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L-J, Inc., v. Bituminous Fire & Marine Insurance Co.: A Comedy of "Occurrences"

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L-J, INC. V. BITUMINOUS FIRE & MARINE INSURANCE CO.: A COMEDY OF "OCCURRENCES"

I. INTRODUCTION

In April 2005, the South Carolina Supreme Court reheard a decision that threatened to complicate construction litigation throughout the state. By refiling its opinion in *L-J, Inc. v. Bituminous Fire & Marine Insurance Co.*,[1] the court attempted to clarify the confusion its original opinion created. The original opinion stated that the insured's faulty workmanship claim did not constitute an "occurrence" under the insured's commercial general liability (CGL) policy.[2] Without an occurrence, the CGL policy did not require the insurer to satisfy claims of faulty workmanship.[3] Recognizing the clamor from the insurance and construction industries,[4] the supreme court agreed to rehear the case. A South Carolina federal district court measured the success of the supreme court's endeavor: "Abandon hope, all ye who enter here."[5]

The supreme court's refiled opinion mostly echoed its original opinion; however, in the refiled opinion an explication of an earlier concession appeared. Originally, the supreme court suggested CGL policies may cover incidents involving faulty workmanship if the faulty workmanship results in "property damage to another."[6] In its refiled opinion, the supreme court distinguished between damage to the contractor's work and damage to other property.[7] The supreme court relied upon a New Hampshire case to distinguish between claims based solely on faulty workmanship and claims based on faulty workmanship resulting in damage to other property.[8] In *High Country*,[9] the New Hampshire Supreme Court found an "occurrence" where the contractor's defective work resulted in property damage.[10] However, the faulty workmanship referred to in

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1. (*Bituminous II*), 366 S.C. 117, 621 S.E.2d 33 (2005).

2. L-J, Inc. v. Bituminous Fire & Marine Ins. Co. (*Bituminous I*), No. 25854, 2004 S.C. LEXIS 190, at *1–2 (S.C. Aug. 9, 2004), *withdrawn*, 366 S.C. 117, 621 S.E.2d 33 (2005).

3. *Id.* at *9–10.

4. *See* Pa. Nat'l Mut. Ins. Co. v. Ely Wall & Ceilings, Inc., No. Civ.A.4:04-1576-RBH, 2006 WL 569589, at *7 (D.S.C. Mar. 6, 2006).

5. Bituminous Cas. Corp. v. R.C. Altman Builders, Inc., No. 2:01-4267-DCN, 2006 WL 2137233, at *1 (D.S.C. July 28, 2006) (citing DANTE, THE DIVINE COMEDY (INFERNO), CANTO III (n.p., n.d)).

6. *Bituminous I*, 2004 S.C. LEXIS 190, at *9.

7. *See Bituminous II*, 366 S.C. 117, 123 & n.4, 621 S.E.2d 33, 36 & n.4 ("The CGL policy may, however, provide coverage in cases where faulty workmanship causes . . . damage to other property, *not in cases where faulty workmanship damages the work product alone.*").

8. *See id.* at 123, 621 S.E.2d at 36 (citing High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474 (N.H. 1994)).

9. 648 A.2d 474.

10. *Id.* at 477.

High Country damaged only the contractor's project.[11] Thus, the South Carolina Supreme Court used a case involving faulty workmanship resulting in damage solely to the contractor's "work product" as an example of faulty workmanship resulting in damage to other property. The challenge for attorneys on both sides of CGL policy litigation lies in defining what a court considers the work product of the contractor.

By emphasizing the facts of *High Country*, attorneys for contractors with CGL policies could characterize each component of the contractor's project as separate work products. Therefore, where a subcontractor's defective construction of one component results in damage to another part of the project, the faulty workmanship has damaged other property. This characterization would fit squarely in the exception suggested by the South Carolina Supreme Court.[12] On the other side, attorneys for the insurers could ignore the facts of *High Country* and argue that the work product is the contractor's *entire* project. Therefore, any damage resulting from a subcontractor's faulty construction that damages only other parts of the contractor's project would not qualify as damage to other property. Consequently, CGL policies would only provide coverage when the faulty workmanship damages property beyond the contractor's entire project.

This Note argues that the facts of *High Country* are indispensable to a discussion of the supreme court's suggestion that policy coverage may extend to situations involving property damage to another. It is possible the supreme court deliberately used *High Country* to create a significant exception, which would prevent insurance companies from arguing that the supreme court established a bright-line rule against faulty workmanship claims.[13] *High Country* thus provides important guidance in framing the impact of *Bituminous II*.

Part II of this Note begins with a general description of CGL policies and then provides background to both the original and refiled *Bituminous* opinions, including an in-depth discussion of *High Country* and the supreme court's intentions in relying on it. Part III summarizes and analyzes recent treatments of *Bituminous* in several South Carolina federal district court opinions, focusing specifically on how these opinions interpret the supreme court's reliance on *High Country*. Part IV briefly examines potential effects of the supreme court's decision on practitioners and consumers. Part V concludes by explaining that the supreme court's holding in *Bituminous II* should be limited to its specific facts, and by asserting that until the supreme court reexamines the issues raised in *Bituminous II*, attorneys for CGL policyholders should narrowly construe the supreme court's current opinion to hold insurance providers responsible for the coverage offered in their policies.

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11. *See id.* at 476.

12. *See supra* note 7 and accompanying text.

13. Pa. Nat'l Mut. Ins. Co. v. Ely Wall & Ceilings, Inc., No. Civ.A.4:04-1576-RBH, 2006 WL 569589, at *6–7 (D.S.C. Mar. 6, 2006).

II. BACKGROUND

A. A General Examination of CGL Policies

Since 1986, a typical CGL policy,[14] like the one issued to the insured in the *Bituminous* cases, has covered property damage caused by an "occurrence."[15] The Bituminous CGL policy defined property damage as "[p]hysical injury to tangible property, including all resulting loss of use of that property"[16] and did not cover property damage that was "expected or intended from the standpoint of the insured."[17] The policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[18] However, even with an occurrence, certain policy exclusions might apply. One exclusion provided that the policy "does not cover [t]hat particular part of any property that must be restored, repaired, or replaced because your work was incorrectly performed on it."[19] The policy defined "your work" as "[w]ork or operations performed by you or on your behalf."[20] According to the policy's language, your work included work performed by a subcontractor.[21] Consequently, if a subcontractor's negligent construction causes damage to a contractor's project, the policy would not appear to provide coverage for the cost to restore, repair, or replace the damaged property.

The policy, however, further stated that the your-work exclusion "does not apply to property damage included in the products-completed operations hazard."[22] The "products-completed operations hazard provision" provided, "Your work will be deemed completed . . . [w]hen all of the work called for in your contract has been completed."[23] Another exclusion, however, "bars coverage for [p]roperty damage to your work arising out of it or any part of it and included in the products-completed operations hazard."[24] Although the vague pronoun reference frustrates any clear interpretation of the exclusion, the exclusion seems to bar coverage for property damage to the contractor's project caused by a subcontractor's faulty workmanship. Further examination of the policy's language reveals an important exception to this exclusion. The policy states that "the 'your-work' exclusion 'does not apply if the damaged work or

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14. *See generally* Clifford J. Shapiro, *Point/Counterpoint: Inadvertent Construction Defects Are an "Occurrence" Under CGL Policies*, CONSTRUCTION LAW, Spring 2002, at 13, 14 [hereinafter Shapiro, *Occurrence Under CGL Policies*] (discussing the evolution of CGL policies).

15. *Id.*; L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C. 549, 554, 567 S.E.2d 489, 492 (Ct. App. 2002), *rev'd*, 366 S.C. 117, 621 S.E.2d 33 (2005).

16. *L-J, Inc.*, 350 S.C. at 554, 567 S.E.2d at 492.

17. *Id.* at 555, 567 S.E.2d at 492.

18. *Id.*

19. *Id.* at 557, 567 S.E.2d at 493 (internal quotation marks and footnote omitted).

20. *Id.* at 557 n.10, 567 S.E.2d at 493 n.10.

21. *See id.* at 558, 567 S.E.2d at 494.

22. *Id.* at 557, 567 S.E.2d at 493 (internal quotation marks omitted).

23. *Id.* (internal quotation marks omitted).

24. *Id.* at 558, 567 S.E.2d at 494 (internal quotation marks omitted).

the work out of which the damage arises was performed on your behalf by a subcontractor.'"[25]

Importantly, this last exception to the your-work exclusion did not appear in CGL policies until 1986.[26] Although such an exception significantly extends coverage for a contractor who constructs the majority of a project through subcontractors, courts have argued that they "'have not made the policy closer to a performance bond for general contractors, the insurance industry has.'"[27]

Applying the policy's plain language to a hypothetical situation helps frame the pertinent issues presented in this Note. A general contractor with a typical post-1986 CGL policy hires various subcontractors to build a home. The plumbing subcontractor negligently installs certain pipes. Years after the completion of the home, the owners discover that the negligently installed pipes have been leaking for some time. The leaks have damaged other parts of the house, such as the walls and ceilings. The damage appears to be an occurrence under the policy because the negligent installation of the pipes has caused physical injury to tangible property, that is, the water-rotted walls and ceilings. Furthermore, the general contractor did not "intend or expect" the "continuous" exposure to the water from the leaking pipes. Additionally, the damage occurred after the general contractor completed the project, and therefore the damage fits the products-completed operations hazard. Most importantly, because the subcontractor's faulty workmanship caused the damage, the occurrence qualifies for the policy's subcontractor exception to the your-work exclusion. Although the CGL policy does not cover the subcontractor's faulty workmanship—the cost of replacing the pipes—the policy should cover the damages caused by the defective pipes.

Of course, such an argument for coverage proves more challenging if a court decides that the damage caused by the subcontractor was not an occurrence. The South Carolina Supreme Court's decision in *Bituminous II* presents exactly this challenge.

B. Bituminous I

1. Facts

In 1989, L-J, Inc. (Contractor) began construction on a roadway system for Dunes West Joint Venture (Developer).[28] To complete the project, the Contractor hired several subcontractors who performed the majority of the work.[29] The Contractor finished construction in 1990; however, by 1994, the

25. *Id.* (internal quotation marks omitted).

26. *See* Shapiro, *Occurrence Under CGL Policies*, *supra* note 14, at 14.

27. *L-J, Inc.*, 350 S.C. at 559, 567 S.E.2d at 494 (quoting Kalchthaler v. Keller Constr. Co., 591 N.W.2d 169, 174 (Wis. Ct. App. 1999)).

28. *Bituminous II*, 366 S.C. 117, 119, 621 S.E.2d 33, 34 (2005).

29. *Id.* at 199, 621 S.E.2d at 34.

road had deteriorated, leading the Developer to bring suit against the Contractor for breach of warranty, breach of contract, and negligence.[30] Expert witnesses attributed the road's deterioration, commonly referred to as "alligator cracking," to several instances of faulty workmanship by the subcontractors, which left the roadway vulnerable to water damage.[31]

2. Procedural History

After the underlying lawsuit settled for $750,000, the Contractor sought indemnification from four insurers, including Bituminous.[32] Although three of the insurers agreed to contribute to the settlement, Bituminous refused, prompting the other insurers to bring a declaratory judgment action against Bituminous.[33] Both a special master and the court of appeals found that the damage to the roadway system constituted an occurrence under the CGL policy.[34] The court of appeals reported that the policy defined an occurrence as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."[35] Defining the repeated exposure to water runoff as an accident, the court of appeals held that the damage to the roadway qualified as an occurrence under the CGL policy.[36] Furthermore, the special master and the court of appeals found that certain exclusions contained in the Contractor's CGL policy "did not apply to work performed by the subcontractors."[37]

3. The South Carolina Supreme Court's Decision

In finding no occurrence under the CGL policy, the South Carolina Supreme Court reversed the lower courts' decisions.[38] The supreme court found no occurrence "because there was no accident causing injury."[39] The supreme court disagreed with the court of appeals's characterization of the road system's continuous exposure to surface water runoff as an accident.[40] Instead, the supreme court reached the following conclusion:

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30. *Id.*

31. *See id.* at 122, 621 S.E.2d at 36 ("[A]pproximately 50% of the cracking was caused by insufficient road subgrade preparation . . . . [An expert] also opined that the cracking was caused by insufficiently thick road course, improper drainage, and excessive traffic.").

32. *Id.* at 119, 621 S.E.2d at 34.

33. *Id.* at 119–120, 621 S.E.2d at 34.

34. *Id.* at 120, 621 S.E.2d at 34.

35. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 350 S.C 549, 555, 567 S.E.2d 489, 492 (Ct. App. 2002), *rev'd*, 366 S.C. 117, 621 S.E.2d 33 (2005).

36. *Id.*

37. *See Bituminous II*, 366 S.C. at 120, 621 S.E.2d at 34.

38. *Bituminous I*, No. 25854, 2004 S.C. LEXIS 190, at *5 (S.C. Aug. 9, 2004), *withdrawn*, 366 S.C. 117, 621 S.E.2d 33 (2005).

39. *Id.* at *13.

40. *Id.* at *10 (citing *L-J, Inc.*, 350 S.C. at 555, 567 S.E.2d at 492).

> While the alligator cracking may have constituted property damage, we find that no occurrence took place as defined by the CGL contract. . . . [T]he only occurrences were various negligent acts by the Contractor during road design, preparation, and construction that led to the premature deterioration of the roads. . . . We find that all of these contributing factors are examples of faulty workmanship causing damage *to the roadway system only*, which does not fall within the contractual definition of occurrence under Bituminous's CGL policy.[41]

The supreme court defined the cost to repair the negligently constructed road as economic loss caused solely by faulty workmanship, a cost for which CGL insurance providers were not liable.[42]

The supreme court recognized that the lack of an occurrence rendered moot the issue of the policy's exclusions;[43] nevertheless, the court decided the your-work exclusion did not apply because of the subcontractor exception to the exclusion.[44] The supreme court pointed out that "[t]he exception to the exclusion provides: 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."[45] By so ruling, the supreme court indicated that if it had found an occurrence, then the CGL policy would have covered the damage even though the subcontractors' faulty workmanship caused the damage.

C. Bituminous II

The supreme court's original opinion reversing the court of appeals's decision had an immediate impact on construction lawyers around the state.[46] Confronted with concern over the potential effects of its initial decision,[47] the supreme court agreed to rehear the case.[48] Unfortunately, as evidenced by recent

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41. *Id.* at *6–7 (internal quotation marks omitted).

42. *Id.* at *7 (citing C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark, N.J., 281 S.C. 593, 596–97, 316 S.E.2d 709, 711–12 (Ct. App. 1984)).

43. *Id.* at *11.

44. *Id.* at *12.

45. *Id.* (emphasis in original in bold).

46. *See* Anne Marie McNeil, Note, L-J, Inc. v. Bituminous Fire & Marine Insurance Co.: *In Determining Coverage Under Commercial General Liability Policies, Should Policy Language or Public Policy Control?* 56 S.C. L. REV. 791, 801 (2005) (discussing the impact of *Bituminous I* and predicting that insurance companies would begin to refuse providing coverage for defective work "regardless of the circumstances").

47. *Id.*; *see also* Pa. Nat'l Mut. Ins. Co. v. Ely Wall & Ceilings, Inc., No. Civ.A.4:04-1576-RBH, 2006 WL 569589, at *7 (D.S.C. Mar. 6, 2006) (describing the "turmoil" created by *Bituminous I*).

48. L-J, Inc. v. Bituminous Fire & Marine Ins. Co., No. 25854, 2005 S.C. LEXIS 41, at *1 (Feb. 3, 2005).

South Carolina federal district court opinions, the refiled opinion failed to adequately settle the issue.[49]

Upon rehearing, the supreme court deviated only slightly from its original opinion. As in its first opinion, the supreme court held the Contractor's faulty workmanship "did not constitute an occurrence."[50] However, two significant distinctions between the opinions exist: the absence of a discussion about the exclusions in the CGL policy and the appearance of the *High Country* decision, which formed the basis for at least a portion of the supreme court's reasoning.

1. The "Your Work" Exclusion

Although in its first hearing of the case the supreme court found no occurrence, the court still addressed the your-work exclusion in its first opinion.[51] In rehearing the case, the supreme court determined that no occurrence existed, and it did not discuss the your-work exclusion.[52] Consequently, absent from the refiled opinion is the conclusion that the subcontractor exception renders the your-work exclusion inapplicable.[53] Without this conclusion, it remains unclear whether a South Carolina court would interpret the subcontractor exception as rendering the your-work exclusion inapplicable. Thus, South Carolina courts could still find the your-work exclusion applies to damage caused by a subcontractor's faulty workmanship, even when it finds an occurrence.

2. High Country Associates v. New Hampshire Insurance Co.

More notable than the absence of the exclusion discussion in *Bituminous II* is the supreme court's treatment of a New Hampshire Supreme Court decision. Purportedly in an effort to distinguish between a faulty workmanship claim and a property damage claim, the South Carolina Supreme Court offered the reasoning of *High Country Associates v. New Hampshire Insurance Co.*[54] The supreme court used the analysis in *High Country* to expound upon a possibility it

49. *See* Bituminous Cas. Corp. v. R.C. Altman Builders, Inc., No. 2:01-4267-DCN, 2006 WL 2137233, at *1 n.1 (D.S.C. July 28, 2006) (recognizing the "ambiguities" surrounding the *Bituminous II* decision); *Pa. Nat'l Mut. Ins. Co.*, 2006 WL 569589, at *7 (describing possible alternative interpretations of *Bituminous II*).

50. *Bituminous II*, 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005) (holding the damage did not constitute an occurrence); *accord Bituminous I*, 2004 S.C. LEXIS 190, at *1 (same).

51. *See supra* notes 43–45 and accompanying text.

52. *Bituminous II*, 366 S.C. at 125, 621 S.E.2d at 37.

53. *Compare id.* (declining to address whether the policy exclusions apply), *with Bituminous I*, 2004 S.C. LEXIS 190, at *13 (concluding the your work exclusion was inapplicable).

54. *Bituminous II*, 366 S.C. at 123, 621 S.E.2d 36 (citing High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474 (N.H. 1994)).

conceded in its first opinion:[55] the CGL policy may cover property damage to another resulting from faulty workmanship.[56]

High Country also involved an insurance company arguing that the CGL policy in question did not cover a contractor's claim for damages.[57] The South Carolina Supreme Court noted that the *High Country* court held the CGL policy covered the contractor's claim.[58] The complaint in *High Country* alleged "negligent construction that resulted in property damage and not merely negligent construction damaging only the work product itself."[59] In addition, the complaint in *High Country* described how the negligent construction of a subcontractor allowed water to seep into the walls of the buildings.[60] The New Hampshire court read the complaint as claiming damages for the water-damaged walls, rather than the cost of rectifying the negligent construction.[61] To the New Hampshire court, this distinction qualified the damage as an occurrence under the CGL policy.[62]

Applying the New Hampshire court's reasoning to *Bituminous II*, the South Carolina Supreme Court emphasized that the complaint failed to allege property damage beyond negligent construction.[63] Because the complaint alleged only faulty workmanship, the supreme court decided the CGL policy provided no coverage.[64] Conversely, had the complaint alleged property damage beyond faulty workmanship, the CGL policy would probably have provided coverage. As a result, the supreme court would likely have upheld an order for indemnification and contribution if the Developer had claimed damages to repair damaged property beyond the work product itself, rather than money damages to compensate for the faulty workmanship.

3. *Analysis of the Reasoning in* Bituminous II

Unfortunately, *Bituminous II* has failed to quell the confusion left in the wake of the original opinion.[65] Ironically, most of the uncertainty stems from the supreme court's reference to *High Country*, seemingly used by the court to clarify the law.

The supreme court's first misstep occurred when it asserted that the New Hampshire court held the CGL policy in *High Country* provided coverage for the alleged property damage.[66] The *High Country* court, however, simply ruled

55. *Bituminous I*, 2004 S.C. LEXIS 190, at *9.
56. *Bituminous II*, 366 S.C. at 123 n.4, 621 S.E.2d at 36 n.4.
57. *See High Country*, 648 A.2d at 475.
58. *Bituminous II*, 366 S.C. at 123, 621 S.E.2d at 36 (citing *High Country*, 648 A.2d at 477).
59. *Id.*
60. *High Country*, 648 A.2d at 477.
61. *Id.*
62. *Id.* at 478.
63. *Bituminous II*, 366 S.C. at 124, 621 S.E.2d at 36.
64. *Id.*
65. *See supra* notes 46–49 and accompanying text.
66. *Bituminous II*, 366 S.C. at 123, 621 S.E.2d at 36 (citing *High Country*, 648 A.2d at 477).

that the alleged damages in the case constituted an occurrence under the CGL policy.[67] The New Hampshire court reversed only the lower court's grant of summary judgment in favor of the insurer, leaving for remand the issue of whether the policy actually provided coverage.[68]

The South Carolina Supreme Court also muddled the facts of *High Country* when it used the case to draw a distinction between "a claim for faulty workmanship versus a claim for damage to the work product caused by the negligence of a third party."[69] The facts of *High Country* reveal that a third party did not cause the damage to the project (the construction of condominium units); instead, the complaint alleged the contractor defectively constructed the condominiums, leading to the loss of structural integrity.[70] Based on those facts, two possibilities exist: either the South Carolina Supreme Court considers a subcontractor a third party, or the court failed to appreciate the factual background of *High Country*. The first possibility seems implausible because subcontractors work on behalf of contractors and, therefore, are not considered third parties. Similarly, it seems unlikely that the supreme court was not well-acquainted with the specific facts of *High Country*. The implausibility of both explanations inevitably leads to confusion in attempting to discern the supreme court's purpose in utilizing *High Country*.

Furthermore, an examination of these facts seems to undermine the supreme court's use of *High Country* to support the proposition that CGL policies do not cover negligent construction damaging the work product itself.[71] The complaint in *High Country* alleged faulty construction of the condominium's exterior walls, which allowed water seepage that not only damaged the walls but also other parts of the project.[72] Again, two possibilities exist: either the South Carolina Supreme Court considered each component of a construction project as a work product separate from other components, or the supreme court failed to appreciate the factual background of *High Country*.

The first possible interpretation, defining work product as a discrete component of the project rather than the entire project, could be reconciled with the facts of *Bituminous* because the only product involved was the roadway.[73] If the supreme court viewed the roadway as a uniform product with no component parts, then the faulty workmanship of the Contractor damaged only the work

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67. *See High Country*, 648 A.2d at 478.

68. *Id.* ("We decline to consider the exclusions on the current state of the record and remand to the trial court for further proceedings."). The South Carolina Supreme Court also declined to reach the issue of policy exclusions in *Bituminous II*, but for different reasons. *Bituminous II*, 366 S.C. at 125, 621 S.E.2d at 37. Because the supreme court ruled the damage did not constitute an occurrence, it remains unclear how South Carolina courts would treat the policy exclusions.

69. *Bituminous II*, 366 S.C. at 123–24, 621 S.E.2d at 36 (citing *High Country*, 648 A.2d at 477).

70. *High Country*, 648 A.2d at 476.

71. *See supra* notes 58–62 and accompanying text.

72. *High Country*, 648 A.2d at 477.

73. *See* Bellino v. Scottsdale Ins. Co., No. C.A.3:05-1459-CMC, 2006 WL 1129402, at *3 (D.S.C. Apr. 27, 2006) (finding no occurrence where the property damage did not extend beyond the construction of a pool).

product itself. Outside the context of the particular facts of *Bituminous*, however, the supreme court's reasoning raises significant questions. Applying the same analysis to a situation involving a house or an office park, whether coverage exists under a CGL policy turns entirely upon how a court defines work product. If a court finds that each part of the project, such as a wall or a roof or the foundation, is a separate work product, then a court could determine the CGL policy covers the damage. For instance, if faulty construction of a foundation causes damage to other parts of a house, a court might hold the damage constitutes an occurrence. The New Hampshire court's reasoning in *High Country* seems to support such an argument.[74]

Alternatively, arguing that a court should consider the entire project as the work product requires assuming the South Carolina Supreme Court relied only on the analysis of *High Country* and not its facts. This assumption seems odd because the supreme court chose to examine *High Country* out of several cases cited from other jurisdictions, two of which found no occurrence where the subcontractors caused damage to other parts of the project.[75] One cited case, *Monticello Insurance Co. v. Wil-Freds Construction, Inc.*, offered a hypothetical example of damage extending beyond the project that would have been an occurence.[76] The *Monticello* court held the general contractor's CGL policy did not cover a subcontractor's faulty workmanship that damaged other parts of the contractor's municipal parking garage project.[77] However, the *Monticello* court recognized the CGL policy would have provided coverage if the faulty workmanship had resulted in damage to cars parked in the garage.[78] If the South Carolina Supreme Court meant to limit coverage to situations involving damage to a third person's property, it could have relied upon *Monticello*. Instead, the supreme court simply placed *Monticello* in a list of other cases without discussing the cases' reasoning.[79]

By choosing to focus on *High Country*, a case from a jurisdiction the supreme court recognized as construing CGL policies in the insured's favor,[80] the supreme court implied that it preferred the New Hampshire court's approach over the other cited cases. This preference suggests the supreme court offered its reliance on *High Country* as an interpretation of its original concession

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74. *High Country*, 648 A.2d at 477.

75. *See Bituminous II*, 366 S.C. at 121, 621 S.E.2d at 35 (citing Heile v. Herrmann, 736 N.E.2d 566, 568 (Ohio Ct. App. 1999) (holding that damage to a general contractor's project caused by a subcontractor's faulty workmanship was not an occurrence under a CGL policy); Monticello Ins. Co. v. Wil-Freds Constr., Inc., 661 N.E.2d 451, 456 (Ill. App. Ct. 1996) (finding no occurrence when faulty workmanship damaged only the general contractor's project)).

76. 661 N.E.2d at 457.

77. *Id.* at 456.

78. *Id.* at 457.

79. *See Bituminous II*, 366 S.C. at 121, 621 S.E.2d at 35 (citations omitted).

80. *See id.* at 121 n.3, 621 S.E.2d at 35 n.3 ("[T]here are several jurisdictions, including . . . New Hampshire, . . . that have found CGL policies to be ambiguous and construed the ambiguity against the drafter.").

concerning the type of damage possibly covered by a CGL policy.[81] The supreme court arguably used *High Country*, a case involving faulty workmanship damaging only other parts of the contractor's project, as an example of damage to "another," damage possibly covered as an occurrence under a CGL policy. Such an interpretation would ameliorate the dramatic effects predicted after the court's original opinion.[82] If the facts of a case parallel the facts of *High Country*, an insured contractor could argue that a subcontractor's damage to other parts of the project should be covered under a CGL policy.

III. RECENT SOUTH CAROLINA FEDERAL DISTRICT COURT DECISIONS

Recent opinions of South Carolina federal district courts illustrate the difficulty of clarifying the confusion surrounding the supreme court's decision in *Bituminous II*.

A. Pennsylvania National Mutual Insurance Co. v. Ely Wall & Ceilings, Inc.

Recognizing the unsettled nature of the state issues, the federal district court in *Pennsylvania National Mutual Insurance Co. v. Ely Wall & Ceilings, Inc.*[83] granted a motion to dismiss the declaratory judgment action brought by Pennsylvania National Mutual Insurance Company (Penn National).[84] The defendant homeowners, organized as the Ocean Bay Club HPR (Ocean Bay), sought damages arising from the work of Ely Wall & Ceilings, Inc. (Ely Wall), which installed exterior stucco for Ocean Bay's condominium project.[85] Improper installation allowed moisture to seep through the skin of the exterior cladding, resulting in damage to other parts of the condominium project.[86] Multiple faulty workmanship claims against Ely Wall prompted Penn National, Ely Wall's insurer, to seek a declaratory judgment that the CGL policies issued to Ely Wall did not cover such claims under South Carolina law.[87]

In its motion to dismiss, Ocean Bay argued that due to the novel question of whether a CGL policy defined damage caused by faulty workmanship as an occurrence, the district court should abstain from deciding the issue.[88] Conceding that the district court should dismiss its action if the action raised

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81. *See supra* note 56 and accompanying text.

82. *See, e.g.*, McNeil, *supra* note 46, at 802 ("[T]he South Carolina Supreme Court . . . provided insurance companies a way to refuse coverage . . ., and forced contractors and potentially innocent property owners to bear the risk of loss if subcontractors perform their work negligently.").

83. No. Civ.A.4:04-1576-RBH, 2006 WL 569589 (D.S.C. Mar. 6, 2006).

84. *See id.* at *9-10.

85. *See id.* at *1, *6.

86. *See id.*

87. *Id.* at *1.

88. *See id.* at *3–4.

difficult questions regarding state law, Penn National nevertheless posited that the recent *Bituminous II* decision had settled the issue.[89] Therefore, Penn National asserted, "resolution of th[e] case require[d] the routine application of settled princip[les] of law to particular disputed facts."[90]

Aware of the importance of leaving close or difficult state law questions to "the most authoritative voice,"[91] the district court examined *Bituminous II*:[92]

> [B]ecause the facts of this case are distinguishable from those in the [*Bituminous II*] case, the decision in [*Bituminous II*] may not answer several questions presented in the present case. . . . [T]his court finds that the [*Bituminous II*] opinion does not necessarily reflect settled law as to the issue of occurrence and coverage under the CGL policies at issue in this case. [93]

Judge Harwell further suggested that the ruling in *Bituminous II* might be limited to the specific facts of the case—alligator cracking that only damaged the roadway system.[94]

To further support the possibility of a fact-specific holding in *Bituminous II*, the district court noted the supreme court's discussion of *High Country*.[95] The district court suggested that the *Bituminous II* court relied on *High Country* to distinguish a complaint alleging faulty construction that damaged only the work product itself from a complaint alleging faulty construction that resulted in property damage.[96] Because *Pennsylvania National* contained facts similar to *High Country*, the district court speculated that the South Carolina Supreme Court might employ the rationale of the *High Country* court and find coverage.[97] Because of this possibility, the district court expressed discomfort in attempting to predict what the supreme court would hold if faced with the present case or a similar case.[98]

Importantly, Judge Harwell also recognized the legitimacy of an argument that the supreme court's discussion of *High Country* was only dictum.[99] Framing the supreme court's treatment of *High Country* as dictum resuscitates the argument that *Bituminous II* in fact establishes the following bright-line rule: "[F]aulty construction is not an occurrence under a CGL insurance policy."[100]

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89. *Id.* at *4.
90. *Id.* (internal quotation marks and citations omitted).
91. *Id.* at *5 (quoting Mitcheson v. Harris, 955 F.2d 235, 237 (4th Cir. 1992)).
92. *See id.* at *5–7.
93. *Id.* at 5 (internal quotation marks omitted).
94. *Id.*
95. *Id.* at *6.
96. *Id.* (citing *Bituminous II*, 366 S.C. at 124, 621 S.E.2d at 36)
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*

Faced with such "close, problematic, and difficult"[101] issues of state law, the district court dismissed Penn National's declaratory judgment action, believing such complicated issues fell within the purview of the state courts.[102]

Although the district court discussed the possibility that CGL policies could cover faulty workmanship that damaged property beyond the work product, the facts of *Pennsylvania National* did not require the district court to define what qualified as the work product.[103] The *High Country* court indisputably held that damage to other parts of the contractor's construction project caused by the subcontractor's faulty workmanship constituted an occurrence under the contractor's CGL policy.[104] The facts in *Pennsylvania National* also involved a subcontractor's faulty construction that damaged other parts of a construction project; however, the faulty workmanship of Ely Wall extended beyond the exterior stucco siding that was Ely Wall's work product.[105]

A distinction may be drawn between what a subcontractor's CGL policy covers and what a contractor's CGL policy covers. A subcontractor's damage to other parts of the project upon which the subcontractor performed no work might be defined as an occurrence under a subcontractor's CGL policy because the damage extended beyond the work product itself. However, that same damage would not constitute an occurrence under the general contractor's CGL policy because the damage did not extend beyond the general contractor's work product—the entire project. As reasonable as this argument appears, *High Country* did not involve a subcontractor's CGL policy; it involved a general contractor's CGL policy.[106] This particular distinction fails to solve the riddle of what the *Bituminous II* court sought to accomplish by relying on *High Country*.

B. Owners Insurance Co. v. Lang's Heating & Air Conditioning

Recognizing a distinction between contractors and subcontractors, the district court in *Owners Insurance Co. v. Lang's Heating & Air Conditioning*[107] granted Owners Insurance Company's partial summary judgment motion.[108] Because the faulty workmanship of the subcontractor, Lang's Heating & Air Conditioning (Lang's) damaged parts of the building that were not worked on by Lang's, Judge Norton found the damage amounted to an occurrence under Lang's CGL policy.[109] As a result, the district court held that Lang's co-

101. *Id.* at *7.
102. *Id.*
103. *See id.* at *6–7.
104. *See* High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 477, 478 (N.H. 1994).
105. *See Pa. Nat'l Mut. Ins. Co.*, 2006 WL 569589, at *6.
106. *See High Country*, 648 A.2d at 475.
107. No. 2:05-2916, 2006 U.S. Dist. LEXIS 18898 (D.S.C. Apr. 10, 2006).
108. *Id.* at *10, *12.
109. *Id.* at *1–2, *10–11.

defendant and insurer, Selective Insurance Company (Selective), had a duty to defend its insured.[110]

The homeowners' underlying complaint alleged that Lang's faulty workmanship led to damage to other parts of the house that were not worked on by Lang's.[111] Selective argued that it had no duty to defend Lang's against the homeowners' action because Lang's faulty workmanship did not constitute an occurrence under the CGL policy.[112] The district court rejected Selective's argument, finding "the claims against Lang's constitute[d] an occurrence as defined by even the most restrictive interpretations of [*Bituminous II*]."[113] In reaching this conclusion, Judge Norton relied on the supreme court's suggestion in *Bituminous II* that CGL policies may cover damages to other property beyond the work product itself.[114] The damage caused to other parts of the house that were not worked on by Lang's extended beyond the work product itself; therefore, the district court concluded it amounted to an occurrence.[115]

C. Okatie Hotel Group, LLC v. Amerisure Insurance Co.

In *Okatie Hotel Group, LLC v. Amerisure Insurance Co.*,[116] the district court dealt with the more complex issue of whether a general contractor's CGL policy covered damage to the project caused by a subcontractor's faulty workmanship.[117] The *Okatie* court decided the alleged faulty workmanship resulted in an occurrence, and it denied the defendant insurer's motion for judgment on the pleadings or, in the alternative, for summary judgment.[118] The plaintiff, Okatie Hotel Group (Okatie), contracted with Devcon Group, Inc. (Devcon) to build a hotel.[119] The defendant insurer, Amerisure Insurance Company (Amerisure), issued several CGL policies to Devcon.[120] Due to the improper performance of Devcon's subcontractors, "the hotel suffered extensive moisture damage."[121]

Despite a state circuit court's judgment against Devcon in a suit by Okatie, Amerisure refused to indemnify its insured.[122] In response to Amerisure's refusal, Okatie filed a breach of contract claim against Amerisure in state court, which Amerisure later removed to federal court.[123] Amerisure first denied that

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110. *See id.* at *11–12.
111. *Id.* at *11.
112. *Id.* at *7–8.
113. *Id.* at *9–10.
114. *Id.* at *10 (quoting *Bituminous II*, 366 S.C. at 123, 621 S.E.2d at 36).
115. *Id.* at *10–11.
116. No. Civ.A.2:04-2212-23, 2006 WL 91577 (D.S.C. Jan. 13, 2006).
117. *Id.* at *1.
118. *Id.* at *6.
119. *Id.* at *1.
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.* (footnote omitted).

the CGL policies issued to Devcon provided coverage, and then moved for judgment on the pleadings, or, in the alternative, for summary judgment.[124] In its motion, Amerisure argued that faulty workmanship did not constitute an occurrence under South Carolina law.[125] In response, Okatie argued its subcontractors' negligent construction was not the occurrence but "that the result of the negligent construction *caused* an occurrence."[126]

In deciding whether the damage caused by Devcon's subcontractors constituted an occurrence, Judge Duffy first pointed out that the definition of occurrence under the instant CGL policy was the same as that in the CGL policy examined in *Bituminous II*.[127] In discussing *Bituminous II*, Judge Duffy focused on the supreme court's reliance on *High Country*.[128] Judge Duffy recounted the *High Country* court's decision by stating, "[w]here the complaint alleged negligent construction that resulted in property damage caused by continuous exposure to moisture and not merely negligent construction damaging only the work product, the CGL policy provided coverage."[129]

Although Amerisure attempted to minimize the role of *High Country* in the *Bituminous II* decision, the *Okatie* court emphasized *High Country*'s influence on South Carolina law.[130] In reconciling the results of *High Country* and *Bituminous II*, Judge Duffy outlined a distinction between the allegations in *High Country* and the allegations in *Bituminous II*: the *High Country* allegations claimed that continuous exposure to water caused damage to other parts of the project, while the allegations in *Bituminous II* only claimed faulty workmanship.[131] Based on this distinction, the district court opined that property damage resulting from such continuous exposure to water constituted an occurrence under the CGL policy.[132] In summary, Judge Duffy reached the following conclusion:

> [C]ontrary to the circumstances in [*Bituminous II*], [Okatie] in the present case . . . alleged property damage beyond damage to the work product and/or the improper performance of the task itself. Accordingly, the court holds that although damage to work product alone, caused by faulty workmanship, does not constitute an occurrence, the property damage to [Okatie]'s hotel—caused by exposure to the harmful condition of leaks

124. *Id.*
125. *Id.* at *2.
126. *Id.* (emphasis added).
127. *Id.* at *5 n.6 (citing *Bituminous II*, 366 S.C. 117, 621 S.E.2d 33 (2005)).
128. *Id.* at *5 (citing *Bituminous II*, 366 S.C. at 123, 621 S.E.2d at 36).
129. *Id.* at *5 (citing High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 477 (N.H. 1994)).
130. *See id.* at *6.
131. *Id.*
132. *Id.*

> and moisture—constituted an occurrence under the CGL policies issued by [Amerisure] to Devcon.[133]

For those reasons, the district court denied Amerisure's motion.[134]

The *Okatie* court rejected Amerisure's argument that *Bituminous II* created a bright-line rule concerning faulty workmanship. Instead, the *Okatie* court felt compelled to account for the supreme court's reliance on *High Country*, finding that a subcontractor's faulty construction that damaged other parts of the contractor's project resulted in an occurrence.[135]

Although not discussed directly, the *Okatie* court probably decided that the damage squared with the exception carved out by the *Bituminous II* court.[136] After all, the *Bituminuous II* court used *High Country* to illustrate the type of case that would fit into the exception.[137] Because the facts in *Okatie* more closely resembled the facts in *High Country* than the facts in *Bituminous II*, the district court seems to have decided the exception applied. The *Okatie* court's opinion, however, failed to explain how the damage to the hotel extended beyond the work product. To fit into the *Bituminous II* court's exception, the *Okatie* court must have viewed the subcontractor's wall, but *not* the entire hotel construction project, as the work product. Therefore, the faulty construction of the walls led to damage beyond the work product alone, namely the other parts of the general contractor's entire project. After *Okatie*, the question remained whether other courts would adopt a similar definition of work product.

D. Pennsylvania Manufacturers' Ass'n Insurance Co. v. Dargan Construction Co.

Recently, a district court adopted the *Okatie* court's reasoning when it ordered the plaintiff insurer, Pennsylvania Manufacturers' Association Insurance Company (Penn Insurance), to defend and indemnify the defendant contractor, Dargan Construction Company (Dargan).[138] As general contractor for three separate hotel and resort projects, Dargan hired several subcontractors to perform the majority of the construction.[139] After Dargan finished construction, Penn Insurance issued a CGL policy to Dargan.[140] Following the discovery of moisture damage to the projects, the owners filed complaints against Dargan

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133. *Id.*

134. *Id.* at *7.

135. "The parties in *Okatie* . . . settled before the [district] court could rule on a motion for reconsideration." Bituminous Cas. Corp. v. R.C. Altman Builders, Inc., No. 2:01-4267-DCN, 2006 WL 2137233, at *4 n.9 (D.S.C. July 28, 2006).

136. *Bituminous II*, 366 S.C. 117, 123 & n.4, 621 S.E.2d 33, 36 & n.4 (2005) ("The CGL policy may, however, provide coverage in cases where faulty workmanship causes . . . damage to other property, *not in cases where faulty workmanship damages the work product alone.*")

137. *Id.*

138. No. 4:05-113-25-TLW-TER, 2006 WL 2038270, at *4–5 (D.S.C. July 20, 2006).

139. *Id.* at *1.

140. *Id.*

alleging defective construction that caused "deterioration . . . and corrosion of the various components of the buildings."[141] Penn Insurance agreed to defend Dargan in the underlying suits pending the court's declaration as to Penn Insurance's duty to defend and indemnify Dargan.[142]

The *Dargan* court noted the CGL policy contained the standard definition of occurrence.[143] The court understood the underlying complaints to request an award not only to correct the defective construction, but also to compensate for the losses resulting from the defective construction.[144] Predictably, Penn Insurance argued that it had no duty to defend Dargan because, as the supreme court held in *Bituminous II*, CGL policies do not cover claims of faulty workmanship.[145] Judge Wooten responded by referring to the *Bituminous II* court's discussion of *High Country*.[146]

Judge Wooten followed the *Okatie* court's reasoning and placed significant importance on the supreme court's reliance on *High Country*.[147] Finding that the facts in *Dargan* "significantly mirror[ed] the facts in *High Country*,"[148] Judge Wooten reached the same result as the *High Country* court.[149] Because the complaint alleged damage to property beyond the work product itself, the district court found an occurrence, thereby requiring Penn Insurance to defend Dargan.[150] As in *Okatie*, the court did not directly define work product, but as in *Okatie*, the court probably viewed only the subcontractors' product as the work product, rather than the entire construction project. Otherwise, the *Dargan* court could not have applied the exception described in *Bituminous II*.

E. Bituminous Casualty Corp. v. R.C. Altman Builders, Inc.

In *Bituminous Casualty Corp. v. R.C. Altman Builders, Inc.*,[151] the district court held the insured general contractor's CGL policy did not cover damage caused by a subcontractor's defective work.[152] In reaching its decision, the court defined the work product as the entire project for which the general contractor

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141. *See id.* at *3.

142. *Id.* at *2.

143. *See id.* at *1 ("Occurrence is defined as[] an accident, including continuous or repeated exposure to substantially the same general harmful conditions.") (internal quotation marks omitted).

144. *Id.* at *3.

145. *Id.*

146. *Id.*

147. *See id.* ("[T]he reference to *High Country* remains significant and provides insight in distinguishing when a policy would provide coverage and when it would not.").

148. *Id.* at *4.

149. *Id.* at *5.

150. *Id.* at *4–5.

151. No. 2:01-4267-DCN, 2006 WL 2137233 (D.S.C. July 28, 2006). The defendant appealed to the Fourth Circuit Court of Appeals after the district court denied its motion to alter or amend. *See* Bituminous Cas. Corp. v. R.C. Altman Builders Inc., No. 2:01-4267-DCN, slip op. at 8 (D.S.C. Aug. 21, 2006).

152. *Altman*, 2006 WL 2137233, at *5.

was responsible.[153] The court therefore held that a subcontractor's defective work that damaged only the general contractor's project did not constitute an occurrence under the CGL policy.[154]

In the underlying state court action, a homeowner sued R.C. Altman Builders, Inc. (Altman) alleging that Altman's defective construction "permitted water intrusion and other damage."[155] After Altman settled with the homeowner, Altman's insurer, Bituminous Casualty Corporation (Bituminous), filed a declaratory judgment action in district court.[156] Bituminous asked the district court to clarify whether Altman's CGL policy provided coverage, arguing that the damage caused by Altman's subcontractors did not amount to an occurrence.[157] Although the magistrate's report found that the allegations qualified as an occurrence,[158] the *Altman* court agreed with Bituminous that there was no occurrence.[159]

After establishing that the CGL policy provisions in *Altman* mirrored those in *Bituminous II*,[160] the court delved into a discussion of *Bituminous II*.[161] Both parties in *Altman* presented interpretations of the *Bituminous II* court's suggestion that CGL policies would cover certain damages caused by faulty workmanship.[162] Bituminous focused on the following two phrases used by the supreme court: "third party" and "work product alone."[163] Bituminous reasoned that unless a third party caused the damage, the CGL policy did not provide coverage.[164] According to this reading, Bituminous had no duty to indemnify Altman because Altman's subcontractors, not a third party, caused the damage.[165] Bituminous also asserted that Altman was responsible for the entire project, so any damage to the project was not damage to property beyond the work product itself.[166] Alternatively, the district court noted that Altman implied that the "work product [was] not the entire general contractor's project, but each specific subcontractor's task."[167] The district court also indicated that Altman

153. *See id.* at *5.
154. *Id.*
155. *Id.* at *1.
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.* at *5.
160. *Id.* at *2.
161. *Id.* at *2–3.
162. *Id.* at *3; *see also Bituminous II*, 366 S.C. 117, 123 & n.4, 621 S.E.2d 33, 36 & n.4 (2005) ("The CGL policy may, however, provide coverage in cases where faulty workmanship causes . . . damage to other property, *not in cases where faulty workmanship damages the work product alone.*")
163. *Altman*, 2006 WL 2137233, at *3.
164. *See id.*
165. *Id.*
166. *Id.*
167. *Id.* (internal quotation marks omitted).

failed to discuss the third party language contained in *Bituminous II*.[168] Ultimately, the *Altman* court favored Bituminous's reading of *Bituminous II*.[169]

In disregarding Altman's reading of *Bituminous II*, the district court reproved Altman's emphasis on the outcome of *High Country*.[170] The *Altman* court found that the supreme court "cited *High Country* for its analysis, not its conclusion."[171] Because the *High Country* excerpts in *Bituminous II* did not mention whether the insured was the general contractor, Judge Norton determined Altman could not rely on the facts or the outcome of *High Country*.[172] According to Judge Norton, the supreme court used *High Country* "to distinguish between damage to defective work and damage stemming from defective work."[173] In other words, Judge Norton believed a CGL policy might cover property damage "stemming from defective work," but a third party must cause the damage or the damage caused by the contractor or subcontractor must extend beyond the work product itself. Importantly, Judge Norton viewed work product as the entire project under the general contractor's control. Based on this interpretation of *Bituminous II*, the district court concluded that a subcontractor's defective work that damaged only other parts of the general contractor's project did not constitute an occurrence.[174]

The *Altman* court assigned little importance to the facts of *High Country*, but the supreme court specifically detailed the facts of the complaint underlying *High Country*.[175] In *High Country*, the underlying complaint distinguished between the damage of the defectively constructed walls and the damage to other parts of the building caused by the defectively constructed walls.[176] By referring to the facts of the complaint, the *Bituminous II* court highlighted the difference between damage to the work product alone and damage to property beyond the work product. The work product referred to in *High Country* was the defectively constructed walls.[177] The damage to the other parts of the building caused by the defective construction of the walls amounted to damage beyond the work product.[178] This distinction is necessary to the *Bituminous II* court's reading of *High Country*'s holding: "In *High Country Assocs.*, the court held that a CGL provided coverage for property damage caused by continuous exposure to moisture when the complaint alleged negligent construction that resulted in

168. *Id.*
169. *Id.*
170. *Id.* at *4.
171. *Id.*
172. *Id.*
173. *Id.* at *4 n.8.
174. *Id.* at *5, *6.
175. *Bituminous II*, 366 S.C. 117, 123–124, 621 S.E.2d 33, 36 (2005) (quoting High Country Assocs. v. N.H. Ins. Co., 648 A.2d 474, 477 (N.H. 1994)).
176. *High Country*, 648 A.2d at 477.
177. *See id.*
178. *Id.*

property damage and *not merely negligent construction damaging only the work product itself.*"[179]

Applying this distinction in *Bituminous II*, the supreme court viewed the roadway system as a single work product.[180] As a result, because the defective workmanship only damaged the roadway, the damage did not constitute an occurrence.[181]

Explaining the *Bituminous II* court's third party language remains problematic for both Altman and other contractors hoping to recover for claims made under their CGL policies. It remains unclear why the supreme court would find *High Country* helpful in distinguishing between a claim of faulty workmanship and a claim of damage caused by a third party because *High Country* did not involve any third parties.[182] However, this inconsistency does not affect the *Bituminous II* court's concession that CGL policies may cover claims where faulty workmanship causes damage beyond the work product itself.[183]

IV. EFFECT ON PRACTITIONERS AND CONSUMERS

As a result of *Bituminous II*, attorneys for contractors with CGL policies now face the challenge of arguing for coverage in an unsettled legal environment. Based primarily on *Bituminous I*, major insurance companies began withdrawing their defenses of contractors in construction defect litigation.[184] Insurance companies also began "declining settlement offers, canceling scheduled arbitrations, and refusing to provide coverage under existing policies."[185] In short, *Bituminous I* emboldened insurers to ignore the plain language of their own policies.[186] However, since the release of *Bituminous II*, insurance companies have felt less confident about their post-*Bituminous I* positions, and have begun to negotiate settlements and pursue litigation selectively.[187] Should a large amount of damages be at stake, insurers probably would file a declaratory judgment action, hoping a court will agree with the

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179. *Bituminous II*, 366 S.C. at 123, 621 S.E.2d at 36 (citing *High Country*, 648 A.2d at 477) (emphasis added).

180. *See id.* at 124, 621 S.E.2d at 36.

181. *Id.* at 123, 621 S.E.2d at 36.

182. *See High Country*, 648 A.2d at 476.

183. *See Bituminous II*, 366 S.C. at 124 n.4, 621 S.E.2d at 36 n.4.

184. *See* Brief for National Association of Home Builders & Home Builders Association of South Carolina as Amici Curiae Supporting Respondent 24, L-J, Inc. v. Bituminous Fire & Marine Ins. Co., 366 S.C. 117, 621 S.E.2d 33 (2005) (No. 97-CP-10-4790) [hereinafter Amicus Brief of NAHB & HBASC].

185. McNeil, *supra* note 46, at 801.

186. See *supra* Part II.A for a discussion of the plain language of CGL policies.

187. Interview with James L. Bruner, Managing Partner, and Wesley D. Peel, Partner, Bruner, Powell, Robbins, Wall & Mullins, L.L.C., in Columbia, S.C. (Sept. 8, 2006). "Founded in 1991, BPRWM was established to concentrate on construction litigation . . . and now comprises the largest group of attorneys with construction law expertise in one firm in South Carolina." BPRW&M: Attorneys at Law, What We Do, http://www.bprwm.com/whatwedo.htm (last visited Mar. 3, 2007).

insurers' interpretation of *Bituminous II* and find no duty to defend.[188] Conversely, insurers probably would negotiate a settlement if the amount of damages is relatively minor.[189] With only minor damages at stake, insurers might be loath to risk an unfavorable court decision that policyholders could use against insurers in future disputes involving much larger damages.

Overall, insurers enjoy the upper hand in negotiations with attorneys for CGL policyholders, at least until state courts provide further clarification of *Bituminous II*. Attorneys for contractors must advise their clients that, although the contractors paid premiums for insurance the contractors believed covered the faulty workmanship of subcontractors, a South Carolina court may disagree. The attorneys for these contractors must also advise their clients that there is now a choice between possibly lengthy litigation with uncertain results or settling for less coverage, if the insurers are willing to consider providing any coverage.

This uncertainty for contractors probably will also negatively affect South Carolina consumers, including both current and prospective homeowners. Faced with the possibility of increased exposure to additional costs and litigation expenses, home builders will probably increase the price of the homes they build.[190] In particular, buyers and builders of low to moderate income housing would suffer due to the costs of increased risk.[191] Additionally, homeowners who discover damage due to faulty construction will have no remedy if the responsible builder is either insolvent or no longer in business.[192] Such a result would contravene the South Carolina Supreme Court's prior announcement that "South Carolina, through both its courts and legislature, has previously been in the vanguard of protecting consumers, particularly in the area of home construction."[193]

V. CONCLUSION

Any interpretation of *Bituminous II* hinges on the degree of significance one attributes to the supreme court's reliance on *High Country*. If the supreme court used *High Country* only for its reasoning, then insurers could argue that *Bituminous II* created a bright-line rule against construing faulty workmanship as an occurrence. Under this interpretation, a contractor's CGL policy would not cover any damage to the contractor's project caused by a negligent subcontractor. As Part IV argued, such a result could have deleterious effects on South Carolina consumers. Alternatively, if the supreme court relied on both the reasoning *and* the facts of *High Country*, policyholders could argue the supreme court significantly limited its holding in *Bituminous II*.

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188. Interview with James L. Bruner and Wesley D. Peel, *supra* note 187.

189. *Id.*

190. *See* Amicus Brief of NAHB & HBASC, *supra* note 184, at 23–24.

191. *Id.* at 24 n.1.

192. *Id.* at 24.

193. *Id.* at 27 (quoting Reynolds v. Ryland Group, Inc., 340 S.C. 331, 338, 531 S.E.2d 917, 921 (2000)).

As the supreme court held in *Bituminous II*, "the damage *in the present case* did not constitute an occurrence."[194] The defective workmanship only damaged the one work product that existed—the roadway. With no other components involved, the damage caused by the subcontractor's negligent construction did not extend beyond the work product. In a situation involving facts similar to those in *High Country*, a CGL policyholder should argue that the subcontractor's negligent construction resulted in damage to other property—components of the contractor's entire project. According to the supreme court's own language, this type of damage would constitute an occurrence.[195]

Of course, insurers can still argue coverage does not exist because it remains unclear how the South Carolina Supreme Court would interpret the subcontractor exception to the your-work exclusion. The plain language of the CGL policy, however, probably will allow the policyholder to make a persuasive argument for coverage. However, to reach the issue of the subcontractor exception provision, attorneys for CGL policyholders must first persuade a South Carolina court that a subcontractor's damage to other parts of a contractor's project constitutes an occurrence. Thus, until the supreme court reexamines the issues surrounding its *Bituminous II* decision, attorneys should use the court's reliance on *High Country* to characterize such damage as an occurrence.

James P. Sullivan

194. *Bituminous II*, 366 S.C. 117, 124, 621 S.E.2d 33, 36 (emphasis added and internal quotation marks omitted).

195. *See id.* at 123, 621 S.E.2d at 36.