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As if the onslaught of construction defect litigation facing builders and contractors in Pennsylvania and across the country is not enough, the courts have made it far more difficult for them to obtain coverage for such claims under their liability insurance policies.

Most occurrence-based policies are triggered only where there has been an accident and most contain business risk/work product exclusions that exclude claims for damage to the "work" or the "product" of the insured. Even in those states where a defect may constitute an occurrence, some courts have ruled that the business risk/work product exclusion nevertheless bars coverage.

In October 2006, in the case of *Kvaerner Metals Division of Kvaerner USA, Inc. v. Commercial Union Ins. Co.*, 908 A.2d 888 (Pa. 2006), the Pennsylvania Supreme Court upheld a carrier's denial of coverage in a case involving damage to a coke oven battery constructed by Kvaerner. After the oven failed to perform, the owner sued Kvaerner for breach of contract and breach of warranty. Kvaerner's carrier denied coverage and Kvaerner filed

a declaratory judgment action. Pennsylvania's highest court defined an "accident" as "an unexpected and undesirable event" or "something that occurs unexpectedly or unintentionally," and held that this definition "cannot be satisfied by claims based upon faulty workmanship." The Court further reasoned that it was improper to convert a CGL policy to a performance bond "since such protections are already readily available for the protection of the contractors."

Since then, the Pennsylvania Superior Court has relied upon the business risk exclusion to deny coverage for damage to a product in a product liability claim. *Plasticert, Inc. v. Westfield Ins. Co.*, 923 A.2d 489 (Pa. Super. 2007).

A trend may be developing in which claims that were previously covered will now be denied under standard ISO CGL policies. This trend dictates that builders and contractors work closely with their carriers to select coverage and with their counsel in interpreting policies and phrasing coverage requests.