

**The Commercial General
Liability Insurance Policy**

2008

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II. INSURING AGREEMENT AND DEFINITIONS

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

The insuring agreement of the 1973 ISO policy¹ reads, in pertinent part:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

A. bodily injury or

B. property damage

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage . . . and may make such investigation and settlement of any claim or suit as it deems expedient²

The 1986 ISO policy³ insuring agreement reads, in pertinent part:

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of “bodily injury” or “property damage” to which this insurance applies. . . . This insurance applies only to “bodily injury” and “property damage” which occurs during the policy period. The “bodily injury” or “property damage” must be caused by an “occurrence”. . . . We will have the right and the duty to defend any “suit” seeking those damages. . . . We may investigate and settle any claim or “suit” at our discretion.

The 2001⁴ and 2004⁵ versions of ISO’s CGL incorporate the “known loss”

¹ For a complete copy of the 1973 version of the CGL policy, see Appendix A.

² In the 1973 ISO policy, terms which are defined appear in bold face type in the policy. In the 1986 ISO policy, defined terms appear in quotation marks.

³ For a complete copy of the 1986 version of the CGL policy, see Appendix B.

⁴ For a complete copy of the 2001 version of the CGL policy, see Appendix D.

provisions of the 1999 “known loss” endorsement CG 0057. It provides, in pertinent part:

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

* * *

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

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

These insuring agreements obligate the insurer to investigate any claim or suit, to defend the insured, and to indemnify the insured for damages. The duty to indemnify raises numerous issues. Is an event a covered accidental “occurrence” or an excluded intentional injury? What are the limits of “property damage” and “bodily injury”? Did the “property damage” or “bodily injury” take place during the policy period and “trigger” the policy? When is a claims-made policy triggered? Does the term “damages” include

⁵ For a complete copy of the 2004 version of the CGL policy, see Appendix E.

equitable relief? Who is an insured? How do you determine the number of occurrences?

As mentioned above, the duty to defend is a separate duty from the duty to indemnify. Where the costs of litigation exceed the costs of indemnity, the duty to defend can be more valuable than the duty to indemnify. Thus, the duty to defend is sometimes referred to as “litigation insurance.”⁶

A. DEFINITION OF OCCURRENCE

The policy definition of “occurrence” has changed over the years. Before 1966, most liability policies provided coverage for bodily injury or property damage “caused by an accident.”⁷ The standard policy's insuring agreement was amended in 1966 to respond to “occurrences” rather than “accidents,” in response to court decisions which required accidents to be sudden in order to fall within coverage.⁸

“Occurrence” was defined in the 1966 CGL policy to broaden coverage to include “an accident, including injurious exposure to conditions. . . .”⁹

Bodily injury and property damage usually (but not always) occur immediately upon the happening of an accident (e.g., an auto collision or “slip and fall”). However, not all accidents are sudden; some occur over a period of time.¹⁰ Hence, “continuous and repeated” was added to the phrase “exposure to conditions” in the definition of

⁶ See *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 409-10, 347 A.2d 842 (1975) (observing that although the policy is referred to as liability insurance, it is litigation insurance as well, protecting the insured from the expense of defending suits brought against it). For an excellent discussion of the duty to defend under Maryland law, see Andrew Janquitto, *Insurer's Duty to Defend in Maryland*, 18 U. Balt. L. Rev. 1 (Fall 1988).

⁷ See, e.g., *State Farm Mut. Auto Ins. Co. v. Treas.*, 254 Md. 615, 255 A.2d 296 (1969); *Glens Falls Ins. Co. v. Am. Oil Co.*, 254 Md. 120, 254 A.2d 658 (1969); *Harleysville Mut. Cas. Co. v. Harris & Brooks, Inc.*, 248 Md. 148, 235 A.2d 556 (1967); *Haynes v. Am. Cas. Co.*, 228 Md. 394, 179 A.2d 900 (1962).

⁸ An “accident” is “a happening; an event that takes place without one's foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected. Webster's Twentieth Century Dictionary. See *Am. Home Assur. v. Osbourn*, 47 Md. App. 73, 80, 422 A.2d 8 (1980); *Ed. Winkler & Son, Inc. v. Ohio Cas. Ins. Co.*, 51 Md. App. 190, 194, 441 A.2d 1129 (1982); see also *Upjohn Co. v. New Hampshire Ins. Co.*, 476 N.W.2d 392, 408 (Mich. 1991) (describing the history of the provision); *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570, 573-75 (Wis. 1990) (same).

⁹ See, e.g., *Am. Home Assur. v. Osbourn*, 47 Md. App. 73, 80, 422 A.2d 8, 13 (1980); see generally 7A J. Appleman, *Insurance Law and Practice*, § 4492 (Berdal ed. 1979 & 2003 Cum. Supp.); see also Tinker, *supra* note 2, at 254-56. In 1972, the definition was changed to broaden coverage to the definition used in the 1973 CGL. See Appleman, *supra*.

¹⁰ See, e.g., *Reliance Ins. Co. v. Mogavero*, 640 F. Supp. 84, 86 (D. Md. 1986) (construction defects); *Steyer v. Westvaco Corp.*, 450 F. Supp. 384, 389-90 (D. Md. 1978) (air pollution); *Harford Co. v. Harford Mut. Ins. Co.*, 327 Md. 418, 435-36, 610 A.2d 286, 294-95 (1992) (air pollution); *Lloyd E. Mitchell, Inc. v. Md. Cas. Co.*, 324 Md. 44, 58-60, 595 A.2d 469, 477-78 (1991) (asbestos exposure).

“occurrence” during the 1973 revisions to clarify that the injury or damage need not happen abruptly.¹¹

In the 1973 ISO CGL policy, “occurrence” is defined as follows:

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

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

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

Whether an injury is accidental appears to be a simple concept, but it has proven difficult to apply. In *Sheets v. Brethren Mut.*,¹² the Court of Appeals of Maryland considered the term “accident” in the context of a farm owner’s general liability policy.¹³ In that case, insured sellers of real estate sought a declaratory judgment that their insurer had a duty to defend and indemnify them in the buyer’s lawsuit alleging negligent misrepresentation that a septic system was in good working order. The Court rejected an objective foreseeability test for determining whether an event was accidental, holding that:

[A]n act of negligence constitutes an “accident” under a liability insurance policy when the resulting damage was “an event that takes place without [the insured’s] foresight or expectation.” *Harleysville v. Harris & Brooks*, 248 Md. at 154, 235 A.2d at 559 (citation omitted). In other words, when a negligent act causes damage that is unforeseen or unexpected by the insured, the act is an “accident” under a general liability policy.¹⁴

In reaching this decision, the Court specifically disapproved of the decision in *Ed. Winkler & Son, Inc. v. Ohio Cas. Ins. Co.*,¹⁵ which adopted an objective test for “accident,” and

¹¹ Tinker, *supra* note 2, at 256-57. Tinker states that “the decision . . . to take the suddenness out of accident and to incorporate coverage for continuous and repeated exposure within the standard provisions” began with the 1966 revision. The phrase “injurious exposure to conditions” was used. *Id.* at 256.

¹² 342 Md. 634, 679 A.2d 540 (1996).

¹³ See Gregory T. Lawrence, *Sheets v. Brethren Mutual: Maryland’s High Court Misconstrues CGL to Cover Excluded Economic Loss Caused by Negligent Misrepresentation*, 27 U. Balt. L. Rev. 189 (Fall 1997); H. Brent Brennenstuhl, Annotation, *Negligent Misrepresentation As “Accident” or “Occurrence” Warranting Insurance Coverage*, 58 A.L.R. 5th 483 (1998).

¹⁴ 342 Md. at 652, 679 A.2d at 548.

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

I.A. Constr. Corp. v. T & T Surveying,¹⁶ which followed *Ed. Winkler & Son, Inc.*¹⁷

Sheets makes clear that the accidental nature of an event is judged by a subjective standard, i.e., the accident may have been foreseeable from an objective standard, but must not have been foreseen by the insured.¹⁸ The mere objective foreseeability of an accident does not make an event intentional. Foreseeability is also an element of negligence. Thus, if objectively foreseeable injury were excluded, the liability policy would lose its purpose, because it would always exclude coverage for negligence.

¹⁶ 822 F. Supp. 1213 (D. Md. 1993).

¹⁷ *Sheets*, 324 Md. at 654; 679 A.2d at 550. In *Ed. Winkler*, which involved an action for slander, malicious prosecution and false arrest, the plaintiff alleged that she was "wrongfully accused by [the insured jewelry store owner] of stealing a \$600.00 diamond and substituting for it a \$20.00 zircon." *Ed. Winkler*, 51 Md. App. at 191. The supposed zircon turned out to be a diamond and the charges were dropped. The Court found that the insured's acts "were committed consciously and deliberately, without the unexpected intervention by any third force; and. . . the likely (and actual) effect of those acts was well within the insured's foresight and anticipation. Hence, the [Complaint] did not allege an accident or an occurrence." *Id.* at 195. Although the Court was interpreting a contract, it applied a traditional tort test, i.e., "natural and probable consequences," to determine whether an event was an accident or intentional. The factual allegations in *Ed. Winkler* made the alleged personal injury much more than merely foreseeable. The tort plaintiff was alleging intentional torts--false arrest and malicious prosecution-- and also was pursuing an action for slander *per se*, specifically, an accusation of theft. Hence, the injurious character of the alleged injury was self-evident. See, e.g., *Metromedia Inc. v. Hillman*, 285 Md. 161, 163-64, 400 A.2d 1117 (1979) (where words themselves impute defamatory character, no extrinsic evidence as to defendant's knowledge of or reckless disregard as to their falsehood is required); *Jacron Sales Co., Inc. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976) (slander may be either an intentional or negligent tort). In *Ed. Winkler*, the injury to the plaintiff was either purposeful or self-evident.

¹⁸ *Sheets*, 342 Md. at 651-52, 679 A.2d at 548-49.