

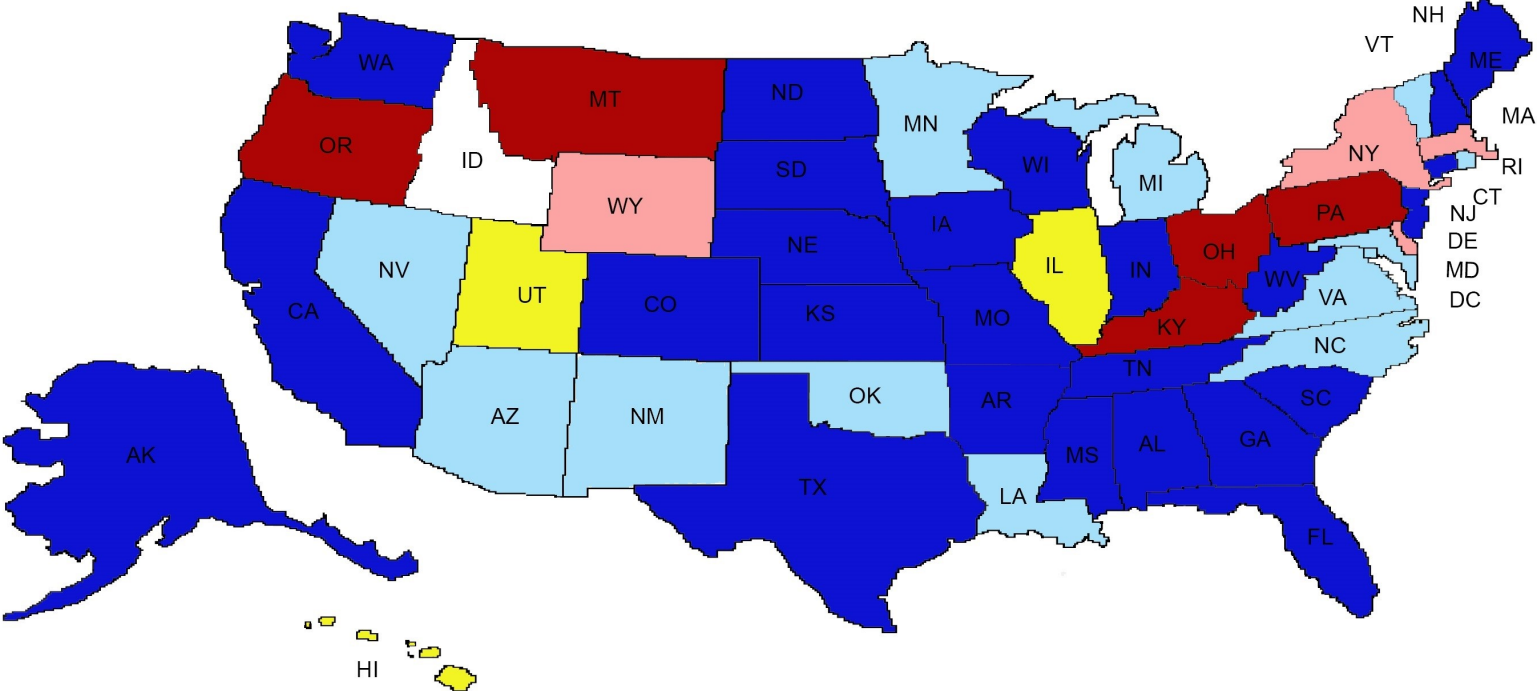


# Defective Construction as an “Occurrence”

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# 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

\*Policy exclusions may apply to preclude coverage despite a finding of an occurrence.  
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# Commercial General Liability Coverage for Defective Construction

Jurisdiction	Case Law
Alabama	<i>Owners Ins. Co. v. Jim Carr Homebuilder, LLC</i> , 2014 Ala. LEXIS 44 (Ala. Mar. 28, 2014).
Alaska	<i>Fejes v. Alaska Ins. Co.</i> , 984 P.2d 519 (Alaska 1999).
Arizona	<i>Lennar Corp. v. Auto-Owners Inc. Co.</i> , 151 P.3d 538 (Ariz. Ct. App. 2007).
Arkansas	ARK. CODE ANN. § 23-79-155; see also <i>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 (8 <sup>th</sup> Cir. 2010).
California	<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 (9 <sup>th</sup> Cir. 2002).
Colorado	COLO. REV. STAT. 13-20-808 (2010); <i>Graystone Constr. Inc. v. Nat'l Fire &amp; Marine Ins. Co.</i> , 2011 WL 5148688 (10 <sup>th</sup> Cir. Nov. 1, 2011).
Connecticut	<i>Capstone Bldg. Corp. v. Am. Motorists Inc. Co.</i> , 308 Conn. 760 (2013); <i>Scottsdale Ins. Co. v. R.I. Pools Inc.</i> , 710 F.3d 488 (2d Cir.) (Connecticut law).
Delaware	<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 (3 <sup>rd</sup> Cir. Jan. 21, 2003), but see <i>AE-Newark Assocs., L.P. v. CNA Ins. Cos.</i> , 2001 WL 1198930 (Del. Super. Ct. Oct. 2, 2001).
District of Columbia	<i>Commonwealth Lloyds Ins. Co. v. Marshall, Neil &amp; Pauley, Inc.</i> , 32 F. Supp.2d 14 (D.D.C 1998).
Florida	<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).
Georgia	<i>Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., Inc.</i> , 707 S.E.2d 369 (Ga. 2011).
Hawaii	HAW. REV. STAT. § 431:1-217 (2011) <i>Burlington Ins. Co. v. Oceanic Design &amp; Constr., Inc.</i> , 383 F.3d 940 (9 <sup>th</sup> Cir. 2004); <i>Group Builders, Inc. v. Admiral Ins. Co.</i> , 231 P.3d 67 (Haw. 2010); <i>State Farm Fire &amp; Cas. Co. v. Vogelgesang</i> , 2011 WL 2670078 (D. Haw. July 6, 2011); <i>Evanston Ins. Co. v. Nagano</i> , 2012 WL 3800320 (D. Haw. Aug. 31, 2012).
Idaho	No decision.
Illinois	<i>U.S. Fid. &amp; 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 (7 <sup>th</sup> Cir. 2008); but see <i>State Farm Fire &amp; Cas. Co. v. Tillerson</i> , 777 N.E.2d 986 (Ill. App. Ct. 2002).

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Indiana	<i>Sheehan Constr. Co., Inc. v. Cont'l Cas. Co.</i> , 935 N.E.2d 160 (Ind. 2010).
Iowa	<i>Nat'l Sur. Corp. v. Westlake Invs.</i> , 2016 Iowa Sup. LEXIS 71 (Iowa June 10, 2016).
Kansas	<i>Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.</i> , 137 P.3d 486 (Kan. 2006).
Kentucky	<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	<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	<i>Peerless Ins. Co. v. Brennon</i> , 564 A.2d 383 (Me. 1989).
Maryland	<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	<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. &amp; Guar. Co.</i> , 778 N.E.2d 1038 (Mass. App. Ct. 2002).
Michigan	<i>Randenbaugh v. Farm Bureau Gen. Ins. Co. of Michigan</i> , 610 N.W.2d 272 (Mich. Ct. App. 2000).
Minnesota	<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	<i>Architex Ass'n v. Scottsdale Ins. Co.</i> , 27 So.3d 1148 (Miss. 2010).
Missouri	<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	<i>Stillwater Condo. Ass'n v. Am. Home Assurance Co.</i> , 508 F. Supp. 1075 (D. Mont. 1981); <i>Taylor-McDonnell Constr. Co. v. Commercial Union Ins. Cos.</i> , 744 P.2d 892 (Mont. 1987); <i>Ohio Cas. Ins. Co. v. Williams</i> , 2003 ML 3341.
Nebraska	<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> , 22 Neb. App. 361 (2014).

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Nevada	<i>Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co.</i> , 459 F. Supp. 2d 1039 (D. Nev. 2006).
New Hampshire	<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	<i>Cypress Point Condo Ass'n, Inc. v. Adria Towers LLC</i> , No. 076348 (N.J. Aug. 4, 2016).
New Mexico	<i>Pulte Homes of New Mexico, Inc. v. Indiana Lumbermens Ins. Co.</i> , 367 P.3d 869 (N.M. Ct. App. 2015).
New York	<i>George A. Fuller Co. v. U.S. Fid. &amp; 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	<i>ABT Bldg. Prods. Corp. v. Nat'l Union Fire Ins. Co.</i> , 472 F.3d (4th Cir. 2006); <i>Travelers Indem. Co. v. Miller Bldg. Corp.</i> , 97 Fed. Appx. 431 (4th Cir. 2004).
North Dakota	<i>ACUITY v. Burd &amp; Smith Contr., Inc.</i> , 2006 ND 187, 721 N.W.2d 33; <i>K&amp;L Homes, Inc. v. Am. Family Mut. Ins. Co.</i> , 2013 ND 57, 829 N.W.2d 724.
Ohio	<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.
Oklahoma	<i>Employers Mut. Cas. Co. v. Grayson</i> , 2008 U.S. Dist. LEXIS 43255 (W.D. Okla. May 30, 2008); <i>Essex Ins. Co. v. Sheppard &amp; Sons Constr.</i> , 2015 U.S. Dist. LEXIS 89096 (W.D. Okla. July 9, 2015).
Oregon	<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> , 2010 U.S. Dist. LEXIS 62865 (D. Or. 2010).
Pennsylvania	<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	<i>Aetna Cas. &amp; Sur. Co. v. Consulting Envtl. Engineers, Inc.</i> , 1989 WL 1110231 (R.I. Super. Ct. June 20, 1989).

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# Commercial General Liability Coverage for Defective Construction

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South Carolina	S.C. CODE ANN. § 38-61-70 (2011), <i>Crossman Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.</i> , 717 S.E.2d 589 (S.C. 2011).
South Dakota	<i>Corner Constr. Co. v. U.S. Fid. &amp; Guar. Co.</i> , 2002 SD 2, 638 N.W.2d 887.
Tennessee	<i>Travelers Indem. Co. of Am. v. Moore &amp; Assocs.</i> , 216 S.W.3d 302 (Tenn. 2007).
Texas	<i>Lamar Homes, Inc. v. Mid-Continent Cas. Co.</i> , 242 S.W.3d 1 (Tex. 2007).
Utah	<i>H.E. Davis &amp; 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 U.S. Dist. LEXIS 11226 (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	<i>Transcont'l Ins. Co. v. Engelberth Constr., Inc.</i> , 2007 WL 3333465 (D. Vt. Nov. 8, 2007).
Virginia	<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	<i>Yakima Cement Prods. Co. v. Great Am. Ins. Co.</i> , 608 P.2d 254 (Wash. 1980).
West Virginia	<i>Cherrington v. Erie Ins. Prop. &amp; Cas. Co.</i> , No 12-0036 (W. Va. June 18, 2013).
Wisconsin	<i>Am. Family Mut. Ins. Co. v. Am. Girl, Inc.</i> , 673 N.W.2d 65 (Wis. 2004).
Wyoming	<i>Great Divide Ins. Co. v. Bitterroot Timberframes of Wyoming, LLC</i> , 2006 WL 3933078 (D. Wyo. Oct. 20, 2006).

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