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# How are Building Product Class Actions Weathering?

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# INTRODUCTION

The United States Supreme Court, through its Class Action Predominance Trilogy, *Amchem*, *Dukes*, and *Comcast*,[1] has set a high bar for certifying class actions seeking damages that differ among class members. Still, building product class actions seeking damages for consequential property damage – physical injury to something other than the product itself – continue to be filed. A pair of recent decisions from the District of South Carolina, however, may temper the class action bar's enthusiasm for such actions.

This paper considers the history of building product class actions and the future of such litigation. It also considers insurance coverage issues presented by such cases. When is the duty to defend triggered by a class action complaint? How are defense costs typically allocated among numerous sequential triggered policies? Does a class action complaint trigger the duty to defend when the representative plaintiff's claim is not potentially covered, but the claims of the putative class may be? Who should select defense counsel? Does the duty to defend end if the claims of the putative class are potentially covered but the claims of the certified class are not?

## PART 1: HISTORICAL OVERVIEW &

[1] *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997); *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).

# CURRENT STATE OF BUILDING PRODUCT CLASS ACTIONS

## A. Historical Overview Of Class Actions' Predominance Requirement

### 1. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).

A review of the legal standard governing Rule 23(b)(3)'s application to building product class actions begins with the Supreme Court's decision *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591 (1997).[2] "The settlement-class certification . . . confront[ed in *Windsor*] evolved in response to an asbestos-litigation crisis." *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 597 (1997) (citing *Georgine v. Amchem Prod., Inc.*, 83 F.3d 610, 618 (3d Cir. 1996)).

In September 1990 Chief Justice Rehnquist created an Ad Hoc Committee on Asbestos Litigation in response to a "perceived failure" by the federal judiciary to respond to the crisis. One possible solution to the crisis, a "global settlement class action of historic proportion," came off the table when the *Amchem* Court affirmed the Third Circuit's vacating of such a settlement. At the same time as its *Amchem* decision, the Court vacated a Fifth Circuit "$1.535 billion global settlement . . . [that was] virtually identical to that decertified by the Third Circuit." Alex Raskolnikov, *Is There A Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545, 2545–46 (1998) (citing *Georgine*, *supra*; *In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996)).

In *Amchem*, the Supreme Court held that the certified settlement class did not meet Rule 23(b)(3)'s predominance requirement due, in part, to the individual nature of the class members' asbestos bodily injury damages. *Amchem*, at 622-23.

The *Amchem* decision has received extensive review and criticism. *See generally* Raskolnikov, *supra*; Mark C. Weber, *A Consent-Based Approach to Class Action*

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[2] Rule 23(b)(3) permits certification if:

> [T]he court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that, a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

*Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155 (1998) (criticizing the *Amchem* decision); Judith Resnik, *Postscript: The Import of Amchem Products, Inc. v. Windsor*, 30 U.C. DAVIS L. REV. 881 (1997).

Since *Amchem*, class action plaintiffs have been required to weigh the likelihood of insurance coverage against the likelihood of certification. Pleading "bodily injury" or consequential "property damage" enhances the likelihood of coverage but diminishes the likelihood of certification. The plaintiffs' bar appears to have resolved this dilemma by declining to seek damages because of "bodily injury" in class actions but continuing to seek damages because of consequential "property damage." *See HPF, L.L.C. v. General Star Indemnity Co.*, 338 Ill. App. 3d 912 (2003) (herbal products) (determining the underlying complaint did not allege that the product caused bodily injury; therefore declining to find coverage); *Medmarc Casualty Insurance Co. v. Avent America,* 612 F.3d 607 (7th Cir. 2010) (concluding that the "omission" of "bodily injury" claims in the complaint was "not a drafting whim (or mistake) on the part of the plaintiffs' attorneys, but rather a serious strategic decision.").[3]

2. *Dukes* and *Comcast*:
Completing the Class Action Predominance Trilogy.

The late Justice Antonin Scalia[4] built upon *Amchem* in *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011) *and Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) (with *Amchem*, the "Class Action Predominance Trilogy").

[3] *Compare with* Part 2, *infra* at p. 14, discussing this strategic decision in the context of building product class actions and concluding that such actions almost always plead such damages.

[4] The jury is out on how Gorsuch's confirmation to the Supreme Court would affect class actions and specifically Rule 23(b)(3)'s predominance requirement. For an analysis of Gorsuch's views on class actions, *see generally* Wystan Ackerman, *Gorsuch on Class Actions: How Might He Compare to Scalia?*, CLASS ACTION INSIDER (February 2, 2017) available at https://www.classactionsinsider.com/2017/02/gorsuch-on-class actions-how-might-he-compare-to-scalia/ (collecting and discussing Judge Gorsuch's three class certification and CAFA cases).

In both *Dukes* and *Comcast*, the Supreme Court rejected the proposed settlement class. The Court concluded, as in *Amchem*, that individual damages determinations and a proposed model for measuring damages could not be applied on a class-wide basis. The proposed settlement classes, therefore, failed to satisfy Rule 23(b)(3)'s predominance requirement.

Some courts have interpreted the Class Action Predominance Trilogy as imposing a categorical rule that any proposed class seeking individual damages determinations cannot meet Rule 23(b)(3)'s predominance requirement, thereby prohibiting certification.[5] But this isn't the view concerning building product class actions, at least not in the Seventh Circuit. *See In re IKO Roofing Shingle Products Liability Litigation,* 757 F.3d 599, 602 (7th Cir. 2014) (Easterbrook J.) ("The [district] court read *Comcast* . . . [t]o require proof 'that the plaintiffs will experience a common damage and that their claimed damages are not disparate.' . . . Elsewhere the district court wrote that 'commonality of damages' is essential . . . If this is right, then class actions about consumer products are impossible. . . . The district court denied plaintiffs' motion to certify under a mistaken belief that 'commonality of damages' is legally indispensable. With that error corrected, the district court can proceed using the proper standards."); *and Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 801 (7th Cir. 2013) *cert. denied,* 134 S. Ct. 1277 (2014) (Posner, J.) ("It would drive a stake through the heart of the class action device . . . that every member of the class have identical damages. If the issues of liability are genuinely common issues, and the damages of individual class members can be readily determined . . . the fact that damages are not identical across all class members should not preclude certification.").

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[5] For both sides of this argument, *see generally* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 799–800 (2013) ("Prior to Comcast, most courts had recognized that the presence of individualized damages issues normally did not defeat class certification. [*See, e.g.*, *Cochran v. Oxy Vinyls LP*, 2008 WL 4146383, at *12 (W.D. Ky. Sept. 2, 2008) ("Of course, a need for individualized damages determinations is not necessarily fatal to (b)(3) certification.")] After Comcast, this proposition has arguably been called into question. . . . It remains to be seen whether Comcast will now cause lower courts to depart from the traditional rule that individualized damages issues normally do not defeat class certification. Courts and commentators are already divided on what the impact of the case will be. . . .") (collecting cases and articles).

The conventional reading of the Class Action Predominance Trilogy is that the class action plaintiffs' alleged damages must, at the very least, be consistent with their theory of liability, so that individual damages determinations do not "overwhelm questions common to the class." *Comcast* at 1433. It now appears that if causation issues are common among the class, and only the extent of damages differs among class members, then common issues may predominate and certification may be proper.

The Class Action Predominance Trilogy creates a hurdle for certification of classes seeking individual consequential damages. Still, the class action plaintiffs' bar continues to file building product actions seeking these damages.

## B. The Current State of Building Product Class Actions

### 1. A Recent Increase In Building Product Class Actions.

There has been an increase in the number of building product class action lawsuits filed in the two decades since *Amchem*. *See* Gavin G. McCarthy, *Construction Defect Class Action Suits Becoming More Common*, 17 UNDER CONSTRUCTION 3 (Winter 2016).[6]

The increase in the number of these lawsuits began around 2000. The likely cause?: the commercialization of residential housing. *See* Gary E. Mason and Alexander Barnett, *How To Successfully Pursue A Class Action Involving Construction Defects*, 1 Ann.2004 ATLA-CLE 349 (July 2004) ("Since the 1990s, residential housing has

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[6] Examples of recent building product class action filings and settlements include:

(1) GAF Timberline Defective Roof Shingles – Settlement 4/22/2015;
(2) Goodyear Tire Defective Radiant Heating System – Filed 10/4/2013;
(3) Pella Corporation Defective Windows – Filed 11/15/2013;
(4) MW Defective Windows – Settlement 12/29/2014;
(5) Maibec Defective Wood Shingles – Third Amended Complaint Filed 3/31/2014;
(6) Mastic and Deceunick Oasis Defective Decking – Filed in January 2014;
(7) Fiberon Noncapped Decking – Settlement 9/4/2013;
(8) James Hardie Building Products Defective Siding – Complaint Filed 8/9/2013;
(9) Zurn Pex F1807 Fittings – Class Certified 7/6/2011;
An overview of these and other recent building product class actions is available at: http://www.classactionsnews.com/product/home-building-products

increasingly become a mass-produced product. . . . [often] marketed without adequate testing. As a result, defective construction materials [listing examples] have been incorporated in[to] residential housing throughout the country to devastating effect.").

Mr. McCarthy, among others, observes that as an inevitable result of this increased use of allegedly defective construction materials, "[o]ver the last several years . . . a new type of 'construction defect' case has become more prevalent — the construction defect class action, in which a few construction defect plaintiffs (generally consumers) seek to represent everyone that bought the product." McCarthy, *supra*. Summarizing these cases' shared characteristics, he notes:

> You would hardly recognize it as a construction case. The plaintiffs say they need not prove injury or causation,[7] at least not in the traditional sense. That is, the claim is not the windows are leaking, but simply that they are prone to leaking. And, rather than seeking repair costs, the plaintiffs seek so-called 'price premium' damages: the difference between the purchase price of the windows and the hypothetical price the plaintiffs would have paid had they known that the windows were prone to leaking.

*Id.* These actions continue to be filed for two reasons. First, a non-trivial number have been certified. Second, class counsels' fees can be substantial. In the words of Mia Hamm, "success breeds success." *See, e.g.*,:

a) Decisions Certifying, or Not Dismissing, Defective Product Class Actions:

i. *In re IKO Roofing Shingle Products Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014) (decision pending; but holding commonality of damages is not required for class certification). For a status update of this lawsuit, motions for class certification and summary judgment are pending, *see* Halunen & Associates, *IKO Roofing Shingle Litigation*, available at: http://www.ikoshingleslawsuit.com/content/iko-status-update-august-2016;

ii. *In re AZEK Building Prods., Inc. Marketing & Sales Practices Litig.*, 82 F. Supp. 3d 608 (D.N.J. 2015) (denying, in part, deck manufacturer's motion to dismiss plaintiff class);

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7 To position their class within the Class Action Predominance Trilogy's confines.

iii. *Brunson v. Louisiana-Pac. Corp.*, 266 F.R.D. 112, 2010 WL 503099 (D.S.C. 2010) (certifying class action against manufacturer of wood exterior trim product, alleging breach of express and implied warranties);

iv. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, 644 F.3d 604 (8th Cir. 2011) (applying Minnesota law) (certifying class action against manufacturer of plumbing systems, even for homeowners whose systems had not yet leaked —"dry plaintiffs" — as part of warranty claims);

v. *Ross v. Trex Co.*, 2009 WL 2365865 (N.D. Cal. July 30, 2009) (provisionally certifying class against a company that manufactures wood-composite deck products);

vi. *Brooks v. GAF Materials Corp.*, 301 F.R.D. 229 (D.S.C. 2014) (defective roof shingles) (declining to decertify a class asserting claims for negligence, breach of warranty, implied warranties, and unjust enrichment);

vii. *Nieberding v. Barrette Outdoor Living, Inc.*, 302 F.R.D. 600 (D. Kan. 2014) (bifurcating class action against manufacturer of outdoor railing products with allegedly defective brackets, since damages determinations required resolution of individual issues);

viii. *Fleisher v. Fiber Composites, LLC*, 2014 WL 866441 (E.D. Pa. Mar. 5, 2014) (approving settlement class);

ix. *Richison v. Am. Cemwood Corp.*, 2003 WL 23190948 (Cal. Super. Ct. Nov. 18, 2003) (approving phase 2 settlement of $83 million for defective roofs).

b) Decisions Awarding Attorney's Fees to Class Counsel:

i. *Pelletz v. Weyerhaeuser Co.*, 592 F. Supp. 2d 1322 (W.D. Wash. 2009) (defective deck-building products) (granting a fee award of $1,750,000, representing a "modest" 1.82 multiplier of Class Counsel's lodestar);

ii. *In re CertainTeed Fiber Cement Siding Litig.*, 303 F.R.D. 199 (E.D. Pa. 2014) (defective fiber cement siding) (approving $18.5 million fee award totaling 17.8% of the common fund and an approximate lodestar multiplier of 2.6);

iii. *In re MI Windows & Doors Inc. Prod. Liab. Litig.*, 2015 WL 4487734 (D.S.C. July 23, 2015), *appeal dismissed* (Sept. 3, 2015) (awarding Homeowner Plaintiffs' counsel $7,091,921.30 for attorneys' fees and $907,198.18 for reasonable expenses);

iv. *In re Zurn Pex Plumbing Prod. Liab. Litig.*, No. 08-MDL-1958 ADM/AJB, 2013 WL 716460, at *6 (D. Minn. Feb. 27, 2013) (defective brass fittings used in plumbing systems) (awarding $8.5 million for attorney's fees and reimbursement of all costs);

v. *In re Bldg. Materials Corp. of Am. Asphalt Roofing Shingle Prod. Liab. Litig.*, No. 8:11-CV-00983-JMC, 2015 WL 1840098, at *4 (D.S.C. Apr. 22, 2015) (finding an award of $3 million in attorney's fees and $700,00 in expenses was warranted);

vi. *Nieberding v. Barrette Outdoor Living, Inc.*, 129 F. Supp. 3d 1236 (D. Kan. 2015) (defective bracket used to connect vinyl guardrails on residential decks and porches) ($118,587.24 fee award, which "amounts to about one third of the total common fund").

Still, a consensus may be emerging that building product claims, at least those seeking consequential damages, are not suitable for class action treatment.

2. An Emerging Consensus?
Questioning the Viability of Building Product Class Actions.

While building products class actions have seen some success in recent years, *see, e.g.*, *In re IKO Roofing Shingle Products Liab. Litig.*, 757 F.3d 599 (7th Cir. 2014) (admonishing the district court for concluding individual damage determinations completely preclude class certification), a new view may be emerging.

A recent pair of decisions, issued together, from the District of South Carolina may signal a new consensus on the shortcomings of building product classes that seek

consequential damages. *See Romig v. Pella Corp.*, 2016 WL 3125472 (D.S.C. June 3, 2016) *and Naparala v. Pella Corp.*, 2016 WL 3125473 (D.S.C. June 3, 2016).

*Romig* and *Naparala* were decided as part of the *Pella* MDL in the District of South Carolina. Of the approximately 20 cases in the MDL, the court selected *Romig* and *Naparala* as the bellwethers on certification.[8]

As in most building product class action cases, the *Romig* court found the proposed classes met Rule 23(a)'s requirements of ascertainability,[9] numerosity, commonality, typicality, and adequacy of class representation. *See Romig*, 2016 WL at *3-9. The court also concluded, however, that individual issues concerning causation and damages predominated over the common liability issue — whether the Pella window is defective. *Id.* at *9-13.

In addition, the court concluded that certifying a liability-only class[10] under Fed. R. Civ. P. 23(c)(4), which the court acknowledged it could do, was not a superior method of adjudicating the class members' claims. *Id.* at *13-15. The court reached this conclusion by determining that even after resolving liability on a class basis, the remaining issues: "(i) whether the original warranty claim caused by defect; (ii) whether any of Pella's affirmative defenses apply; (iii) causation of each class member's damages;

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[8] Because the two decisions are virtually verbatim, the remainder of this Paper cites solely to *Romig*.

[9] For a review of the heightened standard of ascertainability being applied by some federal courts, *see* Kimberly J. Winbush, *Heightened Requirement of "Ascertainability" for Federal Class Action Certifications Arising Under Fed. R. Civ. P. 23(b)(3) After Third Circuit "Trilogy" of Marcus, Hayes, and Carrera*, 19 A.L.R. FED. 3D ART. 7 (2017).

[10] For a review of courts' different interpretation of the legal standard for certifying liability-only classes under Federal Rule of Civil Procedure 23(c)(4), *see* Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U.L. REV. 729, 807-15 (2013) (discussing the divergent use of the issue-only class amongst the federal circuits). *See also* § 4:91.Rule 23(c)(4) issue certification's relationship to the predominance requirement of Rule 23(b)(3), Newberg on Class Actions § 4:91 (5th ed.).

and (iv) the amount of such damages" would require substantial resources to resolve in individual adjudications.

The court also noted that "if the alleged [window] defects are as uniform as plaintiff suggests, then much of the information other class members need to bring their case may already be available." *Id.* In sum, the Court concluded that certifying a class as to one issue would simply not bring the plaintiffs significantly closer to their sought after recovery.

The *Romig* and *Naparala* decisions highlight the shortcomings of certifying a liability-only class when the remaining member-specific issues are fact-intensive, as in most building products class actions. The March 28, 2017 order in *Sullivan v. Maibec,* in the United States District Court for the District of New Jersey, which denies class certification but does not, at least at this point, explain why, may further support a trend against certification of building product classes.

For other decisions decertifying or declining to certify a building products class action, *see, e.g.*,:

a) *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 866, 124 P.3d 530, 550 (2005) ("When single-family residence constructional defect cases present substantial issues requiring individualized determinations, they are not appropriate for class action treatment. Because the homeowners' claims and Beazer Home's defenses presented just such issues in this instance . . . we conclude that the district court abused its discretion in allowing the homeowners' case to proceed as a class action.");

b) *Welch v. Atlas Roofing Corp.*, 2007 WL 3245444, at *8 (E.D. La. Nov. 2, 2007) ("In summary, individual determinations of liability, the extent of that liability, damages, and the timeliness of each class member's claims will predominate over any issues common to the participating class members. Such individual determinations clearly indicate that a class action is not the superior method of fairly adjudicating the class members' claims. Therefore, the Court finds that Welch's action is not appropriate for class certification pursuant to Rule 23(b)(3).");

c) *Pagliaroni v. Mastic Home Exteriors, Inc.*, 2015 WL 5568624 (D. Mass. Sept. 22, 2015) (denial of motion for class certification);

d) Doster Lighting, Inc. v. E-Conolight, LLC, 2015 WL 3776491 (E.D. Wis. June 17, 2015) (same);

e) *Porcell v. Lincoln Wood Prod., Inc.*, 713 F. Supp. 2d 1305 (D.N.M. 2010) (denying motion for class certification because the plaintiff failed to satisfy Rule 23(b)(3)'s predominance and superiority requirements).

Courts' hesitance to certify liability-only classes, or classes requiring individual damage determinations, may stem from uncertainty in the procedural practice of adjudicating the next phase in a class action — trial.

3. Managing Building Products Class Actions Upon Certification.

The vast majority of class actions settle upon certification. *Cf. Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) ("[A] study of certified class actions in federal court in a two-year period (2005 to 2007) found that all 30 such actions had been settled."). As a consequence, case law providing guidance for administering the trial phase of a class action is sparse.

Courts typically bifurcate a class action trial when there is a common question of liability but individual damages questions. *See Olden v. LaFarge Corp.*, 383 F.3d 495, 509 (6th Cir. 2004) ("As the district court properly noted, it can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special master or by another method.") (citing Fed. R. Civ. P. 23(c)(4)(A) *and Simon v. Philip Morris Inc.*, 200 F.R.D. 21, 30 (E.D.N.Y.2001) ("By bifurcating issues like general liability or general causation and damages, a court can await the outcome of a prior liability trial before deciding how to provide relief to the individual class members.")).

*See also* 11:7.Bifurcating liability and damages in class actions—Effect of *Comcast* and *Dukes*, Newberg on Class Actions § 11:7 (5th ed.) ("In sum, neither *Comcast* nor *Dukes* addressed bifurcation directly, and neither held anything that would foreclose bifurcation. In some sense, bifurcation is the *answer* to the problems found by

both Courts in that it enables the separation of the common questions (of liability) and individual questions (of damages).").

For a comprehensive overview of how courts will handle "phase two," of a class action's bifurcated trial, *see generally* § 11:9.Bifurcating liability and damages in class actions—Phase two: approaches to trying damages, Newberg on Class Actions § 11:9 (5th ed.).

In sum, building product class actions seeking relief for consequential damage continue to be filed in the wake of the Class Action Predominance Trilogy. The most recent decisions concerning class certification may indicate a trend away from certifying building product classes, at least those seeking damages because of consequential property damage, based on the recognition that individual causation and damage issues predominate over common liability issues.

# Part 2: General Duty to Defend Considerations In Building Product Class Actions

## A. When Is An Insurer's Duty To Defend Triggered?

The principle issue in determining whether an insurer has a duty to defend a building product class action, as in most building defect cases, is whether the complaint seeks damages because of potentially covered property damage caused by an occurrence.

The "occurrence" issue is largely settled — in most jurisdictions a builder's faulty workmanship or a product manufacturer's faulty design or production can be an occurrence. Whether damage to the product itself is "property damage" differs from state to state. But whatever a particular state's "occurrence" and "property damage" case law, the "your product" exclusion provides that only consequential damage, that is damage to something other than the product itself, is potentially covered.

Consequently, the duty to defend a building product class action frequently depends on whether the complaint seeks damages for consequential property damage. Since consequential damage is an individual damages issue, including it in a putative class action cuts against certification.[11] Still, most building product class action complaints allege damages to property other than the product itself. *Compare with* Part I,

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[11] *See generally* Jill B. Berkeley, *Finding Insurance Coverage for Consumer Products Class Action Complaints*, THE WOMEN OF THE SECTION OF LITIGATION (November 2014) ("The tension between the goal of certifying the class versus triggering the elements of insurance coverage is clear. On the one hand, certification requires common facts and injuries among the class members. Once individual damages are alleged, it becomes more difficult to overcome objections to class certification.").

*See also* Carlos Del Carpio, *Triggering the Duty to Defend a Class Action*, INSURANCE COVERAGE AND PRACTICE SYMPOSIUM (December 2015) ("Courts are divided on "the proper outcome where a class action complaint is drafted to avoid seeking relief for property damage or bodily injury that could preclude certification but could, at least arguably, fall within a policy's coverage. Courts that have addressed this issue have adopted divergent approaches . . .") (collecting and analyzing cases).

*supra* at p. 4 (noting that class action plaintiffs usually do not allege individual bodily injury damages).

1. Defective Work is an Occurrence

With rare exception, the majority rule is that defective workmanship – and by extension, defective design or manufacture of a product – is an occurrence. *See Cherrington v. Erie Ins. Prop. & Cas. Co.*, 231 W. Va. 470 (2013) (recognizing the majority rule that defective workmanship is an occurrence and overruling recent West Virginia precedent to the contrary that was "based upon reasoning which has [quickly] become outdated."). *But see Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317 (2006) (holding defective work is not an occurrence); *Millers Capital Ins. Co. v. Gambone Bros. Dev. Co.*, 2007 PA Super 403 (2007) (same). In most jurisdictions, therefore, a building product class action complaint's allegations of defective work allege an occurrence.

2. "Your Product" Exclusion Limits Coverage; Consequential Damages

The "Your Product" Exclusion in a CGL policy, however, limits an insurer's duty to defend to those complaints that contain allegations of damage to property other than the insured's allegedly defective product. *See* Steven Plitt, *et al.*, *"Your product" exclusion*, 9A COUCH ON INS. § 129:20 (3d ed. December 2016) ("[T]he primary purpose of . . . the 'your product' exclusion is to prevent liability policies coverage for damage to the insured's own product.").

Of course, "[t]he standard definition of 'your product' expressly provides that real property is not included within the purview of this phrase. The work performed by contractors on dwellings, buildings, structures, and any other form of realty is therefore not considered to be the product of the insured." *Id.* (collecting cases). A potentially interesting wrinkle in the application of the "product" exclusion is whether an insured's allegedly defective building product ceases to be a "product" when it becomes a fixture in a building. Does the product at that point become "real property" that is outside the "product" definition in standard general liability policies?

When determining whether an insured's product is "real property" for purposes of the exclusion, courts usually apply the black letter law and their state statute's definitions of "real property." *See, e.g.*, *Stuart v. Weisflog's Showroom Gallery, Inc.*, 311 Wis. 2d

492, 523–24 (2008) (relying on *Black's Law Dictionary's* and Wisconsin Stat. § 990.01's definitions of "real property" to conclude an addition to the plaintiff's home was within the "real property" exception to the "your product" exclusion); *Auto-Owners Ins. Co. v. Am. Bldg. Materials, Inc.*, 820 F. Supp. 2d 1265 (M.D. Fla. 2011) (same conclusion for drywall that was installed into a home).

On the other hand, in *Am. Home Assur. Co. v. AGM Marine Contractors, Inc.*, 467 F.3d 810 (1st Cir. 2006) (applying Massachusetts law) the First Circuit held that floating docks attached to a "pier built upon and planted in submerged land" were not real property within the real property exception of the "assured's product" exclusion. The court also cited to "the technical definition of real property" as well as Massachusetts case law defining real property as "so annexed that it cannot be removed without material injury to the real estate or to itself." *Id.* at 814. After acknowledging the non-uniform case law on whether floating docks are real property, the court determined that "the general definition of real property excludes floating docks that can be removed without damage . . . [T]he floating docks may be *close* to the line-being big structures that ordinarily are not moved about-does not make the line itself uncertain." *Id.* at 815.[12]

*See also Colorado Cas. Ins. Co. v. Brock USA LLC*, 2013 WL 4550416, at *5 (D. Colo. Aug. 28, 2013) ("These cases collectively stand for the proposition that once materials that were once 'your product' have been incorporated into real property, damage *to the resultant real property* does not constitute damage to 'your product.'") (citing:

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[12] The court also opined on the origin of the real property exception:

> It would be a different matter if there were some obvious rationale for the real property exception in the policy that would be frustrated by applying the classic definition. But, so far as we can tell, the exception came about almost by happenstance; . . . Earlier CGL policies did not have the real property exception; and, in construing such policies, courts divided as to whether the phrase "manufactured, sold, handled, or distributed" implicitly excluded real property . . . The ISO inserted the real property language to resolve the matter.

*AGM*, at 815–16. (citing Cunningham & Fischer, *Insurance Coverage in Construction-The Unanswered Question,* 33 TORT & INS. L.J. 1063, 1095-96 (1998)).

i. *Auto–Owners Ins. Co. v. Am. Bldg. Materials, Inc.*, 820 F.Supp.2d 1265, 1272 (M.D.Fla.2011) (described above);
ii. *Stuart v. Weisflog's Showroom Gallery*, Inc., 311 Wis.2d 492 (Wis.2008) (above);

iii. *Scottsdale Ins. Co. v. Tri–State Ins. Co. of MN.*, 302 F.Supp.2d 1100, 1104 (D.N.D. 2004) (citing to the definition of "real property" under North Dakota law, N.D. Cent. Code § 47-01-01, *et seq.*, and when strictly construing the real property exception against the insurer, finding prefabricated modular units, each a separate room, that were attached or affixed to a motel's foundation prior to the time they sustained water damage were within the real property exception to the your product exclusion);

iv. *Wanzek Const., Inc. v. Emp'rs Ins. of Wausau*, 679 N.W.2d 322, 326–28 (Minn.2004) (citing to Black's Law Dictionary's definition of "real property" and determining that coping stones added to a pool were within the real property exception to the your product exclusion)).

*But see McMath Const. Co. v. Dupuy*, 2003-1413 (La. App. 1 Cir. 11/17/04) ("McMath argues that because Dupuy's materials became incorporated into real property, the 'product' exclusion is inapplicable. We reject this argument, because the clear import of the exception is to remove only real property itself from the definition of 'your product.' Had the exception meant to remove materials incorporated into real property from the definition of 'your product,' it would have said so.") (defective stucco).

Another possible wrinkle is addressed in *Liberty Mut. Fire Ins. Co. v. MI Windows & Doors, Inc.*, in which a Florida appellate court reversed a trial court's holding that doors were so "materially changed by addition of the transoms [frames] that they were no longer [insured's] product." 131 So. 3d 15, 17 (Fl. Dist. Ct. App. 2013). After acknowledging the "dearth" of case law on this question, the court distinguished three cases[13] in which the defective product was held to be transformed and no longer the

[13] *See Imperial Casualty & Indemnity Co. v. High Concrete Structures, Inc.*, 858 F.2d 128 (3d Cir.1988) (defective steel cut and shaped into beveled washers); *Pittsburgh Plate Glass Co. v. Fidelity & Casualty Company of New York*, 281 F.2d 538 (3d Cir. 1960) (flaking paint baked onto venetian blinds); *Aetna Cas. & Sur. Co. v. M & S Indus., Inc.*, 64 Wash.App. 916 (1992) (defective plywood panels into concrete form systems).

insured's product when it was combined with another product. The court invoked "common sense" to conclude in the case before it, the addition of frames to doors did not make the doors into something else. *Id.* ("No alchemy confronts us. . . . They continue to operate as sliding glass doors.").

B. Allocation Of Defense Costs Among Insurers On The Risk

The first question insurers with a duty to defend a building product class action must evaluate and answer is how to allocate defense costs among themselves. Because the putative classes in these actions frequently seek damages because of consequential damage occurring over a long period of time, multiple sequential policies of insurance are typically triggered by such actions. These leads to a negotiation among the insurers over who pays how much of the defense.

The rule applied by the overwhelming majority of courts to have answered this question is to allocate the defense costs based on consecutive policies' time on the risk.

The chart below sets forth the law in 27 jurisdictions. Of the 24 jurisdictions that have an established rule on the issue, 22 apply time on the risk allocation and two apply equal shares allocation. Three additional jurisdictions have conflicting authority or implement a different allocation method.

This survey is principally based on the secondary source: Allocation of Losses in Complex Insurance Coverage Claims, Thompson Reuters, 2016, authored by Scott M. Seaman and Jason R. Schulze. That source catalogues allocation decisions concerning defense, indemnity, concurrent insurance policies, consecutive policies, disputes between policy holders and insurers, and disputes among insurers only. The chart below only provides the authority applicable to allocation of (1) defense costs, (2) among consecutive policies, and (3) among insurers.

**Allocation of Defense Costs Survey**

| **State** | **Rule for Allocation of Defense Costs Among Consecutive Policies** | **Authority** |
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| Alabama | Time on the risk | *Commercial Union Ins. Co. v. Sepco Corp.*, 918 F.2d 920 (11th Cir. 1990) |

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| Arizona | Time on the risk | *Owners Ins. Co v. Illinois Union Ins. Co.*, 1 CA-CV 07-0115, 2007 WL 5471953 (Ariz. Ct. App. Dec. 24, 2007) |
| California | Time on the risk | *St. Paul Mercury Ins. Co. v. Mountain W. Farm Bureau Mut. Ins. Co.*, 148 Cal. Rptr. 3d 625, 640 (Ct. App. 2012) |
| Colorado | Probably time on the risk | *D.R. Horton, Inc. - Denver v. Mountain States Mut. Cas. Co.*, 12-CV-01080-RBJ, 2013 WL 674032, at *3 (D. Colo. Feb. 25, 2013) ("This is not to say that there should not or will not be an apportionment of the defense costs among the insurers, either under a 'time on the risk' or some other appropriate allocation method.") |
| Connecticut | Time on the risk | *Travelers Cas. & Sur. Co. of Am. v. Netherlands Ins. Co.*, 95 A.3d 1031 (Conn. 2014) |
| District of Columbia | Allocation among insurers determined by "other insurance" and contribution clauses of policies; joint and several as to insured | *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034, 1051 (D.C. Cir. 1981) |
| Florida | No contribution among insurers allowed; joint and several as to insured | *Miami Battery Mfg. Co. v. Boston Old Colony Ins. Co.*, 97-3410-CIV, 1999 WL 34583205, at *16 (S.D. Fla. Apr. 28, 1999) |
| Georgia | Equal shares, based on contribution language of the policies | *St. Paul Fire & Marine Ins. Co. v. Valley Forge Ins. Co.*, CIVA.106-CV-2074-JOF, 2009 WL 789612 (N.D. Ga. Mar. 23, 2009) |
| Illinois | Time on the risk | *Knoll Pharm. Co. v. Auto. Ins. Co. of Hartford*, 210 F. Supp. 2d 1017 (N.D. Ill. 2002) |
| Kentucky | Time on the risk | *Kentucky League of Cities Ins. Services Ass'n v. Argonaut Great Cent. Ins. Co.*, 5:11-CV-00187, 2013 WL 120013 (W.D. Ky. Jan. 8, 2013) |
| Louisiana | Time on the risk | *Arceneaux v. Amstar Corp.*, 200 So. 3d 277 (La. 2016) |
| Maryland | Time on the risk | *Nationwide Mut. Ins. Co. v. Lafarge Corp.*, CIV.A. H-90-2390, 1994 WL 706538, at *12 (D. Md. June 22, 1994); *Pennsylvania Nat. Mut. Cas. Ins. Co. v. Roberts*, 668 F.3d 106, 114, 2012 WL 336150 (4th Cir. 2012) (concerning indemnity but citing *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212, 1225 (6th Cir. 1980), a seminal case on time on the risk allocation of defense costs) |

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| Michigan | Time on the risk | *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), *decision clarified on reh'g,* 657 F.2d 814 (6th Cir. 1981); *Century Indem. Co. v. Aero-Motive Co.*, 318 F. Supp. 2d 530, 545 (W.D. Mich. 2003) |
| Minnesota | Equal shares | *Cont'l Cas. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, CIV. 09-287 JRT/JJG, 2014 WL 4546039, at *6 (D. Minn. Sept. 12, 2014), *aff'd and remanded,* 812 F.3d 1147 (8th Cir. 2016), *reh'g denied* (Mar. 14, 2016) |
| Missouri | Time on the risk | *Cont'l Cas. Co. v. Med. Protective Co.*, 859 S.W.2d 789 (Mo. Ct. App. 1993) |
| Nebraska | Time on the risk | *Dutton-Lainson Co. v. Cont'l Ins. Co.*, 778 N.W.2d 433, 440 (Neb. 2010) |
| New Jersey | Time on the risk | *Columbus Farmers Mkt., LLC v. Farm Family Cas. Ins. Co.*, CIV A 05-2087, 2006 WL 3761987, at *14 (D.N.J. Dec. 21, 2006) (citing *Owens-Illinois, Inc. v. United Ins. Co.*, 138 N.J. 437 (1994)) |
| New York | Includes support for time on the risk, but also other methods | Time on the risk—*Travelers Cas. & Sur. Co. v. Alfa Laval Inc.*, 954 N.Y.S.2d 23, 24 (App. Div. 2012) (trial court denied Travelers and OneBeacon's "cross motions for summary judgment declaring that they have a duty to defend the underlying asbestos claims only on a pro rata 'time on the risk' basis"; appellate court, in two page opinion, affirmed that holding, but reversed summary judgment against OneBeacon, holding that "Travelers, as the long standing insurer, should provide a complete defense, and OneBeacon may eventually be required to contribute to both defense costs and indemnification on a pro rata basis").<br><br>Equal shares—*State of New York Ins. Dept., Liquidation Bureau v. Generali Ins. Co.*, 844 N.Y.S.2d 13, 15 (App. Div. 2007); *Cont'l Cas. Co. v. Employers Ins. Co. of Wausau*, 865 N.Y.S.2d 855, 861 (Sup. Ct. 2008), *rev'd,* 923 N.Y.S.2d 538 (App. Div. 2011) (trial court allocated based on equal shares among insurers; appellate court held one insurer's policies were exhausted, obviating the allocation issue, but did not assert that, in the event allocation were needed, the equal shares method was incorrect) |

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| | | In proportion to limits—*Avondale Indus., Inc. v. Travelers Indem. Co.*, 774 F. Supp. 1416, 1438 (S.D.N.Y. 1991), *judgment entered,* 86 CIV. 9626 (KC), 1993 WL 427035 (S.D.N.Y. Oct. 15, 1993)<br><br>Dicta that pro-rata contribution is permitted, but declining to set forth the appropriate method for pro-ration—*Cont'l Cas. Co. v. Rapid-Am. Corp.*, 609 N.E.2d 506, 514 (N.Y. 1993) ("When more than one policy is triggered by a claim, pro rata sharing of defense costs may be ordered, but we perceive no error or unfairness in declining to order such sharing, with the understanding that the insurer may later obtain contribution from other applicable policies.") (denying as premature CNA's request for pro-rata allocation of defense costs among consecutive policies issued by National Union and among uninsured periods)<br><br>Interim ruling that insurer should pay 50% of defense costs and thereafter permitting contribution from other insurers—*Consol. Edison Co. of New York v. Fyn Paint & Lacquer Co.*, CV 00-3764 DGT MDG, 2005 WL 139170, at *4 (E.D.N.Y. Jan. 24, 2005) |
| Ohio | Time on the risk | *Lincoln Elec. Co. v. St. Paul Fire & Marine Ins. Co.*, 210 F.3d 672, 689 (6th Cir. 2000) ("We are persuaded that the Ohio Supreme Court would adopt principles in harmony with the compelling rationale articulated in *Forty–Eight Insulations,* 633 F.2d at 1222, 1224–25"); *Pennsylvania Gen. Ins. Co. v. Park-Ohio Indus., Inc.*, 902 N.E.2d 53, 62 (Ohio Ct. App. 2008), *aff'd sub nom. Pennsylvania Gen. Ins. Co. v. Park-Ohio Indus.*, 930 N.E.2d 800 (Ohio 2010) (pro-rata but not specifying the how defense costs should be pro-rated) |
| Oregon | Probably time on the risk, but authority exists for considering policy limits in addition to time on the risk | Time on the risk—*Fireman's Fund Ins. Co. v. Oregon Auto. Ins.*, CV 03-0025-MO, 2010 WL 1542552, at *1 (D. Or. Apr. 15, 2010), *vacated and remanded on other grounds sub nom. Fireman's Fund Ins. Co. v. N. Pac. Ins. Co.*, 446 Fed. Appx. 909 (9th Cir. 2011) |

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| | | Time on the risk and policy limits—*Nw. Pipe Co. v. RLI Ins. Co.*, 3:09-CV-01126-PK, 2012 WL 2268413, at *5 (D. Or. June 13, 2012), *adhered to on reconsideration,* 3:09-CV-01126-PK, 2013 WL 3712416 (D. Or. July 11, 2013) |
| Rhode Island | Time on the risk | *Century Indem. Co. v. Liberty Mut. Ins. Co.*, 815 F. Supp. 2d 508 (D.R.I. 2011) |
| South Carolina | Time on the risk | *Liberty Mut. Fire Ins. Co. v. J.T. Walker Indus., Inc.*, CIV.A. 2:08-2043-MBS, 2010 WL 1345287, at *5 (D.S.C. Mar. 30, 2010), *modified,* 817 F. Supp. 2d 784 (D.S.C. 2011) |
| Texas | Probably time on the risk | *Texas Prop. & Cas. Ins. Guar. Ass'n/Sw. Aggregates, Inc. v. Sw. Aggregates, Inc.*, 982 S.W.2d 600, 604 (Tex. App. 1998) (joint and several as to insured, noting that "insurers may apportion defense costs among themselves any way they choose") ("Furthermore, *Gulf Chemical* and *Lafarge* rely on *Forty–Eight Insulations* for the proposition that where defense costs can be readily apportioned among insurers, each owes only a pro rata portion of those costs based on its time on the risk. We believe that *Forty–Eight Insulations* and its progeny are irreconcilable with *Keene's* holding that each insurer is fully liable to the insured for defense costs.") (following *Keene Corp. v. Ins. Co. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981)).<br><br>*Sw. Aggregates, Inc.*, permitting the insured to select the policy from which it seeks its defense, reduces the persuasive value of the following federal cases, which required the insured to bear defense costs for uninsured or "fronting policy" years. Nevertheless, *Sw. Aggregates* did not address disputes among insurers, and the following cases are arguably good authority for applying time on the risk *vis-a-vis* insurer disputes—*Nat'l Standard Ins. Co. v. Cont'l Ins. Co.*, CA-3-81-1015-D, 1984 WL 23448, at *1 (N.D. Tex. Apr. 9, 1984), *abrogated on trigger of coverage issues by Guar. Nat. Ins. Co. v. Azrock Indus. Inc.*, 211 F.3d 239 (5th Cir. 2000) (time on the risk); *Lafarge Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 935 F. Supp. 675, 680, 1996 WL 459771 (D. Md. 1996) (applying Texas law) (describing prior order in |

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| | | which the court "adopted a *pro rata* allocation formula based upon each insurer's time 'on the risk.'"); *Gulf Chem. & Metallurgical Corp. v. Associated Metals & Minerals Corp.*, 1 F.3d 365 (5th Cir. 1993) (time on the risk); *Lafarge Corp. v. Hartford Casualty Insurance Co.,* 61 F.3d 389 (5th Cir. 1995) (time on the risk)<br><br>Pro rata but not specifying method of pro-ration—*Trinity Universal Ins. Co. v. Employers Mut. Cas. Co.*, 592 F.3d 687, 695 (5th Cir. 2010) (permitting pro-rata allocation of defense costs, but leaving open the method of pro-ration)<br><br>Joint and several as to insured—*Mid-Continent Cas. Co. v. Acad. Dev., Inc.*, CIV.A. H-08-21, 2010 WL 3489355, at *8 (S.D. Tex. Aug. 24, 2010), *aff'd,* 476 Fed. Appx. 316 (5th Cir. 2012) |
| Utah | Time on the risk, except insured is not required to contribute for uninsured periods | *Ohio Cas. Ins. Co. v. Unigard Ins. Co.*, 268 P.3d 180, 187 (Utah 2012) |
| Vermont | Time on the risk | *Towns v. N. Sec. Ins. Co.*, 964 A.2d 1150 (Vt. 2008) |
| Virginia | Probably time on the risk, provided that the defense costs can be pro-rated between covered and non-covered periods. | *Morrow Corp. v. Harleysville Mut. Ins. Co.*, 101 F. Supp. 2d 422, 430 (E.D. Va. 2000) (citing *Insurance Co. of North America v. Forty–Eight Insulations, Inc.,* 633 F.2d 1212, 1224 (6th Cir.1980)) |
| Washington | Fact specific | *In re Consol. Feature Realty Litig.*, CV-05-0333-WFN, 2008 WL 220271 (E.D. Wash. Jan. 25, 2008) (allocating defense costs based on evidence demonstrating that 80-90 percent of defense costs related to discrete acts taking place in one policy period, and therefore allocating 80 percent of defense costs to that policy's issuer) |

In the vast majority of jurisdictions, therefore, insurers defending a class action can predict with confidence that their defense costs will be allocated by the time-on-the-risk method. In Georgia and Minnesota, however, insurers must share defense costs by the equal shares method.

In jurisdictions that have not decided this issue or require a fact-intensive inquiry, insurers should be prepared to litigate this issue or reach quick resolution with co-triggered insurers. *See also* Allan D. Windt, *Allocation of defense costs among consecutive insurers, 1 Insurance Claims and Disputes*, INSURANCE CLAIMS & DISPUTES § 4:45 (6th ed.).

### C. If No Class Representative's Claim Triggers an Insurer's Duty To Defend, But The Claims of Some Unidentified Class Members Would, Does The Insurer Have A Defense Obligation?

Generally, if the claims of any putative class member creates the potential for coverage under an insurer's policy, the insurer must defend the class action. *See Hartford Acc. & Indem. Co. v. Beaver*, 466 F.3d 1289 (11th Cir. 2006) (holding under Florida law that an insured is entitled to a defense despite the fact that the claim of the single remaining class representative, standing alone, was not covered). *See* Carlos Del Carpio, *Triggering the Duty to Defend a Class Action*, INSURANCE COVERAGE AND PRACTICE SYMPOSIUM (December 2015) ("While this issue has not been addressed in many jurisdictions, certain courts have held similarly [to *Beaver*], finding a duty to defend prior to class certification based on potential allegations of putative class members.") (citing *LensCrafters, Inc. v. Liberty Mut. Fire Ins. Co.*, 2005 WL 146896 (N.D. Cal. 2005)).

In *Omega Flex, Inc. v. Pac. Employers Ins. Co.*, 78 Mass. App. Ct. 262, 268 (2010), the Massachusetts Appeals Court explained its rationale for the rule as follows:

> [W]e do not believe that an insured must demonstrate that the plaintiffs will satisfy [Massachusetts'] rule 23 in order to receive a defense from its insurer. . . . In the context of a class action complaint, we understand that principle to mean that we should avoid anticipating the possible outcome of the certification process. . . . The fact that some of the claims may ultimately be deemed unsuitable for class treatment should not deprive the insured of the benefit of a defense, provided the complaint fairly can be read to assert one or more claims that fall within the scope of the policy.

*Id.* Typically then, an insurer must defend a class action if the claims of any putative class member are potentially covered.

## D. If No Certified Claim Triggers an Insurer's Duty to Defend, Does the Insurer Retain A Defense Obligation?

Coverage issues abound when a putative class action complaint pleads both potentially covered and uncovered claims, but the court certifies only the uncovered claims.

In this situation, the insurer may argue that its duty to defend terminates with the certification of the class. There is some authority for this position. *See, Del Webb's Coventry Homes, Inc. v. National Union Fire Ins. Co.*, 2014 WL 7639486 (C.D. Cal. Nov. 19. 2014)(granting insurer's motion to dismiss on the duty to defend and indemnify because only expressly excluded claims for cost of repairing the policyholder's product had been certified).

Arguments exist to the contrary, however. One court refused to terminate an insurer's duty to defend when potentially covered individual (non-representative) claims remained in the lawsuit after certification of a class containing solely uncovered claims. *See Universal Underwriters Insurance Co. v. CARSDIRECT.COM,*2003 WL 22669016 (C.D. Cal. Oct. 28, 2003)(holding presence of potentially covered individual common-law claims for tortious intrusion required the insurer to continue defending an action in which only specifically excluded penal claims had been certified). The holding in this case is consistent with the standard rule that "[a]n insurer that has issued an insurance policy that includes a duty to defend must defend any legal action brought against an insured that is based in whole or in part on any allegations that, if proven, would be covered by the policy . . . ." *See, e.g.,* RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 13(1)(Tentative Draft No. 1 Apr. 11, 2016).

Even when no individual claims have been plead, legal authority exists that an insurer cannot terminate the duty to defend on the basis of a class certification order because such an order does not constitute one of the limited types of circumstances in which courts have allowed an insurer to terminate the duty to defend once it has arisen. *See, e.g.,* RESTATEMENT OF THE LAW OF LIABILITY INSURANCE § 18(1)-(8) and Comment *a* (Tentative Draft No. 1 Apr. 11, 2016). For example, policyholder lawyers are likely to argue that a class certification order is

not a "[f]inal adjudication or dismissal of part of the action that eliminates any basis for coverage of any remaining components of the action" because a certification order is not a final adjudication on the merits or a dismissal. Notably, in the *Del Webb's Coventry Homes, Inc.* case, the federal district court held that an excess insurer's duty to defend had not arisen because the class certification order was issued before the primary policy was exhausted. It did not address the issue of whether a duty to defend, once triggered, may terminate on the basis of a class certification order.

Policyholders also can be expected to argue that basing a duty to defend decision on whether or not legal theories have been crafted to ensure class certification violates the rule that "the duty to defend is triggered when 'any of the allegations in the complaint potentially include conduct that is covered by the indemnity contract.'" *Pancakes of Haw. v. Pomare Props. Corp.,* 944 P.2d 83, 89-91 (Haw. Ct. App. 1997). The policyholder's potential liability to class members still exists for claims that have not been certified, as does the insurer's duty to the policyholder based on that potential liability. The scope of releases in class settlements illustrate this point. When a class defendant settles a class action, the class defendant typically does not seek a release solely of the certified claims, the class defendant seeks a release of all allegations, transactions, facts and occurrences set forth in the complaint whether certified or not. *See, e.g., 9 NEWBERG ON CLASS ACTIONS, at App. 385, Agreement and Release.*

## E. Selecting Defense Counsel; Reasonableness & Conflicts Of Interest

Building product class actions are expensive to defend, but much of the indemnity may not be covered because it is for the cost of the product itself. There is risk to insurance companies in insisting on counsel of their choice when a policyholder has significant indemnity exposure. The policyholder may argue that its indemnity cost would have been less if it had been defended by counsel of its choice.

Is the policyholder entitled to select counsel when much of the indemnity will not be covered? "[T]here are varying views as to how that independent counsel must be selected . . . [which] cannot be reconciled except to note that the holdings of the court are jurisdiction specific." Steven Plitt, *et al.*, *Who Is Entitled to Select Independent Counsel*,

14 COUCH ON INS. § 202:35 (3d ed. December 2016) (collecting cases). *See also* James L. Cornell and Trevor B. Hall, *What Every Business Lawyer Should Know About the Insurance Carrier's Duty to Defend and the Policyholder's Right to Select Counsel*, TEX. J. BUS. L. (2007).

If insurers wish to select counsel, or even participate in the selection of counsel, they should do so promptly, as a delay may create an estoppel. *See Haley v. Kolbe & Kolbe Millwork Co.*, 97 F. Supp. 3d 1047, 1051–52 (W.D. Wis. 2015)[14] ("I will assume that insurers have a right to choose counsel even when they defend the insured under a reservation of rights. Even making that assumption, however, I conclude that . . . insurers lost whatever right they had through their own inaction."). In *Kolbe & Kolbe*, the insurers waited four months after the policyholder tendered its defense to object to the policyholder's selection of counsel.

[14] A certification decision in this case is pending. *See* Wes Dvorak, *Judge Won't Close Curtain on Insurers' Duty to Defend Window Maker*, 11 WESTLAW JOURNAL INSURANCE BAD FAITH 5 (2015).