

A User's Guide
To The Commercial/Comprehensive
General Liability Insurance Policy
2004

Steven E. Leder, Esquire
The Leder Law Group
502 Washington Ave, Suite 101
Baltimore, MD 21204
(443) 279-7900

***Special thanks to Katherine Bainbridge, Esq. for her assistance in editing, polishing and updating this edition.**

TABLE OF CONTENTS

I.	Introduction	1-3
II.	Insuring Agreement and Definitions	3-5
A.	Definition of Occurrence	5-7
1.	Negligent Misrepresentation	7
2.	Defective Workmanship	8-14
3.	Preventive Measures	14
B.	Definition of Bodily Injury	14-17
C.	Definition of Property Damage	17-21
1.	Tangible vs. Intangible Loss	21-23
D.	When Does “Bodily Injury” or “Property Damage” Take Place?	23
1.	The Occurrence Policy Trigger	23-25
a.	Maryland Law	25-30
b.	Known Losses and Losses in Progress	30-32
c.	Allocation	32
i.	The Joint-and-Several Approach	32-34
ii.	The Actual Injury Allocation	34
iii.	The Pro Rata Approach	34-37
iv.	Uninsured Periods	37-38
2.	Claims-Made Trigger	38-39
E.	“As Damages”	39-41

F.	Who is an Insured?	41
1.	The Policy Language	41
2.	The Fellow Employee Exception	41-42
3.	Additional Insureds	42-47
G.	Number of Occurrences	47-49
III.	Exclusions	49
A.	The Intentional Injury Exclusion	49-51
1.	Maryland Case Law	51-53
2.	Problem Fact Patterns	53
a.	Assault and Battery	53
b.	Sexual Assault Against Minors	54-55
c.	Self-Defense	55-57
d.	Mistakes	57-58
e.	False Arrest, Malicious Prosecution and Defamation	59-60
f.	Mental Incapacity	60-62
g.	Innocent Co-Insureds	62
B.	Contractual Liability Exclusion	62-63
1.	The 1973 Provision	63-64
2.	Extended Coverage	64
3.	The 1986 Policy	64-66
4.	Defense Costs	66
5.	Breach of Contract Distinguished	66-67

C.	Aircraft, Auto and Watercraft	68-70
D.	Mobile Equipment	70-71
E.	Pollution Coverage and the Pollution Exclusion	71
1.	CGL Coverage of Environmental Pollution in General	71-72
2.	The “Sudden and Accidental” Pollution Exclusion	72-75
3.	The “Absolute Pollution” Exclusion	75-82
4.	The 1998 Revisions to the Pollution Exclusion	82-84
5.	What is a Pollutant?	84
a.	Medical Waste	84-85
b.	Lead-Based Paint Poisoning	85-86
F.	War	86-87
G.	Host-Liquor Liability	87-88
H.	Workers’ Compensation Exclusion	88-89
I.	Employer’s Liability Exclusion	89-90
J.	Care, Custody and Control, Property-Owned and Alienated Property Exclusions	91
1.	1973 Exclusion K	91
2.	1986 Exclusion J	91-92
a.	The “Owned Property” Exclusion – J(1)	92-93
b.	The Alienated Premises Exclusion – J(2)	93-94
c.	The Loaned Property Exclusion – J(3)	94
d.	The Care, Custody or Control Exclusion – J(4)	94

e.	That Particular Part Upon Which Operations Are Being Performed Exclusion – J(5)	94-95
f.	The Faulty Workmanship Exclusion – J(6)	95-97
K.	Business Risk Exclusions – In General	97-99
L.	Failure to Perform Exclusion	99-102
M.	Impaired Property Exclusion	102-105
N.	Damage to Products Exclusions	105-109
O.	Work Performed Exclusions	109-111
P.	Broad Form Property Damage Endorsement	111-113
Q.	Product Recall or Sistership Exclusion	113-114
R.	Personal and Advertising Injury Exclusion from Coverage A	114-115
IV.	Conditions	115
A.	Notice and Cooperation	115-118
1.	Mere Delay Insufficient to Establish Prejudice Per se	118-121
B.	Separation of Insureds	121
V.	Appendix	
A.	1973 CGL Policy	
B.	1986 CGL Policy	
C.	1998 CGL Policy	
D.	2001 CGL Policy	

I. INTRODUCTION

The "Commercial General Liability" ("CGL") policy offered by the Insurance Services Office ("ISO") forms the backbone of liability protection for business owners. It promises to defend and indemnify business owners from liability for accidental bodily injury and property damage to third parties, with certain exclusions.

Liability insurance has long been the principal vehicle through which businesses seek shelter from the "slings and arrows of outrageous fortune."¹ Before 1940, businesses could obtain liability insurance only through a maze of business-specific policies, e.g., Owners', Landlords' and Tenants' Liability policies, Manufacturers' and Contractors' Liability policies, Owners' and Contractors' Protective Liability policies, Elevator policies, and Contracts policies.² Each policy covered specific hazards and locations and excluded all others. Single line businesses needed to purchase multiple policies each time they acquired a new location or changed their location. Multi-line businesses were forced to purchase multiple policies to cover their various endeavors. Liability insurance coverage was cumbersome.

The insurance industry prepared the first standard general liability insurance policy in 1940, which combined certain historically distinct forms of coverage in a single policy and provided automatic coverage for new locations and business activities. This first standard form has been revised many times since 1940, most significantly in 1973 and 1985, and most recently in 2001.³ For the last twenty-six years the most commonly used contracts have been a series of standard forms drafted by the ISO.⁴ The ISO is a national rating and service organization to which a substantial number of the leading property and casualty insurers subscribe.⁵ Some insurers modify the ISO CGL forms, but generally the industry

¹ William Shakespeare, *The Tragedy of Hamlet*, Act III, sc. 1.

² For a short history of the development of standard insurance policies, from which this discussion was taken, see George H. Tinker, *Comprehensive General Liability Insurance - - Perspective and Overview*, Fed. of Ins. Couns. Q., Vol. 25, No. 3, at 217, 220 (Spring 1975).

³ Copies of the 1973, 1986, 1998, and 2001 versions of the CGL Policy are included in the Appendix to this Guide.

⁴ The insurance industry has long used rating bureaus to draft standard policies. The ISO was formed in 1971. Previously, the Insurance Rating Board, the National Bureau of Casualty Underwriters, and the National Bureau of Casualty and Surety Underwriters developed standard liability policies.

⁵ In *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 772, 113 S. Ct. 2891 (1993), the Court explained the purpose of ISO:

ISO develops standard policy forms and files or lodges them with each State's insurance regulators; most CGL insurance written in the United States is written on these forms. . . . For each of its standard policy forms, ISO also supplies actuarial and rating information: it collects, aggregates,

follows the current standard forms. The ISO's 1973 edition, known as the Comprehensive General Liability Policy, formed the foundation of the available coverage for the next 13 years. In 1976, the ISO published the Broad Form Comprehensive Liability Endorsement (hereinafter "BFCGL"), which included twelve extensions of coverage that previously had to be purchased separately.⁶ In 1986, the ISO introduced a new form known as the Commercial General Liability Policy.⁷

The "Comprehensive General Liability" policy began with a broad grant of coverage followed by exclusions that restricted the coverage. Three documents comprised the basic policy: the declaration page;⁸ the "jacket," which contained the definitions and provisions common to all aspects of the policy; and the CGL "coverage part," which contained the insuring agreement, the exclusions, the "persons insured" section, the limits of liability and the policy territory. Other coverages could be added by endorsement, such as the broad form comprehensive liability endorsement and the products hazard endorsement.

The 1986 ISO policy, the "Commercial General Liability" policy, is the most widely used general liability policy form today. The Commercial General Liability Policy rendered the traditional BFCGL obsolete by combining in one policy most of the coverages previously created by attaching the BFCGL Endorsement to the 1973 Comprehensive General Liability Policy.⁹ Further, it contains significant changes in the trigger of coverage provision and in the pollution exclusion. The policy is offered with either an "occurrence" or a "claims-made" trigger.

The 1986 ISO "occurrence" form consists of five parts. Section I contains the coverages: Coverage A (bodily injury and property damage liability), Coverage B (personal

interprets, and distributes data on the premiums charged, claims filed and paid, and the defense costs expended with respect to each form and on the basis of these data it predicts future loss trends and calculates advisory premium rates. Most ISO members cannot afford to continue to use [an ISO] form if ISO withdraws these support services.

⁶ The coverage included broad form property damage coverage, contractual liability coverage, personal injury and advertising injury liability coverage, medical payments coverage, host liquor law liability coverage, fire legal liability coverage, incidental medical malpractice liability coverage, non-owned watercraft liability coverage, limited worldwide liability coverage, employees as insureds coverage, extended bodily injury coverage, and automatic coverage of newly acquired organizations.

⁷ In 1986, ISO introduced a major revision of the CGL policy. Several minor revisions have been issued since that date. The 1986 and subsequent versions are collectively referred to hereinafter as the "1986 ISO CGL" except where indicated.

⁸ The declaration page may be a typewritten document or a preprinted form with typewritten entries. It usually contains the identity of the "named insured," the policy number, the types of coverage selected, the amount of the deductible, and the forms that are included in the policy. A policy may contain one declaration page for all coverage or separate pages for separate coverages, such as liability, property, inland marine, and crime coverage.

⁹ A Broad Form coverage is available.

and advertising injury liability), and Coverage C (medical payments). Section II describes "Who is an Insured." Section III concerns the "Limits of Insurance." Section IV contains the conditions. Section V contains the definitions.

The 1986 ISO "claims-made" form consists of six parts. The first four sections are the same as in the "occurrence" form. Section V of the claims-made policy concerns the "Extended Reporting Period," and Section VI contains the definitions.

Both formats of the 1986 ISO policy are otherwise the same. Unlike the 1973 ISO policy, there is no jacket.

The purpose of this paper is to provide an introduction to the 1973 and the 1986 ISO policies, references to Maryland case law and to secondary sources concerning major provisions. The focus is on coverage for accidental bodily injury and property damage. This coverage is the primary focus of the 1973 ISO form and is contained in Coverage Part A of the 1986 form. The Personal and Advertising Injury Liability Coverage Part B, Medical Payments Part C, and Supplementary Payments provisions of the 1986 ISO form are beyond the scope of this paper. We will begin by examining the insuring agreement, move to exclusions, and conclude with the conditions.

II. INSURING AGREEMENT AND DEFINITIONS

The CGL, like most liability policies, starts with a broad grant of coverage in the insuring agreement and restricts coverage with exclusions. The insuring agreement focuses the coverage on accidental bodily injury and property damage that occurs during the policy period. It also contains provisions concerning the duty to defend and the duty to indemnify.

The insuring agreement of the 1973 ISO policy¹⁰ reads, in pertinent part:

The Company will pay on behalf of the **Insured** all sums which the **Insured** shall become legally obligated to pay as damages because of

A. **bodily injury** or

B. **property damage**

to which this insurance applies, caused by an **occurrence**, and the Company shall have the right and duty to defend any suit against the **Insured** seeking damages on account of such **bodily injury** or **property damage** . . . and may make such investigation and settlement of any claim or suit as it deems expedient . . . (emphasis in original).¹¹

¹⁰ For a complete copy of the 1973 version of the CGL policy, see Appendix A.

¹¹ In the 1973 ISO policy, terms which are defined appear in bold face in the policy. In the 1986 ISO policy, defined terms appear in quotation marks.

The 1986 ISO policy¹² insuring agreement reads, in pertinent part:

- 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 the duty to defend any "suit" seeking those damages. We may at our discretion investigate any "occurrence" and settle any claim or "suit" that may result. . . .
- b. This insurance applies to "bodily injury" and "property damage" only if:
 - (2) The "bodily injury" or "property damage" occurs during the policy period.

The 2001 version¹³ of ISO's CGL incorporated the "known loss" provisions of the 1999 "known loss" endorsement CG 0057. It provides, in pertinent part:

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

¹² For a complete copy of the 1986 version of the CGL policy, see Appendix B.

¹³ For a complete copy of the 2001 version of the CGL policy, see Appendix D.

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.

These insuring agreements obligate the insurer to investigate any claim or suit, to defend the insured, and to indemnify the insured for damages. The duty to indemnify raises numerous issues. Is an event a covered accidental "occurrence" or an excluded intentional injury? What are the limits of "property damage" and "bodily injury"? Did the "property damage" or "bodily injury" take place during the policy period and "trigger" the policy? When is a claims-made policy triggered? Does the term "damages" include equitable relief? Who is an insured? How do you distinguish the number of occurrences? As mentioned above, the duty to defend is a separate duty from the duty to indemnify. Where the costs of litigation exceed the costs of indemnity, the duty to defend can be more valuable than the duty to indemnify. Thus, the duty to defend is sometimes referred to as "litigation insurance."¹⁴

A. DEFINITION OF OCCURRENCE

The policy definition of "occurrence" has changed over the years.¹⁵ In the 1973 ISO CGL policy, "occurrence" is defined as follows:

Occurrence means an accident, including continuous or repeated exposure to conditions, which results in **bodily injury** or **property damage** neither expected nor intended from the standpoint of the **Insured**.

In the 1986 ISO CGL policy, "occurrence" is defined as follows:

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

¹⁴ See *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 347 A.2d 842 (1975) (observing that although the policy is referred to as liability insurance, it is litigation insurance as well, protecting the insured from the expense of defending suits brought against it). For an excellent discussion of the duty to defend under Maryland law, see Andrew Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. Balt. L. Rev. 1 (Fall 1988).

¹⁵ Until 1966, most liability policies provided coverage for bodily injury or property damage "caused by an accident." See, e.g., *State Farm Mut. Auto Ins. Co. v. Treas.*, 254 Md. 615, 255 A.2d 296 (1969); *Glens Falls Ins. Co. v. Am. Oil Co.*, 254 Md. 120, 254 A.2d 658 (1969); *Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc.*, 248 Md. 148, 235 A.2d 556 (1967); *Haynes v. Am. Cas. Co.*, 228 Md. 394, 179 A.2d 900 (1962). This was changed during the 1966 revisions to the standard CGL to "caused by an occurrence." "Occurrence" was defined in the 1966 CGL policy as "an accident, including injurious exposure to conditions. . . ." See, e.g., *Am. Home Assur. v. Osbourn*, 47 Md. App. 73, 80, 422 A.2d 8, 13 (1980); see generally 7A J. Appleman, *Insurance Law and Practice*, § 4492 (Berdal ed. 1979 & 2003 Cum. Supp.); see also Tinker, *supra* note 2, at 254-56. In 1972, the definition was changed to broaden coverage to the definition used in the 1973 CGL. Appleman, *supra*.

The standard policy's insuring agreement was amended in 1966 to respond to "occurrences" rather than "accidents." "Accident" means:

A happening; an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected.¹⁶

This broadened definition was adopted in response to court decisions which required accidents to be sudden in order to fall within coverage.¹⁷ Bodily injury and property damage usually (but not always) result immediately upon the happening of an accident (e.g., auto collisions or slip and falls). However, not all accidents are sudden; some occur over a period of time.¹⁸ Hence, the phrase "continuous and repeated exposure to conditions" was added to the definition of "occurrence" during the 1973 revisions to clarify that the injury or damage need not happen abruptly.¹⁹

Whether an injury is accidental appears to be a simple concept, but it has proven difficult to apply. In *Sheets v. Brethren Mut.*,²⁰ the Court of Appeals of Maryland considered the term "accident" in the context of a farm owner's general liability policy.²¹ The Court rejected an objective foreseeability test for determining whether an event was accidental, holding that:

[A]n act of negligence constitutes an "accident" under a liability insurance policy when the resulting damage was "an event that takes place without [the insured's] foresight or expectation." *Harleysville v. Harris & Brooks*, 248 Md. at 154, 235 A.2d at 559 (citation omitted). In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an "accident"

¹⁶ Webster's Twentieth Century Dictionary. See *Am. Home Assur. v. Osbourn*, 47 Md. App. 73, 80, 422 A.2d 8 (1980); *Ed. Winkler & Son, Inc. v. Ohio Cas. Ins. Co.*, 51 Md. App. 190, 194, 441 A.2d 1129 (1982).

¹⁷ See *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 408 (Mich. 1991) (describing the history of the provision); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573-75 (Wis. 1990) (same).

¹⁸ See, e.g., *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84, 86 (D. Md. 1986) (construction defects); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 389-90 (D. Md. 1978) (air pollution); *Harford Co. v. Harford Mut. Ins. Co.*, 327 Md. 418, 435-36, 610 A.2d 286, 294-95 (1992) (air pollution); *Lloyd E. Mitchell, Inc. v. Md. Cas. Co.*, 324 Md. 44, 58-60, 595 A.2d 469, 477-78 (1991) (asbestos exposure).

¹⁹ *Tinker*, *supra* note 2, at 256-57. *Tinker* states that "the decision . . . to take the suddenness out of accident and to incorporate coverage for continuous and repeated exposure within the standard provisions" began with the 1966 revision. The phrase "injurious exposure to conditions" was used. *Id.* at 256.

²⁰ 342 Md. 634, 679 A.2d 540 (1996).

²¹ *Id.* See Gregory T. Lawrence, *Sheets v. Brethren Mutual: Maryland's High Court Misconstrues CGL to Cover Excluded Economic Loss Caused by Negligent Misrepresentation*, 27 U. Balt. L. Rev. 189 (Fall 1997); H. Brent Brennenstuhl, Annotation, *Negligent Misrepresentation As "Accident" or "Occurrence" Warranting Insurance Coverage*, 58 A.L.R. 5th 483 (1998).

under a general liability policy.²²

In reaching this decision, the Court specifically disapproved of the decision in *Ed. Winkler & Son, Inc. v. Ohio Cas. Ins. Co.*,²³ which adopted an objective test for "accident," and *I.A. Constr. Corp. v. T & T Surveying*,²⁴ which followed *Ed. Winkler & Son, Inc.*²⁵

Sheets makes clear that the accidental nature of an event is judged by a subjective standard, i.e., the accident may have been foreseeable from an objective standard, but must not have been foreseen by the insured.²⁶ The mere objective foreseeability of an accident does not make an event intentional. Foreseeability is also an element of negligence. Thus, if objectively foreseeable injury is excluded, the liability policy loses its purpose.

1. Negligent Misrepresentation

The Court of Appeals held, in *Sheets, supra*, that an allegation of negligent misrepresentation may allege an accident and, hence, an "occurrence" within the meaning of a liability policy.²⁷ However, there may be other obstacles to coverage.²⁸

²² 342 Md. at 652, 679 A.2d at 548.

²³ 51 Md. App. 190, 441 A.2d 1129 (1982).

²⁴ 822 F. Supp. 1213 (D. Md. 1993).

²⁵ *Sheets*, 324 Md. at 654; 679 A.2d at 550. In *Ed. Winkler*, which involved an action for slander, malicious prosecution and false arrest, the plaintiff alleged that she was "wrongfully accused by [the insured jewelry store owner] of stealing a \$600.00 diamond and substituting for it a \$20.00 zircon." *Ed. Winkler*, 51 Md. App. at 191. The supposed zircon turned out to be a diamond and the charges were dropped. The Court found that the insured's acts "were committed consciously and deliberately, without the unexpected intervention by any third force; and. . . the likely (and actual) effect of those acts was well within the insured's foresight and anticipation. Hence, the [Complaint] did not allege an accident or an occurrence." *Id.* at 195. Although the Court was interpreting a contract, it applied a traditional tort test to determine whether an event is an accident or intentional, i.e., "natural and probable consequences." The factual allegations in *Ed. Winkler* made the alleged personal injury much more than merely foreseeable. There, the tort plaintiff was pursuing actions for two intentional torts, false arrest and malicious prosecution. The plaintiff also was pursuing an action for slander *per se*, i.e., an accusation of theft. Hence, the injurious character of the alleged injury was self-evident. See *Metromedia Inc. v. Hillman*, 285 Md. 161, 163-64, 400 A.2d 1117, 1123 (1979) (where words themselves impute defamatory character, no extrinsic evidence as to defendant's knowledge of or reckless disregard as to their falsehood is required); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (slander may be either an intentional or negligent tort). In *Ed. Winkler*, the injury to the plaintiff was either purposeful or self-evident.

²⁶ *Sheets*, 342 Md. at 651-52, 679 A.2d at 548-49.

²⁷ *Id.* at 658, 679 A.2d 540 at 551.

²⁸ See generally Gregory T. Lawrence, *Sheets v. Brethren Mutual: Maryland's High Court Misconstrues CGL to Cover Excluded Economic Loss Caused by Negligent Misrepresentation*, 27 U. Balt. L. Rev. 189 (Fall 1997); H. Brent Brennenstuhl, Annotation, *Negligent Misrepresentation As "Accident" or "Occurrence" Warranting Insurance Coverage*, 58 A.L.R. 5th 483 (1998).

2. Defective Workmanship

Construction cases frequently cause considerable controversy concerning whether faulty or defective work constitutes accidental or expected property damage. The policy requires that the loss be fortuitous and not the expected result of a breach of contract. The definition of "occurrence" requires an accident. An "accident" is a negligent act that causes unforeseen or unexpected damage.

Courts around the country and courts purporting to apply Maryland law reach different results in determining whether defective work constitutes an "occurrence." Lawsuits usually allege breach of contract and breach of warranty as well as negligence, so some courts reason that when a developer or contractor constructs a poor-quality building in breach of its contract, it is not an accident and not an "occurrence." The analysis is based on the idea that when a building is created, it is created with all of its warts and defects – no event has happened which results in damage to the building that may be described as an "occurrence." These courts reason that defective construction or damage to property within the scope of what the insured contracted to build is not an "occurrence." Courts applying this analysis seem more likely to apply it when the loss is to the insured's own work. Other courts take a different approach, reasoning that where the "property damage" is neither expected nor intended by the insured, it is an "occurrence." Courts seem more likely to reach this result when there is damage to property other than that of the insured. Many of the courts addressing this issue analyze the substance of the allegations and reach their conclusions regardless of the form of the cause of action.

Several insurance coverage decisions applying Maryland law have analyzed the term "expected" in the context of construction contracts.²⁹

In *Lerner Corp. v. Assur. Co. of Am.*,³⁰ the Court analyzed when damages are "expected" under the terms of a CGL policy. The plaintiffs were a developer and construction manager who built and sold a building to the United States. The contract of sale between the plaintiffs and the United States (General Services Administration) ("GSA") provided that acceptance of the work performed under the contract was deemed to be final except as to latent defects. After the building was sold, the GSA discovered latent defects in the building's exterior façade. The insureds repaired the defects and sued their CGL carrier for coverage.

²⁹ See *Lord's Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*, No. 98-1639, 1999 WL 710342 (4th Cir. Sept. 13, 1999); *Mut. Benefit Group v. Wise M. Bolt Co., Inc.*, 227 F. Supp. 2d 469 (D. Md. 2002); *Harbor Court Assocs. v. Kiewit Constr. Co.*, 6 F. Supp. 2d 449 (D. Md. 1998); *U.S. Fire Ins. Co. v. Milton Co.*, 35 F. Supp. 2d 83 (D. D.C. 1998); *Lerner Corp. v. Assur. Co. of Am.*, 120 Md. App. 525, 707 A.2d 906 (1998).

³⁰ 120 Md. App. 525, 707 A.2d 906 (1998).

The Court held that there was no "occurrence" under the terms of the policy.³¹ The Court explained that an accident occurs when a negligent act causes damage that is "unforeseen or unexpected" by the insured.³² The Court reasoned that more than the mere assertion of a negligence claim is needed to allege an "accident," that is, an event that is not within the insured's foresight or expectation.³³ The developer's obligation to repair the defects in the building was not unexpected or unforeseen because it was contemplated by the contract of sale.³⁴ The Court explained:

If the damages suffered related to the satisfaction of the contractual bargain, it follows that they are not unforeseen. In other words . . . it should not be unexpected and unforeseen that, if the building delivered does not meet the contract requirements of the sale, the purchaser will be entitled to correction of the defect. This, we believe, would be the expectation and understanding of the reasonably prudent lay purchaser of a CGL policy.³⁵

Hence, where an insured building contractor fails to fulfill his contract for financial reasons or because of poor workmanship, rather than reasons beyond his foresight and expectation, such an event may not be an accident. Note that *Lerner Corp.* may be limited in several ways. First, there was no breach of contract. The insureds repaired their own defective work. Second, the defect in the façade did not cause any consequential damage to the work of third parties.

The reasoning in *Lerner Corp.* was extended in *Harbor Court Assocs. v. Kiewit Constr. Co.*³⁶ There, the owner and developer of the Harbor Court complex in the Baltimore Inner Harbor sued the general contractor and two subcontractors, alleging construction defects. Those subcontractors, who were insureds under the same insurance policies, filed a third-party action against their insurers. The Court held that in the context of a construction project the word "expected" refers to damages for which an insured would be responsible in any event, irrespective of fault, because of its contractual obligations to properly construct its product.³⁷

³¹ *Id.* at 537-38, 707 A.2d at 912.

³² *Id.* at 536-37, 707 A.2d at 912.

³³ *Id.* at 536, 707 A.2d at 911.

³⁴ *Id.*, 707 A.2d at 912.

³⁵ *Id.* at 536-37, 707 A.2d at 912.

³⁶ 6 F. Supp. 2d 449 (D. Md. 1998). The Court analyzed an earlier policy which defined "occurrence" as "an accident or happening or event or a continuous or repeated exposure to conditions which results, during the policy period, in bodily injury or property damage neither *expected* nor intended from the standpoint of the insured." (emphasis added). Although the term "expected" is analyzed in a different section of the policy, whether an event is "expected" is intrinsic to the definition of "accident."

³⁷ *Id.* at 456-57.

*U.S. Fire Ins. Co. v. Milton Co.*³⁸ involved a declaratory judgment action by insurers of a developer and a builder of the Bentley Place Condominium Project ("the Project") after an award for the plaintiffs in the underlying action. There, the Court denied cross-motions for summary judgment, reasoning that "there is no 'occurrence' under a comprehensive general liability insurance policy where a contractor's use of defective materials and substandard workmanship results in economic losses that would normally be recoverable in a breach of contract action."³⁹ The Court suggested that an award of damages in the underlying litigation for the replacement of inferior or omitted materials and the correction of substandard workmanship is not the result of an occurrence, nor were any consequential damages awarded to compensate the unit owners for losses as a result of the use of inferior material and workmanship.⁴⁰ On the other hand, consequential damages that were not within the contemplation of the parties at the time of contracting (hence normally not recoverable in a contract action by the Council) would be considered the result of an occurrence.⁴¹ Other damages, such as damage to roofing shingles and resultant water damage to the interior of the units, caused by a subcontractor's negligence, "may have been both unforeseeable (as a matter of contract law) and actually unforeseen (under the Sheets analysis)."⁴²

In *Lord's Landing Village Condo. Council of Unit Owners v. Continental Ins. Co.*,⁴³ the Fourth Circuit extended the rule to bar coverage for defective work by the insured condominium developer's subcontractors. There, the Condominium Association sued the developer for faulty workmanship, including, among other issues, the failure to prime wood before painting, which caused the wood to rot. The Court reasoned that the breach of a duty to perform construction work properly is not an "accident" under the meaning of a CGL policy and, therefore, the insurer owed the developer no coverage.⁴⁴

In *Mut. Benefit Group v. Wise M. Bolt Co., Inc.*,⁴⁵ an insurer sought a declaratory judgment that it had no obligation to defend or indemnify a contractor sued by homeowners alleging negligent construction and breach of contract. The U.S. District Court for the District of Maryland held that the insurer had a duty to defend, concluding

³⁸ 35 F. Supp. 2d 83 (D. D.C. 1998) (applying Maryland law).

³⁹ *Id.* at 86.

⁴⁰ *Id.* at 87.

⁴¹ *Id.*

⁴² *Id.*

⁴³ No. 98-1639, 1999 WL 710342 (4th Cir. Sept. 13, 1999).

⁴⁴ 1999 WL 710342 at *3.

⁴⁵ 227 F. Supp. 2d 469 (D. Md. 2002).

that the homeowners had alleged property damage caused by an occurrence. The Court noted, citing *Kiewit and Lerner Corp., supra*, that in cases dealing with construction damage the “critical inquiry in determining whether alleged damages were ‘expected’ by the insured is whether the damages relate to the satisfaction of the insured’s contractual obligations to construct its product or whether the damages relate to something other than the insured’s product.”⁴⁶ The Court noted that the homeowners had alleged in their complaint not only damage to the house built by the insured, but also damage to other property, including furnishings and food in their pantry, as well as loss of use of the house.⁴⁷ Damage to other property and loss of use damages did not fall within those for which an insurer would be liable, irrespective of fault, based upon its contractual duty to properly construct its product.⁴⁸ Therefore, because the complaint contained allegations potentially covered by the policy, there was a duty to defend.⁴⁹

Two earlier cases decided by the U.S. District Court for the District of Maryland, *Reliance v. Mogavero*⁵⁰ and *I.A. Constr. Corp. v. T & T Surveying, Inc.*,⁵¹ state that the natural and probable consequences of poor workmanship do not constitute an “occurrence.”⁵²

In *Reliance Ins. Co. v. Mogavero*,⁵³ the insured general contractor’s faulty workmanship had to be repaired or replaced. The allegedly defective work was limited to the work performed by the named insured. The Court broadly stated that the term “‘occurrence’ [the 1973 ISO policy definition] does not include the normal, expected consequences of poor workmanship.”⁵⁴ In *I.A. Constr. Corp. v. T & T Surveying*,⁵⁵ the insured surveyor’s error caused another contractor to begin construction of a MARC train platform at the Camden Yards station at the wrong elevation. Part of the platform had to be demolished and rebuilt at the proper site. The Court held that there was no “accident” and hence no “occurrence,” noting that “accident” requires “an undesigned sudden and unexpected event” not the “natural and ordinary consequences of a negligent act.”⁵⁶

⁴⁶ *Id.* at 475-76.

⁴⁷ *Id.*

⁴⁸ *Id.* at 476.

⁴⁹ *Id.* at 480.

⁵⁰ 640 F. Supp. 84 (D. Md. 1986).

⁵¹ 822 F. Supp. 1213 (D. Md. 1993).

⁵² *Reliance*, 640 F. Supp. at 86; *I.A. Constr. Corp.*, 822 F. Supp. at 1215.

⁵³ 640 F. Supp. 84 (D. Md. 1986).

⁵⁴ *Id.* at 86.

⁵⁵ 822 F. Supp. 1213 (D. Md. 1993).

⁵⁶ *Id.* at 1217.

J. Appleman, commenting on similar cases, said:

Conduct or behavior which reasonably can be expected to result in injury or damages has been held not to be protected under a liability policy. These cases hold that neither property damage nor personal injury sustained by the method of performing something contemplated by the parties will bring the result within the policy coverage. This result seems more reasonable when the damage is a usual and to be anticipated consequence from the ordinary method of carrying on the insured's business.⁵⁷

In *Sheets v. Brethren Mut. Ins. Co.*,⁵⁸ the Court of Appeals of Maryland specifically disapproved the analysis in *I.A. Constr. Corp. v. T & T Surveying, Inc.*, but did not comment on *Reliance Ins. Co. v. Mogavero*.⁵⁹

In *Mogavero*, there was no damage to property of anyone other than the insured; it simply performed its own work poorly. In *I.A. Constr. Corp.*, however, in dicta, the Court said that the poor surveying by the insured led to property damage to the work of another. Therefore, the narrow holding of *Mogavero* may still be valid.

The essence of the *Lerner Corp., Harbor Court Assocs., Lord's Landing* and *U.S. Fire Ins.* decisions is that, regardless of the form of the cause of action, the damages that result from the insured's poor workmanship are not unforeseen from the insured's perspective.⁶⁰ A builder who constructs a defective structure knows that the

⁵⁷ Appleman, *supra* note 15, at § 4492.02. Insurers usually do not intend to cover design errors or professional negligence of those in the construction industry. Therefore, they usually attach the "Engineers, Architects, or Surveyors Professional Liability Endorsement" to the CGL form. In *I.A. Constr. Corp., supra*, the Court did not reach this issue, but indicated in dicta that it would not apply. 822 F. Supp. at 1215 n.36.

⁵⁸ 342 Md. 634, 679 A.2d 540 (1996).

⁵⁹ The Court stated:

At least one other case applying Maryland law has also relied on *Ed. Winkler & Son v. Ohio Cas. Ins.*, 51 Md. App. 190, 441 A.2d 1129 (1982), for the proposition that an "accident" is not "the natural and ordinary consequences of a negligent act" *Ed. Winkler*, 51 Md. App. at 195, 441 A.2d at 1132. See *I.A. Constr. Corp. v. T & T Surveying, Inc.*, 822 F. Supp. 1213, 1215 (D. Md. 1993) holding that a surveying error is not an "occurrence" under Maryland law.

342 Md. at 550 n.4, 679 A.2d at 654 n.4.

⁶⁰ In *Harbor Court Assocs. v. Kiewit Const. Co.*, Judge Garbis reasoned:

It is immaterial that the Consolidated Amended Complaint asserts claims against Kiewit-General, Smoot-Masonry, and Owen-Steel on theories of negligence and indemnification, in addition to breach of contract. The Lerner Court stated that "we hold that the damages

owner/purchaser will suffer damages.⁶¹ Nonetheless, these cases must be analyzed carefully and individually. *Lerner Corp.*, the sole Maryland appellate court decision, is the least expansive in its holding. Moreover, the Court of Appeals has not yet spoken. The Court may well give a broader interpretation to *Sheets* than *Lerner Corp.* and the federal courts have done.

It is, however, fair to say that generally it will not be considered an "accident" when a builder does not fulfill its contract. Even those courts which do not follow the line of reasoning that "a breach of contract is not an occurrence" may still conclude that a builder's defective work does not constitute an "occurrence." In such cases, the analysis should be whether the resultant property damage was subjectively intended or "substantially certain" to occur from the insured's perspective. If so, there is no "accident" because the property damage was "expected and intended."

3. Preventive Measures -- No Anticipatory Accidents

Preventive measures taken by the insured to avert an "occurrence" are not covered under the CGL policy. In *W.M. Schlosser v. INA*⁶² a general contractor backfilled an excavation site when he was faced with the imminent collapse of the site. But for these emergency measures, adjacent structures owned by others might have been damaged. The general contractor looked to his liability insurer to cover his costs of backfilling and re-excavating the site. There, the Court held that "no claims were made by others as a result of any personal injury or property damage."⁶³ Moreover, there was no "occurrence" within the meaning of the policy that caused damage to the person or

claimed, *regardless of the form of the cause of action* that GSA might have maintained against the Insureds to repair the faulty construction of the facade, were not covered by the CGL policies issued to the Insureds and that the Insurers were not obligated to indemnify the Insureds for the costs incurred related to the repair of the building's damaged facade." *Lerner*, 707 A.2d at 909 (emphasis added). While the issue is not presently before the Court, this Court has previously held that when the relationship between parties is purely contractual and the heart of a plaintiff's complaint is that a defendant did not adequately perform its contract with plaintiff, no tort duties independent of the contractual duties between the parties arise. *Martin Marietta Corp. v. INTELSAT*, 763 F. Supp. 1327,1331-32 (D. Md.1991), *aff'd in part and rev'd in part*, 991 F.2d 94 (4th Cir.1992).

6 F. Supp. 2d at 456 n.16.

⁶¹ This is not the universal view. *See, e.g.,* Neeson and Meyer, *The Comprehensive General Liability Policy and its Business Risk Exclusions: An Overview*, Reference Handbook on the Comprehensive General Liability Policy (TIPS 1995) at 83-88; *see generally* 4 P. L. Bruner & P. J. O'Connor, *Construction Law* § 11:37 (2003) ("Exclusions Affecting Coverage for Defective Work: Concept of 'Business Risk'").

⁶² 325 Md. 301, 600 A.2d 836 (1992).

⁶³ *Id.* at 306, 600 A.2d at 838.

property of others."⁶⁴ Hence, imminent property damage or bodily injury as a result of a *threatened* accident does not constitute an occurrence unless and until it actually takes place.⁶⁵

The Court of Special Appeals reached a seemingly discordant result in *Aetna Ins. Co. v. Aaron*⁶⁶ where it held that the liability portion of a homeowner's policy applies to the cost of preventative measures undertaken on the insured's property in order to avoid damage to the property of a third party.⁶⁷ Remediation expenses that reflect the cost of repairs for damage to the insured's property which are unrelated to preventative measures are not covered.⁶⁸

B. DEFINITION OF BODILY INJURY

The CGL is triggered only where someone has sustained bodily injury or property damage. The 1973 ISO policy defined "bodily injury" as:

[B]odily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

The 1986 ISO policy defined "bodily injury" as:

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

The 1986 ISO policy was not intended to effect any significant change in the definition of "bodily injury."

Whether the plaintiff has sustained a "bodily injury" is readily apparent in most cases. A burn or a scar is visible to the eye. A strained back or a fractured vertebrae may be diagnosed by a physician. Some injuries, however, are not so clearly "bodily injuries." For example, what about a claim for pain, suffering, and mental anguish unaccompanied by physical injury? The Court of Special Appeals of Maryland held that these incorporeal injuries were "bodily injuries."⁶⁹ This seems to go against the national trend and may be

⁶⁴ *Id.* at 306-07, 600 A.2d at 838-39.

⁶⁵ *Id.* See also *Bausch & Lomb, Inc. v. Utica Mut. Ins. Co.*, 330 Md. 758, 625 A.2d 1021 (1993).

⁶⁶ 112 Md. App. 472, 685 A.2d 858 (1996).

⁶⁷ *Id.* at 485, 685 A.2d at 864-65.

⁶⁸ *Id.*

⁶⁹ See *Loewenthal v. Security Ins. Co.*, 50 Md. App. 112, 123, 436 A.2d 493, 499 (1981).

subject to attack.⁷⁰ Loss of consortium, on the other hand, is not a separate "bodily injury," and hence, does not result in a separate "occurrence" within the meaning of the policy.⁷¹ Similarly, loss of services is not a separate bodily injury.⁷²

Further, the complaint must seek damages because of "bodily injury." In *N. Ins. Co. of N.Y. v. Baltimore Business Communications, Inc.*,⁷³ an insurer sought a declaratory judgment that it was not obligated to provide coverage to the insured, a defendant in a products liability class action in which the plaintiffs sought damages associated with the use of cellular telephones which allegedly emitted radiation, thereby exposing users to injuries. The complaint alleged that plaintiffs suffered biological effects of radio frequency radiation and the increased health risks arising therefrom as a result of their use

⁷⁰ See, e.g., *Travelers Indem. Co. of Rhode Island v. Holloway*, 17 F.3d 113 (5th Cir. 1994) (in an action arising out of the insured's plot to kill the mother of a child who was competing against the insured's daughter for a junior high school cheerleading position, the insured had no coverage because intentional infliction of emotional distress injuries are not "bodily injury"). In California, emotional distress arising out of a contractual relationship is not "bodily injury" and does not trigger the duty to defend. See also *Stein-Brief Group, Inc. v. Home Indem. Co.*, 76 Cal. Rptr. 2d 3 (Cal. App. 1998). But see *Am. States Ins. Co. v. Canyon Creek*, 786 F. Supp. 821 (N.D. Cal. 1991) (potential for coverage where invasion of right of private occupancy arose from breach of contract); *Vandenberg v. The Superior Court of Sacramento County*, 982 P.2d 229 (Cal. 1999) (CGL policy that provides coverage for sums the insured is "legally obligated to pay as damages" does not necessarily preclude coverage for losses pleaded as contractual damages); *Ritchie v. Anchor Cas. Co.*, 286 P.2d 1000 (Cal. App. 1955) (insurer had duty to defend insured in lawsuit for breach of tort duty arising out of contract). In *Waller v. Truck Ins. Exchange, Inc.*, 900 P.2d 619 (Cal. 1995), the Supreme Court of California ruled that emotional distress claims arising from contractual relations or economic loss only were not covered under a CGL policy. The Court reasoned that the underlying lawsuit was a business dispute and the alleged torts were business and contract transgressions. The Court held that the acts complained of were not occurrences. The Court stated:

These [CGL] policies were never intended to cover emotional distress damages that flow from an uncovered "occurrence," and the parties could not reasonably have expected that coverage would be expanded merely because a claim of emotional or physical distress is alleged as a result of the economic loss. . . . All allegations in the [shareholder's] complaint were related to [his] asserted economic loss as a . . . shareholder, and . . . shareholder disputes are not covered by [the] policy."

900 P.2d at 630. See generally J. Brady and S. Danskin, *Emotional Distress: Minor Issue Muddies The Duty To Defend*, 57 Def. Couns. J. 208 (1990).

⁷¹ See, e.g., *Valliere v. Allstate Ins. Co.*, 324 Md. 139, 143, 596 A.2d 636, 638 (1991); *Daley v. U.S.A.A.*, 312 Md. 550, 553-60, 541 A.2d 632, 633-36 (1988); *Travelers Indem. Co. v. Cornelsen*, 272 Md. 48, 51, 321 A.2d 149, 150 (1974).

⁷² *Nationwide Mut. v. Scherr*, 101 Md. App. 690, 647 A.2d 1297 (1994). In *Reames v. State Farm Fire and Cas. Ins. Co.*, 111 Md. App. 546, 683 A.2d 179 (1996), the tort complaint contained a number of counts, none of which specifically alleged damages as a result of "bodily injury." The insured sought coverage claiming that the events giving rise to the complaint resulted in "bodily injury" and there were some factual allegations from which "bodily injury" could be inferred in the complaint. The Court held that unasserted claims of "bodily injury" do not trigger coverage. *Id.* at 560-61, 683 A.2d at 186. Even where there is extrinsic evidence and factual allegations in the complaint, there is no duty to defend unless the complaint alleges a claim for "bodily injury." *Id.* at 562-63, 683 A.2d at 187.

⁷³ 68 Fed. Appx. 414, 2003 WL 21404703 (4th Cir. June 19, 2003).

of wireless handheld portable telephones sold and/or distributed by the [insureds].⁷⁴ However, the relief sought by the plaintiffs was “compensatory damages including but not limited to amounts necessary to purchase a [cell phone] headset . . . for each class member.”⁷⁵ The insurer contended that the plaintiffs did not seek damages for bodily injuries, but rather, the cost of the headsets to ensure that they would not be injured.⁷⁶

The Court disagreed, noting that “in alleging that persons using cell phones without headsets suffer from the radiation emitted by such phones, the complaint alleges a ‘bodily injury.’”⁷⁷ It concluded that the allegations of the complaint were sufficient to claim “damages because of” bodily injury.⁷⁸ It noted that on the face of the complaint, the plaintiffs were seeking “unspecified compensatory damages flowing from their bodily injuries, i.e., harm suffered from radiation.”⁷⁹ Thus, the insured could, therefore, potentially be liable to plaintiffs for “any and all compensatory damages recoverable under Maryland law, including damages for already existing bodily injuries.”⁸⁰ The Court concluded, therefore, that unless admissible extrinsic evidence negated the allegations in the complaint, the insurer owed a duty of defense to the insured.⁸¹

Whether "bodily injury" has occurred has been a particular problem in latent disease cases and is discussed in the "Trigger of Coverage" section, *infra*.

⁷⁴ *Id.* at 419, 2003 WL 21504703 at *1.

⁷⁵ *Id.* at 419, 2003 WL 21504703 at *3.

⁷⁶ *Id.* at 419-20, 2003 WL 21504703 at *4.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* at 420, 2003 WL 21404703 at *4.

⁸⁰ *Id.*

⁸¹ *Id.*