



INSURANCE COVERAGE ISSUES: SUBROGATION

*presented by*

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*\*Affiliated with the Law Offices of J. Goldberg & D. Grossman.*

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## INSURANCE COVERAGE – SUBROGATION CONSIDERATIONS

### I. TRIGGER UNDER COLORADO LAW

#### A. Construction Defect Context:

1. *Public Service Co. of Colorado v. Wallis and Cos.*, 986 P. 2d 924 (Colo. 1999).
2. *American Employer's Ins. Co. v. Pinkard Construction Co.*, 806 P.2d 954 (Colo.App. 1990).

#### B. Practical Application of *Wallis*:

1. Continuous Trigger (First Defect to Discovery).
2. Time-On-Risk/Degree of Risk Assumed.
3. Excess: Apportioned by Degree of Risk Assumed.
3. SIRs/Uninsured Periods: Insured's Responsibility.
5. Vertical Exhaustion?
6. Insolvent Insurers?

#### C. *Wallis* Allocation Method Applied in *Hoang v. Monterra Homes (Powderhorn) LLC*, (2005 WL 427936 (Colo.App. Feb. 24, 2005)).

#### D. Insured's Interest in Property at Time Damages Occur:

1. *Browder v. United States Fid. & Guar. Co.*, 893 P.2d 132 (Colo. 1995).
2. *Leprino v. Nationwide Prop. and Cas. Ins. Co.*, 89 P.3d 487 (Colo.App. 2003).

### II. PROPERTY DAMAGE

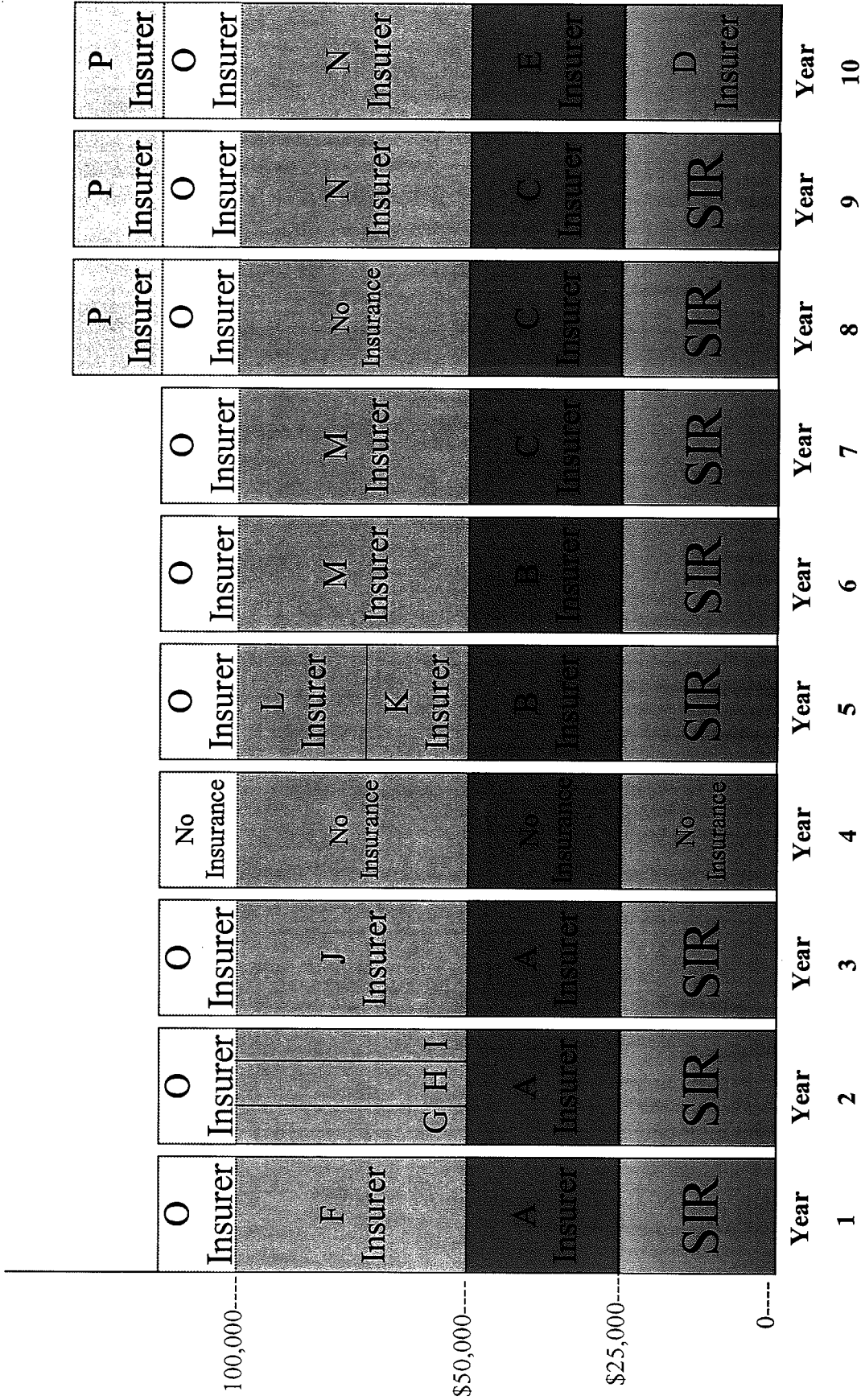
#### A. What Does and Does Not Constitute "Property Damage" Under a Standard Commercial General Liability Policy?

#### B. When is "Property Damage" Deemed to Occur?

### III. COMMON BUSINESS RISK EXCLUSION

- A. Common Business Risk Exclusions Where "Property Damage" Occurs During Construction
  - 1. Exclusion j(5) – the "Real Property Operations" Exclusion
  - 2. Exclusion j(6) – the "Faulty Workmanship" Exclusion
  - 3. Exclusion k – the "Your Product" Exclusion
  
- B. Common Business Risk Exclusions Where "Property Damage" Occurs After Construction is Completed
  - 1. Exclusion k – the "Your Product" Exclusion
  - 2. Exclusion l – the "Your Work" Exclusion
  
- C. Other Business Risk Exclusions
  - 1. Exclusion b – the "Contractual Liability" Exclusion
  - 2. Exclusion m – the "Impaired Property" Exclusion

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Insured's Liability = \$1 Million = Each Period Allocated = \$100,000  
*Public Service Company of Colorado v. Wallis and Cos., 986 P. 2d 924 (Colo. 1999).*

# CONSTRUCTION LIABILITY: COMMON BUSINESS RISK EXCLUSIONS

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“Comprehensive general liability policies normally exclude coverage for faulty workmanship based on the rationale that poor workmanship is considered a business risk to be borne by the policyholder, rather than a ‘fortuitous event’ entitling the insured to coverage.” McGowan v. State Farm Fire and Cas. Co., 100 P.3d 521, 525 (Colo. App. 2004).



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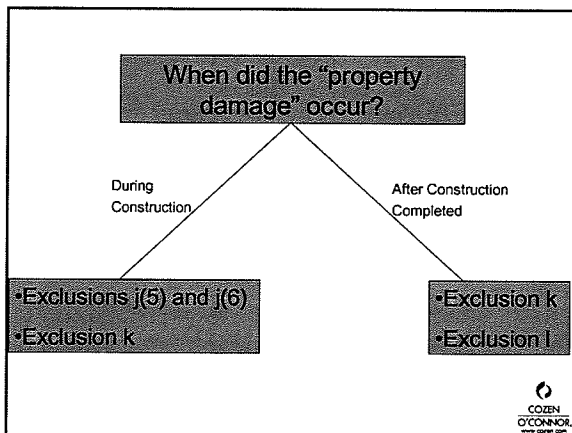
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**Common exclusions where "property damage" occurs during construction**

**j. Damage to property**  
"Property damage" to:

\* \* \*

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations.

(6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products – completed operations hazard."

**k. Damage to Your Product**

"Property damage" to "your product" arising out of it or any part of it.



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**A Closer Look at Exclusion j(5)**



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**j. Damage to property**  
"Property damage" to:

\* \* \*

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations.



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Exclusion j(5) applies only to "property damage" to the particular part of the property on which the insured or its subcontractors are working at the time the damage occurs.



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### A Closer Look at Exclusion j(6)



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**j. Damage to property**  
"Property damage" to:

\* \* \*

(6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

\* \* \*

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products – completed operations hazard."



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j (6) applies only to the work that has not been completed (because of the “products completed” exception), and applies only to “that particular part” of the property worked on by the insured/subcontractors.



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### A Closer Look at Exclusion k



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**k. Damage to Your Product**

“Property damage” to “your product” arising out of it or any part of it.



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"Your product" is generally defined as any goods or products, other than real property, that are manufactured, sold, handled, distributed, or disposed of by the insured.



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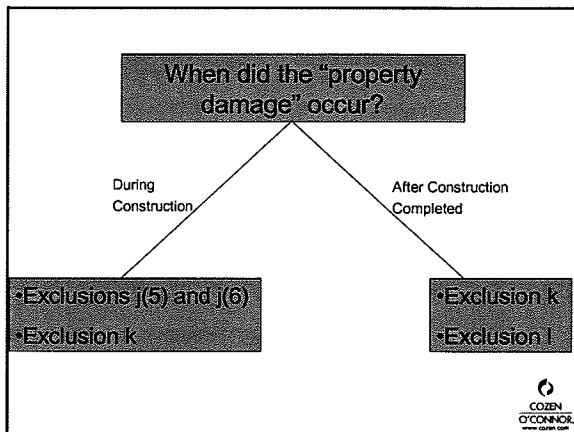
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**Common exclusions where "property damage" occurs after construction is complete**

- k. Damage to Your Product**  
"Property damage" to "your product" arising out of it or any part of it.
- l. Damage to Your Work**  
"Property Damage" to "your work" arising out of it or any part of it and included in the "products – completed operations hazard."  
  
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.



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A Closer Look at Exclusion k



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**k. Damage to Your Product**

"Property damage" to "your product" arising out of it or any part of it.



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"Your product" is generally defined as any goods or products, other than real property, that are manufactured, sold, handled, distributed, or disposed of by the insured.



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## A Closer Look at Exclusion I



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### I. **Damage to Your Work**

"Property Damage" to "your work" arising out of it or any part of it and included in the "products – completed operations hazard."

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.



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This exclusion only applies to work that has been completed. It eliminates coverage for "property damage" to work both (i) performed by the insured; and (ii) damaged by the insured's own work. Both elements are necessary in order for this exclusion to apply.



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This exclusion does not apply if the damaged work or the work out of which the damages arises was performed by a subcontractor. Thus, under this exception, the determination of whether a particular party is a subcontractor becomes critical.



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The exclusion does not apply if there is damage to property other than the insured's work.



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17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss shall be deemed to occur at the time of the "occurrence" that caused it

