CGL COVERAGE OF CONSTRUCTION DEFECTS!

William H. Locke, Jr.
Graves Dougherty Hearon & Moody
Austin, Texas

ACREL Spring Meeting
Insurance Committees
San Diego
March, 2016

CGL Coverage of Construction Defects!

I. UNINSURABLE BUSINESS RISK OR INSURABLE ACCIDENT?

A. First Party or Third Party Insurance

The most common means of insuring against property damage at a construction site is through "*first party*" coverage, *e.g.,* builder's risk insurance. Protection of owners, developers, contractors and subcontractors against "*third party*" claims (claims by parties other than the parties to the contract, for example, claims by injured employees of the contractor against the owner) is the subject of commercial general liability ("*CGL*") insurance policies. CGL insurance is thus commonly considered to be third party insurance. Contractors have sought to utilize CGL policies as first party insurance to cover property damage occurring at the construction site arising out of faulty workmanship. Due to defective products and negligently performed work damage can occur to the contractor's work product and even beyond the work to the project.

B. Crafting Policy Language to Exclude Business Risk Within Insured's Control

Liability insurers have sought to exclude from the coverage of CGL policies so-called "*business risks*", those risks thought generally to be under the control of the insured (contractor or subcontractor) and which are not regarded as fortuitous in nature.

C. Coverage of Accidental Property Damage

In crafting policy language (coverage and exclusions) insurers have struggled for decades to draft policy language that clearly and unambiguously covers "accidental" property damage but does not cover uninsurable business risks. The insurance industry has resisted insuring contractor's for property damage caused by "business risks" within the contractor's control. This issue has been the subject of considerable litigation.

D. Same Policy Language But Results Differ State to State

Although the vast majority of cases involve interpretation of the same CGL policy language, there is a marked split of authority. As reviewed below, the recent focus has been on the "occurrence" and "property damage" requirements of the CGL policy, with some courts applying the legal theories of "business risk" and "economic loss" as a means to exclude coverage. In undertaking this approach, these courts have ignored interpreting the policy as a whole and have failed to consider the purpose and scope of the policy's construction-specific exclusions and the exceptions to these exclusions.

II. THE STANDARD POLICY LANGUAGE

A. ISO CG 00 01 04 13

1. The Form.

See **CG 00 01 04 13** Commercial General Liability Insurance Coverage Form, and in particular the portions quoted below.

SECTION I—COVERAGES
COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE LIABILITY
1. Insuring Agreement
a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "**property damage**" to which this insurance applies.
b. This insurance applies to "bodily injury" and "property damage" only if:
(1) The "bodily injury" or "property damage" is caused by an "**occurrence**" …; (and)
(2) The "bodily injury" or "property damage" occurs during the policy period; ….

2. Exclusions. This insurance does not apply to: …

a. Expected or Intended Injury. "Bodily injury" or "property damage" expected or intended from the standpoint of the insured. ….

b. Contractual Liability. "Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "Insured Contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement….

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; or

(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"….

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. (emphasis added.)

Upon examination of this language, a determination of what is covered and what is excluded is the product of the following definitions: "*property damage*", an "*occurrence*", "*your work*", and "*products-completed operations hazard*".

2. The Exclusions.

Assuming that the property damage is covered because it is the result of an "*occurrence*", then coverage involves a determination as to whether any of the policy's exclusions exclude coverage, including the following exclusions discussed below: **Exclusion 2.a** Expected or Intended Injury-"property damage" expected or intended from the standpoint of the insured (the contractor); **Exclusion 2.b** Contractual Liability; **Exclusion 2.j(5)** Damage to Property - "property damage" to that particular part on which the insured (the contractor) or its contractors or subcontractors are performing operations, if the "property damage" arises out of those operations; **Exclusion 2.j(6)** Damage to Property - damage to that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it; or **Exclusion 2.l** Damage to Your Work - damage to your work and included in the "products-completed operations hazard".

B. An "Occurrence"? - Or Excluded as Exclusion 2.a - Expected or Intended Injury?

1. "Accident" or "Expected or Intended Injury"

a. Policy Definition of "Occurrence"

The standard policy definition of an "**occurrence**" is set out in Section V - Definitions, Paragraph **13** "Occurrence". The policy defines "occurrence" as an "**accident**". However, the term "accident" is not defined and its definition is left to the courts. This circumstance has led to a range of court-made interpretations of definitions and determinations of coverage.[1] See Endnote 2 for a list of jurisdiction holding that faulty workmanship is not an occurrence and a list of jurisdictions holding it is.[2]

b. One Approach - Ambiguity in Definition of "Occurrence" Means Not a Limitation on Coverage

Texas courts are of the view that the term "occurrence" is ambiguous and does not provide a basis for limitation on coverage. In its 2007 decision the Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified questions from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007), held that an insured builder's faulty workmanship in building a house foundation met the "occurrence" requirement of its CGL policy.[3]

2. Coverage Triggers - Timing of the Occurrence.

a. Four Theories of Occurrence Triggers

A question arises as to the timing of the "occurrence" and which policy in a string of annual CGL policies affords coverage. There are four theories of "occurrence" triggers: (1) **exposure** – a policy is triggered upon the first exposure to the injury-causing event;[4] (2) **manifestation** – a policy is triggered upon the first manifestation of injury;[5] and (3) **continuous** – all policies between the date of first exposure and the date of manifestation are triggered;[6] and (4) **injury-in-fact** – a policy is triggered when the first injury takes place.[7]

b. Texas Approach - "Injury in Fact" Trigger

(1) Duty to Depend if Injury Occurs During Policy Period

In *OneBeacon Ins. Co. v. Don's Building Supply, Inc.*, 553 F.3d 901, 902 (5th Cir. 2008 *per curiam*) the insurer sought a declaration that it had no duty to defend or indemnify its insured, Don's Building Supply ("*DBS*"), in 22 lawsuits that various homeowners filed against DBS and other defendants. Previously homeowners had filed suits against DBS asserting claims arising from water intrusion into the wall cavities of their homes due to an allegedly defective synthetic siding system known as Exterior Insulation and Finish Systems ("*EIFS*"). The EIFS was distributed and sold by DBS and designed, manufactured, and marketed by the other defendants. The defects were latent, being not readily apparent to one examining the exterior of the EIFS surface. DBS requested a defense from OneBeacon under three occurrence-based CGL policies issued to DBS by Potomac Insurance Company of Illinois and assigned by Potomac to OneBeacon. The central question before the federal district court was whether the property damage described in the suit was alleged to have occurred within the respective policy periods such that OneBeacon's duty to defend DBS was triggered. In response to certified questions raised by the Fifth Circuit, 496 F.3d 361, the Texas Supreme Court responded as follows adopting the "injury-in-fact" trigger in Texas:

> The Fifth Circuit asks generally when property damage "occurs" under Texas law for purposes of an occurrence-based commercial general liability insurance policy, a question this Court has never answered. More specifically, is an insurer's duty to defend triggered where damage is alleged to have occurred during the policy period but was inherently undiscoverable until after the policy expired? As to this policy, which focuses on when damage comes to pass, not when damage comes to light, we answer "yes"-the insurer's duty is triggered under Texas law; the key date is when injury happens, not when someone happens upon it. Based on the Texas Supreme Court's response, the Fifth Circuit issued its *per curiam* opinion reciting the following answers of the Texas Supreme Court:
>
> So in this case, property damage occurred when a home that is the subject of an underlying lawsuit suffered wood rot or other physical damage. The date that the physical damage is or could have been discovered is irrelevant under the policy…. (Answer to first question.)
>
> Under the actual-injury rule applicable to this policy, a plaintiff's claim against DBS that any amount of physical injury to tangible property occurred during the policy period and was caused by DBS's allegedly defective product triggers OneBeacon's duty to defend. The duty is not diminished because the property damage was undiscoverable, or not readily apparent or "manifest," until after the policy period ended. (Answer to second question.)

(2) Insured May Select Policy in a Series of Policies

The court of appeals in *Mid-Continent Casualty Co. v. Castagna,* 410 S.W.3d 445 (Tex. App.-Dallas 2013, *pet. denied*) held that a home owner did not have to apportion its damages attributable to foundation cracks that appeared over three CGL policy periods to each policy period, but could select the policy period with the highest limits; each insurer being fully liable for the loss.

(3) Injury in Fact May Occur Many Years After Performance of Defective Work

Another Fifth Circuit case, *Wilshire Insurance Co. v. RJT Construction, LLC,* 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) illustrates how the injury in fact may occur many years after the defective work was performed. In finding that the CGL insurance issuer had a duty to defend a foundation repair contractor, the court noted

> Wilshire urges that the homeowner's complaint in this case makes no allegations that property damage occurred during the policy period. We disagree. The complaint alleges that "cracks in the walls and ceilings" were "suddenly appearing" in late 2005. The cracks themselves are physical damage allegedly caused by the faulty foundation. This is not a case where latent internal rot long lies undiscovered before external signs warn of the festering damage. The cracks are not merely a warning of prior undiscovered damage; they are the damage itself. It is of no moment that the faulty foundation work occurred in 1999, [citation omitted] or that the damage was discovered in 2005; it matters only that damage was alleged to have occurred in 2005.[8]

(4) Rip and Tear Costs Covered

In a more recent EIFS case, the Texas Supreme Court in *Lennar Corp v. Markel American Insurance Co.*, 413 S.W.3d 750 (Tex. 2013) held the insured's loss "*because of*" (see this language italicized in Coverage A to the attached standard form CGL policy) property damage that occurred during the policy period (wood rot from defective construction due to using EIFS) included "rip and tear" costs Lennar incurred in ripping all of the EIFS off of the homes it constructed using EIFS, as the only way to find all the damage. These investigation and access costs were covered as all houses had suffered at least some wood rot during the policy period. The court rejected the insurer's argument that the damages should be apportioned among different insurers' policy periods. The court concluded, "that Markel's policy covered Lennar's entire remediation costs for damaged homes." *Lennar*, 413 S.W.3d at 758-59.

C. Exclusion 2.b - the "Contractual Liability" Exclusion and the "Insured Contract" Exception

1. The Form.

2. Exclusions
This insurance does not apply to:…
b. Contractual Liability
"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption liability in a contract or agreement. This exclusion does not apply to liability for damages:
(1) That the insured would have in the absence of the contract or agreement; or
(2) Assumed in a contract or agreement that is an "**Insured Contract**", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement…. (emphasis added.)

"**Insured contract**" is defined in the standard CGL (see Section 5 Definitions in the attached **CG 00 01**) as follows:

9. "Insured contract" means: …
f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work for a municipality) under which you *assume* the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement…. (emphasis added.)

2. Texas Approach - Good and Workmanlike Covenant Is Same as Implied Duty and Not Excluded from Coverage as an Assumed Contractual Liability.

The Texas Supreme Court in *Ewing Construction Co., Inc. v. Amerisure Ins. Co.*, 420 S.W.3d 30 (Tex. 2014) held that Exclusion **2.b**, the "**Contractual Liability" Exclusion,** did not apply to negate coverage for a contractor where the "property damage" at issue was the property constructed. The supreme court was asked to answer two questions posed to it by the Fifth Circuit.[9] In 2008, Ewing Construction Company, Inc. entered into a standard AIA construction contract with a school district to construct tennis courts at one of its schools. Shortly after construction of the tennis courts was completed, the courts started flaking, crumbling, and cracking, rendering them unusable. Ewing tendered defense of the school district's suit to its insurer. The federal district court held, and the Fifth Circuit initially held, that Ewing "assumed" the liability for its own performance under the contract. The Fifth Circuit withdrew its opinion and certified the question to the Texas Supreme Court. The Texas Supreme Court concluded that a contractor that agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract and thus does not "assume liability" for damages arising out of its defective work and does not trigger the contractual liability exclusion.[10] The court found that the allegations that Ewing did not perform its work in a good and workmanlike manner were substantively the same as the allegations that it negligently performed its work under the contract. The court held that

> Accordingly, we conclude that a general contractor who agrees to perform its construction work in a good and workmanlike manner, without more, does not enlarge its duty to exercise ordinary care in fulfilling its contract, thus it does not "assume liability" for damages arising out of its defective work so as to trigger the Contractual Liability Exclusion. We answer the first question "no" and, therefore, need not answer the second question. *Id.* at 38.

D. Exclusion 2.j(5) - the "Ongoing Operations" Exclusion

1. The Form.

2. Exclusions. This insurance does not apply to: …
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; (emphasis added.)

2. The Exclusion.

The terms "that particular part" and "are performing operations" in the exclusion are not defined in the standard policy.

(a) "That Particular Part"

Turner, INSURANCE COVERAGE OF CONSTRUCTION DISPUTES (2d ed.) § 31:5 gives the following guidance:

> The use of the word "*particular*" suggests that the exclusion should only apply to the smallest unit of division available to the work in question. This coverage approach is often called the "component parts" approach. Even in cases where work is being performed on a large, undivided and undifferentiated piece of property, such as bare land, the "particular part" language seems too limiting to allow the entire property to fall within the exclusion. More appropriately, only the immediate area of the work where the property damage arises should fall within the exclusion. Certainly, the entire building or piece of real property being worked on cannot be the "particular

> part." Thus, damages for the diminution in value of the entire building or property have been held to be unaffected by exclusions containing the "particular part" limitation.

That the phrase "that particular part" is intended to limit the breadth of the exclusion from coverage is illustrated by the following analysis by the Missouri Supreme Court in *Columbia Mut. Ins. Co. v. Schauf,* 967 S.W.2d 74, 80 (Mo. 1998) when it was called on to decide whether this exclusion resulted in excluding coverage for all fire loss damages to a house or merely to the portion of the work from which the fire originated:

> Houses and buildings can be divided into so many parts that attempting to determine which part or parts are the subject of the insured's operations can produce several reasonable conclusions. For example, the "particular part of the real property on which [the insured] is performing operations" could mean, as Columbia Mutual contends, "the entire area of the real property that Schauf is scheduled to work." Under this interpretation, any damage the insured causes to property in the area which he was contracted to work would be excluded from coverage.
> Another possible definition of the instant exclusion is that the "particular part of real property on which [the insured] is performing operations" is only the part of the property that is the subject of the insured's work at the time of the damage. Under this interpretation, only the damage the insured causes to the particular part of the property that is actually the object of the insured's work where the damage occurs is excluded from coverage; any other damage would not be subject to the exclusion….
> In accordance with the relevant maxims of construction and the language and purpose of the instant exclusion, this Court upholds that the instant exclusion denies coverage for property damage to the particular part of real property that is the subject of the insured's work at the time of the damage, if the damage arises out of those operations.

Applying the holding to the facts of this case compels the conclusion that the exclusion applies to any damage to the kitchen cabinets. When the damage in this case occurred, Schauf was cleaning from his spray equipment the lacquer he had applied to the kitchen cabinets. Because cleaning the lacquer was the last step in the job of lacquering the kitchen cabinets, the kitchen cabinets were the particular part of the real property that was the subject of Schauf's operations at the time of the damage. Consequently, the damage to the kitchen cabinets is excluded from coverage.

(b) "Are Performing Operations"

A second limitation on **Exclusion 2.j(5)** is for damage to "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." This language is interpreted to exclude damages involving "works in progress", in other words it does not apply to "completed operations." The "arises out of operations" has caused confusion for some courts in interpreting the scope of the exclusion. However, the vast majority of courts have concluded that this exclusion is limited to barring coverage for property damage occurring during on-going operations. *See e.g., Mid-Continent Casualty Co. v. JHP Development, Inc.*, 557 F.3d 207, 215 (5th Cir. [Tex.] 2009).

E. Exclusion 2.j(6) - the "Faulty Workmanship" Exclusion and the "Products-Completed Operations Hazard" Exception

1. <u>The Form</u>.

> **2. Exclusions.** This insurance does <u>not</u> apply to: …
> **j. Damage to Property**. "Property damage" to: …
> **(6)** <u>That particular part</u> of any property that must be restored, repaired or replaced because *"your work" was* <u>incorrectly performed on it</u>. Paragraph (6) of this <u>exclusion does</u> <u>not</u> <u>apply</u> to "property damage" included in the "<u>products-completed operations hazard</u>". (emphasis added.)

2. The Exclusion.

The purpose of **Exclusion 2.j(6)** is to exclude coverage for the costs to repair or replace particular work discovered while the insured is still performing its work.[11]

3. The Exception to the Exclusion.

The stated exception to this exclusion is for "property damage" included in the "products-completed operations". Thus, if the claim arises from defective work that is discovered after the contractor has completed its work, **Exclusion 2.j(6)** does not apply. The function of the "*products-completed operations hazard*" ("*PCOH*") exception was been defined in *Pursell Const., Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 69 (Iowa 1999) as follows:

> Before proceeding to our analysis of whether there was coverage, we think it would be helpful to explain how the PCOH provision fits into a CGL policy. A CGL policy, like every other insurance policy, has an insuring clause under which the insurer agrees to pay sums that the insured becomes legally obligated to pay because of property damages caused by an occurrence. The CGL policy also has exclusions that take away some of this coverage. The PCOH provision is an exception to these exclusions. Or, stated another way, the PCOH provision is simply a category of losses that are covered even though these losses might otherwise be excluded. Viewed in this light, the PCOH provision does not create a separate category of coverage. Rather, any loss falling within the PCOH provision must still meet all the requirements of the policy, like any other loss, except the exclusion from which the losses are excepted.

Note that **Exclusion 2.j(6)** also employs the "that particular part" limitation to the exclusion. This limitation to this exclusion has been held to permit coverage for damage to other non-defective work emanating from defective work.[12]

F. Exclusion 2.l - the "Your Work" Exclusion and the "Subcontractor" Exception

1. The Form.

> **2. Exclusions.** This insurance does not apply to: …
> **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. (emphasis added.)

2. The Exclusion.

The exclusion is limited to damages to "*your work*". This exclusion is the "heart" of the "**business risk**" doctrine. It is most often asserted by insurers in claims against contractors for latent defective work. It is oft said that "CGL insurance does not insure against faulty workmanship." The policy arguments supporting this exclusion are the concerns that substituting CGL insurance for the contractor's workmanship obligation is tantamount to providing a performance bond; expanding CGL insurance to cover performance promises will encourage poor workmanship; shifting the economic loss to the insurer for the contractor's faulty performance affords little incentive for the insured to exercise the necessary care and workmanship to operate in a sound business manner; and to do otherwise would encourage the contractor to underestimate the cost of performing the job, and thus shift the cost of doing business from the insured to the insurer.[13]

3. The Exception to the Exclusion.

Damage to other property (*i.e.*, others' non-defective work or personal property) is not encompassed by this exclusion.[14] Note that that **Exclusion 2.l** does not apply if the "damaged work or the work out of which the damage

arises was performed on your behalf by a subcontractor." This exclusion and this exception were introduced into the standard policy and have remained unchanged since their introduction in the 1986 revision to the standard CGL policy. The 1986 exclusion/exception to exclusion replaced the 1973 "exclusion o" aka the "Work Performed" exclusion which read:

> This insurance does not apply … to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof or out of the materials, parts or equipment furnished in connection therewith.

The 1973 Work Performed exclusion applied to both property damage occurring during the course of construction and to completed operations. Also, the 1973 exclusion did not contain the "**subcontractor exception**". The 1986 exclusion is substantially narrower than the 1973 exclusion. Thus, whether this exclusion permits broader coverage depends on the extent to which the contractor has performed its services through subcontractors.[15] As the Texas Supreme Court explained in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), in answer to certified question from the Fifth Circuit, 501 F.3d 435 (5th Cir. 2007):

> Lamar submits that this exclusion would have eliminated coverage here but for the subcontractor exception. According to Lamar, this exception was added to protect the insured from the consequences of a subcontractor's faulty workmanship causing "property damage." Thus, when a general contractor becomes liable for damage to work performed by a subcontractor—or for damage to the general contractor's own work arising out of a subcontractor's work—the subcontractor exception preserves coverage that the "your-work" exclusion would otherwise negate. Lamar's understanding of the subcontractor exception is consistent with other authorities who have commented on its effect.

III. LEGISLATIVE RESPONSE

A. Legislating "Occurrence" in Construction Defect Claims

Four state, Colorado, Arkansas, South Carolina and Hawaii, have enacted statutes addressing whether construction defects constitute an occurrence insured by a CGL policy.

B. Colorado Act

In 2010 Colorado became the first state to legislate the definition of "occurrence" in the CGL insurance coverage for construction defect claims. As with the states to follow, the legislation was enacted in response to a court decision that faulty construction is not an occurrence - specifically, in this case, that allegations of faulty construction, without specific consequential damage to other property, do not constitute an occurrence. *General Sec. Indem. Co. of Ariz. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo. Ct. App. 2009). The Colorado legislature found that

> [t]he interpretation of insurance policies issued to construction professionals is of vital importance to the economic and social welfare of the citizens of Colorado.

See COLO. REV. STAT. § 13-20-808 (the "**Colorado Act**"). The Colorado statue creates a presumption that the work of a construction professional that results in damage to person or property, including damage to the work itself, is an accident unless otherwise expected or intended on the part of the insured.[16] The burden to prove an occurrence is shifted away from the insured. The insurer now must not only prove the application of an exclusion to eliminate the claimed coverage, but must also affirmatively prove the effect of any exception to an exclusion or condition that may restore coverage under the policy.

C. Arkansas Act

In 2007 the Arkansas Supreme Court ruled that "[f]aulty workmanship is not an accident; instead, it is a foreseeable occurrence, and performance bonds exist in the marketplace to insure the contractor against claims for the cost of repair or replacement of faulty work." *Essex Ins. Co. v. Holder,* 261 S.W.3d 456, 460 (Ar. 2007). In 2011 the Eight Circuit Court of Appeals held that collateral damage to property, including damage to iron and another silo totaling millions of dollars, other than the work itself (i.e., the entire silo constructed by the general contractor and its subcontractor(s)) was not foreseeable and therefore was an occurrence. *Lexicon Inc. v. ACE Am. Ins. Co*, 634 423 (8th Cir. 2011). In response the Arkansas legislature enacted legislation defining "occurrence" to include faulty workmanship. Ark. Code Ann. § 23-79-155. (the "**Arkansas Act**").[17] ISO has promulgated an endorsement, ISO CG 01 42 07 11, for use in Arkansas that modifies the definition of occurrence to be the statutory definition.

D. South Carolina Act

In 2011 the South Carolina Supreme Court in *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (S.C. 2011), overruling *Auto Owners Ins. Co. v. Newman*, 684 S.E.2d 541 (S.C. 2009) found that builders were not entitled to coverage under a CGL policy for damage to housing units caused by faulty construction, because the resulting damage was not a fortuitous event; it was a natural and expected consequence of their faulty work. The South Carolina legislature immediately responded by adopting S. C. Code Ann. § 39-61-70(B)-(D) (the "**South Carolina Act**") effectively reversing the *Crossman* opinion.[18] The South Carolina Act provides that a CGL policy shall contain or be deemed to contain a definition of occurrence that includes

> (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) property damage for bodily injury resulting from faulty workmanship itself.

E. The Hawaii Act

On this issue commentators characterize Hawaiian law as undecided.[19] As a result of concerns about the perceived impact of the decision of the Hawaii Intermediate Court of Appeals ("**ICA**") in *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Hawai'i 142, 231 P.3d 67 (Haw. Ct. App. 2010)[20] on insurance coverage for building owners and contractors and the prospect of no coverage for injured persons, Hawaii enacted Haw. Stat. § 431:1-217 effective June 3, 2011 ("**the Hawaii Act**"). Two bills were introduced in the legislature; HB 839 and HB 924. They sought to require Hawaiian courts to presume that a CGL insurance policy covers construction defects. As such, the purpose of the Hawaii Act was stated to be to restore the insurance coverage for which construction professionals paid and to ensure that the good faith expectations of parties at the time they entered into the insurance contract are upheld.[21] After vigorous insurance industry lobbying, the Hawaii Act as passed provided that the term "**occurrence**" under CGL policies is to be construed in accordance with the law as it existed at the time the policy was issued.[22] The Hawaii Act leaves open the question of what "the law" is or was as of the issuance of the CGL policy. The Hawaii Supreme Court has not ruled on whether CGL insurance provides coverage for construction defects, neither prior to June 3, 2011 or subsequently. As of the adoption of the Act, in addition to *Group Builders*, there were and there have subsequently been federal court decisions where the court looked at related Hawaii cases to guess how the Hawaii Supreme Court would rule.[23] A difference of opinion exists as to whether the guess was correct.[24] It remains to be determined if Hawaii courts will look at CGL insurance as a contractual undertaking to insure the insured for claims of property damage arising out of its faulty workmanship and will review each case on a facts and circumstances basis: was the insured's faulty workmanship intended or accidental from the standpoint of the insured; was the damage only to the work itself or did it cause damage to other work of the insured or to a third party's property; did the damage occur after completion of construction; and was the work undertaken by the insured's subcontractor.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section **II** – Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section **V** –Definitions.

SECTION I – COVERAGES

COVERAGE A – BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";

(2) The "bodily injury" or "property damage" occurs during the policy period; and

(3) Prior to the policy period, no insured listed under Paragraph **1.** of Section **II** – Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph **1.** of Section **II** – Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

(1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;

(2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or

(3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

(1) That the insured would have in the absence of the contract or agreement; or

(2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorneys' fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:

(a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and

(b) Such attorneys' fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

(1) Causing or contributing to the intoxication of any person;

(2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or

(3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in:

(a) The supervision, hiring, employment, training or monitoring of others by that insured; or

(b) Providing or failing to provide transportation with respect to any person that may be under the influence of alcohol;

if the "occurrence" which caused the "bodily injury" or "property damage", involved that which is described in Paragraph **(1), (2)** or **(3)** above.

However, this exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages. For the purposes of this exclusion, permitting a person to bring alcoholic beverages on your premises, for consumption on your premises, whether or not a fee is charged or a license is required for such activity, is not by itself considered the business of selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

(1) An "employee" of the insured arising out of and in the course of:

(a) Employment by the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph **(1)** above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

(1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":

(a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:

(i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;

(ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";

(b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;

(c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:

(i) Any insured; or

(ii) Any person or organization for whom you may be legally responsible; or

(d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:

(i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;

(ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or

(iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".

(e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

(1) A watercraft while ashore on premises you own or rent;

(2) A watercraft you do not own that is:

(a) Less than 26 feet long; and

(b) Not being used to carry persons or property for a charge;

(3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;

(4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

(a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged; or

(b) The operation of any of the machinery or equipment listed in Paragraph **f.(2)** or **f.(3)** of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

(1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or

(2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

(1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;

(2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;

(3) Property loaned to you;

(4) Personal property in the care, custody or control of the insured;

(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; or

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

Paragraphs **(1), (3)** and **(4)** of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of seven or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section **III** – Limits Of Insurance.

Paragraph **(2)** of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs **(3), (4), (5)** and **(6)** of this exclusion do not apply to liability assumed under a sidetrack agreement.

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.

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.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

(1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

(2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

(1) "Your product";

(2) "Your work"; or

(3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

However, this exclusion does not apply to liability for damages because of "bodily injury".

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

Exclusions **c.** through **n.** do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section **III** – Limits Of Insurance.

COVERAGE B – PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section **III** – Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages **A** or **B** or medical expenses under Coverage **C.**

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments – Coverages **A** and **B.**

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication, in any manner, of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods – Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

(1) Advertising, broadcasting, publishing or telecasting;

(2) Designing or determining content of web sites for others; or

(3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs **14.a., b.** and **c.** of "personal and advertising injury" under the Definitions section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-related

Any loss, cost or expense arising out of any:

(1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or

(2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

(1) War, including undeclared or civil war;

(2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

(3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

(1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;

(2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;

(3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transactions Act (FACTA); or

(4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

COVERAGE C – MEDICAL PAYMENTS

1. Insuring Agreement

a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

(1) On premises you own or rent;

(2) On ways next to premises you own or rent; or

(3) Because of your operations;

provided that:

(a) The accident takes place in the "coverage territory" and during the policy period;

(b) The expenses are incurred and reported to us within one year of the date of the accident; and

(c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

(1) First aid administered at the time of an accident;

(2) Necessary medical, surgical, X-ray and dental services, including prosthetic devices; and

(3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers' Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage **A.**

SUPPLEMENTARY PAYMENTS – COVERAGES A AND B

1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:

a. All expenses we incur.

b. Up to $250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.

c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.

d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to $250 a day because of time off from work.

e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";

b. This insurance applies to such liability assumed by the insured;

c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";

d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;

e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and

f. The indemnitee:

(1) Agrees in writing to:

(a) Cooperate with us in the investigation, settlement or defense of the "suit";

(b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";

(c) Notify any other insurer whose coverage is available to the indemnitee; and

(d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and

(2) Provides us with written authorization to:

(a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph **2.b.(2)** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph **f.** above, are no longer met.

SECTION II – WHO IS AN INSURED

1. If you are designated in the Declarations as:

a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.

b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.

c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.

d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.

e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

(a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;

(b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph **(1)(a)** above;

(c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraph **(1)(a)** or **(b)** above; or

(d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

(a) Owned, occupied or used by;

(b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by;

you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.

c. Any person or organization having proper temporary custody of your property if you die, but only:

(1) With respect to liability arising out of the maintenance or use of that property; and

(2) Until your legal representative has been appointed.

d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.

3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:

a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;

b. Coverage **A** does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and

c. Coverage **B** does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III – LIMITS OF INSURANCE

1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:

a. Insureds;

b. Claims made or "suits" brought; or

c. Persons or organizations making claims or bringing "suits".

2. The General Aggregate Limit is the most we will pay for the sum of:

a. Medical expenses under Coverage **C;**

b. Damages under Coverage **A,** except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and

c. Damages under Coverage **B.**

3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage **A** for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".

4. Subject to Paragraph **2.** above, the Personal And Advertising Injury Limit is the most we will pay under Coverage **B** for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.

5. Subject to Paragraph **2.** or **3.** above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:

a. Damages under Coverage **A;** and

b. Medical expenses under Coverage **C**

because of all "bodily injury" and "property damage" arising out of any one "occurrence".

6. Subject to Paragraph **5.** above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage **A** for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.

7. Subject to Paragraph **5.** above, the Medical Expense Limit is the most we will pay under Coverage **C** for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV – COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:

(1) How, when and where the "occurrence" or offense took place;

(2) The names and addresses of any injured persons and witnesses; and

(3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

(1) Immediately record the specifics of the claim or "suit" and the date received; and

(2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

(1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";

(2) Authorize us to obtain records and other information;

(3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and

(4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or

b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages **A** or **B** of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph **b.** below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph **c.** below.

b. Excess Insurance

(1) This insurance is excess over:

(a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

(i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

(ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

(iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

(iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion **g.** of Section **I** – Coverage **A** – Bodily Injury And Property Damage Liability.

(b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured.

(2) When this insurance is excess, we will have no duty under Coverages **A** or **B** to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

(3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

(a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and

(b) The total of all deductible and self-insured amounts under all that other insurance.

(4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.

b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.

c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

a. The statements in the Declarations are accurate and complete;

b. Those statements are based upon representations you made to us; and

c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

a. As if each Named Insured were the only Named Insured; and

b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V – DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and

b. Regarding web sites, only that part of a web site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or

b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

4. "Coverage territory" means:

a. The United States of America (including its territories and possessions), Puerto Rico and Canada;

b. International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph **a.** above; or

c. All other parts of the world if the injury or damage arises out of:

(1) Goods or products made or sold by you in the territory described in Paragraph **a.** above;

(2) The activities of a person whose home is in the territory described in Paragraph **a.** above, but is away for a short time on your business; or

(3) "Personal and advertising injury" offenses that take place through the Internet or similar electronic means of communication;

provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph **a.** above or in a settlement we agree to.

5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".

6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, bylaws or any other similar governing document.

7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.

8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";

b. A sidetrack agreement;

c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;

d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;

e. An elevator maintenance agreement;

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph **f.** does not include that part of any contract or agreement:

(1) That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel, underpass or crossing;

(2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:

(a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or

(b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or

(3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in **(2)** above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";

b. While it is in or on an aircraft, watercraft or "auto"; or

c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;

b. Vehicles maintained for use solely on or next to premises you own or rent;

c. Vehicles that travel on crawler treads;

d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:

(1) Power cranes, shovels, loaders, diggers or drills; or

(2) Road construction or resurfacing equipment such as graders, scrapers or rollers;

e. Vehicles not described in Paragraph **a., b., c.** or **d.** above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:

(1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or

(2) Cherry pickers and similar devices used to raise or lower workers;

f. Vehicles not described in Paragraph **a., b., c.** or **d.** above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

(a) Snow removal;

(b) Road maintenance, but not construction or resurfacing; or

(c) Street cleaning;

(2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and

(3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

a. False arrest, detention or imprisonment;

b. Malicious prosecution;

c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;

d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;

e. Oral or written publication, in any manner, of material that violates a person's right of privacy;

f. The use of another's advertising idea in your "advertisement"; or

g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

(1) Products that are still in your physical possession; or

(2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:

(a) When all of the work called for in your contract has been completed.

(b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.

(c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

(1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;

(2) The existence of tools, uninstalled equipment or abandoned or unused materials; or

(3) Products or operations for which the classification, listed in the Declarations or in a policy Schedule, states that products-completed operations are subject to the General Aggregate Limit.

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 of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or

b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:

(a) You;

(b) Others trading under your name; or

(c) A person or organization whose business or assets you have acquired; and

(2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

[1] **What is an "Accident"?.** There are multiple judicial views of this question. See the National Summary Chart (current as of February 2015) appearing in Wielinski, Patrick J., INSURANCE FOR DEFECTIVE CONSTRUCTION (IRMI 4th Ed. 2015) in the slides accompanying this article.

Intent Irrelevant; Faulty Workmanship *Per Se* Not an "Occurrence". Some courts find that faulty workmanship *per se* cannot trigger a covered "occurrence." *DCB Const. Co., Inc. v. Travelers Indem. Co. of Illinois*, 225 F.Supp. 2d 1230 (D. Colo. 2002) - no accident where contractor had to tear down walls and rebuild them because they did not meet specifications for sound transmission; *Monticello Ins. Co. v. Wil-Freds Const., Inc.*, 661 N.E.2d 451 (Ill. 2d Dist. 1996); *State Farm Fire and Cas. Co. v. Tillerson*, 334 Ill. App.3d 404, 777 N.E.2d 986 (Ill. 5th Dist. 2002) - construction defects not an "occurrence" as they were ordinary consequence of contractor's improper work; *Hawkeye-Security Ins. Co. v. Vector Const. Co.*, 460 N.W.2d 329 (1990); *ACS Const. Co., Inc. of Mississippi v. CGU*, 332 F.3d 885, 889 (5th Cir. [Miss.] 2003) - "The faulty workmanship of the waterproofing membrane resulting in the leaks does not constitute an 'occurrence' under the policy."; *Cincinnati Ins. Co. v. Venetian Terrazzo, Inc.*, 198 F. Supp.2d 1074 (E.D. Mo. 2001) - alleged negligence in pouring concrete subfloor did not constitute an accident or an "occurrence" and therefore insurer had no duty to defend; *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 2004 WL 1775571 (S.C. 2004) - premature deterioration of roads as a result of faulty workmanship was not caused by an "occurrence"; *ProDent, Inc. v. Zurich U.S.*, 33 Fed. Appx. 32 (3rd Cir. 2002) - negligence in installing copper pipes instead of PVC called for by drawings was not an "occurrence" within meaning of policy.

Faulty Workmanship is a "Business Risk" Not Covered by CGL Policy. Some courts ground their decision of no occurrence on the rationale that CGL insurance is not intended to protect an insured from having to repair or replace improperly performed work. These courts hold that such losses are an "expectation" loss, and to hold otherwise would be to encourage poor workmanship. These courts do not base their opinion on the terms of the policy but on "public policy". For example, this rationale is set out in Henderson, *Insurance Protection for Products Liability & Completed Operations—What Every Lawyer Should Know*, 50 NEB. L. REV. 415, 441 (1971) where the commentator states that CGL coverage is "for tort liability for physical damage to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." See the following Minnesota court decisions following this "tort vs. contract" rationale in interpreting the Broad Form Property Damage Endorsement to the pre-1986 CGL policy form: *Bor-Son Building Corp. v. Employers Commercial Union Ins. Co. of America*, 323 N.W.2d 58 (Minn. 1982) and *Knutson Construction Co. v. St. Paul Fire & Marine Ins. Co.*, 396 N.W.2d 229 (Minn. 1986). Henderson's article is addressing the coverage language of even the earlier pre-1966 version. Unfortunately, some court decisions have cited this article and the "tort vs. contract" rationale as the coverage test in construing post-1986 policies without recognizing the changes reflected in the 1986 revision. *See*, *e.g.*, *Data Specialties, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909 (5th Cir. 1997) – court found no coverage as insured's obligation to repair arose out of a contract obligation, not a tort; *Silk v. Flat Top Const., Inc.*, 453 S.E.2d 356 (Va. 1994) – construction manager's liability for failing to properly supervise and inspect work resulting in cost overruns is a result of breach of contract not tort.

The Illogical Performance Bond Comparison. Some courts falling into this line of reasoning compare use of CGL policies for this purpose as an attempt to substitute a CGL policy for a performance bond. These courts overlook the fact that property damage may be covered by both a CGL policy and a performance bond, but for different purposes. *Essex Ins. Co. v. Holder*, 261 S.W.3d 456 (Ark. 2007) - faulty workmanship is not an accident; instead it is a foreseeable occurrence and performance bonds exist in the market place to insure the contractor against claims for the cost of repair or replacement of faulty work; *Oak Crest Const. Co. v. Austin Mut. Ins. Co.*, 137 Or. App. 475, 905 P.2d 848 (Or. 1995) aff'd 329 Or. 620, 998 P.2d 1254 (Or. 2000); *U. S. Fidelity & Guar. Corp. v. Advance Roofing & Supply Co., Inc.*, 163 Ariz. 476, 788 P.2d 1227 (Ariz. Ct. App. Div. 1 1989) – no coverage existed for contractor that installed negligent roofs as poor workmanship did not amount to an occurrence and to hold otherwise would be tantamount to converting the CGL policy into a performance bond. However, although there is an overlap in coverage between performance bonds and CGL insurance, neither is a substitute for the other. A performance bond does not extend to cover "bodily injury" like a CGL policy; and a performance bond covers many other risks than failure of the contractor or, if given by subcontractors, the subcontractors' breaches of contract, except to the extent of a CGL's coverage of a subcontractor's damage to the work or the project.

Coverage Depends on Actor's Intent. The majority of courts focus on the intent of the actor. However, since most action involves a degree of intent, focus on an actor's intent to act runs the risk of holding that an "accident" could not occur as the actor intended his action, even though he did not intend to cause the damage that resulted. Even when the focus is on the consequence of an insured's act, as opposed to the act itself, there is a wide divergence in court decisions as to whether a covered loss has occurred. *Sheets v. Brethren Mut. Ins. Co.*, 342 Md. 634, 679 A.2d 540, 58 A.L.R.5th 883 (1996) – court states that Maryland follows the majority position that whether a loss arises from an accident is to be determined from the standpoint of the insured's subjective intent. The court in *Indiana Ins. Co. v. Hydra Corp.*, 245 Ill. App.3d, 185 Ill. Dec. 775, 615 N.E.2d 70, 73 (2d Dist. 1993) defined an "occurrence" with a focus on whether the damages were intended or expected by the insured. The court defined "occurrence" as "an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden or unexpected event of an inflictive or unfortunate character." *Voorhees v. Preferred Mut. Ins. Co.*, 128 N.J. 165, 607 A.2d 1255, 1263, 8 A.L.R. 5th 937 (1992); *Economy Lumber Co. v. Insurance Co. of North America*, 157 Cal. App. 3d 641, 204 Cal. Rptr. 135 (1st Dist. 1984) - damage caused by the application of defective siding was an occurrence; however, if more siding applied after knowing of the damage it caused, then damage is not unforeseeable and no "occurrence". *Federated Mut. Ins. Co. v. Grapevine Excavation, Inc.*, 197 F.3d 720 (5th Cir. 1999) - suit which included allegations that insured excavation subcontractor negligently damaged work of paving subcontractor through use of substandard fill asserted "accident" within definition ascribed to that term by Texas Supreme Court and thus "occurrence" within meaning of commercial general liability policy.

The Standard CGL Policy - Exclusion 2.a. The concept of excluding from coverage expected or intended damages is specifically addressed in the standard policy at Paragraph 2.a Exclusion – Expected or Intended Injury. Paragraph **2.a** is the result of ISO's modifying the standard policy form in 1986 to remove the following language from the definition of an "occurrence": "which results in 'bodily injury' or 'property damage'

neither expected nor intended from the standpoint of the insured." and by creating a new exclusion from coverage for "expected or intended injuries", set out in the standard policy above at Paragraph 2.a.

Seven Approaches to Determining if Damages are Covered as Unexpected or Unforeseeable Damages. The Tennessee Supreme Court noted the following seven approaches that courts have taken to determine whether the injury or damage incurred is excluded from coverage as an expected or intended injury. *Tennessee Farmers Mut. Ins. Co. v. Evans*, 814 S.W.2d 49, 54-55 (Tenn. 1991). The court stated:

> [1] One approach has been to decide whether there was an intent to do "some" harm, which disregards the question of whether the insured wanted to cause the particular harm that resulted. … [2] A second approach has been to focus on whether the insured intended to commit the act and also intended to commit some type of harm. … [S]ome jurisdictions have indicated that the insured's intent in this regard may be actual or inferred from the nature of the act and the accompanying reasonable foreseeability of harm. … [3] A third approach is to hold that an exclusionary provision … applies where an intentional act by an insured person results in injuries or damages that are a natural and probable result of the act. … [4] A fourth method has been to construe the policy language so that there can be no recovery if the ultimate result is substantially certain to be a consequence of the insured's actions. … [5] A fifth view has been to hold that the insured must have intended that the act cause the type of injury that actually occurred and, in addition, intended to harm the person who actually sustained the injury. … [6] A sixth method of analysis has become known as the "damn fool" doctrine, which simply means that coverage is not provided for acts which are simply too ill-conceived to warrant allowing the insured to transfer the risk of such conduct to an insurer. … [7] A seventh view, a combination of some of those mentioned previously, is that the insured must have intended the act and also to have caused some kind of injury in order for the intentional injury exclusion to apply, but once it is found that harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude from that intended by the insured. (*Approach numbering and underlining added by author.*)

(1) The "Specific Intent Rule" - No Coverage if There is an Intent to Do Some Harm. The approach results in a broad reading of the exclusion and thus results in very limited coverage for the insured. This approach is followed by very few courts. Keeton, INSURANCE LAW 520 (1988). See discussion at 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(a) Construction of "intended" – View that insured must have intended act and to cause some kind of bodily injury or property damage – generally (1984).

(2) No Coverage if Act Is Intentional and There is an Expectation of Resulting Damage. Some courts have employed an "expectation" of injury standard, and in so doing have imported a "foreseeability" test. Calvert Ins. Co. v. Western Ins. Co., 874 F.2d 396, 399 (7th Cir. 1989) - "Injury is 'expected' where the damages are not accomplished by design or plan, i.e., not 'intended,' but are 'of such a nature that they should have been reasonably anticipated (expected) by the insured.'" (emphasis in original). Taylor-Moreley-Simmon, Inc. v. Michigan Mut. Ins. Co., 645 F. Supp. 596, 599-600 (E. D. Mo. 1986), judgm't aff'd, 822 F.2d 1093 (8th Cir. 1987) - "[A]n accident includes that which happens by chance or fortuitously, without intention or design, and which is unexpected, unusual, and unforeseen… . The alleged breaches of warranty raised in the [plaintiff's] petition do not remove the conduct at issue here from the "accident" category for purposes of this lawsuit." Smith v. Hughes Aircraft Co. Corp. 783 F.Supp. 1222, 1235-37 (D. Ariz. 1991), aff'd in relevant part, rev'd in part and remanded, 22 F.3d 1432 (9th Cir. 1993) - "Because the insured's intent is measured subjectively, it follows that the insured's expectations should be measured similarly.") Queen City Farms, Inc. v. Central Nat. Ins. Co. of Omaha, 126 Wash. 2d 50, 882 P.2d 703 (Wash. 1994), as amended (1994) and as clarified on denial of reconsideration (Wash. 1995) - subjective standard applied in determining whether personal injury or property damage arising from contamination of groundwater resulting from leak of toxic materials from waste pit was "occurrence," covered by liability policies, which defined occurrence as accident or happening or event or continuous or repeated exposure to conditions which unexpectedly and unintentionally resulted in personal injury or property damage. Keeton, INSURANCE LAW 520 (1988). See discussion at 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(a) Construction of "intended" – View that insured must have intended act and to cause some kind of bodily injury or property damage – generally (1984). Other courts have recognized the fallacy of this as the test. *Armstrong World Industries, Inc. v. Aetna Cas. & Surety Co.*, 45 Cal. App. 4th 1, 52 Cal. Rptr.2d 690 (1st Dist. 1996):

> In our view, imposing a "should have known" standard on insureds would defeat the essential purpose of insurance agreements. What is expected or intended is different from that which was reasonably foreseeable or what should have been known. An insurance policy exclusion from manufacturing activities which carry a risk of causing environmental harm, although not known or intended to cause harm in the insureds business conduct, would create an exclusion swallowing the entire purpose of the insurance protection for unintended consequences. Insurance is purchased and premiums are paid to indemnify the insured for damages caused by accidents, that is, for conduct not meant to cause harm but which goes awry. The insured may be negligent indeed in failing to take precautions or to foresee the possibility of harm, yet insurance coverage protects the insured from his own lack of due care. If coverage is lost for damage which a prudent person should have foreseen, there would be no point to purchasing a policy of liability insurance.

(3) The "Natural and Probable Consequences" Test. Other courts have stated the standard as whether the damages are a result of the natural and ordinary consequence of the insured's action and thus not covered. *See discussion at* 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(d) Construction of "intended" – View that classic tort doctrine of looking to natural and probable consequences of insured's act determines intent – generally (1984). *Argonaut Southwest Ins. Co. v. Maupin*, 500 S.W.2d 633 (Tex. 1973) – court found that an "occurrence" did not exist as the damage was a natural result of voluntary and intentional acts by the insured, even if the insured was unaware or did not intend the resulting damages. The court found that the insured, a contractor, acted intentionally when it removed soil from the property pursuant to a contract with a tenant. *Armstrong v. Security Ins. Group*, 292

Ala. 27, 288 So.2d 134 (Ala. 1973); *Casualty Reciprocal Exchange v. Thomas*, 647 P.2d 1361 (Kan. 1982); *Northwestern Nat. Casualty Co. v. Phalen*, 597 P.2d 720 (Mont. 1979); *Vittum v. New Hampshire Ins. Co.*, 369 A.2d 184 (N.H. 1977). *See discussion at* 31 A.L.R.4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(d) Construction of "intended" – View that classic tort doctrine of looking to natural and probable consequences of insured's act determines intent – generally (1984). This approach has been criticized by commentators. See Holmes, APPLEMAN ON INSURANCE, 2d, § 116.4 at 148 (1996) - "[Minority rule that the natural and ordinary consequences of a negligent act do not constitute an accident] is, of course, nonsense."); and § 117.3 at 247 "This judicial holding seriously restricts or limits the liability insurer's liability so as to render the liability policy valueless or even meaningless."; and § 117.3 at 259 "[T]hese opinions. . . essentially annul a large amount of liability coverage." The Fifth Circuit in *Federated Mut. Ins. Co. v. Grapevine Excavation*, 197 F.3d 720 (5th Cir. 1999) addressed the Texas law approach of distinguishing between excluded intentional conduct and covered voluntary conduct as follows:

> We perceive a clearly reconcilable dichotomy, not a tension, resulting from the distinction between the *Maupin* and *Orkin* line of cases; in the former, the damage-causing acts of the tortfeasor are either actually or legally deemed to be intentionally harmful; in the latter, the acts that are performed intentionally are not intended to cause harm but do so as the result of negligent performance of those acts. In the instant case, both types of tortious acts frequently occur in the performance of a contract; the difference lies in the way that the obligor performs. An obligor who intends his performance to result in damage—or, one who commits an act that is legally deemed to constitute an intentional tort—is a *Maupin* tortfeasor. On the other hand, an obligor that intends his performance to be correct, but who negligently falls short of the appropriate standard and causes unintentional damage, is an *Orkin* tortfeasor. Had the only allegations against GEI [the insured] accused it of knowingly and willfully choosing and using the substandard material that damaged the paving, and doing so to cut corners or gain unearned profit, GEI would be a *Maupin* tortfeasor. As [the contractor's] allegations against GEI include negligence, however, GEI is an *Orkin* tortfeasor.

In *Grapevine Excavation* the insured contractor subcontracted to provide excavation, backfill and compaction for a retailer's parking lot. Due to the contractor's use of fill materials that failed to meet the retailer's compaction specifications, its subcontractor's paving failed and the contractor cured the construction defect by overlaying another coat of blacktop. The court found that the damages suffered by the contractor were the result of a covered accident.

(4) No Coverage if Ultimate Result is a Substantially Certain Consequence of the Act.. Courts adopting this view employ a more objective test as to intent. *City of Carter Lake v. Aetna Cas. & Sur. Co.*, 604 F.2d 1052 (8th Cir. 1979) – court held no coverage for damage to a property's owner's basement due to the insured's operations where the court determined the insured "knew or should have known after the first instance of flooding that further flooding was 'substantially probable."

(5) No Coverage if Insured Intended Act that Caused Type of Injury that Actually Occurred and Intended to Injure Person that Was Actually Injured. Few courts have adopted this stringent test as the sole basis of finding an exclusion from coverage. See discussion at 31 A.L.R. 4th 957 Construction and application of provision of liability insurance policy expressly excluding injuries intended or expected by insured § 5(f) Construction of "intended" – View that insured must have had specific intent to cause type of injuries suffered (1984).

(6) The "Damn Fool Doctrine". This approach is to exclude coverage for damage caused by actions too ill-conceived to permit coverage. Discussing this doctrine, Professor Keeton states:

> All of these situations involve 'calculated' decisions by insureds. There are many instances in which an insured's course of conduct was intentional, but the consequences which resulted, though highly expectable, were clearly not intended or desired by the insured. When one attempts to predict whether a court will negate the insurer's decision to reject coverage under a liability insurance policy in such cases, an analytical approach that is worth considering is whether the insured's actions fall into the category of incredibly foolish conduct. Keeton, INSURANCE LAW 539-541 (1988).

(7) No Coverage if Insured Intended Some Harm, Even if the Damage is Not the Harm Intended. In this approach the insured must have intended the act and also to have caused some kind of injury in order for the intentional injury exclusion to apply, but once it is found that harm was intended, it is immaterial that the actual harm caused is of a different character or magnitude from that intended by the insured. *Lockhart v. Allstate Ins. Co.*, 579 P.2d 1120 (Az. 1978); *Butler v. Behaeghe*, 548 P.2d 934 (Colo. 1976); *Hartford Fire Ins. Co. v. Spreen*, 343 So.2d 649 (Fla. App. 1977); *Colonial Penn Ins. Co. v. Hart*, 291 S.E.2d 410 (Ga. 1982); *Aetna Cas. & Sur. Co. v. Freyer*, 411 N.E.2d 1157 (Ill. 1980); *Hanover Ins. Co. v. Newcomer*, 585 S.W.2d 285 (Mo. App. 1979); *Oakes v. State Farm Fire & Cas. Co.*, 137 N.J. Super. 365, 349 A.2d 102 (N.J. 1975).

[2] **Approaches in Different Jurisdictions.**

Decisions Finding Faulty Workmanship Not a Basis for an "Occurrence":
Ark. *Nabohlz Const., Corp. St. Paul Fire and Marine Ins. Co.,* 354 F.Supp. 2d 917 (E. D. Ark. 2005) – Suit to recover cost to repair faulty roof did not allege an "occurrence".
Illinois. *Viking Const. Management, Inc. v. Liberty Mut. Ins. Co.*, 358 Ill. App. 3d 34, 294, Ill. Dec. 478, 831 N.E.2d 1 (1st Dist. 2005) - wall collapse caused by defective construction not covered as complaint did not allege property damage caused by an occurrence; collapse of wall under natural and ordinary circumstances did not constitute "occurrence" within the meaning of CGL policy.
Indiana. *Amerisure, Inc. v. Wurster Const. Co., Inc.,* 181 N.E.2d 998 (Ind. Ct. App. 2004), decision clarified on reh'g, 822 N.E.2d 1115 (Ind. Ct. App. 2005) - defective exterior insulation finish system was not an "occurrence".

Ill. *Stoneridge Development Co., Inc. v. Essex Ins. Co.,* 888 N.E.2d 633 (Ill. 2d Dist.), app. denied 897 N.E.2d 264 (Ill. 2008) - cracks that developed in home "were not an unforeseen occurrence that would qualify as an 'accident' because they were the natural and ordinary consequences of defective workmanship"; *Cincinnati Ins. Co. v. Tayor-Morely, Inc.* 556 F. Supp.2d 908 (S.D. Ill. 2008) - developer's allegedly faulty construction of homes did not constitute an "accident" or "occurrence".
Md. *OneBeacon Ins. v. Metro Ready-Mix, Inc.,* 427 F. Supp. 2d 574 (D. Md. 2006) - concrete manufacturer's provision of defective grout that was insufficient to support pile caps did not involve an accident within the policy definition of "occurrence".
Mo. *Hartford Ins. Co. of the Midwest v. Wyllie*, 396 F. Supp. 2d 1033 (E. D. Mo. 2005) - suit against seller of condominium alleging intentional misrepresentation for failing to disclose problems and defects with roof and heating systems did not allege an "occurrence"; *Charles Hampton's A-1 Signs, Inc. v. American States Ins. Co.*, 225 S.W.3d 482 (Tenn. Ct. App. 2006 app. denied 2007) – applying Missouri law; *J. E. Jones Const. Co. v. Chubb & Sons, Inc.* 486 F.3d 337 (8th Cir. 2007) – applying Missouri law; *St. Paul Fire and Marine Ins. Co. v. Building Const. Enterprises, Inc.*, 484 F. Supp.2d (W.D. Mo. 2007).
N.D. *Century Sur. Co. v. Demolition & Dev., Ltd*, 2006 WL 163174 (N. D. Ill. 2006) - misidentifying building for demolition was not an "occurrence".
Oh. *Westfield Cos. v. Gibbs*, 2005 WL 1940305 (Oh. Ct. App. – 11th Dist. 2005) – property owner's action against contractor alleging fraud and trespass did not satisfy occurrence element; and later case at 2006 WL 120041 – damages resulting from contractor's delay was not an "accident" and therefore did not arise for an "occurrence".
Or. *Oak Crest Const. Co. v. Austin Mutual Ins. Co.*, 998 P.2d 1254 (Or. 2006).
Pa. *Millers Capital Ins. Co. v. Gambone Bros. Development Co., Inc.* 941 A.2d 706 (Pa. 2007), app. denied. 963 A.2d 471 (Pa. 2008) - defective drywall resulting in delamination, pealing and disfigurement, which compromised structural integrity, was not caused by an accident and, thus, the policy provided no coverage as there was no "occurrence" ; *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.*, 589 Pa. 317, 908 A.2d 888 (Pa. 2006) - failure to construct coke oven battery properly such that oven walls spalled, rod housings bowed, and ovens cracked paver bricks was not an accident and, therefore, was not an "occurrence".
S.C. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (S. C. 2005) – poor workmanship resulting in roads that deteriorated much more quickly than normal did not amount to an "occurrence".
Wash. *Mid-Continent Cas. Co. v. Williamsburg Condominium Ass'n,* 2006 WL 2927664 (W. D. Wash. 2006) - property damage to condominiums caused by builder's breach of contract and/or breach of warranty could not be regarded as an "occurrence".
W. Va. *Webster County Solid Waste Authority v. Brackenrich & Associates, Inc.* 217 W.Va. 304, 617 S.E.2d 851 (W. Va. 2005) - defective workmanship by engineering firm hired to design and supervise the construction of upgrades to a county land fill was not an "occurrence".

Decisions Finding Faulty Work a Basis for an "Occurrence":
Ariz. *Lennar Corp. v. Auto-Owners Ins. Co.*, 151 P.3d 538 (Ariz. Ct. App. Div. 1 2007).
Ark. *U.S. Fidelity & Guar. Co. v. Continental Cas. Co.*, 120 S.W.3d 556 (Ark. 2003) - "First, we must consider whether there was an occurrence. Appellants argue that the 'occurrence' that gave rise to the property damage was Ray's defective workmanship on the Wal-Mart projects. The policy defines an 'occurrence' as 'an accident.' We have defined an 'accident' as 'an event that takes place without one's foresight or expectation—an event that proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.' Because the policy has defined 'occurrence,' and because we have defined 'accident,' we conclude that the remaining fact question which must be resolved in this case before coverage can be determined is whether Ray's workmanship on the Wal-Mart projects constituted an 'accident.'" The court noted that there is a split of authority on whether defective workmanship is an accident and therefore an "occurrence" under a general liability policy.
Cal. *McGranahan v. insurance Corp. of NY*, 544 F. Supp.2d 1052 (E.D. Call 2008) - "occurrence" alleged where complaint was neutral regarding whether insured intended to install moldy drywall, as it only asserted it installed moldy drywall.
Colo. *Hoang v. Monterra Homes (Powderhorn) LLC,*, 129 P.3d 1028 (Colo. Ct. App. 2005), as modified on denial of reh'g and cert. granted - claim that homebuilder was negligent in constructing homes on unsuitable site containing expansive soils alleged an "occurrence".
Fla. *U. S. Fire Ins. Co. v. J.S.U.B., Inc.*, 979 So.2d 871 (Fla. 2007). See discussion in this Article.
Ga. *SawHorse, Inc. v. Southern Guar. Ins. Co. of Georgia*, 269 Ga. App. 493, 604 S.E.2d 541 (Ga. 2004) - "Southern Guaranty has cited no Georgia authority supporting its apparent claim that faulty workmanship cannot constitute an 'occurrence' under a general commercial liability policy. And this claim runs counter to case law finding that policies with similar 'occurrence' language provide coverage for 'the risk that. . . defective or faulty workmanship will cause injury to people or damage to other property.' Furthermore, Southern Guaranty has pointed to no evidence that SawHorse intended for the faulty workmanship to occur. Under these circumstances, Southern Guaranty is not entitled to summary judgment based on the "occurrence' language in the policy."
Ind. *Indiana Ins. Co. v. Alloyd Insulation Co.,* 2002 WL 1770491 (Ohio Ct. App. 2d Dist. Montgomery County 2002) - corrosion and consequential property damage from faulty roof due to defective workmanship constituted an "accident" and thus an "occurrence".
Kan. *Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co.,* 33 Kan. App.2d 504, 104 P.3d 997 (Kan. 2005) - damage that occurs over time as a result of defective materials or workmanship in the construction of a home and leads to structural damage is an "occurrence"; 281 Kan. 844, 137 P.3d 486 (Kan. 2006) - homeowners' claim for property damage from window leaks against general contractor constituted an "occurrence" as there is nothing in the basic coverage language of the CGL policy to support any definitive tort/contract line of demarcation for purposes of determining coverage.
Ky. *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007) - intentional act of contractor's employee in demolishing part of home, allegedly because contractor had not communicated to employee that the project was limited to demolishing the home's carport, constituted an "accident" and therefore was an "occurrence," within the meaning of CGL policy.
La. *Broadmoor Anderson v. National Union Fire Ins. Co. of Louisiana*, 912 So.2d 400 (La. Ct. App.2d Cir. 2005) - defective ceramic tile and stone work resulting in water infiltration constituted an "occurrence"; *North American Treatment Systems, Inc. v. Scottsdale Ins. Co.,* 943 So.2d 429 (La. Ct. App. [1st Cir.] 2006), writ denied, 2007 WL 781850 and 2007 WL 781854 - claims of negligent work resulting in a collapse at a wastewater treatment plant clearly claimed damages by reason of an "occurrence".
Minn. *O'Shaughnessy v. Smuckler Corp.*, 543 N.W.2d 99 (Minn. Ct. App. 1996) abrogated on other grounds by *Gordon v. Microsoft Corp.*, 645 N.W.2d 393 (Minn. 2002).

Mo. *Columbia Mut. Ins. Co. v. Epstein*, 239 S.W.3d 667 (Mo. Ct. App. E.D. 2007) - defect in concrete purchased for house foundation was "accident" and, thus, "occurrence"; *American States Ins. Co. v. Herman C. Kempker Const. Co., Inc.,* 71 S.W.3d 232 (Mo. Ct. App. W.D. 2002) - developer's claim that insured contractor negligently misrepresented construction of street in development potentially was an "occurrence" and therefore, insurer had a duty to defend.

Oh. *Dublin Bldg. Sys. v. Selective Ins. Co. of South Carolina*, 874 N.E.2d 788 (Ohio Ct. App. 10th Dist. Franklin County 2007) - property damage, including mold contamination, caused by exterior stucco subcontractor, who failed to properly seal office building's exterior walls, constituted an insurable "occurrence"; *Erie Ins. Exchange v. Colony Dev. Corp.* 736 N.E.2d 941 (Ohio Ct. App. 10th Dist. Franklin County 2006); *Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.,* 2002 WL 723215 (Ohio Ct. App. 10th Dist. Franklin County 2002) - collapse of store's ceiling was an "accident" and, therefore, an "occurrence" within the meaning of contractor's CGL policy, but express contractual liability exclusion applied to shield insurers from liability.

Pa. *Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co.,* 2003 Pa Super 149, 825 A.2d 641, 654 (Pa. 2003) - "In the instant case, the damage at issue is not the absence of the grout or the size of the grout spaces but the deformation and deflection of the brick work, tie rods and roof of the battery which occurred after the battery was placed in use. Whether that damage was caused in whole or in part by the torrential rains of October 31st and November 1st, or by some other event during the heatup of the battery, we are not hesitant to conclude that the physical damage to the battery constituted an occurrence for which the policies provide coverage *UNLESS* otherwise precluded by one of the exclusions set forth in the policy."

N.D. *ACUITY v. Burd & Smith Const., Inc.,* 721 N.W.2d 33, 39-40 (N.D. 2006) - "We agree with the rationale of those courts holding that faulty workmanship causing damage to property other than the work product is an accidental occurrence for purposes of the CGL policy. . . . Here, the Kailliers allege damage to the interior of the apartment building. We conclude that claim is the type of risk covered by a CGL policy and constitutes an 'occurrence' under Acuity's policy."

Neb. *Auto-Owners Ins. Co. v. Home Pride Companies, Inc.*, 268 Neb. 528, 684 N.W.2d 571, 577-78 (Neb. 2004) - "Although it is clear that faulty workmanship, standing alone, is not covered under a standard CGL policy, it is important to realize that there are two different justifications for this rule. On the one hand, the rule has been justified on public policy grounds, primarily on the long-founded notion that the cost to repair and replace the damages caused by faulty workmanship is a business risk not covered under a CGL policy. Today, the business risk rule is part of standard CGL policies in the form of "your work" exceptions to coverage. Therefore, the business risk rule does not serve as an initial bar to coverage, but, rather, as a potential exclusion, via the "your work" exclusions, if an initial grant of coverage is founded. . . . Important here, although faulty workmanship, standing alone is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence. . . . In the instant case, [insureds' subcontractors] negligently installed shingles on a number of apartments, which caused the shingles to fall off. Additionally, the amended petition alleged that as a consequence of the faulty work, the roof structures and buildings have experienced substantial damage. This latter allegation represents an unintended and unexpected consequence of the contractors' faulty workmanship and goes beyond damages to the contractors' own work product. Therefore, the amended petition properly alleged an occurrence within the meaning of the insurance policy."

S.C. *Auto Owners Ins. Co., Inc. v. Newman*, 2008 WL 648546 (S.C. 2008) - water intrusion and resulting damage was an "occurrence" covered under the policy; *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.* 350 S.C. 549, 567 S.E.2d 489 (S. C. Ct. App. 2002) - deterioration and failure of roads from repeated water runoff was an "accident" and, therefore, an "occurrence" and subcontractor exception to policy's business risk exclusion restored coverage otherwise excluded under the policy.

S.D. *Corner Const. Co. v. U. S. Fidelity and Guar. Co.,* 2002 S.D. 5, 638 N.W.2d 887 (S.D. 2002) - failure to fill voids between studs with insulation and to securely attach the vapor barrier was an "accident" resulting in property damage.

Tenn. *Travelers Indem. Co. of America v. Moore & Associates, Inc.,* 216 S.W.3d 302, 308-09 (Tenn. 2007) – see discussion in this Article; and *State Farm Fire and Cas. Co. v. McGowan*, 421 F.3d 433, 2005 FED App. 0374P (6th Cir. 2005) - holding that an insured's negligence was an "occurrence" under an insurance policy because it was unintended and unforeseen.

Tex. *Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1 (Tex. 2007), answer to certified question conformed to, 501 F.3d 435 (5th Cir. 2007) – see discussion in this Article; and *CU Lloyd's of Texas v. Main Street Homes, Inc.,* 79 S.W.3d 687 (Tex. App.—Austin 2002) - homeowners' allegations that general contractor built homes after learning that foundation designs were inadequate for soil conditions and failed to disclose that knowledge to purchasers stated an "accident" and thus an "occurrence". *King v. Dallas Fire Ins. Co.* 45 Tex. Sup. Ct. J. 715, 2002 WL 1118438 (Tex. 2002), op. withdrawn and superseded on reh'g on other grounds, 85 S.W.3d 185 (Tex. 2002) - liability insurer owed duty to defend employer accused of negligently hiring and supervising employee accused of battery, because the employer's negligent hiring constituted an "occurrence"; *Lennar Corp. v. Great American Ins. Co.,* 2005 WL 1324833 (Tex. App.—Hou. [14th Dist.] 2005) - suit to recover costs paid to repair water damage and replace defective exterior insulation and finish systems on hundreds of homes built in the Houston area in the late 1990s alleged an "occurrence", and 200 S.W.3d 651 (Tex. App. Hou. [14th Dist.] 2006, writ granted) - homebuilder's negligent construction of homes using defective exterior insulation and finish system constituted an "occurrence" within scope of CGL and commercial umbrella liability policies; *Mid-Continent Cas. Co. v. JHP Dev., Inc.*, 2009 WL 189886 (5th Cir. [Tex.] 2009) - faulty workmanship allegations against contractor in the construction of five condominiums that resulted in water leakage was an occurrence; *Pine Oak Builders, Inc. v. Great American Lloyds Ins. Co.*, 2006 WL 1892669 (Tex. App.—Hou. [14th Dist.] 2006) - property damage caused by defective construction may constitute an "occurrence" if it is inadvertent and results in damage to the insured's own work, the result of which is unintended and unexpected, *rev'd on other grounds Pine Oak Builders' Inc. v. Great American Lloyds Ins. Co*., 279 S.W.3d 650 (Tex. 2009).

Utah. *Great American Ins. Co. v. Woodside Homes Corp.*, 448 F. Supp.2d 1275 (D. Utah 2006) - subcontractor's faulty work causing cracks in building foundation, basement floor, and driveway involved an occurrence such that breach of warranty claim and breach of contract claim were potentially covered.

Wash. *Mid-Continent Cas. Co. v. Titan Const. Corp.* 281 Fed. Appx. 766 (9th Cir. 2008) - negligent construction of condominium that resulted in breach of contract and breach of warranty claims constituted "occurrence" under CGL policy.

Wisc. *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 76 (Wis. 2004) - "American Family argues that because Pleasant's claim is for breach of contract/breach of warranty it cannot be an "occurrence," because the CGL is not intended to cover contract claims arising out of the insured's defective work or product, but this is by operation of the CGL's business risk exclusions, not because a loss actionable only in contract can never be the result of an "occurrence" within the meaning of the CGL's initial grant of coverage. This distinction is sometimes

overlooked and has resulted in some regrettably overbroad generalizations about CGL policies in our case law."; *1325 North Van Buren, LLC v. T-3 Group, Ltd.*, 284 Wis.2d 387, 2005 WI. App. 121, 701 N.W.2d 13 (Ct. App. 2005), review granted 2005 WI. 150, 286 Wis.2d 97, 705 N.W.2d 659 (Wis. 2005) - CM-at-risk failures that result in property damage and delays were an occurrence; *Glendenning's Limestone & Ready-Mix Co., Inc. v. Reimer*, 721 N.W.2d 704 (Wis. Ct. App. 2006) - concluding, after a detailed discussion, that "occurrence" is not equivalent to faulty workmanship, but rather faulty workmanship may result in an "occurrence" and, in this case, where pleading alleges that the rubber mats that subcontractor improperly installed were damaged by a scraper that cleans manure from them is a claim for property damage caused by an occurrence in that the damage was not intended or anticipated and that it was also not intended or anticipated that using the scraper to clean the manure off the mats would damage the mats; *Stuart v. Weisflog's Showroom Gallery, Inc.,* 722 N.W.2d 766 (Wis. Ct. App. 2006, review granted), 727 N.W.2d 34 (Wis. 2006) - insured's misrepresentations that it was a licensed architect and familiar with building code requirements qualified as "occurrences" per its insurance policy because intent to deceive is not a necessary element of homeowners' cause of action.

[3] ***Lamar Homes*.** The Texas Supreme Court in *Lamar Homes, Inc. v. Mid-Continent Cas. Co.,* 242 S.W.3d 1 (Tex. 2007) analyzed the issue as follows:

> We begin with the question whether defective construction or faulty workmanship that damages only the work of the insured is an "occurrence." As previously mentioned, "occurrence" is defined, in part, as an accident, but accident is not otherwise defined in the policy. Terms that are not defined in a policy are given their generally accepted or commonly understood meaning.
>
> The insurance carrier submits that the damages alleged here for repairs to the home are direct economic damages flowing from Lamar's contractual undertaking and are conclusively presumed to have been foreseen by Lamar. [The homeowners alleged that Lamar was negligent in designing and constructing their home's foundation and that, as a result, the home's sheetrock and stone veneer cracked.] Thus, the carrier concludes that faulty workmanship is not an accident because injury to the general contractor's work is the expected and foreseeable consequence. … [Texas law], however, did not adopt foreseeability as the boundary between accidental and intentional conduct. Insurance is typically priced and purchased on the basis of foreseeable risks, and reading [Texas law] as the carrier urges would undermine the basis for most insurance coverage. Moreover, the carrier's argument includes a false assumption—that the failure to perform under a contract is always intentional (or stated differently "that an accident can never exist apart from a tort claim"). …
>
> An accident is generally understood to be a fortuitous, unexpected, and unintended event. … [A] claim does not involve an accident or occurrence when either direct allegations purport that the insured intended the injury (which is presumed in cases of intentional tort) or circumstances confirm that the resulting damage was the natural and expected result of the insured's actions, that is, was highly probable whether the insured was negligent or not. Applying our prior decisions, the Fifth Circuit has concluded that the terms "accident" and "occurrence" include damage that is the "unexpected, unforeseen or undesigned happening or consequence" of an insured's negligent behavior, including "claims for damage caused by an insured's defective performance or faulty workmanship." The federal district court here [question certified by the Fifth Circuit under appeal from the federal district court that ruled against the insured] distinguishes [prior Fifth Circuit case law finding poor workmanship meets the occurrence element] by drawing the distinction between faulty workmanship that damages the insured's work or product and faulty workmanship that damages a third party's property. … The CGL policy, however, does not define an "occurrence" in terms of the ownership or character of the property damaged by the act or event. Rather, the policy asks whether the injury was intended or fortuitous, that is, whether the injury was an accident. … We … see no basis in the definition of "occurrence" for the district court's distinction.
>
> The determination of whether an insured's faulty workmanship was intended or accidental is dependent on the facts and circumstances of the particular case. For purposes of the duty to defend, those facts and circumstances must generally be gleaned from the plaintiffs' complaint. Here, the complaint alleges an "occurrence" because it asserts that Lamar's defective construction was a product of its negligence. No one alleges that Lamar intended or expected its work or its subcontractors' work to damage the DiMares' home. (citations omitted.)

[4] **Exposure.** *Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc*, 633 F.2d 1212 (6th Cir. 1980).

[5] **Manifestation.** *Textron, Inc. v. Aetna Cas. & Sur. Co.*, 723 A.2d 1138 (R.I. 1999); *Eagle-Picher Indus. Inc. v. Liberty Mut. Ins. Co.*, 682 F.2d 121 (1st Cir. 1982).

[6] **Continuous.** *Montrose Chem. Corp. of Cal. v. Admiral Ins. Co.*, 913 P.2d 878, 880, 904 (1995) distinguishing *Prudential-LMI Commercial Ins. v. Superior Court*, 798 P.2d 1230 (1990).

[7] **Injury-In-Fact. Texas:** *Don's Building Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20 (Tex. 2008). The court specifically abrogated the holdings in the following cases: *Summit Custom Homes, Inc. v. Great Am. Lloyds Ins. Co.*, 202 S.W.3d 823 (Tex. App.—Dallas 2006, pet. filed); *State Farm Fire & Cas. Co. v. Rodriguez*, 88 S.W.3d 313 (Tex. App.—San Antonio 2002, pet. denied); *Closner v. State Farm Lloyds*, 64 S.W.3d 51 (Tex. App.—San Antonio 2001, no pet.); *State Farm Mut. Auto. Ins. Co. v. Kelly*, 945 S.W.2d 905 (Tex. App.—Austin 1997, writ denied); *Cullen/Frost Bank of Dallas, N.A. v. Commonwealth Lloyd's Ins. Co*., 852 S.W.2d 252 (Tex. App.—Dallas 193), writ denied, 889 S.W.2d 266 (Tex. 1994)(*per curiam*); and *Dorchester Dev. Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987, no writ).

Other States: *Transcon. Ins. Co. v. W. G. Samuels Co.*, 370 F.3d 755 (8th Cir.); *Mut. Fire, Marine & Inland Ins. Co. v. Safeco Ins. Co.*. 473 So.2d 1012 (Ala. 1985); *Hoang v. Assurance Co. of Am.*, 149 P.3d 798 (Colo. 2007); *Travelers Ins. Co. v. Eljer Mfg., Inc.*, 757 N.E.2d 481

(2001); *Gelman Scis., Inc. v. Fid. & Cas. Co. of N.Y.*, 572 N.W.2d 617 (1998) reh'g granted on other grounds, 576 N.W.2d 168 (1998), overruled on other grounds by *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776 (2003); *Sentinel Ins. Co. v. First Ins. Co. of Haw.*, 875 P.2d 894 (1994). *N. States Power Co. v. Fid. & Cas. Co. of N.Y.*, 523 N.W.2d 657 (Minn. 1994); *Energy North Natural Gas*, 848 Ala.2d at 719-23; *Kief Farmers Coop. Elevator Co. v. Farmland Mut. Ins. Co.*, 534 N.W.2d 28 (N.D. 1995); *St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co.*, 923 P.2d 1200 (1996); *Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co.*, 486 S.E.2d 89 (1997); *Transcon Ins. Co. v. Wash. Pub. Utils. Dists.' Util. Sys.*, 760 P.2d 337 (1988).

[8] ***Wilshire Insurance*.** Wilshire insured RJT under two consecutive CGL policies running from June 2004 through June 2006. In 1999, RJT repaired the foundation of Ashbaugh's home after the home was damaged by an accidental discharge of plumbing water. In 2007 Ashbaugh sued RJT for negligently performing the foundation repair. Ashbaugh alleged that late in 2005 cracks in the walls and ceilings suddenly appeared in his home, damage which he attributed to the foundation being out of level.

[9] **Fifth Circuit.** The Fifth Circuit certified the following two questions to the Texas Supreme Court:

> 1. Does a general contractor that enters into a contract in which it agrees to perform its construction work in a good and workmanlike manner, without more specific provisions enlarging this obligation, "assume liability" for damages arising out of the contractor's defective work so as to trigger the Contractual Liability Exclusion.
> 2. If the answer to question one is "Yes" and the contractual liability exclusion is triggered, do the allegations in the underlying lawsuit alleging that the contractor violated its common law duty to perform the contract in a careful, workmanlike, and non-negligent manner fall within the exception to the contractual liability exclusion for "liability that would exist in the absence of contract. 690 F.3d 628, 633 (5th Cir. 2012).

[10] ***Gilbert*.** The Texas Supreme Court distinguished *Ewing* from the facts addressed by it in *Gilbert Texas Constr. LP v. Underwriters at Lloyd's, London*, 327 S.W.3d 118 (Tex. 2010). In *Gilbert* the insured entered into a contract with the Dallas Area Rapid Transit Authority (DART) to construct a commuter railway system. During construction, heavy rains damaged neighboring buildings owned by RT Realty (RTR). RTR sued Gilbert, under a third-party beneficiary claim as to the Gilbert's contractual undertaking under Gilbert's contract with DART. The contract obligated Gilbert to protect all existing improvements at or near the work site and on adjacent property of third parties and to repair any damage to them. In *Gilbert* the Texas Supreme Court held the contractual liability exclusion applied to deny coverage for Gilbert. Gilbert by its contract assumed a liability, which the court was unwilling to allow recourse to its CGL insurance to insure it against its breach of contract. The court stated:

> Independent of its contractual obligations, Gilbert owed RTR the duty to comply with law and to conduct its operations with ordinary care so as not to damage RTR's property, and absent its immunity it could be liable for damages it caused by breaching its duty. In its contract with DART, however, Gilbert undertook a legal obligation to protect improvements and utilities on property adjacent to the construction site, and to repair or pay for damage to any such property "resulting from a failure to comply with the requirements of this contract or failure to exercise reasonable care in performing the work." (emphasis added). The latter obligation—to exercise reasonable care in performing its work—mirrors Gilbert's duty to RTR under general law principles. The obligation to repair or pay for damage to RTR's property "resulting from a failure to comply with the requirements of this contract" extends beyond Gilbert's obligations under general law and incorporates contractual standards to which Gilbert obligated itself. The trial court granted summary judgment on all RTR's theories of liability other than breach of contract, so Gilbert's only potential liability remaining in the lawsuit was liability in excess of what it had under general law principles. Thus, RTR's breach of contract claim was founded on an obligation or liability contractually assumed by Gilbert within the meaning of the policy exclusion. *Id.* at 127.

[11] **Exclusion 2.j(6) for "Property Damage" to Your Work Except if Occurs After Completion of Operations.** *American States Ins. Co. v. Powers*, 262 F. Supp.2d 1245, 1251-52 (D. Kan. 2003):

> Thus, when exclusion j(6) is read together with the "product-completed operations hazard" provision, the result is that exclusion j(6) does not apply to claims arising from 'defective work that is discovered after the contractor has completed its work.' The application of exclusion j(6), then, turns on whether Mr. Powers' work on the building was incomplete (in which case the exclusion would apply) or complete (in which case the exclusion would not apply). There is no evidence before the court suggesting that Mr. Powers' work on the building was incomplete at the time the Stouts discovered the allegedly defective work. Rather, the uncontroverted facts demonstrate that Mr. Powers completed the building on May 30, 2000 and that sometime thereafter the Stouts realized that the building allegedly did not meet the contract specifications, did not meet various building codes pertaining to structural design, and was not constructed in a workmanlike manner. While the work performed by Mr. Powers may have needed significant correction, repair or replacement, such work is nonetheless treated as "complete" for purposes of the policy. Thus, because Mr. Powers' work was complete at the time of the damage, the property damage falls within the 'property-completed operations hazard' exception to exclusion j(6) and, accordingly, exclusion j(6) does not apply here.

[12] **Exclusion 2. j(6) - "That Particular Part".** *Mid-Continent Casualty Co. v. Krolczyk*, 408 S.W.3d 896 (Tex. App.--Hou. [1st Dist.] 2013, pet. denied) - in a "duty to defend" issue case, a court construed a HOA's pleadings in a suit against a subdivision developer that the developer built a "totally inadequate" road as not excluding coverage of the developer under 2.j(6). The court found the HOA's pleadings had alleged that the

asphalt laid on the surface of the road cracked, but not allegations were made that the surface work was defective. Accordingly, only the defectively performed work (*e.g.*, the road base) would not be covered by the CGL insurance, while the non-defectively performed work would be covered, such as the paving and repaving work.; also see *E & R Rubalcava Const., Inc. v. Burlington Ins. Co.,* 147 F. Supp.2d 523 (N. D. Tex. 2000) "[T]he *business risk* exclusion [**Exclusion 2.j(6)**] … only applies to the cost of repair of the foundation work itself, not to the cost of repair of any other damage to the homes in issue."; and *Dorchester Development Corp. v. Safeco Ins. Co.*, 737 S.W.2d 380 (Tex. App.—Dallas 1987). However, some courts have interpreted the exclusion to apply to the whole project. *See, e.g., E. H. Spencer & Company, LLC v. Essex Insurance Co.*, 2009 WL 2231222 (Mass. Super.) following the rationale in *Jet Line Servs., Inc. v. American Employers Ins. Co.*, 494 Mass 706 (Mass. 1989) where court stated "[w]here the insured was retained to perform work on an entire unit of property, and not just a portion of it, the applicability of the exclusion to damage of the entire unit is more apparent than in cases in which the insured was retained to work on only a part of the unit."

[13] **Rationale for the "Business Risk" Exclusions.** Hendrick and Weizel, *The New Commercial General Liability Forms—An Introduction and Critique*, 36 F.I.C.C., 319, 322 (Summer 1986). "**Business Risks**" are "[those risks] which are the normal, frequent, or predictable consequences of doing business, and which business management can or should control and manage. CGL insurance is not meant to be a safety net for every business error or omission."

[14] **Covered Damages.** The Fifth Circuit in *Wilshire Insurance Co. v. RJT Construction Co.*, 581 F.3d 222, 226 (5th Cir. [Tex.] 2009) found that **Exclusion 2.l** precluded coverage only for the cost of repairing its insured's own work, the defective foundation, but did not exclude coverage of the damages caused to the balance of the home. The court noted that in *Travelers Insurance Co. v. Volentine*, 578 S.W.2d 501, 503 (Tex. Civ. App.—Texarkana 1979, no writ) the insured, an automobile mechanic, performed faulty work on an engine's valves which resulted in the destruction of the entire engine; the Texas court found that the **Exclusion 2.l** precluded only the cost of replacing the valves themselves, but not the extent those other parts [of the engine] were damaged or destroyed. *Travelers* at 504.

[15] **Subcontractor Exception.** For an example of sustaining coverage under the "subcontractor exception", see *Mid-Continent Casualty Co. v. Castagna*, 410 S.W.3d 445 (Tex. App.-Dallas 2013, pet. denied) finding that the foundation work that cracked over several policy periods was constructed by the contractor's subcontractors.

[16] **Colorado Act.** Colo. Rev. Stat. § 13-20-808 provides:

> (3) In interpreting a liability insurance policy issued to a construction professional, a court shall presume that the work of a construction professional that results in property damage, including damage to the work itself or other work, is an accident unless the property damage is intended and expected by the insured. Nothing in this subsection (3):
>
> (a) Requires coverage for damage to an insured's own work unless otherwise provided in the insurance policy; or
>
> (b) Creates insurance coverage that is not included in the insurance policy.
>
> (4)(a) Upon a finding of ambiguity in an insurance policy, a court may consider a construction professional's objective, reasonable expectations in the interpretation of an insurance policy issued to a construction professional.
>
> (b) In construing an insurance policy to meet a construction professional's objective, reasonable expectations, the court may consider the following:
>
> (I) The object sought to be obtained by the construction professional in the purchase of the insurance policy; and
>
> (II) Whether a construction defect has resulted, directly or indirectly, in bodily injury, property damage, or loss of the use of property.....
>
> (5) If an insurance policy provision that appears to grant or restore coverage conflicts with an insurance policy provision that appears to exclude or limit coverage, the court shall construe the insurance policy to favor coverage if reasonably and objectively possible.
>
> (6) If an insurer disclaims or limits coverage under a liability insurance policy issued to a construction professional, the insurer shall bear the burden of proving by a preponderance of the evidence that:
>
> (a) Any policy's limitation, exclusion or condition in the insurance policy bars or limits coverage for the insured's legal liability in an action or notice of claim ...; and
>
> (b) Any exception to the limitation, exclusion, or condition in the insurance policy does not restore coverage under the policy.

[17] **Arkansas Act.** The Arkansas Act Ark. Code Ann. § 23-79-155 requires that:

> A commercial general liability insurance policy offered for sale in this state shall contain a definition of 'occurrence' that includes: (1) Accidents, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) Property damage or bodily injury resulting from faulty workmanship.

[18] **South Carolina Act**. The South Carolina Act S. C. Code Ann. § 39-61-70(B)-(D) provides:

> (B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:
>
> (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and
>
> (2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.
>
> (C) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer, including a surplus lines insurer, may include in a commercial general liability insurance policy.
>
> (D) This section applies to a commercial general liability insurance policy that insures a construction professional for liability arising from construction related work.

[19] **Hawaiian Bibliography.** Wielinski, Patrick J, INSURANCE FOR DEFECTIVE CONSTRUCTION (IRMI 4th Ed. 2015); Bernardelli, Dina, 44 WTR BRIEF 34 *Legislating "Occurrence" in Construction Defect Coverage* (Winter 2015); Iwamoto, Ray, *Construction Defects and "Occurrence" under the Commercial General Liability Policy,* THE PRACTICAL REAL ESTATE LAWYER 19 - 24 (July 2015); Iwamoto, Ray, *The Uninsured Risks of Development (Part 2),* THE PRACTICAL REAL ESTATE LAWYER Vol. 27, No. 4 (July 2011); Shidlofsky, Lee, *Deconstructing CGL Insurance Coverage Issues in Construction Cases*, 9 No. 2 JOURNAL OF THE AMERICAN COLLEGE OF CONSTRUCTION LAWYERS 2, (August 2015); Miller, Thomas F., Miller, Rachel M, and Miller, Matthew T., HANDLING CONSTRUCTION DEFECT CLAIMS W. STATES § 6.02 Third-Party Coverage (2014); Beh, Hazel, Hiraoka, Keith, Olson, Peter, Tanoue, Michael, and Van Etten, Alan, Symposium Issue: The Moon Court Era – *Key Issues in Hawai'i Insurance Law Answered by the Moon Court,* 33 U. HAW L. REV. 779 (Summer 2011)*;* and Etten, Allan Van and Morgan, Bridget G, *Insurance Primer*, 14 HAWAII BAR J. 4 (June 2010).

[20] ***Group Builders.*** *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Hawai'i 142, 231 P.3d 67 (Haw. Ct. App. 2010). The decision in *Group Builders* arose out of a suit brought by a subcontractor, Group Builders, Inc., against its CGL insurer, Admiral Ins. Co., for Admiral's refusal to defend, indemnify, or otherwise provide coverage as to a construction defect damage case brought by Hilton Hotels Corporation. Hilton hired Hawaiian Dredging as the general contractor for construction of the Kalia Tower as part of the Hilton Hawaiian Village in Waikiki. Hawaiian Dredging subcontracted with Group Builders, Inc. to install an exterior insulation finishing system ("**EIFS"**) and sealant, spray-applied fireproofing, building insulation, and metal wall framing on Kalia Tower. After completion of construction, extensive mold growth was discovered resulting in Hilton's closing guest rooms on floors 5 through 25. Hilton and Group Builders settled its lawsuit, which resulted in Group Builders assigning its claims against Admiral, as well as the right to sue in Group Builder's name, to Tradewind Insurance Company, Ltd. The court found that under the CGL policy the mold damage and resulting loss of use of the Kalia Tower qualified as "property damage" under the policy, but stated the question to be determined as follows:

> The issue before us is whether alleged faulty construction work, giving rise to contractual claims, constitutes an "occurrence" under a CGL policy. *Id.* at 146, 71.

After noting that there was a split of authority on the issue, and reviewing precedents cited as the majority position, the court held:

> We hold that under Hawai'i law, construction defect claims do not constitute an "occurrence" under a CGL policy. Accordingly, breach of contract claims based on allegations of shoddy performance are not covered under CGL policies. Additionally, tort-based claims, derivative of these breach of contract claims, are also not covered under CGL policies. *Id.* at 148-149 and 73-74.

[21] **Legislative Purpose for the Hawaii Act.** The text of H.B. 924 passed as Act 93 proclaims:

> The legislature further finds that the 2010 decision of the Hawaii Intermediate Court of Appeals in *Group Builders, Inc. v. Admiral Ins. Co.,* 123 Hawai'i 142, 231 P.3d 67 (Haw. Ct. App. 2010), creates uncertainty in the construction industry, and invalidates insurance coverage that was understood to exist and that was already paid for by construction professionals. Prior to the Group Builders decision, which held that commercial general liability policies do not cover bodily injury or property damage arising from construction defects, construction professionals entered into and paid for insurance contracts under the reasonable, good-faith understanding that bodily injury and property damage resulting from construction defects would be covered under the insurance policy. It was on that premise that general liability insurance was purchased….
> The purpose of this Act is to restore the insurance coverage that construction industry professionals paid for and to ensure that the good-faith expectations of parties at the time they entered into the insurance contract are upheld.

[22] **The Hawaii Act.** 2011 Hawaii Laws Act 83 (H.B. 924) provides:

> (a) For purposes of a liability insurance policy that covers occurrences of damage or injury during the policy period and that insures a construction professional for liability arising from construction-related work, the meaning of the term "occurrence" shall be construed in accordance with the law as it existed at the time that the insurance policy was issued.

[23] **Federal Guesses.** For a discussion of these cases see Iwamoto, Ray, *Construction Defects and "Occurrence" under the Commercial General Liability Policy,* THE PRACTICAL REAL ESTATE LAWYER 19 - 24 (July 2015); Iwamoto, Ray, *The Uninsured Risks of Development (Part 2).* THE PRACTICAL REAL ESTATE LAWYER Vol. 27, No. 4 (July 2011).

[24] **Differences of Opinion.** Ray Iwamoto notes:

> Simply stated, these federal cases and the Hawaii state case precedent described there do not, per *Group Builders*, require the conclusion that construction defects are never occurrences under the CGL policies. Instead, they support the narrower conclusion that when defective workmanship is the basis for a breach of contract claim, that defective workmanship, if it is the result of the insured's intentional act or omission, then the resulting consequences are the reasonably foreseeable results of such intentional acts or omissions and there is no accident and no "occurrence" under the CGL policy. These cases do not address bodily injury or death ("personal injury") or collateral property damage resulting from construction defects and do not stand for the proposition that in those cases the construction defect cannot form the basis for an occurrence under the CGL policy. Also, the Hawaii case law precedent is to focus on the acts of the insured and do not apply when there are more than one insured under a wrap policy or under an additional insured endorsement.

Iwamoto, Ray, *Construction Defects and "Occurrence" under the Commercial General Liability Policy,* THE PRACTICAL REAL ESTATE LAWYER 19, 20 (July 2015). This commentator calls attention to two Hawaii Supreme Court cases decided before, but not cited in, *Group Builders* that may support the conclusion that the Hawaii Supreme Court will approach the question by reviewing the CGL policy both as a whole and as applied to the facts and circumstances of a particular property damage claim, not merely declaring that CGL policies cannot insure a contractor for property damage claims arising out of construction defects. See *dicta* in *Sturla, Inc. v. Fireman's Fund Ins. Co.*, 67 Haw. 203, 684 P.2d 960 (Haw. 1984) - while not deciding that a claim for defective carpet was not an "occurrence", the court reviewed the CGL policy and found that coverage was excluded by several policy exclusions; and *Hurtig v. Terminix Wood Treatment & Contracting Co.,* 67 Haw. 480, 692 P.2d 1153 (Haw. 1984) - the court ruled that the policy exclusions excluded losses confined to the insured's own work or work product and since the house was property beyond the insured's own termite inspection treatment work product, the standard liability policy required the insurer to indemnify the insured.

In addressing the effect of the Act, Dina Bernardelli concludes at 44 WTR BRIEF 34, 39 *Legislating "Occurrence" in Construction Defect Coverage* (Winter 2015):

> Hawaii's legislation creates a different kind of predictability that, ultimately, falls short of the original goal and does not create a presumption of coverage for faulty construction as an occurrence. To the contrary, *Group Builders*, which determined that defective construction is not an occurrence, would guide coverage for faulty workmanship for policies issued in 2010 and later. Assumedly, construction professionals purchasing insurance in 2010 or thereafter know they are not obtaining coverage for faulty construction under their CGL policy.