This survey represents a compendium of the applicable caselaw, and in some cases statutory law, in the 50 states and the District of Columbia, which addresses insurance coverage issues that arise in the context of construction defect claims. Specifically, we examine following key areas: (1) “Property Damage” Requirement; (2) “Occurrence” Requirement; (3) Timing of “Property Damage”; and (4) the “Business Risk” Exclusions.

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ALABAMA

1. The “Property Damage” Requirement

Alabama courts have held that there must be allegations of physical injury or destruction of tangible property in order to meet the definition of “property damage” in a standard CGL policy. U.S. Fid. & Guar. Co. v. Warwick Dev. Co., Inc., 446 So.2d 1021 (Ala. 1984) (finding that there was no evidence of “property damage” because misrepresentations did not cause physical damage to property). Moreover, the Alabama Supreme Court has held that such “property damage” is limited to damage to property other than the insured’s work or product. See U.S.F.& G. v. Andalusia Ready Mix, Inc., 436 So. 2d 868, 871 (Ala. 1983).

For instance, in Andalusia, the insured manufacturer supplied defective grout to a builder of a water treatment plant, which purportedly caused the construction of the plant to be defective. The court found that, because the complaint did not limit allegations of damage to grout only and, instead, discussed “extensive repairing and remodeling of [the] Water Treatment Plant” as a whole, allegations suggesting the existence of damage to other areas of the plant constituted “property damage.” 436 So. 2d at 871; see also Town & Country Prop., LLC v. Amerisure Ins. Co., 111 So.3d 699, 709 (Ala. 2011) (finding that “property damage” was limited to damaged non-defective ceiling tiles).

Alabama courts have also concluded that purely economic losses do not constitute “property damage” within the meaning of a CGL policy. Am. States Ins. Co. v. Martin, 662 So. 2d 245, 248 (Ala. 1995). In Martin, a CGL insurer sought a declaration that it had no duty to provide coverage in an action brought by investors to recover money lost in real estate investments made with the insured. Id. at 247. The plaintiffs in the underlying action alleged that “over a period of time their security instruments were exposed to unsafe financial conditions and to ultimate loss or risk of loss ‘that caused property loss or damage and loss of use of said . . . security instruments and/or the property in which the said funds were invested.’” Id. at 249.

The court stated that “[n]owhere in the [underlying] complaint do [plaintiffs] seek recovery for damages to tangible property,” and stated that the CGL policy language was “based on the assumption that tangible property, unlike an economic interest, is generally subject to physical damage or destruction.” Id. Thus, the court held that no coverage existed for the investors’ claims of “property damage,” because there was no damage to tangible property. Id.; see also State Farm Fire & Cas. Co. v. Sexton & Sexton, Inc., 985 F.Supp. 1336 (M.D. Ala. 1997) (“Strictly economic losses like lost profits, loss of an anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to ‘tangible’ property.”); State Farm Fire & Cas. Co. v. Middleton, 65 F. Supp. 2d 1240, 1245 (M.D. Ala. 1999) (citing Sexton & Sexton, 985 F.Supp. at 1340) (finding that loss of business, closure of business and loss of credit do not constitute physical injury of tangible property or loss of use of such property).
2. The “Occurrence” Requirement

Alabama courts have generally found that the determination as to whether there is an “occurrence” in the context of a standard CGL policy will depend on whether the actions giving rise to the damage are accidental or fortuitous. See Moss v. Champion Ins. Co., 442 So.2d 26 (Ala. 1983). In connection with claims resulting from the faulty workmanship of an insured, however, Alabama courts do generally hold that “faulty workmanship itself is not an occurrence,” but recognize that “faulty work may lead to an occurrence.” Nationwide Mut. Fire Ins. Co. v. David Group, Inc., __ So.3d __, 2019 WL 2240382 (Ala. May 24, 2019). In making that determination, the court will focus on the nature of the damage that results from that faulty workmanship to determine whether an “occurrence” exists. Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So.3d 148 (Ala. 2014); see also Canal Indem. Co. v. Carbin, 2017 WL 3437655 (N.D. Ala., Aug. 10, 2017) (noting that under Alabama law damage caused by “negligence” or “wantonness” is not “accidental’ for purposes of insurance coverage.”).

In U.S. Fid. & Guar. Co. v. Warwick Dev. Co., 446 So.2d 1021 (Ala. 1984), the court addressed whether coverage was available for claims arising from the faulty construction of a house and various misrepresentations allegedly made by the insured in connection with the construction. Because the damages for which the insured sought coverage arose from faulty workmanship, the court found that such damages do not meet the definition of an “occurrence” and, therefore, did not trigger coverage under the policy. Id. at 1024.

In Moss, 442 So.2d at 26, a homeowner sued a contractor that was hired to re-roof her house. The homeowner alleged that the house incurred water damage from rain as a result of the fact that the contractor did not adequately cover the house during the re-roofing process. Id. Based on evidence that the contractor took active steps to ensure that the house was covered, and despite the fact that his instructions were not followed, the court found that there was no evidence that the contractor intentionally caused damage to the home. Id. at 29. In finding that there was an “occurrence”, the court stated that “the authorities absolve the insured where there is a lack of intent to cause damage or where he has taken reasonable steps to prevent damage and thus could not reasonably foresee the damage caused.” Id.; see also Employers Mut. Cas. Co. v. Smith Constr. & Dev., LLC, 949 F. Supp. 2d 1159, 1171 (N.D. Ala. 2013) (“Under Alabama law, the term ‘accident’ does not necessarily exclude human negligence. . . . Rather, an insured party only loses coverage in such situations where it (1) intended to cause damage or (2) did not take reasonable steps to prevent the damage.”).

The court in Town & Country Property, LLC v. Amerisure Ins. Co., 111 So.3d 699, 706 (Ala. 2011), addressed the courts’ holdings in both Warwick and Moss, finding that “faulty workmanship itself is not an occurrence but that faulty workmanship may lead to an occurrence if it subjects personal property or other parts of the structure to ‘continuous or repeated exposure’ to some other ‘general harmful condition’ (e.g., the rain in Moss) and, as a result of that exposure, personal property or other parts of the structure are damaged.” Based upon that conclusion, the court in Town & Country found that coverage was not available for the repair or replacement of the faulty work itself. Id.; see also U.S. Fid. & Guar. Co. v. Bonitz Insulation Co. of Ala., 424 So. 2d 569, 573 (Ala. 1982) (“[f]If the occurrence or accident causes damage to some other property than the insured’s product, the insured’s liability for such damage becomes the liability of the insurer under the policy.”); Employers Mut. Cas. Co. v. Kenny Hayes Custom Homes, LLC, 2016 WL 527075 (S.D. Ala. 2016) (finding the occurrence requirement is satisfied where “alleged faulty construction caused damage to an otherwise non-defective portion of the property”).
The Alabama Supreme Court concluded that the location of the other property damaged by the insured’s faulty work is not relevant to the determination of whether an “occurrence” is presented. Owners, 157 So.3d 148. The court in Owners evaluated the holdings in Warwick, Moss and Town & Country in relation to a claim for defective construction against an insured homebuilder, and concluded that the court’s statement in Town & Country regarding the necessity of damage to other property to constitute an “occurrence” was not intended to refer only to property that was not a part of the construction project or repair project. Id. at 155-56.

Instead, the court found that an “occurrence” is not defined by criteria such as the location of the damage and that, as long as it is fortuitous, an “occurrence” may still be present when damage is done to the construction itself that is not in and of itself faulty workmanship. The court noted that to read into the term “occurrence” limitations regarding the location or nature of the damage, would mean that “where the insured contractor is engaged in constructing an entirely new building, or in a case where the insured contractor is completely renovating a building, coverage for accidents resulting from some generally harmful condition would be illusory.” Id. at 155. Such a reading would result in no portion of the project being insured if damage results from the exposure to a condition arising out of faulty workmanship.

Alabama courts have declined to adopt a bright line rule as to whether breach of contract claims constitute an “occurrence.” However, there is instructive Alabama case law as to when and under what circumstances a breach of contract may constitute an “occurrence.” See Reliance Ins. Co. v. Gary C. Wyatt, Inc., 540 So. 2d 688 (Ala. 1989) (holding that a breach of contract based on failure to procure insurance claim was not an “occurrence” because the breach did not result in bodily injury or property damage); Auto-Owners Ins. Co. v. Toole, 947 F.Supp. 1557, 1564 (M.D. Ala. 1996) (declining “to adopt a broad holding that claims sounding in contract are not occurrences,” but also holding that various breach of contract claims arising out of sales and financing arrangements were not “occurrences” because “[t]here is simply no reason to expect that such liability would be covered under a [CGL] policy.”)

3. **Timing of “Property Damage”**

Alabama courts typically apply an “injury in fact” trigger in the context of construction defect cases. Warwick, 446 So. 2d at 1024. The Alabama Supreme Court has held that “[a]s a general rule the time of an ‘occurrence’ of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed but the time the complaining party was actually damaged.” Id. As a result, “it is the insurance that is in force at the time of the property damage that is applicable rather than insurance that was in force when the work was performed.” See also State Farm Fire & Cas. Co. v. Gwin, 658 So. 2d 426, 428 (Ala. 1995) (quoting Warwick, 446. So. 24 at 1023-24); Alabama Plating Co. v. U.S. Fid. & Guar. Co., 690 So. 2d 331, 334 n.1 (Ala. 1997) (concluding that the time of the occurrence under a liability policy is the “time the property was actually injured.”); see also Auto-Owners Ins. Co. v. Wier-Wright Enterprises, Inc., 2017 WL 1019535, at *14 (N.D. Ala., Mar. 16, 2017) (“Under the rule of . . . , the time of the ‘occurrences’ under the liability insurance policies at issue is the time the property was actually injured”).
4. **The “Business Risk” Exclusions**

Alabama courts have generally upheld the enforceability of the “business risk” exclusions contained in a CGL policy, precluding coverage for “property damage” to the insured’s property, product or work. See *Bonitz*, 424 So. 2d at 573 (concluding that where sole damage alleged was to faulty roof itself, such damages were related to the work done pursuant to contract and thus were precluded from coverage); *Andalusia*, 436 So. 2d at 872 (precluding coverage for damages attributable to removal and replacement of the insured’s defective product/work).

In *Bonitz*, a property owner sued for damages resulting from a contractor’s allegedly negligent installation of a roof on a gymnasium. 424 So.2d at 570-71. In denying coverage for damage to the roof itself, the Alabama Supreme Court stated, “[s]ince the roof is ultimately Bonitz’s product in the sense that it is the end result of work performed by or on behalf of Bonitz, several of the exclusions apply to remove liability for damage to the roof itself from the coverage of the policy.” *Id.* at 573. Nonetheless, the court noted that these exclusions are not applicable to damage to property other than the insured’s product or work. *Id.*

In *Andalusia*, the insured manufacturer’s defective grout caused damage to a water treatment plant. 436 So. 2d at 871-72. While the Alabama Supreme Court found that coverage for the removal and replacement of the grout itself was excluded from coverage by the “your product” and “your work” exclusions, the repairs and replacements performed in areas of the plant separate and apart from the defective grout were not precluded from recovery under the policy. *Id.*; see also *Aetna Ins. Co. v. Pete Wilson Roofing & Heating Co.*, 272 So. 2d 232, 234 (Ala. 1972) (Regarding the insured’s “product” under a CGL policy, the court stated that “the word ‘product’ denotes the end result of one’s labor. One product may be made from many other products and still be the product of its immediate producer.”)

In *Owners*, the court found that the “your work” exclusion did not apply because the insured specifically purchased coverage for damages included in the “products-completed operations.” 157 So. at 156-57. In support of its holding, the court looked to language within the policy stating that the “products-completed operations hazard” did not include bodily injury or property damage arising from “products or operations for which the classification, shown in the Declarations, states that products-completed operations are included.” *Id.* Based on this language, the court found that, because the insured purchased coverage for damages included within “products-completed operations,” the “your work” exclusion could not apply. *Id.* at 157.

In *Garrett v. Auto-Owners Ins. Co.*, 689 So. 2d 179,180 (Ala. Civ. App. 1997), the insured brought an action against its garage liability insurer for refusing to pay for damage to a customer’s transmission as a result of an alleged faulty clutch replacement. The insurer disclaimed coverage because the policy excluded coverage for “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 materials, parts or equipment furnished in connection therewith.” *Id.* The court held that the damage to the customer’s transmission was excluded from coverage because the removal and reinstallation of the transmission was a “portion” of work required in replacing the clutch. *Id.*
1. The “Property Damage” Requirement

The Supreme Court of Alaska has held that damage to third-party property caused by an insured’s work constitutes “property damage” under a CGL policy. See Fejes v. Alaska Ins. Co., Inc., 984 P.2d 519, 523-24 (Alaska 1999). In Fejes, a homeowner recovered damages from a general contractor as a result of a defective curtain drain. Id. at 521. The curtain drain was constructed by a subcontractor, but it caused flooding damage to the septic system, which was constructed by the general contractor. Id. Rejecting the insurer’s argument that the homeowner merely experienced economic or “loss of bargain damages” resulting from faulty workmanship, the court concluded that the flooding of the septic system qualified as “destruction of tangible property” and thus constituted “property damage” within the meaning of the policy. Id. at 523-24.

Relying on Fejes, the United States District Court for the District of Alaska held that coverage under a CGL policy “extends to property damage resulting from a subcontractor’s defective work whether or not the property damaged constitutes work the general contractor performed.” Clear, LLC v. Am. & Foreign Ins. Co., 2008 U.S. Dist. LEXIS 23355, 2008 WL 818978, at *7 (D. Alaska, Mar. 24, 2008). In Clear, a general contractor hired various subcontractors to perform work in constructing a Heritage Center. Id. at *1. Shortly after completion of the project, numerous problems were discovered relating to the roof and walls that was caused by the work of the general contractor and subcontractors. Id. Finding the “property damage” requirement to be satisfied, the court explained:

Under Alaska law and the terms of the Policy, there is CGL coverage for all property damage to the Center arising from [the general contractor’s] defective work and its subcontractors’ defective work. Furthermore, because making repairs to this covered property damage necessarily includes the costs involved in removing and replacing other materials to gain access to the damaged property, such costs would seem to fall within the CGL coverage when the customary canons of insurance policy interpretation are applied.

Id. at *7.

2. The “Occurrence” Requirement

In evaluating the “occurrence” requirement, the Supreme Court of Alaska has defined the term “accident” as “anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected.” Fejes, 984 P.2d at 523; see also D.W.J. v. Wausau Business Ins. Co., 192 F. Supp.3d 1014, 1018 (D. Alaska 2016) (same). In Fejes, the court held that the failure of the curtain drain installed by the subcontractor, resulting in flooding of the septic system, was neither expected nor intended by the general contractor and, therefore, constituted an “occurrence.” Id.
In *Clear*, the court extended the scope of the *Fejes* holding to apply in the context of damage to the general contractor’s own work as well as damage to third party property:

This court has no trouble extending the reach of *Fejes* to say that defective work by the general contractor which damages other property falls within the CGL coverage, because the same analysis by which the Alaska court concluded that the subcontractor’s work was an accident supports the conclusion that the general contractor’s own defective work damaging other property was an accident. Under Alaska law and the terms of the Policy, there is CGL coverage for all property damage to the Center arising from [the general contractor’s] defective work and its subcontractors’ defective work.


3. **Timing of “Property Damage”**

Alaska courts have not addressed the timing of “property damage” in the context of a construction defect claim. The District Court of Alaska has, however, addressed the timing of “property damage” in the context of environmental contamination claims. See *MAPCO Alaska Petroleum, Inc. v. Cent. Nat’l Ins. Co. of Omaha*, 795 F. Supp. 941 (D. Alaska 1991). While noting a lack of Alaska case law on point, the court acknowledged Alaska’s general concurrence with California insurance law. As such, the court determined coverage “should be triggered by exposure to contaminants rather than by manifestation of the damage.” In *MAPCO*, the court, applying Alaska law, denied summary judgment to the insurer because the question as to when the groundwater was exposed to contaminants was a triable question of fact. Id.

4. **The “Business Risk” Exclusions**

The Supreme Court of Alaska also has addressed application of the “business risk” exclusions. In *Fejes*, the court evaluated a variation of the j(5) and j(6) exclusions and found that they did not bar coverage for damage to the insured contractor’s septic system. *Fejes*, 984 P.2d at 524. With respect to an exclusion barring coverage for “that particular part of any property . . . out of which any property damage arises,” the court found that the exclusion applied only to the curtain drain, as opposed to the septic tank, because the damage arose from the defects in the curtain drain. Id.

The court also evaluated the application of an exclusion for the “restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured.” Id. The court found that this exclusion was not applicable because the parties did not repair the curtain drain or the septic tank, but rather, replaced them with a holding tank system. Id. The court found that, “the exclusion would exclude claims for the cost of repairing or replacing the curtain drain, but not the cost of alternative waste disposal systems made necessary by the failure of the curtain drain.” Id.
The court in *Fejes* also evaluated the application of the “your work” exclusion, but the exclusion at issue was altered to remove the exclusion of work performed “on behalf of the insured.” *Id.* at 525. The court found that “[t]he effect of this deletion is to provide coverage as to work performed for the named insured by subcontractors.” *Id.* Because the property damage giving rise to the plaintiff’s claims arose from the work of a subcontractor on behalf of the insured, the court found that the “your work” exclusion did not apply to preclude coverage. *Id.*

With respect to the “your product” exclusion, the court in *Fejes* rejected the position that the entire building could be considered the contractor’s “product” for purposes of this exclusion. The court found that, based on the language of the policy, “[w]e are of the view that a ‘product’ under the policy does not include a completed building. Interpreting the term to include a completed building would negate the intended coverage of the broad form endorsement, which is meant to provide protection to completed work when damage arises from the work of a subcontractor.” *Id.* at 526.

The court in *Clear* further articulated the rule to be applied in connection with the business risk exclusions, and found that they apply to limit coverage for damage to the insured’s own work, but not to third party property damage. The District Court in *Clear* provided the following additional analysis:

[T]his court reads the *Fejes* decision to instruct that the Policy’s exclusions j(5) and j(6) should be read together to exclude any damages which represent the cost of repairing or replacing any property constituting defective work done by [the general contractor] or its subcontractors, but not to exclude coverage for repairing or replacing any damaged property which is not itself defective work. . . . Thus, coverage for damaged property created by [the general contractor] and damaged by [the general contractor’s] own defective work is eliminated, but damage to the Center arising out of the subcontractor’s defective work is not.

ARIZONA

1. The “Property Damage” Requirement

Arizona courts have found that the cost of repairing or replacing faulty workmanship does not constitute “property damage” under a CGL policy. See, e.g., U.S. Fid. & Guar. Co. v. Advance Roofing & Supply Co., 788 P.2d 1227, 1233 (Ariz. Ct. App. 1989) (“In our opinion, the better reasoned authorities hold that mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in the policy, nor would the cost of repairing the defect constitute property damages.”); U.S. Home Corp. v. Maryland Cas. Co., 261 Fed. Appx. 22, 23 (9th Cir. 2007) (holding that the cost of repairing defective stucco did not constitute “property damage”). Damages caused by faulty workmanship have been characterized – without significant analysis by the court – as property damage by the Arizona Court of Appeals. Lennar Corp. v. Auto-Owners Ins. Co., 151 P.3d 538 (Ariz. Ct. App. 2007) (noting that the plaintiffs “do not claim faulty work alone; they also claim that property damage resulted from the faulty work” and referring to the damage to other property as “property damage.”).

The court in Advance Roofing also held that breach of contract claims arising from faulty workmanship do not constitute “property damage,” as that term is defined by CGL policies. 788 P.2d at 1230-31. Arizona courts have further found that diminution in value claims are also not sufficient to satisfy the “property damage” requirement of a CGL policy. Nucor Corp. v. Emp’rs Ins. Co. of Wausau, 231 Ariz. 411, 416 (Ariz. Ct App. 2012).

2. The “Occurrence” Requirement

Arizona courts have found that “while faulty construction does not constitute an occurrence, damage to property resulting from faulty work may constitute an occurrence.” Lennar, 151 P.3d at 545. Under this framework, costs to repair or replace faulty workmanship will not be afforded coverage because they do not arise from an “occurrence,” but damage to property caused by such faulty workmanship will satisfy the “occurrence” requirement of a CGL policy. Id. (quoting Advance Roofing, 788 P.2d at 233); see also Sunwestern Contr. Inc. v. Cincinnati Indem. Co., 2019 WL 2137312 (D. Ariz. May 16, 2019)(holding an “occurrence” is presented where the insured’s faulty work installing pipe components damaged parts of the pipeline, and stating “consequential property damage resulting from faulty work is an occurrence under the CGL policy”).

In Advance Roofing, the insured contractor, Advance, performed faulty roof work for a homeowners association. The association sued Advance for breach of contract alleging that “[t]he work that was performed . . . was not completed in accordance with the contract requirements and was not performed in a good workmanlike manner.” 788 P.2d at 1229. In rejecting case law presented by the insured for the proposition that faulty workmanship alone is sufficient to bring a claim within the scope of a CGL policy, the Court of Appeals of Arizona explained:
In our opinion these authorities disregard the fundamental nature of a comprehensive general liability policy of the type involved in this litigation, and ignore the policy requirement that an occurrence be an accident. If the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured’s performance of the contract, and the policy takes on the attributes of a performance bond. We find these authorities unpersuasive.

In our opinion, the better reasoned authorities hold that mere faulty workmanship, standing alone, cannot constitute an occurrence as defined in [a CGL] policy.

Id. at 1233.

In Lennar, the Court of Appeals of Arizona upheld Advance Roofing’s distinction between faulty workmanship standing alone and faulty workmanship that causes damage to other property. See Lennar, 151 P.3d at 545. Unlike in Advance Roofing, the homeowners association in Lennar alleged damage beyond the faulty workmanship itself, such as cracks in the walls, baseboard separation and floor tile grout cracks. Id. The court found such allegations to be sufficient to constitute an “occurrence”. Id.; see also U.S. Home Corp. v. Maryland Cas. Co., 261 Fed.Appx. 22, 23 (9th Cir. 2007) (relying on Advance Roofing and Lennar and holding that mere allegations of defective stucco do not constitute an occurrence).

3. Timing of “Property Damage”

Under Arizona law, there can be no “occurrence” within the meaning of a CGL policy until such time as a plaintiff sustains actual damage. Lennar, 151 P.3d at 548, (citing State v. Glens Falls Ins. Co., 609 P.2d 598, 600-01 (Ariz. Ct. App. 1980)). Thus, the “general rule [is] that coverage is determined by the time of the injury or damage and not the conduct on the part of the insured that gave rise to the injury or damage.” Outdoor World v. Cont’l Cas. Co., 594 P.2d 546, 549 (Ariz. Ct. App. 1979).

In the context of construction defect claims, the Arizona Court of Appeals has concluded that “the relevant date for coverage purposes is the date the property damage occurs, even if that damage is incremental.” Lennar, 151 P.3d at 548. The Lennar court further explained that “pursuant to the plain language of their policies, insurers [generally] must provide coverage for ongoing property damage that occurs during the policy period even if other similar damage preceded that damage.” Id. at 549. Thus, to the extent property damage occurs during an insurer’s policy period, a coverage obligation likely will be found to exist. Id.
4. **The “Business Risk” Exclusions**

In Federal Ins. Co. v. P.A.T. Homes, Inc., 547 P.2d 1050, 1052-53 (Ariz. 1976), overruled on other grounds, the Supreme Court of Arizona concluded that the “your work” and contractual liability exclusions of a CGL policy were ambiguous and would not apply to preclude coverage for liability of an insured for faulty construction work. The court based its conclusion on “the principle of construction that where various jurisdictions reach different conclusions as to the meaning, intent, and effect of the language of an insurance contract ambiguity is established.” *Id.*

Retreating from the broad-sweeping test for ambiguity set forth in *P.A.T.*, the Arizona Supreme Court later held that where policy language presents conflicting reasonable interpretations, the court is “not thereby automatically constrained to construe it against the insurer.” *State Farm Mut. Auto. Ins. Co. v. Wilson*, 782 P.2d 727, 734 (Ariz. 1989). Instead, the determination must come at the end of the court’s inquiry into various considerations such as “legislative goals, social policy and examination of the transaction as a whole.” *Id.* (disapproving of *P.A.T.* to the extent it automatically requires ambiguities in exclusions to be construed against the insurer); see also *Cantex, Inc. v. Princeton Excess & Surplus Lines Ins. Co.*, 2016 WL 3101793, at *3 (Ariz. Ct. App. June 2, 2016) (finding ambiguity in damage to property exclusion, as to whether work had been “put to its intended use,” and directing the court on remand that it must be “considered . . . in the context of the facts”).

More recently, Arizona courts have applied the “business risk” exclusions to preclude coverage for faulty work and/or products, in certain cases. *See SWA Painting, Inc. v. Golden Eagle Ins. Co.*, 268 Fed.Appx. 521(9th Cir. 2008) (finding that the “impaired property” exclusion applied to preclude coverage for loss of use of homes because of defective paint job that had to be redone); *Aetna Cas. & Sur. Co. v. Haugen*, 963 F.2d 378 (9th Cir. 1992) (concluding that “work completed” exclusion barred coverage for claims seeking costs to repair and replace a defective drainage system designed by insured); *Brewer v. Home Ins. Co.*, 710 P.2d 1082 (Ariz. Ct. App. 1985) (holding that collapse of a pipe due to failure of manufacturer to provide adequate installation drawings and failure to warn of the need for bracing on pipes during installation fell within “products hazard” exclusion).

Exclusion j(6) - barring coverage for damage to “that particular part of any property” on which the insured’s work was incorrectly performed on it - has been interpreted to exclude coverage only for the specific part of property upon which the insured is performing operations, and not to the larger piece of property of which the insured’s work is a component. *See Sunwestern Contractors*, 2019 WL 2137312, at *4-5 (finding that damage to pipeline, caused by insured’s faulty installation of pipe component, including flanges, was not excluded by the damage to property exclusion, but that exclusion j(5) would apply to bar all claims, because the pipeline and all its related components were “real property” on which the insured was performing operations); *Desert Mountain Prop., Ltd. P*ship v. Liberty Mut. Fire Ins. Co.*, 236 P.3d 421, 432 (Ariz. Ct. App. 2010), aff’d, 250 P.3d 196 (Ariz. 2011) (stating the exclusion has a “narrow scope” and applies only “to the repair of defective workmanship and not to the repair of damage that resulted from the defective workmanship”).
ARKANSAS

1. **The “Property Damage” Requirement**

In determining whether coverage is available for damages in the construction defect context, Arkansas courts have generally focused upon the “occurrence” requirement in construction defect cases as opposed to the “property damage” requirement. Specifically, Arkansas courts have found that the “property damage” requirement is satisfied if the claim arises from an “occurrence” and alleges damage to tangible property. *Geurin Contractors, Inc. v. Bituminous Cas. Corp.*, 5 Ark. App. 229 (Ark. Ct. App. 1982) (“[T]he damage which is the subject of this lawsuit comes within the definition of “occurrence” within the meaning of the policy. Therefore, we find that it also comes within the meaning of “property damage” as defined in the policy.”)

2. **The “Occurrence” Requirement**

Notwithstanding the case law discussed below, the Arkansas Legislature enacted a statute, which provides that “[a] commercial general liability insurance policy offered for sale in this state shall contain a definition of “occurrence” that includes: (1) [a]ccidents, including continuous or repeated exposure to substantially the same general harmful conditions; and (2) [p]roperty damage or bodily injury resulting from faulty workmanship.” Ark. Code Ann. § 23-79-155(a) (West 2011). Notably, the statute specifically states that “[t]his section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer may include in a commercial general liability policy.” Ark. Code Ann. § 23-79-155(b).

The legislative materials associated with the Arkansas statute indicate an intention to reduce uncertainty over whether the coverage provided under a commercial liability policy includes damages caused by faulty workmanship. However, it is not clear how, if at all, the statute changes established precedent in Arkansas dealing with damages caused by faulty workmanship. Specifically, the text of the statute does not appear to extend coverage or require policies offered for sale in Arkansas to include a definition of “occurrence” that would suggest an expansion of coverage to damage to an insured’s work itself. Instead, the effect of the statute appears to be such that, absent an exclusion to the contrary, damage to property, other than that upon which the insured performed work, is generally covered.

The impact of the statute on Arkansas decision law is not yet clear. Particularly, it is unclear whether: (a) the statute is intended to apply only to prospectively issued insurance policies; or (b) if it is intended to apply to commercial general liability policies already in existence. Because the statute provides that “a commercial general liability insurance policy offered for sale in this state shall contain a definition of ‘occurrence’ in accordance with the statute,” an argument may be advanced that the statute is intended to apply only to prospectively issued insurance policies, not policies already in existence. This argument is further supported by the general rules of Arkansas statutory construction that “unless a statute expressly states otherwise, it is presumed that the legislature intends for it to apply prospectively or on the date of its enactment.” See *Sturdivant v. Ark. Dept. of Health & Human Serv.*, 260 S.W.3d 763, 765 (Ark. Ct. App. 2007).
Although no Arkansas state court has addressed the issue of retroactive application, the Eighth Circuit, applying Arkansas law, has. In J-McDaniel Constr. Co., Inc. v. Mid-Continent Cas. Co., 761 F.3d 916 (8th Cir. 2014), the parties disputed whether the negligent construction of a home constituted an accident triggering coverage under the subject policy.

In rejecting the argument that section 23-79-155 should retroactively apply to the subject policy’s definition of “occurrence,” the Eighth Circuit stated that, under Arkansas law, an insurance policy is governed by the statutes in effect at the time of its issuance. Id. at 919. Therefore, the Eighth Circuit declined to disregard the holding in Essex Ins. Co. v. Holder, 370 Ark. 465 (2008), wherein the Arkansas Supreme Court found that defective workmanship resulting in damage to the work product alone does not constitute an “occurrence.” Id.

Notwithstanding the foregoing, in 2008, the Supreme Court of Arkansas joined the “majority of states” in holding that “defective workmanship standing alone - resulting in damages only to the work product itself - is not an “occurrence” under a CGL policy.” Holder, 261 S.W.3d at 460. Noting that Arkansas case law has “consistently defined ‘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,” the Supreme Court concluded:

Faulty 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 the faulty work.

Id.; see also Auto-Owners Ins. Co. v. Hambuchen Const., Inc., 2016 WL 7634791 (E.D. Ark. 2016) (relying on Holder in finding that “damages for defective workmanship that resulted in damages only to the work product itself . . . does not qualify as property damage caused by an “occurrence.”).

A few years prior to the Holder decision, a federal district court had correctly predicted that the Arkansas Supreme Court would elect to join the majority of courts that have concluded that defective workmanship, on its own, does not constitute an occurrence. See Nabholz Constr. Corp. v. St. Paul Fire and Marine Ins. Co., 354 F. Supp. 2d 917, 922 (E.D. Ark. 2005). The court concluded that a “contractor’s obligation to repair or replace its subcontractor’s defective workmanship should not be deemed ‘unexpected’ on the part of the contractor, and therefore, fails to constitute an ‘event’ for which coverage exists.” Id. at 921. The court noted, however, that consequential damages arising from faulty workmanship, such as water stained ceiling tiles resulting from the leaking roof, may constitute an “occurrence.” Id. at 923.

In Lexicon, Inc. v. ACE Am. Ins. Co., 634 F.3d 423, 424 (8th Cir. 2011), in connection with a company’s relocation to the West Indies, the insured agreed to construct several new silos at the company’s new plant. The insured then subcontracted the construction of the silos to another entity. Id. “After months of use, one of the silos collapsed due to [the subcontractor’s] faulty welds.” Id. The collapse caused damage to nearby equipment and other property, and the insured sought defense and indemnification from its insurer for the underlying lawsuit. Id.
The Eighth Circuit, pursuant to Holder, stated that “[u]nder Arkansas law, it was foreseeable that faulty subcontractor work would damage the silo, but not foreseeable that faulty subcontractor work would cause millions of dollars in collateral damage.” Id. at 427. As a result, in accordance with Holder, the court found that damage to the silo itself, i.e., the defective work product, does not arise from an “occurrence,” but damages to property other than the silo itself met the “occurrence” requirement of the CGL policy. Id.

3. **Timing of “Property Damage”**

Arkansas courts have not addressed the “timing” issue in the context of construction defect cases. In the environmental context, however, at least one Arkansas trial court has applied the “injury in fact” trigger of coverage. See Unigard Sec. Ins. Co. v. Murphy Oil USA, Inc., 331 Ark. 211, 219 (1998).

4. **The “Business Risk” Exclusions**

As noted above, section 23-79-155 does not restrict or limit the nature or types of exclusions that may otherwise appear in a commercial general liability policy. Thus, Arkansas cases interpreting the business risk exclusions are unaffected by that statute.


In El Dorado Foundry, the Court of Appeals of Arkansas applied the “impaired property” exclusion to preclude coverage for the insured’s faulty repair work to certain components of a refinery. The court found that the insured’s poor workmanship on the heat exchangers “rendered the refinery incapable of use until further repairs were made” and, therefore, fell within the parameters of the impaired property exclusion. Id. Likewise, the court concluded that economic losses arising from the insured’s defective work, such as repair costs and lost profits, also were barred from coverage. Id.
1. The “Property Damage” Requirement

Under California law, “property damage” can exist where the damage results from the incorporation of a defective component or product into a larger structure, so long as the defective component imposes physical harm on other parts of the system. F & H Constr. v. ITT Hartford Ins. Co., 12 Cal. Rptr. 3d 896, 901 (Cal. Ct. App. 2004). The purpose of liability policies is not to provide coverage for a contractor’s faulty work, but, liability coverage is triggered “when the insured’s defective materials or work cause injury to property other than the insured’s own work or products.” Id. at 902. In F & H Constr., the court found that the costs of modifying pile caps installed by the insured and a lost bonus for early completion of the project to be “intangible economic damages,” as opposed to potentially covered “property damage.” Id.

In St. Paul Fire & Marine Ins. Co. v. Coss, 80 Cal. App. 3d 888, 896-97 (Cal. Ct. App. 1978), the insurer issued a CGL policy to Coss, a licensed building contractor, and Coss entered into a contract to construct a home on the homeowner’s property pursuant to the homeowner’s specifications. When the structure was almost complete, a dispute ensued between Coss and the homeowners as to the quality of work being performed, in which the homeowners alleged that Coss used defective materials in the construction and that Coss’s work was defective.

Finding that the defective materials and workmanship produced an inferior home, the California Court of Appeal held that the contractor’s incorporation of defective workmanship and material into the home, in itself, did not constitute “property damage” within the terms of the CGL policy. Id. at 893; see also Fresno Econ. Imp. Used Cars, Inc. v. U.S. Fid. & Guar. Co., 76 Cal. App. 3d 272, 284 (Cal. Ct. App. 1977) (finding that the presence of a broken head gasket in a motor vehicle was not “injury to tangible property” and, therefore, was not “property damage”).

Finally, claims associated strictly with economic losses such as diminution of value, lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, are typically not “property damage” under California law. “As one court explained, [i]n contrast to the earlier policies, insurance coverage after 1973 requires that physical or tangible property be affected.” N.H. Ins. Co. v. Vieira, 930 F.2d 696, 698-99 (9th Cir. 1991) (holding that diminution in value resulting from faulty installation of drywall did not qualify as physical injury or destruction of tangible property to satisfy “property damage” requirement).
2. **The “Occurrence” Requirement**

California courts have concluded that construction defect claims will constitute an “occurrence” for any period during which the insured was unaware of the defects that are at issue. *Economy Lumber Co. v. Ins. Co. of N. Am.*, 157 Cal. App. 3d 641, 648 (Cal. Ct. App. 1984); *see also Navigators Specialty Ins. Co. v. Moorfield Constr., Inc.*, 6 Cal. App. 5th 1258, 1278 (Cal. Ct. App. 2016) (holding no coverage for damage to concrete where insured deliberately installed tiles that it knew exceeded moisture vapor emissions rates because such acts did not constitute an occurrence and there was no intervening unforeseeable act between the installation and the property damage taking place that could be deemed an occurrence). In other words, to the extent that an insured is unaware of a defect in its work, California courts have found that the resulting damage is unforeseeable and, therefore, the result of an “occurrence.”

In finding that an “occurrence” does not encompass claims for already discovered construction defects, the court in *Economy Lumber* relied on *Hogan v. Midland Nat’l Ins. Co.*, 3 Cal. 3d 553 (1970). In *Hogan*, the insured sold a defective saw to a lumber business, which cut lumber more narrowly than required. *Id.* at 558. That defect was not, however, discovered until a substantial amount of lumber was cut and sold. *Id.* The court found that any damages resulting from the undetected defect (those damages resulting before the insured became aware the lumber was sufficiently defective to cause a customer to reject it) was the result of an “occurrence” because the damages from the under-cutting were unforeseeable. *Id.* at 559-60. However, the court found that any damages that arose after the insured began cutting the lumber wider to avoid rejection were foreseeable and, therefore, not an “accident” covered under the policy. *See also Ameron Intern. Corp. v. Am. Home Assur. Co.*, No. CV 11-1601 CAS, 2011 WL 2261195 (C.D. Cal. 2011) (holding that insured’s action of supplying defective concrete for highway project constituted an “occurrence” under a CGL policy).

3. **Timing of “Property Damage”**

In Montrose, the court explained the continuous injury trigger as follows:

> [t]he timing of the accident, event, or conditions causing the bodily injury or property damage, e.g., an insured’s negligent act, is largely immaterial to establishing coverage; it can occur before or during the policy period. Neither is the date of discovery of the damage or injury controlling: it might or might not be contemporaneous with the causal event. It is only the effect—the occurrence of bodily injury or property damage during the policy period, resulting from a sudden accidental event or the “continuous or repeated exposure to conditions”—that triggers potential liability coverage.”

Id.

Thereafter, in Pepperell, the court relied on the reasoning in Montrose in concluding that the continuous trigger approach should be used in third party liability insurance cases involving continuous injury and/or progressive deterioration. 62 Cal. App. 4th 1051. In Pepperell, the home at issue was completed in November of 1988, the developer had coverage from May 1988 to May 1989, and the property damage first manifested in March 1991. Id. at 1048. Scottsdale disclaimed coverage “[s]ince it is alleged that the defects being claimed did not manifest themselves until on or about March 8, 1991, which was after the expiration of the policy. . . .” Id. at 1049. Nonetheless, the court rejected Scottsdale’s position, reasoning that there was potential for coverage within Scottsdale’s policy period. Id. at 1055. It stressed that “whether the damages alleged were in fact ‘continuous’ is itself a matter for final determination by the trier of fact.” Id. at 1056.

The court in St. Paul Mercury Ins. Co. v. Mountain West Farm Bureau Mut. Ins. Co., 210 Cal. App. 4th 645, 660 (Cal. Ct. App. 2012) explained that “[f]or occurrence-based policies in construction defect cases, ‘[t]he trigger of coverage depends on determining the cause of the injury.’” In Mountain West, the appeals court affirmed the lower court’s decision to apply a continuous injury trigger, in light of the fact that the property damage at issue was of a continuous, progressive nature. Id.

4. The “Business Risk” Exclusions

California courts typically uphold the “business risk” exclusions that appear within CGL policies. In this regard, California courts have stated that “[i]n every business venture there is an element of risk; the product fails to perform as expected; it lacks appeal to the consumer and does not sell; or it actively malfunctions and a third-party suffers a loss. Products liability coverage is designed to protect against only the bodily injury or property damage of others and not the business risks that accompany every commercial venture.” Armstrong World Indus. v. Aetna Cas. & Sur. Co., 45 Cal. App. 4th 1, 110 (Cal. Ct. App. 1996) (quoting, 7A Appleman, Ins. Law & Practice, § 4508.01 p. 353).
The “your product” and “your work” exclusions preclude coverage for damage to an insured’s own work or product. See Pardee Constr. Co. v. Highlands Ins. Co., 51 Fed. Appx. 772 (9th Cir. 2002) (holding that coverage for insured’s failure to install certain devices within the walls of a building, which caused no damage aside from the necessity that the contractor repair its own faulty work, fell within an “exclusion for ‘your work’ barring coverage for the restoration, repair, or replacement of the insured’s work product made necessary by faulty workmanship”). “Your work” and “your product” exclusions do not bar coverage, however, for property damage to a third-party’s property sustained as a result of the insured’s faulty workmanship. Armstrong, 45 Cal. App. 4th at 112; Econ. Lumber Co., 157 Cal. App. 3d at 650 (finding that exclusion does not bar recovery upon showing of extensive damage to other property as an indirect result of insured’s faulty materials or workmanship); Diamond Heights Homeowners Assn. v. Nat’l Am. Ins. Co., 227 Cal. App. 3d 563, 572-73 (Cal. Ct. App. 1991) (barring coverage for home association’s claims of defective workmanship because damage was to insured’s alleged defective product).

In Global Modular, Inc. v. Kadena Pacific, Inc., 15 Cal. App. 5th 127, 222 Cal. Rptr. 3d 819 (2017), the court clarified that the phrase “that particular part” in the j(5) and j(6) exclusions “is intended to be a narrowing element, one that limits the provision’s application to a distinct part of a construction project,” and therefore hold that the j(5) exclusion “applies only to damage caused during physical construction activities” on the exact location where the damage occurs, and that the j(6) exclusion “applies only to the particular component of the insured’s work that was incorrectly performed and not to the insured’s entire project”). In addition, the subcontractor exception to the “your work” exclusion has been recognized and applied by the Ninth Circuit. Northern Ins. Co. of New York v. Allied Mut. Ins. Co., 1997 WL 78692, at *2 (9th Cir. Feb, 14, 1997).

California also recognizes that the “impaired property” exclusion generally excludes coverage for “property damage” to property not physically injured if the impairment arises out of a deficiency in “your work” or “your product.” See Watts Indus., Inc. v. Zurich Am. Ins. Co., 121 Cal. App. 4th 1029, 1047 (Cal. Ct. App. 2004); see also Shade Foods, Inc. v. Innovative Prods. Sales & Mktg., Inc., 78 Cal. App. 4th 847, 866-67 (Cal. Ct. App. 2000). This exclusion does not always apply, however, if other property has been damaged as a result of the impaired property, including situations where the damaged property incorporates the allegedly impaired work or product. Watts Indus. Inc., 121 Cal. App. 4th at 1047; see also Anthem Elec., Inc. v. Pacific Employers Ins. Co., 302 F.3d 1049, 1059 (9th Cir. 2002).
1. The “Property Damage” Requirement

Colorado courts have held that “‘property damage’ does not include costs of repair or replacement of defective workmanship, but does include consequential damage to other parts of property.” Peerless Indem. Ins. Co. v. Colclasure, 2017 WL 633046, at *5 (D. Colo. Feb. 16, 2017) (holding that the repair and replacement of a roof improperly installed by the insured did not constitute “property damage,” defined as “physical injury to tangible property” or “loss of use of tangible property that is not physically injured”); see also RMHB Construction, Inc. v. Builders Ins. Group., 348 F.Supp.3d 1093, 1104 (D. Colo. 2018) (noting that neither “breach of contract or poor workmanship . . . meets the policy’s definition of property damage”); TCD, Inc. v. Am. Family Mut. Ins. Co., 296 P.3d 255 (Colo. App. 2010) (holding that costs of repair and replacement of a roof that did not meet code was not “property damage”); Cool Sunshine Heating & Air Conditioning, Inc. v. Am. Family Mut. Ins. Co., 2014 WL 7190233, at *3 (D. Colo. Dec. 17, 2014) (stating “[t]he cost to repair a defectively installed product does not constitute ‘property damage’ unless the defective product causes some damage to the property outside of the cost to replace the defective product”); Greystone Constr. v. Nat’l Fire & Marine Ins. Co., 661 F.3d 1272, 1284 (10th Cir. 2011), as amended by rehear’g in part (noting, in the context of determining whether an “occurrence” was presented, that coverage under a CGL policy would only be provided if the “occurrence” caused “damage to nondefective property”); Bainbridge, Inc. v. Travelers Cas. Co. of Conn., 159 P.3d 748, 755 (Colo. App. 2006).

However, where the insured is a general contractor facing defective workmanship claims to the entire home he construed, some courts have observed in dicta, or tacitly assumed, that such claims could potentially constitute “property damage.” See, e.g., Hubbell v. Carney Bros. Constr., 2013 WL 2029037 (D. Colo. May 14, 2013) (noting, in a related case concerning CGL coverage for the general contractor that constructed the home, that the homeowner’s allegations had been found by the Teamcorp court to “arguably be [capable of being] read as meeting the definition of ‘property damage’, without discussing the difference between the work performed by the design contractor and that performed by the general contractor); Bainbridge, Inc. v. Travelers Cas. Co. of Connecticut, 159 P.3d 748 (Colo. App. 2006) (in context of determining liability insurer’s obligations to defend an equitable subrogation claim against insured, stating without significant analysis that coverage was potentially triggered by the complaint’s allegations that the insured’s defective work and failure to comply with drainage plans “caused damage to Plaintiff’s property” and that “such damage has caused, and continues to cause, actual property damage”). But see Am. Family Mut. Ins. Co. v. Teamcorp, Inc., 659 F.Supp.2d 1115, 1130-31 (D. Colo. 2009) (where insured contractor (who was not a licensed architect or engineer) prepared design plans for a home, the court concluded that it was arguably facing claims for “property damage” under its CGL policy where the claims asserted were for “deficient and non-compliant plans; construction not in conformity with those plans; incorrect location of the residence on the property; an improperly poured foundation; and, ultimately, a residence that would be structurally unsound and uninhabitable if completed according to the plans”).
2. The “Occurrence” Requirement


However, in reaction to the 2009 General Security decision (holding as a matter of first impression that generally all claims of faulty workmanship do not allege an “occurrence”), the Colorado Legislature enacted the Construction Professional Commercial Liability Insurance Act (“CPCLIA”), which became effective on May 21, 2010, and superseded the General Security decision. In relevant part, the CPCLIA provides as follows:

[i]n 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.

C.R.S.A. § 13-20-808(3).

However, this provision also states that “[n]othing 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.”
In order to effectuate this public policy purpose, the CPCLIA 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;

(b) Creates insurance coverage that is not included in the insurance policy.

C.R.S.A. § 13-20-808(3).

Colorado courts have observed that “the statute is not a guarantee of coverage under the commercial liability policy,” but that “rather it operates to shift the burden of proof away from the insured specifically as to the meaning of ‘accident,’ . . . and to create a judicial presumption that an ‘accident’ (and therefore an ‘occurrence’) has been shown, unless or until a policy exclusion eliminates coverage for that type of occurrence.” Peerless Indem. Ins. Co. v. Colclasure, 2017 U.S. Dist. LEXIS 22193, at *12 (D.Colo. Feb. 16, 2017). Where the evidence indicates that the insured “did not intend and expect the damage to [the claimant’s] property,” a Colorado court will find that the insured’s work was an “accident” and therefore an “occurrence.” Id. at *13.

The CPCLIA’s application provision states: “This act applies to all insurance policies currently in existence or issued on or after the effective date of this act.” Although the Colorado Supreme Court has not yet considered the effect of this provision, other Colorado courts have generally agreed that the CPCLIA cannot be applied to policies that expired prior to the statute’s enactment. See TCD, Inc. v. Am. Family Mut. Ins. Co., 296 P.3d 255 (Colo. Ct. App. 2012), cert. den., 2013 WL 673985 (Feb. 25, 2013) (noting the CPCLIA applies to policies “for which the policy period had not yet expired as of May 21, 2010”); Kalman Floor Co. v. Old Republic Gen. Ins. Corp., 2019 WL 132138 (D. Colo. Jan. 8, 2019) (applying General Security holding, not section 13-20-808, to determine whether claims arising from faulty workmanship concerned an “occurrence,” where policy at issue was in effect from January 31, 2009 to January 31, 2010). See also Colorado Pool Systems, Inc. v. Scottsdale Ins. Co., 317 P.3d 1262 (Colo. Ct. App. 2012), cert. granted in part, 2013 WL 4714283 (Colo. Sep. 3, 2013), appeal withdrawn before decision (holding that the CPCLIA could not be applied retroactively to insurance agreements that have been made prior to the enactment of the statute).
In addition, regardless of the application of the CPCLIA, the Colorado Court of Appeals has held that so-called “rip and tear” damage caused to nondefective work in the process of correcting defective work has been found to be the result of an “occurrence,” and thus to constitute covered damages under a CGL policy. *Colorado Pool*, 317 P.3d at 1271 (declining to apply CPCLIA, but finding that under prior case law, damage to nondefective work that occurred during the replacement of the defective work was the result of an “accident” or “occurrence”).

Additionally, a Colorado federal court found faulty workmanship of a subcontractor potentially qualified as an “occurrence” where the subcontractor’s faulty workmanship caused damage to other, non-faulty parts of the project. See *Mt. Hawley Ins. Co. v. Creek Side at Parker Homeowners Ass’n, Inc.*, 2013 WL 104795, at *1 (D. Colo. Jan. 8, 2013).

In *Mt. Hawley*, a homeowners association sued the developer/builder of a residential development project seeking damages allegedly caused by construction defects. 2013 WL 104795 at *1. The homeowners association alleged that the developer/builder’s subcontractors performed defective work that caused consequential damage to other, non-faulty parts of the project. Id. The district court explained that “[f]aulty workmanship can constitute an occurrence that triggers coverage under a GCL policy if . . . the damage was to non-defective portions of the contractor’s or subcontractor’s work.” Id. at *2.

3. **Timing of “Property Damage”**

Colorado law provides that “the time of the occurrence of an accident is not the time the wrongful act was committed but the time when the complaining party was actually damaged.” *Leprino v. Nationwide Prop. & Cas. Ins. Co.*, 89 P.3d 487, 490 (Colo. App. 2003). The Supreme Court of Colorado has noted that to “stretch the scope of ‘accident’ backward in time to reach the date of the earliest beginning of any prior event which might be regarded as having a causal relation to the unlooked-for mishap would introduce ambiguity where none now exists.” See *Samuelson v. Chutitch*, 529 P.2d 631, 635 (Colo. 1974) (concluding that the “occurrence” triggering coverage was the explosion of the propane tank and not the time when the negligent installation of the pipeline was performed).

Considering these general principles, the Colorado Court of Appeals has found that each policy in effect during the time that continuous and progressive damage was taking place would be triggered. *Am. Employer’s Ins. v. Pinkard Constr. Co.*, 806 P.2d 954, 956 (Colo. App. 1990), cert. dismissed, 831 P.2d 887 (Colo. 1991) (referring to the applied theory as the “exposure” theory). In Pinkard, the insured installed a roof that corroded over a period of several years and, ultimately, collapsed. Id. at 955. Finding that the corrosion was a “progressive and continuous condition,” the court held that coverage was triggered under each policy during the years of corrosion. Id. at 956. In rejecting a “manifestation” trigger of coverage, the court explained:
When actual damages were sustained is difficult to assess in a situation in which, as here, the property damage occurred progressively over a period of time. Courts which have addressed situations of delayed ultimate damage have used either the “exposure” or the “manifestation” theory to determine when actual damages were sustained. Under the exposure theory, an insurer is liable for damages during any policy period in which there is exposure to a damage-causing condition or agent. The manifestation theory determines liability as of the time when ultimate injury occurs or becomes manifest.

Under the facts at issue here, we conclude that the exposure theory is more appropriate... Here, the damage slowly progressed, and, although not immediately apparent, the evidence shows that progressive and continuous deterioration of the roof infected the integrity of the structure causing actual property damage during the respective policy periods.

Id.

Colorado has also addressed the issue of whether CGL policies provide coverage for property damage occurring during the policy period where the property has subsequently been sold to another party after the expiration of the policy period. The Supreme Court of Colorado has held that the sale of property after the expiration of the policy did not terminate coverage for property damage occurring during the policy period. See Hoang v. Assurance Co. of Am., 149 P.3d 798 (Colo. 2007). In Hoang, the insured contractor was sued by homeowners for various deficiencies in their homes. Id. at 800-01. Although the homes experienced “property damage” within the applicable policy periods, certain homeowner plaintiffs did not actually own the property at issue during the policy period. Id., at 801. The insurer denied coverage on the basis that the insured’s coverage becomes non-operative when the home is sold to another party. The Supreme Court of Colorado rejected this argument reasoning:

Nowhere does the policy state that the CGL coverage [the insured] purchased terminates when the property is sold to a person who did not own it during the policy period when the damage occurred. The policy contains an exclusion for property owned by the insured, but no exclusion based on the identity or circumstances of the property’s ownership by another.

Id. at 803.

As a result, the court held that the contractor had insured itself against liability for damage occurring during the policy period regardless of whether the property at issue was sold to a subsequent purchaser. Id.
4. The “Business Risk” Exclusions

The CPCLIA also addressed the interpretation of business risk exclusions as applied to construction professionals. Specifically, section 13-20-808 provides that an insurer disclaiming coverage to a “construction professional:"

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 made pursuant to section 13-20-803.5 concerning a construction defect; and (b) any exception to the limitation, exclusion or condition in the insurance policy does not restore coverage under the policy.

Therefore, while the CPCLIA does not purport to bar application of the business risk exclusions, it does change the typical burden of proof requirements by requiring that the insurer prove not only the application of an exclusion but also that any exception to the exclusion does not restore coverage.

In general, Colorado courts have found standard business risk exclusions in CGL policies to be unambiguous and to exclude coverage for faulty workmanship on the grounds that faulty work is considered a business risk to be borne by the insured. See Farmington Cas. Co. v. Duggan, 417 F.3d 1141, 1142 (10th Cir. 2005) (“The rationale for such exclusions is that faulty workmanship is not an insurable ‘fortuitous event,’ but a business risk to be borne by the insured.”); see also Adair Grp., Inc. v. St. Paul Fire & Marine Ins. Co., 477 F.3d 1186, 1188 (finding that such exclusions prevent CGL policies from being used by contractors as “an anticipatory guarantee of quality work”); Bangert Bros. Constr. Co. v. Americas Ins. Co., 888 F. Supp. 1069, 1072-73 (D. Colo. 1995) (concluding that exclusions barring coverage for faulty workmanship and defective performance were unambiguous and barred coverage for defective construction); Ohio Cas. Ins. Co. v. Imperial Contractors, Inc., 765 P.2d 1060, 1061-62 (Colo. App. 1988) (holding that “the language of the policy is clear in its exclusion of coverage for defects in the insured’s work product.”).

The standard “damage to property” exclusion, exclusion (j) in the ISO CGL form, has been applied to bar coverage only for work that is in progress, not damage that occurs after work is completed: “Exclusion (j)(5) generally applies when the work is in progress and focuses on the area where the insured is performing work; Exclusion (j)(6), on the other hand, focuses on the repair of that work and expressly does not apply if the work has been completed.” Cont’l West Ins. Co. v. Shay Constr., 805 F.Supp.2d 1125 (D. Colo. 2011); see also Crossen v. Am. Family Mut. Ins. Co., 2010 U.S. Dist. LEXIS 68108 (D. Colo. July 7, 2010). In McGowan v. State Farm & Cas. Co., 100 P.3d 521, 525 (Colo. App. 2004), the Colorado Court of Appeals concluded that exclusion (j)(6) unambiguously precluded coverage for costs to repair and replace structural damage to homes caused by the insured’s faulty construction work. The court further noted that the “products-completed operations hazard” exception did not apply because the insured’s work was not completed at the time the damage occurred. Id. at 526.
Exclusion (j) has been applied to bar coverage for damage to a home constructed by the insured, where damage was alleged to the entire structure and was alleged to have been caused while the insured was performing its work. *Hubbell*, 2013 WL 2029037, at *6-7.

In construing exclusion (k), as to damage to “your product,” the District Court of Colorado held that the “your product” exclusion did not apply where the insured was a roofing contractor that was to repair the homeowner’s roof, subcontracted the work to another entity, and subsequently was sued by the homeowner for defective workmanship causing damage to other property. *Peerless*, 2017 U.S. Dist. LEXIS 22193 at *17-18. The court concluded that the “your product” exclusion did not apply to bar coverage, because the “defective workmanship in this action... constitute[s] a service, not a product.” *Id.* at *18.

The District of Colorado has applied the “impaired property” exclusion to bar coverage for loss of use of property not physically injured that was caused by an insured’s faulty workmanship. See *DCB Constr. Co. v. Travelers Ind. Co. of Ill.*, 225 F.Supp.2d 1230, 1232 (D. Colo. 2002). In *DCB*, the insured constructed hotel walls that did not comply with contract specifications, which were subsequently removed and replaced. *Id.* at 1230. The hotel owners claimed damages for the repair and replacement of the walls as well as lost profits from the hotel rooms. *Id.* at 1231. The court held that the “impaired property” exclusion barred coverage for the claims against the insured. *Id.* at 1233. See also *Peerless*, 2017 U.S. Dist. LEXIS 22193, at *8 (“The purpose of this exclusion is in essence to preclude coverage for loss of use claims arising from faulty work or products when there is no physical injury to the property. Thus, this exclusion prevents an insured from claiming coverage for pure economic loss.’”).
1. The “Property Damage” Requirement

The Supreme Court of Connecticut has held that faulty workmanship itself is not “property damage” under a CGL policy, but that damage to otherwise non-defective tangible property would be. *Capstone Bldg. Corp. v. Am. Motorists Ins. Co.*, 67 A.3d 961 (2013). There, the insureds, a general contractor and project developer, settled construction defect claims brought by the University of Connecticut involving the allegedly negligent construction of a dormitory building. *Id.* at 968. After the settlement, the insureds sought coverage for the settlement amount from the insurer that had issued an Owner Controlled Insurance Program Commercial General Liability policy. *Id.* at 972.

In regards to whether the claimed defects caused “property damage” under the subject CGL policy, the parties agreed that physical injury to third parties’ property was covered, however, they disagreed over the application of the term “property damage” when invoked to cover damages to the work of the insured contractor or subcontractor. *Id.* at 976. The court noted “whether an insured party makes a viable claim for property damage is a highly fact-dependent determination in each case.” *Id.*

First, the court found “water and mold damage to portions of the insured’s project, beyond the defective work itself, would qualify as ‘physical injury to tangible property’” and therefore, was covered “property damage” under the policy. *Id.* at 979. The court reasoned that these items constituted damage to non-defective property stemming from defective construction. *Id.*

Next, the court found certain alleged defects, including building code violations, defective construction itself and poor quality control did not constitute “property damage” unless the defects resulted in damage to other, non-defective property. *Id.* at 980. In reaching this conclusion, the court explained that “faulty workmanship or defective work that has damaged the otherwise non-defective completed project has caused physical injury to tangible property [under the policy], [and] [i]f there is no damage beyond the faulty workmanship or defective work, then there may be no resulting property damage.” *Id.* at 981.

Lastly, in finding repair work was not covered under the subject policy, the court held “[e]xtending coverage to the repair of the defective work itself would render the policy’s requirement for “physical injury to tangible property” meaningless, since it would allow the insured to recover the costs to repair work that, although defective, did not meet the definition of property damage.” *Id.* The court emphasized, however, that the insuring agreement did contemplate coverage for repairs to non-defective property stemming from “physical injury to tangible property” or “loss of use” caused by defective work stemming from an occurrence, including consequential costs for the necessary repairs and remediation. *Id.* at 982.
Similarly, in *Times Fiber Comm. Inc. v. Travelers Indem. Co.*, No. CVX05CV030196619S, 2005 WL 589821, at *10 (Conn. Super. Ct. Feb. 2, 2005), the court held that the cost to repair and replace an insured’s defective work or product did not constitute “property damage.” In *Times Fiber*, an insured supplier of cables had been notified that the cables needed to be suitable for indoor residential use. *Id.* at *1. After purchasing and installing the cables, it was discovered that they did not meet applicable building codes. *Id.* As a result, the purchaser was forced to replace the cables. *Id.* Furthermore, as drywall and other finishing had already been installed around the cables, the cables were difficult to access. *Id.* at *4.

The purchaser then filed a lawsuit seeking recovery “to repair physical damage to the units resulting from the removal and replacement of non-conforming cable and for the purchase price of the cables,” among other relief. *Id.* at *6. The insured tendered notice of the claim to its insurer, which had issued a series of policies that contained definitions of “property damage” that included physical injury to tangible property and loss of use of such property, as well as loss of use of tangible property that is not physically injured. *Id.* at *2, 4.

The *Times Fiber* court also addressed the issue of whether costs involved in the removal of the drywall to access the allegedly defective cables were covered under the policies in question. *Id.* at *8. Noting a lack of authority in Connecticut, the court examined decisions from other states, including *Wdeo v. Stone E. Brick, Inc.*, 81 N.J. 233 (1979) (finding no coverage where damage was confined to the insured’s work or product) and *Watts Indus. Inc. v. Zurich Am. Ins. Co.*, 121 Cal. App. 4th 1029 (7th Cir. 2004) (finding that the incorporation of a defective component or product into a larger structure or system does not constitute physical injury to tangible property, unless and until the defective component physically injures some other tangible part of the larger system or the system as a whole). The *Times Fiber* court found no duty on the part of the insurer to indemnify its insured for costs involved in the replacement of the defective cables or for the cost of removing and replacing the surrounding drywall. The court concluded:

> In this case there is no allegation that the Times Fiber’s cable harmed anything. Instead, the claims are solely for replacement and repair costs resulting from the removal of the defective cable. It is clear that there would be no coverage if the cable could have been removed without causing damage to the surrounding walls and based on the analysis in *Wdeo* the court finds that the allegations in this case are for contractual liability due to faulty workmanship instead of tort liability for physical damages. Accordingly, this court finds that the allegations of the complaints do not fall within coverage for physical injury to tangible property.

*Id.* at *8.
By contrast, the court concluded that the removal of the defective cable did result in loss of use of tangible property by way of lost rental income and diminution of fair market value of the property.  Id.  Because the tenants had to be relocated and provided with alternate accommodations, such allegations were “loss of use” of tangible property within the meaning of “property damage” in the CGL policy.  Id.  However, the court found that this “property damage” was not caused by an “occurrence” in light of the circumstances of the case and, as a result, there was no coverage for any of the alleged damages.  Id. at *9.

2.  The “Occurrence” Requirement

As a matter of first impression, the Supreme Court of Connecticut held that defective workmanship can give rise to an “occurrence” under a CGL policy.  Capstone Bldg. Corp., 67 A.3d at 973 (“W[e] conclude that defective workmanship can give rise to an ‘occurrence’ under the insuring agreement.”).  In Capstone Building, the insurer argued that defective construction lacks the element of “fortuity” necessary to be considered an “accident” within the meaning of the definition of “occurrence.”  Id.

In rejecting this contention, the court reasoned, “[i]nsurance policies . . . are designed to cover foreseeable risk, including negligent acts,” and the “mere fact that defective work is in some sense volitional does not preclude it from coverage under the terms of the policy.”  Id.  As such, the court concluded by stating “because negligent work is unintentional from the point of view of the insured, we find that it may constitute the basis for an “accident” or “occurrence” under the plain terms of the commercial general liability policy.”  Id. at 975.

3.  Timing of “Property Damage”

The Supreme Court of Connecticut follows the rule that coverage is triggered when a claimant sustains actual damage and not when the act or omission that caused such damage was committed.  See Landerman v. U.S. Fid. & Guar. Co., 203 A.2d 150 (Conn. 1964) (finding no coverage under a CGL policy where a defective ladder was sold during the policy period but did not cause any injury until after the expiration of the policy period); see also Tiedemann v. Nationwide Mut. Fire Ins. Co., 324 A.2d 263 (Conn. 1973) (finding that a contractor’s liability insurer, which limited protection to “accidents” occurring within a policy period, was not liable for damages caused by a fire in a home where the fire occurred after cancellation of policy, even though the contractor’s alleged ‘negligent activity’ occurred during the policy period).

In a more recent case, the Superior Court of Connecticut affirmed that coverage is triggered when “property damage” occurs during the policy period of a CGL policy.  See Travelers Prop. Cas. Co. of Am. v. Laticrete In’l, Inc., No. CV044002006S, 2006 WL 2349079 (Conn. Super. Ct., July 27, 2006).  The policies at issue in Laticrete were in effect from January 10, 1996 to February 1, 1998.  Id. at *2.  The underlying complaint against the insured alleged that water intrusion was first discovered in March 1998, after the expiration of the Travelers Policy.  Id. at *3.  The allegations were that defective shower pans and/or a defective waterproofing membrane caused water damage to surrounding walls, floors, steel studs, insulation, dry wall and other property separate from the insured’s work or product.  Id.
In its analysis of whether Travelers owed Laticrete a duty to defend and indemnify, the court reasoned that “the triggering event is not the installation of Laticrete’s allegedly defective waterproofing product; rather, the triggering event is the water leaking through the membrane and causing physical injury to tangible property.” *Id.* at *3. Even though a specific date was not alleged in the underlying complaint, the court held that the damage conceivably could have occurred during the policy period since it was possible that at least some of the shower pans were exposed to water during that policy period. *Id.*

4. **The “Business Risk” Exclusions**

In *White v. Pajak*, No. CV90-0384105S, 1992 WL 139162, at *3-4 (Conn. Super. Ct. 1992), the Superior Court of Connecticut held that the “your work” exclusion precluded coverage for claims against the insured who had damaged the clapboard siding of the plaintiff’s house while performing power washing services. Because the insured conceded that the damages arose from his power washing services, the court found the “your work” exclusion to bar coverage and, thus, granted the insurer’s motion for summary judgment. *Id.* at *4.

In *Candid Corp. v. Assurance Co. of Am.*, No. CV054008138, 2007 WL 1120616 (Conn. Super. Ct. March 29, 2007), the Superior Court of Connecticut found unambiguous the “damage to property” exclusion (j)(6) (which bars coverage for property damage to that particular part of any property that must be restored, repaired or replaced because “your work” was incorrectly performed on it). In *Candid*, the insured contractor performed building restoration work that caused damage to the specialty windowpanes contained in the building. *Id.* at *1. Although work on the windowpanes was not specified in its contract, the insured allowed paint to collect on the windowpanes and caused further damage to them by improperly cleaning off the paint. *Id.* In ruling on the insurer’s motion for summary judgment, the court considered whether exclusion (j)(6) barred coverage for the underlying claims.

After concluding that (j)(6) was unambiguous, the court next addressed whether it applied to the facts at hand. *Id.* at *3. The court noted that “the alleged damage did not occur to the portion of the building [the insured] was working on . . . but to the surrounding window panes.” *Id.* at *4. Because the extent of the damage allegedly resulting from the insured’s work performed under its contract was a disputed issue of fact, the court held that such issues had to be resolved by the trier of fact before it could hold that the exclusion applied as a matter of law. *Id.*

More recently, in *Capstone Building*, 67 A.3d at 983, the Connecticut Supreme Court analyzed a “your work” exclusion. The CGL policy at issue provided that the “your work” exclusion did not apply “if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.” The Court concluded that coverage is eliminated for property damage caused by an insured contractor’s work, but coverage is restored for property damage caused by the work of a subcontractor of that contractor. *Id.*
The Court noted the “exclusion and exception are triggered . . . only when there is an initial grant of coverage in the insuring agreement.” Id. Thus, in applying the exclusion to the facts presented, the Court found that the entire construction project met the definition of “your work” because it was completed by the general contractor or its subcontractors. Id. at 984. Nevertheless, the Court went on to find that the “subcontractor exception” restored coverage for damage caused by the contractor’s subcontractors’ work. Id. However, these claims were only applicable to the defects that qualified as property damage under the policy, as previously discussed above.

As such, the Court held “that the “subcontractor exception” to the “your work” exclusion would reinstate coverage if the plaintiff/contractor ultimately proved that property damage was caused by its subcontractors’ defective work. Property damage resulting from the plaintiffs’ own faulty work, however, would be precluded from coverage by the “your work” exclusion.” Id.
DELAWARE

1. **The “Property Damage” Requirement**

Delaware courts have not directly addressed whether faulty workmanship constitutes “property damage” under a CGL policy. In AE-Newark Assoc., L.P. v. CNA Ins. Co., No. CIV.A. 00C-05-186JEB, 2001 WL 1198930, at *1 (Del. Super. Oct. 2, 2001), the insured installed a roofing system that developed water leaks, which caused extensive damage to plaintiff’s property and to personal property of plaintiff’s tenants. Without any analysis of the issue, and prior to an examination of the “your work” exclusion, the court stated that “[t]here was clearly ‘property damage’ under the insurance policy that was caused by an ‘occurrence.’” Id. at *3; see also Don’s Hydraulics, Inc. v. Colony Ins. Co., 417 F. Supp. 2d 601, 613 (D. Del. 2006) (court indirectly addresses the issue in the context of examining whether repair costs are “damages” by stating that “the costs [of the general contractor’s repairs to its own work] did arise ‘because of’ property damage, and if the insurance applies to that property damage, the associated costs appear to be covered as well.”)

2. **The “Occurrence” Requirement**

Delaware federal courts have applied the principle that faulty workmanship, under certain circumstances, does not constitute an “occurrence” within the meaning of a CGL policy. For example, in Broshahan Builders, Inc. v. Harleysville Mut. Ins. Co., 137 F. Supp. 2d 517 (D. Del. 2001), the court, applying Delaware law, held that damage sustained by a homeowner due to the insured’s failure to properly install waterproofing materials was clearly within the control of the insured, as the general contractor of the construction project, and was not “a fortuitous circumstance happening without agency.” Id. at 526. As such, the court held that the “property damage” to the home was not caused by an “occurrence” and, therefore, was not covered by the policy at issue. Id.; see also Goodville Mut. Cas. Co. v. Baldo, No. 09-338-SLR, 2011 WL 2181627, at *3 (D. Del. June 3, 2011) (“Under Delaware law, defective workmanship does not constitute an occurrence for purposes of a commercial general liability policy.”). Relying on prior federal court decisions, the Superior Court of Delaware recently confirmed that Westfield Ins. Co. v. Miranda & Hardt Contr. & Bldg. Servs., LLC, 2015 Del. Super. LEXIS 160, 2015 WL 1477970 (Del. Super. Ct., 2015) that faulty workmanship does not constitute an occurrence under Delaware law.

3. **Timing of “Property Damage”**

Delaware courts have not addressed the timing of “property damage” issue in the context of a construction defect claim. In the environmental context, however, a Delaware federal court held that a continuous trigger applied to determine when injury occurred as a result of the spread of leachate at and from a landfill. See New Castle County v. Cont’l Cas. Co., 725 F.Supp. 800, 812 (D. Del. 1989); see also Harleysville Mut. Ins. Co., Inc. v. Sussex Cnty. Del., 831 F.Supp. 1111, 1124 (D. Del. 1993) (recognizing that under Delaware law, the “continuous trigger” theory applied in determining whether property damage arising from the discharge of contaminants from a landfill occurred during the policy period, so that every policy, from start of injurious process, would be triggered).
4. **The “Business Risk” Exclusions**

The business risk exclusions are recognized in Delaware as being “designed to protect insurers from contractors’ attempts to recover funds to correct deficiencies caused by the contractors’ questionable performance.” See Brosnahan Builders, 137 F.Supp.2d at 527, n. 9. Indeed, the exclusions are premised on the notion that coverage is meant to provide tort liability protection, not to shield an insured in the event that it fails to perform its contractual obligations adequately. Id.; see also Don’s Hydraulics, Inc., 417 F. Supp.2d at 614 (applying the “your work” exclusion to bar coverage for contractor’s indemnification claims arising out of repair to its own work).

Brosnahan Builders involved a contractor’s claim for coverage arising out of its alleged use of inadequate materials in constructing residential homes. 137 F.Supp.2d at 523-24. The court noted that “the ‘property damage’ to the building resulted from the defective ‘operations’ of [the contractors] or their subcontractors.” Id. at 527. Consequently, the court found that the policy’s damage to property exclusion applied, where that exclusion barred coverage for property damage to “real property on which you or any contractor or subcontractor working directly or indirectly on your behalf is performing operations, if the property damage arises out of those operations” applied to bar coverage. Id. at 527-28. Separately, the court also applied the “your work” exclusion, finding that the subcontractor exception did not apply because the complaint did not state the work was performed by subcontractors. Id. at 528.
DISTRICT OF COLUMBIA

1. The “Property Damage” Requirement

There is a dearth of case law analyzing whether faulty workmanship constitutes “property damage” in the District of Columbia. However, two 1998 decisions by the United States District Court for the District of Columbia are instructive. First, in Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley, Inc., 32 F. Supp. 2d 14 (D.D.C. 1998), the District Court found that an insurer had a duty to defend against allegations that defective work by the insured caused damage to other property. Commonwealth involved the construction of the Washington Metro subway rail system. The construction included a system of “floating” concrete slabs laid beneath the running rails to absorb vibration and noise of the trains. The slabs were to rest atop shock absorbing pads constructed by the insured subcontractor. Id. at 17. After completion of the work, it was discovered that the pads were defective such that they became compressed under the weight of the slabs, causing uneven settling of the track bed which required remediation. Id.

The District Court found that the remediation work constituted “property damage” under the policy. Id. at 18. The Court likened the issue to one where a boiler exploded and damaged the surrounding area which then needed to be repaired, noting that “here, the failure of the product, nonetheless, allegedly caused property damage to the surrounding area with further damage occurring when the defective product was repaired or replaced. This is sufficient to bring the moving Defendants within the general coverage provisions of the policy for purposes of the duty to defend[].” Id. at 19. Notably, the Court stated that “[i]f this were a situation where the only claimed damage was to the defective product itself, the result probably would be different.” Id. at 18.

In U.S. Fire Ins. Co. v. Milton Co., 35 F.Supp.2d 83 (D.D.C. 1998) the United States District Court for the District of Columbia addressed the issue of whether faulty workmanship constitutes “property damage” under Maryland law. In Milton, a CGL insurer and an excess liability insurer sought a declaratory judgment that their respective policies did not cover liability for a condominium developer and builder for claims arising from defective materials and substandard workmanship. The court held that under Maryland law the definition of “property damage” within the meaning of CGL policies “excludes the replacement of substandard materials and repair of inferior workmanship.” Id. at 86. While not an interpretation of D.C. law, a District of Columbia Court may look to its decision in Milton, and to Maryland law in general, in addressing construction defect coverage issues. That position also seems in line with the dicta contained in Commonwealth, 32 F. Supp. 2d at 18.
2.  **The “Occurrence” Requirement**

Whether faulty workmanship constitutes an “occurrence” has not been addressed by a District of Columbia court. In *Milton*, however, the court concluded:

> [L]iability insurance is distinct from a performance bond. A construction company entering a contract is deemed as a matter of law to expect that it will be liable to the purchasers of the project if it should fail to deliver that which it promised. Its breach is not an “accident.” Thus, under Maryland law, there is no “occurrence” under a comprehensive general liability insurance policy where, and to the extent that, 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.

35 F.Supp.2d at 86.

As noted above, a District of Columbia Court may look to its decision in Milton and to Maryland law generally, as persuasive authority in addressing this issue. See, e.g., *Western Exterminating Co. v. Hartford Accident & Indem.*, 479 A.2d 872, 874-75 (D.D.C. 1984) (holding that allegations of a negligent termite inspection did not constitute an “occurrence” because “there can be no ‘occurrence’ without resulting damage to tangible property”).

3.  **Timing of “Property Damage”**

District of Columbia courts generally apply the manifestation theory in determining the timing of “property damage.” See *Hartford Fin. Serv. Grp., Inc. v. Hand*, 30 A.3d 180, 188 (D.C. Cir. 2011) (“In the context of insurance policies covering the risk of physical injury to property, the general rule is that a compensable injury occurs when actual damage to property is discovered by the insurance beneficiary.”). See also *Wrecking Corp. of Am. v. Ins. Co. of N. Am.*, 574 A.2d 1348, 1350-51 (D.C. 1990) (noting that “the prevailing rule is that ‘proper damage occurs’ at the time the damage is discovered or when it has manifested itself.”)

However, in *Young Women’s Christian Ass’n of the Nat’l Capital Area, Inc. v. Allstate Ins. Co. of Ca.*, 275 F.3d 1145 (D.C. Cir. 2002), the U.S. Court of Appeals for the District of Columbia applied the continuous trigger theory in requiring the insurer of a subcontractor to cover liabilities arising out of the subcontractor’s negligence and breach of contract, in supplying and installing defective concrete panels. The Court found that the law of the District of Columbia “would apply a continuous trigger to the occurrence-based policies where the damage can be characterized as being continuous or progressive.” Id. at 1150. Looking specifically to the definitions of “occurrence” contained in the relevant policies as including “continuous or repeated exposure” to a condition or conditions, the Court held that “[t]he plain terms of these policies support application of the continuous trigger where, as here, the exposure [...] was continuous in nature.” Id. at 1152.
However, the Young Women’s Christian Ass’n court acknowledged that its application of the continuous trigger theory was an exception to the general rule in the District of Columbia that the manifestation theory applies when determining the timing of property damage. Id. at 1154 (citing Wrecking Corp. of Am., Va., Inc. v. Ins. Co. of N. Am., supra, at 1349-50).

4. The “Business Risk” Exclusions

In Commonwealth Lloyds Ins. Co. v. Marshall, Neil & Pauley, Inc., 32 F.Supp.2d 14, 19 (D.D.C. 1998), the court held that the “own work” (i.e., “your work”) exclusion did not apply to defective work that allegedly damaged other property. See also Central Armature Works, Inc. v. Am. Motorists Ins. Co., 520 F. Supp. 283, 288 (D.C. 1981) (applying a “your work” exclusion to the insured’s work, but noting that the exclusion does not bar coverage for damages to property other than the insured’s work or product caused by the insured’s poor performance). It should be noted that the “your work” exclusion at issue in Central Armature Works did not contain the subcontractor work exception contained in more recent policies.
1. The “Property Damage” Requirement

The Florida Supreme Court has concluded that the repair and replacement of defective work does not constitute “property damage,” but consequential or resultant damage caused by the defective work does constitute “property damage.” See U.S. Fire Ins. Co. v. J.S.U.B., Inc., 979 So. 2d 871, 876 (Fla. 2007).

In J.S.U.B., the insured, a general contractor, brought a declaratory judgment action against its insurer asserting that a CGL policy provided coverage for damage to homes caused by a subcontractor’s use of poor soil and improper soil compaction. The court found that the case did “not involve a claim for the cost of repairing the subcontractor’s defective work, but rather a claim for repairing the structural damage to the completed homes caused by the subcontractor’s defective work.” Id. at 890. The Court held that physical injury to the completed project that occurs as a result of defective work of a subcontractor can constitute “property damage” under a CGL policy. Id. at 890-91. The court explained that its decision was in accord with other courts that “have also recognized that there is a difference between a claim for the costs of repairing or removing defective work, which is not a claim for ‘property damage,’ and a claim for the costs of repairing damage caused by the defective work, which is a claim for ‘property damage.’” Id. at 889.

Likewise, in Auto-Owners Ins. Co. v. Pozzi Window Co., 984 So. 2d 1241, 1245 (Fla. 2008), a window manufacturer sued its CGL insurer, alleging that the insurer breached its contract where it denied coverage for costs for the repair or replacement of windows which were alleged to have been negligently installed by a subcontractor. The homeowner had purchased the windows that were installed by the contractor. The Florida Supreme Court found that there was “a factual issue” regarding whether the nature of the “defective work” was limited to the faulty installation or whether the windows themselves were also defective. Id. at 1247. The Court explained:

Because the Subcontractor’s defective installation of the defective windows is not itself “physical injury to tangible property,” there would be “no property damage” under the terms of the CGL policies. Accordingly, there would be no coverage for the costs of repair or replacement of the defective windows.

Conversely, if the claim is for the repair or replacement of windows that were not initially defective but were damaged by the defective installation, then there is physical injury to tangible property. In other words, because the windows were purchased separately by the Homeowner, were not themselves defective, and were damaged as a result of the faulty installation, then there is physical injury to tangible property, i.e., windows damaged by defective installation. Indeed, damage to the windows themselves caused by the defective installation is similar to damage to any other personal item of the Homeowner, such as wallpaper or furniture. Thus, coverage
would exist for the cost of repair or replacement of the windows because the Subcontractor’s defective installation caused property damage.

Id. at 1249.

Most recently, the Middle District of Florida held that coverage for “property damage” is triggered under CGL policies where the plaintiff alleges that a subcontractor’s defective work caused “damage to other building components,” “damage to other property,” or “property damage to work of [the developer], other subcontractors and tradesman, and to other building components and materials.” Southern Owners Ins. Co v. Gallo Bldg. Servs., No. 8:15-cv-01440-EAK-AAS, 2018 WL 6619987, at *6 (M.D. Fla. 2018).

2. The “Occurrence” Requirement

The Florida Supreme Court has concluded that claims of faulty or defective construction can constitute an “occurrence” under a CGL policy. In J.S.U.B, the court focused on whether the resulting damage was expected or intended from the standpoint of the insured. 979 So. 2d at 885. The court noted that even a breach of contract claim could constitute an “occurrence” so long as the end result was not intended or expected from the standpoint of the insured. Id. The court held that not only can faulty workmanship constitute an “occurrence,” but that it can qualify as such even when the faulty workmanship results in damages to its own work. Specifically, the court stated: “[W]e reject a definition of “occurrence” that renders damage to the insured’s own work as a result of a subcontractor’s faulty workmanship expected, but renders damage to property of a third party caused by the same faulty workmanship unexpected.” Id.; see also Pozzi Windows 984 So. 2d at 1248 (finding that the defective installation of windows, which the Builder did not intend or expect, was an “occurrence” under the terms of the CGL policies).

However, the United States District Court for the Middle District of Florida, interpreting J.S.U.B. and Pozzi Windows, held that where faulty workmanship alone caused only economic damage and physical damage to the insured’s work, there was no “occurrence.” See Amerisure Mut. Ins. Co. v. Auchter Co., No. 3:08-cv-645-J-32HTS, 2010 WL 457386, at *3-6 (M.D. Fla. Feb. 4, 2010).

3. Timing of “Property Damage”

Under Florida law, generally the trigger of coverage is the date when the complaining party actually sustained its damages and not when the negligent act or omission giving rise to the alleged damage occurred. See, e.g., Boardman v. Petroleum, Inc. v. Federated Mut. Ins. Co., 135 F.3d 750, 754 n.13 (11th Cir. 1998) (“Courts applying . . . Florida . . . law . . . have rejected the ‘manifestation trigger of coverage’ approach in favor of an approach under which coverage is triggered by property damage alone taking place during the policy period”); Trizec Props., Inc. v. Biltmore Constr. Co., 767 F.2d 810, 812-13 (11th Cir. 1985) (“There is no requirement that the damages ‘manifest’ themselves during the policy period. Rather, it is the damage itself which must occur during the policy period for coverage to be effective); Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240, 1247 (11th Cir. 2015) (“Property damage occurs when the damage happens, not when the damage is discovered or discoverable.”); Scottsdale Ins. Co. v. Granada Ins. Co., 371 F.Supp.3d 1130 (S.D. Fla. 2019) (“As the Eleventh Circuit recently put it in Carithers, the plain language of the policy triggers coverage when
property damage occurs and, in turn, property damage occurs ‘when the damage happens, not when the damage is discovered or [is] discoverable.’”) Accordingly, “the event which triggers potential coverage under an occurrence-type policy is the sustaining of actual damage by the complaining party and not the date of the negligent act or omission which caused the damage.” Trizec Props, 767 F.2d at 812.

Other courts applying Florida law have held that where the damage is continuously occurring, the appropriate trigger of coverage is when the damage manifests or is discovered. “The ‘trigger’ for coverage for the CGL policies is when the damage occurs and if damage is continuously occurring, the ‘trigger’ is the time the damage ‘manifests’ itself or is discovered.” Auto Owners Ins. Co. v. Travelers Cas. & Sur. Co., 227 F. Supp. 2d 1248, 1266 (M.D. Fla. 2002).

In Essex Builders Grp., Inc. v. Amerisure Ins. Co., 485 F. Supp. 2d 1302, 1309-10 (M.D. Fla. 2006) the court confirmed the holding in Travelers, finding that damage to apartment buildings that was not visible until late 2001, was not covered by a policy that expired in 2000 because there was no occurrence during the policy period. Id. at 1310; see also Mid-Continent Cas. Co. v. Frank Casserino Constr., Inc., 721 F.Supp.2d 1209 (M.D. Fla. 2010) (holding that the fact that no one saw or discovered damage caused by water intrusion during the policy period is immaterial, as the only relevant inquiry is whether physical injury to the building manifested itself during the period of coverage.); Harris Specialty Chems., Inc. v. U.S. Fire Ins. Co., No. 3:98–CV-351-J-20B, 2000 WL 3453982, at *12 (M.D. Fla. July 7, 2000) (concluding that the trigger date of coverage was the manifestation of discoloration of buildings caused by insured’s product); Hardaway Co. v. U.S. Fire Ins. Co., 724 So. 2d 588, 590 (Fla. Dist. Ct. App. 1998) (concluding that the trigger date of coverage was when pipe exploded, not when it was installed).

As a result, it appears that there is some disagreement among courts applying Florida law with respect to the appropriate trigger of coverage in construction defect cases.

4. The “Business Risk” Exclusions

Florida courts generally have found that the “business risk” exclusions preclude coverage for “property damage” associated with defective construction. LaMarche v. Shelby Mut. Ins. Co., 390 So. 2d 325, 326-27 (Fla. 1980); Centex Homes Corp. v. Prestressed Systems, Inc., 444 So.2d 66, 67 (Fla. Dist. Ct. App. 1984) (“it is well established that the purpose of comprehensive liability insurance coverage is to provide protection for personal injury or property damage caused by the product only and not for the replacement or repair of the product.”).

In Old Republic Ins. Co. v. Sheridan, 407 So. 2d 619, 620 (Fla. Dist. Ct. App. 1981), property owners filed an action against a developer, a general contractor and their insurance carrier to recover damages to their property in connection with a swimming pool that had been installed on their property. The policy at issue contained a “your work” exclusion that provided that the insurance did 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 materials, parts or equipment furnished in connection therewith.” Id. The court applied this exclusion to bar coverage for damage to the swimming pool erected by the insured. Id. at 621. The court explained that the “your work” exclusion precluded coverage for costs related to the repair or replacement of the swimming pool, but did not preclude coverage for...
damage caused to other property. \textit{Id.}

In reaching its decision, the court cited to the Florida Supreme Court’s decision in LaMarche, in which the court stated that the district court’s decision was consistent with the “majority view” that the purpose of comprehensive liability insurance coverage “is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.” 407 So. 2d at 326; see also \textit{J.S.U.B.}, 979 So. 2d at 881 (“LaMarche’s ultimate determination that there was no coverage for repair and replacement of the contractor’s own defective work was based on the policy exclusions, not the insuring provisions.”).

In \textit{J.S.U.B.}, the court upheld the subcontractor exception in the “your work” exclusion and found coverage under the general contractor’s CGL policy where the alleged damage to several homes resulted from the subcontractor’s faulty soil compaction and testing. \textit{Id.} at 883.

Where a plaintiff’s claim is based on loss of use of tangible property not physically damaged, the “impaired property” exclusion applies to bar coverage. \textit{Commercial Union Ins. Co. v. R.H. Barto Co.}, 440 So. 2d 383, 387 (Fla. Dist. Ct. App. 1983). In \textit{Commercial Union}, the plaintiff claimed damages for the loss of use of its office building resulting from the insured’s faulty installation of an air conditioning system. The court determined that the plaintiff’s claim fell within the impaired property exclusion. \textit{Id.} In so holding, the court addressed the “sudden and accidental physical injury” exception to the exclusion. Because the air conditioning system was subject to frequent and repetitive breakdown requiring constant repair and replacement, the plaintiff’s allegations did not constitute a “sudden and accidental” physical injury or destruction and, therefore, the exception did not apply. \textit{Id.} at 388.
GEORGIA

1. The “Property Damage” Requirement

In determining whether “property damage” exists under a CGL policy in the context of a construction defect claim, Georgia courts have found that “property damage” is intended to extend only to damage to property other than the insured’s work itself. Sapp v. State Farm Fire & Cas. Co., 226 Ga. App. 200 (Ga. App. 1997). In that regard, the Court of Appeals of Georgia has set forth the basis for making this determination, noting that there are two types of risks incurred by a contractor: (1) the business risk involved with the necessity to repair or replace defective work; and (2) the risk that faulty workmanship will cause injury or damage to other property. Id. at 203-04. While the first type of risk is not covered, Georgia courts have found that the second risk is the “type for which CGL . . . coverage is contemplated.” Id. at 204.

“The coverage applicable under the CGL policy is for tort liability for injury to persons and damage to other property[,] 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.” Id. (quoting Glens Falls Ins. Co. v. Donmac Golf Shaping Co., 203 Ga. App. 200 (Ga. App. 1997); McDonald Constr. Co., Inc. v. Bituminous Cas. Corp., 279 Ga. App. 757, 761-62, 632 (Ga. App. 2006)(“For there to be coverage under a CGL policy for faulty workmanship, there would have to be damage to property other than the work itself. . . .”); Gentry Machine Works, Inc. v. Harleysville Mut. Ins. Co., 621 F.Supp.2d 1288 (M.D. Ga. 2008) (same); Elrod’s Custom Drapery, Inc. v. Cincinnati Ins. Co., 187 Ga. App. 670 (“[P]urpose of this comprehensive liability insurance coverage is to provide protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.”); see also Taylor Morrison Serv., Inc. v. HDI-Gerling Am. Ins. Co., 293 Ga. 456, 456-57 (2013)(“‘[P]roperty damage,’ as that term is used in the standard CGL policy, necessarily must refer to property that is nondefective, and to damage beyond mere faulty workmanship.”)

In Sapp, the court evaluated whether coverage was available to an insured for damages arising from negligence claims related to its installation of hardwood floors at a project as well as certain mechanisms used to provide ventilation and moisture barriers for the floors. 226 Ga. App. at 200. Although the insured asserted that coverage should be available under its CGL policy for any damages arising from the floor installation, the court noted that the damages asserted against the insured were limited solely to the cost of repairing and replacing the floor itself. Id. at 204. As a result, the court found that coverage was not available for damage arising from the installation of the insured’s work itself and that “[a]ny damages to the house during the removal of the hardwood floor and the restoration of the house to the condition it was prior to [the insured’s] work were merely incidental to his claimed damages that [the insured] negligently performed the services for which [homeowner] contracted.” Id.
Similarly, in McDonald, the Georgia Court of Appeals determined whether coverage was available to a general contractor for the replacement of delaminated floor tiles that had been installed by a subcontractor. 279 Ga. App. at 758. To correct the defective tiles, the insured hired a new subcontractor, which included costs for new tiles, labor and moving furniture to allow for the installation. Id. In deciding whether the repair and reinstallation of the tiles constituted “property damage” under the insured’s policy, the court stated that there had to be damage to property other than the work itself in order to trigger coverage. Id. at 763. The court stated that the insured admitted on multiple occasions that it repaired the tiles in accordance with its contractual obligations for the construction and that there was no evidence of damage to any third party or tort liability outside of the contract. Id. As a result, the court held that there was no “property damage” that would be entitled to coverage. Id.; see also Johnson Landscapes, Inc. v. FCCI Ins. Co., No. 1:06-cv-2525-WSD, 2007 WL 4258233 (N.D. Ga. Nov. 30, 2007) (holding that coverage was not available for corrective work required by contract).

2. The “Occurrence” Requirement

The Georgia Supreme Court has found that faulty workmanship may constitute an “occurrence” even when there is no damage to third party property. Taylor Morrison Serv., Inc. v. HDI-Gerling Am. Ins. Co., 293 Ga. 456, 746 S.E.2d 587 (Ga. 2013). In Taylor Morrison Services, Inc., the Court addressed a situation in which the insured, a homebuilder, was sued by homeowners that owned homes built by the insured. Id. at 457. The homeowners alleged that the concrete foundations of their homes were improperly constructed because the contractor failed to lay adequate gravel beneath the foundations, failed to use adequate moisture barriers in the construction of the foundations, and built the foundations with concrete having too high a water-to-cement ratio. Id. As a result, the homes purportedly suffered damage in the form of water intrusion, cracks in the floors and driveways, and warped and buckling flooring. Id. at 457-458. In addition to claims of negligence, the homeowners alleged that the contractor misrepresented or concealed material information about the construction of the foundations and homes. Id. at 458.

The Court in Taylor Morrison Services addressed two specific issues, including: (1) whether Georgia law requires there to be damage to property other than the insured’s work to meet the “occurrence” requirement of a standard CGL policy; and (2) if not, whether breach of contract, fraud or breach of warranty claims can constitute an “occurrence.” Id. at 457. In evaluating the first question, the Court found that the term “accident” most commonly means “an unexpected happening without intention or design.” Id. (quoting Am. Empire Surplus Lines Ins. Co. v. Hathaway Dev. Co., 288 Ga. 749 (2011)). Additionally, the Court explained that “[s]tanding alone, the word is not used usually and commonly to convey information about the nature or extent of injuries worked by such a happening, much less the identity of the person whose interests are injured.” Id. Instead, the Court found that the term “accident” conveys information that is limited to whether a happening was expected or intended. Id. As a result, the Court held that “an ‘occurrence,’ as the term is used in a standard CGL policy, does not require damage to the property or work of someone other than the insured.” Id.
The Court noted that, in determining that the faulty workmanship of an insured can constitute an “occurrence,” its holding is not inconsistent with the “settled notion that CGL coverage generally is intended to insure against liabilities to third parties for injury to property or person, but not mere liabilities for the repair or correction of the faulty workmanship of the insured.” Id. at 461. The Court explained that the “occurrence” requirement is only one of the various requirements necessary to obtain coverage under a CGL policy, and any interpretation that Georgia courts have had of the “property damage” requirement or the “business risk” exclusions will still apply to limit coverage to claims arising from faulty workmanship. Id. The Court advised that “these other requirements of coverage are inherently better suited than the requirement of an ‘occurrence’ to limit coverage in faulty workmanship cases to instances in which the faulty workmanship has damaged other, nondefective property or work.” Id.

With respect to the second issue, the Court stated that, because fraud claims inherently require an intentional action, such claims do not meet the “occurrence” requirement of a standard CGL policy. Id. On the other hand, the Court held that, while a breach of contract and breach of warranty may involve an intentional act, there is a possibility that actions giving rise to such claims are not intentional. Id. As a result, the Court found that it is possible to have an “occurrence” even when the underlying claims are based upon theories of breach of contract or breach of warranty. Id.; see also Maxum Indem Co. v. Jimenez, 318 Ga. App. 669 (Ga. Ct. App. 2012) (finding that claims for defective workmanship may constitute an “occurrence” even if set forth in breach of contract claim).

3. **Timing of “Property Damage”**

Georgia law regarding the timing requirement in the construction defect context is very limited. To the extent that there are Georgia cases regarding the requirement that “property damage” “occurs during the policy period,” there have been conflicting views in connection with the proper interpretation of that language. In Arrow Exterminators, Inc. v. Zurich Am. Ins. Co., 136 F. Supp. 2d 1340 (N.D. Ga. 2001), a termite extermination business sued two general liability insurers, seeking a declaration regarding the insurers’ refusal to pay insurance claims for termite damage. Noting that there was no Georgia statute or state case law on point, the district court adopted a continuous trigger based on the fact that the policies did not incorporate a requirement that the damage must be discovered or manifested during the policy period. Id. at 1345-46. The court stated that “[w]ith a continuous trigger, all liability policies in effect from the exposure to manifestation provide coverage and are responsible for the loss.” Id. at 1340.

In Owners Ins. Co. v. James, 295 F. Supp. 2d 1354 (N.D. Ga. 2003), however, the court evaluated the application of identical language regarding the timing of “property damage” in connection with a scenario in which the insured applied a defective exterior insulation and finish system (“EIFS”) to a house that resulted in water infiltration. In finding that there was no evidence of any damage during the policy period, the court explained that the timing of the inquiry is based not upon the timing of the cause of the damage, but on the timing of the damage itself. Id. 1362. “Based on the plain language of the policies, the relevant question in determining coverage is when the property damage occurred, rather than when the event causing that damage occurred.” Id. The court ultimately found that the there was no evidence to establish that damage occurred as a result of the defective EIFS during the policy period, and, therefore, summary judgment on the lack of coverage was appropriate. Id. As a result, unlike the court in Arrow, the court in James applied an injury-in-fact trigger.
4. **The “Business Risk” Exclusions**

Georgia courts have found that business risk exclusions “are designed to exclude coverage for defective workmanship by the insured builder causing damage to the construction project itself.” *Sapp v. State Farm Fire & Cas. Co.*, 226 Ga. App. 200, 202-203 (Ga. App. 1997). These exclusions have been found to be clear and unambiguous by Georgia courts, which have noted that the presence of such exclusions illustrate that “there could not be any ‘objectively reasonable’ expectation on the part of the insured that coverage for defective workmanship by the insured builder which caused damage to the construction project itself [is] provided under the policy.” *Id.* at 203.

Applying these exclusions in Georgia courts includes the assessment of the two different risks presented under a CGL policy: the business risk borne by the contractor to correct its own work and faulty work that causes injury to third party property. *Glens Falls Ins. Co. v. Donmac Golf Shaping Co.*, 203 Ga. App. 200 (Ga. App. 1997). In that regard, Georgia courts have relied on *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233 (1979), to explain that “[t]he risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property other than to the product or completed work itself, and for which the insured may be found liable. The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work.” *Id.* at 511 (quoting *Weedo*, 81 N.J. at 235); see also *Hathaway Dev. Co., Inc. v. Am. Empire Surplus Lines Ins. Co.*, 301 Ga. App. 65 (Ga. App. 2009) (“[T]he CGL policy does not cover the costs to replace the defective workmanship - here, the defective plumbing - but does cover the costs to repair damage to other property caused by the defective workmanship.”)

In *SawHorse, Inc. v. S. Guar. Ins. Co. of Ga.*, 269 Ga. App. 493 (Ga. App. 2004), the court evaluated whether exclusions j(5) and j(6) applied to preclude coverage to a contractor for the alleged negligent addition of a second floor in a home that resulted in damage to both the first and the second floors. The court found that the work on the project was ongoing at the time of the damage and that the repair work to the second floor fell squarely within the application of the j(6) exclusion, precluding coverage for any costs incurred in connection with those repairs. *Id.* at 497. In connection with the first floor damage, however, the court found that j(5) and j(6) do not apply to preclude coverage to damages to property upon which the contractor was not performing work. *Id.* As a result, the court limited the application of j(5) and j(6) to the contractor’s work, without extending those exclusions to damages to third party property. *Id.*; see also *QBE Ins. Co. v. Couch Pipeline & Grading, Inc.*, 303 Ga. App. 196 (Ga. App. 2010) (holding that j(5) and j(6) precluded coverage because allegations were limited to subcontractor’s grading work itself).
Notably, Georgia courts have found that exclusions j(5) and j(6) may extend to a project as a whole to the extent that an insured has contracted to perform the entire project. See Bituminous Cas. Co. v. N. Ins. Co. of N.Y., 249 Ga. App. 532, 533-34 (Ga. App. 2001). In Bituminous, the court addressed a situation in which a contractor for the construction of a home sought coverage for damage incurred as a result of the installation of defective slate deck attached to the master bedroom. Id. at 532. Following water leakage that took place as a result of the defective deck, the contractor agreed to reinstall it, but, during that reinstallation, the plastic sheeting that covered the deck blew away during a heavy rainstorm, causing water to inundate the house. Id. In finding that j(5) and j(6) applied to preclude coverage for the damage resulting from the rainstorm, the court rejected the contractor’s reliance upon cases in which j(5) and j(6) were not applied because there was damage to third party property. Id. The court noted that the insured was the general contractor for the project, and, therefore, it was responsible for the entire construction. Id. at 434. As such, the court held that j(5) and j(6) precluded coverage for the damages sought against the contractor. Id.

Moreover, Georgia courts have routinely enforced the “your product” and “your work” exclusions. In Gary L. Shaw Builders, Inc. v. State Auto Mut. Ins. Co., 182 Ga. App. 220 (Ga. App. 1987), the court addressed the application of the “your product” and “your work” exclusions in the context of a claim against a builder in connection with the purported faulty construction of a home. In applying the “your product” and “your work” exclusions, the court noted that there is a distinction between damage to the faulty work or product and damage caused by the faulty work. Id. at 224. Based on that distinction, the court stated that standard CGL policies are not intended to cover damages to the faulty workmanship, but coverage may be available for damages caused by the faulty workmanship. Id. The court ultimately found that the “your product” and “your work” exclusions applied to preclude coverage because the damages alleged against the insured arose from work or work product that was expressly excluded under those provisions. Id.; see also Reliance Ins. Co. v. Povia-Ballantine Corp., 738 F. Supp. 523 (S.D. Ga. 1990) (“[T]he purpose of [the ‘your product’ exclusion] is to make clear that the liability policy ‘provide[s] protection for personal injury or for property damage caused by the completed product, but not for the replacement and repair of that product.’” (citations omitted)); see also Gentry Machine Works, Inc. v. Harleysville Mut. Ins. Co., 621 F.Supp.2d 1288, 1292 (M.D. Ga. 2008) (applying “your work” and “your product” exclusions to apply to repair and replacement of defective pedestals).

Georgia courts have expressly limited the application of the “your work” exclusion to the specific areas upon which the insured was performing its work. Canal Indem. Co. v. Blackshear Farmers Tobacco Warehouse, Inc., 227 Ga. App. 637 (Ga. App. 1997). In Canal Indem. Co., the court addressed a coverage dispute regarding underlying claims of faulty workmanship asserted against an insured subcontractor that installed and repaired only a portion of a defective roof on a tobacco warehouse. Id. According to the allegations asserted against the insured, there were two types of damages: (1) damage to the tobacco in the warehouse; and (2) damages to repair the roof itself. Id. at 639. The court found that the “your work” exclusion did not apply to the damaged tobacco within the warehouse. Id. With respect to the roof, however, the court held that the “your work” exclusion applied to bar coverage for any damages in connection with the repair of the roof, but only in connection with the section of the roof upon which the insured performed work. Id.
With respect to the “your product” exclusion, Georgia courts have found that a building cannot be considered a “product” for purposes of determining the application of business risk exclusions. See Hathaway Dev. Co. v. Am. Empire Surplus Lines Ins. Co., 301 Ga. App. 65 (Ga. App. 2009). The court in Hathaway Development Co. evaluated whether coverage was precluded for claims arising from a plumbing subcontractor’s allegedly defective work in a building. Id. In determining whether the exclusion regarding damages arising from the inclusion of an insured’s defective “work” in a “product” applied, the court found that a building cannot be considered a “product,” and, therefore, the exclusion was inapplicable. Id.
1. The “Property Damage” Requirement

Under Hawaii law, claims based on costs to repair or replace defective work or products likely would not constitute “property damage” within the meaning of a CGL policy. See Sturla, Inc. v. Fireman’s Fund Ins. Co., 684 P.2d 960, 962 n.4 (Haw. 1984) (concluding that costs of replacing uneven and fading carpets sold by insured was not covered under the CGL policy). The trial court in Sturla found that “property damage” requires damage to something or someone other than the product itself for liability coverage to exist. Id. Nonetheless, in affirming this decision, the Hawaii Supreme Court based its holding on the application of “business risk” exclusions, leaving unresolved the issue of whether the alleged defective carpeting constituted “property damage” within the meaning of the policy.

In addition to the foregoing, it is important to note that the Intermediate Court of Appeals of Hawaii has held that diminution of value does not constitute “loss of use” within the definition of “property damage.” Hawaiian Ins. & Guar. Co., Ltd. v. Blair, Ltd., 726 P.2d 1310, 1315 (Haw. Ct. App. 1986).

2. The “Occurrence” Requirement

State and federal courts in Hawaii have adopted different approaches to the “occurrence” requirement in the context of construction defect claims. In Grp. Builders, Inc. v. Admiral Ins. Co., 231 P.3d 67 (2010) (“Group Builders I”), Hawaii’s Intermediate Court of Appeals, held that that “under Hawaii law, construction defect claims do not constitute an ‘occurrence’ under a CGL policy.” Id. at 73. Accordingly, the court found that “breach of contract claims based on allegations of shoddy workmanship are not covered under CGL policies.” Id. “Additionally, tort-based claims, derivative of these breach of contract claims,” were also found not to be covered under CGL policies. Id. at 73-74.

The Hawaii state legislature enacted Haw. Rev. Stat. § 431:1-217 in 2011 as a response to the Group Builders I decision in order to restore insurance coverage for construction defect claims. Specifically, section 431:1-217 was enacted to stop application of the law set forth in Group Builders I to policies issued before the ruling. The statute states, in relevant part:

(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.

In light of Section 431:1-217, policies issued before Group Builders I must be interpreted only through the lens of case law existing at that time. See Am. Auto. Ins. Co. v. Haw. Nut & Bolt, Inc., 2017 U.S. Dist. LEXIS 149571, at *11 (D. Haw. Sep. 14, 2017) (“Given that the Policies pre-date Group Builders, Act 83 requires that the Policies be interpreted according to then-existing law”). Of note, however, the case law in existence before Group Builders I did not make it clear whether alleged construction defects can be considered an “occurrence” under a CGL policy.
Thereafter, in another state court decision, Group Builders, Inc. v. Admiral Ins. Co., No. 29729, 2013 WL 1579600 (Apr. 15, 2013) (“Group Builders II”), the Hawaii Intermediate Appellate Court acknowledged this uncertainty when it considered whether the same insurance policy at issue in Group Builder I provided coverage for the insured in a construction defect lawsuit. The subject policy was issued in the year 2000 and the insurer disclaimed both defense and indemnity in 2004. In evaluating whether the insurer did, in fact, have a duty to defend the insured, the court found that there was such a duty because the courts “were split as to whether construction defect claims constituted an ‘occurrence’ under a CGL policy at the time [the insurer] refused to undertake a defense on behalf of [the insured.]” Id. at *10.

Based on the foregoing, the holding in Group Builders I likely applies to policies issued after 2010, when it was decided, to deem faulty workmanship claims outside of the definition of an “occurrence.” That said, it remains unclear whether Hawaiian courts will find that such claims constitute an “occurrence” under pre-2010 policies. The holding in Group Builders II suggests that there is, at the very least, a duty to defend such claims on the issue of “occurrence” given the legal landscape of that time.

Notwithstanding the foregoing, however, federal courts in Hawaii have precluded coverage for construction defect claims under pre-2010 policies based upon the reasoning set forth in Group Builders I, regardless of the statute. Specifically, the United States District Court for the District of Hawaii found that, even if Haw. Rev. Stat. § 431:1-217 “nullified” the decision in Group Builders I as to policies preceding the decision, all prior cases that Group Builders I relied upon are still good law. See Illinois Nat’l Ins. Co. v. Nordic PCL Constr., Inc., 870 F. Supp. 2d 1015, 1028-32 (D. Haw. 2012) (evaluating policies issued in 2007 and noting that the court was “clearly bound by [prior case law], in which the Ninth Circuit construed Hawaii law as not providing for insurance coverage for contract related claims”).

In that regard, the District Court of Hawaii has held that it is still bound by the 2004 decision in Burlington Ins. Co. v. Oceanic Design & Constr., Inc., 383 F.3d 940, 948, 956 (9th Cir. 2004), and its predecessors, wherein the Ninth Circuit predicted that the Hawaii Supreme Court would determine that insurance coverage would not be provided for contract related claims as a contract claim does not constitute an “occurrence” under a CGL policy. See State Farm Fire & Cas. Co. v. Vogelgesang, 834 F. Supp. 2d 1026, 1037 (D. Haw. 2011) (concluding that House Bill 924/Haw. Rev. Stat. § 431:1-217 did not affect the ruling because nearly all of the cases that Group Builders I relied on “predate 2006, the year State Farm issued to Defendants the first policy that could potentially provide coverage in this case. None of these cases suggests that the claims associated with the Okudas’ contract with Defendants warrants coverage.”); Nordic PCL Constr., Inc., 870 F. Supp. 2d at 1030 (in an action involving policies issued in 2007, the court noted that it was “clearly bound by Burlington, in which the Ninth Circuit construed Hawaii law as not providing for insurance coverage for contract related claims” as such claims are not “occurrences” under a CGL policy); Evanston Ins. Co. v. Nagano, 891 F. Supp. 2d 1179, 1184 (D. Haw. 2012) (in an action involving policies issued from 2002 through 2012, the court found, relying on Hawaii case law existing at the time when “Defendants first purchased the Policies,” “that the actions which form the basis of the [underlying plaintiff’s] contract claims and contract-based claims are not occurrences within the meaning of the Policies.”). Federal courts in Hawaii have found that there is no duty to defend or indemnify the insured if the underlying claims are contract based. See Nautilus Ins. Co. v. 3 Builders Inc., No. 11-00303 LEK-RLP, 2013 WL 3223643, at *13-15 (D. Hawaii June 24,
(declining to follow Group Builders II because under applicable federal case law at the time the relevant policy was issued, there was no coverage for contract-related claims and, thus, there was no duty to defend).

3. Timing of “Property Damage”

The Supreme Court of Hawaii has adopted the “injury-in-fact” trigger for claims involving all standard CGL policies. Sentinel Ins. Co., Ltd. v. First Ins. Co. of Hawaii, Ltd., 875 P.2d 894, 915-17 (Haw. 1994). Under the “injury-in-fact” approach, an injury occurs “whether detectable or not” and “need not manifest itself during the policy period, as long as its existence during that period can be proven in retrospect.” Id. at 915. The court found the “injury-in-fact” trigger to be compelled by the plain language of CGL policies and consistent with the reasonable expectations of the parties as well as other public policy considerations. Id. at 917. Indeed, the court clarified, “the very nature of an ‘occurrence’ as opposed to ‘claims-made’ policy is to provide coverage for property damage that occurred during the policy period whenever that liability is imposed.” Id. at 916. While noting that the injury-in-fact trigger “may provide less predictability than the manifestation trigger for insurance companies in setting policy reserves,” the Supreme Court observed that “CGL occurrence policies were not designed for optimizing predictability in establishing reserves.” Id. at 917.

Despite adopting the “injury-in-fact” trigger, the court stated that where “injury-in-fact occurs continuously over a period covered by different insurers or policies, and actual apportionment of the injury is difficult or impossible to determine, the continuous injury trigger may be employed to equitably apportion liability among insurers.” Id.; Ass’n of Apartment Owners of Imperial Plaza v. Fireman’s Fund Ins. Co., 939 F. Supp. 2d 1059, 1069 (D. Haw. 2013) (finding that plaintiff had “established that the water infiltration occurred progressively over time as a continuous and indivisible process of injury”). Under the continuous injury trigger, “property damage” is “deemed to have ‘occurred’ continuously for a fixed period . . . and every insurer on the risk at any time during that trigger period is jointly and severally liable to the extent of their policy limits, the entire loss being equitably allocated among the insurers. Sentinel, 875 P.2d at 915 (citing Chemical Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co., 817 F. Supp. 1136, 1153 (D.N.J. 1993)). The “trigger period” begins with the inception of the injury and ends when the injury ceases. Id.

4. The “Business Risk” Exclusions

“Exclusion clauses . . . serve ‘to restrict and shape the coverage otherwise afforded.’” Sturla 684 P.2d at 963 (citing Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 237 (1979)). In Sturla, the Supreme Court of Hawaii recognized that the business risk exclusions found in the policy at issue were “meant to negate coverage for the contractual liability of an insured as a source of goods or services to make good on a product or work which is defective or otherwise unsuitable because it is lacking in some capacity.” Id. While Sturla interpreted the business risk exclusions under the prism of a faulty product, it expressly recognized that the business risk exclusions were applicable to defect claims for faulty workmanship as well. Indeed, the court relied on Weedo, a New Jersey construction defect case and explained, “[l]ike the New Jersey court we believe the risks insured by the standard form policy are “injury to people and damage to property caused by a faulty product or workmanship.”
In *Sturla*, a developer sued the insured carpet distributor for the cost of replacing defective carpets, which faded prematurely. The Supreme Court concluded that the claims were precluded by the “your product” exclusion and that the insured had no reasonable expectation of coverage for claims alleging that its products were “not that for which the damaged person bargained for.” *Id.* at 964. The court was careful once again to limit its decision to the facts before it and refused to make any broad generalizations. Instead, the court found that the business risk exclusions are clear and could not have given rise to an objectively reasonable expectation of protection for the claims asserted in the instant lawsuit. *Id.*; see also *Burlington Servs., Ltd. v. Steve’s AG Services, Ltd.*, 2007 WL 4357767, at *1 (9th Cir. Dec. 10, 2007) (holding that exclusions (j)(5) and (j)(6) applied to bar coverage to insured tree logger for claims based upon costs to restore land to natural state and replace improperly cut timber). But see *Hurtig v. Terminix Wood Treating & Contr. Co.*, 692 P.2d 1153, 1154 (1984) (holding that “your work” exclusion was not applicable to termite damage to home where claimed loss was not confined to the insured’s “work,” which consisted of inspection and application of chemicals).
1. The “Property Damage” Requirement

Despite a lack of case law addressing construction defect claims under Idaho law, the Supreme Court of Idaho considered the “property damage” requirement in Western Heritage Ins. Co. v. Green, 54 P.3d 948 (Idaho 2002). In Green, the insured contracted with a family to apply fertilizer and weed control chemicals to their farmland prior to the planting of a potato crop.  Id. at 833. Due to clogging of the sprayer nozzles during application, some areas of the field were insufficiently sprayed or skipped altogether, resulting in weed growth and damage to the soil and plants.  Id. at 834. The court found that the damage to the crops constituted damage to “tangible property” while the damage to the soil fell within the scope of “loss of use.”  Id. at 952. The court noted that the definitions of “property damage” and “occurrence” are “straightforward and concise . . . [and] unambiguous.”  Id. at 952.

2. The “Occurrence” Requirement

Idaho courts have not addressed what constitutes an “occurrence” under a CGL policy in the context of a construction defect claim. Nonetheless, in the context of a homeowner’s policy, the Idaho Supreme Court appeared to utilize the following two dictionary definitions to determine what constitutes and “occurrence:”

*Insurance contract. An accident within accident insurance policies is an event happening without any human agency, or, if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens. A more comprehensive term than “negligence,” and in its common signification the word means an unexpected happening without intention or design.*


*ac • ci • dent (ak əsi dent), n. 1. an undesirable or unfortunate happening, unintentionally caused and usually resulting in harm, injury, damage, or loss; casualty; mishap: automobile accidents. 2. any event that happens unexpectedly, without a deliberate plan or cause.*


Mut. of Enumclaw v. Wilcox, 123 Idaho 4, 8-9 (1992); see also Farm Bureau Mut. Ins. Co. v. Cook, 163 Idaho 455, 459 (2018) (analyzing whether the “occurrence” requirement in a property insurance policy can be satisfied where the claim arises out of an intentional shooting: “Our rulings in Wilcox and State Farm demonstrate that Idaho is, as Couch on Insurance describes, a ‘nature of the event’ state and not a ‘standpoint of the insured’ state. ** An intentional shooting caused the injuries, and thus the shooting was not an ‘occurrence’ under Idaho law.”)
3. **Timing of “Property Damage”**

The Supreme Court of Idaho has held that “it is well settled that the time of the occurrence of an “accident,” within the meaning of a liability indemnity policy, is not the time the wrongful act was committed but the time the complaining party was actually damaged.” Millers Mut. Fire Ins. Co. v. Ed Bailey, Inc., 103 Idaho 377, 379 (1982) (quoting Nat’l Aviation Underwriters v. Idaho Aviation Ctr., 471 P.2d 55, 57 (Idaho 1970)). Accordingly, an accident “does not occur until damages resulting from an insured act occur.” Id. at 380.

In Millers, the incorporation of the insured’s defective insulation in a potato storage facility during the policy period was alleged to have resulted in a fire occurring after the expiration of the policy period. The court explained that such a situation involved the “commission of a wrongful act which produces no discernible harm for a period of time and then suddenly manifests itself in a burst of damages.” Id. at 381. In such cases, “the time of the accident is the time the damage occurs.” Id.; see also N. Pac. Ins. Co. v. Mai, 130 Idaho 251, 254-55 (1997) (concurring opinion advocating the “injury-in-fact” trigger to define occurrence). Accordingly, there was no coverage under the policy in effect at the time the defective insulation was installed because no actual physical damage occurred during that policy period. Millers, 103 Idaho at 381; see also Melichar v. State Farm Fire & Cas. Co., 143 Idaho 716, 721 (2007) (holding that Idaho “case law makes clear that an accident occurs during the policy period in which the policy holder was actually damaged, and not the period in which the event giving rise to the loss occurred”); State of Idaho v. Bunker Hill Co., 647 F. Supp. 1064, 1070 (D. Idaho 1986) (addressing the various trigger-of-coverage theories and holding that, under the circumstances of the case, the court did not need to adopt a trigger method because the language of the policies was clear and unambiguous that the environmental property damage for which insurance was provided must occur during the policy period).

4. **The “Business Risk” Exclusions**

Idaho courts have yet to fully address the scope of the business risk exclusions under CGL policies. In Green, however, the Supreme Court of Idaho found that an “impaired property” exclusion precluded coverage for the “loss of use” of soil caused by the insured’s misapplication of chemicals on the claimant’s farmland. Green, 54 P.3d at 953-54. The exclusion addressed by the court provided as follows:

This insurance does not apply: (m) to loss of use of tangible property which has not been physically injured or destroyed resulting from (1) a delay or lack of performance by or on behalf of the named insured of any contract or agreement, or (2) the failure of the named insured’s products or work performed by or on behalf of the named insured to meet the level of performance, quality, fitness or durability warranted or represented by the named insured; but this exclusion does not apply to loss of use of other tangible property resulting from the sudden and accidental physical injury to or destruction of the named insured’s products or work performed by or on behalf of the named insured after such products or work have been put to use by any person or organization other than an insured.
The court found that damages relating to the loss of use of the soil that had been improperly sprayed were barred from coverage under this exclusion. Id. at 954. The court also held that exclusion (k), which barred coverage for property damage “to property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control,” applied since the “soil was in the care, custody or control of the Greens.” Id. at 953.
1. The “Property Damage” Requirement

The Supreme Court of Illinois has held that CGL policies are intended to protect the insured from liability for injury or damage to third party property; they are not intended to pay the costs associated with repairing or replacing the insured’s defective work and products which are deemed to constitute purely economic losses. Travelers Ins. Co. v. Eljer Mfg., Inc., 197 Ill. 2d 278, 314 (2001); see also CMK Dev. Corp. v. West Bend Mut. Ins. Co., 917 N.E.2d 1155, 1166 (Ill. App. Ct. 2009) (“there is no coverage for contract liability that arises when a contractor fails to deliver the home that the purchasers bargained for.”); Stoneridge Dev. Co., Inc. & Highland Glen Assoc. v. Essex Ins. Co., 888 N.E.2d 633, 654 (Ill. App. Ct. 2008) (insured builder’s workmanship causing cracks in home was not “property damage” since homeowner’s “sought costs of repair or replacement of the diminished value of their home, which are economic losses”); Viking Constr. Mgmt. Inc. v. Liberty Mut. Ins. Co., 831 N.E.2d 1, 17-18 (Ill. App. Ct. 2005) (claims for economic damages, including “repair and replacement of the damaged product” do not constitute “property damage”).

In Stoneridge, the court held that the CGL policy issued by Essex did not cover its insured’s liability in connection with damages sought by homeowners against the insured for the costs of repair or replacement or the diminished value of the homeowners’ home because such damages were deemed economic losses. 888 N.E.2d at 654. In that case, the plaintiffs in the underlying action filed a complaint against Essex’s insured, Stoneridge, for damages alleged to have been caused by Stoneridge’s improper construction of the plaintiffs’ residence, which was located on and/or near improperly compacted soil. The plaintiffs alleged that Stoneridge breached the purchase contract and the implied warranty of habitability. Id. at 638.

The policy issued by Essex defined “property damage” as “[p]hysical injury to tangible property, including all resulting loss of use of that property.” The Stoneridge court reasoned that tangible property suffers a physical injury if the property “is altered in appearance, shape, color or in other material dimension.” Id. at 653 (citing Travelers Ins. Co. v. Eljer Mfg., Inc., 757 N.E.2d 481 (Ill. 2001)). In concluding that the policy’s definition of “occurrence” was not triggered, the court stated that “[w]hile defective workmanship could be covered if it damaged something other than the project itself . . . in this case the [plaintiffs] alleged damage only to the home” and “[t]hus, there was no ‘occurrence.’” Id. at 654. The court next held that “there was no ‘property damage’” because “[t]he [plaintiffs] sought costs of repair or replacement or the diminished value of their home, which are economic losses.” Id.; see also State Farm Fire and Cas. Co. v. Tillerson, 777 N.E.2d 986 (Ill. App. Ct. 2002) (finding that replacement of defective work or the diminishing value of the home were economic losses and not property damage under the policy).

The Stoneridge court next addressed the insured’s argument that Essex’s definition of “property damage” ignores the Illinois Supreme Court’s definition of the term in Eljer Mfg., where the Supreme Court held that there is physical injury to tangible property if the property “is altered in appearance, shape, color or in other material dimension.” Eljer Mfg., 757 N.E.2d at 496. The insured in Stoneridge argued that this definition does not limit “property damage” to personal property. In addressing this argument, the Stoneridge court was quick to clarify that it was its “discussion of ‘occurrence’ that led [it] to conclude that property damage that is a natural and ordinary consequence of defective workmanship is not
an ‘accident’ under a CGL policy, though there would still be coverage if the construction defect results in damage to something other than the project itself.” Stoneridge, 888 N.E.2d at 655. While the Stoneridge court noted that the Illinois Supreme Court in Eljer Mfg. did not “address the principle that breach of contract claims generally are not covered by CGL policies,” the court clarified that the Illinois Supreme Court nonetheless recognized the “underlying principle that costs associated with repairing or replacing the insured’s defective work and products are purely economic losses and are not covered by CGL policies.” Id.

Similarly, in Lyerla v. AMCO Ins. Co., 536 F.3d 684 (7th Cir. 2008), the insured was hired to build a residential dwelling according to particular plans and specifications. Id. at 686. The homeowners sued alleging that the insured failed to construct the building pursuant to the agreed-upon plans and specifications, failed to complete punch list items within the timeframe provided by the contract, and failed to build the home in a workmanlike manner. Id. at 686-87. The court, applying Illinois law, held that the underlying complaint alleges that the insured did not satisfy his contractual obligations and fails to contain any facts alleging “property damage” caused by an “occurrence.” The court stated that the homeowners did not allege physical injury to tangible property, since tangible property suffers a physical injury when the property is “altered in appearance, shape or color or other material dimension,” and the complaint was held to allege nothing of that kind. Id. at 691. The court went on to clarify that storage fees and liquidated damages sought in the complaint do not constitute “property damage,” but rather are contract damages. Id. at 692.

Thus, the principle that CGL policies preclude from coverage costs associated with repairing or replacing an insured’s defective or faulty work has long been the rule in Illinois. Tillerson, supra, 777 N.E.2d at 991 (complaint seeks either the repair or replacement of defective work or the diminution in value of home and thus seeks recovery for economic loss, not physical injury to tangible property, therefore there is no allegation that the insured tortuously injured the home and no “property damage” is alleged); Pekin Ins. Co. v. Richard Marker Assoc., Inc., 682 N.E.2d 362, 365 (Ill. App. Ct. 1997) (CGL policies “are intended to provide coverage for injury or damage to the person or property of others; they are not intended to pay the costs associated with repairing and replacing the insured’s defective work and products, which are purely economic losses.”); Western Cas. & Sur. Co. v. Brochu, 475 N.E.2d 872, 878 (Ill. 1985) (analyzing definition of “property damage” in light of policy’s “your product” and “your work” exclusions and holding that homeowners’ claims of property damage to its home built by insured is not covered by CGL policy because homeowners seek compensation solely for property damage to the home built by insured).

2. The “Occurrence” Requirement

Generally, Illinois courts do not consider claims solely alleging damage due to defective workmanship to constitute an “occurrence” within the meaning of a CGL policy. Richard Marker Associates, Inc., 682 N.E.2d at 366 (where complaint alleged that insured’s faulty workmanship caused damage to the building itself as well as furniture, clothing and antiques located inside the building, then such claims falls within the meaning of a CGL policy’s “accident” and an “occurrence.”); Monticello Ins. Co. v. Wil-Freds Constr., Inc., 661 N.E.2d 451, 457 (Ill. 1996) (there would have been an “occurrence,” if water had damaged cars in the parking garage or falling concrete had hit a pedestrian); Western World Ins. Co. v. Penns-Star Inc. Co., 2009 WL 1605909, at *4 (S.D. Ill. June 8, 2009) (where insured contractor intended to destroy a common wall but did not intend to damage adjacent building, property damage to adjacent building was therefore an accident that constituted an occurrence).
Whether an insured’s faulty workmanship constitutes an “occurrence” depends on whether the alleged property damage was a “natural and ordinary consequence” of the insured’s work. Viking Constr. Mgmt., Inc., 831 N.E.2d at 15 (“collapse of the wall and section of the building was the ordinary and natural consequence of improper bracing, i.e., faulty construction work [by the insured]” and thus there was no “occurrence” under CGL policy at issue); Lyerla., supra, 536 F.3d at 691-92 (insured contractor’s alleged failure to construct home pursuant to plans and specifications, failure to build home in a workmanlike manner, failure to correct defects and failure to complete home on time did not constitute “property damage” caused by an “occurrence” because resulting damage from such defective work was considered the natural and ordinary consequences of defective workmanship, rather than an accident); Cincinnati Ins. Co. v. Taylor-Morley, Inc., 556 F. Supp. 2d 908, 916-17 (S.D. Ill. 2008) (insured real estate developer’s construction defects did not amount to an “occurrence” since such defects were held to flow as a natural and ordinary consequence of improper construction techniques and did not constitute an “accident”).

In Stoneridge, as discussed above, the court concluded that cracks revealed in a house subsequent to an insured’s construction of the house did not constitute an “occurrence” under the CGL policy at issue. Stoneridge, 888 N.E.2d at 654. More particularly, the Court reasoned that “[t]he cracks that developed in the [plaintiffs’] home were not an unforeseen occurrence that would qualify as an ‘accident,’ because they were natural and ordinary consequences of defective workmanship, namely, the faulty soil compaction.” Id. Although the policy did not define “accident,” the court relied on its previous definition of the term as “an unforeseen occurrence, usually of an untoward or disastrous character or an undesigned, sudden, or unexpected event of an inflictive or unfortunate character.” Id. at 650.

Furthermore, in Tillerson, a case factually analogous to Stoneridge, the court held that damages to a home caused by a contractor’s faulty soil compaction did not qualify as an “occurrence” or “accident” under the CGL policy at issue. 777 N.E.2d at 991. There, the insured contractor built a new room addition on a house and converted the existing carport into a garage. Id. at 988. The homeowners later sued the insured for breach of express and implied warranties, alleging that the insured built the addition over an existing cistern and failed to properly compact the soil before constructing the addition. Id. The contractor’s insurance company sought a declaratory judgment that it had no duty to defend the contractor. Id.

The court concluded that the homeowners’ allegations did not fall within the meaning of an occurrence because there were no allegations of an unforeseen, sudden, or unexpected event. Id. at 991. The court clarified that the word “occurrence” in insurance policies broadens coverage and eliminates the need to find an exact cause of damages, “as long as they are neither intended not expected by the insured” but that nonetheless, the occurrence must still be an accident. Id. at 990-91. More particularly, the court held that the construction defects alleged in the homeowners’ complaint were not an accident because they were the natural and ordinary consequences of the contractor’s alleged improper construction techniques. Id.

However, it is important to note that, in one particular Illinois case, an insured’s negligently performed work was held to give rise to an “occurrence”. In Country Mut. Ins. Co. v. Carr, 867 N.E.2d 1157 (Ill. App. Ct. 2007), the court held that the sudden movement of the plaintiff homeowners’ basement walls allegedly as a result of an insured’s inappropriate backfill and negligent use of earthmoving equipment adjacent to the walls was indeed an
accident, and thus, qualified as an “occurrence” as defined by the applicable CGL policy at issue. The court reasoned that the movement of walls resulted in damage to those walls and to other parts of the residence and that there was no allegation in the underlying complaint that the wall movement was intended or expected by the insured. Id. at 1162-63. However, it should be noted that the Seventh Circuit recently determined Carr to be an “outlier” under Illinois law. Nautilus Ins. Co. v. Bd. of Directors of Regal Lofts Condo. Ass’n, 764 F.3d 726, 732, n.1 (7th Cir. 2014).

3. Timing of “Property Damage”

In Illinois, CGL policies are “triggered” if the “property damage” takes place during the policy period. See Eljer Mfg., Inc., supra, 757 N.E.2d at 481 (CGL policy triggered at such time that claimant suffered water damage due to leaks from plumbing system manufactured and sold by insureds); U.S. Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226 (Ill. App. Ct. 1994) (concluding that except in circumstances where the injury process continues progressively over time, occurrence policies affording coverage for bodily injury and those affording coverage for property damage are both governed by an injury-in-fact trigger; thus, it is the property damage, not its cause, which must occur during the policy period for coverage to be triggered); Pekin Ins. Co. v. Janes & Addems Chevrolet, Inc., 636 N.E.2d 34 (Ill. App. Ct. 1994) (“the insured was covered under a general liability policy and coverage is triggered when the injury occurs.”).

In Great Lakes Dredge & Dock Co. v. City of Chicago, 260 F.3d 789 (7th Cir. 2001), the Seventh Circuit Court of Appeals held that although the pilings that ultimately caused the collapse of a tunnel below a riverbed had been driven months earlier, businesses did not suffer “property damage” and there was no “occurrence” triggering coverage until the actual collapse of the tunnel and flooding of the businesses. Id. at 795. Accordingly, although the faulty plumbing was installed during the policy period, coverage was not triggered because the water damage was caused by a leak that took place after the policy period expired. Id. at 795-96.

4. The “Business Risk” Exclusions

In Illinois, the interpretation of the “business risk” exclusions is based on the premise that liability policies are not intended to provide protection against the insured’s own faulty workmanship or product, which are normal risks associated with the conduct of the insured’s business. Instead, liability policies are meant to afford coverage for damage to other property caused by the insured’s work or product. See, e.g., USF&G v. Wilkin Insulation Co., 578 N.E.2d 926, 934 (Ill. 1991) (“business risk” exclusion did not preclude coverage for property damage resulting from insured’s incorporation of asbestos-containing materials into buildings since the underlying complaints sought recovery for damage to property other than the product installed by the insured). Thus, “CGL policies generally do not cover” the “business risk” undertaken by an insured contractor - “the risk that the insured ‘may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity.’” Pekin Ins. Co. v. Miller, 854 N.E.2d 693, 699 (Ill. App. Ct. 2006).

Where the policyholder’s work causes damage to other property, however, the “business risk” exclusions may not apply. Indeed, Illinois courts interpret the “your work” and “your product” exclusions to preclude coverage for the cost of repairing damage to the
insured’s work or product itself or for repair or replacement of the insured’s defective work or product. Home Indem. Co. v. Wil-Freds, Inc., 601 N.E.2d 281, 285-86 (Ill. App. Ct. 1992). Accordingly, these exclusions do “not apply to the loss of use of other property arising out of sudden and accidental physical injury to [the insured’s] product or [the insured’s] work after it has been put to its intended use.” Tillerson, 777 N.E.2d at 992 (insurer owed no duty to defend insured pursuant to the “your product” or “your work” exclusions in light of allegations that insured failed to adequately construct room addition and convert an existing carport into a garage in accordance with design specifications, good workmanship, and reasonable construction standards).

In Wil-Freds, the court reviewed business risk exclusion (n), which bars coverage for “property damage to the named insured’s products arising out of such products or any part of such products.” 601 N.E.2d at 284-86. There, the underlying claim involved negligence and breach of contract claims asserted against the insured, surrounding its construction of a new library addition and renovation of existing library facilities. Id. at 282-83. The insurer contended that exclusion (n), by itself, precluded coverage for these claims, arguing that a completed building, for the purposes of exclusion (n), was considered the insured’s “product.” Thus, the insurer reasoned, because the underlying complaint alleged only damage to the addition itself, coverage was properly excluded. Conversely, the insured argued that “work” or “services” are not included within the policy definition of “named insured’s products” and that the reference to “products” in exclusion (n) and the reference to “work performed” in exclusion (o) evidenced the parties’ intent to preclude coverage for different types of risks. Id. at 284.

The court adopted the insurer’s argument with respect to exclusion (n), and in doing so, relied on other Illinois rulings, including Western Cas. & Sur. Co. v. Brochu, 460 N.E.2d 832 (Ill. App. Ct. 1984), which interpreted identical exclusionary clauses. In Brochu, homeowners filed a complaint against a general contractor alleging physical damage and diminution in value as a result of the insured’s alleged failure to construct their home in a workmanlike manner. Id. at 834. In the Brochu coverage action, the court held that the alleged property damage to the house which resulted from soil subsidence was excluded under exclusions (n) and (o). Id. at 838. In reaching its conclusion with respect to exclusion (n), the court determined that a completed house met the policy definition of product, which the policy at issue there defined as “goods or products manufactured, sold, handled or distributed by the named insured.” Id. at 836-38. The Appellate Court next concluded that, consequently, exclusion (n) applied to preclude coverage for repairs or replacements arising from the failure of an insured’s own work or product. Id. at 837; see also Faulkner v. U.S.F.& G., 511 N.E.2d 652, 657 (Ill. App. Ct. 1987) (no duty to defend under “your product” or “your work” exclusions where underlying complaint sought damages solely for property damage to building “i.e., damages for economic losses resulting from [insured contractor’s] poor workmanship.”)

Regarding whether the “products-completed operations hazard” exclusion applies to contractors, in Leakakos Constr. Co., Inc. v. Am. Surety Co. of N.Y., 291 N.E.2d 176, 178 (Ill. App. Ct. 1972) the court determined that the issue is a “question of whether a contractor’s activities include the manufacture or sale of goods or products,” because, as the court recognized, some cases interpreting this clause have placed contractors outside of this exclusion by reasoning that contractors deal in services and not products. Id. Concluding that it is not realistic to categorically hold that a contractor renders only services, the court held that “the facts of each case should be examined to determine if a contractor has created
by his physical labor or services a definable product or component.” Id. at 178-79.

Applying this reasoning, the Leakakos court ultimately held that an incinerator system for an apartment building constructed by the insured contractor constituted a “product” within the meaning of a “products hazard” exclusion, and, thus, the exclusion was applicable with regard to a claim against the contractor by a tenant who allegedly suffered injuries when fumes and smoke leaked into her apartment as a result of the faulty incinerator system. Id. The court found that “[t]he system was a specially constructed component in the wall and constituted a work product of the insured which eventually caused an injury by reason of its internal defectiveness” and that the insured “sold the incinerator system just as he sold his services.” Id. at 179. Because the work was complete when the injury occurred, the incinerator constituted a separate risk and the allegations against the insured fell within the exclusion. Id. But see Hoffman & Klemperer Co. v. Ocean Acc. & Guar. Corp., 292 F.2d 324, 329 (7th Cir. 1961) (finding that the “products-completed operations hazard” exclusion did not apply because the contractor’s business was cleaning buildings i.e., selling a service, not a product.)

In contrast to its holding in Leakakos, in USF&G v. Brennan, 410 N.E.2d 613 (Ill. App. Ct. 1980), the court found that the “your product” exclusion did not apply to bar coverage because the alleged damage did not arise out of the insured’s product. There, a school district’s complaint alleged that the insured failed to furnish and install rooftop heating, ventilating and air conditioning units in a workmanlike manner. Id. at 615. The insured did not build any system and the school district’s complaint made no charge of internal defectiveness of the units furnished but, rather, complained only as to the manner in which such units were put in place. Id. at 616.

In distinguishing the facts as set forth in Leakakos, the court reasoned that the performance of the insured’s services was part of the same transaction as furnishing equipment (i.e., the units), but, unlike Leakakos, the insured did not build any system and the school district’s complaint failed to assert allegations of internal defectiveness of the units. Id. Under these facts, the court found that an exclusion for property damage arising out of the insured’s product did not bar coverage for building damage caused by water leakage from the insured’s improper installation of the rooftop heating, ventilating and air conditioning units. Specifically, the Court held that the exclusion did not apply because the damage did not derive from internal defectiveness of the units but from the manner in which they were installed. Id.
1. The “Property Damage” Requirement

Prior to 2010, faulty workmanship did not constitute “property damage” within the terms of a CGL policy under Indiana law. See, e.g., Amerisure, Inc. v. Wurster Constr. Co., Inc., 818 N.E.2d 998, 1004-05 (Ind. Ct. App. 2004) (finding no property damage because “there are no allegations that any person or property, other than these interconnected systems on the buildings being constructed by [the insured], was damaged due to these defects” (emphasis in original); Selective Ins. Co. of the Southeast v. Cagnoni Dev. LLC, 1:06-cv-0760-DFH-TAB, 2008 WL 126950, at *11 (S.D. Ind. Jan. 10, 2008) (holding that damage to the roof installed by the insured does not constitute “property damage”).

As of 2010, however, in Sheehan Constr. Co. v. Cont’l Cas. Co., 935 N.E.2d 160 (Ind. 2010) opinion adhered to as modified on reh’g, 938 N.E.2d 685 (Ind. 2010), the Supreme Court of Indiana abrogated the established framework relied upon by the appellate courts for this proposition when determining that faulty workmanship could constitute an “occurrence” under a CGL policy.

While Sheehan focused on the definition of “occurrence,” the effect of its decision necessarily changed the approach Indiana courts take when determining whether faulty workmanship can constitute “property damage.” This issue was addressed in Trinity Homes LLC v. Ohio Cas. Ins. Co., 864 F. Supp. 2d 744 (S.D. Ind. 2012), wherein an Indiana federal court stated as follows:

While the Court in Sheehan did not specifically state that damage caused by faulty workmanship was “property damage” under a CGL, its conclusion that faulty workmanship could be an accidental occurrence was based in large part upon a rejection of the notion that property damage could never involve damage to the home the contractor or his subcontractor’s built.

Id. at 750.

The court went on to explain that Sheehan clearly determined that “the tangible property which experienced the ‘physical injury’ so as to qualify as ‘property damage’ can include the construction project.” Id. at 752.

Mere economic loss or diminution of value does not, however, necessarily constitute “property damage.” See Aetna Life & Cas. v. Patrick Indus., Inc., 645 N.E.2d 656, 660 (Ind. Ct. App. 1995) (“[W]e have no hesitation in concluding that diminution in value is not property damage.”). In Patrick, the court held that damages sought for diminution of value of campers due to the incorporation of a defective particleboard component supplied by the insured did not constitute property damage under a CGL policy, stating as follows:
[W]e think the better result is to keep “diminution of value” and “physical injury” separate and distinct . . . [d]iminution in value of tangible property is an incorporeal and intangible harm measured by market forces, not an injury to the material substance of tangible property. . . . We feel confident in assuming that the commercial parties to CGL policies bargain for limited coverage in exchange for modest premiums. The concept of incorporation should not be extended so that physical injury will be deemed to occur every time a defective component is integrated into another’s tangible property.

Patrick, 645 N.E.2d at 661-62 (internal citations omitted).

Notwithstanding the foregoing, one Indiana federal district court has found that the Patrick decision does not apply to cases involving the loss-of-use aspect of property damage. See Am. Ins. Co. v. Crown Packaging Int’l, 813 F. Supp. 2d 1027, 1041 n.23 (N.D. Ind. 2011) (noting that Patrick “considers only the physical injury aspect of property damage, not loss of use,” and that “the diminution in value therein resulting from the damage did not cause a complete economic loss of the third party’s property”). The federal district court in Crown Packaging reasoned as follows:

Nevertheless, the court has been unable to find, and neither have the parties identified, any Indiana cases discussing whether an economic loss of use (a complete loss, not simply a diminution in value) comes within the “loss of use” provision in a typical CGL policy. However, the court thinks that even a layperson (many of whom have first-hand experience with the damaged auto hypothetical above) would answer affirmatively, if asked whether a party whose use of an item is to sell it at a profit has lost the item’s use when it is so damaged that it is cheaper to throwing it away is less expensive than salvage. Moreover, this is the conclusion reached in the most relevant cases the court has found, such as by the Third Circuit in Lucker Mfg. v. Home Ins. Co., 23 F.3d 808 (3rd Cir. 1994).

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The court thinks that Indiana would employ eminently-sensible logic as in Lucker, and adopt what the Illinois appellate court described in Pittway Corp. as the majority view that “the term ‘property damage’ includes tangible property which has been diminished in value or made useless irrespective of any actual physical injury to the tangible property.”


Notably, the Crown Packaging decision has neither been followed nor cited by any Indiana state court, and the Patrick decision remains good law that has never been questioned by an Indiana state court.
Indiana courts have found that consequential damage to third-party property caused by an insured’s faulty workmanship or defective product falls within the scope of “property damage.” Cagnoni, 2008 WL 126950, at *11. In Cagnoni, the court concluded that consequential damage to parts of a warehouse other than the leaky roof installed by the insured - including damage to personal property located within the warehouse, clean-up costs for water that leaked through the roof and loss of use and loss of rent resulting from the defective roof also constituted covered property damage - fell squarely within the definition of “property damage.” 2008 WL 126950, at *11-*13; see also Irving Materials, Inc. v. Zurich Am. Ins. Co., 2007 WL 1035098, at *16 (S.D. Ind. March 30, 2007) (finding that consequential damage to adjacent materials, structures and joints beyond defective concrete itself constituted “property damage.”)

2. The “Occurrence” Requirement

The Supreme Court of Indiana has held that a CGL policy issued to a contractor could provide coverage for water damage to homes caused by a subcontractor’s faulty workmanship to the extent that the subcontractor’s faulty workmanship was the product of unintentional conduct. Sheehan Constr. Co., Inc. v. Cont’l Cas. Co., 935 N.E.2d 160, 170 (Ind. 2010). The Supreme Court of Indiana was quick to clarify that the question of whether faulty workmanship is an accident will depend on the facts of each case. In further expanding on its conclusion, the court stated as follows:

The question presented is whether faulty workmanship is an accident within the meaning of a standard CGL policy. In our view the answer depends on the facts of the case. For example, faulty workmanship that is intentional from the viewpoint of the insured cannot be an “accident” or an “occurrence.” . . . On the other hand if the faulty workmanship is “unexpected’ and “without intention or design” and thus not foreseeable from the viewpoint of the insured, then it is an accident within the meaning of a CGL policy.

Sheehan, 935 N.E.2d at 170.

3. Timing of “Property Damage”

Indiana courts acknowledge that the “time of the occurrence of an accident within the meaning of an indemnity policy is not the time when the wrongful act was committed but the time when the complaining party was actually damaged.” U.S. Fid. & Guar. Co. v. Am. Ins. Co., 345 N.E.2d 267, 270 (Ind. Ct. App. 1976); Great Lakes Chem. Corp. v. Int’l Surplus Lines Ins. Co., 638 N.E.2d 847, 854 (Ind. Ct. App. 1994).

In Irving Materials, the United States District Court for the Southern District of Indiana applied a different approach in the context of what the court found to be a continuing loss. See Irving Materials, Inc. v. Zurich Am. Ins. Co., No. 1:03 CV 00361 SEB JP, 2007 WL 1035098, at *16 (S.D. Ind. Mar. 30, 2007). Specifically, the Irving Materials court addressed the timing of property damage caused by defective concrete mix that was incorporated into construction projects:
We . . . think that the time of the occurrence in this continuing loss circumstance is best described as the point when the concrete was poured (the first time [the insured] is potentially liable to a third party) and continued through the time at which the third party discovered or was notified of the damage to its property and had an opportunity to prevent further damage from the defective concrete.

Id.; cf. U.S. Fid. & Guar. Co., 345 N.E.2d at 273 (holding that insurer providing coverage at time the chipping of defective bricks became apparent was responsible for all damage to the structure even if such loss extended beyond that insurer’s policy period).

4. The “Business Risk” Exclusions


In Barick, the court held that exclusions (j)(5), (j)(6) and the “your work” exclusion precluded coverage for fraud and breach of contract claims against the insured developer arising out its faulty workmanship in constructing homes. 2008 WL 938330, at *8-10 (holding that “your work” exclusions barred coverage for any work performed by or on behalf of an insured, and any restoration required as a result of an insured’s work).

Similarly, in Jim Barna, the court concluded that the “your product” exclusion barred coverage to the insured log home distributor for damages arising from the inadequate construction of a log home by a builder selected by the insured. 791 N.E.2d at 828. See also U.S. Fid. & Guar. Co., 345 N.E.2d at 271 (“[T]he manufacturer will not be reimbursed by the insurance company for the cost of the actual individual products which he may be called upon to replace in the damaged structure”); Crown Packaging Int’l, 813 F. Supp. 2d at 1047 (holding that “the cost of [the insured’s] defective containers is excluded from coverage [by the “your product” and “your work” exclusions]; [but that the claimant’s] costs incurred in inspecting, reworking and disposing of the defective containers are not”).

Notably, the Supreme Court of Indiana has held that an entire house may constitute the product of a general contractor for purposes of the “your work” and “your product” exclusions. Ind. Ins. Co. v. DeZutti, 408 N.E.2d 1275, 1280 (Ind. 1980) (“[T]hese exclusions clearly exclude insurance coverage for damages to the insured’s product or work when such damages are confined to the product or work and caused by the product or work, or any part thereof”). In DeZutti, the insured general contractor was sued for damages caused by its alleged faulty construction of a home. The Court held that the “your work” exclusion unambiguously precluded coverage for damages arising out of work performed by the insured or on its behalf. Id. at 1278, 1281. In so holding, the Court noted that the insured was a general contractor and, therefore, “his product or work must be the entire project or house which he built and sold.” Id. at 1280.
1. The “Property Damage” Requirement

Under Iowa law, the faulty workmanship of an insured does not qualify as “property damage” under a CGL policy. Pursell Constr., Inc. v. Hawkeye-Sec. Ins. Co., 596 N.W.2d 67, 71 (Iowa 1999) (finding insured contractor’s faulty construction of houses not to constitute “property damage” caused by an “occurrence,” as required by applicable CGL policy, because all of the damage was to the very property on which insured performed its work).

Damages incurred by a third-party as a result of an insured’s faulty workmanship can, however, constitute “property damage.” See Ellsworth-William Coop. Co. v. United Fire & Cas. Co., 478 N.W.2d 77, 81-82 (Iowa Ct. App. 1991) (finding that loss of use of undamaged grain bins was covered loss of use of tangible property where definition of property damage included “loss of use of tangible property which has not been physically injured or destroyed...”); First Newton Nat’l Bank v. General Cas. Co. of Wis., 426 N.W.2d 618, 626-27 (Iowa 1988) (where multi-peril policy provided two alternative definitions of property damage, one of which required “loss of use of tangible property which has not been physically injured or destroyed...,” and the other defined “property damage” as an “injury to or destruction of tangible property,” the court found that loss of property and loss of profits from farming operations sufficed to meet the required definitions of “property damage” under both policies).

The covered “property damage” sustained by a third party may include, among other things, loss of use, where “property damage” is defined to include such loss of use. Id. at 81-82. If the CGL policy at issue does not contain such a provision, however, intangible economic losses such as loss of use do not qualify as “property damage.” Yegge v. Integrity Mut. Ins. Co., 534 N.W.2d 100, 102 (Iowa 1995); Strotman Bldg. Center, Inc. v. West Bend Mut. Ins. Co., Nos. 98-1525, 9-212, 1999 WL 975842, at *2 (Iowa Ct. App. Oct. 27, 1999).

2. The “Occurrence” Requirement

Standing alone, an insured’s faulty workmanship does not constitute an “occurrence” under a CGL policy. See Pursell Constr., 596 N.W.2d at 71 (“defective workmanship, standing alone, that is, resulting in damages only to the work product itself, is not an occurrence.”); W.C. Stewart Constr. Inc. v. Cincinnati Ins. Co., 770 N.W.2d 850 (Iowa Ct. App. 2009) (holding that damages arising out of building movement and cracks in walls caused by the insured’s defective grading and compacting work did not constitute an “occurrence” as the damage was to the property upon which the insured performed work); Norwalk Ready Mixed Concrete, Inc. v. Travelers Ins. Co., 246 F.3d 1132, 1137 (8th Cir. 2001) (“[D]efective workmanship, regardless of who is responsible for the defect, cannot be characterized as an accident under Iowa law.”); Gen. Cas. Ins. Co. v. Exterior Sheet Metal, Inc., No. C01-2085, 2002 WL 32172280, at *7 (N.D. Iowa Dec. 24, 2002) (“[W]hen an insured’s defective workmanship causes damage only to their own work product, that damage is not the result of an ‘occurrence’ within the meaning of the [CGL] policy.”); Cont’l Ins. Co. v. Jerry’s Homes, Inc., No. 04-1890, 2006 WL 228917, at *3 (Iowa Ct. App. Feb 1, 2006) (“Defective work is not covered under a CGL policy if the only damage is the work product itself.”)
Consequential damages occurring as a result of an insured’s faulty workmanship, however, can qualify as an “occurrence” if those damages were unforeseen or unexpected. See Pella Corp. v. Liberty Mut. Ins. Co., 221 F. Supp. 3d 1107, 1125 (S.D. Iowa 2016) (“defective workmanship resulting in third party property damage can give rise to an occurrence under Iowa law”); Exterior Sheet Metal, 2002 WL 32172280, at *7 (“if the defective workmanship also causes damage to other property which was unforeseen or unexpected, an ‘accident’ occurs within the meaning of the [CGL] policies.”).

For example, in Decker Plastics Inc. v. W. Bend Mut. Ins. Co., 833 F.3d 986, 988 (8th Cir. 2016), the insured, Decker Plastics, a manufacturer of plastic bags, sold its product to A1, a vendor of landscaping materials. Id. at 987. Because Decker Plastics failed to manufacture the bags with an ultraviolet inhibitor, the bags deteriorated in the sunlight, causing small shreds of plastic to mix with A1’s landscaping materials. Id. A1 sued Decker Plastics to recover its losses, and Decker Plastics’ insurer denied coverage. Id. Reversing the district court’s ruling, the Eighth Circuit determined that the deterioration of Decker Plastics’ bags was a covered occurrence, and predicted that the Supreme Court of Iowa would follow the reasoning of similar cases to limit the holding of Pursell to cases where the alleged occurrence is defective workmanship causing damage only to the work product itself. Id. at 988.

Based on similar reasoning, the Iowa Supreme Court also has ruled that “defective work negligently performed by an insured’s subcontractor may constitute an occurrence covered by a modern standard-form CGL policy.” Nat’l Sur. Corp. v. Westlake Inv., Ltd. Liab. Co., 880 N.W.2d 724, 738-40 (Iowa 2016) (“[W]e interpret the insuring agreement in the modern standard-form CGL policy as providing coverage for property damage arising out of defective work performed by an insured’s subcontractor unless the resulting property damage is specifically precluded from coverage by an exclusion or endorsement;” noting that “[o]ur past cases considering whether defective workmanship constituted an occurrence . . . involved defective work performed by the insured, not the insured’s subcontractor”); see also Hudson Hardware Plumbing & Heating, Inc. v. AMCO Ins. Co., 888 N.W.2d 682, *17-18 (Iowa Ct. App. 2016) (noting that the Westlake decision “was a bit of a game changer” and finding an alleged “occurrence” because the underlying complaint could have alleged unexpected damage that went beyond the insured’s work product).

3. **Timing of “Property Damage”**

In a construction defect case, under Iowa law, courts will “look[] to the time of the occurrence - which is defined as ‘when the claimant sustained actual damage and not when the act or omission that caused such damage was committed.’” See General Cas. Ins. Co. v. Penn-Co Constr., Inc., No. C03-2031-MWB, 2005 WL 503927, at *15 (N.D. Iowa Mar. 2, 2005) (quoting First Newton Nat’l Bank v. General Cas. Co. of Wis., 426 N.W.2d 618, 623 (Iowa 1988)).
4. **The “Business Risk” Exclusions**

The risk that an insured’s product may fail to meet contractual standards is a business risk not covered by a CGL policy. See Exterior Sheet Metal, 2002 WL 32172280, at *6 (damage to an insured’s own work product is excluded under the “your work” and “your product” exclusions); see also Modern Equip. Co. v. Cont’l W. Ins. Co., 355 F.3d 1125, 1129-31 (8th Cir. 2004) (finding that the “your product” exclusion precluded coverage for loss-of-use damages where “[the claimant] did not lose the use of its warehouse space, rather it lost only the use of a portion of the [the insured’s] rack system); Balzer Bros. v. United Fire & Cas. Co., No. 98-1911, 2000 WL 1027258 (Iowa Ct. App. July 26, 2000) (holding that “your work” exclusion applied to deny coverage for the moving of coolers with a forklift when the forklift operator hit the coolers causing them damage). Coverage for damage to a third-party’s property, however, caused by the insured’s work will not be barred by the business risk exclusions. See Exterior Sheet Metal, 2002 WL 32172280, at *8.
KANSAS

1. The “Property Damage” Requirement

Under Kansas law, physical injury to insured’s work product caused by the insured’s faulty or negligent workmanship can constitute “property damage” under a commercial general liability insurance policy. Fid. & Deposit Co. of Md. v. Hartford Cas. Ins. Co., 189 F.Supp.2d 1212, 1219-20 (D. Kan. 2002). In Fidelity, a school district entered into an agreement with a general contractor to build a school and a performing arts center. Id. at 1213. When the work was found to be defective, resulting in significant wall deterioration, the school district sued the contractor and a wall subcontractor, among others, for breach of contract and negligence because of significant wall deterioration. Id. at 1214.

The court rejected the insurer’s argument that injury to the insured’s work or product did not constitute “property damage” within the meaning of the CGL policy. Id. at 1220. The court found that because the policy does not “limit the coverage to property that is not in the possession of or work product of the insured” and that if the work product of the insured could never come within the definition of “property damage,” then the policy exclusions set forth to limit such damages would be without meaning. Id. The court concluded that “the injury to the project allegedly caused by the insured’s faulty workmanship was caused by an ‘occurrence’ and resulted in ‘property damage,’ thus bringing the [claims] here within the policies’ coverage.” Id.

2. The “Occurrence” Requirement

The Kansas Supreme Court has addressed the question of whether faulty or negligent workmanship can constitute an “occurrence.” In Lee Builders, Inc. v. Farm Bureau Mut. Ins. Co., 137 P.3d 486 (Kan. 2006), a general contractor brought an action against its CGL insurer for breaching its duty to defend and indemnify the contractor against a homeowner’s claim for property damage from window leaks caused by a subcontractor’s alleged faulty workmanship and materials. The court held that damage occurring as a result of faulty or negligent workmanship constitutes an “occurrence” as long as the insured did not intend for the damage to occur. Id. at 493.

In support of its conclusion, the court determined that the alleged damage was caused by an “occurrence” because faulty materials and workmanship provided by the contractor’s subcontractors caused continuous exposure of the home to moisture, which in turn caused damage that was both unforeseen and unintended. Id. at 495. The court relied on the court’s ruling in Fidelity, discussed above, wherein an insured’s negligent workmanship was deemed to constitute an “occurrence” under a CGL policy absent evidence that the insured contractor intended for its work to be defective. Id. at 491-94.

3. Timing of “Property Damage”

Although Kansas has not yet addressed the issue of the timing of “property damage” in the construction defect context, the Kansas Supreme Court has applied a continuous trigger to cases involving ongoing physical injuries. Atchison, Topeka & Santa Fe Ry. Co. v. Stonewall Ins. Co., 71 P.3d 1097, 1127 (Kan. 2003) (holding that coverage under excess liability policies for noise-induced hearing loss claims asserted by the insured’s employees was continuously

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triggered from first exposure to the noise to the manifestation of injury). Additionally, the
United States District Court for the District of Kansas has applied an injury in fact trigger of
coverage in the context of environmental pollution cases. See Cessna Aircraft Co. v. Hartford
injury-in-fact to property, rather than manifestation of injury, governed the trigger point as
to when the groundwater contamination constituted an “occurrence” under the CGL policy at
issue).

4. **The “Business Risk” Exclusions**

Courts applying Kansas law have applied the “business risk” exclusions to bar coverage
in connection with construction defect cases. In Advantage Homebuilding, LLC v. Maryland
Cas. Co., 470 F.3d 1003 (10th Cir. 2006), three homeowners secured a judgment against the
insured contractor for material defects and damage to windows in their homes in connection
with the insured’s construction of those homes. The District Court concluded that property
damage took place when the masonry subcontractor scratched the windows or dropped
mortar on them while performing its work, and consequently, exclusion j(5) of the CGL policy
barred coverage. Id. at 1010.

On appeal, the insured homebuilder claimed that j(5) did not apply because the
homeowners did not have a claim until they acquired the property, which was after the work
was completed. Id. Applying Kansas law, the Tenth Circuit rejected the insured’s argument
and concluded that exclusion j(5) applies whenever “property damage ‘arise[s] out of the
work of the insured, its contractors, or its subcontractors while ‘performing operations.’” Id.
at 1011 (emphasis in original) (citation omitted). But see Potomac Ins. of Ill. v. Huang, No.
exclusion does not exclude coverage for property damage to a third-party’s property arising
out of the insured’s product).

The Tenth Circuit in Advantage also addressed the application of exclusion j(6), which
precludes coverage for that part of any property which had to be restored, repaired or
replaced because the insured’s work was incorrectly performed on it. 470 F.3d at 1011.
Although finding the exclusion to be “inartfully drafted,” the Tenth Circuit nonetheless
concluded that it applied to bar coverage since “it was intended to exclude coverage for the
cost of restoring, repairing or replacing faulty workmanship on the part of the insured, its
contractors, and subcontractors,” and thus, the exclusion operated to bar coverage for the
cost of repairing or replacing the subcontractor’s faulty workmanship. Id. at 1012.

The Kansas Court of Appeals examined application of a CGL policy’s “your product”
2005), aff’d 137 P.3d 486 (Kan. 2006). The court in Lee Builders rejected the insurer’s
argument that the insured contractor’s “product” was the entire custom home it had
constructed. 104 P.3d at 1004. The court reasoned that such product would be “real
property,” which was specifically excluded from the definition of “your product” under the
subject policy. Thus, the court found that work on homes, buildings, or other structures was
not the insured’s product, and that, as a result, the “your product” exclusion did not bar
coverage. Id. at 1005.
KENTUCKY

1. The “Property Damage” Requirement

Although Kentucky state courts have not directly addressed whether faulty workmanship constitutes “property damage,” federal courts in Kentucky have concluded that damages to the insured’s work product itself do not constitute “property damage” under a CGL policy pursuant to Kentucky law. Assurance Co. of Am. v. Dusel Builders, Inc., 78 F.Supp.2d 607 (W.D. Ky. 1999).

In Dusel Builders, a homeowner asserted breach of contract claims against the insured contractor, claiming that the house that the insured constructed was not done in a workmanlike manner. In finding that the damages at issue were limited to the insured’s own work, the court found that such damages were not sufficient to meet the definition of “property damage” under a CGL policy. The court relied on Fuller v. U.S.F.& G., 613 N.Y.S. 2d 152, 200 A.D. 2d 255 (N.Y. App. Div. 1994), which reasoned that coverage is available only when an insured’s work results in damages to a third party, noting that a CGL policy “was never intended to provide contractual indemnification for economic loss to a contracting party because the work product contracted for is defectively produced.” Id. at 609; see also, Westfield Ins. Co. v. Dan “K” Serv. Co., 4:04-CV-69-R, 2006 WL 250480 (W.D. Ky. Feb. 1, 2006).

2. The “Occurrence” Requirement


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In Motorists Mut. Ins. Co. v. Cincinnati Ins. Co., 2008 WL 746689, at *4 (Ky. Ct. App. March 21, 2008), the Kentucky Court of Appeals held that damage to a home caused by the defective work performed by the insured homebuilder’s subcontractors constituted property damage caused by an occurrence since the damage was not intentional. On appeal, however, the Kentucky Supreme Court overruled the Appellate Court’s holding and refused to find that faulty workmanship, standing alone, can automatically be deemed an “occurrence” under a CGL policy. Cincinnati, 306 S.W.3d at 75. The Court explained that “refusing to find faulty workmanship, standing alone, constitutes an ‘occurrence’ under a CGL policy ‘ensures that ultimate liability falls to the one who performed the negligent work . . . instead of the insurance carrier’” such that “[i]t will also encourage contractors to choose their subcontractors more carefully instead of having to seek indemnification from the subcontractors after their work fails to meet the requirements of the contract.” Id.

In Cincinnati, the court explained that faulty construction is not an “occurrence” because poor workmanship cannot be an “accident.” Id. at 79. To be considered an accident, the event must be fortuitous, “beyond the power of any human being to bring . . . to pass.” Id. at 76. The court stated that “the issue of control is encompassed in the fortuity doctrine.” Id. The court concluded that the insured had control over the construction of the home, either directly or through the subcontractors it chose and that it therefore cannot logically follow that the allegedly substandard construction of the home by the insured was a “fortuitous, truly accidental, event.” Id. at 76. This reasoning led the Court to the conclusion that the faulty workmanship claim at issue was not covered by the CGL policy because the faulty workmanship was not an accidental occurrence and that faulty workmanship cannot be deemed an accident. Id.

The Supreme Court of Kentucky recently reaffirmed its position that faulty workmanship does not constitute an “occurrence” under a CGL policy. See Martin/Elias Properties, LLC v. Acuity, 544 S.W.3d 639, 640 (Ky. 2018). In Acuity, a contractor failed to support a structure’s existing foundation adequately before digging around it, causing the old foundation to crack and the entire structure to sag. The insurer denied coverage for the loss, arguing that the contractor’s faulty workmanship failed to qualify as an occurrence under the CGL policy.

The Kentucky Supreme Court held that the contractor’s faulty workmanship was not an accident because “the actions taken by [the contractor], which led to the property damage, were entirely under his control, and he fully intended to execute the plan as he did.” The court’s opinion turned on application of the fortuity doctrine. Specifically, the court held:

In determining whether an event constitutes an accident so as to afford the insured CGL policy coverage, courts must analyze this issue according to the doctrine of fortuity: 1) whether the insured intended the event to occur; and 2) whether the event was a “‘chance event’ beyond the control of the insured.”

In analyzing fortuity, the court stated that the “emphasis should not be whether the damage done is the type of damage that would be expected by the contractor, but rather whether the damage resulted from the actions purposefully taken by the contractor or those working under the contractor’s control.” Applying this standard, the court found that “[the contractor] had both intent and full control when conducting his work, which ultimately failed to support the existing structure.” Accordingly, the court held that the resulting
damage from the contractor’s poor workmanship was not a fortuitous event and did not trigger coverage under the policy. Notably, however, the court specifically did not evaluate whether an “occurrence” exists when there is damage to third party property, as it found that the facts at issue did not require it to reach that determination.

3. **Timing of “Property Damage”**

Acknowledging that Kentucky courts have not directly addressed the issue of the timing of “property damage” in any context, the Kentucky Court of Appeals in *Asbury College v. Ohio Cas. Ins. Co.*, 2005 WL 1252331, at * 2 (Ky. Ct. App. May 27, 2005) affirmed a trial court’s use of an “occurrence trigger” in a declaratory judgment action involving claims against an insured for negligent hiring, supervision and retention of the insured’s employee who sexually assaulted a child. The trial court determined that the “occurrence” trigger commences at the time the claimant was injured, not the time when the negligence leading up to the injury occurred. *Id.*

4. **The “Business Risk” Exclusions**

In *Bituminous Cas. Corp. v. Kenway Contracting, Inc.*, 240 S.W.3d 633 (Ky. 2007), the Supreme Court of Kentucky held that the CGL policy’s j(5) and j(6) business risk exclusions were ambiguous and, therefore, inapplicable in the context of the facts of that case. With respect to exclusion j(5), the insurer claimed that the exclusion applied to bar coverage, as the insured was performing operations on the residence when the accident occurred. *Id.* At 640. The insured claimed that it had been hired only to perform work on the carport and, therefore, operations were not being performed on the residence, which actually constituted the damage. *Id.* At 641. The Kentucky Supreme Court adopted the insured’s argument on the grounds that the exclusion was subject to both interpretations and thus ambiguous, reasoning as follows:

> We note that the phrase “that particular part of real property” and the term “operations” are not defined in the CGL policy. The [insured] suggest that from their perspective, operations should be limited to the carport. [The insurer] argues operations should be determined from the perspective of the [equipment operator], and real property should extend to any real property upon which operations are occurring. Given that the policy contains terms that are not defined, and given that each party has suggested a reasonable interpretation in light of the plain meaning of the words used, we conclude the policy is ambiguous. In keeping with the principle that “[a]n ambiguous policy is to be construed against the drafter, and so as to effectuate the policy indemnity[,]” we conclude exclusion j(5) does not operate to preclude coverage. *Id.* at 641.

With respect to exclusion j(6), the court found it to be ambiguous as well. The court reasoned that the plain meaning of the exclusionary language could be interpreted as: (1) applying to work performed properly but in the wrong location, thus requiring repair or replacement; or (2) applying only to the manner of work that was performed. *Id.* At 642.
In this regard, and applying the second interpretation, the court found that the exclusion would not apply to the facts in *Bituminous* because there was no allegation that the work on the carport was faulty in any manner. Thus, exclusion j(6) would apply only if the damage to the residence occurred during a necessary stage in the partial teardown of the carport and would not preclude coverage if the damage resulted from an accident. Because the court found that the damage in *Bituminous* was neither expected nor intended from the insured’s perspective, it determined that the damage qualified as an accident. As such, the court found that exclusion j(6) would not bar coverage. *Id.* at 642; see also *Generali v. U.S. Branch Nat’l Trust Ins. Co.*, 2009 WL 2762273, at *5 (W.D. Ky. Aug. 27, 2009) (holding that “your work” exclusion barred coverage for damage to the insured’s own work, but not the veneer and drywall work performed by the insured’s subcontractor); *Cemex, Inc. v. LMS Cont., Inc.*, 3:06-CV-124-H, 2008 WL 4682349, at *4 (W.D. Ky. Oct. 21, 2008) (finding that faulty workmanship exclusion applied to bar coverage where all of the damages resulted from the insured’s faulty work on the property where the insured had contracted to do blasting work); *Westfield Ins. Co. v. Dan “K” Serv. Co.*, 4:04-CV-69-R, 2006 WL 250480, at *5 (W.D. Ky. Feb. 1, 2006) (ruling that “your work” exclusion applied to bar coverage for damages arising out of warranty or misrepresentation claim against insured for alleged failure to discover defect in a home prior to purchase).
LOUISIANA

1. The “Property Damage” Requirement

In assessing a CGL policy’s “property damage” requirement, the Court of Appeals of Louisiana stated:

With construction defects, the real issue usually is not whether there has been an “occurrence,” but whether there has been property damage during the policy period and, if so, whether the “work” exclusion is applicable. If the roof leaks or the wall collapses, the resulting property damage triggers coverage under an “occurrence” basis policy, even if the sole cause is improper construction and the only damage is to the work performed by the contractor. Whether coverage for such an “occurrence” is excluded by the work product or other exclusion is a separate, very important inquiry. . . . On the other hand, the mere existence of a construction defect does not trigger coverage under an “occurrence” basis policy; coverage is triggered only if the defect causes property damage during the policy term.


In Iberia Parish Sch. Bd., a landowner sought to recover from a general contractor damages in connection with a leaking roof due to the roof’s improper construction. The contractor, who subcontracted the installation of the roof to a sub-contractor, demanded coverage under the subcontractor’s CGL policy. 721 So. 2d at 1021-22. The court deemed the roof leaking to be an accident or “occurrence,” and held that “defective workmanship and defective materials caused continuous exposure to rain at the school, which caused the roof to leak,” in turn “resulted in property damage because the roof had to be replaced.” Id.

2. The “Occurrence” Requirement

In Louisiana, an insured’s faulty workmanship may be deemed an “occurrence” under a CGL policy. See Martco Ltd. P’ship v. Wellons, Inc., 588 F.3d 864 (5th Cir. 2009) (holding that faulty work performed on heating system subsequent to completion of work deemed an “occurrence”); United Nat’l Ins. Co. v. Dexter Honore Constr. Co., LLC, 2:08-CV-638, 2009 WL 1182259 (W.D. La. April 30, 2009) (finding erosion and unstable surface, which constituted property damage, arising out of insured’s defective construction to be an “occurrence”); Broadmoor Anderson v. Nat’l Union Fire Ins. Co., 912 So. 2d 400 (La. Ct. App. 2005) (finding that faulty workmanship can constitute an occurrence because there is no distinction between tort and breach of contract under a CGL policy); McMath Constr. Co. v. Dupuy, 897 So. 2d 677 (La. Ct. App. 2004) (holding that insured stucco subcontractor’s faulty workmanship on windows and doors in a condo complex resulting in leaks constituted an occurrence even though the sole cause was improper construction and the only damage was to work performed by contractor). But see Mobile Imaging, Inc. v. Fix, 980 So. 2d 240 (La. Ct.
App. 2008) (finding that there were no allegations of property damage caused by an occurrence where no damage to third parties or to other property was alleged).

In Louisiana, “the clear weight of authority in more recent cases considers defects in construction that result in damage subsequent to completion to be accidents and occurrences when they manifest themselves.” Rando, 879 So. 2d at 833. The Louisiana Court of Appeals has consistently interpreted “occurrence” to mean “accident,” such that a construction defect caused by an “accident” will constitute an “occurrence” so long as the damage was not intentional. Joe Banks Drywall & Acoustics, Inc. v. Transcont’l Ins. Co., 753 So. 2d 980, 983 (La. Ct. App. 2000) (finding that stain in vinyl flooring due to insured’s sloppy workmanship is an occurrence, but that the “your work” exclusion barred coverage); Broadmoor Anderson, 912 So. 2d at 405-06 (La. Ct. App. 2005) (relying on Oxner v. Montgomery, 803 So. 2d 36 (La. 2001), Iberia Parish Sch. Bd., 721 So.2d 1021 (La. Ct. App. 1998), Korossy v. Sunrise Homes, Inc., 653 So. 2d 1215 (La. Ct. App. 1995) and Riley Stoker Corp. v. Fid. and Guar. Ins. Underwriters, Inc., 26 F.3d 581 (5th Cir. 1994) to conclude that insured’s deficient workmanship in shower pan installations which caused repeated damage to the hotel from leaking water deemed an accident, and thus an “occurrence”).

Similarly, in Thibodaux v. Arthur Rutenberg Homes, Inc., 928 So. 2d 80 (La. Ct. App. 2005), the court found that there was an occurrence under a CGL policy for sloppy construction by an insured contractor, which resulted in unexpected loss for the homeowner. Id. at 88. The Louisiana Court of Appeals rejected the line of cases in which courts refused to find that defective workmanship or the incorporation of defective materials resulting in unexpected losses was an “accident.” Id. at 88-89. Instead, the Court concluded that the improper construction and incorporation of defective materials resulting in unexpected losses constitutes an accident, and thus, an “occurrence.” Id. at 88.

3. **Timing of “Property Damage”**

In *Korossy*, the plaintiffs’ claims were based on excessive differential settlement of the foundations of their homes, which plaintiffs attributed to faulty construction and defective materials. In addressing the trigger of coverage issue, the court stated:

We find the manifestation theory should be applied in this case. The differential settlement resulted from each home’s continuous or repeated exposure to the injurious conditions over a course of time, but the effects of the excessive settlement did not become “damage” until it was discovered by the homeowners.

It is true that what constituted “damage” depended to an extent on the perceptions of the individual homeowner, in that one may have perceived damage where another perceived only normal wear-and-tear, up to the point where any reasonable person would perceive “damage.” Nevertheless, we conclude the better rule is to deem the occurrence took place when the damage was discovered. The policy definition requires an occurrence to “result” in property damage. Under the facts of these cases, property damage did not result until the damage manifested itself.

653 So. 2d at 1226.

In another construction defect case, the Louisiana Court of Appeals adopted the manifestation theory noting that “under the exposure theory, an insurer would arguably remain a guarantor of its insured’s actions forever,” with the Court stating that it “reject[s] such an inequitable result.” Oxner, 794 So. 2d 86 (triggering of CGL policy occurred when the damage to the house manifested itself, rather than when the alleged negligence occurred) (relying on Lafayette Ins. Co. v. C.E. Albert Constr. Co., Inc., 661 So. 2d 1093, 1096 (La. Ct. App. 1995), which found that failure of defective wiring was not covered because alleged negligent conduct - the installation of defective wiring - was not deemed physical injury to tangible property during policy period resulting from an occurrence during that period); see also Audubon Trace Condo. Ass’n, Inc. v. Brignac-Derbes, Inc., 924 So. 2d 1131, 1133 (La. Ct. App. 5 2006) (applying the manifestation trigger of coverage theory and determining that the “property damage” to condominiums occurred when such damage manifested, which was after the expiration of the policies).

4. **The “Business Risk” Exclusions**

Louisiana courts have held that the primary purpose of the “your work” exclusion is to preclude liability coverage for an insured’s faulty workmanship, while the “your product” exclusion serves the similar purpose of precluding coverage for damage to the insured’s defective product. See N. Am. Treatment Sys., Inc. v. Scottsdale Ins. Co., 943 So. 2d 429, 444-45 (La. Ct. App. 2006) (holding that collapse of water clarifier at water district’s wastewater treatment plant was not the “work” or “product” of insured where collapse occurred during general contractor’s testing of plant for leaks when a subcontractor left a valve open which allowed water to improperly flow into the clarifier); Gaylord Chem. Corp. v. ProPump, Inc., 753 So. 2d 349 at 353, n.5 (La. Ct. App. 2000) (ruling that exclusions did not apply because alleged damage goes beyond damage to the pump sold by seller insured).
In Supreme Servs. and Specialty Co. v. Sonny Greer, Inc., 958 So. 2d 634 (La. 2007), a property owner sued its general contractor seeking recovery for damages resulting from the general contractor’s alleged defective design and construction of concrete slabs, which had been poured by its subcontractors and subsequently re-poured by the contractor in an unsuccessful attempt to repair the defective slabs. The insured general contractor made a demand against its CGL insurer seeking coverage for its liability to repair or replace the cracked concrete slabs. Id. at 637-38. The insurer moved for summary judgment arguing that its policy’s “work product” exclusion (j(5)) expressly precluded coverage for improper construction by the insured’s own workers or any of its subcontractors with respect to the concrete slabs. Id. at 637. The trial court agreed and granted the insurer’s motion. Id.

On appeal, the Appellate Division reversed the trial court’s ruling, holding that: 1) the “work product” exclusion was inapplicable to the work performed by the subcontractors, and 2) the “products-completed operations hazard” (“PCOH”) provision was ambiguous and should be interpreted in favor of coverage. Id. The Louisiana Supreme Court reversed the appellate court’s decision, finding that the CGL policy’s “work product” exclusion clearly and unambiguously bars “coverage for the damage to the property on which [the contractor], and/or its subcontractor, worked.” Thus, under Louisiana law, the “work product” exclusion applies to work performed by the insured contractor as well as work performed by the insured’s subcontractors.

The Court then addressed whether a CGL policy containing a “work product” exclusion and a PCOH provision containing an exception for work performed by a subcontractor suffers from inherent ambiguity that would cancel the work product exclusion to the extent that the defective work is performed by a subcontractor. It held that it did not, reasoning that the PCOH coverage “applies not to the faulty work, but damages arising out of the faulty work.” Id. at 645. As such, the PCOH provision is inapplicable where the “work product” exclusion bars coverage for a claim of faulty workmanship alone, which is unaffected by the PCOH provision. Specifically, the Court explained:

In reviewing both the “work product” exclusion and the PCOH provision, we find no contradiction in their language. Under the “work product” exclusion, the insured or its subcontractor becomes liable for damages to its work or its product caused by its faulty workmanship. Under the PCOH provision, damages, other than the faulty product or work itself, arising out of the faulty workmanship are covered by the policy. Stated differently, if a subcontractor’s faulty electrical work caused the building to burn down before completion, the “work product” exclusion would eliminate coverage for the faulty electrical work performed by the contractor or subcontractor. However, the operations hazard coverage applies not to the faulty work, but damages arising out of the faulty work. Damage to real property arising out of the faulty work (fire damage) would not be excluded as it would be covered under the PCOH provision. The case sub judice involves a claim for damages to the work product itself, i.e., the cracked concrete slab, not a claim arising out of the work and covered by the PCOH provision. Thus, the exception for the work performed on the insured’s behalf by a subcontractor under the PCOH damage section of the policy
simply is inapplicable to the present case. In other words, the PCOH provision only applies to those injuries which might occur as a result of the damaged product. In the instant case, there is no need to delineate the PCOH provision because there is no other product damaged or third person injured. Here, the only applicable provision is the “work product” exclusion, which applies to work performed by Greer or on its behalf by subcontractors.

Id. at 645.

Thus, under Louisiana law, the “work product” exclusion’s applicability to subcontractor work is not cancelled out by the PCOH provision because there is no inherent ambiguity. See also Rubin v. Brookshire Grocery Co., No. CIV.A. 13-1611, 2014 WL 949843, at *8 (W.D. La. Mar. 10, 2014) (citing Supreme Servs, for the proposition that the products completed operations hazard provision is not ambiguous in light of the “work product” exclusion in a CGL policy).

Numerous other Louisiana courts have ruled similarly. See Calcasieu Parish School Bd. v. Lewing Constr. Co., Inc., 971 So. 2d 1275 (La. Ct. App. 2007) (“your work” and “your product” exclusion barred coverage for property damage to a floor installed in school by insured flooring subcontractor); Vobill Homes, Inc., v. Hartford Acc. & Ind. Co., 179 So. 2d 496 (La. Ct. App. 1965), writ denied, 248 La. 698, 181 So. 2d 398 (1966) (“your work” or “your product” exclusions bars coverage for insured’s repair/replacement of defective work or product); Swarts v. Woodlawn, Inc., 610 So. 2d 888 (La. Ct. App. 1992) (work product exclusion precluded coverage for repair or replacement of insured contractor’s defective work on home or resulting defective product); Lewis v. Easley, 614 So. 2d 780 (La. Ct. App. 1993) (work product exclusion in roofing contractor’s CGL policy barred coverage for property owners’ claims of defective roofing); Old River Terminal Co-op v. Davco Corp., 431 So. 2d 1068 (La. Ct. App. 1983) (work products exclusion applied to defects in total structure of silo, not just to defects in silo pilings constructed by subcontractor); Allen v. Lawton and Moore Builders, Inc., 535 So. 2d 779 (La. Ct. App. 1988) (work product exclusion excluded coverage for damages suffered by purchasers as a result of defects in house and lot caused by negligent, faulty or defective construction or workmanship); Parker v. Dubus Engine Co., 563 So. 2d 355, 360 (La. Ct. App. 1990) (work product exclusion barred coverage for insured installer of water pump engines which burned since insured had rebuilt each engine before selling them, qualifying insured as manufacturer of engines and thus, insured’s “products”); Breaux v. St. Paul Fire & Marine Ins. Co., 345 So. 2d 204 (La. Ct. App. 1977) (work product exclusion precluded coverage for repair or replacement costs in connection with insured’s defective work on apartment complex); Massey v. Parker, 733 So. 2d 74, 75-77 (Ct. App. La. 1999) (brick defects in a home constituted property damage such that the “your work” exclusion applied to bar coverage for the general contractor’s faulty work; however, the subcontractor work exception to the exclusion applied to restore coverage for damage to the subcontractor’s work); Miss. Phosphates Corp. v. Furnace and Tube Serv., Inc., 2009 WL 1448967 (S.D. Miss. May 22, 2009) (applying Louisiana law) (“your work” exclusion applied to bar coverage for cost to repair and replace insured’s defective work on boiler at acid plant,
but did not exclude damage to other property). But see City of Alexandria v. Annrich, Inc., 2009 WL 3190341 (La. Ct. App. Oct. 7, 2009) ("your work" exclusion did not apply to damage to the City's property caused by contractor's faulty installation of fiber optic cables).
MAINE

1. The “Property Damage” Requirement

The Supreme Judicial Court of Maine has stated that “[w]hat is insured . . . under the standard comprehensive general liability policy is property damage resulting from an occurrence of harm occasioned by negligent workmanship. What is not insured is the repair or replacement of the faulty work.” Baywood Corp. v. Maine Bonding & Cas. Co., 628 A.2d 1029, 1031 (Me. 1993) (citing Peerless Ins. Co. v. Brennon, 564 A.2d 383, 387 (Me. 1989)); see also Lyman Morse Boatbuilding, Inc. v. N. Assur. Co. of Am., 772 F.3d 960, 966 (1st Cir. 2014) (applying Maine law) (holding CGL policies generally do not cover replacing defective workmanship). The Court’s reasoning is instructive with respect to its determination that the complaint failed to allege property damage within the terms of the CGL policy at issue:

Here, the complaint refers generally to property damage but alleges no physical damage to the units or to the sewer system itself. Only the devaluation of the units because of the town’s refusal to accept the sewer system and the added cost to the association to maintain and service a private system or to upgrade the system to meet the town’s specifications for public acceptance are specified as damages in the complaint. It is not damages for injury to property caused by the faulty design of the system that the association seeks, but rather the cost to replace or upgrade the system. Thus, the complaint does not allege property damage within the policy’s coverage.

Id. at 1031.

Thus, under Maine law, damage confined to an insured’s work or product does not constitute “property damage” within the meaning of a CGL policy. See L. Ray Packing Co. v. Commercial Union Ins. Co., 469 A.2d 832, 835 (Me. 1983) (pure economic loss such as loss of investments, anticipated profits and financial interests or damage to intangible property does not constitute “property damage” for purposes of CGL insurance coverage); Vigna v. Allstate Ins. Co., 686 A.2d 598, 600 (Me. 1996) (economic injury does not constitute “property damage” for purposes of CGL coverage).

2. The “Occurrence” Requirement

The Supreme Judicial Court of Maine has explained that “[a]n accident is an unanticipated event. The ‘accidental’ nature of an event for purposes of a standard liability insurance contract, however, does not derive from the voluntariness of the act, but rather from the unintentional nature of the consequences flowing from the act.” Vigna, 686 A.2d at 600 (citing Gibson v. Farm Family Mut. Ins. Co., 673 A.2d 1350 (Me. 1996)).

In Mass. Bay Ins. Co. v. Ferraiolo Constr. Co., 584 A.2d 608, 610 (Me. 1990), the Supreme Judicial Court of Maine explained that, “[i]n general, occurrence of harm risks are those involving harm to others due to faulty work or products, while business risks are those
involving business expenses incurred by the insured for repair or replacement of unsatisfactory work.” The court held that an insured’s unintentional trespass from operating its gravel pit constituted an occurrence under the policy since the insured contractor did not intend or expect the trespass to occur.

In considering the unintentional nature of the consequences, a Maine federal court rejected the adoption of an objective test based on what was reasonably foreseeable, noting that such test “would allow coverage only when the insured is not negligent and hence generally not in need of liability coverage, while the test would disallow coverage when the insured is negligent and hence in need of coverage.” Honeycomb Sys., Inc. v. Admiral Ins. Co., 567 F. Supp. 1400, 1404 (D. Me. 1983). The court applied the standard set forth in Patrons-Oxford Mut. Ins. Co. v. Dodge, 426 A.2d 888, 892 (Me. 1981), finding that injuries are “expected,” and therefore not an “occurrence” when the insured “in fact subjectively foresaw as practically certain” that those injuries would occur, as such test requires a higher level of expectation. Id. at 1404.

3. Timing of “Property Damage”

The only Maine state court to discuss the timing of “property damage” is Kraul v. Me. Bonding & Cas. Co., 559 A.2d 338 (Me. 1989), cert. denied, 504 U.S. 959 (1992). Although not truly a “trigger” case, the court does acknowledge that injury itself, not the act that causes the injury, must take place during the policy period. Id. at 338. The court stated:

In this occurrence-type liability and completed operations policy, the policy language clearly provides that the insurance company will pay for bodily injury only where it “occurs during the policy period.” Although the insured’s alleged negligence occurred during the policy period, the bodily injury in question occurred after the policy period expired.

Id. Federal courts applying Maine law have held similarly. See Honeycomb, 567 F. Supp. 1400 (finding an occurrence under insurance policy happens when injurious effects of occurrence become “apparent,” or “manifest themselves”).

4. The “Business Risk” Exclusions

Maine courts have held that the “business risk” exclusions found in CGL policies can apply to eliminate coverage. See Peerless Ins. Co. v Brennon, 564 A2d 383, 386 (Me 1989). In Brennon, homeowners brought a breach of contract action against a builder, asserting that the builder had performed construction in an unworkmanlike manner and had deviated from plans and specifications, requiring the owners to hire a second contractor to complete the work. Id. at 384. The builder tendered the defense to its insurer, which denied coverage. Id. In addressing the policy’s business risk exclusions, the court stated:

An “occurrence of harm risk” is a risk that a person or property other than the product itself will be damaged through the fault of the contractor. A “business risk” is a risk that the contractor will not do his job competently, and thus will be obligated to replace or repair his faulty work. The distinction between the two risks is critical to understanding a CGL policy. A CGL policy
covers an occurrence of harm risk but specifically excludes a business risk.

Id. at 386.

The court held that the insurer did not have a duty to defend because “where a contractor performs unsatisfactory work, repair or replacement of the faulty work is a business expense for which insurance coverage is not provided.” Id. However, the court explained, “if the faulty work causes an accident resulting in physical damage to others, coverage is afforded.” Id.

Similarly, in Baywood, supra, a condominium developer sought a declaration that its general liability insurer had a duty to defend it in an action brought by the condominium association. The condominium developers had sold units and represented that the development would be serviced by public water and sewer facilities. 628 A.2d at 1030. The town refused to accept the development’s sewer system due to its inadequate design. Id.

The court in Baywood held that because the complaint in the underlying action did not allege “actual damage to property but rather seeks damages for replacing defective workmanship, which is a business risk specifically excluded from the policy, they have no obligation to defend the underlying action.” Id. at 1031. The court explained that the standard CGL policy, in its exclusions, “specifically excludes coverage for business risks based on the contractor’s warranty for its work.” Id. Because it was “not damages for injury to property caused by the faulty design of the system that the association seeks, but rather the cost to replace or upgrade the system,” coverage was precluded pursuant to the business risk exclusions. Id.

In Oxford Aviation, Inc. v. Global Aerospace, Inc., 680 F.3d 85 (1st Cir. 2012), the owner of an airplane filed a complaint against the insured Oxford, a corporation that had performed various repairs on the plane, alleging numerous defects and other substandard work, including a crack in one of the plane’s side windows. Oxford tendered a claim for coverage to its insurance carrier under a CGL policy and the carrier disclaimed coverage. Id. at 86. The insured filed a declaratory judgment action. Id. The district court granted summary judgment to the insurer, holding that no coverage existed because the underlying claims fell within the policy’s business risk exclusions that bar coverage for damages relating to an insured’s work and repairs. Id. at 87.

The First Circuit reversed, finding that the carrier had a duty to defend because “[h]ere, at least one scenario relating to the cracked window, occurring in flight and away from Oxford’s facilities, does fall within coverage and could plausibly avoid all cited exclusions.” Id. at 91-92. The court determined that each of the four business risk exclusions contained in the policy did not negate the carrier’s duty to defend for the following reasons: (1) the “your work” exclusion does not apply because the complaint alleges the crack occurred in-flight and the “your work” exclusion by its terms does not apply to “property damage occurring away from premises you own or rent; (2) the “your product” exclusion fails because the side window was not a product installed by Oxford; (3) the “products-completed” exclusion fails because the first condition of the exclusion is that the damage in question be “to your work” and the cracked window is not alleged to be Oxford’s work; and (4) the “impaired property” exclusion would apply only to bar a loss of use claim due to the cracked window but does not bar a claim for the loss of the window itself and so does not negate the
duty to defend with respect to the cracked window. Id. at 90-92. Thus, the court held that
the business risk exclusions did not preclude coverage and therefore the carrier had a duty to
defend Oxford in the underlying suit.
1. **The “Property Damage” Requirement**

Under Maryland law, damages arising from faulty workmanship constitute “property damage” under a CGL policy to the extent that they are to property other than the defective work itself. See Harbor Court Assocs. v. Kiewit Constr. Co., 6 F. Supp. 2d 449, 454-55 (D. Md. 1998); IA Constr. Corp. v. T&T Surveying, Inc., 822 F. Supp. 1213 (D. Md. 1993) (“While the phrase ‘property damage’ had been construed to exclude defective work performed by the insured himself, the term does not exclude damages due to the consequential effects which an insured’s poor workmanship had on the work of other contractors.”)

In U.S. Fire Ins. Co. v. Milton Co., 35 F. Supp. 2d 83 (D.D.C. 1998), a CGL insurer and an excess liability insurer sought a declaration that their policies did not cover liability for condominium developers and builders for claims arising from defective materials and substandard workmanship. The court held that, under Maryland law, the definition of “property damage” within the meaning of CGL policies “excludes the replacement of substandard materials and repair of inferior workmanship.” Id. at 86. But see Woodfin Equities Corp. v. Harford Mut. Ins. Co., 678 A.2d 116, 118-19 (Md. Ct. App. 1996), aff’d in part, rev’d in part, 687 A.2d 652 (Md. 1997) (holding that damage to an HVAC system installed by the insured contractor clearly constituted “property damage” under the CGL policy because there was physical injury to tangible property even though the HVAC unit was the insured’s own faulty workmanship).

2. **The “Occurrence” Requirement**

Maryland courts “uniformly hold that when property damage arising out of the insured’s defective workmanship is confined to the insured’s own work product, the damage is not caused by an ‘occurrence’ within the meaning of the CGL policy.” Woodfin, 678 A.2d at 131. When determining whether an occurrence transpired, thereby triggering a CGL insurer’s duty to defend, Maryland law divides property damage into two categories. The first category, foreseeable or expected damage, is not an occurrence and implicates no obligations of the insurer under the policy. The second category, damage to otherwise non-defective work, is unexpected and unforeseen, thereby triggering the duty of the insurer to defend its insured. State Auto. Mut. Ins. Co. v. Old Republic Ins. Co., 115 F. Supp. 3d 615 (D. Md. 2015), appeal dismissed, (4th Cir. 16-1318) (Apr. 6, 2016).

For instance, in Old Republic, the court held that damage to otherwise non-defective components of a retail/office building’s heating, ventilation, and air conditioning system due to subcontractor’s alleged failure to perform necessary water treatment following insured contractor’s installation of system resulted from an “occurrence” under insured’s CGL policy and triggered insurer’s duty to defend, where there was no allegation that insured subjectively expected that components would sustain damage from untreated water. See Travelers Indem. Co. of Am. v. Tower-Dawson, LLC, 299 Fed. Appx. 277, 282 (4th Cir. 2008) (holding that, under Maryland law, the cost of installing a new retaining wall and the cost of repairing the damage to wetlands brought about by the installation of the repaired/new wall are not covered losses under a CGL policy).
In Lerner Corp. v. Assurance Co. of Am., 707 A.2d 906 (Md. App. 1998), the insured office building vendor sued its CGL insurer for breach of contract and sought declaratory relief after the insurer denied coverage for costs that the insured had incurred for repairs to the building’s stone-veneer facade. In holding that the damages were not covered and that the insurers were not obligated to indemnify the insureds for the costs incurred, the appellate court expounded on the Sheets decision:

If the damages suffered relate to the satisfaction of the contractual bargain, it follows that they are not unforeseen. In other words, and in the context of this case, 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. On the other hand, if the defect causes unrelated and unexpected personal injury or property damage to something other than the defective object itself, the resulting damages, subject to the terms of the applicable policy, may be covered. For example, if a collapse of the veneer had injured a user of the facility or damaged property other than the veneer itself, these may well be covered.

Id. at 912.

Further, in OneBeacon Ins. Co. v. Metro Ready-Mix, Inc., 242 Fed. Appx. 936 (4th Cir. 2007), a CGL insurer sought a declaration that it had no duty to defend or indemnify an insured manufacturer on breach of contract and warranty claims arising from the insured’s supplying of defective grout for a construction project. The court held that any damage done to the pile caps and columns while remedying the defective grout was not caused by an “occurrence” because the “damage was not unforeseen insofar as the term has been interpreted with respect to CGL policies under Maryland law.” Id. at 941. “Just as a company must be presumed to foresee that it will be forced to pay for any defects in its own property, the company must also foresee that it will be forced to pay for incidental costs that are incurred in remedying those defects.” Id.

In Federal Ins. Co. v. Firemen’s Ins. Co. of Wash., D.C., 769 F. Supp. 2d 865, 877 (D. Md. 2011), the court held that damages to an insured builder’s construction of a house and garage were not “occurrences” because those damages resulted “from the satisfaction of the contract between” the insured builder and the homeowner. Nonetheless, the court found that property damage not subject to the work performed - including trees, bushes, driveway and furnishings - did constitute an occurrence under the policy. Id. at 878-79.

3. Timing of “Property Damage”

In determining the trigger of coverage, Maryland courts have adopted the injury-in-fact approach. In Harbor Court, a general contractor and its subcontractors brought suit against their insurers claiming that the insurers had a duty to defend the contractors against a construction defect lawsuit arising from defects in a condominium and hotel complex. 6 F.Supp. 2d at 449. The court noted that, under Maryland law, coverage is triggered “when
the property damage first occurred, not when such damage was actually discovered or manifested.” Id. at 455, n.13 (citing Harford County v. Harford Mut. Ins. Co., 610 A.2d 286, 294-95 (Md. 1992)).

In Mayor & City Council of Balt. v. Utica Mut. Ins. Co., 802 A.2d 1070, 1094 (Md. Ct. Spec. App. 2002), however, the Maryland Court of Special Appeals explained that “while the ‘injury-in-fact’ is an appropriate trigger of coverage . . . this trigger does not preclude coverage under subsequent policies when there is continued exposure.” In addressing the trigger issue in an asbestos exposure case, the court explained:

We reject trigger theories that are based exclusively on exposure to harm or the manifestation of injury. The “injury-in-fact” and “continuous” trigger theories are not mutually exclusive, but instead may in an appropriate circumstance be complimentary in the appropriate context.

Id. at 1098.

4. The “Business Risk” Exclusions

Maryland courts have found that certain “business risk exclusions” bar coverage for construction defect claims. In Century I Joint Venture v. U.S. Fid. & Guar. Co., 493 A.2d 370, 372-73 (Md. Ct. Spec. App. 1985), condominium developers sought a declaratory judgment that their liability insurers were obligated to defend and indemnify them in an action for faulty design and construction. The court held that because the policies excluded coverage for damage to the developers’ work product and work performed, the insurer was not obligated to defend or indemnify the developers. Id. at 376. The court explained, “[s]ince appellants’ business consisted of the erection of a condominium building and the sale of individual condominium units therein, under a plain and ordinary interpretation of the exclusion, a condominium unit would be included within the definition ‘products . . . sold . . . by the named insured.’” Id. The court recognized that the general purpose of the “business risk” exclusions is to bar recovery for the insured’s obligation to repair or replace its own defective work or product. Id. at 374-75.

Thus, it is likely that a Maryland court would apply the “business risk exclusions” in situations where damages are limited to the insured’s defective work or product. See Am. Modern Home Ins. Co. v. Reeds at Bayview Mobile Home Park, 175 Fed. Appx. 363 (4th Cir. 2006) (J. Wilkins dissenting); Atlantic Crane Serv. v. S.G. Marino Crane Serv., Inc., JFM-99-2681, 2000 WL 1828270 (D. Md. Nov. 29, 2000). In Modern Home, the dissent recognized that courts have uniformly agreed that the purpose of the “business risk exclusions” is to remove any obligation of the insurer to pay for the repair or replacement of the insured’s defective work. Modern Home, 176 Fed. Appx. at 371-72. However, the dissent also recognized that “it is equally well established that such business risk exclusions permit coverage for damages to other property or for other accidental loss caused by the defective product or defective work.” Id.; see also Fed. Ins. Co. v. Firemen’s Ins. Co., 769 F. Supp. 2d 865, 879 (D. Md. 2011) (holding that the “your work” exclusion applied only to property subject to “work performed” by the insured, not to other property including trees, azaleas, driveway, lumber and furnishings damaged as a result of the insured’s faulty workmanship).
With respect to the application of the subcontractor exception to the “your work” exclusion, the court in French v. Assurance Co. of Am., 448 F.3d 693 (4th Cir. 2006) (applying Maryland law), applied the exception to preserve coverage to an insured general contractor for damage to the insured’s otherwise non-defective work arising out of a subcontractor’s defective installation the home’s exterior with a synthetic stucco system.
1. **The “Property Damage” Requirement**

Under Massachusetts law, an insured’s defective product or work, standing alone, does not typically constitute “property damage” under a CGL policy. See U.S. Fire Ins. v. Peerless Ins. Co., No. CIV.A. 00-5595, 2004 WL 1515591, at *5-6 (Mass. Super. June 15, 2004). However, if an insured’s faulty workmanship causes damage to other property, courts have found that the damage to other property does constitute “property damage” under a CGL policy. Id. at *6; see also Amtrol, Inc. v. Tudor Ins. Co., No. CIV.A.01-10461-DPW, 2002 WL 31194863, at *5 (D. Mass. Sept. 10, 2002) (applying Massachusetts law) (holding that evidence of any third-party damages caused by water leakage from defective water heater constitutes “property damage” and is covered under policies).

A Massachusetts federal court has stated that CGL policies:

> are intended to protect the insured from liability for injury or damage to the persons or property of others; they are not intended to pay the costs associated with repairing or replacing the insured’s defective work and products, which are purely economic losses. Finding coverage for the cost of replacing or repairing defective work would transform the policy into something akin to a performance bond.


In addition, it has been recognized in Massachusetts that “defining the negligent construction as the ‘property damage’ stands against notions of fairness and public policy” since “[s]uch an interpretation would essentially deem comprehensive general liability insurance policies limitless.” Certain Interested Underwriters at Lloyds of London v Boston Group. Dev., Inc., 011885, 2002 WL 799710, at *4, n.3 (Mass Super. Feb. 26, 2002).

In Cont’l Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 146 (1984), an insurance carrier issued multiple CGL policies for the construction of a tower to its named insured, John Hancock Mutual Life Insurance Company, which provided coverage for Hancock, the owner, the general contractor and the subcontractor in charge of constructing the curtain wall on the tower. Following construction, a complaint was brought for design and construction of the tower. Id. The carrier filed a declaratory judgment action, arguing that the curtain wall was not integrated into the tower and therefore any damages were limited to the repair and replacement of the curtain wall itself, which is not covered under the policies. Id. at 148.

Addressing the issue of whether the term “property damage” requires actual physical damage to property other than the defective workmanship itself, or if it includes intangible damages, such as the resulting loss of use of that other property, the court held that such loss of use does constitute “property damage” under Massachusetts law. Id. at 147-48. The court then held that the unsightly appearance of the negligently constructed curtain wall, after being integrated into the building as a whole, caused “property damage” to the entire tower, triggering the duty to defend. Id. at 148-49. Thus, under Massachusetts law, where faulty workmanship to a part of a building causes the loss of use of that building in its entirety, the
resulting loss of use is considered “property damage” under a CGL policy.

2. The “Occurrence” Requirement


In Mello Constr., the insured, a general contractor, was hired for the construction of an elementary school and was insured under a CGL policy during this time period. Id. at *1. As part of the project, the insured subcontracted work for the construction of a concrete slab supporting the school. Id. Prior to the completion of the project, the insured was informed of a number of defects with the concrete slab and the insured contractor repaired the slab that the subcontractor had negligently installed. Id. Over a year later, the insured filed a claim for the cost of these repairs with its CGL insurance carrier, the carrier disclaimed coverage and the insured filed a declaratory judgment action against the carrier seeking a declaration of coverage. Id. at *2. The court granted summary judgment in favor of the carrier, holding that not only was coverage expressly excluded under the policy agreement, even if no exclusions applied, “[d]efective work is not an accident and hence was not an ‘occurrence.’” id. at 3. Accordingly, the court held that there was no coverage for the repair and replacement of the concrete slab, as the claim did not arise out of a covered “occurrence.”

Similarly, in Davenport, an insured general contractor brought a declaratory judgment action, seeking coverage under an insurance policy issued to one of its subcontractors. 56 Mass. App. Ct. at *1. The subcontractor had been hired to paint a residential home but failed to apply a primer, and, as a result, the contractor had to re-do the paint job. Id. The court granted summary judgment in favor of the insurance carrier, stating that, aside from the fact that coverage is barred by one of the policy’s exclusions, “[f]aulty workmanship, alone, is not an ‘occurrence’ as defined in the [insurance] policy; nor does the cost to repair the defective work constitute property damage.” Id. Accordingly, the court held that the claim did not constitute an “occurrence.”
In Friel Luxury, homeowners filed an action against an insured contractor, claiming a variety of deficiencies in the work performed on their home, including issues with the roofing and sheet metal work, the fire stopping and insulation, and the HVAC systems. 2009 WL 5227893 at *1. The insured filed a declaratory judgment action against its insurance carrier, seeking defense and indemnification under a CGL policy and the court granted summary judgment in favor of the insurance carrier. Applying Massachusetts law, the Court held that the underlying claims did not constitute a covered “occurrence” under the policy, as the underlying complaint “clearly and unequivocally details [the contractor’s] defective workmanship.” Id. at “6. Because faulty workmanship, standing alone, does not constitute an accidental “occurrence” under a CGL policy, the court denied coverage.

In Am. Home Assur. Co., a lawsuit was filed against an insured contractor for the negligent installation of certain concrete floating docks and the court held that the claims did not constitute an “occurrence” under a Commercial Marine Liability Policy that had been issued to the insured. 379 F. Supp. 2d at 136. Specifically, the court stated that it was “undisputed that only the floating docks themselves sustained property damage and that this damage resulted from faulty workmanship” and that “Massachusetts courts have . . . held that faulty workmanship fails to constitute an accidental occurrence in a commercial general liability policy.” Id. Accordingly, the court held that “the faulty workmanship here does not constitute an occurrence and, therefore, there is no coverage under the policy.” Id.

3. Timing of “Property Damage”

The few Massachusetts courts that have addressed the timing issue are not in agreement. The Supreme Judicial Court of Massachusetts, in context of addressing a “care, custody or control” exclusion, stated that “[t]he time of the occurrence of an accident within the meaning of an indemnity policy is not the time the wrongful act was committed, but the time when the complaining party was actually damaged.” Cont’l Cas. Co. v. Gilbane Bldg. Co., 391 Mass. 143, 152 (1984). However, the court was not addressing the issue of trigger of coverage.

In Gilbane, a CGL insurance carrier brought a declaratory judgment action to determine whether it had duty to defend a general contractor and certain subcontractors in actions brought by the building owner and nearby restaurant owner for damages for faulty design of a tower. Id. The tower was constructed in 1968 and the underlying plaintiffs alleged that in 1972 significant numbers of glass panels failed in the tower’s curtain wall, resulting in the tower not to be able to “withstand the forces and conditions to which it was subjected.” Id. at 146. The carrier argued that coverage was barred by an exclusion in the policy, which excluded coverage for property “being installed, erected or worked upon by the insured.” Id. at 151. Specifically, the carrier argued that there were glass units in the curtain wall that failed in 1968, during installation, and therefore the damage fell within the exclusion as property being worked on by the insured. Id. at 152. However, the court found that an incidental number of glass units had problems during or shortly after installation, that those units were fixed, and that “[s]ignificant numbers of glass units did not fail until November, 1972.” Id. Thus, the court held that the “property damage” occurred in 1972, when the faulty windows actually failed and the damages became apparent. Id.
By contrast, subsequent to Gilbrane, a Massachusetts federal court utilized the manifestation trigger approach. See Ill. Union Ins. Co. v. Fireman's Fund Ins. Co., No. CIV. A. 88-2078-F, 1989 WL 149279, at *3 (D. Mass. Dec. 5, 1989). In Illinois Union, an insured roofer sought coverage under a CGL policy after the roofer negligently installed a roof during the policy period, but the roof only manifested the effects of this negligence during a wind storm occurring after the termination of the policy period. 1989 WL 149279, at *2. Applying Massachusetts law, the district court addressed whether the insurance carrier had any obligation to defend and indemnify the roofer in response to the claims of the building owner, and found that it did not. Id. at *4. Specifically, the court held that Massachusetts law follows the manifestation trigger theory of coverage and therefore coverage is triggered at the moment property damages actually appear or become apparent. Id. at *3. The court stated, “[t]he undisputed fact that the negligent roofing occurred during the policy period but never manifested itself in any way prior to the gale that occurred outside the policy period entitles the plaintiff to its declaratory judgment.” Id. at *5.

4. The “Business Risk” Exclusions

Massachusetts courts generally have found that the “business risk” exclusions preclude coverage for damage claims associated with defective construction. Mello Constr., Inc., 2007 WL 2908267, at *4. In analyzing the “business risk” exclusions, the Massachusetts Court of Appeals in Dorchester Mut. Fire Ins. Co. v. First Kostas Corp., Inc., 731 N.E.2d 569 (Mass. App. Ct. 2000), explained:

General liability coverage is not intended as a guarantee of the insured’s work, and for that reason, general liability policies contain “business risk” exclusions. Such “business risks” have been described as those “which management can and should control or reduce to manageable proportions; risks which management cannot effectively avoid because of the nature of the business operations; and risks which relate to the repair and replacement of faulty work or products. These risks are a normal, foreseeable and expected incident of doing business and should be reflected in the price of the product or service rather than as a cost of insurance to be shared by others.


In construing the “damage to property” exclusion, Massachusetts courts have made a “distinction between the damage to the work product of the insured and damage to the larger units of which the insured’s work product is but a component,” in defining the scope of the property upon which the insured was performing operations. Mills Constr. Corp., Inc., 2019 WL 1440404, at *6. The Massachusetts Supreme Judicial Court applied the exclusion to bar coverage for damage to the entire tank upon which the insured was performing cleaning and repair services. Jet Line Services, Inc. v. Am. Employers Ins. Co., 537 N.E.2d 107, 111 (Mass. 1989). By contrast, where the insured was hired to move a farmhouse to an alternate site and build a new foundation for it, and subsequent damage was alleged to the superstructure as a result of the negligent construction of the foundation, the Appeals Court found that the damage to property exclusion would not apply, because the insured’s
operations were performed on a discrete component of the house - i.e., the foundation, not the superstructure. Frankel v. J. Watson Co., Inc., 484 N.E.2d 104, 105 (Mass. App. Ct. 1985); see also All Am. Ins. Co. v. Lampasona Concrete Corp., 120 N.E.3d 1258, 1261-62 (Mass. App. Ct. 2019)(holding exclusion did not apply to bar coverage, where insured’s work on one layer of integrated flooring system caused damage to the other layers of that system that were outside the scope of the insured’s contracted work); E.H. Spencer & Co., LLC v. Essex Ins. Co., 25 Mass.L.Rptr. 578 (Mass. Sup. Ct. 2009), aff’d, 2011 WL 1327718 (Mass. App. Ct. Apr. 8, 2011) (noting application of the exclusion turns on the scope of the work that the insured was hired to perform, and applying exclusion to bar coverage for alleged water damage to home’s basement, walls and floors, where the insured had contracted to build the entire home).

In considering the “your product” exclusion, the Supreme Judicial Court of Massachusetts has held that an entire building may constitute the “product” of an insured general contractor. See Commerce Ins. Co. v. Betty Caplette Builders, Inc., 647 N.E.2d 1211, 1214 (Mass. 1995). The court noted that the insured builder “assumed the risk of failing to construct in a workmanlike manner and to provide an acceptable end product” and, therefore, was not entitled to coverage for damages sought by the homeowners resulting from its own faulty workmanship. Id. The court based its ruling on decisions from a majority of jurisdictions concluding that an entire building constitutes the product of the builder. Id. at 1213; see also AGM Marine Contractors, Inc., 467 F.3d at 814 (applying “your product” exclusion to bar coverage for damage to floating docks due a storm, due to faulty work in installation, and noting that the “real property” exception to the definition of the insured’s “product” would not apply, because the docks could easily be severed from land without injury to the land); Essex Ins. Co. v. BloomSouth Flooring Corp., 562 F.3d 399 (1st Cir. 2009) (“your product” exclusion did not apply to bar coverage for damage to concrete floor on which the insured’s carpet was placed).

Massachusetts courts have applied the “your work” exclusion to bar coverage for property damage arising out of an insured’s faulty work. For example, in C&I Steel, Inc. v. Zurich N. Am., 0300767, 2005 WL 1367814, at *3 (Mass. Super. Apr. 20, 2005), the court applied the “your work” exclusion to bar coverage for costs sought to repair defective steel work performed by a subcontractor. See also Davenport, 778 N.E.2d 1038 (“your work” exclusion applied to bar coverage to general contractor for its subcontractor’s faulty workmanship in painting a home where property damage allegedly occurred prior to completion of work).

Massachusetts courts have applied the “impaired property” exclusion to bar coverage for loss of use and other consequential damage to property not physically injured caused by an insured’s faulty workmanship. See McKenna v. Zurich Ins. Co., 04-P-254, 2005 WL 820538, at *2 (Mass. App. Ct. Apr. 8, 2005); First Kostas Corp., 731 N.E.2d at 572 (“impaired property” exclusion precludes coverage for claims of loss of use: “(1) when the loss was caused by faulty workmanship; and (2) when there has been no injury to the property aside from the incorporation of the insured’s faulty work itself.”). But see BloomSouth, 562 F.3d at 408 (“impaired property” exclusion did not apply because alleged odor from carpet installed by insured; evidence suggested that the removal and replacement of the carpet could not restore the building to use).
1. **The “Property Damage” Requirement**

The Court of Appeals of Michigan has suggested that faulty workmanship does not constitute “property damage.” **AFCON, Inc. v Ellis-Don Michigan, Inc., 2005 WL 415671, at *3** (Mich. Ct. App. Feb. 22, 2005), appeal den., 474 Mich. 932 (2005) (“The core of the present dispute is whether Ellis-Don’s “damages” constituted “property damage” or whether its “damages” were merely additional costs expended to remedy AFCON’s defective wall.”) The court noted the following examples in recognizing what has constituted “property damage” in other cases: “removal and replacement of the concrete floor in which a defective radiant heating tube was placed, . . . damage to the interior of a building from a leaky roof, . . . damage to a mobile home as a result of structural defects, . . . and fire damage to a tunnel under construction and construction equipment.” Id.; see also **Houseman Constr. Co. v. Cincinnati Cas. Co., 2010 WL 1658959, at *2** (W.D. Mich. Apr. 23, 2010)(holding that a sinking floor, caused by the insured’s defective work on floor, constituted “property damage”, but noting that the determination as to whether claim was covered turned on whether that damage had been caused by an “occurrence”).

2. **The “Occurrence” Requirement**

In **Hawkeye-Security Ins. Co. v. Vector Constr. Co., 460 N.W.2d 329, 331 (Mich. Ct. App. 1990),** the Michigan Court of Appeals likened an “occurrence” to an “accident,” offering the following analysis as instructive guidance:

> [it] may be anything that begins to be, that happens, or that is a result which is not anticipated and is unforeseen and unexpected by the person injured or affected thereby—that is, takes place without the insured’s foresight or expectation and without design or intentional causation on his part. In other words, an accident is an undesigned contingency, a casualty, a happening by chance, something out of the usual course of things, unusual, fortuitous, not anticipated, and not naturally to be expected.”

Id. at 332 (holding that no “occurrence” was presented, in a claim where the damage alleged was only to insured’s own work).

In holding that an “occurrence” generally does not encompass claims of faulty workmanship alone, the court noted that this determination was in line with a majority of cases in Michigan. Id.; see **Guerdon Indus., Inc. v. Fid. & Cas. Co. of N.Y., 371 Mich. 12, 18-19** (1963); see also **Skanska USA Building Inc. v. MAP Mechanical Contractors, Inc., 2019 WL 1265078, at *8** (Mich. Ct. App. Mar. 19, 2019)(holding that a claim which concerned only the repair and replacement of the insured’s own work was not an “occurrence” under a CGL policy); **Houseman, 2010 WL 1658959, at *4; Frankenmuth Mut. Ins. Co. v. Kompus, 135 Mich. App. 667, 678** (Mich. Ct. App. 1984); **Groom v. Home-Owners Ins. Co., 2007 WL 1166050, at *5** (Mich. Ct. App. Apr. 19, 2007) (because the “property damage” caused by the defendant insured’s improper construction of a condominium with a defective roof that leaked water and caused the growth and spread of mold was limited to the condominium, the alleged damage did not constitute an occurrence within the meaning of the CGL policy); Liparoto

If the insured’s faulty workmanship causes damage to property other than the work itself, however, such will constitute an “occurrence.” Radenbaugh v. Farm Bureau Gen. Ins. Co., 240 Mich. App. 134 (Mich. Ct. App. 2000), appeal den., 463 Mich. 980 (2001). In Radenbaugh, the insureds sold a double-wide mobile home. As part of the sale, the insureds provided the purchasers with erroneous schematics and instructions that were used in the construction of a basement for the home. Id. at 136. As a result, the home was deemed too dangerous for occupancy and the basement suffered severe damage. Id. The purchasers sued the insureds and the insureds’ insurer refused to defend or indemnify them. After settling with the purchasers, the insureds commenced an action for breach of the CGL policy. Id.

The insurer argued that it was not required to provide a defense because the underlying claims for damage were not the result of an “occurrence” under the policy. Id. at 145. The Michigan Court of Appeals disagreed, noting that the underlying complaint alleged damages “broader than mere diminution in value of the insured’s product caused by alleged defective workmanship, breach of contract, or breach of warranty.” Id. at 141. The court clarified that because of the insureds’ defective instructions to the basement contractor, the basement of the mobile home was improperly constructed and the basement was rendered unusable because “water is seeping into and condensing on basement walls.” Id. at 144-45. Thus, the court found the claim arose from an occurrence, and stated that “when an insured’s defective workmanship results in damage to the property of others, an ‘accident’ exists within the meaning of the standard comprehensive liability policy.” Id. at 147.

3. Timing of “Property Damage”

Although Michigan courts have not addressed the timing of “property damage” with respect to construction defect cases, they have dealt with the issue in the context of “property damage” resulting from environmental pollution. See Gelman Sciences, Inc. v. Fid. & Cas. Co. of N.Y., 456 Mich. 305 (1998) (“according to the policies’ explicit terms, actual injury must occur during the time the policy is in effect in order to be indemnifiable, i.e., the policies dictate an injury-in-fact approach. The manifestation trigger simply is not supported by the policy language”)(overruled on other grounds).

The injury-in-fact trigger of coverage in Gelman was followed by the court in Dow Chem. Co. v. Fireman’s Fund Ins. Co., 217 F. Supp. 2d 816 (E.D. Mich. 2002), which also applied the “injury-in-fact” trigger, holding that coverage is triggered upon proof that the groundwater was injured by the release of pollutants during the policy period. See also Arco Indus. Corp. v. Am. Motorists Ins. Co., 232 Mich. App. 146 (Mich. Ct. App. 1998) (applying injury-in-fact coverage trigger theory to hold that coverage was triggered when actual property damage occurred during the policy period).

4. The “Business Risk” Exclusions

The Michigan Court of Appeals has applied the “business risk” exclusions to claims brought against a general contractor arising out of the allegedly defective construction of retainer walls at a construction site. In AFCON, a general contractor, Ellis-Don, entered into an agreement to construct a sewer overflow detention basin and treatment facility. 2005 WL...
In order to safely perform the required excavation, Ellis-Don hired AFCON to build retaining walls to protect the workers and the project from the collapse of the surrounding earth. \textit{Id.} After excavation of one section of the wall, another section of the wall shifted. \textit{Id.} Shortly thereafter, excavation was terminated when the wall shifted again, causing a two-hundred foot long crack in the wall. \textit{Id.} Upon discovering the crack, Ellis-Don consulted an engineering firm, which recommended that Ellis-Don build two dirt berms perpendicular to the wall to prop it up. \textit{Id.}

AFCON brought suit against Ellis-Don, alleging that it was owed payment on its contract. \textit{Id.} Ellis-Don responded by filing a counter-complaint seeking damages resulting from the movement of the wall. \textit{Id.} AFCON tendered defense of Ellis-Don’s counter-complaint to its insurer, Liberty Mutual. \textit{Id.} Although initially providing AFCON with a defense under a reservation of rights, Liberty Mutual later disclaimed coverage based on the “your work” and “your product” exclusions. \textit{Id.}

The court stated that “it is clear from Ellis-Don’s allegations and arguments that the ‘damage’ they incurred was additional costs associated with rectifying AFCON’s allegedly faulty work product.” \textit{Id.} at *3. Therefore, the Michigan Court of Appeals held that the “business risk” exclusions pertaining to “property damage” to “your work” barred coverage “because Ellis-Don’s ‘damages’ were not ‘property damage,’ but additional costs associated with rectifying AFCON’s faulty work product.” \textit{Id.}
1. The “Property Damage” Requirement

Older decisions from Minnesota courts generally used the business risk doctrine to interpret CGL policies in the construction defect context, observing that CGL policies are not intended to protect against the “risk that the insured ‘may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity.’” Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 881 (Minn. 2002); see also Knutson Constr. Co. v. St. Paul Fire and Marine Ins. Co., 396 N.W.2d 229, 232-33 (Minn. 1986) (coverage afforded under a CGL policy “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”). However, in a 2004 decision, the Minnesota Supreme Court clarified that interpretation of a CGL policy must be “determined by the specific terms of the insurance contract.” Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 327 (Minn. 2004); see Magney Constr., Inc. v. Cincinnati Ins. Co., 2008 WL 11349958, at *5 (D. Minn. Dec. 1, 2008) (stating that in Wanzek, the Supreme Court “made it clear that the business-risk doctrine does not drive the interpretation of a CGL policy” and that instead the language controls).

Under the typical definition of “property damage,” defective work or materials do not constitute “property damage” under a CGL policy unless it causes damage to a third party’s property giving rise to tort liability. Id.; see also Thermex Corp. v. Fireman’s Fund Ins. Co., 393 N.W.2d 15, 17 (Minn. Ct. App. 1986) (replacement costs related to defective work and materials are not “property damage”); Sand Companies, Inc. v. Gorham Hous. Partners III, LLP, A10-113, 2010 WL 5154378 (Minn. Ct. App. Dec. 21, 2010) (design defect in sprinkler system does not constitute “defective work or materials” and is “property damage” under CGL policy).


Although economic losses do not constitute “property damage,” consequential damages may still be covered under a CGL policy as “damages because of property damage.” Western Nat’l Mut. Ins. Co. v. Frost Paint & Oil Corp., 1998 WL 27247, at *2 (Minn. Ct. App. Jan. 27, 1998) (coverage for “consequential losses, including lost profits flowing from physical injury to its [property], which were caused by [insured’s] defective paint.”); Reinsurance Assoc. of Minn. v. Timmer, 641 N.W.2d 302, 314 (Minn. Ct. App. 2002) (lost profits and consequential damages covered for infection of cattle herd as a result of disease contracted from sold cows).
2. The “Occurrence” Requirement

In general, an “occurrence” is defined as an “accident.” See Singsaas v. Diederich, 307 Minn. 153, 155 (1976); see also Bd. of Regents of Univ. of Minn. v. Royal Ins. Co. of Am., 517 N.W.2d 888, 892 (Minn. 1994) (“accidental” in liability insurance parlance means unexpected or unintended’’); Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602, 611 (Minn. 2012) (accident defined as “an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause”); Integrity Mut. Ins. Co. v. Klampe, A08-0443, 2008 WL 5335690, at *4 (Minn. Ct. App. Dec. 23, 2008) (“contractor who knowingly violates contract specifications is consciously controlling his risk of loss and has not suffered an occurrence”).

The standard is such that “there is an ‘occurrence’ as long as the insured did not engage in conscious wrongdoing.” West Nat’l Mut. Ins. Co. v. Frost Paint & Oil Corp., C3-97-1118, 1998 WL 27247 (Minn. Ct. App. Jan. 27, 1998); see also Ohio Cas. Ins. Co. v. Terrace Enters., Inc., 260 N.W.2d 450, 452-53 (Minn. 1977) (“occurrence” exists where conduct was negligent but not reckless or intentional); Aten v. Scottsdale Ins. Co., 511 F.3d 818, 820 (8th Cir. 2008) (stating, under Minnesota law, “water damage to other property resulting from an improperly poured and graded basement floor” constituted occurrence). As such, “[a]n insured contractor’s willful and knowing violations of contract specifications and expected standards of workmanship do not establish an ‘occurrence.’” Johnson v. AID Ins. Co. of Des Moines, Iowa, 287 N.W.2d 663, 665 (Minn. 1980). However, ordinary negligence, or a contractor’s mistake or carelessness, may be deemed an occurrence for which coverage applies. See Ohio Cas. Ins. Co. v. Terrace Enters., Inc., 260 N.W.2d 450, 452 (Minn. 1977) (contractor that made efforts to protect the soil and concrete from freezing, which later turned out to be inadequate, “was perhaps negligent, but not reckless or intentional” such that the “settling of the building was an ‘occurrence’ within the terms of the policy”).

Further, under a policy issued to a building and design company, the faulty work of its subcontractors has been held to be an “accident” and thus an “occurrence” from the perspective of the builder-insured, according to a recent decision from the District of Minnesota. Westfield Ins. Co. v. Miller Architects & Builders, Inc., 2018 WL 495652, at *2 (D. Minn. Jan. 19, 2018).

Although not specifically referring to the term “rip and tear,” the Court of Appeals has also concluded that no “occurrence” is presented by the “damages caused or necessitated to the property of others by the repair and replacement of [the insured’s] own faulty work.” Western Nat’l Mut. Ins. Co. v. Barbes, 2006 WL 1704201, at *5 (Minn. Ct. App. June 20, 2006) (holding that damage to homeowner’s interior furnishings and fixtures, necessary to repair insured’s faulty framing work, were caused by “repairs deliberately undertaken by [the insured] as a result of its faulty work” and therefore were “not an accidental occurrence”).
3. **Timing of “Property Damage”**

“Minnesota follows the ‘actual injury’ or ‘injury in fact’ rule to determine which insurance policies have been ‘triggered’ by an occurrence for which an insurer must indemnify its insured.” Wooddale Builders, Inc. v. Maryland Cas. Co., 722 N.W.2d 283, 292 (Minn. 2006) (citing North States Power Co. v. Fid. & Cas. Co. of N.Y., 523 N.W.2d 657, 662 (Minn. 1994)). “Under this rule, a liability policy is ‘triggered’ if the complaining party . . . is actually damaged during the policy period, regardless of when the underlying negligent act occurred.” Id.

“The essence of the actual injury trigger theory is that each insurer is held liable for only those damages which occurred during its policy period; no insurer is held liable for damages outside its policy period.” North States Power, 523 N.W.2d at 662. “Where the policy periods do not overlap, therefore, the insurers are consecutively, not concurrently liable.” Id. A “pro rata by limits” allocation method effectively makes those insurers with higher limits liable for damages incurred outside their policy periods and is therefore inconsistent with the actual injury trigger theory.”

“Thus, under the actual-injury trigger rule, only those policies in effect when the bodily injury or property damage occurred are triggered.” In re Silicone Implant Ins. Coverage Litig., 667 N.W.2d 405, 415 (Minn. 2003). To trigger a policy, “the insured must show that some damage occurred during the policy period.” Id. “For purposes of the actual-injury trigger theory, an injury can occur even though the injury is not ‘diagnosable,’ ‘compensable,’ or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period.” Id. Therefore, a policy may be triggered under the actual injury theory, even where the property damage is not yet evidence during the policy period, “as long as it can be determined, even retroactively, that some injury did occur during the policy period.” Id.; see also Kootenia Homes, Inc. v. Federated Mut. Ins. Co., A05-278, 2006 WL 224162 (Minn. Ct. App. Jan. 31, 2006) (finding coverage triggered shortly after construction when “moisture intrusion” from stucco caused property damage to home).

The “date of the defective work cannot be substituted for the commencement” of when actual property damage occurred. Donnelly Bros. Constr. Co., Inc. v. State Auto Prop. & Cas. Ins. Co., 759 N.W.2d 651, 657-58 (Minn. Ct. App. 2009) (holding date of construction cannot be used as trigger date where date of actual injury is unclear); see also Domtar, Inc. v. Niagara Fire Ins. Co., 563 N.W.2d 724, 733 (Minn. 1997) (“When environmental contamination arises from discrete and identifiable events, then the actual-injury trigger theory allows those policies on the risk at the point of initial contamination to pay for all property damage that follows”).
However, Minnesota courts also apply a flexible approach of the actual injury rule for the allocation of liability “in those difficult cases in which property damage is both continuous and so intermingled as to be practically indivisible.”  Id.; see also Donnelly Bros. Constr. Co., Inc., 759 N.W.2d at 656 (“Various decisions of Minnesota courts illustrate the difficult and complex task of determining insurer liability for damage arising from repeated incidents generally and particularly for damage to buildings resulting from moisture and water intrusion caused by contractors.”); Wooddale Builders, Inc., 722 N.W.2d at 290 (“damage sustained to these homes was not the result of a discrete and identifiable event, but rather so continuous and indivisible as to make it impossible to identify one such event”).

In Wooddale Builders, Inc., the Court departed from the traditional actual injury approach where each insurer is held liable only for damages that occurred during its policy period, and found that while damages would be allocated to the insured for periods during which it elected to be self insured, damages would be allocated to insurers during periods where it suffered property damages and coverage was unavailable.  722 N.W.2d at 297-98.  Thus, based on the circumstances of each case, the court may flexibly apply the actual injury rule in the interests of justice, and a strict application of the rule is not required.  Id.

4.  The “Business Risk” Exclusions

In Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co., 819 N.W.2d 602 (Minn. 2012), an insured-contractor brought a declaratory judgment action against its CGL insurer seeking indemnification for an arbitration award stemming from the insured’s alleged negligent-construction of a home resulting in moisture damage.  Id. at 609-610.  In analyzing whether the insured was entitled to coverage, the court addressed whether the policy’s “business risk” exclusions barred coverage for the negligent construction claims.  The court noted that the “your product” exclusion was inapplicable, as the exclusion only applies to “goods and products” and therefore does not apply to the construction work performed in this case.  Id. at 612.  The court then held that the “your work” exclusion barred coverage for the claim alleging negligent-construction of the addition to the home, but that the exclusion did not apply to all of the claims alleging negligent construction of the original home (i.e., the installation of the windows).  Id.  The court reasoned that the “your work” exclusion applied to the work on the addition to the home because the damage claimed was to work performed entirely by the insured.  Id.  However, any claims for damages to the preexisting adjacent walls and structures of the original home that had moisture damage due to the insured’s defective installation of the windows would not be barred by the “your work” exclusion.  Id.  This is because such damages constitute third-party property damage caused by the insured’s faulty workmanship, which is not barred by the “business risk” exclusions.  See also Interlachen Properties, LLC v. State Auto Ins. Co., 275 F.Supp.3d 1094, 1110 (D. Minn. 2017) (holding “your work” exclusion would bar coverage for the cost of correcting the insured’s faulty workmanship).

The court in Knutson Constr. Co. v St. Paul Fire and Marine Ins. Co., 396 NW2d 229, 235 (Minn. 1986) held that the business risk exclusions – the “owned and occupied” exclusion, the “products” exclusion, and the “work performed” exclusion – “generally operate to exclude coverage for claims arising out of the insured’s product when the claim for relief seeks replacement or repair of damages to the product itself.  Therefore, absent other considerations, we reaffirm our holding in Bor-Son [Bldg. Corp. v. Employers Commercial
that the CGL policy does not provide coverage for claims of defective materials and workmanship giving rise to a claim for damage to the property itself which is the subject matter of the construction project.” Id. at 238; see also Thommes v. Milwaukee Ins. Co., 641 N.W.2d 877, 884 (Minn. 2002) (holding that the “your work” exclusion applies to the insured’s work performed in a faulty or defective manner).

However, business risk principles do not “serve as the foundation for a separate “business risk doctrine” that operates to override the express language of policy exclusions.” Milwaukee Ins. Co., 641 N.W.2d at 880. “Thus, if parties to an insurance contract demonstrate their intent, using clear and unambiguous language, to exclude the risk of damage to the real property of third parties, then there is no need to look to business risk principles to ascertain whether the policy was intended to cover such risks.” Id. at 882; Wanzek Constr., Inc. v. Employers Ins. of Wausau, 679 N.W.2d 322, 327 (Minn. 2004) (extent a policy covers a business risk “must be determined by the specific terms of the insurance contract”).
1. The “Property Damage” Requirement

Mississippi courts have held that where an insurance policy defines “property damage” in terms of “tangible property,” losses that are purely pecuniary, economic or contractual will not constitute “property damage.” Audubon Ins. Co. v. Stefancik, 98 F. Supp. 2d 751, 756 (S.D. Miss. 1999) (financial losses and injury to reputation alone do not constitute “tangible property”); see also Nationwide Mut. Ins. Co. v. Lake Caroline, Inc., 515 F.3d 414, 423 (5th Cir. 2008) (claim of slander by developer against operator of golf club resulted in damage to reputation which was purely economic in nature and thus not considered “property damage” under terms of developer’s CGL policy).

Where damage occurs to third-party property, damages for diminution in value of that property and demolition expenses may be considered “property damage under an insurance policy.” Scottsdale Ins. Co. v. Bungee Racers, Inc., CIVA 4:04CV376 PB, 2006 WL 2375367, at *5 (N.D. Miss. Aug. 14, 2006) (“claims for diminution in the value of their property and the demolition expenses both involve ‘physical injury to tangible property.’”)

In W.R. Berkley Corp. v. Rea’s Country Lane Constr., Inc., 140 So. 3d 437 (Miss. Ct. App. 2013), reh’g denied (Jan. 7, 2014), cert. denied, 139 So. 3d 74 (Miss. 2014), the underlying action involved a contract between an owner of real property and an insured-contractor to remove dirt from the owner’s property and, once the dirt was removed, to create ponds by replacing the topsoil, grading the slopes of the pits, and planting grass. Id. at 439. After the insured failed to complete the contract, the property owner filed suit, alleging breach of contract, negligence, and other state law claims. Id. The insured then filed a declaratory judgment action against its CGL insurer seeking defense and indemnification for the claims asserted by the property owner. Id. The trial court held that the insurer breached its contract to the insured by failing to provide a defense. Id. at 440.

On appeal, the insurer asserted that it owed no duty to defend under the policy because the underlying complaint did not allege “property damage” but instead alleged “economic damages” in that the alterations made to the property did not comply with the agreed-upon specifications, a portion of the property was converted, and the owner was not sufficiently compensated under the contract. Id. at 443. The court of appeals disagreed, noting that the underlying claims alleged “property damage” to the extent that the property “had been physically injured by pits being dug, topsoil being stripped, and mounds of waste dirt being dumped.” Id. Thus, the court held that the alleged damages were not purely economic and therefore the claims constituted “property damage” as defined by the policy. Id.

2. The “Occurrence” Requirement

2007) (“if the policy is construed as protecting a contractor against mere faulty or defective workmanship, the insurer becomes a guarantor of the insured’s performance of the contract, and the policy takes on the attributes of a performance bond.”)

In ACS Constr. Co., Inc. of Miss. v. CGU, 332 F.3d 885 (5th Cir. 2003), the Fifth Circuit Court of Appeals found that an insurer owed no obligation to provide insurance coverage for claims of defective workmanship where the insured contractor had contracted to build munitions bunkers and then subcontracted out installation of the allegedly defective waterproofing membranes in the bunker roofs. In its analysis of established Mississippi law, the Fifth Circuit held that “the faulty workmanship of [the subcontractor] unfortunately amounts to negligence” and that “[h]iring the subcontractors and installing the waterproofing membranes were not accidents under the terms of the policy.” Id. at 891. Therefore, “the installation of the waterproofing membrane is the underlying act referenced an ‘occurrence’ which does not trigger coverage under the policy.” Id. at 891-92; see also Mendrop, 2007 WL 4200827, at *7 (defective construction does not constitute an “accident.”)

Importantly, however, the Supreme Court of Mississippi declined to follow the reasoning of the Fifth Circuit Court of Appeals in ACS. In Architex Ass’n Inc. v. Scottsdale Ins. Co., 27 So. 3d 1148, 1159 (Miss. 2010), the Court explained that while the ACS court was right to hold that exclusionary language cannot be used to create coverage where none exists, the term “occurrence” cannot be construed in a manner to preclude coverage for unexpected and unintended property damage resulting from work performed by a subcontractor on behalf of a general contractor.

In Architex, the Court reasoned that the policy definition of “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions,” did not preclude coverage for unexpected or unintended “property damage” resulting from the negligent acts or conduct of a subcontractor since such conduct was not excluded by other applicable terms of the policy and where such policy charged an additional premium for work done by subcontractors. Id. at 1162.

3. **Timing of “Property Damage”**

Although no Mississippi state court has directly addressed the issue of timing of “property damage” under an insurance policy in the construction defect context, the Southern District of Mississippi has predicted that Mississippi law would apply the majority rule that coverage is triggered at the time of injury. Essex Ins. Co. v. Massey Land & Timber, LLC, No. CIVA504CV102DCBJCS, 2005 WL 3133033, at *1 (S.D. Miss. Nov. 22, 2005); (“Although there is no case applying Mississippi law directly on point, the Court finds that the Mississippi Supreme Court would follow the majority position that coverage is triggered at the time of injury or damage.”).

In Massey Land & Timber, the court addressed whether certain CGL policies provided coverage to an insured contractor who had performed defective “dirt work” on the foundation of a project to construct multiple residential houses, which ultimately experienced settlement damages as a result of the insured’s faulty workmanship. After establishing that coverage is typically triggered at the time of injury, the court turned to the issue of when property damage occurred. Essex Ins. Co. v Massey Land & Timber, LLC, 5:04 CV 102 DCB JCS, 2006 WL 1454767, at *3 (S.D. Miss. May 24, 2006). The court noted that “[b]ecause the Mississippi Supreme Court, thus far, has not spoken directly to the issue before
this Court, the Court must make an “Erie-guess” as to how the Mississippi Supreme Court would rule.” Id. “This Court finds that the Mississippi Supreme Court would follow the majority position under the facts of this case and apply the ‘continuous trigger’ theory. Id. “[T]he ‘continuous trigger’ theory includes all times from exposure through progression to manifestation” and “defines damage broadly to include the entire process of damage from exposure to manifestation when the damage is of a continuous and progressive nature.” Id.; see also Maxum Indem. Co. v. Wilson, 707 F. Supp. 2d 683, 684 (S.D. Miss. 2010)(holding that the “property damage” took place when the building at issue collapsed, not when the faulty work was performed, because there was no evidence of tangible, physical injury to the building prior to collapse).

In Carl E. Woodward, LLC v. Acceptance Indem. Ins. Co., 743 F. 3d 91 (5th Cir. 2014) the Fifth Circuit, interpreting Mississippi law, found policies which provide that additional insured coverage exists only “with respect to liability arising out of your ongoing operations performed for that insured” prohibit claims for liability arising out of completed operations. The court explained coverage is limited to liability caused by “active work;” and no coverage is provided for “property damage manifesting itself after [a subcontractor] stopped working on the site.” Id. at 99. The Fifth Circuit stated that it was “apparent from the face of the [underlying] cross-claim that [the third-party plaintiff’s] claims . . . did not arise out of [the subcontractor’s] ongoing operations.” The court determined that the third-party plaintiff “did not allege that the non-conforming . . . work led to any other damages while operations were ongoing.” Id. at 101.

4. The “Business Risk” Exclusions

Mississippi courts have held that the “business risk” exclusions are “designed to exclude coverage for faulty workmanship or defective work performed by the insured, as that is the business risk that should be borne by the insured and not the insurer.” W.R. Berkley Corp., 140 So. 3d 437; see also Lafayette Ins. Co. v. Peerboom, 813 F. Supp. 2d 823, 829 (S.D. Miss. 2011) (“The ‘business risk’ exclusions operate together to exclude coverage for an insured’s faulty workmanship, the rationale for the exclusions being that ‘faulty workmanship is not an insurable ‘fortuitous event,’ but a ‘business risk’ to be borne by the insured and not the insurer’”).

“The umbrella term ‘business risk exclusions’ . . . eliminate[s] coverage for the expense of restoring, repairing, or replacing the insured’s defective work and the insulated’s satisfactory work that was damaged by work that failed.” Acadia Ins. Co. v. Peerless Ins. Co., 679 F. Supp. 2d 229, 234 (D. Mass. 2010). “[T]he purpose of a CGL policy is to protect businesses from liability to third parties for bodily injury or property damage resulting from accidents.” Noble v. Wellington Associates, Inc., 2012-CA-01269-CAO, 2013 WL 6067991 (Miss. Ct. App. Nov. 19, 2013). Thus, in Mississippi, the business risk exclusion excludes coverage for replacing faulty workmanship, and coverage under a CGL policy will only exist where the faulty workmanship of a contractor causes property damage or personal injury resulting in third party liability or damage to other work performed by the insured which was satisfactory. Lafayette Ins. Co. v. Peerboom, 813 F. Supp. 2d 823, 829-30 (S.D. Miss. 2011) (applying Mississippi law) (“[A] CGL policy is not a performance bond and is not intended to protect a contractor’s business risk to replace or repair defective work that does not conform to the agreed contractual requirements; rather, the policy is intended to protect the insured from liability because the insured’s goods, products, or work cause bodily injury or damage to property other than the insured’s work product.”).
In *Meng v. Bituminous Cas. Corp.*, 626 F. Supp. 1237 (S.D. Miss. 1986), a lawn sprinkler subcontractor sought coverage for the negligent installation of a sprinkler system. The insurer disclaimed coverage based on the business risk exclusions related to the insured’s “injury to product” and “injury to work.” *Id.* at 1238. The court found that the insurer had no liability for costs to repair or replace the sprinkler system pursuant to the “injury to product” exclusion. Costs to retain an expert to inspect the defective parts were also not covered, as those costs were associated with the defects in the product. *Id.* at 1239. The court did find coverage, however, for the cost for damage to other property, specifically trees and plants that died as a result of the defective sprinkler system. *Id.* at 1239. Furthermore, the “injury to work” exclusion precluded coverage for replacement or repair of the work performed by the insured where the damage to the work was caused by the work itself or by the materials, parts or equipment used in connection with the work. *Id.* at 1240; see also *Bungee Racers*, 2006 WL 2375367 (“your work” and “your product” exclusions did not apply to bar coverage because there was no claim for damage to the insured’s own work).
1. The “Property Damage” Requirement

The Missouri Court of Appeals has found that water damage to condominium units, including costs to repair or replace defective exterior cladding, constitutes “property damage” under a developer/general contractor's CGL policy. Village at Deer Creek Homeowners Ass’n, Inc. v Mid-Continent Cas. Co., 432 SW3d 231 (Mo. Ct. App. 2014).

In Village at Deer Creek, the insured, the developer and general contractor for the construction of a condominium complex, was sued after water leaks appeared in multiple units. Id. at 234-35. An expert for the condominium association identified 28 defects in the exterior cladding systems of the units. Id. at 236. After trial, a substantial judgment was entered against the insured. Id. at 237. The condominium association and individual homeowners filed an equitable garnishment action against the insured’s carriers. Id. The court found that “[o]nce defective construction causes damage, the cost to repair the damage is covered ‘property damage.’” Id. at 243. In finding that the costs to replace the exterior cladding systems were also “property damage,” the court stated “[t]hat cost to repair damage may include the cost to replace the defective construction if it too has been damaged or must be removed to access other damaged areas.” Id. But see Spirco Env’l Inc. v. Am. Int’l Specialty Lines Ins. Co., 555 F.3d 637, 644 (8th Cir. 2009) (applying Missouri law) (“[W]hen a contractor installs faulty material and must destroy or tear apart a structure to reach and replace the faulty material in order to properly complete a job, the tear-out and rebuilding costs are not “property damage” as that term generally is used in standard commercial general liability policies”); Esicorp, Inc. v. Liberty Mut. Ins. Co., 266 F.3d 859, 862 (8th Cir. 2001) (applying Missouri law) (“mere incorporation of a defective component is not ‘property damage’ because it does not result in ‘physical injury’”); Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 673 (Mo. Ct. App. 2007) (finding defective cement foundation that caused damage to sub-flooring and framing is covered “property damage”).

“The plain meaning of ‘property damage’ under these policies is a tangible, that is, a physical or material, loss or destruction of property.” St. Paul Fire & Marine Ins. Co. v. Lippincott, 287 F.3d 703, 705 (8th Cir. 2002) (finding that negligent misrepresentations about structure damage of house did not cause property damage). Where damages are pecuniary in nature, they “are not property damage within the meaning of . . . insurance policies.” St. Paul Fire & Marine Ins. Co. v. Lippincott, 287 F.3d 703, 706 (8th Cir. 2002).

2. The “Occurrence” Requirement

“It is well-settled Missouri law that when a liability policy defines occurrence as meaning accident, Missouri courts consider this to mean injury caused by the negligence of the insured.” Village at Deer Creek, 432 S.W.3d at 246 (internal quotations omitted). “The determinative inquiry into whether there was an ‘occurrence’ or ‘accident’ is whether the insured foresaw or expected the injury or damages.” D.R. Sherry Constr., Ltd. v. Am. Family Mut. Ins. Co., 316 S.W.3d 899, 905 (Mo. 2010). “Where a person makes a conscious decision with respect to a known risk, he cannot later claim that it was unforeseeable that the risk would be realized.” Cincinnati Ins. Co. v. Stolzer, 4:09CV00396 ERW, 2010 WL 481298 (E.D. Mo. Feb. 5, 2010).
“Courts have consistently held, however, that where the underlying cause of loss is a breach of contract, the breach of contract is not an ‘occurrence’ according to the applicable definition of ‘occurrence.’ J.E. Jones Constr. Co. v. Chubb & Sons, Inc., 486 F.3d 337, 341 (8th Cir. 2007). “The rationale for these decisions is that because the performance of a contract is within the insured’s control, a breach of that contract cannot qualify as an ‘accident’ and therefore cannot be an ‘occurrence.’” Id.; see also Am. States Ins. Co. v. Mathis, 974 S.W.2d 647, 650 (Mo. Ct. App. 1998) (holding insured’s breach of contract is not an “occurrence” under a CGL policy); Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667, 672 (Mo. Ct. App. 2007) (claim for defective materials that arises purely from products liability, rather than breach of contract, is an occurrence); Hawkeye-Security, 6 S.W.3d at 426 (negligent performance and failure to fulfill contractual terms when building a house not an occurrence); Cincinnati Ins. Co. v. Stolzer, 2010 WL 481298 (E.D. Mo. 2010) (if the insured “foresaw” the possibility of damage, then there is no occurrence); St. Paul Fire & Marine Ins. Co. v. Building Constr. Enters., Inc., 484 F. Supp. 2d 1004 (W.D. Mo. 2007), affirmed, 526 F.3d 1166 (8th Cir. 2008) (subcontractor’s substandard work was not an “accident” and thus not an “occurrence” and therefore coverage was precluded for the insured’s cost of performing required repairs). But see Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005) (faulty workmanship of insured general contractor’s subcontractor constituted an occurrence under general contractor’s policy); Taylor-Morley-Simon, Inc. v. Michigan Mut. Ins. Co., 645 F. Supp. 596 (E.D. Mo. 1986), aff’d 822 F.2d 1093 (8th Cir. 1987) (court determined that settling of a concrete slab was an occurrence despite allegations of breach of warranty); Am. States Ins. Co. v. Herman C. Kempker Constr. Co., 71 S.W.3d 232, 237 (Mo. Ct. App. 2002) (holding that claim for negligent misrepresentation can potentially constitute an “occurrence” and therefore trigger the duty to defend).

In a 2018 decision, the Missouri Court of Appeals held that a CGL policy issued to the owner of a building, which had overseen the renovation of that building, did not provide coverage for construction defect claims brought by the homeowners’ association, because the defects were not an “accident” from the owner’s perspective. View Home Owner’s Association v. The Burlington Ins. Co., 552 S.W.3d 726, 731 (Mo. Ct. App. May 1, 2018). The court reasoned that the owner had “the ability to resolve any alleged construction deficiencies” and therefore, “the failure to address them cannot be described as an ‘undesigned or unexpected event.’” Id.

In Building Construction Enterprises, defendant Building Construction Enterprises, Inc. (“BCE”) contracted with the Army Corps of Engineers to construct a training facility designed with underground support structures, including a pattern of PVC conduit encased in concrete ten feet underground called “duct banks.” Id. at 1005-6. Following construction, the Corps of Engineers noted that the duct banks, which were constructed entirely by subcontractors of BCE, were defectively constructed and BCE attempted repairs. Id. at 1006. However, a few months later, additional problems with the duct banks came to light and the Corps demanded that BCE provide a revised plan for correcting those deficiencies. Shortly thereafter, BCE undertook the necessary repairs and subsequently made a claim under two different CGL insurance policies. Id. As a result, the insurance carriers filed a declaratory judgment action seeking a declaration that they had no duty to indemnify BCE for the costs of repairing the substandard work performed by its subcontractors. Id.

The district court held that the substandard work performed by BCE’s subcontractors did not constitute an “occurrence” and therefore no coverage existed under BCE’s policies. Id. at 1010-11. Citing Mathis, supra, which had substantially similar facts, the court
explained that an occurrence is “[a]n event that takes place without one’s foresight or expectation; an undersigned, sudden and unexpected event.” Id. Under this definition, the court explained that BCE did not meet its burden of establishing the existence of coverage, stating the following:

The Army Corps of Engineers sent BCE a list of deficiencies in the construction of the duct bank and demanded that BCE correct them, which BCE promptly did. The only other damages identified by BCE as resulting from the negligent work of its subcontractors was “the required reseeding of several acres of tall-grass prairie destroyed as a result of the required re-excavation of the duct bank and replacement of backfill,” and that “several roadways were, or must be, destroyed and rebuilt as a direct result of the required rework.” BCE Ans., Ex 12 at 3. These additional costs cannot be considered an accident or occurrence any more than the negligent work which necessitated them. Mathis, 974 S.W.2d at 650 (“That the electrical conduit and cables had to be torn out and replaced when the duct banks were torn out and replaced was a normal, expected consequence of [the insured’s] breach of contract and not an occurrence.”)

Under Mathis, the substandard work performed by BCE’s subcontractors does not constitute an occurrence under BCE’s policies.

Id.

In Paric Corp., the plaintiff insurance carrier filed a declaratory judgment action seeking a declaration that it has no duty to defend or indemnify its insured-contractor, Paric, in connection with three underlying actions involving the faulty construction of three hotels owned and operated by the ESA defendants relating to the Exterior Insulation and Finish System (“EIFS”). The Court denied the insurer’s motion for summary judgment and held that the underlying actions did in fact allege the possibility of an “occurrence” under the policies. Id. at *4. In making this determination, the court noted that the factors to consider are: whether the insured intended, expected, or desired the results; whether the alleged occurrence was a business risk not covered by the general liability policy; and whether excluding the alleged occurrence from coverage essentially leaves the insured without any coverage. Id. at *5. Based on these considerations, the court explained:

The ESA defendants have asserted negligence claims against defendant Paric in two of the underlying actions where a subcontractor installed the EIFS. In the remaining action, defendant Paric apparently installed the EIFS itself and no negligence claim was asserted against defendant Paric. However, the Court does not find that these differences rule out the possibility of plaintiff’s coverage in any of the underlying actions. Before addressing the exclusions, the Court is not concerned with whether the contractor or a subcontractor actually installed the EIFS or the windows. Additionally, the Court is not concerned with the names of the underlying causes
of action. The Court is only concerned, at this stage, with whether the underlying actions allege the possibility of an occurrence.

Given the allegedly hidden nature of the defects in the EIFS and the windows, in addition to the fact that ESA and not Paric chose the EIFS and the windows, it appears that Paric did not intend, expect or desire that the EIFS or the windows would leak, thus damaging the hotels. Additionally, given that the ESA defendants made those choices, this does not appear to be the type of business risk assumed by defendant Paric in building a hotel. Even though defendant Paric would still have a fairly substantial amount of coverage from the policies even without coverage for these alleged injuries, the underlying actions do allege the possibility of an accident, and thus an occurrence. After considering the aforementioned factors examined by other courts, the Court is persuaded that the petitions in all three of the underlying actions do allege the possibility of an occurrence, thus giving plaintiff the duty to defend defendant Paric in the underlying actions.

Id. at *6.

Although an occurrence does not include any expected or foreseeable damages, an “accident” does not necessarily need to be a sudden event and can be the result of a process. D.R. Sherry, 316 S.W.3d at 905. “Occurrence” type policies are meant to cover “cases of progressive injury where the cause of the damage is present during the policy period but the damage is not apparent until after the policy period.” Id. (cracking of foundation and drywall over period of time creates possible occurrence issue for the jury); see also Stark Liquidation Co. v. Florists’ Mut. Ins. Co., 243 S.W.3d 385, 394 (Mo. Ct. App. 2007) (continued damage from diseased apricot trees as progressive occurrence); Scottsdale Ins. Co. v. Ratliff, 927 S.W.2d 531, 532 (Mo. Ct. App. 1996) (accident can occur by continuous or repeated exposure to conditions).

3. **Timing of “Property Damage”**

Currently, no Missouri case has addressed the question of trigger of coverage in the context of a construction defect claim. However, a federal court predicted that Missouri would follow the “exposure theory” which holds that exposure to a damaging condition triggers the policy or policies in effect at the time of such exposure. See Cont’l Ins. Co. v. Northeastern Pharm. & Chem. Co., Inc., 842 F.2d 977, 984 (8th Cir. 1988) cert. denied, 109 S. Ct. 66 (1988) (applying Missouri law) (exposure trigger applicable to property damage claims); Cont’l Cas. Co. v. Med. Protective Co., 859 S.W.2d 789, 792 (Mo. Ct. App. 1993) (“Where the loss is caused not by a single event but by a series of cumulative acts or omissions, we believe the fair method of apportioning the loss among consecutive insurers is by application of the ‘exposure theory’ utilized in cases of progressive disease such as asbestosis”). But see Nationwide Ins. Co. v. Central Missouri Elec. Co-op., Inc., 278 F.3d 742, 747 (8th Cir. 2001), reh’g den. (Oct. 1, 2001) (conceding that a valid argument could be made for the injury-in-fact theory, in considering appropriate trigger of coverage for claims of damage due to installation of defective electrical transformer, and finding, without significant analysis, that
at least one of the multiple, distinct injuries took place in each policy year, under either an injury in fact or exposure theory).

4. The “Business Risk” Exclusions

“Business risks are those risks that are the ‘normal, frequent, or predictable consequences of doing business, and which business management can and should control and manage.’” Mathis, 974 S.W.2d at 649 (Mo. Ct. App. 1998); Columbia Mut. Ins. Co. v. Schauf, 967 S.W.2d 74, 77 (Mo. 1998) (“Some risks, termed ‘business risks,’ are considered the responsibility of the business owner, rather than the insurer; consequently, they are excluded from coverage”).

The business risk exclusions are based on “the apparently simple premise that general liability coverage is not intended as a guarantee of the quality of an insured’s product or work.” Columbia Mut. Ins. Co., 967 S.W.2d at 77. “In an attempt to give effect to the intent underlying both the coverage and exclusion provisions of commercial liability policies, courts have interpreted such policies as insuring the risk of the insured causing damage to other persons and their property, but not insuring the risk of the insured causing damage to the insured’s own work.” Id.

“The possibility of damaging the property on which one is working is the type of routine, controllable, and limited risk that constitutes a business risk.” Id, at 78. “To effectuate the exclusion’s purpose, courts held that it applied to the exact property that was the subject of the insured’s work when damaged, but not to property that was ‘incidental’ to that work or to property that was the subject of the insured’s work before the damage or that would be afterwards.” Id; see Elec. Power Sys. Int’l, Inc. v. Zurich Am. Ins. Co., 880 F.3d 1007 (8th Cir. 2018) (holding that damage to electrical transformer’s internal core and coil, as result of insured’s failure to properly perform work on bushing, was excluded by damage to property exclusion; entire transformer was “that particular part” of property on which the insured was working, because disconnecting bushing from core and coil was necessary for insured to perform its work on bushing); Spirtas Co. v. Nautilus Ins. Co., 715 F.3d 667 (8th Cir. 2013) (holding the damage to property exclusion in subcontractor’s policy barred coverage for general contractor’s claim for reimbursement against subcontractor arising from subcontractor’s faulty work on a bridge, damaging river below, and finding “both the bridge and river were the ‘particular part of real property’” on which the insured was performing operations, as dropping bridge into river was part of the insured’s demolition operations).

In Columbia Mut. Ins. Co. v. Epstein, 239 S.W.3d 667 (Mo. Ct. App., 2007), the contractor, Epstein, entered into an agreement to construct the foundation of a house for the Doerrs. Id. at 668. Upon completion of the foundation and the frame, the Doerrs discovered that the foundation failed to meet township building code regulations and, thus, construction of their house was stalled until the foundation was removed and re-poured. Id. The Doerrs filed suit against Epstein who submitted the claim to his insurer, Columbia Mutual. Id. The Missouri Court of Appeals explained that the business risk exclusion for damages to “your product” under the Columbia policy applied because:

the foundation is either Epstein’s work or Epstein’s product . . . Epstein, as a concrete layer, agreed to provide and indeed provided a concrete foundation for the Doerrs in exchange for an agreed upon price. This fits squarely within the definition of
“your product” in Columbia’s policy with Epstein.

Id. at 674.

Based on this reasoning, the court found that although Columbia was not liable for damages to Epstein’s product (the concrete foundation), it remained liable for alleged damages that were not Epstein’s product; namely, costs associated with removing and replacing the sub-floor and framing. Id.

Moreover, the subcontractor exception to the “your work” exclusion has been upheld under Missouri law. See Amerisure Mut. Ins. Co. v. Paric Corp., 2005 WL 2708873 (E.D. Mo. Oct. 21, 2005) (applying the exception to the “your work” exclusion”); Nat’l Union Fire Ins. Co. of Pitts., Pa. v. Structural Sys. Tech., Inc., 964 F.2d 759 (8th Cir. 1992) (coverage allowed under subcontractor exception to “your work” exclusion for damage to radio tower that collapsed due to subcontractor’s faulty workmanship).
MONTANA

1. The “Property Damage” Requirement

In Montana, “property damage” is defined as actual physical injury to an insured’s “tangible” property. *Graber v. State Farm Fire & Cas. Co.*, 244 Mont. 265, 269, 797 P.2d 214, 216 (1990) (“Montana courts have consistently held that in order for economic loss to be covered by insurance a direct physical injury to tangible property must occur”). “Tangible property is property that is capable of being handled, touched or physically possessed.” *Id.*

In *Generali-U.S. Branch v. Alexander*, 320 Mont. 450 (2004), the Montana Supreme Court held that an insured’s claim to recover payments made for an inadequately installed plumbing and heating system did not, in that instance, constitute a claim for “property damage” under its CGL policy. There, motel owner’s Kenneth and Nancy Hansen (“Hansens”) hired Generali’s insured, Alexander, to perform plumbing work on a pool heating system at the motel. *Id.* at 453. The Hansens subsequently alleged in their complaint that Alexander failed to provide a plumbing and heating system that would perform as represented. *Id.*

The court held that the Hansens’ complaint sought compensation for lost payments made to Alexander, “not for physical injury to their property, nor for loss of use of that property.” *Id.* at 455. Accordingly, the court found that Generali had neither a duty to defend nor a duty to indemnify Alexander under his CGL policy because “the Hansens did not seek compensation for property damage as that term was defined under the policy.” *Id.*

More recently, in *Swank Enterprises, Inc. v. All Purpose Servs., Ltd.*, 336 Mont. 197 (2007), the Montana Supreme Court determined that “property damage” occurred where it was alleged that the improper application of paint caused “physical injury” to certain pipes and tanks at a construction project. In *Swank*, the general contractor and its insurer filed a declaratory judgment action seeking indemnity from its subcontractor’s CGL insurer in connection with the settlement of a lawsuit filed by the project owner against the general contractor. *Id.* at 199. In addressing whether “property damage” occurred, the court found that “the application of improper paint during the 1997 policy period caused ‘physical injury,’” defined under the policy as “a physical and material alteration resulting in a detriment,” because the improper paint had “physically and materially altered the treatment center’s tanks and pipes, resulting in a detriment to the City of Libby.” *Id.* at 201-02.

The court further held that the “detriment in fact was that the pipes and tanks had to be stripped and repainted.” *Id.* at 202. Additionally, the court noted that the timing of when the “property damage” was discovered was irrelevant to a finding of coverage. “A ‘physical injury’ can occur ‘even though the injury is not ‘diagnosable,’ ‘compensable,’ or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period.’” *Id.*
2. **The “Occurrence” Requirement**

Generally, an “occurrence” as defined under a CGL policy “is one whose consequences were neither expected nor intended by the insured.” See Lindsay Drilling & Contracting v. U.S. Fid. & Guar. Co., 208 Mont. 91, 95 (1984); Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 326 Mont. 174, 180 (2005) (“an ‘occurrence’ constitutes an accident that results in property damage ‘neither expected nor intended from the standpoint of the insured’”).

Because the definition of an “occurrence” focuses on an insured’s intent or expectations, “acts that take place over a significant period of time, but cause unexpected damage fall within the definition of an ‘occurrence’ and are entitled to coverage.” Travelers Cas. & Sur. Co. v. Ribi Immunochem Research, Inc., 326 Mont. 174, 181, (2005).

A policy “precludes coverage for bodily injuries or damages, though not specifically intended by the insured, if the resulting harm was within the expectation or intention of the insured from his standpoint.” Portal Pipe Line Co. v. Stonewall Ins. Co., 256 Mont. 211, 216 (1993). In Portal, the court explained that the use of the word “occurrence” had a broader definition than the word “accident” and that the intent of an occurrence-based policy is to insure the acts or omissions of the insured, including his intentional acts, excluding only those in which the resulting injury is either expected or intended from the insured’s standpoint. Id.

The court in Lindsay Drilling found that an insured drilling company that negligently allowed bystanders to tamper with core samples was covered for an “occurrence” because “[t]his scenario does not include intended or expected consequences.” Because the claim alleges that the insured acted negligently, rather than intentionally, it sets forth an “occurrence.” 208 Mont. at 95.

As recently articulated by the Montana Supreme Court, in Montana, an event is an “occurrence” or “accident” unless the act causing the event “was intentional” and “the consequence or resulting harm stemming from the act was [objectively] intended or expected from the actor’s standpoint.” Employers Mut. Cas. Co. v. Fisher Builders, Inc., 371 P.3d 375, 378, 2016 MT 91, 383 Mont. 187 (Mont. 2016).

Fisher involved an action by homeowners against a contractor for damages resulting from the dismantling of a lake home during a remodel. In determining whether an “occurrence” is excluded from coverage, the court in Fisher looked at “1) whether the act itself was intentional, and 2) if so, whether the consequence or resulting harm stemming from the act was intended or expected from the actor’s standpoint.” Id. “If the answer to either question is ‘no,’ the act is an occurrence.” Id.; W. Heritage Ins. Co. v. Slopeside Condo. Ass’n, Inc., 371 F. Supp. 3d 828, 2019 WL 1060704, at *2 (D. Mont. 2019).

3. **Timing of “Property Damage”**

In order to determine when coverage is triggered, Montana adheres to the “injury-in-fact” theory, meaning that coverage is triggered if the actual physical injury occurs within the policy period. See Swank Enter., Inc., 336 Mont. at 202 “A ‘physical injury’ can occur ‘even though the injury is not ‘diagnosable,’ ‘compensable,’ or manifest during the policy period as long as it can be determined, even retroactively, that some injury did occur during the policy period.’” Id.
In Swank, the Montana Supreme Court examined this issue after the insurer argued that although the insured improperly painted the pipes at issue during the policy period, the actual damage that occurred was the stripping and repainting of the pipes caused by the improper paint job, which took place after the policy had expired. Id. The court disagreed, holding that “the fact that the discovery or diagnosis of the problem did not occur until after [the subject policy period] is of no consequence.” Id. “[T]he application of improper paint during the . . . policy period caused ‘physical injury’ because it physically and materially altered the treatment center’s tanks and pipes, resulting in a detriment.” Id. at 201-02.

Similarly, in Lindsay Drilling, 208 Mont. at 95, the court found that the actual salting of the core samples with gold was the point in time that the actual injury occurred because the salting “physically and materially altered” the samples.

4. The “Business Risk” Exclusions

In cases alleging defective workmanship, Montana courts have consistently upheld business risk exclusions in CGL policies. Story v. Hawkeye-Sec. Ins. Co., 2001 WL 35735573, at *2 (Mont. Dist. 2001) (“In reviewing the status of the law regarding insurance liability policy exclusions, it is clear that the types of exclusion in the Commercial General Liability Coverage under j(1) through j(6) of the policy from the defendants issued to the plaintiff, are exactly the type of exclusions which the Courts have upheld time and again in cases with similar factual scenarios”); Taylor-McDonnell Constr. Co. v. Commercial Union Ins. Co., 229 Mont. 34 (1987) (business risk exclusions are not ambiguous and act as a valid limitation on the scope of CGL policies); Thomas v. Nautilus Ins. Co., CV 11-40-M-DWM-JCL, 2011 WL 4369519, at *7 (D. Mont. Aug. 24, 2011) (court held that exclusions j(5) and j(6) apply to damage that occurs while the insured’s work is ongoing, and served to bar coverage to the extent damage alleged to home occurred while contractor’s work was ongoing); Haskins Constr., Inc. v Mid-Continent Cas. Co., CV-10-163-BLG-RFC, 2011 WL 5325734, at *5 (D Mont Nov. 3, 2011) (“your work” exclusion barred coverage for contractor’s faulty construction of a home).

Recently, in Atlantic Cas. Ins. Co. v. Quinn, 2019 U.S. Dist. LEXIS 103566, 2019 WL 255097 (June 20, 2019), the District Court of Montana analyzed the “business risk” exclusions in connection with a dispute between homeowners and contractors for alleged substandard construction of a custom home. Here, the contractor’s carrier argued that even if the alleged faulty workmanship were an occurrence, the resulting property damage would not be covered due to exclusion j(6). Id. However, the court stated that “Exclusion “(j)(6) . . . functions to exclude property damage that occurred during [the contractor’s] work on the home” and determined that further factual development was necessary. Id; see also Northland Cas. Co. v. Mulroy, 357 F. Supp. 3d 1045, 1049 (D. Mont. 2019) (explaining the products-completed operations hazard “depends on timing”).
NEBRASKA

1. The “Property Damage” Requirement

Nebraska courts recognize that coverage under a CGL policy extends when an insured’s work causes “property damage” to something other than the insured’s work product.” Auto-Owners Ins. Co. v. Home Pride Co., Inc., 268 Neb. 528, 535 (2004). “[A]lthough a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured’s work product, an unintended and unexpected event has occurred, and coverage exists.” Id.; see also Alsobrook v. JIM EARP Chrysler-Plymouth, Ltd., 274 Neb. 374, 384 (2007) (roof shingles that fall off and damage other property as a result of faulty workmanship); Fireman’s Fund Ins. Co. v. Structural Systems Tech., 426 F. Supp. 2d 1009, 1025 (D. Nebraska 2006) (terms of CGL policies serve to “prevent liability policies from insuring against an insured’s own faulty workmanship, which is a normal risk associated with operating a business”). A commercial general liability policy is “not a contract in the nature of a performance bond or guarantee of satisfactory construction.” Thos v. Employer’s Mut. Cas. Co., 215 Neb. 424, 428 (1983). “[A] CGL policy is intended to cover an insured’s tort liability for physical injuries or property damage.” Federated Serv. Ins. Co. v. Alliance Constr., LLC, 282 Neb. 638, 647 (2011).

In Mapes Industries, Inc. v. U.S. Fid. & Guar., 252 Neb. 154 (1997), a manufacturer of laminated insulating panels used in the construction of a building sought coverage for allegations that the panels were defective. In examining the “property damage” requirement of a CGL policy, the court noted:

[The underlying] complaint fails to allege . . . the existence or possible future development of physical injury to or destruction of the building or tangible property other than to the panels manufactured by Mapes. As a consequence, the [alleged] property damage . . . does not impose upon [the insurer] an obligation to defend Mapes.

Id. at 162.

Thus, damage to the insured’s work alone is not covered under a commercial general liability policy and coverage will only extend to third-party property damage. See also Thos, 215 Neb. at 428 (holding coverage extends to “tort claims by third parties for . . . ‘property damage,’ not including the insured’s product”); Chief Indus., Inc. v. Great Northern Ins. Co., 268 Neb. 450, 464 (2004) (finding that there is no coverage where the property damage is limited to the named insured’s product).

In Drake-Williams Steel, Inc. v. Cont’l Cas. Co., 294 Neb. 386, 883 N.W.2d 60 (Neb. 2016), the Supreme Court of Nebraska further held that the cost to retrofit pile caps to provide necessary structural support that was lacking as a result of improper initial installation was not covered under a CGL policy because retrofitting was not “property damage” within the meaning of the policy. The court found that bringing its work to
specification by whatever means necessary is simply a business risk that the insured bears, not the kind of risk covered by insurance.

2. The “Occurrence” Requirement

The “definition of occurrence requires a two-part analysis. First, the occurrence must be an accident, and second, the property damage resulting from the accident must be neither expected nor intended from the standpoint of the insured.” Farr v. Designer Phosphate & Premix Int’l, Inc., 253 Neb. 201, 206 (1997). “[A]n accident within the meaning of liability insurance contracts includes any event which takes place without the foresight or expectation of the person acted upon or affected thereby.” Id. “[I]n the context of damage to personal property, where acts are voluntary and intentional and the injury is the natural result of the act, the result was not caused by accident even though that result may have been unexpected, unforeseen, and unintended.” Id.

In Auto-Owners Ins. Co. v. Home Pride Companies, Inc., 268 Neb. 528 (2004) the Supreme Court of Nebraska stated that “although faulty workmanship, standing alone, is not an occurrence under a CGL policy, an accident caused by faulty workmanship is a covered occurrence.” Id. at 534. In this regard, the court stated as follows:

Stated otherwise, although a standard CGL policy does not provide coverage for faulty workmanship that damages only the resulting work product, if faulty workmanship causes bodily injury or property damage to something other than the insured’s work product, an unintended and unexpected event has occurred, and coverage exists.”


3. Timing of “Property Damage”

Although Nebraska courts have not addressed the timing of “property damage” in the construction defect context, the Nebraska Supreme Court has applied an “injury-in-fact” trigger in the context of third party insurance coverage. Farr v. Designer Phosphate & Premix Int’l, Inc., 253 Neb. 201, 207 (1997) (“the time of the occurrence of an accident, within the meaning of a liability indemnity policy, is not the time when the wrongful act was committed, but the time when the complaining party was actually damaged”); see also KAAPA Ethanol, LLC v. Affiliated FM Ins. Co., 7:05CV5010, 2008 WL 4790997 (D. Neb. Oct. 30, 2008) (timing of occurrence is when actual damage commences).

Further, a Nebraska federal court has stated “that if faced with the question, Nebraska would adhere to the ‘injury-in-fact’ trigger and hold that in first party property insurance cases, coverage for property loss or damage that has progressed over time occurs when the damage commenced, not merely when it was discovered.” Kaapa Ethanol, LLC v. Affiliated FM Ins., Co., 7:05CV5010, 2008 WL 2986277 (D. Neb. July 29, 2008).
4. The “Business Risk” Exclusions

Nebraska courts have found that CGL policies do “not cover a ‘business risk,’ that is, the insured’s defective construction resulting to damage to its own work.” See Fireman’s Fund v. Structural Sys. Tech., Inc., 426 F. Supp. 2d 1009, 1019 (D. Neb. 2006).

“Business-risk” exclusions apply to “prevent liability policies from insuring against an insured’s own faulty workmanship, which is a normal risk associated with operating a business.” Auto-Owners Ins. Co. v. Home Pride Co., Inc., 268 Neb. 528, 538 (2004). “[T]he 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.” Id. at 534. “Today, the business risk rule is part of standard CGL policies in the form of ‘your work’ exceptions to coverage.” Id. “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 found.” Id.; see also Thos v. Employer’s Mut. Cas. Co., 215 Neb. 424, 428 (1983) (applying “your product” exclusion to preclude coverage).

“Generally speaking, the ‘your work’ exclusions, of which “n(2)” is one, operate to prevent liability policies from insuring against an insured’s own faulty workmanship, which is a normal risk associated with operating a business.” Auto-Owners, 268 Neb. at 538. These exclusions do not extend beyond the repair and replacement of a contractor’s own work or product. Id.
NEVADA

1. The “Property Damage” Requirement

In Nevada, “tangible, physical injury to property must occur during the policy period in order for coverage to be triggered.” United Nat’l Ins. Co. v. Frontier Ins. Co., Inc., 120 Nev. 678, 685 (2004). Thus, purely economic damages do not constitute “property damage.” Id.

Nevada courts have stated that “property damage” can exist where the damage results from the incorporation of a defective component, so long as the defective component imposes physical harm on other parts. U.S. Fid. & Guar. Co. v. Nevada Cement Co., 93 Nev. 179, 182 (1977) (“It has been held that the mere presence of a defective product in an entity can constitute property damage”).

In Nevada Cement, a production error resulted in the manufacture of a quantity of cement containing an insufficient amount of a chemical compound. Id. at 181. The general contractor to whom the concrete was supplied sought reimbursement for additional construction expenses incurred as a result of the use of the defective cement. Id. The insurer denied coverage and Nevada Cement settled with the contractor and brought suit seeking recovery from the insurer. Id.

The court held that when an insured supplies a part to another who constructs an entity from the insured’s part, coverage may be found where the insured’s part proves defective and causes damage to the entity. Id. at 182. Thus, the court found that compensable injury to, or destruction of, tangible property occurred when defective cement destroyed the structural integrity of the building. Id.

The Nevada Supreme Court has held that claims strictly associated with intangible economic injuries do not constitute “property damage.” See Frontier Ins. Co., Inc., 120 Nev. 678. In Frontier, the court held that a subcontractor’s allegedly negligent welding of a support structure did not constitute “property damage.” In that case, the underlying lawsuit involved claims arising out of the collapse of a marquee sign that took place after the insured’s CGL policy expired. Id. at 681.

The insured argued that alleged improper welding or general negligent acts in the erection of the sign, which took place during the relevant policy period, constituted “property damage.” Id. at 688. The Supreme Court disagreed and stated that “improper welding or general negligent acts [are] intangible, economic injuries and not the type of physical, tangible injury or destruction to property that a reasonable person would contemplate as covered under the policy.” Id. at 688-689. Accordingly, because the complaint did not allege any physical, tangible injury during the insurer’s policy period, the court concluded that “there was no potential, or possible, coverage under the CGL insurance policy” and the insurer had no duty to defend. Id.
2. The “Occurrence” Requirement

Although the Nevada Supreme Court has never directly addressed the issue of whether faulty workmanship constitutes an “occurrence” under a CGL policy in the context of a construction defect case, the District of Nevada has predicted that “Nevada likely would follow the majority of courts who have held faulty workmanship in and of itself is not an accident.” Big-D Constr. Corp. v. Take it for Granite Too, 917 F.Supp.2d 1096, 1108 (D. Nev. 2013). However, the court also predicted that the Nevada law “likely would follow the courts which recognize that although faulty workmanship itself is not an accident, the unexpected consequences of that faulty workmanship is an accident.” Id.

In Big-D Constr. Corp., an insured subcontractor installed various stone tiles on the interior and exterior of a commercial building. Id. at 1103. After installing the stonework, on three separate occasions, stone tiles fell from the exterior of the building. Id. As a result, the stonework for the entirety of the exterior wall needed to be repaired and replaced in order to avoid future stone tiles from falling and potentially causing property damage or personal injury to pedestrians walking in and out of the building. Id. at 1104. Based on the foregoing, the court held that the insured subcontractors defective stonework itself did not constitute an occurrence, but that “the events of the three stone tiles falling from the building were unexpected, unforeseen, and unintended, and come within the plain, ordinary, and common meaning of an accident.” Id. at 1108.

In Gary G. Day Constr. Co. v. Clarendon Am. Ins. Co., 459 F.Supp.2d 1039, 1043 (D. Nev. 2006), an insured contractor was hired to perform the rough framing work on a housing development project consisting of 92 homes. Subsequently, a class certification was brought against the insured contractor alleging “framing related defects toward Plaintiff, a significant portion of which involved alleged water intrusion around windows of the homes framed by the company.” Id. The insured brought a declaratory action against its insurance carriers seeking coverage and the court held that the water intrusion constituted an “occurrence” as it was not expected or intended by the insured. Id. at 1047. The court provided the following:

The Court finds that water intrusion is a “happening that is not expected, foreseen, or intended” and thus falls within the definition of “occurrence.” Certainly, neither the Plaintiff nor the homeowners intended to have water intrude into the 20 homes. Nor can it be said that either the Plaintiff or the homeowners expected or foresaw the water intrusion. Likewise, the Parties agree that water intrusion is the only potential basis for coverage.

Id.

3. Timing of “Property Damage”

Addressing the timing of “property damage” in the context of a first-party progressive property damage case, the Nevada Supreme Court applied the “manifestation” trigger theory. Jackson v. State Farm Fire & Cas., 108 Nev. 504 (1992). In Jackson, the Court ultimately found that the “manifestation” trigger promotes greater certainty, resulting in lower costs to insureds and enabling the reasonable expectations of insureds to be met. Id. at 508-09. “Manifestation of loss is defined as ‘that point in time when appreciable damage occurs and is
or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered.” Id. at 509. “The manifestation date will generally be a question of fact; nonetheless, summary judgment may be appropriate where the undisputed evidence establishes that no damage had been discovered before a given date.” Id.

In United Nat’l Ins. Co. v. Frontier Ins. Co., Inc., 120 Nev. 678 (2004), the Nevada Supreme Court held that tangible, physical injury must occur during the policy period for coverage to be triggered. Id. at 685. In Frontier, an insured subcontractor and a liability insurer brought a subrogation action against prior liability insurers in order to recover the cost of defending and settling lawsuits arising out of collapse of sign, allegedly erected during the period of the prior policy. Id. at 682-83. The court held that, in order for coverage to be triggered under the CGL policies, “tangible, physical injury to property must occur during the policy period.” Id. at 1157.

4. The “Business Risk” Exclusions

Nevada courts have not addressed the applicability of business risk exclusions in any substantive detail. However, federal courts applying Nevada law have predicted that the Nevada state court would recognize the applicability of the “business risk” exclusions to prevent recovery for damage to an insured’s own work. See CGU/Hawkeye Sec. Ins. Co. v. Oasis Las Vegas Motor Coach Park, L.P., 65 Fed. Appx. 182 (9th Cir. 2003) (applying Nevada law) (holding “work performed exclusion” barred coverage where concrete company negligently mixed and poured concrete); Big-D Constr. Corp., 917 F. Supp. at 1114 (court found “your product” exclusion barred additional insured coverage to general contractor for property damage to the three stone tiles that fell as a result of insured subcontractor’s work).
1. The “Property Damage” Requirement

In New Hampshire, courts construe “property damage” under a CGL policy as “actual damage to property other than the work product of the insured.” Webster v. Acadia Ins. Co., 156 N.H. 317, 320 (2007) (allegations regarding damage to the appearance and shape of metal clips fastening roof membrane to building, including buckling, bowing, lateral movement, and separation of the clips from the building frame were separate and distinct from simply alleging that insured’s work installing the roof was defective); see also High Country Assoc. v. N.H. Ins. Co., 139 N.H. 39 (1994) (permitting recovery for home association’s claims of property damage to the buildings themselves as a result of water seepage attributable to insured’s faulty workmanship, which included construction of the condominium units, because it constituted third-party property damage). However, damage to an insured’s own work does not qualify as property damage. Hull v. Berkshire Mut. Ins. Co., 121 N.H. 230 (1981) (denying recovery on basis that insured’s defective work was the only damaged property, thus damages were only economic in nature).

In addition, “loss of use” as a result of an insured’s faulty workmanship may constitute property damage. M. Mooney Corp. v. U.S. Fid. & Guar. Co., 136 N.H. 463 (1992) (holding loss of use of forty-seven fireplaces in additional units as a result of fire in one unit constituted property damage).

Wallace v. Nautilus Ins. Co., 2019 WL 3302172 (D.C.N.H. 2019) is one of the few cases nationwide to address whether “rip and tear” damages are covered under a CGL policy. In Wallace, plaintiffs, the homeowners of two adjoining homes, entered into separate contracts with defendant’s named insured to replace the roofs on each house with “LifePine” roofs. Id. at *1. After completion of the work, plaintiffs noticed several issues with the roofs, and withheld payment. Id. Subsequently, it was determined that the roof was improperly installed resulting in water leaking through both roofs. Id. at *2. To resolve the issue, plaintiffs removed and replaced the roofs. Id. At arbitration, the arbitrator found in favor of plaintiffs and awarded them damages including the amount to replace the roofs. Id. Nautilus paid the arbitration award with the exception of the costs of replacing the roofs and the award of attorneys’ fees. Id.

In Wallace, the court first determined that the water leaking through the roofs constituted an occurrence. Id. at *4. Next, the court inquired as to whether “whether the cost of removing and replacing the roofs is considered damages because of plaintiffs’ property damage.” Id. Plaintiffs claimed that the physical damage to the roof decks could not be repaired without removing the roofs themselves, and are thus entitled to recovering of the costs of removing and replacing the roofs. Id. The court noted that “[n]o New Hampshire case has addressed the question of whether so-called “rip-and-tear” damages are covered under a standard CGL policy,” but case law from other jurisdictions support the conclusion that such damages fall within the scope of coverage for such policies. See Carithers v. Mid-Continent Cas. Co., 782 F.3d 1240, 1251 (11th Cir. 2015) (affirming district court’s holding that cost of replacing a defectively-constructed balcony was covered under standard CGL policy when it was necessary to remove the balcony to repair property damage to the plaintiff’s garage); Clear, LLC v. Am. & Foreign Ins. Co., No. 3:07CV00110JWS, 2008 WL 818978, at *9 (D. Alaska Mar. 24, 2008) (interpreting standard CGL policy to provide coverage
for “the reasonable costs to repair property damage caused by the defective work . . . , including the cost of removing and replacing property that was not injured when that removal and replacement was necessary in order to fix the damage caused by” the defective workmanship). Nautilus did not address plaintiffs’ argument concerning rip-and-tear damages in its filings.

The Wallace court did not reach a determination as to whether the rip-and-tear damages are covered under the policy because it found that even assuming they were covered, plaintiffs did not incur rip-and-tear damages since the damage property (the roof decks) were reused when a new roof was installed. Id. Accordingly, the court then determined that the costs of replacing the defective roof were not covered under the policy. Id. at *7.

2. The “Occurrence” Requirement


New Hampshire courts have defined the term “accident,” in the context of an “occurrence,” to mean “circumstances, not necessarily a sudden and identifiable event, that were unexpected or unintended from the standpoint of the insured.” High Country Assoc. v. N.H. Ins. Co., 139 N.H. 39, 44 (1994). In High Country, the court found the term “occurrence” to be ambiguous and construed it in favor of coverage. Id. Specifically, the court found that mildew alleged in the underlying writ amounted to an “occurrence” because the damage was unexpected from the standpoint of High Country Associates and was caused by continuing exposure to moisture seeping through the walls of the units.

3. Timing of “Property Damage”

The timing of an “occurrence” is “not the time the wrongful act was committed, but the time when the complaining party was actually damaged.” Suburban Constr. Co., Inc. v. Hartford Fire Ins. Co., 894 F. Supp. 53, 56 (D.N.H. 1992) (citing Peerless Ins. Co. v. Clough, 105 N.H. 76 (1963)). In Peerless, the Supreme Court of New Hampshire considered allegations involving fire damage sustained as a result of faulty work performed by a contractor on damaged buildings. The court established that “the time of the occurrence resulting in the loss or damage, and not the time of the negligence, determines whether there is coverage under the policy.” Peerless, 105 N.H. at 78.

4. The “Business Risk” Exclusions

New Hampshire courts have yet to directly analyze the “business risk” exclusions in
the context of construction defect claims. However, the Supreme Court of New Hampshire, in the first-party coverage context, has applied a similar type of exclusion referred to as the “negligent work exclusion”. See Weeks v. Co-Operative Ins. Co., 149 N.H. 174 (2003).

In Weeks the court found there was no recovery for damage to when a brick veneer wall separated from the asphalt shingle wall underneath it. Id. Both parties agreed that the cause of the brick veneer separation was faulty workmanship.

The court found that the “negligent work exclusion” in the policy precluded coverage for “[l]oss or damage caused by or resulting from faulty workmanship . . . unless the faulty workmanship results in a covered cause of loss, in which case the defendant will provide coverage for the loss or damage caused by that covered cause of loss.” Id. at 176-77. Ultimately, the court found that there “was no subsequent ensuing cause of loss separate and independent from the initial excluded cause of loss, i.e. the faulty workmanship.” Id; see also Windham Envt’l Corp. v. U.S. Fid. & Guar. Co., No. 06-cv-367-JM, 2008 WL 4534083, at *5 (D.N.H. September 29, 2008) (holding that “business risk” exclusions, including the “your product,” “your work” and “impaired property” exclusions, served to preclude coverage for the environmental claims at issue).
1. The “Property Damage” Requirement

Under New Jersey law, consequential damages to non-defective property caused by faulty workmanship is considered “property damage” as defined by a CGL policy. In *Cypress Point Condominium Association, Inc. v. Adria Towers, LLC*, 226 N.J. 403 (2016), the Plaintiff, a condominium association, brought claims against the developer and the developer’s insurers as well as various subcontractors. The developer served as the general contractor on the condominium project and hired the subcontractors who performed all the construction work. The subcontractors allegedly failed to properly install the roof, flashing, gutters and leaders, the brick and EIFS facade, windows, doors and sealants. The Plaintiff sought coverage from the insurers under the developer’s CGL policies for consequential damages caused by the subcontractors’ defective work.

The trial court determined that there was no “property damage” or an “occurrence,” granted summary judgment to one insurer, and dismissed the complaint against the other. On appeal, the Plaintiff did not contend that the replacement costs for the faulty work constituted “property damage” or an “occurrence.” Rather, the Plaintiff argued that the faulty workmanship of subcontractors had caused consequential damages to the common areas and unit owners’ property and that under a plain reading of the language in the policies, these consequential damages constituted “property damage” and an “occurrence.”

In the Appellate Division decision *Cypress Point Condo. Ass’n, Inc. v. Adria Towers, LLC*, 441 N.J. Super. 369, 373 (App. Div. 2015), the court held that “the unintended and unexpected consequential damages caused by the subcontractors’ defective work” constituted “property damage” and an “occurrence.” The court based its decision “in part” on the developer’s reasonable expectation that the subcontractors’ faulty workmanship is to be treated differently than the work of a general contractor.

The Appellate Division concluded that consequential damages “clearly” constitute “physical injury to tangible property,” noting that the interior structures, including the drywall, insulation, wall finishes, and wood flooring, were damaged by water infiltration from the faulty workmanship. It bears noting, however, the court’s language regarding the scope of its holding:

We emphasize that the consequential damages here are not the cost of replacing the defective work — that is the improperly installed roof, flashing, gutters and leaders, brick and EIFS facade, windows, doors, and sealants. Those costs are considered a business risk associated with faulty workmanship. Rather, the consequential damages are those additional damages to the common areas of the condominium building and the unit owners’ property. The consequential damages are therefore not the cost of correcting the defective work, such as the cost of replacing the stucco in the Weedon case or replacing the firewalls as in *Firemen’s*, but rather the cost of curing the “property damage” arising from the subcontractors’ faulty workmanship.
The New Jersey Supreme Court affirmed the Appellate Division in *Cypress Point Condo. Ass’n v. Adria Towers, LLC*, 226 N.J. 403 (2016). The Supreme Court, while acknowledging that the faulty workmanship itself was not covered by the policies, held that post-construction consequential damages were covered “property damage” under the terms of the policies.

In addition, with respect to third-party “property damage” caused by faulty workmanship, New Jersey courts have held that the resulting damages must be actual physical damages, rather economic losses resulting from the defective work. *Cypress Point, supra*, 441 N.J. Super. at 373 (App. Div. 2015) (“our courts have stressed that actual physical damage is required, not just economic loss or diminution, as a result of the faulty work”); *Heldor Indus., Inc. v. Atl. Mut. Ins. Co.*, 229 N.J. Super. 390, 397-98 (App. Div. 1988) (“Our acknowledgement that profit loss constituted ‘property damage’ was predicated on a finding of damage to tangible property”).

Recently, in *313 Jefferson Tr., LLC v. Mercer Ins. Cos.*, No. A-2907-15T3, 2018 N.J. Super. Unpub. LEXIS 35 (Super. Ct. App. Div. Jan. 8, 2018), the Appellate Division clarified that the Supreme Court’s decision in *Cypress* is not so broad as to define occurrence without some damage to non-defective property. The court in *313 Jefferson Tr.*, remanded the case for the court to analyze whether there was property damage attributable to unintended and unexpected harm caused by negligent conduct. Id.

2. **The “Occurrence” Requirement**

In *Cypress Point*, both the Appellate Division and Supreme Court also considered the question of whether consequential damages to the common areas of the condominium complex and unit owners’ property caused by the defective work of the subcontractors constitute an “occurrence.” The Appellate Division held that “the unintended and unexpected consequential damages caused by the subcontractors’ defective work” constituted an “occurrence.” The court reasoned that the insurers did not contend, and it could not reasonably believe, that the subcontractors either expected or intended for their faulty workmanship to cause “physical injury to tangible property” and, therefore, the consequential damages constituted an “occurrence.” The Supreme Court affirmed, citing a “strong recent trend in the case law [of most federal circuit and state courts] interpret[ing] the term ‘occurrence’ to encompass unanticipated damage to non-defective property resulting from poor workmanship.” See 226 N.J. 403 (2016). The Supreme Court held that the result of the subcontractors’ faulty workmanship - consequential water damage to the completed and non-defective portions of the condominium was an “occurrence” under the CGL policies.

Thus, under *Cypress Point*, costs incurred to repair defects and faulty work would not constitute “property damage” caused by an “occurrence,” but the cost to correct any damage arising out of that defective work would be deemed “unintended and unexpected consequential damages,” constituting an “occurrence” as defined by a CGL policy.
Moreover, the “occurrence” provision of an insurance policy is intended to limit coverage under the policy to fortuitous acts. Liability policies typically do not, therefore, cover claims for breach of contract or breach of warranty because such claims do not result from an accident. See, e.g., Weedo v. Stone-E-Brick, Inc., 81 N.J. 233, 237 (1979); Atlantic Mut. Ins. Co. v. Hillside Bottling Co., Inc., 387 N.J. Super. 224, 233 (App. Div. 2006) (concluding that “claims that sound in breach of warranty, whether express or implied . . . do not fall within the coverage provided [under a CGL Policy].”) More specifically, under New Jersey law, claims for breach of contract do not satisfy the definition of “occurrence.” See, e.g., Weedo, supra, 81 N.J. at 237; Grand Cove II Condo. Ass’n, Inc. v. Ginsberg, 291 N.J. Super. 58, 72 (App. Div. 1996) (noting that claims for breach of contract and warranty “clearly do not assert claims for which coverage is provided”).

3. Timing of “Property Damage”


The Appellate Division recently addressed the issue of timing in the construction defect context in Air Master & Cooling v. Selective Ins. Co. of Am., Docket No. A-5415-15T3 (App. Div. October 10, 2017). In that decision, the court affirmed that a “continuous trigger” is applicable in the context of a construction defect case involving water infiltration and ensuing property damage that takes place over a period of years. The court further held that, for a continuous loss, the continuous trigger period ends on the date the damages manifested.

In its analysis concerning the “manifestation” of damages, the Air Master court relied heavily on Winding Hills Condo. Ass’n, Inc. v. North Am. Specialty Ins. Co., 332 N.J. Super. 85 (App. Div. 2000), a case in which the Appellate Division defined manifestation as the time when the “essential” nature of the harm became known, and not just the initial discovery of some damage, or the much later definitive proof of the nature and extent of the damage. The court found that the awareness of the “essential difficulties” had become known in between these two extremes.
The Air Master court, relying on the Winding Hills analysis, defined its conclusion as follows:

In the present insurance context involving the “essential” manifestation of an injury, we regard the term to connote the revelation of the inherent nature and scope of that injury. On one end of the spectrum, manifestation cannot be merely tentative . . . nor must the manifestation be definitive or comprehensive. . . . The critical term “essential,” as used in this coverage context should be understood and applied consistent with such concepts.

However, due to the sparse factual record before it, the Air Master court did not make a finding as to the appropriate trigger end date, but instead remanded the case for further proceedings. See also Selective Way Ins. Co. v. Arthur J. Ogren, Inc., 2010 WL 5347962, at *3 (App. Div. 2010) (applying continuous trigger and holding property damage that “manifests” prior to the inception of a commercial general liability policy period will preclude coverage during subsequent policy periods).

4. The “Business Risk” Exclusions


In Newark Ins. Co. v. Acupac Packaging Inc., 328 N.J. Super. 385, 746 A.2d 47 (App.Div. 2000), the issue was whether the insurance policy covered damage caused by leaky paquettes of lotion that had been attached to advertising cards as part of a cosmetic company’s promotion. The court in that case noted that “[o]dinarily, the 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.” Id.

In Cypress Point, the Supreme Court of New Jersey addressed a “your work” exclusion that contained the “subcontractor exception.” Contrasting the “your work” exclusion to a prior version that did not contain the exception, the Court stated, “[h]owever, the exception to this exclusion, which was added to the 1986 ISO standard form CGL policy, narrows the exclusion by expressly declaring that it does not apply if the damaged work or work out of which the damage arises was performed by a subcontractor. Thus, because the water damage here is alleged to have arisen out of faulty workmanship performed by subcontractors, it is a covered loss.” Cypress Point, 226 N.J. 403, 407, 143 A.3d 273, 275 (2016).
New Jersey courts have also applied exclusion j(5) to bar coverage under CGL policies. In School Alliance Ins. Fund v. Fama Constr. Co., 353 N.J. Super. 131 (Law. Div. 2001), aff’d, 353 N.J. Super. 1 (App. Div. 2002), the insured, a general contractor, was employed to construct a middle school. Id. at 134. In turn, the insured hired a subcontractor to perform masonry work related to constructing certain masonry walls. Id. During construction of the school, a severe windstorm knocked down six concrete block walls. Id. At the time they were knocked down, the walls had not yet been completed. Id. at 141. While the Appellate Division recognized that, at the time, there was no New Jersey case law directly construing the language of exclusion j(5) in the standard CGL policy, the court held that coverage was precluded pursuant to this exclusion. Id. at 144.

In Ohio Cas. Ins. Co. v. Island Pool & Spa, Inc., 418 N.J. Super. 162 (App. Div. 2011), cert. denied, 206 N.J. 329. the defendant, Island Pool & Spa, Inc., was hired to repaint an inground swimming pool. Id. at 165. In order to paint the pool, defendant drained the pool and installed a temporary pump to prevent subterranean water from exerting upward pressure on the pool. Id. The pump failed during a torrential rainfall and the pool lifted out of the ground, damaging it beyond repair and causing damage to adjacent decking and landscaping. Id. The defendant repaired the damage and submitted the costs to its carrier, which paid the costs associated with repairing the decking and landscaping, but declined coverage for repairing the pool based upon, inter alia, the j(5) exclusion that applied to that “particular part” of the property on which the insured was “performing operations”. Id. After the trial court found in favor of defendant with respect to the j(5) exclusion, the carrier appealed. Id. at 166-67.

The Appellate Division in Island Pool found that the j(5) exclusion, or as the Appellate Division referred to it, the “ongoing operations” exclusion, precluded coverage. Id. at 176. The Appellate Division held that the exclusion applied to “‘ongoing operations’, meaning it excludes coverage for damage to property the insured is working on at the time the property damage occurs. . . .” Id. (citing 3 Jeffrey E. Thomas, New Appleman on Insurance Law, Library Edition § 18.03[10][h] (2010)). The court further stated that “[a]s the New Appleman treatise explains, the j(5) exclusion is written in the present tense – it applies to property on which the insured is performing operations. The use of the present tense [signifies] . . . that the exclusion applies to damages that occur while the insured is working on the project.” Id. The Appellate Division noted that at the time of the heavy rainfall, Island Pool had already drained the pool as part of its repainting work. Further, the court held that “[c]learly, draining the pool was the first step in painting the pool, which was the work Island Pool was hired to perform. Thus, the property damage did “arise out of those operations,” and occurred while Island Pool was “performing operations.” Id. at 172.

The Appellate Division thus held that exclusion j(5) applied “because the damage occurred while Island Pool’s repainting project was ongoing and the damage arose out of Island Pool’s operations.” Id. at 176. It is worth noting that the insurer agreed to pay for the damage to the decking and landscaping “because Island Pool was not ‘performing operation’ on the landscaping or deck[.]” Id. at 166.
Finally, in *Epic Mgmt., Inc. v. Harleysville Ins. Co. of N.J.*, No. C-117-08, 2010 WL 3516902, the general contractor on a project to build a baseball stadium brought a declaratory judgment action against the insurers of one of its subcontractors after learning that the subcontractor had dissolved and was insolvent. The subcontractor in question had been retained to perform “all drywall, carpentry and asphalt shingle roofing work” on the stadium. *Id.* at *3. It was alleged that “the stadium roof had ‘missing and damaged asphalt shingles,’ ‘protruding and loose nails,’ and ‘dimpling of the steel decking underside.’” *Id.* It was further alleged that these defects caused the roof to leak. In analyzing potential coverage under one of the policies issued to the subcontractor, the Appellate Division noted that the “policy excludes coverage for claims based on the insured’s performance of his or her work.” *Id.* at *12. Specifically citing to exclusion j(5) and j(6), the Appellate Division held that the “claims of ‘missing and damaged asphalt shingles,’ ‘protruding and loose nails,’ and ‘dimpling of the steel decking underside’ clearly fall within the scope of those exclusions.” *Id.*
1. The “Property Damage” Requirement

New Mexico courts have held that a contractor’s defective work may constitute “property damage.” In Pulte Homes of New Mexico, Inc. v. Indiana Lumberman’s Ins. Co., 367 P.3d 869, 872 (N.M. Ct. App. 2015), developer Pulte Homes of New Mexico, Inc. and Pulte Homes Inc. (collectively, “Pulte”) was sued by multiple homeowners alleging the use of “substandard and inadequate windows that leak,” among other things. Pulte tendered the defense to Indiana Lumberman’s Insurance Company (“Lumberman’s”) under a CGL policy issued to Western Building Solutions (“WBS”), which named Pulte as an additional insured. Id. at 871. WBS provided the windows for the project and provided and installed the homes’ sliding glass doors. Id. The underlying complaints alleged that the windows and doors were not properly installed and did not operate properly. It was alleged that the windows and doors were installed using a fraction of the appropriate number of fasteners, did not fully open or close, had begun to deteriorate, warp, and twist, and required replacement. Id. at 872. The policy defined “property damage” as “[p]hysical injury to tangible property” or “[l]oss of use of tangible property that is not physically injured.” Id. at 876. The New Mexico Court of Appeals held that the allegations in the complaints were those of “property damage” because the windows and doors had deteriorated and needed to be replaced. Id.

On the other hand, New Mexico courts have determined that a claim for diminution in value does not constitute “property damage.” In Leafland Group-II Montgomery Towers Ltd. P’ship v. Ins. Co. of N. Am., 118 N.M. 281 (1994), the insured purchased an apartment complex and procured a first-party comprehensive insurance policy. Id. at 282. Five years later, the insured discovered that asbestos had been used in the construction of the apartment complex. Id. In determining whether there was coverage under the policy, the court stated that the insured “can point to no event that happened during the time the policy was in effect that caused direct loss or damage to its property.” Id. at 283. Instead, the insured could only claim a loss in property value due to the discovery of asbestos in the building, which the court held was insufficient to demonstrate “property damage.” Id. But see Mid-Continent Cas. Co. v. Circle S Feed Store, LLC, 754 F.3d 1175, 1186 (10th Cir. 2014) (holding that, under New Mexico law, a diminution in value of a third-party’s property caused by “subsidence and cavern growth” attributable to the insured’s mining activities constitutes “property damage” under a CGL policy).

2. The “Occurrence” Requirement

Under New Mexico law, courts have held that faulty workmanship constitutes an “occurrence” under a CGL policy. In Pulte Homes, the New Mexico Court of Appeals agreed with the view recently adopted in other jurisdictions that faulty workmanship can constitute an “occurrence.” Pulte Homes, 367 P.3d at 877 (citing Taylor Morrison Servs., Inc. v. HDI-Gerling Am. Ins. Co., 293 Ga. 456 (Ga. 2013) (the “insured’s faulty workmanship can amount to an occurrence when the only damage alleged is to work of the insured”); Owners Ins. Co. v. Jim Carr Homebuilder, LLC, 157 So. 3d 148 (Ala. 2014) (to result in an “occurrence” under a CGL policy, it is not necessary for the insured’s allegedly faulty work to cause damage to third-party property); K & L Homes, Inc. v. Am. Fam. Mut. Ins. Co., 829 N.W.2d 724 (N.D. 2013) (faulty workmanship could constitute an “occurrence” under a CGL policy if the faulty work was “unexpected” and the property damage was not anticipated or intentional).
Finding these recent cases the “more reasoned approach to construing the meaning of ‘occurrence,’” the New Mexico Court of Appeals concluded that the damage to the windows and doors was caused by an “occurrence.” Id. at 878. The court also relied on the plain language of the policy, noting that the definition of “occurrence” “did not expressly state that faulty workmanship can never constitute an accident and does not limit the term’s effect to a particular class of tangible property.” Id.

3. **Timing of “Property Damage”**

New Mexico courts also have not yet ruled on the issue of when coverage is triggered in connection with a construction defect claim. New Mexico federal courts have declined to take a firm position espousing any one theory, instead viewing it as a matter of contract law:

> The Court finds it improper to engage in an analysis of which theory of insurance coverage the New Mexico Supreme Court would adopt if confronted with the question. Insurance is fundamentally a matter of contract law.


However, in *Leafland*, 118 N.M. 281 (1994), the Supreme Court of New Mexico held that the first-party comprehensive liability policy at issue did not provide coverage for an injury that occurred prior to the policy taking effect. The court explained:

> In this case, the underlying problem causing the diminution in property value - the use of asbestos in constructing the building - was present long before [the insured] acquired the property. The presence of asbestos had, in effect, already diminished the value of the property before [the insured] purchased the property and bought insurance from INA, even though the presence of asbestos remained undetected for some time after [the insured] bought the property. In other words, the diminution in property value was discovered, but not caused, during the time the policy was in effect. Because the claimed loss occurred prior to the time the insurance was purchased, ‘the concept of risk that is inherent in all policies of insurance is lacking.’

Id. at 284.

The utility of this case in the context of construction defect claims is questionable.

4. **The “Business Risk” Exclusions**

New Mexico courts have not addressed the “business-risk” exclusions in the context of a construction defect claim. However, the Supreme Court of New Mexico has addressed the applicability of certain “business risk” exclusions in the context of other types of claims.

In *Computer Corner, Inc. v. Fireman’s Fund Ins. Co.*, 132 N.M. 264 (2002), the insured
was a family-owned business engaged in the sale and service of personal computers. Id. at 265. In attempting to repair a customer’s personal computer, the customer’s hard-drive was erased and consequently suffered significant damages. Id.

The first exclusion addressed by the court stated that the insurance does not apply to “property damage to your product arising out of it or any part of it.” Id. at 286 (emphasis omitted). “A principal difficulty with this exclusion is determining what ‘your product’ means in a given context.” Id. The policy at issue did not define what “your product” meant and, as a result, the court held that the exclusion did not apply because there was nothing in the exclusion that would have suggested to a reasonable insured that “your product” included pre-existing electronic data belonging to a customer. The Court noted that the computer data that had been erased “existed prior to and apart from any service or parts provided by [the insured] in repairing the computer.” Id.

Addressing the “your work” exclusion, the court similarly found that the erased computer data could not be excluded as the insured’s own work. “Ultimately, we have the same problem with this exclusion that we have with the preceding exclusion: the property that was lost . . . clearly existed prior to and apart from any parts or service provided by [the insured] in repairing the computer.” Id. “We do not believe that a reasonable insured in [the insured’s] position would have understood ‘property damage to your work’ to include property damage to a customer’s pre-existing property.” Id.

Finally, the court addressed the “impaired property” exclusion. In declining to apply this exclusion, the court concluded that “this exclusion is unintelligible from the standpoint of a hypothetical reasonable insured operating a computer repair service.” Id. at 269.
NEW YORK

1. The “Property Damage” Requirement

New York courts have held that faulty workmanship does not constitute “property damage” under a CGL policy, except where the faulty workmanship causes damage to some property other than the work product itself. See QBE Ins. Corp. v. Adjo Contracting Corp., 997 N.Y.S.2d 425, 439 (2d Dep’t 2014) (“New York courts have generally acknowledged that, while a commercial general liability policy does not insure for damage to the work product itself, it insures ‘faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product’”); see also George A. Fuller Co. v. U.S. Fid. & Guar. Co., 613 N.Y.S.2d 152, 155 (1st Dep’t 1994) (liability policy does not insure against faulty workmanship in the work product itself but rather faulty workmanship in the work product which creates a legal liability by causing bodily injury or property damage to something other than the work product); Bonded Concrete, Inc. v. Transcontinental Ins. Co., 784 N.Y.S.2d 212, 213-14 (3d Dep’t 2004) (holding no “property damage,” as “the damages sought were the costs of correcting the defect, not the damage to property other than the completed work itself”); Apache Foam Prod. Div. of Millmaster Onyx Group of Kewanee Indus., Inc. v. Cont’l Ins. Co., 528 N.Y.S.2d 448, 448-50 (4th Dep’t 1988) (CGL policy precluded coverage for claims relating to damage to the named insured’s own product but did not exclude claims for coverage for property damage to other portions of roofing not part the insured’s product or work); J. Lucarelli & Sons, Inc. v. Mountain Valley Indem. Co., 881 N.Y.S.2d 708 (3d Dep’t 2009) (stating that purpose of a CGL policy is to provide coverage for tort liability for physical damage to others, not for claims against a contractor where his or her own work product was defective).

2. The “Occurrence” Requirement

Although New York’s highest court has not yet ruled on the issues, both lower state and New York federal courts generally hold that faulty workmanship alone does not constitute an “occurrence” under a CGL policy. See Hartford Acc. & Indem. Co. v. A.P. Reale & Sons, Inc., 644 N.Y.S.2d 442, 443 (3d Dep’t 1996) (“[T]he purpose of a commercial general liability policy . . . is to provide 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 what the damaged person bargained for.”); J.Z.G. Resources, Inc. v. King, 987 F.2d 98, 103 (2d Cir. 1993) cert. denied, 510 U.S. 993 (1993) (under New York law, an insurer had no duty to indemnify its insured against a claim for the costs of repairing faulty roads, rather than for consequential property damage inflicted on other property as a result of poor workmanship, as such damage did not result from an “occurrence”); Jakobson Shipyard, Inc. v. Aetna Cas. & Sur. Co., 775 F. Supp. 606, 610 (S.D.N.Y. 1991) (holding that under New York law an “occurrence” does not encompass “faulty design, construction or installation”); Transportation Ins. Co. v. AARK Const. Group, Ltd., 526 F. Supp. 2d 350, 356-57 (E.D.N.Y. 2007) (CGL insurer was not obligated to provide coverage for the cost to repair collapsed garage or the loss of use of the building incident to the closure of the garage because the damages were not caused by an “occurrence” and loss of use constitutes non-covered economic damages).

In George A. Fuller Co. v. U.S. Fid. & Guar. Co., 200 A.D.2d 255, 259 (1st Dep’t 1994), the Court held that the allegations against the insured (the general contractor for the
project) for the improper installation of a curtain wall, floor, and water metering system, all of which were the responsibility of the insured under a contract, did not constitute an “occurrence” as the allegations all related to the insured’s failure to meet its contractual obligations. 200 A.D.2d at 259; see also Pavarini Constr. Co., Inc. v. Cont’l Ins. Co., 759 N.Y.S.2d 56, 57 (1st Dep’t 2004) (claim for damages arising out of an alleged breach of a construction contract does not constitute an “occurrence.”) For there to be an occurrence, the defective work must result in damage to property distinct from the insured’s own product. Baker Residential Ltd. P’ship v. Travelers Ins. Co., 10 A.D.3d 586, 587, 782 N.Y.S.2d 249, 250 (1st Dep’t 2004).

Furthermore, claims for alleged breach of warranty and contractual obligations do not meet the requirements necessary to be considered an “occurrence” under a commercial general liability policy. See QBE Ins. Corp., 934 N.Y.S.2d 36 (“General commercial liability policies, as a rule, provide coverage only for damages arising in tort and exclude purely contractual or warranty damages.”); see also Hartford Acc. & Indem. Co., 644 N.Y.S.2d 443; Pavarini Constr. Co., 759 N.Y.S.2d at 57 (finding that general contractor/construction manager was not entitled to coverage for claims, because claim for breach of contract was not “accident including continuous or repeated exposure to substantially the same general harmful conditions” under policy). A claim for breach of contract or warranty can be an “occurrence” however, “if, as a result of the breach, the defective product damages property other than the defective product itself,” including the larger entity or structure into which the insured’s work was incorporated. Perrone Leather, LLC v. Selective Way Ins. Co., 2018 WL 8802229, at *7 (N.D.N.Y. Mar. 9, 2018).

In addition, despite the holdings of New York’s intermediate appellate courts, the United States Court of Appeals for the Tenth Circuit, applying New York law, recently chose to depart from those holdings and instead concluded that “New York intermediate appellate court decisions would not persuade the New York Court of Appeals to find that the damages at issue [due to the insured’s subcontractor’s faulty work] were not an occurrence.” Black & Veatch Corp. v. Aspen Ins. (UK) Ltd., 882 F.3d 952, 970 (10th Cir. 2018), cert. denied, 139 S.Ct. 151, 202 L.Ed.2d 35 (2018). The court reasoned that to hold otherwise would render the subcontractor exception to the damage to property exclusion meaningless, and that its conclusion was in line with that of other state supreme courts, while the New York appellate court decisions were “distinguishable, outdated, or otherwise inapplicable.” Id. at 971. The Tenth Circuit declined to certify the question to the New York Court of Appeals. Id. at 970.

3. **Timing of “Property Damage”**

New York courts have yet to address what trigger applies in the construction defect context. However, in environmental property damage claims, New York courts consistently apply the injury-in-fact theory to determine whether coverage exists under CGL policies. In this regard, New York courts have determined that liability coverage is triggered when real personal injury or actual property damage occurs, notwithstanding the time of the actual act that caused the injury occurred. See Olin Corp. v. Ins. Co. of N. Am., 972 F. Supp. 189, 194 (S.D.N.Y. 1997), aff’d, 221 F.3d 307 (2d Cir. 2000); Employers Ins. of Wausau v. Duplan Corp., No. 94 Civ. 3143 (CSH), 1999 WL 777976 (S.D.N.Y. Sept. 30, 1999).
Courts outside of New York, applying New York law, have applied an injury-in-fact trigger in the context of a construction defect claim. Specifically, the Supreme Court of Delaware, applying New York law, determined that in the construction defect context, “property damage” sufficient to trigger coverage may occur as early as installation of the defective work or product if the property damage immediately begins to manifest, and such a case will trigger all policies where such damage continues to manifest. Hoechst Celanese Corp. v. Certain Underwriters at Lloyd’s London, 673 A.2d 164, 169 (Del. 1996) (applying New York law) (property damage occurs continuously during time where the plumbing system is actually leaking).

In addition, the Supreme Court of Illinois, applying New York law, applied an injury-in-fact trigger when determining whether or not coverage existed under a policy due to the defective installation of plumbing. Travelers Ins. Co. v. Eljer Mfg., Inc., 197 Ill. 2d 278, 288, (2001). In applying the injury-in-fact theory, the court stated:

the reasoning of the New York courts clearly illustrates that the plain language of the policies calls for coverage upon the occurrence of an injury-in-fact. Therefore, the [lower] court held that, under New York law, ‘the installation of the plumbing system is not the triggering event. The ‘occurrence’ is the leak as that is when the ‘effects of exposure’ actually result in damage to property.’

Id.

4. The “Business Risk” Exclusions

New York courts have applied exclusions j(5) and j(6) to bar defective workmanship claims and have stated that they are the primary means of precluding coverage for business risks arising out of construction defect claims. See Airolite Co. v. Valley Forge Ins. Co., 16 Misc. 3d 1113(A), 847 N.Y.S.2d 895, at *4 (N.Y. Sup. Ct. 2007); George A. Fuller Co., 200 A.D.2d at 260 (“even if the claims asserted in the Epurio complaint were otherwise covered, they would fall within the policy’s exclusions 2(j)(5) and (6), which except from coverage damage to the insured’s work product.”); Zandi Constr. Co., Inc. v. Firemen’s Ins. Co. of Newark, 440 N.Y.S.2d 353 (3d Dep’t 1981) (holding policies “unambiguously exclude coverage for property damage to the insured’s work product caused by its failure to perform in a workmanlike manner or by its breach of a warranty of fitness of that work product”).

In addition, exclusions for damage to “your product” or “your work” generally have been interpreted by New York courts to preclude coverage for costs incurred by the insured to correct or replace the insured’s defective work. Village of Newark v. Pepco Contractors, Inc., 472 N.Y.S.2d 66, 67 (App. Div. 1984) (“policies specifically exclude coverage for damages to or arising from the work or work product of the insured and clearly indicate that the risk insured against is not faulty workmanship, but the possibility that the work product may cause injury other than to the product itself”); see also Hartford Acc. & Indem. Co. v. A.P. Reale & Sons, Inc., 644 N.Y.S.2d 442 (3d Dept.1996) (holding that the “your product” exclusion precluded coverage for property damage to the insured’s work product under the policy); Adler & Nielson Co. v. Ins. Co. of N. Am., 56 N.Y.2d 540, 543 (1982) (“[a]s the insurer properly contends, that [the defective] item consists of damages to the work product of the insured itself and accordingly is excluded from coverage under the insurance policy in this case.”)

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1. The “Property Damage” Requirement

Under North Carolina law, “repairs to property necessitated by an insured’s failure to properly construct the property to begin with” does not constitute “property damage.” Prod. Sys., Inc. v. Amerisure Ins. Co., 167 N.C. App. 601, 605 (2004), review denied, 359 N.C. 322 (2005); Builders Mut. Ins. Co. v. Mitchell, 709 S.E.2d 528, 531-32 (N.C. App., April 5, 2011) (faulty workmanship is not included in the standard definition of “property damage”); Wm. C. Vick Const. Co. v. Pennsylvania Nat’l Mut. Ins. Co., 52 F.Supp.2d 569, 583 (E.D.N.C. 1999), aff’d, 213 F.3d 634 (4th Cir. 2000) (court held that “damages based solely on shoddy workmanship (i.e., damages seeking repair costs and/or completion costs) are not ‘property damage’ within the meaning of a standard form CGL policy”); Harleysville Mut. Ins. Co. v. Hartford Cas. Ins. Co., 90 F. Supp. 3d 526 (E.D.N.C. Feb. 27, 2015) (applying North Carolina law) (“under North Carolina law . . . ‘property damage’ in the context of commercial general liability policies means ‘damage to property that was previously undamaged’ and does not include ‘the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance’ by the insured”).

In Production Systems, plaintiff Production Systems, Inc. (“PSI”) contracted with Rubatex to design, construct and install two foam rubber sheet line systems at a Rubatex plant. Id. at 602-03. PSI used its own employees for certain work on the line systems while hiring subcontractors to perform other work for the line systems. Id. at 603. Rubatex experienced problems almost immediately after the line systems were put into operation and ultimately had to shut down the line systems until repairs were made. Id. Rubatex refused to pay PSI, which led to PSI filing suit against Rubatex. Id. Rubatex filed a counterclaim alleging that PSI failed to “design, construct and install proper line systems.” Id.

PSI requested that its insurers defend and indemnify PSI in connection with Rubatex’s counterclaim. Id. The insurers refused and PSI filed a declaratory judgment action. Id. at 603-04. The trial court granted summary judgment in favor of the insurers. Id. at 604. The Court of Appeals recognized that “‘property damage’ in an insurance policy has been interpreted to mean damage to property that was previously undamaged, and not the expense of repairing property or completing a project that was not done correctly or according to contract in the first instance.” Id. at 606 (citing Hobson Constr. Co., Inc. v. Great Am. Ins. Co., 71 N.C. App. 586, 590 (1984)). The Court of Appeals stated that PSI, “acting alone or through its subcontractor, failed to properly install certain components of the [line systems]” and that “Rubatex’s counterclaim alleged no damages other than the cost of repairing the line systems and the loss of use of the line systems.” Id. at 606. Therefore, the Court of Appeals held that “‘property damage’ does not refer to repairs to property necessitated by an insured’s failure to properly construct the property to begin with.” Id. at 607.
A North Carolina federal court has, however, held that a claim for “loss of use” of a distributing studio resulting from an insured’s faulty workmanship in installing the building’s concrete floors does constitute “property damage,” provided that damages from the building’s “loss of use” are expressly asserted in the complaint. Wayne Brothers, Inc. v. North River Fire Ins. Co., No. 1:01CV00842, 2003 WL 22213615 (M.D.N.C. Aug. 20, 2003). In Wayne Brothers, plaintiff, Wayne Brothers, commenced a declaratory judgment action against its insurer seeking a defense and indemnification under a CGL policy. Id. at *1. Wayne Brothers was a subcontractor required to install concrete floors in a 90,000 square foot refrigerated distribution facility. Id. At some point after Wayne Brothers completed the flooring, the facility developed problems with surface delamination. Notably, the complaint brought against Wayne Brothers was not limited to a claim for repair of the faulty flooring, but included claims for loss of use, business disruptions, and damages to equipment. Id. at *2-4. The court held that, “the allegations in the pleadings sufficiently allege . . . property damage” because the loss of use and damage to equipment were “damages” to property that was initially undamaged. Id. at *4-5. Thus, the court held that the insurer had a duty to defend under the policy. Id. at *9.

2. The “Occurrence” Requirement

Under North Carolina law, “a claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy.” Mitchell, 210 N.C. App. at 661 (quoting 9A Couch on Insurance, 3d § 129:4); Wm. C. Vick Const. Co., 52 F.Supp.2d at 584-85. In Mitchell, the Court of Appeals held that, in order to constitute an “occurrence,” there must be an accident that causes damage to property other than the work product. Id. at 532.

Significantly, in Vick Construction, the damages claimed were based solely on the costs of repairing faulty workmanship, and thus, the court found there was no occurrence. Id. at 586. In making this determination, the court explained that the plain language of the policies states that an “occurrence” is foremost an “accident,” and that “[t]he North Carolina Supreme Court . . . has defined ‘accident’ in the context of a general liability policy to mean ‘an unforeseen event, occurring without the will or design of the person whose mere act causes it; an unexpected, unusual, or undesigned occurrence; the effect of an unknown cause, or, the cause being known, an unprecedented consequence of it; a casualty.’” Id. at 584 (quoting Taylor v. Hartford Acc. & Indem. Co., 257 N.C. 626, 626 (1962)). Further, the court stated that “[a] common element in the Supreme Court’s definition of ‘accident’ is the notion that an accident is ‘unforeseen,’ ‘unexpected,’ ‘unusual,’ ‘undesigned,’ the effect of an ‘unknown cause,’ or an ‘unprecedented consequence.’” Id.

However, the court noted that “[i]f for example [plaintiff] sued . . . for damages caused to office furniture due to leaks in a newly constructed building . . . or if faulty construction caused the ceiling to collapse thereby causing injury to a person standing inside the new addition, such an event may very well constitute an ‘accident’ triggering coverage. . . .” Id. at 585-86. See also Travelers Indem. Co. v. Miller Bldg. Corp., 97 Fed. App’x 431, 437 (4th Cir. 2004) (finding an occurrence where shoddy workmanship on glass doors caused damage to rooms inside the building).
3. **Timing of “Property Damage”**

For purposes of timing, state courts in North Carolina have adopted an injury-in-fact trigger that equates the alleged “injury-in-fact” to the time the alleged faulty workmanship was performed. See *Gaston County Dying Mach. Co. v. Northfield Ins. Co.*, 351 N.C. 293 (2000). In *Gaston*, the court found that where an accident that causes an injury on a date certain and all subsequent damages flow from the single event, there is but one occurrence and only the policies on the risk on the date of the injury-causing event are triggered. *Id.* at 303-04.

Further, in *Hutchinson v. Nationwide Mut. Fire Ins. Co.*, 594 S.E.2d 61 (N.C. App. 2004), the court applied this same trigger analysis to the allegedly negligent construction of a retaining wall. *Id.* at 62. There, the insured contractor entered into an agreement to construct a custom home including a retaining wall. *Id.* The underlying plaintiff’s damages were allegedly caused by the insured’s failure to install a drainage system in the retaining wall and the continual entry of water into the soil from the compacted surface area. *Id.* Construction of the retaining wall took place during the summer of 1999, with construction on the entire project ending in October 1999. *Id.* at 62. The contractor was insured on and before December 11, 1998 and on and after November 15, 1999. Thus, the critical inquiry was whether or not the alleged “property damage” took place during the time period in which the contractor was uninsured i.e., December 12, 1998 - November 14, 1999. *Id.*

Applying this analysis, and noting that construction had indisputably ended prior to coverage resuming on November 15, 1999, the court found “with certainty that the entry of water was caused by faulty construction pre-dating insured coverage.” *Id.* at 64. Citing to *Gaston*, the court held that “even in a situation where damage continues over time, if the court can determine when the defect occurred from which all subsequent damages flow, the court must use the date of the defect and trigger the coverage applicable on that date.” *Id.*

Similarly, in *Harleysville Mut. Ins. Co. v. Berkley Ins. Co. of the Carolinas*, 610 S.E.2d 215 (N.C. App. 2005), the court found that the triggering event for purposes of coverage took place during construction rather than at the time of discovery. *Id.* at 219. In *Harleysville*, the underlying plaintiffs sued RGS Builders, Inc. (“RGS”) for structural damage caused by moisture penetration into their homes caused by RGS’s allegedly defective installation of EIFS cladding. *Id.* at 216. The plaintiffs had entered into a contract for the construction of their home in April 1993 and a certificate of occupancy was issued on December 15, 1994. *Id.* In May of 1996, the residence was inspected and high levels of moisture intrusion were detected. *Id.* RGS subsequently performed repairs to the EIFS cladding. *Id.* Plaintiffs ultimately filed suit against RGS, alleging negligence, negligent misrepresentation, breach of implied warranty, breach of contract and unfair and deceptive trade practices with respect to the allegedly deficient installation of the synthetic stucco. *Id.* at 216. RGS forwarded the complaint to its insurer, Harleysville Mutual Insurance Company (“Harleysville”), seeking defense and indemnification under a general liability policy issued to it in May of 1997. *Id.* at 217. Harleysville declined to provide coverage, stating that any property damage incurred took place prior to the inception of the policy on May 1, 1997. *Id.*
The court agreed with Harleysville, finding that the plaintiff’s damages arose from the continual entry of moisture into their residence through the synthetic stucco. Id. at 218. The alleged source of the property damage was RGS’s negligent installation of this stucco. Id. As all construction and repair took place prior to May 1, 1997, the court found that no property damage took place during the Harleysville policy period and no coverage was afforded by the policy. Id. at 218-19; see also Nelson v. Hartford Underwriters Ins. Co., 177 N.C. App. 595 (N.C. App. 2006) (potential causes of mold each occurred prior to start of coverage period, therefore no coverage even though mold continued to grow during the policy period).

However, a North Carolina federal recently rejected the injury-in-fact approach utilized by North Carolina state courts, opting instead for a multiple trigger where continuous property damage is alleged but the date the “property damage” actually occurred cannot be determined with certainty. Harleysville, 90 F. Supp. 3d 526.

4. The “Business Risk” Exclusions

In North Carolina, the “your work” exclusion has been interpreted to preclude coverage only for damage to a particular insured’s work. Wayne Brothers, Inc., 2003 WL 22213615; see also Builders Mut. Ins. Co. v. Mitchell, N.C. App. 657 (N.C. App. 2011) (“your work” exclusion applies only to damage to the insured’s work product itself); Alliance Mut. Ins. Co. v. Dove’s Welding, 214 N.C. App. 481 (N.C App. 2011) (same).

In Wayne Brothers, the carriers argued that the claims for defective construction were barred by the “your work” exclusion, contending that the damages all arose out of the insured’s own work. Id. The court disagreed, stating that the underlying pleadings did not establish that the damages arose from the insured’s own work because there were potentially between four and five other parties whose actions or omissions may have caused the damage at issue. Id. The court also found that the “your work” exclusion did not apply because the complaint alleged damages for “loss of use” of the studio resulting from the defective floors, which the court stated constitutes “property damage” in and of itself. Id.; see also Western World Ins. Co., Inc. v. Carrington, 369 S.E.2d 128 (N.C. 1988) (noting that the “your work” exclusion does not apply where there are claims for damages other than costs for repairing or replacing the insured’s defective work).

In Breezewood of Wilmington Condo. Homeowners’ Ass’n, Inc. v. Amerisure Mut. Ins. Co., 335 Fed.Appx 268, 277-78 (4th Cir. 2009), the Fourth Circuit, applying North Carolina law, excluded coverage based on the “your work” exclusion. The court reasoned that “[o]ur holding today that the CGL policy excludes coverage for damage to an insured’s completed property caused by an insured’s faulty workmanship is fully consistent with this Court’s previous interpretations of the ‘your work’ exception inasmuch as the alleged water damage ‘arises out of’ Quality Built’s work within the meaning of ‘your work’ exclusion and is not alleged to have been performed by a subcontractor.” Id. at 278.
**NORTH DAKOTA**

1. **The “Property Damage” Requirement**

   In the construction defect context, the Supreme Court of North Dakota has held that damage to an insured’s own faulty work may constitute “property damage” under a CGL policy. *K & L Homes, Inc. v. Am. Family Mut. Ins. Co.*, 829 N.W.2d 724, 736-37 (2013). In *K & L Homes*, the court stated that damage to a home allegedly caused by the faulty workmanship of the insured homebuilder “is stated as including cracks, unevenness, and shifting, all of which would fall within ‘physical injury’ to ‘tangible property’ for purposes of the CGL policy.” *Id.* at 736-37. Thus, despite the fact that the damage was to the insured’s own work, the court found that the alleged damage constituted “property damage” under the policy. *Id.*

2. **The “Occurrence” Requirement**

   In *K & L Homes*, the Supreme Court of North Dakota addressed the issue of whether an insured’s faulty workmanship may constitute an “occurrence” under a CGL policy where homeowners sought to recover damages for a home they had purchased from the insured, a general contractor. 829 N.W.2d at 732. The court held that an insured’s faulty workmanship may constitute an “occurrence” “if the faulty work was ‘unexpected’ and not intended by the insured, and the property damage was not anticipated or intentional, so that neither the cause nor the harm was anticipated, intended, or expected.” *Id.* at 736. In making this determination, the court overruled its own prior decision on this issue in *ACUITY v. Burd & Smith Const., Inc.*, 721 N.W.2d 33 (2006), stating as follows:

   Our Court in *Burd & Smith* incorrectly decided the question of whether faulty workmanship may constitute an “occurrence” by drawing a distinction between faulty workmanship that damages the insured’s work or product and faulty workmanship that damages a third party’s work or property. This focus on the nature of the property damaged to define whether there has been an “occurrence” has been criticized by courts and commentators. Another court addressed the concern that, by looking at the scope of coverage through the lens of the “your work” exclusion, policy coverage was being created by something other than the insuring agreement’s grant of coverage.

   * * *
Although this is a valid point, it misses the mark slightly. The import of the “your work” exclusion and its subcontractor exception is not that the exclusion “creates” coverage. Rather, the import is that the exception lends insight into the baseline definition of “occurrence” from which parties and courts interpreting CGL policies should operate. If the definition of “occurrence” cannot be understood to include an insured’s faulty workmanship, an exclusion that exempts from coverage any damage the insured’s faulty workmanship causes to its own work is nugatory. If, on the other hand, the definition of “occurrence” does include an insured’s faulty workmanship, such an exclusion functions as a meaningful “limitation or restriction on the insuring clause.”

_Id._ at 735-36 (citations omitted).

The court in _K & L Homes_ pointed out that “[t]here is nothing in the definition of ‘occurrence’ that supports that faulty workmanship that damages the property of a third party is a covered ‘occurrence,’ but faulty workmanship that damages the work or property of the insured contractor is not an ‘occurrence.’” _Id._ at 736.

3. **Timing of “Property Damage”**

North Dakota has adopted the general rule that “the time of the occurrence of an accident, within the meaning of a liability indemnity policy, is not the time when the wrongful act was committed, but the time when the complaining party was actually damaged.” _Friendship Homes, Inc. v. Am. States Ins. Co._, 450 N.W.2d 778, 780 (N.D. 1990); _Grinnell Mut. Reins. Co. v. Thies_, 755 N.W.2d 852, 859 (N.D. 2008) (concluding that “the occurrence happened when the complaining party [] was actually damaged, rather than when any mold may have accumulated”).

In _Friendship Homes_, the insured contractor negligently installed a fireplace in a building during the relevant policy period. 755 N.W.2d at 778. Due to negligent installation, a fire occurred in the building three years later, after the contractor’s policy was cancelled. _Id._ at 779. The court concluded that the “occurrence” took place on the date of the fire rather than at the time of the negligent fireplace installation. _Id._ at 780. The court, therefore, rejected the claimant’s argument that it sustained “property damage” during the contractor’s period of coverage. _Id._

4. **The “Business Risk” Exclusions**

Under North Dakota law, the “business risk” exclusions are intended to “prevent policyholders from converting liability insurance into protection from foreseeable business risks.” _Grinnell Mut. Reins. Co. v. Lynne_, 686 N.W.2d 118, 123 (N.D. 2004). These exclusions are based on the premise that “a business risk, such as costs resulting from improper performance of contract, should be built into the price of the product.” _Id._ at 123-24. Furthermore, the North Dakota Supreme Court summarized the “business-risk” exclusions as being “designed to exclude coverage for defective workmanship by the insured causing damage to the project itself.” _Ernst v. Acuity_, 704 N.W.2d 869, 872 (N.D. 2005).
The Supreme Court of North Dakota addressed the application of the “business risk” exclusions in *Fisher v. Am. Family Mut. Ins. Co.*, 579 N.W.2d 599 (N.D. 1998). In Fisher, the insured subcontractor was hired by homeowners to sand and apply a polyurethane finish to hardwood flooring recently installed by another contractor. *Id.* at 601. Shortly after the insured’s work, the floorboards began to separate and split. *Id.* In addressing the relevant “business risk” exclusions, the court reached the following conclusions: (1) exclusion (j)(5) did not apply to damage occurring after the insured had completed its operations; (2) the products-completed operations hazard exception to exclusion (j)(6) applied because the damage occurred away from the insured’s premises and after the work had been completed; and (3) exclusions (k) and (l) (“your work” and “your product”) precluded coverage for the cost of the sanding and finishing performed by the insured. *Id.* at 604-06; see also *Peterson v. Dakota Molding, Inc.*, 738 N.W.2d 501, 506 (N.D. 2007) (holding that “your work” and “your product” exclusions barred coverage for damages arising from insured’s manufacturing of defective funnels); *Grinnell Mut. Reins. Co. v. Lynne*, 686 N.W.2d 118, 126 (N.D. 2004) (concluding that exclusion (j)(5) precluded coverage for damage to real property upon which insured was performing operations).
1. The “Property Damage” Requirement

Under Ohio law, the results of defective workmanship may constitute “property damage” under a CGL policy. In *Ohio Northern University v. Charles Constr. Servs.*, 120 N.E. 3d 762 (Ohio 2018), the allegedly faulty work of a subcontractor in building a new luxury hotel and conference center caused “extensive water damage from hidden leaks[.]” While the Ohio Supreme Court focused primarily on whether the faulty work was an “occurrence,” it noted that “there is no question that the water-related damage to the inn was ‘property damage[,]’” *Id.* at 770.

In *Zanco, Inc. v. Michigan Mut. Ins. Co.*, 464 N.E.2d 513 (Ohio 1984), a builder and real estate developer brought suit against its insurer contending that the insurer had a duty to defend in connection with a lawsuit filed by a condominium owners association against Zanco for breach of its duty to construct the complex in a workmanlike manner. Ultimately, the Ohio Supreme Court determined that the insurer had no duty to defend Zanco because the “work” and “product” exclusions contained in the CGL policy were applicable. However, in dicta, the Court stated that “a perfectly credible argument c[ould] be made . . . that the counterclaim alleged ‘property damage’ caused by an ‘occurrence’ as those terms are defined in the policies.” *Id.* at 514.

Notably, in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 979 N.E.2d 269, 274 (Ohio 2012), the Supreme Court of Ohio held that claims for faulty workmanship do not constitute “property damage” caused by an “occurrence.” *See also Bogner Constr. Co. v. Field & Assoc.*, No. 08 CA 11, 2009 WL 91300 (Ohio App. Jan. 13, 2009) (holding there is no coverage under a CGL policy for defective workmanship). However, like the Supreme Court in *Ohio Northern*, the court in *Custom Agri* focused on the “occurrence” issue, leaving open the question of whether the faulty work constituted “property damage” in the first place.

Further, “loss of use” due to a contractor’s negligent delay can also qualify as “property damage” under a CGL policy. *Westfield Ins. Co. v. Coastal Group*, No. 05CA008664, 2006 WL 120041, at *2 (Ohio Ct. App. Jan. 18, 2006); *Hanna*, 2008 WL 2581675, at *3 (finding that damage to work other than that of the insured resulting in loss of use of home constituted “property damage”).

2. The “Occurrence” Requirement

As noted above, the Ohio Supreme Court has held that claims of defective construction or workmanship do not constitute an “occurrence” under a CGL policy. *Custom Agri*, 979 N.E.2d at 274; *Ohio Northern*, 120 N.E. 3d at 770-71. At issue in *Custom Agri* was the installation of a defective steel grain bin on the property owners’ land. *Id.* at 477. The Ohio Supreme Court explained that claims for faulty workmanship in the context of a defectively manufactured product are not a fortuitous event, and therefore do not constitute an “occurrence” in the context of a CGL policy. *Id.* at 484.
In Custom Agri, the alleged damage was limited entirely to the contractor’s own work. In Ohio Northern, the Ohio Supreme Court expanded the ruling to include property damaged caused by the work of a subcontractor. Noting that it needed only to apply the holding in Custom Agri to decide the issue, the Court held that “[p]roperty damage caused by a subcontractor’s faulty work is not an ‘occurrence’ under a CGL Policy because it cannot be deemed fortuitous.” Ohio Northern, 120 N.E. 3d at 764. Put another way, the Supreme Court held that “a subcontractor’s faulty work does not meet the definition of an ‘occurrence’ because it is not based on fortuity.” Id. at 770. As noted above, the Ohio Northern Court held that the consequential damages were unquestionably “property damage”, but because the faulty work that caused those damages did not constitute an “occurrence,” there could be no coverage. Id.

3. Timing of “Property Damage”

As a general rule, Ohio law applies the manifestation trigger rule in construction defect cases to determine whether “property damage” falls within the coverage period of a general liability policy. Cleveland Bd. of Educ. v. R.J. Stickle Int’l, 76 Ohio App. 3d 432, 437 (Ohio Ct. App. 1991) (ruling that carrier on the risk when first visible or discoverable manifestations of damage occur must pay the entire claim); Reynolds v. Celina Mut. Ins. Co., No. 98CA007268, 2000 WL 202107, at *3 (Ohio Ct. App. Feb. 16, 2000) (“The date for determining whether property damages falls within the coverage period of an occurrence policy is when the first visible or discoverable manifestations of damage occur”).

In Stickle, the Court of Appeals of Ohio addressed the timing of “property damage” under multiple CGL policies involving the insured’s faulty installation of a roof resulting in leakage. 76 Ohio App. 3d at 433. The insured installed the roof in 1974, which began leaking in 1975, and continued leaking until 1988. Id. Applying the manifestation trigger rule, the court held that coverage was triggered only for those policies issued in 1975, when the roof first started leaking, because “the insurer at the time of the first visible manifestations of damage must bear the responsibility for the entire loss.” Id. at 437.

In Reynolds, homeowners filed an action against an insured contractor for damages relating to the defective construction of their new home, discovered when the homeowners took possession of the home in 1987, and the insured sought to recover under a policy that became effective on January 1, 1988. 2000 WL 202107 at *1. Citing Stickle, the court applied the manifestation trigger theory and held that there was no coverage under the policy as the damages occurred and were discovered prior to the effective date of the policy. Id. at *4.

However, Ohio courts apply the continuous trigger theory in cases where: (1) the damages are continuing in nature; and (2) the damages manifest themselves after the relevant policies were in effect. Westfield Ins. Co. v. Milwaukee Ins. Co., No. CA2004-12-298, 2005 WL 2179312, at *3 (Ohio Ct. App. Sept. 12, 2005); Plum v. W. Am. Ins. Co., 2006 WL 256881, at *4 (Ohio Ct. App. Feb. 3, 1991) (“The timing of the manifestation, in our view, is important”).
In *Plum*, the court applied the continuous trigger theory where an insured contractor had built a home in 1989 and the homeowners discovered numerous construction defects manifesting in 1996-97. 2005 WL 2179312 at *3. In declining to apply the manifestation rule, the court distinguished *Reynolds*, noting that in *Reynolds* “the damage manifested itself before the policy was in effect; here it manifested itself long afterward.” *Id.* at *4. “Applying a manifestation trigger in cases such as this presents numerous problems that, in effect, will almost always deny coverage.” *Id.*

Similarly, in *Westfield*, the court recognized that Ohio courts have applied the manifestation trigger theory under certain facts, but held that the continuous trigger theory applied where water exposure damages were discovered five years after the construction of a home. 2005 WL 2179312, at *3. The court in *Westfield* concluded that where there has been property damage over an extended period of time, specifically over more than one policy period, the continuous trigger rule should apply in apportioning the costs of reimbursing the insured between the various insurance companies and/or policy periods. 2005 WL 2179312, at *3; see also *Hartford Ins. Grp. v. Commercial Union Assurance Cos.*, 1979 WL 207144 (Ohio Ct. App. June 15, 1979) (applying continuous trigger theory for damages property sustained over course of nearly 20 years as a result of “a continuing underground trespass of city water”).

4. **The “Business Risk” Exclusions**

Generally, Ohio courts have found that the “business risk” exclusions are intended to preclude coverage for those risks which are within the control of the insured, such as the risk of not performing its work in a sufficient manner, not those that are the normal, predictable consequences of doing business. *Westfield Ins. Co. v. Riehle*, 113 Ohio App.2d 249, 254 (1996); *Younglove Const., LLC v. PSD Develop., LLC*, 767 F. Supp. 2d 820 (N.D. Ohio 2011).

In *LISN, Inc. v. Commercial Union Ins. Cos.*, 83 Ohio App. 3d 625 (Ohio Ct. App. 1992), the Court of Appeals of Ohio upheld a denial of coverage on the grounds that the (j)(6) exclusion barred coverage for the insured’s indemnification claim for costs incurred in repairing and replacing a functioning telephone cable it had erroneously damaged in the course of removing an obsolete cable. *Id.* at 629. Recognizing that this exclusion was a valid “business risk” exclusion, the court found that damage done to the functioning cable because the insured had incorrectly performed its work was not covered under the CGL policy, because “[b]usiness risk’ exclusions are intended to exclude coverage for risks that are inherent in performing a particular type of work.” *Id.* at 629-30 (citing *Weedo v. Stone E-Brick*, 81 N.J. 223, 236-38 (1979)).

In *Zanco*, the Ohio Supreme Court held that both the “insured’s product” (k) exclusion and the “insured’s work” (l) exclusion operate to exclude coverage of losses occasioned by defective products and/or faulty workmanship of a general contractor/developer. 464 N.E.2d at 513; see also *Stiggers v. Erie Ins. Co.*, 2008 WL 963138, at *5 (Ohio Ct. App. April 10, 2008) (holding that the “faulty workmanship exclusion” barred coverage for “property damage” caused by the insured’s as well as the insured’s subcontractor’s faulty workmanship).
Further, in Ohio Cas. Ins. Co. v. Joseph Sylvester Constr., 1991 WL 206628 (Ohio Ct. App. Sept. 30, 1991), the Court of Appeals determined that an entire home constructed and sold by the builder/developer constituted the developer’s “work product” for purposes of applying the “your product” business risk exclusion. Id. at *5. The “defective slag” used by the insured contractor caused damage to other areas of the house, and the insured argued that the other areas of the home did not constitute “work product” under the exclusion. Id. In finding that the “work product” exclusion applied, the court explained that “[i]n the instant case, the whole house was the work product of the appellants.” Id. at *6. As such, the court concluded “[t]here was no collateral damage to property that was not the appellants’ work product” and “[t]hus, all of the damage was excluded.” Id.; see also Erie Ins. Exchange v. Colony Dev. Corp., 2003 WL 23096010, at *8-10 (Ohio Ct. App. Dec. 31, 2003) (affirming trial court’s conclusion that the “faulty workmanship”, “your work” and “your product” business risk exclusions contained in a general contractor’s CGL policy exclude coverage for a claim of “property damage” resulting from its own faulty workmanship); State Auto Mut. Ins. Co. v. Fairfield Homes, 1989 WL 139822 (Ohio Ct. App. Nov. 14, 1989) (holding contractor’s various alleged construction defects in residential homes were excluded from coverage under, among others, the CGL policy’s “work performed” exclusion).
OKLAHOMA

1. **The “Property Damage” Requirement**

   Oklahoma courts have not yet addressed whether faulty workmanship constitutes “property damage” under a CGL policy. However, a federal court, applying Oklahoma law, held that claims which are “economic or pecuniary in nature” do not constitute “property damage”. *Boggs v. Great N. Ins. Co.*, 659 F. Supp. 2d 1199, 1209 (N.D. Okla. 2009).

2. **The “Occurrence” Requirement**

   Although Oklahoma state courts have not squarely addressed what constitutes an “occurrence” in the context of a CGL policy, the Western District of Oklahoma, applying Oklahoma law, has stated that damages resulting from negligence may constitute an “occurrence,” despite the fact that the concept of negligence carries an element of foreseeability, without depriving the “occurrence” of its accidental nature. *Employers Mut. Cas. Co. v. Grayson*, 2008 WL 2278593, at *4 (W.D. Okla. May 30, 2008); see also *Penley v. Gulf Ins. Co.*, 414 P.2d 305, 309-10 (Okla. 1966) (holding that damages caused by negligence can still be considered “caused by an accident”).

   In *Grayson*, the court considered whether damage resulting from the incorporation of an insured’s defective concrete into a bridge constituted an “occurrence.” Id. at *5. Due to the incorporation of the defective concrete, the bridge was rendered unusable and replacement and removal of certain component parts was required. Id. at *4. The court noted that the insured did not knowingly deliver defective concrete and that “the damage to the bridge deck and to its structural components during the required removal of the defective concrete was the unintended consequence of [the insured] innocently supplying a non-conforming product.” Id. at *5. The inadvertent supply of defective concrete was, therefore, held to be an “occurrence” within the meaning of the policy. Id.

   In *Essex Ins. Co. v. Sheppard & Sons Constr., Inc.*, 2015 U.S. Dist. LEXIS 89096, 2015 WL 4132919 (W. D. Okla. 2015), the district court looked to Oklahoma decisions outside of the construction defect context to determine the relationship between negligent conduct, an accident and “occurrence.” The court’s analysis consisted of the following:

   The cases holding an occurrence is not accidental under Oklahoma law further inform the analysis. Those cases clearly involve intentional conduct wholly distinct from the negligent conduct arising from the alleged faulty workmanship at issue here. See, e.g., *Shelter Mut. Ins. Co. v. Wheat*, 313 Fed. Appx. 76, 82 (10th Cir. 2008) (insured’s shooting of victim at victim’s house was not an accident); *Equity Ins. Co. v. Garrett*, 2008 OK CIV APP 23, 178 P.3d 201, 205 (Okla. Civ. App. 2008) (where insured admitted she intentionally drove her vehicle into a pedestrian, the resulting injury was not accidental).
Most recently, in Broom v. Wilson Paving & Excavating, Inc., 356 P.3d 617, 2015 OK 19, 2015 WL 1541969, at *9 (Okla. 2015) (for publication), the Oklahoma Supreme Court held that an exclusion providing that the insurance did not apply to “bodily injury” or “property damage” that was “expected or intended from the standpoint of the insured” did not apply where a contractor’s negligence caused a trench to collapse and injure a worker. See id. (“The very nature of negligence as a basis of recovery is inconsistent with activity that would produce an ‘expected or intended’ injury under the language in the Mid-Continent policy.”). Although the Broom court was construing a policy exclusion and not addressing whether occurrence coverage existed, the holding further supports the result reached by this Court interpreting and applying Oklahoma law. Id. at *18-19.

Without further analysis, the district court then held that “under controlling Oklahoma law faulty workmanship may constitute an accident (and, therefore, an occurrence).” Id.

In North Start Mut. Ins. Co. v. Rose, 27 F. Supp. 3d 1250 (E.D. Okla. 2014), an Oklahoma federal court, citing the Tenth Circuit Court of Appeals, stated that “[f]aulty workmanship can constitute an occurrence that triggers coverage under a CGL policy if (1) the property damage was not caused by purposeful neglect or knowingly poor workmanship, and (2) the damage was to non-defective portions of the contractor’s or subcontractor’s work or to third-party property.” Id. (citing Greystone Constr. Inc. v. Nat’l Fire & Marine Ins. Co., 661 F.3d 1272, 1286-86 (10th Cir. 2011)).

3. **Timing of “Property Damage”**

Oklahoma courts acknowledge the well-settled principle that “the time of an occurrence of an accident, within the meaning of a liability indemnity policy, is not the time when the wrongful act was committed but the time when the complaining party was actually damaged.” Farmers Alliance Mut. Ins. Co. v. Salazar, 77 F.3d 1291, 1296 (10th Cir. 1996); see also Harbour v. Mid-Continent Cas. Co., 752 P.2d 258, 261, n.3 (Okla. Ct. App. 1987) (finding that the damage must occur during the policy period).

4. **The “Business Risk” Exclusions**

Coverage under a CGL policy “is not intended to extend to ordinary ‘business risks,’ such as those relating to the repair or replacement of faulty work or products” or “serve as a performance bond or a guaranty of goods or services.” Hartford Acc. & Indem. Co. v. Pac. Mut. Life Ins. Co., 861 F.2d 250, 253 (10th Cir. 1988). Instead, the purpose of a CGL policy “is to protect the insured from liability for damage to property other than his own work or property that is caused by the insured’s defective work or product.” Id.
In *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991), the insured general contractor built a school building that was later discovered to have a defective roof causing leaks and interior damage to the school. *Id.* at 373. The insured’s roofing subcontractor had used defective and/or non-specified materials and improperly installed the roof. *Id.* The school sought damages to replace the roof and for the interior damage caused by the leaks. *Id.* The insurer conceded coverage for the damage to the interior of the school, but contended that the policy did not cover damages arising out of the repair and replacement of the subcontractor’s faulty workmanship. *Id.* at 373. The insurer relied on the following exclusions:

(m) to property damage to the Named Insured’s products arising out of such products or any part of such products;

(n) 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 materials, parts or equipment furnished in connection therewith;

*Id.* at 374.

In a declaratory judgment action, the insured in *Dobson* asserted that the foregoing “business risk” exclusions were ambiguous when read in conjunction with the “warranty of fitness or quality” exception to the contractual liability exclusion. The court rejected the insured’s argument, concluding that were unambiguous and that the costs to repair and replace the subcontractor’s defective workmanship and products was barred by the aforementioned exclusions. *Id.* at 377. For the purpose of the exclusion at issue in *Dodson* that barred coverage for “property damage to work performed by or on behalf of the named insured . . . ,” the fact that a subcontractor had performed the work was not an issue. *Id.*; see also *Trinity Univ. Ins. Co. v. Broussard*, 932 F. Supp. 1307, 1310 (N.D. Okla. 1996) (holding that the “your work” exclusion barred coverage for cost to repair or replace defective roof installed by insured).

By contrast, in *Grayson*, the court concluded that the “your work” and “impaired property” exclusions did not apply to bar coverage for the cost of replacement and labor in replacing component parts of a bridge damaged in the removal of the insured’s defective concrete. 2008 WL 2278593, at *6-7. Although both parties agreed that the non-conforming concrete was the insured’s “product” and that injury to the concrete itself was excluded, the court found that “the damage resulting to other property, the loss-of-use damage to the bridge as a whole, and the physical injury to the component parts during the removal process, are not excluded” by the “your product” exclusion. *Id.* at *6. The court further held that the damages alleged did not fall within the scope of the impaired property exclusion because the bridge did not constitute “impaired property.” *Id.* First, the bridge was rendered unusable by the defective concrete and “merely replacing the concrete would not have made the bridge useable.” *Id.* Thus, the bridge could not be “restored to use” by only replacing the defective product. Second, the bridge did not qualify as property “not physically injured” as there was physical injury to other component parts of the bridge during the repair process. *Id.*
Recently, the Tenth Circuit, interpreting Oklahoma law, held that exclusions (j)(5) and (j)(6) are ambiguous under Oklahoma law. MTI, Inc. v. Emplrs. Ins. Co., 913 F.3d 1245, 1250 (10th Cir. 2019). The court’s rationale was that the phrase “that particular part” could be read to refer solely to the direct object on which the insured was operating. Alternatively, it could apply to those parts of the project directly impacted by the insured party’s work. “Because both readings are permissible, the exclusions are facially ambiguous.” Id.
OREGON

1. The “Property Damage” Requirement

Generally, Oregon courts have held that claims for damage to an insured’s own defective work do not constitute “property damage” under a general liability policy. Wyoming Sawmills, Inc. v. Transp. Ins. Co., 282 Or. 401, 406 (1978); FountainCourt Homeowners’ Ass’n v. FountainCourt Dev., LLC, 360 Or. 341, 361 (2016) (citing Wyoming Sawmills for the proposition that non-covered damage to the insured’s own work is distinguishable from covered damage to other portions of a building caused by the insured’s defective work.)

In Wyoming Sawmills, a lumber manufacturer sold defective studs to a lumber company that were used in a building. Id. at 403. After settling the lumber company’s claim against it, the manufacturer sued its CGL insurer to recover labor expenses for the removal and replacement of the defective studs. Id. at 403. The insurer denied liability on the ground that it was only liable for “property damage,” which was defined in pertinent part as “physical injury to or destruction of tangible property. . . .” Id. at 404. The insurer argued that “the property damage that is covered by the policy is damage occasioned by the defective studs to other property, i.e., the balance of the building, and that the [evidence does] not demonstrate that the labor expense incurred was occasioned by the repair of such damages.” Id. at 405.

The Oregon Supreme Court held:

The present policy defines property damages as ‘physical injury to . . . tangible property.’ . . . The inclusion of this word [‘physical’] negates any possibility that the policy was intended to include ‘consequential or intangible damage,’ such as depreciation in value, within the term ‘property damage.’ The intention to exclude such coverage can be the only reason for the addition of the words. As a result, in the absence of a showing that any physical damage was caused to the rest of the building by the defective studs and that the labor cost was for the rectification of any such damage, plaintiff cannot recover.

Id. at 406; see also General Ins. Co. of Am. v. Western Am. Dev. Co., Inc., 43 Or. App. 671, 675 (Or. Ct. App. 1979) (finding that economic loss does not constitute damage to tangible property; expenses, lost profits, and fact that property was worth less than expected did not constitute “loss of use of tangible property”); Martin v. State Farm Fire and Cas. Co., 146 Or. App. 270, 280 (1997) (holding that an economic interest in the value of property does not constitute “property damage”); cf. Farmers Ins. Co. of Or. v. Truitanich, 123 Or. App. 6, 9-10 (Or. Ct. App. 1993) (finding odor from methamphetamine “cooking” constituted “direct physical loss” thereby causing “property damage” to the house).
Similarly, in Milgard Mfg., Inc. v. Cont’l Ins. Co., Inc., 92 Or. App. 609 (Ct. App. 1988), a subcontractor agreed to produce and supply tempered glass windows to install in a building. The building owner brought an action against the general contractor alleging that the window assemblies did not meet contractual requirements because they were improperly tempered, and therefore, the owner was damaged due to the delay in the completion of the house. Id. at 611. A similar claim was made against Milgard who, in turn, tendered the claim to its liability insurer. The insurer initially accepted Milgard’s tender of the defense but later rejected it asserting that the damage alleged was not covered by the policy. Id. at 612. The court found that none of the damages alleged in the underlying action resulted from physical injury to the building and, thus, did not constitute “property damage.” Id. at 613-14 (citing Wyoming Sawmills, 282 Or. at 401).

2. The “Occurrence” Requirement

While there is little law on the issue, Oregon courts have held that claims under a commercial liability policy associated with the repair and/or replacement of an insured’s faulty workmanship generally do not constitute an “occurrence”. Oak Crest Const. Co. v. Austin Mut. Ins. Co., 329 Or. 620, 626-27 (Or. 2000); Kisle v. St. Paul Fire & Marine Ins., 262 Or. 1 (Or. 1972).

Specifically, the Oak Crest Court held that costs incurred in repairing a subcontractor’s inferior painting work did not arise from an “accident” within meaning of the policy at issue. Rather, damage from the subcontractor’s work amounted solely to a breach of contract, which did not constitute an “occurrence”. Id. at 627.

While losses that occur only as a result of an insured’s failure to fill its contractual obligations are not an “occurrence,” “property damage resulting from the negligent performance of a contract can qualify as being ‘caused by accident’ if the damage results from a tort.” Schneider Equip., Inc. v. Travelers Indem. Co. of Ill., 2005 WL 1565006, at *5 (D. Or. 2005) (court held that negligent installation and supervision of a screen in a well that caused irreparable damage to the well was deemed to be an “occurrence”); Oak Crest, 998 P.2d at 1257; Willmar Dev’t, LLC v. Illinois Nat’l Ins. Co., 726 F. Supp. 2d 1280, 1286 (D. Or. 2010); H.D.D. Co. v. Navigators Specialty Ins. Co., 2019 U.S. Dist. LEXIS 113561, 2019 WL 2996911 (D. Or., July 9, 2019).

3. Timing of “Property Damage”

A federal court in Oregon has held that, for purposes of trigger in the construction defect context, “[a]ctual injury must occur during the policy period in order to trigger a policy's coverage.” Charter Oak Fire Ins. Co. v. Interstate Mech., Inc., 958 F.Supp.2d 1188, 1212-13 (D.Or. 2014) (vacated by stipulation). Under the “actual injury” theory, “coverage exists under every policy that was in effect during the time periods in which damage to property actually occurred, even if the damage was discovered long after it began.” Id.; see also St. Paul Fire & Marine Ins. Co. v. McCormick & Baxter Creosoting Co., 324 Or. 184, 201, 923 P.2d 1200, 1210 (1996) (holding that policies are triggered at the time of actual injury in the environmental contamination context).
4. The “Business Risk” Exclusions

While there is limited Oregon case law addressing the application of the “business risk” exclusions, the District of Oregon has found that those exclusions barring coverage for damages related to the repair or replacement of defective materials and workmanship, such as the “your work” and “your product” exclusions, preclude coverage for property damage claims associated with defective construction. Atlantic Mut. Ins. Co. v. SCP Global Tech., Inc., 2006 WL 1142701, at *3, *7-8 (D. Or. April 25, 2006) (holding that CGL insurer had no duty to defend or indemnify insured “because any conduct giving rise to liability by [the insured] will be excluded from coverage under the Policy” due to the application of the “your work” and “your product” exclusions); Schneider Equip., Inc. v. Travelers Indem. Co. of Illinois, 2006 WL 2850465, at *5 (D. Or. Sept. 29, 2006) (holding “your work” exclusion bars coverage for claims against insured who installs water systems where only damages alleged were for well parts installed by insured).

In Schneider Equipment, the insured filed an action for breach of contract against its insurer based on the insurer’s refusal to defend the insured in an underlying action. In the underlying action, one of the insured’s employees damaged a well screen during the installation process, which caused damage to the well. Id. at *1. The company that hired the insured, which was a corporation that engaged in the business of constructing complete water systems, filed suit, prompting the insured to seek a defense from the insurer. The insurer denied coverage and the plaintiff filed an action for breach of contract. Id. at *1-2. The district court agreed with the insurer and held that the plaintiff’s claim was not covered under the CGL policy because the “your work,” “your product,” and “impaired property” exclusions were “each . . . applicable and would preclude coverage for the damage” alleged by the plaintiff. Id. at *5.

In Bresee Homes Inc. v. Farmers Ins. Exchange, 293 P.3d 1036 (Or. 2012), allegations were made that a builder “failed to install flashing properly and that the exterior synthetic stucco . . . leaked water into the interior [of the home] and failed.” Id. at 1038. The Supreme Court held that the “products - completed operations hazard” exclusion does not bar coverage where the allegations in the complaint “describe events and damage that occurred in the past, but which could have occurred at any time after contract execution. The allegations describing past deficient performance and damage do not necessarily say anything about the date [the builder] completed its work.” Id. at 1042. The insurer held policies with the insured builder before, during, and after the installation of the stucco. Id. at 1038.
1. The “Property Damage” Requirement

Pennsylvania courts have not specifically analyzed whether a contractor’s faulty workmanship constitutes “property damage” under a CGL policy. Instead, they have generally skipped over the analysis of the “property damage” requirement to focus on the issue of whether “property damage” caused by faulty workmanship constitutes an “occurrence.”

The closest a court has come to analyzing the “property damage” requirement under Pennsylvania law was in Nationwide Mut. Ins. Co. v. CPB Intern., Inc., 562 F.3d 591 (3d App. 2009), where the Third Circuit Court of Appeals found claims that a nutritional supplement was deficient and of improper composition constituted “property damage” as defined under a CGL policy. In CPB, an underlying lawsuit alleged that a nutritional supplement shipped by the insured was deficient, of improper composition, and unusable for its intended purpose (which was to be combined with other ingredients to manufacture nutritional tablets). "Id. at 593-94. It was alleged that the improper composition of the supplement was not discovered until after it had already been combined with other ingredients to form the nutritional tablet, and that the tablets were useless as a result. "Id. at 594.

While the Court in CPB merely concluded that the underlying complaint alleged “property damage” with no instructive analysis, the court’s holding suggests that it did so on the premise that the allegations against the insured included consequential damages, i.e., that the insured’s supplement when combined with other ingredients made the entire tablet useless.

2. The “Occurrence” Requirement

Pennsylvania courts have determined that a contractor’s faulty workmanship does not constitute an “occurrence” under a CGL policy. Kvaerner Metals Div. of Kvaerner U.S., Inc. v. Commercial Union Ins. Co., 589 Pa. 317 (2006). In Kvaerner, the insured was retained to design and construct a coke oven battery for Bethlehem Steel Corporation (“Bethlehem”). "Id. at 321. Bethlehem ultimately sued the insured, alleging that the coke oven battery was damaged and did not meet the contract specifications and warranties (alleging claims for breach of contract and breach of warranty). "Id. at 322.

The Supreme Court of Pennsylvania in Kvaerner held that the definition of an “accident,” which is required to establish an “occurrence,” cannot be satisfied by a claim for faulty workmanship. "Id. at 335. The Court stated that “[s]uch claims simply do not present the degree of fortuity contemplated by the ordinary definition of ‘accident’ or its common judicial construction in this context.” "Id. at 336. As the complaint averred only “property damage from poor workmanship to the work production itself,” the Court held that there was no “occurrence,” and therefore no duty to defend or indemnify the insured. "Id.; see also Nationwide Mut. Ins. v. CPB Int’l, Inc., 562 F.3d 591 (3d. Cir. 2009) (stating that “Pennsylvania law does not recognize applicability of a general liability policy to breach of contract and breach of warranty claims,” even if consequential damages are alleged by the underlying plaintiff); Zurich Am. Ins. Co. v. R.M. Shoemaker Co., 519 Fed. Appx. 90, 93 (3d. Cir 2013) (“Faulty workmanship - whether caused by the contractor’s negligence alone or by
the contractor’s negligent supervision, which then permitted the willful misconduct of its subcontractors does not amount to an ‘accident’ or ‘occurrence.’ Nor does a foreseeable act like the subsequent water infiltration into the structure.”

In addition to finding that faulty workmanship does not constitute an “occurrence,” Pennsylvania courts have also determined that ancillary damage to non-defective work caused by the faulty workmanship does not constitute an “occurrence.” Millers Capital Ins. Co. v. Gambone Brothers Dev. Co., 941 A.2d 706 (Pa. Super. 2007) (“Gambone”). The underlying lawsuits in Gambone alleged that numerous residential homes were damaged from water infiltration by improper stucco application. Id. at 708-10. The homeowners alleged that Gambone, the insured, as the general contractor, had engaged in poor workmanship, which included faulty design, implementation and supervision of the building process. That defective work allegedly caused water to leak into the structures and damage the interior and exterior components with mold growth, cracking, and moisture penetration. Id. The theories for relief against Gambone were breach of warranty, fraud, negligent representation, and violation of the Unfair Trade Practices and Consumer Protection Law. Id.

The court in Gambone, following Kvaerner, found “natural and foreseeable acts, such as rainfall, which tend to exacerbate the damage, effect, or consequences” initially caused by faulty workmanship are not sufficiently fortuitous to constitute an “occurrence” under comprehensive general liability policies. Id. at 713. Additionally, the Gambone court held that the inclusion of the phrase “continuous or repeated exposure to substantially the same general harmful conditions” in the definition of “occurrence” did not create coverage outside of there being an “accident.” Id. at 714. This phrase simply means that an “accident” can include a series of fortuitous events. Id. Therefore, although there was “continued and repeated” water damage to the homes at issue in Gambone, there was no “occurrence” because the “continued and repeated” damage was caused by faulty workmanship. Id. at 714.

The Kvaerner and Gambone decisions have since been followed by Pennsylvania federal courts applying Pennsylvania law to faulty workmanship cases. See, e.g., Specialty Surfaces Int’l, Inc. v. Cont’l Cas. Co., 609 F.3d 223 (3d Cir. 2010) (“Specialty Surfaces”) (relying on Kvaerner and Gambone in finding water damage to ground subgrade work was a foreseeable result of the failure to properly design and install the synthetic turf and subdrain system); Nationwide Mut. Ins. Co. v. CPB Int’l, Inc., et al., 562 F.3d 591, 596-597 (3d Cir. 2009) (Pennsylvania law) (applying Kvaerner and Gambone to find that neither faulty workmanship nor consequential damages from faulty workmanship not caused by a fortuitous event does not constitute an “occurrence”); State Farm Fire & Cas. Co. v. Brighton Exteriors, Inc., 2015 WL 894419, at *5-6 (E.D. Pa. 2015) (following Kvaerner, Gambone and Specialty Surfaces to hold that “faulty workmanship under a contract is not sufficiently fortuitous to qualify as an ‘occurrence’” and further that “there is no duty to defend even if the alleged faulty stucco work causes additional damage”); Trans. Ins. Co. v. C.F. Bordo, Inc., 2009 WL 839366, at *1 (M.D. Pa. 2009) (relying on Kvaerner and Gambone, noting that faulty workmanship claims concerning the exterior of a residence do not possess the degree of fortuity necessary to establish an occurrence, and further that ancillary and accidental damage caused by faulty workmanship did not constitute an occurrence).

By contrast, where the claim against the insured concerns the design and/or manufacture of a defective product, Pennsylvania courts have found that the claim arises from an “occurrence.” See Indalex, Inc. v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa., 83
A.3d 418 (Pa. Super. 2013), appeal den., 627 Pa. 759 (2014)(holding that an “occurrence” was presented where the claims against the insured concerned its defective design and manufacture of windows, resulting in water damage to other property, and distinguishing Kvaerner and Gambone because the claim concerned “an off-the-shelf product that failed and allegedly caused property damage and personal injury” and because, unlike Kvaerner, the policy’s definition of “occurrence” included the subjective requirement that the accident must cause damage “neither expected nor intended from the standpoint of the insured”); Brayman Construction Co. v. Westfield Ins. Co., 2019 WL 1060277 (W.D.Pa. Mar. 6, 2019)(following Indalex and finding an “occurrence” where claims against the insured concerned its defective design, manufacture and delivery of concrete to a construction project). In addition, the Superior Court of Pennsylvania has recently found that Kvaerner did not govern a claim by a commercial tenant against its landlord arising from the alleged breach of lease requirements to maintain the roof, resulting in a flood damaging the tenant’s inventory. Penn. Manufacturers Indemnity Co. v. Pottstown Industrial Complex LP, 2019 WL 3281746 (Pa. Super. Jul. 22, 2019)(holding that claim at issue arose from an “occurrence”).

3. **Timing of “Property Damage”**

While Pennsylvania courts have not specifically addressed the timing issue in the context of a construction defect claim, the Pennsylvania Supreme Court recently held that the “first manifestation” trigger theory applied to determine which CGL policies would be triggered by claims for “continuous and progressive” property damage to a dairy herd caused by water contamination. Pennsylvania Nat’l Mut. Cas. Ins. Co. v. St. John, 106 A.3d 1, 2014 WL 7088712 (Pa. 2014). In so holding, the Pennsylvania Supreme Court explicitly declined to apply the multiple or continuous trigger theory that the Court had previously adopted for asbestos bodily injury claims in J.H. France Refractories Co. v. Allstate Ins. Co., 534 Pa. 29 (Pa 1993):

[W]hile the multiple trigger theory of liability appropriated the reasonable expectations of the insured in J.H. France [asbestos], the circumstances of the damage to Appellants’ dairy herd, coupled with the language of the Penn National policies does not warrant its application herein. Our holding in J.H. France remains an exception to the general rule under Pennsylvania jurisprudence that the first manifestation rule governs a trigger of coverage analysis for policies containing standard CGL language. We therefore find J.H. France distinguishable and decline to apply the multiple trigger theory of liability to determine coverage under the Penn National policies for the damages sustained by Appellants’ dairy herd.

St. John, 106 A.3d at 23; but see Pa. Mfrs. Ass’n Ins. Co. v. Johnson Matthey, Inc., 160 A.3d 285 (Pa. Commw. 2017) (concluding that the court in St. John did not limit J.H. France to asbestos or bodily injury claims; “Contrary to Insurer’s characterizations, neither the Supreme Court’s rejection of a multiple trigger of coverage in St. John nor the Court’s reasoning in that opinion suggests that J.H. France Refractories Co. is inapplicable to property damage coverage for undetected environmental contamination.”)
St. John involved water contamination at a dairy farm that caused various health and reproductive problems with a dairy herd beginning as early as April 2004, and progressing with greater frequency over the next few years. 2014 WL 7088712, at *1. The farm owners alleged that they did not suspect the herd’s drinking supply was the cause of their difficulties until March 2006. Id. at *2. After investigation, the farm owners determined that the herd’s drinking water had been contaminated, and that the contamination was caused by defective plumbing done when LPH Plumbing & Heating (“LPH”) installed a new plumbing system in July 2003. Id. The farm owners sued LPH and its welding subcontractors, Stoltzfus Welding (“Stoltzfus”) for negligent installation of the plumbing system. Id. Following trial, a verdict was entered against LPH and Stoltzfus in the amount of approximately $3.8 million. Id.

LPH was defended in that suit by its liability insurer, Pennsylvania National Mutual Casualty Insurance Company (“Penn National”), which had issued three successive one-year CGL policies to LPH in effect from July 1, 2003 through July 1, 2006, and one umbrella policy in effect from July 1, 2005 to July 1, 2006. Id.

Penn National filed a declaratory judgment action seeking to determine its rights and responsibilities under the four policies it had issued to LPH. Id. The trial court entered an order declaring that only the 2003-2004 CGL policy had been triggered, because the events constituted a single occurrence which took place when the effects of LPH’s negligence first manifested in April 2004 in the form of decreased milk production. Id. at *4. On the farm owners’ appeal, the intermediate appellate court affirmed the trial court’s holding. Id. at *6.

The farm owners appealed to the Supreme Court of Pennsylvania, which held that a first manifestation trigger applied, and that under such an approach, coverage is triggered under a policy when either bodily injury or property damage becomes reasonably apparent. Id. at *14. Accordingly, the court held that physical injury to tangible property or loss of use of tangible property first became reasonably apparent in April 2004 when the herd experienced a significant drop in milk production and/or experienced higher incidents of various illnesses. Id. at 15.

In so holding, the court stated that its decision was further informed “by the fact that since 1986, in Pennsylvania the first manifestation rule has served as the test for determining coverage under commercial general liability policies, with the lone exception of asbestos bodily injury claims.” Id.; see also West Am. Ins. Co. v. Lindepuu, 128 F. Supp.2d 220 (E.D. Pa. 2000) (court held that only those policies in force when property damage from contractor’s negligent installation of windows and doors first became apparent were triggered).

4. The “Business Risk” Exclusions

In Ryan Homes, Inc. v. Home Indem. Co., 438 Pa. Super. 342 (Pa. Super. Ct. 1994), the court held that coverage was barred by certain “business risk” exclusions. In Ryan Homes, a subcontractor installed fire-retardant roof sheathing on homes built and sold by Ryan Homes. Id. at 344. After the sheathing was applied, roof shingles and other roofing materials were applied to the roofs by a different subcontractor. Id. Ryan Homes later discovered that much of the plywood used in the roofing projects was defective, deteriorating, and causing loss of structural strength to the buildings. Id. Faced with threats of a lawsuit, Ryan Homes repaired the defective roofs. Id. After the project was complete, Ryan Homes filed a claim against its insurer for the cost of removing and replacing the roof shingles and for disposing of
the trash and administering its program of handling customer complaints. **Id.**

The court in *Ryan Homes* held that “[a] liability policy excluding damage to any goods or products made or sold by the insured or for ‘work completed by or for’ [the insured] does not insure any obligation of the policyholder to repair or replace [its] own defective work or product.” . . . The insured, therefore, must assume the risk of the quality of its product and its work. **Id.** at 348-49. “Regardless of the underlying cause of action against the insured, [the exclusions] eliminate coverage for property damage caused by the lack of quality or performance of the insured’s products and for any repair or replacement of the faulty work performed by or on behalf of the insured.” **Id.** at 349.

Furthermore, in *Lindepuu*, the District Court for the Eastern District of Pennsylvania held that a contractor’s negligent installation of doors and windows was subject to a business risk exclusion for impaired or recalled property because the repairs and replacement of the items in question were a result of a “known or suspected defect, deficiency” or “inadequacy.” 128 F. Supp. 2d at 229. Specifically, the court held that:

> [the contractor] installed the windows and doors in an allegedly negligent fashion. This constitutes his “work.” The windows and doors themselves are either also his “work” or property other than his own that cannot be used or is less usable because it incorporates work that is thought to be defective, deficient, or inadequate; or in other words “impaired property.” . . . Under the plain language of the policy the claims against [the contractor] for damage to the windows and doors and the cost for their replacement are not covered under Exclusion “n.”

**Id.** at 229.

Further, in *Washington Energy Co. v. Century Sur. Co.*, 407 F. Supp. 2d 680 (W.D. Pa. 2005), the Western District of Pennsylvania, applying Pennsylvania law, held that the impaired property exclusion did not apply because the damages claimed by insured Columbia Gas were not related to a recalled or withdrawn product but rather from the loss of use of its own transmission lines.
RHODE ISLAND

1. The “Property Damage” Requirement

Although there is little case law in Rhode Island addressing the “property damage” requirement in CGL policies, at least one court has dealt with the issue in the construction defect context. See Aetna Cas. & Sur. Co. v. Consulting En’v’t Eng’rs, Inc., 1989 WL 1110231 (R.I. Super. Ct. June 20, 1989). In Aetna, the insured engineer was sued for negligence in the preparation of specifications and blueprints in connection with a municipal sewer project. Id. at *1. The city alleged that the insured’s negligence resulted in pipes and manholes being installed below the proper grade. Id. at *1. In determining whether the alleged damage constituted “property damage,” the court concluded that the manholes and pipes constituted tangible property. Id. at *4. The court further explained, “[t]angible property does not need to be broken to be injured. It will suffice if it is or becomes so defective to be inoperable.” Id. Moreover, the introduction of the defective components into the entire project “may well have constituted physical injury to the entire project for which [the insured] had contractual responsibility.” Id.

Alternatively, the court in Aetna noted that the definition of “property damage” also extended to “loss of use of tangible property which has not been physically injured” and that there was “no question” that the city had lost use of the tangible manholes and pipes as originally installed. Id. By contrast, the court held that strictly economic losses and punitive damages based upon the insured’s allegedly intentional false statements were not accidental and, thus, did not fall within the scope of “property damage.” Id. at *5.

2. The “Occurrence” Requirement

While there is also little case law that addresses the “occurrence” requirement, the court in Aetna concluded that the improper installation and settlement of manholes and pipes did constitute an “occurrence” under a multi-peril policy. 1989 WL 1110231 at *4. In so holding, the court stated while it “may well have been the foreseeable consequence of some negligence of the defendant . . . one cannot say that the defendant expected the damaging consequences of its conduct unless one can say that the defendant knew that its conduct would result in the harmful consequence and pursued it anyway.” Id.

3. Timing of “Property Damage”

Answering a certified question from the United States Court of Appeals for the First Circuit, the Supreme Court of Rhode Island held that “an ‘occurrence’ under a general liability policy takes place when property damage, which includes property loss, manifests itself or is discovered or in the exercise of reasonable diligence, is discoverable.” See CPC Int’l, Inc. v. Northbrook Excess & Surplus Ins. Co., 668 A.2d 647, 649 (R.I. 1995). The court explained:
[T]here can be no occurrence under the policy without property damage that becomes apparent during the policy period, and property loss and compensable damages cannot be asserted unless the property damage is discovered or manifests itself. “Property damage” and “occurrence” are thus inextricably intertwined.

Id.

Accordingly, Rhode Island courts apply a manifestation trigger theory in evaluating the timing of property damage. Id. (citing Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12 (1st Cir. 1982)).

4. The “Business Risk” Exclusions


In Gen. Accident Ins. Co. of Am. v. Am. Nat’l Fireproofing, Inc., 716 A.2d 751 (R.I. 1998), General Accident sought a declaratory judgment that its policy did not provide coverage for the cost of tearing down homes in order to replace fireproofing material installed by the insured. Id. at 752. The exclusion at issue precluded coverage “to that particular part of any property . . . the restoration, repair or replacement of which has been made or is necessary by reason of faulty workmanship thereon by or on behalf of the insured.” Id. at 758. The Supreme Court of Rhode Island upheld the lower court’s holding that “the work involved in correcting the inadequacy of the fireproofing clearly fell within the plain meaning of the faulty workmanship exclusion.” Id. In so holding, the court rejected the argument that the exclusion only applies to coverage for repair, restoration, or replacement of the fireproofing itself and not other consequential damages involved in actually performing the replacement. Id.

Likewise, in Emp’rs Mut. Cas. Co. v. Pires, 723 A.2d 295 (R.I. 1999), the Supreme Court of Rhode Island held that exclusions (j)(5) and (j)(6) were unambiguous and enforceable to bar coverage for damages to windows caused by the insured subcontractor’s faulty work. Id. at 299. During the course of painting doors and window frames in a home, the subcontractor allegedly scratched some window panes. Id. at 296. In determining whether the exclusions were triggered, the court explained:
If Pires performed work on the window panes in connection with painting the window frames . . . and he negligently damaged the panes as part of such a preparation or cleanup operation, then the damage would fall within the exclusion for incorrectly performed work. If, on the other hand, Pires did not intentionally perform work on the window panes in connection with painting the window frames, but only damaged them accidentally when he was performing work on the frames, then such damage would not fall within the policy’s exclusion for “incorrectly performed work” on such property.

Id. at 299.

The Supreme Court of Rhode Island later distinguished the Pires holding in Shelby Ins. Co. v. Northeast Structures, Inc., 767 A.2d 75, 77 (R.I. 2001). In Shelby, the allegedly defective temporary bracing installed by the insured led to the collapse of a structure during a storm. Id. at 76. While the insured argued that its work was merely the temporary braces and not the structure itself, the court concluded that, unlike Pires, the installation of temporary bracing could not be separated from the structure itself. Id. at 77. Therefore, the damage caused by the insured’s faulty workmanship on the temporary braces would fall within exclusions (j)(5) and (j)(6) unless the collapse was the result of an “Act of God.”
1. **The “Property Damage” Requirement**

The Supreme Court of South Carolina in *Crossman Communities of N.C. v. Harlesyville*, 395 S.C. 40 (S.C. 2011) held that damage to the insured’s defective work itself did not constitute “property damage, while damage caused by the defective work would constitute ‘property damage.’” *Id.* at 49. In *Crossman*, homeowners brought suit against the developers of a series of condominium projects, alleging that the developers negligently constructed the units resulting in the units experiencing substantial decay and deterioration, namely that the interior of the condominiums were damaged by water intrusion caused by the negligently installed siding. *Id.* at 44. The court held that costs to replace the negligently constructed stucco did not constitute “property damage,” but the damage caused by water penetration to the remainder of the project did. *Id.* at 49.

The Supreme Court of South Carolina has also held that claims for diminution in value are not claims for “property damage” under a CGL policy. *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 588 S.E.2d 112 (S.C. 2003). In *Carl Brazell*, a number of homeowners filed suit against various contractors alleging diminution in value of their respective properties arising out of the contractor’s failure to disclose the fact that the development was previously used as a training site for aerial bombing during WWII and, as a result, the property contained a number of potentially hazardous materials. *Id.* at 113. The court found that plaintiffs’ complaint failed to allege any physical injury or loss of use as defined by the policy. Rather, the plaintiffs were seeking solely the economic losses resulting from the diminished resale values of their homes. *Id.* at 115. Accordingly, the court held there was no coverage under the policies as the diminished value of property does not constitute physical injury to tangible property. *Id.*

2. **The “Occurrence” Requirement**

In 2011 the South Carolina Legislature enacted a statute that provides:

> 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.

*South Carolina Code §38-61-70.*

This statute does not apply retroactively and only applies prospectively to contracts executed on or after May 17, 2011. See *Harleysville Mut. Ins. Co. v. State*, 736 S.E.2d 651 (S.C. 2012) (holding the statute’s retroactivity provision unconstitutional).

In a case prior to the enactment of §38-61-70, the Supreme Court of South Carolina held that “property damage” to an insured’s work product, standing alone, caused by faulty workmanship, did not constitute an “occurrence.” *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 121, 621 S.E.2d 33, 35 (S.C. 2005).
In L-J, the Supreme Court of South Carolina examined whether damage caused by the faulty workmanship of a contractor and its subcontractors on a road construction project was covered under a CGL policy issued to the contractor. Id. at 33-35. The court held that negligent acts of a contractor that result in damage to the work they were contracted to perform do not constitute an “occurrence” under a standard CGL policy. Id. at 36. The court stated that “a CGL policy is not intended to cover economic loss resulting from faulty workmanship.” Id. at 35. Further, the court noted, “because faulty workmanship is not something that is typically caused by an accident or by exposure to the same general harmful conditions, we hold that the damage in this case did not constitute an occurrence.” Id. The court reasoned that if it had reached a contrary result, “the CGL would be more like a performance bond, which guarantees the work, rather than like an insurance policy, which is intended to insure against accidents.” Id.

However, in Crossman Communities, 395 S.C. 40, the Supreme Court of South Carolina found the definition of “occurrence” to be ambiguous, and thus, construed it in favor of coverage for damages to other property caused by repeated water intrusion. “Occurrence” in the policy at issue was defined to include “continuous or repeated exposure to substantially the same general harmful conditions.” Id. at 47. This decision was issued shortly after the enactment of §38-61-70.

3. **Timing of “Property Damage”**

South Carolina applies a “modified continuous trigger theory” to claims for continuing damages. See Joe Harden Builders, Inc. v. Aetna Cas. & Sur. Co., 486 S.E.2d 89 (S.C. 1997). Under this theory, “coverage is triggered at the time of an injury-in-fact and continuously thereafter to allow coverage under all policies in effect from the time of injury-in-fact during the progressive damage.” Id. at 91. Thus, “coverage is triggered whenever the damage can be shown in fact to have first occurred, even if it is before the damage became apparent.” Id.

4. **The “Business Risk” Exclusions**

The Supreme Court of South Carolina has upheld the application of the business risk exclusion to claims brought against a general contractor arising out of allegedly defective workmanship performed by a subcontractor. Century Indem. Co. v. Golden Hills Builders, Inc., 561 S.E.2d 355, 358-59 (S.C. 2002) (reversed on other grounds). In Golden Hills, the court explained:

A comprehensive liability policy, such as the one at issue, provides coverage “for all the risks of legal liability encountered by a business entity,” with coverage excluded for certain risks . . . [i]t is not intended to insure business risks, i.e., risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage . . . [t]he policies do not insure [an insured’s] work itself, but rather, they generally insure consequential risks that stem from that work . . . [b]ased on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision.
Id. (citing Rowland H. Long, The Law of Liability Insurance, § 3.06(1) (2001)); Isle of Palms Pest Control Co. v. Monticello Ins. Co., 459 S.E.2d 318 (S.C. Ct. App. 1995) (general liability policy is intended to provide coverage for tort liability for physical damage to property of others; it is not intended to provide coverage for insured’s contractual liability which causes economic losses); Engineered Prods., Inc. v. Aetna Cas. & Sur. Co., 368 S.E.2d 674 (S.C. App. 1988) (under policy excluding coverage for damages resulting from restoration, repair, or replacement of insured’s defective work, insurer had no duty to defend its insured in action where losses were result of faulty workmanship by insured’s subcontractor); see also Bennett & Bennett Const. Inc. v. Auto Owners Ins. Co., 747 S.E.2d 426 (S.C. 2013) (holding there is no coverage under a CGL policy where a subcontractor, acting on behalf of an insured, directly damages the insured’s work product, necessitating removal and replacement of the same, during the insured’s operations because operations were ongoing).
1. **The “Property Damage” Requirement**

South Dakota courts uphold the general principle that faulty workmanship resulting in damage to third-party property constitutes “property damage” under a CGL policy. See *Corner Constr. Co. v. U.S. Fid. & Guar. Co.*, 638 N.W.2d 887, 894-95 (S.D. 2002). In *Corner Construction*, the Supreme Court of South Dakota held that damage to the general contractor’s work caused by the insured subcontractor’s faulty workmanship constituted “property damage” covered under a CGL policy. *Id.* at 895.

Likewise, in *Dakota Block Co. v. W. Cas. Co.*, 132 N.W.2d 826 (S.D. 1965), the Supreme Court found that the insured manufacturer’s defective concrete blocks resulting in discoloration and cracking of exterior walls of a school constituted “property damage” to the entire building. *Id.* at 830. While “property damage” requires “injury to or destruction of property other than the goods or products of the insured,” South Dakota courts recognize that “consequential damages, including diminution of value of property, caused by the use or application of a deficient or inferior product, fall within the coverage provisions” of a CGL policy. *St. Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361, 366 (8th Cir. 1966).

In *Northern Grain*, the Eighth Circuit, applying South Dakota law, held that the diminution of productivity of a wheat crop due to the insured’s inferior and deficient seeds constituted “property damage.” *Id.* at 366. But see *SLA Prop. Mgmt. v. Angelina Cas. Co.*, 856 F.2d 69, 73 (8th Cir. 1988) (agreeing with the United States District Court for the District of South Dakota that the inclusion of the word “physical” in the definition of property damage “negates any possibility that the policy was intended to include consequential or intangible damage”).

2. **The “Occurrence” Requirement**

Under South Dakota law, an “occurrence” is defined as an “accident,” or an “event that is undesigned, sudden, and unexpected.” *Corner Construction*, 638 N.W.2d at 894 (citing *Taylor v. Imperial Cas.*, 144 N.W.2d 856, 858 (S.D. 1966) (citations omitted)). In *Corner Construction*, the Supreme Court of South Dakota concluded there was an “occurrence” where the subcontractor’s negligent installation of a vapor barrier caused damage to the general contractor’s work and required removal and replacement of the drywall installed by the general contractor. *Id.*

3. **Timing of “Property Damage”**

South Dakota courts acknowledge that coverage under an occurrence-based policy is triggered at the time the complaining party is actually damaged rather than when the wrongful act was committed. *Kirkham, Michael & Assoc., Inc. v. S. D.*, 361 F. Supp. 189 (D.S.D. 1973). In *Kirkham*, the insured architectural firm prepared plans and specifications for the construction of a municipal waste treatment facility. *Id.* at 189. After turning the project over to the city, various deficiencies were discovered causing the city to expend additional sums to repair the facility. *Id.* at 190. No damage was alleged to have been sustained prior to the tender of the project to the city. In considering which policy period
was implicated, the United States District Court for the District of South Dakota explained:

It is the damage incurred by “accident” that triggers the policies’ coverage, not the preceding wrongful acts. A thorough reading of the complaint discloses that the City sustained actual damages or injury by accident when the alleged defective facility was turned over for possession and operation. Counsel for [the insured] does not explain how they suffered an “accident” or “injury” prior to this time.

Id. at 193.

Accordingly, the court held that the policy in effect at the time the plant was turned over to the city, when the deficiencies were discovered, was the applicable policy period. Id.

4. The “Business Risk” Exclusions


In Haugan, the insured contracted to design and to construct an aircraft hangar. 197 N.W.2d at 20. The owner of the hangar later commenced a suit alleging the contractor failed to perform in a workmanlike manner by failing to provide proper footings and foundations causing portions of the structure to sink and to separate from the rest of the foundation and causing various other components, such as windows, doors and floors, to become cracked or broken. Id. The court denied coverage based on the “your work” exclusion, finding that the exclusion denied coverage “for liability on a claim arising out of damage to the work or product of the insured.” Id. at 22; see also Swenson, 831 N.W.2d 402 (holding that weather damage to a home as a result of builder’s negligent failure to protect the project from the same, and the inclusion of moldy and damaged building materials in the house fell within the “your work” exclusion to deny coverage).

In Alverson, the Supreme Court of South Dakota found that exclusion j(6) unambiguously applied to preclude coverage to property that had to be repaired due to the insured’s faulty workmanship. 559 N.W.2d at 236. In Alverson, the insured subcontractor caused damage to windows while cleaning them in the course of performing masonry work. Id. at 234. Although cleaning the windows was not included in the subcontractor’s contract, the court found “it became [the insured’s] work to clean them incidental to the contract.” Id. at 236. Therefore, because the insured’s faulty workmanship required the windows to be “restored, repaired or replaced,” the court concluded that coverage was barred by the exclusion. Id.; see also Swenson v. Auto Ins. Co., 831 N.W.2d 402, 409-10 (S.D. 2013) (holding that insured’s use of materials that had sustained water damage were not “real property” under exclusion j(6), but separately found that water damage to the building itself which occurred “under the supervision of” the insured during active performance of construction work as a result of negligently failing to protect the work from weather constituted damage to “real property” such that exclusion j(6) applied); Swenson, 831 N.W.2d at 408-09 (S.D. 2013) (holding that building materials left outside by construction company which sustained
water damage were the “personal property” of the builder, and that the materials were in the “care, custody, and control” of the builder when they were damaged because the damage was the result of the builder’s failure to maintain the site during the winter, such that exclusion j(5) applied to bar coverage).

In Owners Ins. Co. v. Tibke Constr., Inc., the Supreme Court of South Dakota narrowly construed exclusion j(7) (identical to exclusion j(6) typically found in ISO forms) to preclude coverage for damage to the specific part of a structure upon which the insured or its representative’s defective work was performed. 901 N.W.2d 80, 85-87 (S.D. 2017). In doing so, the Court held that exclusion j(7) did not preclude coverage for settlement damage to the properly constructed home that the insured build atop soil whose compaction was incorrectly tested by the insured’s subcontractor. Id. at 88.

Finally, in Dakota Block, the Supreme Court found the “your product” exclusion to be inapplicable where the insured manufacturer’s concrete blocks caused damage beyond the blocks themselves:

We are satisfied that common sense dictates there was substantial property damage to the entire school building when the exterior walls presented a faded, discolored, mottled and unsightly appearance in contrast to a uniform and eye-pleasing manifestation envisioned by the original plans. To say the damage in such instance can be confined to the blocks as distinct from the school building, we feel, is unrealistic and loses sight of the forest because of the trees. . . . [T]he uncontradicted testimony of costs of reconstruction lead to the inevitable conclusion of a damaged structure caused by the plaintiff’s defective product. This places the loss within the policy coverage.

Dakota Block, 132 N.W.2d at 830.

Thus, because the alleged damage was not just to the insured’s concrete blocks, the “your product” exclusion did not apply. Id.
TENNESSEE

1. The “Property Damage” Requirement

The Supreme Court of Tennessee has held that faulty workmanship, by itself, does not constitute “property damage” under a CGL policy. Travelers Indem. Co. of Am. v. Moore & Assoc., Inc., 216 S.W.3d 302 (Tenn. 2007). Faulty workmanship which causes property damage to other non-defective work, however, does constitute “property damage.” Id.

In Moore, a general contractor entered into a contract to construct a hotel. Id. at 304. During the construction of the hotel, the general contractor hired a subcontractor to provide and to install the hotel windows. Id. The subcontractor negligently installed the windows, which permitted water intrusion into the hotel. Id. The water intrusion then caused severe damage to some of the interior components of the hotel. Id. The general contractor’s insurer disclaimed coverage for the claim on the grounds that claims based on faulty workmanship are not covered under a CGL policy. Id. at 307.

Addressing the issue of “property damage,” the Moore court noted the difference between “faulty workmanship” and faulty workmanship that causes “property damage”:

We conclude that Hilcom’s claim is not limited to faulty workmanship and does in fact allege “property damage.” Moore’s subcontractor allegedly installed the windows defectively. Without more, this alleged defect is the equivalent of the “mere inclusion of a defective component” such as the installation of a defective tire, and no “property damage” has occurred. The alleged water penetration is analogous to the automobile accident that is caused by the faulty tire. Because the alleged defective installation resulted in water penetration causing further damage, Hilcom has alleged “property damage.” Id. at 310; see also Columbia Nat’l Ins. Co. v. JR Livingston Constr., LLC, 2016 WL 1259560, at *4 (M.D. Tenn. Mar. 28, 2016) (relying on Moore to find that an insurer’s duty to defend was triggered by allegations of damage to other property as a result of the insured’s faulty workmanship); Forrest Constr., Inc. v. Cincinnati Ins. Co., 728 F. Supp. 2d 955, 964-65 (M.D. Tenn. 2010) (“Moore made it clear that ‘property damage’ occurs when one component of a finished product damages another component.”).

2. The “Occurrence” Requirement

In Moore, the Supreme Court of Tennessee held that faulty workmanship that causes damage to some other portion or component of the construction is an “occurrence” under a CGL policy. 216 S.W.3d at 308-09. In Moore, the court concluded that “the water penetration was an event that was unforeseeable[, and thus,] the alleged water penetration is both an ‘accident’ and an ‘occurrence’ for which there is coverage under the ‘insuring agreement.’” Id. at 309; see also State Farm Fire & Cas. Co. v. Bonetti, 2012 WL 1252540, at *3 (W.D. Tenn. Apr. 13, 2012) (noting that accident and negligence are not synonymous when determining whether there was an “occurrence” under a CGL policy).
3. **Timing of “Property Damage”**

The issue as to the timing of property damage in a construction defect case has not yet been addressed by Tennessee courts.

4. **The “Business Risk” Exclusions**

The Supreme Court of Tennessee has held that the subcontractor exception to the “your work” exclusion applies when the damages were a result of work performed by a subcontractor. *Moore*, 216 S.W.3d at 310. Therefore, because the faulty workmanship in the Moore case was performed by a subcontractor, and not the insured, a general contractor, the court held that the “your work” exclusion was inapplicable. *Id.*

In so holding, however, the Moore court did observe that the insured’s work would have constituted the entire hotel. *Id.* Thus, in the absence of the subcontractor exception to the “your work” exclusion, the “your work” exclusion would have operated so as to bar coverage in the claim in Moore. *Id.* Particularly, the Moore court stated:

> [W]e conclude that the entire hotel meets the definition of “your work” because the entire construction project was performed by Moore or by subcontractors on Moore’s behalf. Therefore, all damages to the hotel initially are excluded by the “your work” exclusion. . . . The CGL [policy] in this case, however, contains a subcontractor exception to the “your work” exclusion. . . . The subcontractor exception provides that any damages arising out of the work performed by a subcontractor fall outside the “exclusion” and are covered under the CGL [policy]. It is alleged that the installation of the windows was performed by subcontractors hired by Moore. Therefore, damages resulting from the subcontractors’ faulty installation of the windows are not excluded from coverage, even if those damages affected Moore’s work.

*Id.*; see also JR Livingston Constr., 2016 WL 1259560, at *4 (finding that allegations that the insured and/or subcontractors working on the insured’s behalf did not adequately construct a home and failed to construct a home in accordance with the drawings and specifications, applicable building codes, and accepted construction practices, coupled with the specific allegations of defects and property damage, were sufficient to allege work by a subcontractor that is outside the “your work” exclusion); *Forrest*, 728 F. Supp. 2d at 965 (“[a]s in Moore, even if the “your work” exclusion initially excludes coverage, the subcontractor exception applies to negate the exclusion.”).
TEXAS

1. The “Property Damage” Requirement

The Supreme Court of Texas has held that the “property damage” requirement may be satisfied where a general contractor negligently injures or upon its own work or upon that of a third-party. In Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1 (Tex. 2007), the court addressed an insurer’s argument that CGL insurance does not exist to protect a general contractor in the event it damages its own work. Id. at 7. The court found no merit to this argument, stating that while a general contractor’s work would likely be excluded from coverage under the business risk exclusions, it nonetheless qualified as “property damage” under an insuring agreement of a CGL policy. Id. at 10-11; see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., 279 S.W.3d 650, 652 (Tex. 2009) (finding that faulty workmanship constitutes “property damage”); Luxury Living, Inc. v. Mid-Continent Cas. Co., 2003 WL 22116202, at *16 (S.D. Tex. Sept. 10, 2003) (rejecting argument that damage to home itself does not constitute “property damage” under CGL policy).

In Federated Mut. Ins. Co. v. Grapevine Excavation Inc., 197 F.3d 720, 722-23 (5th Cir. 2000), the United States Court of Appeals for the Fifth Circuit, applying Texas law, concluded that damage to a Wal-Mart parking lot resulting from the excavation contractor’s failure to properly compact subsurface materials constituted “property damage” within the meaning of the subcontractor’s CGL policy. See also E&R Rubalcava Constr., Inc. v. Burlington Ins. Co., 147 F. Supp. 2d 523, 527 (N.D. Tex. 2000) (court held that damage to a newly constructed home caused by the improper foundation work of E&R, a construction company, constituted covered “property damage” under CGL policy); Home Owners Mgmt. Enter., Inc. v. Mid-Continent Cas. Co., 294 Fed. Appx. 814, 817 (5th Cir. 2008) (court held that homeowner’s claims against general contractor for damage to the home itself caused by the general contractor may constitute “property damage” within the terms of the general contractor’s CGL policy).

However, in Building Specialties, Inc., the United States District Court for the Southern District of Texas held that allegations of defective work requiring replacement or repair of defective duct work installed by the insured without further allegations of physical damage to the duct work itself, other parts of the house or loss of use, is not sufficient to qualify as property damage under a CGL policy. Bldg. Specialties, Inc. v. Liberty Mut. Fire Ins. Co., 712 F. Supp. 2d 628, 640, 642, 645 (S.D. Tex. 2010) (asserting that purely economic damages do not constitute “property damage”); see also Lexington Ins. Co. v. Nat’l Oilwell Nov, Inc., 355 S.W.3d 205, 211 (Tex. App. Houston [1st Dist.] 2011) (agreeing with the holding in Bldg. Specialties).

In addition, Texas courts have generally found that allegations of “loss of use” resulting from damage to property fall within the definition of “property damage” contained in a CGL policy. For example, in Crownover v. Mid-Continent Cas. Co., 772 F.3d 197 (5th Cir. 2014), the plaintiffs hired a contractor, Arrow, to build their home. Id. at 199. Thereafter, cracks began to show in the walls and foundation and “problems with the [air-conditioning] system caused leaking in exterior lines and ducts inside the home.” Id. The air-conditioning system ran continuously to compensate for the leaks, requiring the stressed unit to be replaced. Id.
Arrow refused to repair the damage, so the plaintiffs filed an arbitration claim. Id. at 200. The arbitrator awarded the plaintiffs damages based on findings that “the foundation had failed” and that the air-conditioning unit “was not installed properly.” Id. Mid-Continent, Arrow’s insurer, refused to indemnify the plaintiffs, who then filed suit in federal court. Id.

The court granted summary judgment for Mid-Continent, and the plaintiffs appealed. Id. at 200-01. Applying Texas law, the Fifth Circuit rejected Mid-Continent’s argument that the arbitration damages were not covered “damages because of property damage” under the commercial general liability policy. Id. at 206. The court held that the defectively installed air-conditioning unit was “tangible property” and that “the loss of [its] use amounted to property damage.” Id. at 207; see also In re ML & Assocs., 302 B.R. 857, 860-61 (N.D. Tex. 2003) (stating that CGL policy’s definition of property damage includes loss of use); Gehan Homes, Ltd. v. Emp’rs Mut. Cas. Co., 146 S.W.3d 833, 844 (Tex. App. 2004) (holding that construction errors causing damage to a home, resulting in temporary housing elsewhere, falls under “loss of use” provision in a CGL’s policy definition of property damage); Mid-Continent Cas. Co. v. JHP Dev., Inc., 2005 WL 1123759, at *5 (W.D. Tex. Apr. 21, 2005) (water damage to home caused by faulty workmanship constitutes “property damage” under CGL policy).

2. The “Occurrence” Requirement

In Lamar Homes, Inc. v. Mid-Continent Cas. Co., 242 S.W.3d 1, 16 (Tex. 2007), the Supreme Court of Texas held that allegations of faulty workmanship against a general contractor can constitute an “occurrence” under a CGL policy as long as the faulty workmanship was not intentional. See also Home Owners Mgmt. Enter., Inc. v. Mid-Continent Cas. Co., 294 Fed.Appx. 814, 821-22 (5th Cir. 2008) (“[N]egligent construction can constitute an ‘occurrence[,]’”); Rotella v. Mid-Continent Cas. Co., 2008 WL 2694754, at *4 (N.D. Tex. July 10, 2008) (applying the Supreme Court’s holding in Lamar and determining that an insurer had duty to defend an insured against claims of faulty workmanship as “unintended construction defects may constitute an ‘accident’ or ‘occurrence’ under [a] CGL policy”); Trinity Universal Ins. Co. v. Emp’rs Mut. Cas. Co., 592 F.3d 687, 692 (5th Cir. 2010) (citing Lamar for the proposition that claims for damage caused by an insured’s defective performance or faulty workmanship may constitute an “occurrence” within meaning of a CGL policy when property damage results from the unexpected, unforeseen or undesigned happening or consequence of the insured’s negligent behavior).

3. Timing of “Property Damage”

To determine when “property damage” takes place, Texas courts apply the “actual injury” or “injury-in-fact” trigger theory adopted by the Supreme Court in Don’s Building Supply, Inc. v. OneBeacon Ins. Co., 267 S.W.3d 20, 24 (Tex. 2008). See Wilshire Ins. Co. v. RJT Constr., LLC, 581 F.3d 222, 225 (5th Cir. 2009) (recognizing Don’s Building as prevailing law in Texas); see also Pine Oak Builders, Inc. v. Great Am. Lloyds Ins. Co., 279 S.W.3d 650, 652-53 (Tex. 2009) (applying actual-injury rule for purposes of determining whether homeowners’ property damage claims against builder were covered under CGL policies); Union Ins. Co. v. Don’s Bldg. Supply, Inc., 266 S.W.3d 592, 594-96 (Tex. App. 2008) (holding that homeowners’ “property damage” as a result of insured’s faulty installation of EIFS siding was sustained when property actually sustained damage).
In Don’s Building, 267 S.W.3d at 22-23, the insured, a seller and manufacturer of synthetic stucco, was sued by homeowners for wood rot damages caused by exposure to moisture. The insurer sought a ruling that it had no duty to defend or indemnify under the CGL policies it issued to the insured during the three-year period when the residences were first exposed to the moisture that caused the damages. Id. at 23. The homeowners, however, did not discover the damages until after the relevant CGL policies expired. Id. at 22-23. Relying on the policies’ definition of property damage as “physical injury” to property, the court held property damage occurs at the time the property suffers actual physical injury, not when the property is exposed to conditions that later cause physical injury or when property damages manifest. Id. at 23, 29. In other words, the court explained, the “key date is when injury happens, not when someone happens upon it.” Id. at 22.

In Wilshire, 581 F.3d at 224, the insured repaired a home’s foundation after it was damaged by an accidental discharge of plumbing water. When cracks appeared in the walls and ceiling, the owner sued the insured for allegedly defective work on the foundation. Id. The Fifth Circuit explained:

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 [before the policy period], or that the damage was discovered in 2005; it matters only that damage was alleged to have occurred in 2005.

Id. at 225.

Similarly, in VRV Development L.P. v. Mid-Continent Cas. Co., 630 F.3d 451, 454 (5th Cir. 2011), the insured developed residential lots, hiring subcontractors to build retaining walls on those lots. The insured procured a CGL policy from Mid-Continent for the period of May 25, 2005 to May 25, 2006. Id. at 454. In January and March 2007, following heavy rainfall, the retaining walls collapsed, damaging four homeowners’ backyards and undermining support for a public utility easement owned by the City of Dallas. Id. Citing to OneBeacon, the Fifth Circuit stated that the focus must be placed on the actual damage to the homeowners’ property, not to the time of the alleged negligent conduct that causes the damage. Id. at 458. The only potentially-covered property damage did not occur until 2007, when the retaining walls fell and damaged the homeowners’ property and public utility easement, not when the walls were negligently constructed. Id.
4. The “Business Risk” Exclusions

Texas courts have recognized the “business risk” exclusions as valid limitations on the availability of coverage for construction defect claims. In T.C. Bateson Constr. Co. v. Lumbermens Mut. Cas. Co., 784 S.W.2d 692 (Tex. App. 1989), the general contractor responsible for constructing a library at the University of Texas sought coverage for a lawsuit brought by the university when the marble that sheathed the building cracked. The policy excluded coverage for “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 materials, parts or equipment in connection therewith.” Id. at 694. The court concluded that the entire library constituted the “product” of the general contractor:

In the context of this case the exclusions are designed to protect insurers from contractors’ attempts to recover funds to correct deficiencies caused by the contractors’ questionable performance. Their use demonstrates the insurers’ belief that the cost of not performing well is a cost of doing business and not considered part of the risk sharing scheme for which general liability policies are written.

Id. at 695 (quoting Vari Builders, Inc. v. U.S. Fid. & Guar. Co., 523 A.2d 549, 551 (Del. Super. Ct. 1986)); see also Sarabia v. Aetna Cas. & Sur. Co., 749 S.W.2d 157, 158 (Tex. App. 1988) (holding that “major overhaul” of a diesel truck engine with no damage “after the overhaul other than what [the insured] had repaired, replaced or reworked” was excluded from coverage); Eulich v. Home Indem. Co., 503 S.W.2d 846, 848-49 (Tex. App. 1973) (holding that the “your work” exclusion applied to bar coverage for damage to entire building after it collapsed due to installation of steel member with less strength than required by contract); VRV, 630 F.3d at 457 (holding that damage to retaining walls constructed by the insured and its subcontractors were excluded from coverage); Lamar Homes, 242 S.W.3d at 11 (“[W]hen a general contractor becomes liable for damages 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.”).

In more recent decisions, however, Texas courts have narrowly construed the “business risk” exclusions, finding that under some circumstances, a construction project is not the “product” or “property” of the general contractor insured, but rather is property of the project owner. Indeed, at least two Texas courts have held that the “your product” exclusion does not encompass an entire building. See CU Lloyd’s of Tex. v. Main St. Homes, Inc., 79 S.W.3d 687, 697 (Tex. App. 2002) (finding that a completed house is not a “product”); Mid-United Contractors, Inc. v. Providence Lloyds Ins. Co., 754 S.W.2d 824, 826 (Tex. App. 1988). The Mid-United court explained:
A “named insured’s products” is defined in the policy to mean the “goods or products manufactured, sold, handled or distributed by the named insured or by others trading under his name. . . .” We hold that exclusion (n), applicable to the insured’s products, does not apply to the construction of the building because in ordinary language buildings are constructed or erected, not manufactured, and because any ambiguity in the policy language must be construed against the insurer and in favor of the insured.

Id. at 826. But see Bldg. Specialties, 712 F. Supp. 2d at 647 (distinguishing insulation ducts from completed buildings that were “built, constructed, or erected” as in Mid-United or CU Lloyd’s and finding that the insulations ducts were a product for purposes of the business risk exclusion).
1. The “Property Damage” Requirement

Utah law holds that damages arising from the need to replace or repair construction work as a result of an insured subcontractor’s inadequate work product does not constitute “property damage” under a CGL policy. H.E. Davis & Sons, Inc. v. North Pac. Ins. Co., 248 F. Supp. 2d 1079, 1085 (D. Utah 2002). In H.E. Davis, the insured’s excavation and paving company entered into a contract with a school district to prepare the site and to perform fill and compaction construction for the building of a middle school. Id. at 1081. Shortly after the work was completed, the school discovered that the soil placed by the company was not sufficiently compacted. Id. Although the court decided that the reason for the unacceptable compacting was the mistake of the soils engineer, the insured, at its own expense, decided to rectify the situation by removing the soil and replacing it with correctly compacted material. Id.

In a declaratory judgment action, the insurer argued, and the court agreed, that “there is no ‘property damage’ where there is no complete loss of the use of the property and . . . damages resulting from a loss of business are economic losses and not covered ‘property damage’” within the meaning of a standard form CGL policy. Id. at 1084-85. Thus, despite the faulty soil compaction at the middle school, there was neither physical injury to the property nor complete loss of the use of the property. Id. at 1085. Instead, the alleged damages consisted of “costs to repair and replace [the insured’s] own work product, i.e., the soil pad; and . . . [costs] . . . due to construction delays.” Id.

In Nova Cas. Co. v. Able Constr., Inc., 983 P.2d 575 (Utah 1999), the Supreme Court of Utah held that claims for breach of contract, breach of implied warranty, and promissory estoppel against a developer/contractor did not allege “property damage” covered under the contractor’s CGL policy. In Nova, the homeowners entered into a contract with a construction company to construct a house on a lot purchased from a third party to run a business. Id. at 577. Upon completion of the project, the homeowners opened their business, and thereafter, were subject to a suit and eventual court order that they stop conducting business. Id. The court maintained that the homeowners’ claims based on allegations that the company misled them into thinking that they would be able to conduct a specific type of business in their home did not constitute “property damage” where the homeowners did not lose complete use of the home, but only the ability to use it for their intended business venture. Id. at 580-81.

2. The “Occurrence” Requirement

Federal courts in Utah appear split on whether faulty construction constitutes an “occurrence” under a CGL policy. In H.E. Davis, a Utah federal court held that an insured’s inadequate compaction of soil at the middle school, which necessitated the replacement of concrete footings installed by another contractor, could not constitute an “occurrence” because the consequences of the insured’s actions were natural, expected or intended. 248 F. Supp. 2d at 1084.; see also Auto-Owners Ins. Co. v. Fleming, 701 Fed. Appx. 738, 742 (10th Cir. 2017) (finding that there was no “occurrence” because the plaintiffs alleged only faulty construction causing damage to the insured’s own work); Cincinnati Ins. Co. v. Linford Bros. Glass Co., 2010 WL 520490, at *3 (D. Utah Feb. 9, 2010) (“Because the reasonably foreseeable
consequences of negligently manufacturing windows and doors include damage to the property in which the defective products are installed, there can be no “occurrence” here under Utah law.”)

However, in Cincinnati Ins. Co. v. AMSCO Windows, 921 F. Supp. 2d 1226 (D. Utah 2013) aff’d, 593 F. App’x 802 (10th Cir. 2014), a Utah federal court predicted that that Utah Supreme Court would hold that “where defective workmanship causes damage to property other than the work product itself, that such damage results from an accidental ‘occurrence’ within the meaning of CGL policy language.” See also Great Am. Ins. Co. v. Woodside Homes Corp., 448 F. Supp. 2d 1275, 1281 (D. Utah 2006) (court determined that the insurer of the general contractor was required to defend against a home buyers’ breach of warranty and breach of contract claims where the underlying complaint asserted claims of faulty work by the subcontractor, which caused cracks in a building foundation, basement floor, and driveway.)

3. **Timing of “Property Damage”**

While Utah courts have not yet addressed the appropriate trigger to use in the context of a construction defect claim, a Utah federal court has applied an “injury-in-fact” trigger to a claim for continuing environmental property damage. See Quaker State Minit-Lube, Inc. v. Fireman’s Fund Ins. Co., 868 F. Supp. 1278, 1304 (D. Utah 1994).

4. **The “Business Risk” Exclusions**

Utah courts also hold that the business risk exclusions for “damage to impaired property” and “damage to your work” preclude coverage for claims associated with defective construction. In H.E. Davis, the court upheld application of these exclusions with respect to claims against an insured subcontractor arising out of improper compaction of soil on a construction site, which included costs associated with the removal and replacement of concrete footings installed by another contractor. 248 F. Supp. 2d at 1084-86. In Auto-Owners Ins. Co. v. Timbersmith, Inc., 2016 WL 3356800, at *6 (D. Utah June 15, 2016), the court found that a policy containing the business risk exclusions provides coverage for damage to property other than the defective work completed by the insured that occurred while operations were ongoing and property damage to a subcontractor’s or other work caused by a subcontractor’s faulty workmanship that occurs after operations are completed.

In Woodside Homes Corp., 448 F. Supp. 2d at 1282, the court determined that the subcontractor exception to the “your work” exclusion supports the finding that defective subcontractor work is covered under CGL policies. Id. at 1282. The court found the subcontractor’s defective work was not excluded by the policy because to find otherwise would render the subcontractor exception meaningless. Id.; see also Am. Credit Union v. Kier Constr. Corp., 314 P.3d 1055, 1059-60 (Utah Ct. App. 2013) (emphasizing that the subcontractor exception restored coverage for work performed on the named insured’s behalf by another contractor, not to work the named insured performed in its own capacity as a subcontractor). Finally, with respect to the “your work” exclusion, the Utah District Court recently held the exclusion inapplicable where damage arose “in significant respect” out of operations on property other than that to which the damage occurred, even if the damage also arose to some extent out of operations on the property that was damaged. Big-D Constr. Midwest, LLC v. Zurich Am. Ins. Co., 2018 U.S. Dist. LEXIS 103199, 2018 WL 3025066 (D. Utah, June 18, 2018).
1. The “Property Damage” Requirement


In Down Under Masonry, the court considered whether a contractor’s installation of inferior cedar roof shingles constituted “property damage” under the insured contractor’s CGL policy. 950 A.2d at 1215-16. The homeowners hired the contractor to build a garage with red cedar shingles on the roof but the contractor installed white cedar shingles that were inferior in quality. Id. at 1214. The homeowners sued the contractor, who then submitted a claim to its CGL carrier. Id. The insurer provided a defense to the contractor at trial but withdrew the defense after a jury found the contractor liable for breach of contract, among other claims. Id. The contractor then commenced a declaratory judgment action against its insurer. Id.

In entering summary judgment in the insurer’s favor, the court held that aesthetic impact on property value caused by the installation of inferior shingles did not constitute “property damage” and, therefore, was not covered under the contractor’s CGL policy. Id. at 1216. The court reasoned that the CGL policy defined “property damage” as “[p]hysical injury to tangible property” or the “[l]oss of use of tangible property that is not physically injured.” Id. at 1215-16. Neither “physical injury” nor “loss of use” took place in the case before the court because “[n]othing in the record . . . suggests that any physical defect existed in the shingle material used or in the manner in which the shingles were installed, or that the [homeowners] were unable to use their new garage as a result of the inferior shingles.” Id. at 1216.; see also City of Burlington v. Ass’n of Gas & Elec. Ins. Servs., Ltd., 751 A.2d 284, 292 (Vt. 2000) (“AGEIS”) (holding that a woodchip seller’s loss of real and personal property through repossession and foreclosure after the City refused additional deliveries was not “property damage” and therefore was not covered, but rather the alleged breach caused an economic loss, which had a collateral effect of loss of use of property).

By contrast, in Fine Paints of Europe, the court held that a claim based on defective paint that was applied to the exterior of a cottage and materially altered the appearance of the property by cracking, peeling and separating comes within the insuring agreement’s definition of “property damage.” 2009 WL 819466, at *5.
2. The “Occurrence” Requirement

While Vermont state courts have not addressed the “occurrence” issue in the traditional construction defect context, a Vermont district court stated that “[t]he relevant inquiry is not whether [the insured] breached a contract or warranty, but whether [the insured] by its actions expected or intended the harm.” Fine Paints of Europe, 2009 WL 819466, at *6. Finding no dispute that the insured did not intend the injury, the court held that the paint failure at the cottage constituted an “occurrence” under Vermont law. Id.

By contrast, the AGEIS court held that the insured, in reducing its purchases of wood chips from suppliers, “‘intended or expected economic injury to the wood chip suppliers’” such that the “occurrence” requirement was not satisfied. 751 A.2d at 286. The court further reasoned that “basing coverage on the [insured’s] lack of ‘precise knowledge of the amount or nature of the damage it might inflict on others as a consequence of its business actions’ would take us ‘far afield from any common-sense definition of accident.’” Id.

3. Timing of “Property Damage”

Vermont courts have not specifically addressed the timing of property damage in the context of construction defect claims. However, the Supreme Court of Vermont applied the continuous-trigger theory to an environmental pollution claim under a homeowners’ policy. Towns v. N. Sec. Ins. Co., 964 A.2d 1150 (Vt. 2008). In Towns, the insured homeowner resided at the relevant property from 1972 to 1987, during which time he diverted a substantial amount of waste and debris from his waste-hauling business to the property for use as fill to level a steep embankment on his property. Id. at 1152. Thereafter, the subsequent homeowners contacted the Attorney General’s Office because they were concerned about the fill. Id. The Attorney General issued an administrative order in September 1996 which required the insured to hire an environmental consultant to develop a remediation plan. Id.

The insured brought suit against Northern Security Insurance Company (“Northern”), which had issued a homeowners’ insurance policy covering the property from November 1983 to June 1987. Id. at 1153. Northern appealed the trial court’s decision to apply the “continuous-trigger” theory to determine whether there was an “occurrence” during the policy period, and argued that the court should apply the “manifestation” theory, which would preclude coverage under the Northern policy because the environmental damage was not discovered until nine years after the policy had expired. Id. at 1162. The Supreme Court rejected Northern’s argument, and, like the trial court, applied the continuous-trigger approach. Id. at 1162-65.

4. The “Business Risk” Exclusions

In Garneau v. Curtis & Bedell, Inc., 610 A.2d 132 (Vt. 1992), the Supreme Court of Vermont applied the “work product” exclusion contained in a contractor’s “package policy that included liability coverage” to bar coverage for the alleged damages. Specifically, the court held that a claim against a contractor for building a home too close to the property line in violation of zoning requirements was excluded by the “work product” exclusion because
the allegedly deficient placing of the home is part of a contractor’s “work product.” Id. at 134-35.

In City of Barre v. N.H. Ins. Co., 396 A.2d 121 (Vt. 1978), the Supreme Court of Vermont found that the loss, which occurred during the construction of a recreation building when wooden arches were blown down by gusting wind, did not fall within the faulty workmanship exclusion under the terms of a “builder’s risk” policy. Id. The trial court found that the collapse was caused by the builder’s negligence, namely, failing to secure and support the structures in accordance with recommended architectural and construction standards. Id. The policy expressly excluded coverage as to “any loss caused directly or indirectly by faulty materials or faulty workmanship or error in design or latent defect. . . .” Id. at 122. In reversing the trial court’s judgment for the insurer, the Supreme Court of Vermont concluded that:

[f]airly read, the policy in question excludes coverage for damage resulting from defective materials incorporated into the structure itself, or from weaknesses in the product caused by faults in the construction process, but it does not exclude coverage for damage caused, at least in part, by negligent practices of the contractor during the construction process. It is the quality of the product which is excluded from coverage, and not damage to the product caused by negligence during the construction period.

Id. at 122-23; see also City of Burlington v. Hartford Steam Boiler Inspection & Ins. Co., 190 F. Supp. 2d 663, 672-73 (D. Vt. 2002), aff’d, 346 F.3d 70 (2d Cir. 2003) (holding that the “faulty workmanship” exclusion unambiguously precludes coverage for “quality of products” claims).
1. **The “Property Damage” Requirement**

Virginia courts have not addressed whether faulty workmanship constitutes “property damage” under a CGL policy.

2. **The “Occurrence” Requirement**

In *Stanley Martin Co., Inc. v. Ohio Cas. Grp.*, 313 Fed.Appx. 609 (4th Cir. 2009), the Fourth Circuit addressed “the issue of whether damage that a subcontractor’s defective work causes to a general contractor’s otherwise nondefective work constitutes an ‘occurrence’ under the general contractor’s CGL insurance policy.” Id. at 610. The defective trusses supplied by a subcontractor led to mold infestation in otherwise non-defective aspects of the general contractor’s work. Id. The court advised that “the Virginia Supreme Court has not addressed the issue of whether damage that a subcontractor’s defective work causes to the insured’s nondefective work constitutes an occurrence.” Id. at 612.

The Fourth Circuit noted that there was “no allegation here that Stanley Martin ‘either expected or intended that its subcontractor’ would perform defective work, or that the spread of mold beyond the defective trusses was expected or intended.” Id. at 614. As such, the Fourth Circuit held that while remediation and replacement of the defective trusses themselves did not trigger the duty to indemnify, “any mold damage that spread beyond the defective trusses and the gypsum fire walls to the nondefective components of the townhouses was an unintended accident, or an occurrence that triggered coverage under the [CGL] policy.” Id.; see also *Builders Mut. Ins. Co. v. Dragas Mgmt. Corp.*, 709 F. Supp. 2d 441, 444, 448 (E.D. Va. 2010) (holding that damage to copper wiring and metal circuitry, and an exploding microwave, caused by a subcontractor’s supply of Chinese drywall constituted an “occurrence” so as to survive the insurer’s motion to dismiss).

Virginia law generally holds that damage for replacement or repair of the insured’s own product or work, including component parts thereof, is not an “occurrence.” See *Nationwide Mut. Ins. Co. v. Wenger*, 278 S.E.2d 874, 876-77 (Va. 1981); see also *Hotel Roanoke Conference Ctr. Comm’n v. Cincinnati Ins. Co.*, 303 F. Supp. 2d 784, 786 (W.D. Va. 2004) (finding that damages resulting from the insured’s defective performance of a contract and limited to the insured’s work were “expected” and thus not covered by a general commercial liability policy), aff’d 119 F. App’x 4451 (4th Cir. 2005); see also *Boiler Brick Refactory Co., Inc. v. Md. Cas. Co.*, 168 S.E.2d 100, 102 (Va. 1969) (holding that a policy covering injury and property damage caused by an accident covers tort liability for such injuries, “not damages resulting from assumed or imposed contractual liability”); *Pulte Home Corp. v. Fid. & Guar. Ins. Co.*, 2004 WL 516216, at *5 (Va. Cir. Ct. Feb. 6, 2004) (holding that defective workmanship cannot constitute an “occurrence” as faulty workmanship by the insured is almost always foreseeable); *Dragas Mgmt. Corp. v. Hanover Ins. Co.*, 798 F. Supp. 2d 758, 763 (E.D. Va. 2011) (finding that the replacement of the insured’s defective drywall is not an occurrence under the policy; however, any repair or replacement of non-defective components of the effected homes or personal property of the homeowners constituted an occurrence); *Indiana Lumbermens Mut. Ins. Co. v. Timber Treatment Technologies, LLC*, 2017 WL 7691870, at *7-8 (E.D. Va. Oct. 25, 2017) (finding that the damages alleged in the complaint could not fall within coverage because they were limited to the insured’s defective
product and the costs of removing and replacing that product); *Western World Ins. Co. v. Air Tech, Inc.*, 2019 WL 1434666, at *6 (W.D. Va. Mar. 29, 2019) (finding that the allegations did not reflect an occurrence because the only damages alleged were that the product supplied by the insured was defective and that product needed to be replaced).

3. **Timing of “Property Damage”**

Virginia courts have not addressed the timing of property damage in the context of construction defect claims.

4. **The “Business Risk” Exclusions**

In *Nationwide Mut. Ins. Co. v. Wenger*, 278 S.E.2d 874 (1981), the Supreme Court of Virginia held that there was no coverage under a CGL policy issued to a contractor for alleged negligence and breach of warranty after the poultry houses it built had collapsed. In a case of first impression, the court considered whether damages claimed for repair of a structure erected by an insured are compensable under a standard comprehensive general liability policy. Id. at 875. The court enforced policy language excluding from coverage “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 materials, parts or equipment furnished in connection therewith.” Id. The court held that the language of this exclusion is unambiguous and excludes coverage for a claimed loss arising from internal deficiencies of the insured’s own work product. Id. “When the completed operation of the insured causes injury to a person or damage to property, the policy applies, unless the injury is to the completed operation itself.” Id. at 877; see also *Travelers Indem. Co. of Am. v. Miller Bldg. Corp.*, 142 F. App’x 147, 149-50 (4th Cir. 2005) (holding that a subcontractor exclusion in CGL policies issued to a general contractor merely rendered “your work” exclusion inapplicable and did not grant or extend coverage).

In *Indiana Lumbermens*, the court found that the “your product” exclusion bars coverage when the only damage alleged is to the insured’s product. 2017 WL 7691870, at *8. The court found that the damages alleged in that case fell within the “your product” exclusion because the damages were limited to the insured’s product and costs for repair, replacement, and removal of that product. Id.
1. The “Property Damage” Requirement

Under Washington law, damage to third-party property constitutes “property damage” under a CGL policy, as does the repair and replacement of an insured’s own faulty work to the extent the repair and replacement of such work is necessary to fix damage caused by the insured’s work to third-party property. See Mut. of Enumclaw Ins. Co. v. T&G Constr., Inc., 199 P.3d 376 (Wash. 2008).

In Mutual of Enumclaw, the insurer filed a declaratory judgment action against its insured, a subcontractor, arguing that the settlement payments in an underlying suit were based upon contract violations and not covered “property damage.” 199 P.3d at 380. The underlying matter arose from a lawsuit filed by a homeowners association against a construction developer based on claims that poorly installed siding on homes led to rot and mold from water intrusion to the interior walls. Id. at 379.

The court held that “the subsurface and interior walls were not installed by subcontractor and damage to these areas was property damage covered by the policy.” Id. at 384. Similarly, “[r]emoving and repairing the siding is simply part of the cost of repairing the damage to the interior walls and was properly treated as property damage. . . .” Id. Thus, while the court drew a distinction between damage to the insured subcontractor’s siding and damage caused by the siding, because the insured’s siding had to be removed for the third party property damage to be repaired, the court found that those removal costs also were “property damage” within the meaning of the CGL policy.

A decision from the Ninth Circuit, applying Washington law, also held that damage to third party property constituted “property damage” under a CGL policy. Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127 (9th Cir. 2002). In DeWitt, the insured subcontractor was alleged to have negligently installed cement piles and was subsequently compelled to re-install new cement piles. DeWitt alleged the following three types of property damage: “(1) damage to the construction site by impaling it with unremovable obstacles, (2) damage to the work of other subcontractors that had to be removed and reconstructed due to DeWitt’s negligence, and (3) damage to buried mechanical piping and site work while moving equipment to replace the under-strength piles.” Id. at 1133.

The court concluded that the damage to the construction site was merely faulty work and not “property damage” under the policies in questions. Id. at 1133. The court stated that “[f]or faulty workmanship to give rise to property damage, there must be property damage separate from the defective product itself.” Id. at 1133. The court further concluded “that the alleged damage to the buried mechanical and site work caused by DeWitt’s movement of heavy equipment was ‘physical injury to tangible property’ and thus constituted ‘property damage’ within the scope of the policies.” Id.; see also Yakima Cement Prods. Co. v. Great Am. Ins. Co., 608 P.2d 254, 258 (Wash. 1980) (holding that no “property damage” occurred due to the incorporation of defective concrete panels where the record was devoid of evidence that the building value was diminished); Marley Orchard Corp. v. Travelers Indem. Co., 750 P.2d 1294, 1297 (Wash. Ct. App. 1988) (finding that stress to trees was “property damage” caused by the installation of a defective sprinkler system).
2. **The “Occurrence” Requirement**

The Supreme Court of Washington has held that an insured’s “unintentional and unexpected mismanufacture of concrete panels,” which necessitated their removal, refabrication, repair, and reerection, constituted an “occurrence” as contemplated by comprehensive liability policy. *Yakima Cement Prod. Co. v. Great Am. Ins. Co.*, 93 Wash. 2d 210, 215-16 (1980); see also *Dewitt*, 307 F.3d at 1133 (The Ninth Circuit, applying Washington law, found that an insured’s defective manufacture of concrete panels constituted an “occurrence”).

In *Mid-Continent Cas. Co. v. Titan Constr. Corp.*, 281 Fed.Appx. 766 (9th Cir. 2008), the insurer asserted that there was no coverage for breach of contract and warranty claims against the insured general contractor for the defective construction of a condominium project because such claims do not constitute an occurrence. Id. The Ninth Circuit found that “[a]bsent any allegation that the substandard construction in this case resulted from an intentional breach of contract by [the insured contractor], we conclude that the negligent construction of the Williamsburg project that resulted in breach of contract and breach of warranty claims constituted an ‘occurrence.’” Id. at 768.

3. **Timing of “Property Damage”**

The Court of Appeals of Washington has utilized a continuous trigger approach in a case involving defective siding work that led to water intrusion into the building envelope. *Am. States Ins. Co. v. Century Sur. Co.*, 164 Wash. App. 1030 (2011). Finding that the allegations of continuous property damage from the same occurrence spanned both policy periods of the insurer, the court stated that “[u]nder the ‘continuous trigger’ rule, every policy spanning the period during which property damage progresses is liable for all damages attributable to the occurrence.” Id. at *6; see also *Gruol Constr. Co., Inc. v. Ins. Co. of N. Am.*, 524 P.2d 427, 430 (Wash. Ct. App. 1974) (where resulting damage was continuous, coverage was properly imposed under the language of the policy on INA and Northwestern Mutual even though the initial negligent act (the defective backfilling) took place within the period of Safeco’s policy coverage.)

4. **The “Business Risk” Exclusions**

Washington courts have recognized the “business risk exclusions” as valid limitations on the availability of coverage for construction defect claims. In *Westman Industrial Co. v. Hartford Ins. Grp.*, 751 P.2d 1242 (Wash. Ct. App. 1988), the court held that a contractor’s faulty design and construction of a boathouse was excluded by the “your product” exclusion since boathouses, akin to houses, met the policies’ definition of a product.

In *Westman*, the written contract entered into between the parties did not specify who had the responsibility for obtaining building permits; however, Westman, a contractor, assumed that responsibility by applying for, and taking out, a building permit for the boathouses. Id. at 1243. Shortly after construction, it was discovered that Westman’s failure to follow building code regulations resulted in an inadequately designed boathouse that was structurally unstable and unable to adequately resist wind uplift. Id. at 1244. Subsequently, the boathouse was destroyed in a storm and several boats were damaged. Id. In an action brought by the owners of the damaged boats, the court found that Westman and the property
owner were jointly and severally liable and for damage to nearby boats struck by pieces of the flying boathouse.  Id. The coverage action ensued as a result of Westman’s request for defense and indemnification costs from its insurer.

The court reasoned that the damages claimed by Westman were excluded under the CGL policy because the boathouse was a product.  Id. at 1245-47. The boathouse was viewed as a product since its construction was an ordinary arms-length business deal between a buyer and a seller where the parts were “‘assembled in the ordinary channels of commerce.’”  Id. at 1246 (quoting Prosser, 700 P.2d at 1191).

In Mid-Continent Cas. Co. v. Titan Constr. Corp., 281 F. App’x. 766 (9th Cir. 2008), the Ninth Circuit, applying Washington state law, found that the “your work” exclusion in a construction company’s CGL policy did not apply to preclude coverage for breach of contract and breach of warranty claims arising from alleged negligent construction of a condominium project, given that the exclusion contained a subcontractor exception and all work on the condominium project was performed by subcontractors.

In addition, the court found that the “your product” exclusion did not apply to the construction of the condominium as the policies’ definition of “Your Product,” which is “[a]ny goods or products, other than real property, manufactured, sold, handled, distributed or disposed by (a) You. . . .” (emphasis added),” expressly excepted real property.  Id. at 768-69. In its discussion of what constitutes “real property,” the Ninth Circuit held that the since “real property” was not defined in the commercial general liability policy, the court found it proper to adopt the common meaning of the term, as defined in Black’s Law Dictionary 1254 (8th ed. 2004).  Id. Black’s Law Dictionary defined “real property” as “land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.”  Id.
WEST VIRGINIA

1. **The “Property Damage” Requirement**

   In Cherrington v. Erie Ins. Prop. & Cas., 745 S.E.2d 508 (W. Va. 2013), the Supreme Court of Appeals of West Virginia found that the defective construction of a home by a contractor constituted “property damage” under the contractor’s CGL policy. In Cherrington, a homeowner sued a builder for the costs to repair defects in a newly constructed residence. Id. at 513. The court found that the allegedly extensive list of damage to items in the home due to the faulty construction constituted “property damage” under the contractor’s CGL policy. Id. at 522.

2. **The “Occurrence” Requirement**

   Under West Virginia law, defective workmanship of a subcontractor constitutes an “occurrence” under the CGL policy of the general contractor. Cherrington, 745 S.E.2d at 521 (reversing the court’s earlier decisions to hold that defective workmanship itself constitutes an occurrence where the damages were not deliberate, expected, or foreseen); see also State ex rel. Nationwide Mut. Ins. Co. v. Wilson, 778 S.E.2d 677, 682-84 (W. Va. 2015) (“[a]n accident is never present when a deliberate act is performed unless some additional unexpected, independent and unforeseen happening occurs which produces the damage”); Nationwide Prop. & Cas. v. Comer, 559 F. Supp. 2d 685, 691 (S.D. W. Va. 2008) (comparing a homeowner’s insurance policy with a CGL to find that breach of implied warranty of habitability does not constitute an “occurrence”).

3. **Timing of “Property Damage”**

   A federal court in West Virginia has applied the manifestation theory to a homeowner’s claim against a contractor for the defective construction of a home. Simpson-Littman Const., Inc. v. Erie Ins. Prop. & Cas. Ins. Co., 2010 WL 3702601 (S.D.W. Va. Sept. 13, 2010). In Simpson-Littman, the court found that the question of whether property damage occurred to the home under the subject policy was to be determined by whether the home was actually damaged before the subject policy expired. Id. at *14. The court stated that “[t]he easiest way to determine when the property damage (the cracks and other structural defects) actually occurred is to ascertain when it first appeared or was discovered. Nonetheless, it is still the time of actual damage, not its observance, that ultimately matters.” Id.

4. **The “Business Risk” Exclusions**

   The Supreme Court of Appeals of West Virginia has upheld a business risk exclusion to preclude coverage for “injury to or destruction of . . . any goods, products or containers thereof manufactured, sold, handled or distributed or premises alienated by the named Insured, or work completed by or for the named Insured, out of which the accident arises.” McGann v. Hobbs Lumber Co., 145 S.E.2d 476, 479 (W.Va. 1965). In McGann, the court stated that “Exclusion (j)(4) clearly provides that this policy does not apply to premises alienated by
the insured or to work completed by the insured out of which the accident arises. It is undisputed that the damaged premises here involved was that alienated by the insured and was work completed by the insured out of which the accident arose.” Id. at 480.

In Cherrington, the Supreme Court of Appeals of West Virginia held that the “your work” exclusion did not preclude coverage for the work of subcontractors on a residential home because the exclusion did not apply to the work of subcontractors and the majority of the home construction was performed by subcontractors. Cherrington, 745 S.E.2d at 524.
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1. The “Property Damage” Requirement

In Am. Family Mut. Ins. Co. v. American Girl, Inc., 673 N.W.2d 65 (Wis. 2004), the Supreme Court of Wisconsin held that the buckling and cracking of a building constituted “property damage” as defined by the general contractor’s CGL policies as it was “plainly ‘physical injury to tangible property.’” Id. at 70; see also Stuart v. Weisflog’s Showroom Gallery, Inc., 753 N.W.2d 448, 462-63 (Wis. 2008) (the Supreme Court of Wisconsin determined that damages stemming from the negligent acts and misrepresentations of a home improvement contractor/insured constituted “property damage” covered by CGL policy, rather than economic damages); Acuity v. Soc’y Ins., 339 Wis. 2d 217, 221 (WI App. 2012)(damage to the engine room, the roof, and the resulting damage to the equipment caused by subcontractor’s removal and replacement of engine room’s south wall constituted “property damage” under subcontractor’s CGL policy.)

2. The “Occurrence” Requirement

The Court of Appeals of Wisconsin has stated that “faulty workmanship itself does not constitute an ‘occurrence’ under a CGL policy.” Mantz Automation, Inc. v. Navigators Ins. Co., 326 Wis. 2d 266 (WI App. 2010). In Mantz, the court found that the defective installation of a concrete floor by a subcontractor did not constitute an “occurrence” under the general contractor’s CGL policy. Id. at *5. In so holding, the court stated that there were no allegations that the “faulty workmanship caused an accident, such as the sinking of soil or the leaking of windows, that caused subsequent property damage.” Id.

In American Girl, the court found that the damage to a warehouse at issue “was caused by substantial soil settlement underneath the completed building, which occurred because of the faulty site-preparation advice of the soil engineering subcontractor.” 673 N.W.2d at 70. In holding that the claim for breach of contract/breach of warranty constituted an “occurrence”, the court stated as follows:

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. We agree that CGL policies generally do not 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.

Id. at 76.

In Stuart, the Wisconsin Supreme Court determined that damages stemming from intentional or volitional misrepresentations were not covered under the contractor’s CGL policy because the misrepresentations were not accidental occurrences. 753 N.W.2d at 458-59. The court explained that the jury determined that the insured “made misrepresentations
in order to induce the [plaintiffs] into the remodeling architectural contract. . . . In addition, [the insured] knew at the time of the misrepresentations that he was not familiar with an applicable building code.” Id. As such, the court determined there was no occurrence since the misrepresentation claims were not “accidental” in nature. Id. at 459-61.

3. **Timing of “Property Damage”**

The Supreme Court of Wisconsin has applied the “continuous trigger” theory to cases concerning property damage resulting from defective work. American Girl, 673 N.W.2d at 84. The “continuous trigger” theory “applies where [an] injury or damage occurs over more than one policy period.” Id.

4. **The “Business Risk” Exclusions**

A CGL policy containing a business risk exclusion covers only collateral property damage associated with the defective work, and not the defective work itself, the cost to repair or replace it, or any effect on the property’s value that it may have. Vogel v. Russo, 613 N.W.2d 177, 182 (Wis. 2000). However, certain business risk exclusions in post-1986 policies contain exceptions which, under Wisconsin law, specifically restore coverage where damage to the construction project arose out of work performed by a subcontractor for the named insured. See American Girl, 673 N.W.2d at 83-84. In American Girl, the court reasoned that:

Cases in Wisconsin and in other jurisdictions have consistently recognized that the 1986 CGL revisions restored otherwise excluded coverage for damage caused to construction projects by subcontractor negligence. . . .

* * *

One commentator has pointed out that “those cases [finding no coverage] involved the older policy language while the current policy specifically provides that the ‘own work’ 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.’”

* * *

This interpretation of the subcontractor exception to the business risk exclusion does not “create coverage” where none existed before, as American Family contends. There is coverage under the insuring agreement’s initial coverage grant. Coverage would be excluded by the business risk exclusionary language, except that the subcontractor exception to the business risk exclusion applies, which operates to restore the otherwise excluded coverage.

Id.
Additionally, with respect to the “your product” exclusion, the Wisconsin Supreme Court has held that the exception to the exclusion for “real property” encompasses any real estate, i.e., a home or similar structure. *Stuart*, 753 N.W.2d at 523-24.
1. **The “Property Damage” Requirement**

Wyoming courts have not yet addressed the “property damage” requirement under a CGL policy in the context of construction defect claims.

2. **The “Occurrence” Requirement**

A Wyoming federal court has held that claims sounding in breach of contract do not constitute an “occurrence” under a CGL policy. *Great Divide Ins. Co. v. Bitterroot Timberframes of Wyo., LLC*, 2006 WL 3933078 (D. Wyo. Oct. 20, 2006). The insured in *Bitterroot* was a subcontractor hired to perform exterior woodwork at a resort, which included the installation of siding. *Id.* at *1*. The insured was sued by the general contractor related to allegations by the owner of defective workmanship. *Id.* In finding that the allegations against the insured did not constitute an “occurrence”, the court stated as follows:

> Although, defendant argues that while not specifically stated, the Underlying Action alleges that defendant improperly installed and waterproofed the siding, resulting in water damage to the FSJH resort, the facts fail to demonstrate an alleged loss resulting from an “occurrence” as defined by the Policy. Instead the allegations demonstrate losses resulting from breach of contract, as water damage is the natural and foreseeable result of improper installation and waterproofing of exterior siding, and therefore can not constitute an “accident” for purposes of determining coverage.

* * *

Defendant’s inadequate preparation and installation of the siding on the resort was not an “accident” since defendant intended to perform in compliance with the contract, but allegedly failed to do so. Defendant could foresee the natural consequences of any negligence or poor workmanship, thus, any resulting damage is not considered an “accident” triggering an “occurrence” under the Policy.

*Id.* at *8*; see also *Emp’rs Mut. Cas. Co. v. Bartile Roofs, Inc.*, 478 F. App’x 493, 499 (10th Cir. 2012) (holding that natural results of negligent and unworkmanlike construction of the insured did not constitute an occurrence under a CGL insurance policy).

3. **Timing of “Property Damage”**

There is no case law in Wyoming addressing the timing of property damage in the context of construction defect claims, or in latent and/or long-term property damage situations that may be analogous to the construction defect context.
4. **The “Business Risk” Exclusions**

In *Ricci v. N.H. Ins. Co.*, 721 P.2d 1081 (Wyo. 1986), the Supreme Court of Wyoming addressed claims of construction defects in the context of certain business risk exclusions. In *Ricci*, the homeowners filed claims against a builder after water leaked into the homes’ basements, causing the homeowners to incur loss in the form of diminution in value. *Id.* at 1083. After learning of the builder’s judgment-proof status, the homeowners sought to recover from the builder’s insurers. *Id.* at 1084. The policies in question contained exclusions for property damage to the insured’s products if such damage arose from the products themselves or from damage to the insured’s work, regardless of whether the work was performed by the insured or on its behalf, if the damage arose from any portion of the work. *Id.* The court found that this language plainly and unequivocally “exclude[d] coverage for the insured’s own negligent work.” *Id.* at 1086.
We hope you find this survey to be a useful tool in helping understand, analyze and resolve construction defect insurance coverage matters. The content herein does not construe legal advice on any specific matter, and we encourage you to contact us with questions at contactus@kennedyslaw.com.