

# Construction Defect, Failure to Settle Coverage Update

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*The e-POST*

## Construction Defect – Illinois

### ***Acuity Ins. Co. v. 950 West Huron Condo. Ass'n***

--- N.E.3d ---, 2019 WL 1416820 (Ill. App. Ct. Mar. 29, 2019)

The Appellate Court of Illinois, First District ruled that Acuity Insurance Company (Acuity) had a duty to defend its subcontractor insured, Denk & Roche Builders Inc. (Denk) against allegations of faulty workmanship because the same constituted an occurrence. The appellate court's ruling reversed the decision of the trial court, which found Acuity had no duty to defend.

Acuity issued a commercial general liability policy to Denk. Denk was a subcontractor on a condominium building in Chicago that was constructed during the late 1990s and early 2000s. Several years later, the homeowners' association noted several construction defects that allegedly led to water intrusion in the building. The association filed a lawsuit against the general contractor, who in turn sued Denk for faulty workmanship.

The appellate court rejected Acuity's argument and the decision of the trial court, saying that Acuity's argument that the defects were the natural and ordinary consequence of Denk's faulty work was at odds with existing Illinois law. Instead, the appellate court held that because Denk's faulty workmanship was alleged to have caused damage to a part of the construction that was not a part of Denk's scope of work, the same constituted an occurrence under the Acuity policy, "notwithstanding that it would not be an occurrence from a general contractor or developer's perspective." Instead, "[f]rom the eyes of the subcontractor, the 'project' is limited to the scope of its own work, and the precise nature of any damage that might occur to something outside of that scope is as unknown or unforeseeable as damage to something entirely outside of the construction project."

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## Failure to Settle – D. Mass. (Massachusetts Law)

### ***Great American Ins. Co. v. Granite State Ins. Co.***

No. 11-11542-GAO, 2019 WL 1435912 (D. Mass. Mar. 29, 2019)

Great American Insurance Company (Great American) sued Granite State Insurance Company (Granite State) for allegedly failing to settle a lawsuit brought by Amadeo Gallotto (Gallotto) against

Parkview Condominium Trust (Parkview) for Gallotto's worksite injuries. Granite State provided \$1 million of primary coverage and Great American issued \$5 million of excess coverage to Parkview. Granite State defended Parkview in the underlying action. During a mediation shortly before trial, the smallest dollar amount Gallotto would accept from Granite State was \$2.15 million. During trial, further settlement negotiations ensued. Granite State rejected an approximate \$900,000 demand but countered with a high-low suggestion within the policy limits, which Gallotto rejected. A jury ultimately entered a \$7.5 million verdict against Parkview, requiring Great American to pay its policy limits.

Great American filed suit against Granite State, alleging that Granite State failed to settle the underlying action within the limits of the Granite State policy. The U.S. District Court for the District of Massachusetts found that Granite State did nothing wrong. The district court noted that Gallotto's only "demand that fell within the policy limits was the demand for something in the \$900,000 range, made early in the trial. It was not unreasonable for Granite State to reject that demand. ..." The district court reasoned that, in light of the defense counsel's repeated assessments of Parkview's likelihood of success at trial, "Great American has not shown that 'no reasonable insurer would have refused [that] settlement offer' at the time it was made." Accordingly, judgment was entered in favor of Granite State.

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## 'Collapse' – Second Circuit (Connecticut Law)

### *Valls v. Allstate Ins. Co.*

--- F.3d ---, 2019 WL 1442081 (2d. Cir. Apr. 2, 2019)

The U.S. Court of Appeals for the Second Circuit held that the "collapse" provision in a homeowner's insurance policy does not cover the cost of fixing cracks in a home's walls due to a defective concrete foundation. The three underlying plaintiffs all filed suit in federal court against their insurer, Allstate Insurance Company (Allstate), after Allstate denied coverage to them for cracking in their basement walls due to the existence of defective concrete foundations. The policy generally excluded "collapse" with the exception of the sudden and accidental collapse of the entire building structure or of part of a building structure. The U.S. District Court for the District of Connecticut held in favor of Allstate and dismissed all three complaints.

On appeal, the U.S. Court of Appeals for the Second Circuit affirmed the trial court's judgment. The appellate court found that the type of damage alleged by the plaintiffs did not fall within the coverage of the Allstate policies. Specifically, the appellate court noted that the policy's collapse provision states that "[c]ollapse does not include settling, cracking, shrinking, bulging or expansion." Therefore, the appellate court held that the collapse provision in the Allstate policy at issue "does not afford coverage for basement walls that exhibit signs of deterioration but that have not collapsed suddenly, accidentally, and entirely, as required by the Policy."

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CONSTRUCTION DEFECT, FAILURE TO SETTLE COVERAGE UPDATE Cont.

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