercial general liability ("CGL") policies cover bodily injury and property damage caused by an "occurrence," which is in turn defined as an "accident." For claims arising out of defective construction, courts have applied different interpretations of the "occurrence" definition.

There are many nuances among the states on this issue, although generally most fall into one of three analytical camps:

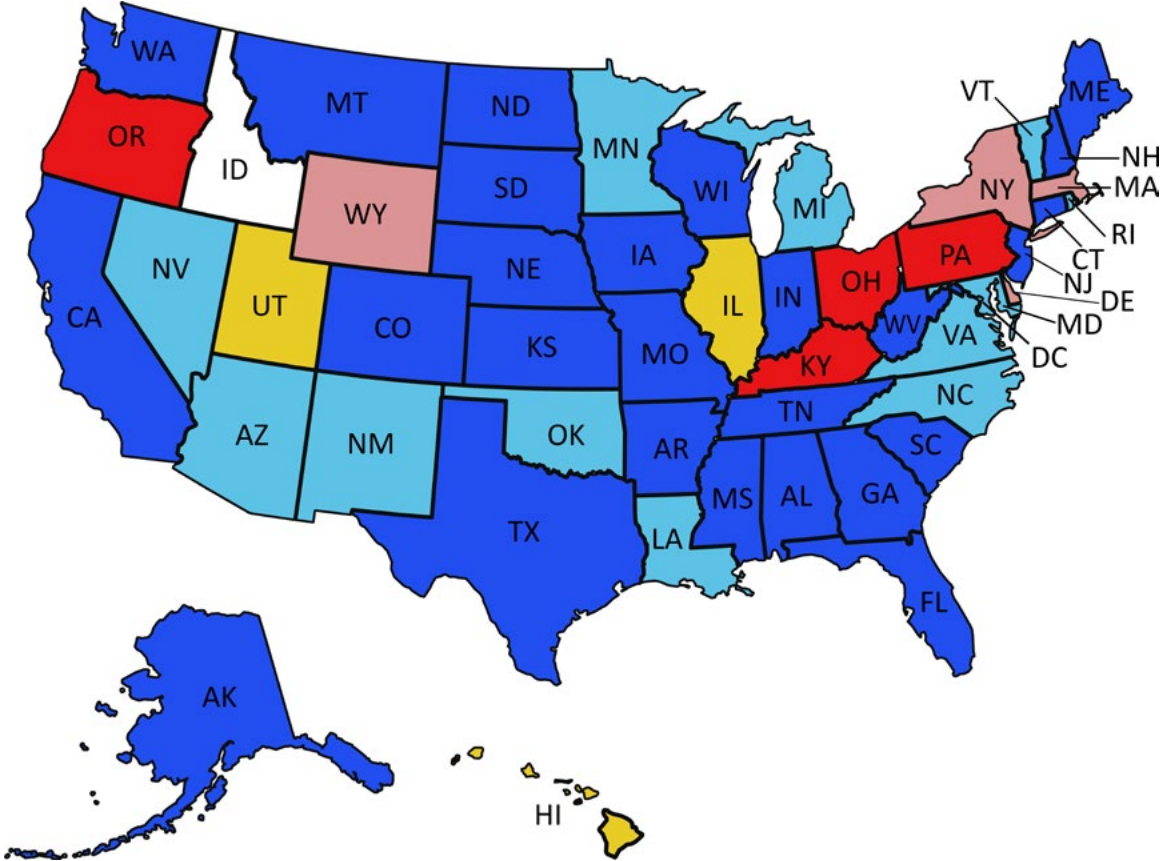
- (1) Some states hold that defective or faulty workmanship is an "occurrence," provided the construction contractor did not intend to cause damage. This analytical framework reserves the analysis concerning whether certain aspects or items of damage (for example, the faulty work itself) are uncovered due to exclusionary provisions.
- (2) Many states have held that defective or faulty workmanship which causes damage to other work or property is an "occurrence." This framework can often lead to coverage for most damage that results from the faulty work – for example, the cost to replace wet dry wall as a result of faulty window installation. However, the analysis may be complicated by court interpretation of what constitutes "other work or property." For general contractors in some states, the entire construction project might be considered their work, leaving them without coverage despite the fact that, at first glance, the case law seems favorable.
- (3) Finally, a small number of states find that defective or faulty workmanship is never an "occurrence." Courts taking this approach typically cite to one of two rationales: either the contractor was contractually obligated to provide work free from defect; or the contractor should have foreseen that it would be responsible for correcting defects in its work. Courts will often cite to the concept that correcting deficient work is a "business risk" for contractors which is not intended to be covered by insurance.

The map on the following page identifies how each state has analyzed the issue of whether defective construction qualifies as an "occurrence." A state colored dark blue indicates that the jurisdiction's highest court has found defective construction to be an "occurrence." These states, almost universally, follow the reasoning set forth in number 1, above. States with statutes to the same effect are likewise shaded dark blue, and the statute identified in the table under Relevant Authority.

A state colored dark red, conversely, indicates that the jurisdiction's highest court has held that defective construction is never an occurrence. These states generally follow the framework set forth in number 3, above.











Light blue and light red shading show trends, based on lower court or federal court authority. In these jurisdictions, courts may take the "middle of the road" approach set out in number 2, above. Often, in these states, whether the insured has coverage is dependent upon other factors, such as whether the court views the entire project as the contractor's work.











Lastly, where caselaw and/or statutes are conflicting or unclear, the state is shaded yellow.











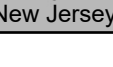













Defective Construction as an "Occurrence"










- Highest Court has found defective construction to be an occurrence (or by state statute).
- Tending towards coverage; only lower state court or federal court authority exists.
- Highest Court has found defective construction *not* to be an occurrence.
- Tending *against* coverage; only lower state court or federal court authority exists.
- Unclear, cases/legislation conflict.
- No decision.

State	Policyholder Impact	Relevant Authority
 Alabama	Favorable	<i>Owners Ins. Co. v. Jim Carr Homebuilder, LLC</i> , 157 So. 3d 148 (Ala. 2014).
 Alaska	Favorable	<i>Fejes v. Alaska Ins. Co.</i> , 984 P.2d 519 (Alaska 1999).
 Arizona	Favorable	<i>Lennar Corp. v. Auto-Owners Inc. Co.</i> , 151 P.3d 538 (Ariz. Ct. App. 2007).
 Arkansas	Favorable	ARK. CODE ANN. § 23-79-155; <i>see also Essex Ins. Co. v. Holder</i> , 261 S.W.3d 456 (Ark. 2008); <i>Lexicon, Inc. v. Ace Am. Ins. Co.</i> , 634 F.3d 423 (8th Cir. 2011).
 California	Favorable	<i>Hogan v. Midland Nat'l Ins. Co.</i> , 476 P.2d 825 (Cal. 1970); <i>Anthem Elecs., Inc. v. Pac. Employers Ins. Co.</i> , 302 F.3d 1049 (9th Cir. 2002).
 Colorado	Favorable	COLO. REV. STAT. § 13-20-808 (2010); <i>Graystone Constr. Inc. v. Nat'l Fire & Marine Ins. Co.</i> , 661 F.3d 1272 (10th Cir. 2011).
 Connecticut	Favorable	<i>Capstone Bldg. Corp. v. Am. Motorists Inc. Co.</i> , 67 A.3d 961 (Conn. 2013); <i>Scottsdale Ins. Co. v. R.I. Pools Inc.</i> , 710 F.3d 488 (2d Cir. 2013) (Connecticut law).
 Delaware	Unfavorable	<i>Brosnahan Builders, Inc. v. Harleysville Mut. Ins. Co.</i> , 137 F. Supp. 2d 517 (D. Del. 2001), <i>aff'd</i> 2003 WL 146486 (3rd Cir. Jan. 21, 2003), <i>but see AE-Newark Assocs., L.P. v. CNA Ins. Cos.</i> , 2001 WL 1198930 (Del. Super. Ct. Oct. 2, 2001).
 District of Columbia	Favorable	<i>Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley, Inc.</i> , 32 F. Supp.2d 14 (D.D.C 1998).
 Florida	Favorable	<i>U.S. Fire Ins. Co. v. J.S.U.B., Inc.</i> , 979 So.2d 871 (Fla. 2007); <i>Auto-Owners Ins. Co. v. Pozzi Window Co.</i> , 984 So. 2d 1241 (Fla. 2008).

State	Policyholder Impact	Relevant Authority
 Georgia	Favorable	<i>Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.</i> , 707 S.E.2d 369 (Ga. 2011).
 Hawaii	Unclear	HAW. REV. STAT. § 431:1-217 (2011); <i>Burlington Ins. Co. v. Oceanic Design & Constr., Inc.</i> , 383 F.3d 940 (9th Cir. 2004); <i>Group Builders, Inc. v. Admiral Ins. Co.</i> , 231 P.3d 67 (Haw. 2010); <i>State Farm Fire & Cas. Co. v. Vogelgesang</i> , 834 F. Supp. 2d 1026 (D. Haw. 2011); <i>Evanston Ins. Co. v. Nagano</i> , 891 F. Supp. 2d 1179 (D. Haw. 2012).
 Idaho	No Authority	N/A
 Illinois	Unclear	<i>U.S. Fid. & Guar. Co. v. Wilkin Insulation Co.</i> , 578 N.E.2d 926 (Ill. 1991); <i>Lyerla v. AMCO Ins. Co.</i> , 536 F.3d 684 (7th Cir. 2008); <i>but see State Farm Fire & Cas. Co. v. Tillerson</i> , 777 N.E.2d 986 (Ill. App. Ct. 2002).
 Indiana	Favorable	<i>Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.</i> , 935 N.E.2d 160 (Ind. 2010).
 Iowa	Favorable	<i>Nat'l Sur. Corp. v. Westlake Invs.</i> , 880 N.W.2d 724 (Iowa 2016).
 Kansas	Favorable	<i>Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.</i> , 137 P.3d 486 (Kan. 2006).
 Kentucky	Unfavorable	<i>Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.</i> , 306 S.W.3d 69 (Ky. 2010); <i>but see Bituminous Cas. Corp. v. Kenway Contracting Inc.</i> , 240 S.W.3d 633 (Ky. 2007).
 Louisiana	Favorable	<i>Broadmoor Anderson v. Nat'l Union Fire Ins. Co. of Louisiana</i> , 912 So.2d 400 (La. Ct. App. 2005); <i>McMath Constr. Co. v. Dupuy</i> , 897 So.2d 677 (La. Ct. App. 2005).
 Maine	Favorable	<i>Peerless Ins. Co. v. Brennon</i> , 564 A.2d 383 (Me. 1989).

State	Policyholder Impact	Relevant Authority
 Maryland	Favorable	<i>French v. Assurance Co. of Am.</i> , 448 F.3d 693 (4th Cir. 2006); <i>Lerner Corp. v. Assurance Co. of Am.</i> , 707 A.2d 906 (Md. Ct. Spec. App. 1998); <i>but see Harbor Court Assocs. v. Kiewit Constr. Co.</i> , 6 F. Supp. 2d 449 (D. Md. 1998).
 Massachusetts	Unfavorable	<i>Am. Home Assurance Co. v. AGM Marine Contractors, Inc.</i> , 379 F. Supp. 2d 134 (D. Mass. 2005); <i>Davenport v. U.S. Fid. & Guar. Co.</i> , 778 N.E.2d 1038 (Mass. App. Ct. 2002).
 Michigan	Favorable	<i>Randenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan</i> , 610 N.W.2d 272 (Mich. Ct. App. 2000).
 Minnesota	Favorable	<i>O'Shaughnessy v. Smuckler Corp.</i> , 543 N.W.2d 99 (Minn. Ct. App. 1996); <i>Aten v. Scottsdale Ins. Co.</i> , 511 F.3d 818 (8th Cir. 2008).
 Mississippi	Favorable	<i>Architex Ass'n v. Scottsdale Ins. Co.</i> , 27 So.3d 1148 (Miss. 2010).
 Missouri	Favorable	<i>D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co.</i> , 316 S.W.3d 899 (Mo. 2010); <i>Columbia Mut. Ins. v. Epstein</i> , 239 S.W.3d 667 (Mo. Ct. App. 2007).
 Montana	Favorable	<i>Employers Mut. Cas. Co. v. Fisher Builders, Inc.</i> , 371 P.3d 375 (Mont. 2016).
 Nebraska	Favorable	<i>Auto-Owners Ins. v. Home Pride Cos.</i> , 684 N.W.2d 571 (Neb. 2004); <i>but see Cizek Homes v. Columbia Nat'l Ins. Co.</i> , 853 N.W.2d 28 (Neb. App. 2014).
 Nevada	Favorable	<i>Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.</i> , 459 F. Supp. 2d 1039 (D. Nev. 2006).
 New Hampshire	Favorable	<i>High Country Assocs. v. New Hampshire Ins. Co.</i> , 648 A.2d 474 (N.H. 1994); <i>Webster v. Acadia Ins. Co.</i> , 934 A.2d 567 (N.H. 2007).
 New Jersey	Favorable	<i>Cypress Point Condo Ass'n, Inc. v. Adria Towers LLC</i> , 143 A.3d 273 (N.J. 2016).

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 New Mexico	Favorable	<i>Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.</i> , 367 P.3d 869 (N.M. Ct. App. 2015).
 New York	Unfavorable	<i>George A. Fuller Co. v. U.S. Fid. & Guar. Co.</i> , 613 N.Y.S.2d 152 (N.Y. App. Div. 1994); <i>J.Z.G. Resources, Inc. v. King</i> , 987 F.2d 98 (2d Cir. 1993); <i>Transp. Ins. Co. v. AARK Constr. Group</i> , 526 F. Supp. 2d 350 (E.D.N.Y. 2007).
 North Carolina	Favorable	<i>ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.</i> , 472 F.3d 99 (4th Cir. 2006); <i>Travelers Indem. Co. v. Miller Bldg. Corp.</i> , 97 Fed. Appx. 431 (4th Cir. 2004).
 North Dakota	Favorable	<i>ACUITY v. Burd & Smith Contr., Inc.</i> , 2006 ND 187, 721 N.W.2d 33; <i>K&L Homes, Inc. v. Am. Family Mut. Ins. Co.</i> , 2013 ND 57, 829 N.W.2d 724.
 Ohio	Unfavorable	<i>Westfield Ins. Co. v. Custom Agri Sys., Inc.</i> , 2012-Ohio-4712, 979 N.E.2d 269 (Ohio 2012); <i>Allied Roofing, Inc. v. W. Reserve Group</i> , 2013-Ohio-1637; <i>Ohio N. Univ. v. Charles Constr. Servs., Inc.</i> , Slip Op 2018-Ohio-4057.
 Oklahoma	Favorable	<i>Employers Mut. Cas. Co. v. Grayson</i> , 2008 WL 2278593 (W.D. Okla. May 30, 2008); <i>Essex Ins. Co. v. Sheppard & Sons Constr.</i> , 2015 WL 4132919 (W.D. Okla. July 9, 2015).
 Oregon	Unfavorable	<i>Oak Crest Constr. Co. v. Austin Mut. Ins. Co.</i> , 998 P.2d 1254 (Or. 2000); <i>Wilmar Dev., LLC v. Illinois Nat'l Ins. Co.</i> , 726 F. Supp. 2d 1280 (D. Or. 2010).
 Pennsylvania	Unfavorable	<i>Kvaerner Metals Division of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.</i> , 908 A.2d 888 (Pa. 2006); <i>Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.</i> , 941 A.2d 706 (Pa. Super. Ct. 2008); <i>Indalex Inc. v. Nat'l Union Fire Ins. Co.</i> , 83 A.3d 418 (Pa. Super. Ct. 2013).
 Rhode Island	Favorable	<i>Aetna Cas. & Sur. Co. v. Consulting Env'tl. Engineers, Inc.</i> , 1989 WL 1110231 (R.I. Super. Ct. June 20, 1989).
 South Carolina	Favorable	<i>Harleysville Mut. Ins. Co. v. State</i> (Nov. 21, 2012) S.C. Code Ann. § 38-61-70, <i>Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.</i> , 717 S.E.2d 589 (S.C. 2011).
 South Dakota	Favorable	<i>Corner Constr. Co. v. U.S. Fid. & Guar. Co.</i> , 2002 SD 2, 638 N.W.2d 887.

State	Policyholder Impact	Relevant Authority
 Tennessee	Favorable	<i>Travelers Indem. Co. of Am. v. Moore & Assocs.</i> , 216 S.W.3d 302 (Tenn. 2007).
 Texas	Favorable	<i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007).
 Utah	Unclear	<i>H.E. Davis & Sons, Inc. v. N. Pac. Ins. Co.</i> , 248 F. Supp. 2d 1079 (D. Utah 2002); <i>Cincinnati Ins. Co. v. Linford Bros. Glass Co.</i> , 2010 WL 520490 (D. Utah Feb. 9, 2010); <i>but see Great Am. Ins. Co. v. Woodside Homes Corp.</i> , 448 F. Supp. 2d 1275 (D. Utah 2006).
 Vermont	Favorable	<i>Transcont'l Ins. Co. v. Engelberth Constr., Inc.</i> , 2007 WL 3333465 (D. Vt. Nov. 8, 2007).
 Virginia	Favorable	<i>Stanley Martin Cos. v. Ohio Cas. Group</i> , 313 Fed. Appx. 609 (4th Cir. 2009); <i>but see Hotel Roanoke Conference Ctr. Comm'n v. Cincinnati Ins. Co.</i> , 303 F. Supp. 2d 784 (W.D. Va. 2004), <i>aff'd</i> 119 Fed. Appx. 451 (4th Cir. 2005); <i>Travelers Indem. Co. of Am. v. Miller Bldg. Corp.</i> , 142 Fed. Appx. 147 (4th Cir. 2005).
 Washington	Favorable	<i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 608 P.2d 254 (Wash. 1980).
 West Virginia	Favorable	<i>Cherrington v. Erie Ins. Prop. & Cas. Co.</i> , 745 S.E.2d 508 (W. Va. 2013).
 Wisconsin	Favorable	<i>Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</i> , 673 N.W.2d 65 (Wis. 2004).
 Wyoming	Unfavorable	<i>Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC</i> , 2006 WL 3933078 (D. Wyo. Oct. 20, 2006).