

**ANALYSIS OF COMMERCIAL
GENERAL LIABILITY COVERAGE
FOR CONSTRUCTION DEFECT
WORK CLAIMS IN
MINNESOTA AND WISCONSIN**



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QUESTIONS TO ASK WHEN EVALUATING CONSTRUCTION DEFECT CLAIMS

1. Was the insured legally obligated to pay damages? **If NO → Deny Claim** (See *Obligation to Pay Damages*, pg. 2)
2. Was there property damage? (See *Property Damage No. 1*, pg. 2)
 - a. Is there physical damage to tangible property? (See *Property Damage No. 1a*)
 - b. Is there loss of use to tangible property that is not physically harmed?

If NO to both → Deny Claim (See *Property Damage No. 1b*, pg. 2)
3. Was the property damage caused by an occurrence, i.e.: an accident? **If NO → Deny Claim** (See *Occurrence No. 1*, pg. 2)
4. Did the property damage occur during the policy period? **If NO → Deny Claim** (See *Occurrence No. 4*, pg. 2)
5. Is the policy triggered under any other theory?
 - a. manifestation,
 - b. exposure,
 - c. continuous, or
 - d. actual injury.

If NO to all → Deny Claim
6. Are any other policies triggered? **If YES → Coordinate Coverage between insured's policies and policies of others, if implicated.** (See *Other Insurance*, pg. 9)
7. Was the property damage expected or intended from the standpoint of the insured? **If YES → Deny Claim** (See *Exclusion A*, pg. 6)
8. Was the obligation to pay damages for the property damage assumed in a contract? **If YES → Deny Claim** (See *Exclusion B 1*, pg. 6)
9. Was the contract an insured contract? **If YES → Coordinate Indemnitee's Own Coverage** (See *Exclusion B 3*, pg. 6)

If YES, was the damaged work or work out of which the damage arose performed on the named insured's behalf by a subcontractor? **If NO → Deny Claim** (See *Exclusion L*, pg. 8)
10. Did the property damage arise out of the named insured's product? **If YES → Deny Claim** (See *Exclusion K*, pg. 8)
11. Is the property damage to the named insured's work within the products-completed operations hazard? (See *Products-Completed Operations Hazard and Exclusion L*, pg. 8)
12. Was the property damage to that particular part of real property on which the named insured or its contractors or subcontractors are performing operations, if the property damage arises out of those operations? **If YES → Deny Claim** (See *Exclusion J 5*, pg. 7)
13. Was the property damage to that particular part of any property damage which must be restored, repaired, or replaced because the named insured's work was incorrectly repaired on it? **If YES → Deny Claim** (See *Exclusion J 6*, pg. 7)
14. Does the claim involve property damage to impaired property arising out of the named insured's "work" or its delay or failure to perform a contract? **If YES → Deny Claim** (See *Exclusion M*, pg. 8)
15. Does the claim involve property damage to property that has not been physically injured arising out of the named insured's "work" or its delay or failure to perform a contract? **If YES → Deny Claim - Unless Exception Applies** (See *Exclusion M*, pg. 8)
16. Are damages claimed for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of the named insured's product or work, or impaired property if withdrawn or recalled from the market or use because of a known or suspected defect or deficiency? **If YES → Deny Claim, If NO → Claim Allowed** (See *Exclusion N*, pg. 8)

INITIAL GRANT OF COVERAGE

OBLIGATION TO PAY DAMAGES

Plaintiff must seek money damages in order to trigger coverage.

MN – See *TJB Cos., Inc. v. Md. Cas. Co.*, 504 N.W.2d 476, 477 (Minn. 1993) (coverage is not triggered where plaintiff sought rescission of contract rather than money damages).

WI – See *Bloomfield Rd., LLC v. DeMichele*, 762 N.W.2d 863 (Wis. Ct. App. 2008) (no homeowner’s liability coverage where plaintiff sought injunction rather than money damages).

OCCURRENCE

1. An occurrence must be an accidental event, which includes repeated or continuous exposure to substantially the same general harmful conditions.

MN – See *Hauenstein v. St. Paul-Mercury Indem. Co.*, 65 N.W.2d 122, 126 (Minn. 1954) (stating an accident is defined as “an unexpected, unforeseen or undesigned happening or consequence from either a known or an unknown cause”); *Am. Fam. Ins. Co. v. Walser*, 628 N.W.2d 605, 611 (Minn. 2001) (affirming the use of the *Hauenstein* standard).

WI – See *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 753 N.W.2d 448, 456 (Wis. 2008) (an accident is an event or condition occurring by chance or one that arises from unknown causes, and is unforeseen and unintended).

Was the property damage caused by an occurrence? (i.e., an accident?) If NO → Deny Claim

2. An occurrence must be unintentional.

MN – See *Sage Co. v. Ins. Co. of N. Am.*, 480 N.W.2d 695, 698 (Minn. Ct. App. 1992) (determining the intentional firing of an employee is not an occurrence), overruled in part, *Am. Fam. Ins. Co. v. Walser*, 628 N.W.2d 605 (Minn. 2001) (finding where there is no intent to injure, the incident is an accident, even if the conduct itself was intentional).

WI – See *J.G. v. Wangard*, 753 N.W.2d 475, 491 (Wis. 2008) (no coverage for damages arising from intentional sexual contact).

3. For the event to be deemed an occurrence, the insured must not have expected the event and must not have been certain that the event would have caused the damage.

MN – See *Domtar v. Niagara Fire Ins. Co.*, 563 N.W.2d 724, 735 (Minn. 1997) (stating the insurance term, “expected” damage, requires “a certainty of harm on the part of the insured greater than general negligence standards of foreseeability used to impose liability on the insured.”).

WI – See *Glassner v. Detroit Fire & Marine Ins. Co.*, 127 N.W.2d 761, 764 (Wis. 1964) (an occurrence is a fortuitous and extraneous happening and not loss or damage which was almost certain to happen).

4. If the event that caused the property damage occurred before the policy term began, as long as the property damage occurred *during* the policy term, the event that caused that damage will be deemed an “occurrence.”

MN – See *Wooddale Builders v. Md. Cas. Co.*, 722 N.W.2d 283, 292 (Minn. 2006) (citing *N. States Power Co. v. Fidelity & Cas. Co. of NY*, 523 N.W.2d 657, 663 (Minn. 1994)) (a liability policy is “triggered” if the complaining party is actually damaged during the policy period, regardless of when the underlying negligent act occurred); *Jenoff, Inc. v. New Hampshire Ins. Co.*, 558 N.W.2d 260, 263 (Minn. 1997) (“[I]n Minnesota, an ‘occurrence,’ within the meaning of an indemnity policy, is not the time when the wrongful act was committed, but rather, it is the time when the complaining party was actually damaged”).

WI – See *Plastics Eng’g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626 (Wis. 2009) (when a liability policy is triggered during policy period, the insurer is responsible for all sums up to the policy limits).

5. As long as the damage occurs during the policy period, it does not matter who owns the property at the time, unless the policy language states otherwise.

MN – *Bergen v. Grinnell Mut. Reinsurance Co.*, 946 F. Supp. 2d 867, 873 (D. Minn. 2013) (“Coverage must turn on whether property was damaged during the policy period, and not when the insured’s liability is assessed or who owned the property at that time. If it can be shown that property was damaged during the policy period and that damage was caused by an occurrence, no policy language precludes coverage simply because the underlying plaintiff did not own the property at that time”).

6. If the property damage was caused by the negligent misrepresentation of the insured, the negligent misrepresentation is not an “occurrence” because the insured intended to induce reliance on the statement.

MN – See *Tschimperle v. Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 424 (Minn. Ct. App. 1995) (“Negligent misrepresentations cannot be ‘accidents’ because the insured intends to induce reliance on the statement.”).

WI – See *United Coop. v. Frontier FS Coop.*, 738 N.W.2d 578, 583-584 (Wis. Ct. App. 2007) (a misrepresentation that cannot be said to have caused any property damage as defined in a typical CGL or other liability policy is not an occurrence).

Was the insured legally obligated to pay damages? If NO → Deny Claim

Did the property damage occur during the policy period? If NO → Deny Claim

PROPERTY DAMAGE

1. Property damage is either physical injury or loss of use of tangible property. This distinction is necessary for the determination of when the loss is deemed to have occurred.

- a. The property must be considered tangible.
 - Electronic data is not considered tangible property. Electronic data includes information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy

discs, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically stored equipment. See *Tschimperle v. Aetna Cas. & Sur. Co.*, 529 N.W.2d 421, 425 (Minn. Ct. App. 1995) (stating the “loss of investment does not constitute damage to tangible property”).

b. What is considered loss of use?

MN – See *Wakefield Pork v. RAM Mut. Ins. Co.*, 731 N.W.2d 154, 157 (Minn. Ct. App. 2007) (landowner’s complaint alleging loss of use and enjoyment of property due to odors from neighboring pig farm constituted property damage).

WI – See *Everson v. Lorenz*, 695 N.W.2d 298, 307 (Wis. 2005) (sufficient claims for loss of use require the property to be useless); *Vogel v. Russo*, 613 N.W.2d 177, 184 (Wis. 2000) *overruled in part*, *Ins. Co. of N. Am. v. Cease Elec., Inc.*, 688 N.W.2d 462, 468 n.6 (Wis. 2004) (diminution in value of home does not constitute loss of use, even where such reduction in value nears the point of worthlessness); and *Jares v. Ulrich*, 667 N.W.2d 843, 848 (Wis. Ct. App. 2003) (animal infestation which resulted in homeowner’s inability to occupy the property implied both loss of use and physical damage).

Was there property damage?

- A. **Is there physical damage to tangible property?**
B. **Is there loss of use to tangible property that is not physically harmed?**

If **NO** to both → **Deny Claim**

Was the property damage expected or intended from the standpoint of the insured? If YES → Deny Claim

Did the property damage arise out of the named insured’s product? If YES → Deny Claim

Is the property damage to the named insured’s work within the products completed operations hazard? If YES and performed by insured → Deny Claim

INSURED

If the Declarations designate:

1. An **individual**;
 - the individual who is a sole owner of a business, and
 - the individual’s spouse is insured with respect to the conduct of that business.
2. A **partnership** or **joint venture**;
 - the partnership or joint venture is an insured, and
 - the members and partners of the partnership or joint venture, and
 - the members and partners’ spouses are insureds with respect to the conduct of the business.

MN – See *Am. States Ins. Co. v. Ankerum*, 651 N.W.2d 513, 522 (Minn. Ct. App. 2002) (whether a joint venture exists is usually a question for the fact finder to determine).

WI – See *Grotelueschen by Doherty v. Am. Fam. Mut. Ins. Co.*, 492 N.W.2d 131, 135 (Wis. 1992) (where the partnership and the individual partners are named as insureds, the partners are insured as individuals for partnership-related liability).

3. A **limited liability company**;

- the limited liability company is an insured, and
- the members of the limited liability company are insureds with respect to the conduct of the business, and
- managers are insureds with respect to their duties as managers.

WI – See *Brown v. MR Grp, L.L.C.* 693 N.W.2d 138, 142 (Wis. Ct. App. 2005) (the definitions of a limited liability company’s members and managers same as under Wisconsin Statutes chapter 183, a ‘member’ is one admitted to membership, and a ‘manager’ is so designated in the articles of organization).

4. An **organization** other than a partnership, joint, venture, or limited liability company;

- the organization is an insured, and
- the “executive officers” and directors are insureds with respect to their duties as officers and directors, and
- stockholders are insureds with respect to their liability as stockholders.

5. A **trust**;

- the trust is an insured, and
- trustees are insureds with respect to their duties as trustees.

6. In addition to the above designees, the following are also insureds:

- a. The designee’s “**volunteer workers**” are insureds with respect to the performance of duties related to conduct of the designee’s business.
- b. The designee’s “**employees**” are insureds, only if the designee is an organization other than a partnership, joint venture, or limited liability company, and only for acts within the scope of their employment or while performing duties related to the conduct of the designee’s business.

The designee’s “**employees**” are **not** insureds for “property damage” to property that is either owned or controlled by the designee.

- c. The designee’s **managers** are insureds, if the designee is a limited liability company, for acts within the scope of their employment or while performing duties related to the conduct of the designee’s business.

The designee’s managers are **not** insureds for “property damage” to property that is either owned or controlled by the designee.

- d. Any person or organization is an insured while acting as the designee's **real estate manager**.

WI - See *Brown v. MR Grp, L.L.C.* 693 N.W.2d 138, 143 (Wis. Ct. App. 2005) (the common usage definition of real estate manager is one who manages the business affairs of certain real estate).

A **newly acquired or formed organization** (that is not a partnership, joint venture, or limited liability company) is an insured only if the designee is the owner or has a majority interest, and is subject to the following conditions:

- Similar insurance must not be available to the organization.
- Coverage only lasts for 90 days after the insured acquires or forms the organization, or until the end of the policy period, whichever is earlier.
- Coverage does not apply to "property damage" that occurred before the insured acquired or formed the organization.

INSURER

The "insurer" refers to the insurance company providing the insurance at issue. The terms "we," "us," and "our" used in the policy refer to the same insurance company.

NAMED INSURED

To be a "named insured," the person's name must appear in the declaration. The terms "you" and "your" used in the policy refer to the same persons.

SUIT

The following constitute a "suit":

- A civil proceeding in which property damages are alleged.
- An arbitration proceeding in which property damages are alleged and the insured must submit or does submit with the insurer's consent.
- An alternative dispute resolution proceeding in which property damages are alleged and the insured submits with the insurer's consent.
- The insured received a potentially responsible party (PRP) letter.

MN - See *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 315 (Minn. 1995), overruled in part, *Bahr v. Boise Cascade Corp.*, 766 N.W.2d 910, 919 (Minn. 2009) (a state agency's request for information constituted a "suit" under a comprehensive general liability policy).

WI - See *Johnson Controls, Inc. v. Empls. Ins. of Wausau*, 665 N.W.2d 257, 284 (Wis. 2003) (the receipt of a PRP letter from a state agency for remediation of costs is the functional equivalent of a "suit" and triggers the duty to defend).

Is there a suit or claim that triggers the policy under any theory?

- A. Manifestation,**
- B. Exposure,**
- C. Continuous, or**
- D. Actual Injury**

If NO to ALL → Deny Claim

DEFENSE AND INDEMNITEES OF INSURED

All of the following are necessary for an indemnitee of the insured to be defended by the insurer:

1. There is a suit.
2. Both the insured and the insured's indemnitee are named as parties to the suit.
3. The damages sought in the suit are damages for which the insured has assumed liability of the indemnitee in an "insured contract."
4. The insurance applies to liability assumed by the insured.
5. In the "insured contract" between the insured and the insured's indemnitee, the insured has assumed the obligation to defend the indemnitee, or to cover the cost to defend the indemnitee.
6. No conflict appears to exist between the interests of the insured and the interests of the indemnitee.
7. The indemnitee and the insured have asked the insurer to conduct and control the defense of the indemnitee against the suit
8. The indemnitee and the insured have agreed that the insurer can assign the same counsel to defend the insured and the indemnitee.
9. The indemnitee has agreed in writing to cooperate with the insurer in the investigation, settlement or defense of the suit.
10. The indemnitee has agreed in writing to immediately send the insurer copies of any demands, notices, summonses or legal papers received in connection with the suit.
11. The indemnitee has agreed in writing to notify any other insurer whose coverage is available to the indemnitee.
12. The indemnitee has agreed in writing to cooperate with the insurer with respect to coordinating other applicable insurance available to the indemnitee.
13. The indemnitee has provided the insurer with written authorization to obtain records and other information related to the suit.
14. The indemnitee has provided the insurer with written authorization to conduct and control the defense of the indemnitee in the suit.
15. The applicable limit of insurance has not been used up in the payment of judgments or settlements.

WI - See *Berg v. Gulf Underwriters Ins. Co.*, 756 N.W.2d 478 (Wis. Ct. App. 2008) (finding indemnity clauses are primarily to benefit the insured and the insurer, the indemnitee is only an incidental beneficiary of the clause).

Are any other policies triggered? If YES → Coordinate coverage between insured's policies and policies of others, if implicated

DEFINITIONS

YOUR WORK

Was the contract an insured contract? If YES → Coordinate indemnitee's own coverage

1. Work or operations performed by named insured.
2. Work or operations performed on behalf of named insured, including work done by a subcontractor.

MN – See *Acceptance Ins. Co. v. Ross Contractors*, 2008 WL 2796593 (Minn. Ct. App. 2008).

WI – See *Am. Fam. Ins. Co. v. Am. Girl*, 673 N.W.2d 65 (Wis. 2004).

3. Materials, parts or equipment furnished in connection with work or operations performed by named insured or on behalf of named insured.
4. Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work.”

WI – See *Stuart v. Weisflog's Showroom Gallery*, 753 N.W.2d 448, 460-461 (Wis. 2008) (a representation need not be false to trigger the exclusion).

5. The providing of or failure to provide warnings or instructions.

YOUR PRODUCT

The following are considered “your product”:

1. Goods or products which are manufactured, sold, handled, distributed, or disposed of by:
 - (a) named insured;
 - (b) others trading under the name of the named insured; or
 - (c) a person or organization whose business or assets the named insured has acquired.
2. Containers, materials, parts, or equipment furnished in connection with goods or products.
3. Warranties or representations made at any time with respect to the fitness, quality, durability, performance, or use of “your product.”
4. Failure to provide warnings or instructions for “your product.”

The following are **NOT** considered “your product”:

1. Real property

MN - *Merritt v. Mendel*, 690 N.W.2d 570, 572 (Minn. Ct. App. 2005) (work or products that are incorporated and integral to the structure are improvements to real property).

WI – See *Gen. Cas. Ins. Co. v. Feuling Concrete Constr.*, 538 N.W.2d 859 (Wis. Ct. App. 1995) (poured concrete for foundation walls not real property and damage resulting from faulty foundation excluded); *Toldt Woods Condo. Owner's Ass'n v. Madeline Square*, 757 N.W.2d 850 (Wis. Ct. App. 2008) (a pond constructed by insured qualifies as real property, not considered “your product”).

2. Vehicles
3. Vending machines or other property rented to or located for the use of others but not sold.

INSURED CONTRACT

1. Lease of premises

Leases are “insured contracts,” except for the portion of the lease which indemnifies any person or organization for damage by fire to premises while rented to insured or temporarily occupied by insured.

2. Easement or license

An easement or license is an “insured contract” AS LONG AS the easement/license is NOT in connection with construction or demolition on or within 50 feet of a railroad.

3. Obligation to indemnify a municipality required by ordinance.

An agreement obligating the insured to indemnify a municipality, required by ordinance, is an “insured contract” UNLESS the agreement is in connection with work for a municipality.

4. If part of a contract pertaining to the insured's business assumes tort liability of another party, that part of the contract is an “insured contract” -- AS LONG AS THE FOLLOWING DO NOT APPLY:

- a. The contract/agreement indemnifies an architect, engineer, or surveyor for property damage arising out of (1) preparing, approving, or failing to prepare or approve, maps, drawings, and specifications, or (2) giving directions/instructions, or failing to give them, if that is the primary cause of the damage.
- b. The insured is an architect, engineer, or surveyor who assumes liability for damage arising out of insured's rendering or failure to render professional services, including those listed in section a above.

MN – See *KBL Cable Svcs. of the SW. v. Liberty Mut. Fire Ins. Co.*, 2004 WL 2660709 (Minn. Ct. App. 2004) (the language expressed a clear intent to indemnify the other party for all tort liability).

WI – See *Nu-Pak v. Wine Specialties Int'l*, 643 N.W.2d 848, 856 (Wis. Ct. App. 2002) (“insured contract” is an assumption of the tort liability of another party, not an assumption of the insured's own tort liability).

PRODUCTS-COMPLETED OPERATIONS HAZARD

Was the contract an insured contract? If YES → Coordinate indemnitee's own coverage

If the property damage occurs due to “your work” away from premises the named insured owns or rents, it qualifies under the products-completed operations hazard.

WI – See *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65, 82 (Wis. 2004) (finding coverage for property damage due to the

named insured's work occurring away from premises the named insured owned or rented).

The named insured's work must be completed to qualify under the products-completed operations hazard. Products still in the named insured's possession and work that has been abandoned do not qualify.

Work qualifies as completed when it has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project. Work qualifies as completed if it merely needs service, maintenance, correction, repair, or replacement.

MN – See *Ames v. Minn. Hoist Inspection, Inc.*, 1996 WL 5785 (Minn. Ct. App. 1996) (no coverage for damage due to a completed product where endorsement excluded coverage for bodily injury and property damage included within the products-completed operations hazard).

EXCLUSIONS

EXCLUSION A

Exclusion A - Expected or Intended Injury.

Property damage expected or intended from the standpoint of the insured is excluded from coverage.

1. If the insured knew that the damage would result from insured's actions, then this exclusion applies.

MN – See *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 372 (Minn. Ct. App. 1992) (whether the landfill operator expected or intended the contamination was a material question of fact not appropriate for summary judgment).

WI – See *Ludwig v. Dulkan*, 579 N.W.2d 795, 799 (Wis. Ct. App. 1998) (“an intentional-acts exclusion precludes insurance coverage where an intentional act is substantially certain to produce injury even if the insured asserts that he did not intend any harm.”).

2. If the insured should have known that the damage would have resulted from the insured's actions, then this exclusion applies.

MN – See *Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co.*, 480 N.W.2d 368, 372 (Minn. Ct. App. 1992) (an objective standard of reasonableness may be used to determine whether the actor should have known that there was a substantial probability that certain consequences would result from his actions).

WI – See *Ludwig v. Dulkan*, 579 N.W.2d 795, 799 (Wis. Ct. App. 1998) (intent may be actual (a subjective standard) or inferred by the nature of the insured's intentional act (an objective standard)).

3. If the insured intended to do the act and intended to cause the damage, then this exclusion applies.

MN – See *Cont'l W. Ins. Co. v. Toal*, 309 Minn. 169, 174-75, 244 N.W.2d 121, 124-125 (1976) (“a distinction between

intentional acts and unintended injuries is consistent with the general rule that it is the harm itself that must be intended before the exclusion will apply.”).

WI – See *J.G. and R.G. v. Wangard*, 753 N.W.2d 475, 488 (Wis. 2008).

4. If the insured acted with extreme recklessness so that intent may be inferred, then this exclusion applies.

MN – See *Woida v. N. Star Mut. Ins. Co.*, 306 N.W.2d 570, 573 (Minn. 1981) (inferring intent to injure when insured was part of group that fired shots into occupied truck.).

5. If the damage was a result of a claim of which the insured received notice before the policy went into effect, then this exclusion applies.

MN – See *Wooddale Builders, Inc. v. Md. Cas. Co.*, 722 N.W.2d 283, 292 (Minn. 2006) (once a builder receives notice of a claim, any subsequent damage with respect to that claim was expected by insured).

WI – See *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65, 85 (Wis. 2004) (insurers are not obligated to cover losses occurring and known about at the time the policy was written).

Was the property damage expected or intended from the standpoint of the insured? If YES → Deny Claim

EXCLUSION B

Exclusion B – Contractual Liability

This exclusion applies to an insured contractually obligated to pay for the property damage by reason of assumption of liability.

1. If the insured would have been liable for the damage even without having assumed liability, then this exclusion does NOT apply.

MN – See *Auto-Owners Ins. Co. v. NewMech Co.*, 678 N.W.2d 477, 483 (Minn. Ct. App. 2004) (developer was already liable for damages under statutorily imposed warranties).

WI – See *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65, 81 (Wis. 2004) (the exclusion does not operate to exclude coverage for any and all liabilities to which the insured is exposed under the terms of the contracts it makes generally).

2. If the claims being made are tort claims, the exclusion does NOT apply.

MN – See *Fallon McElligott v. Seaboard Sur. Co.*, 607 N.W.2d 801 (Minn. Ct. App. 2000) (denying coverage for a contract claim improperly pled as a tort claim).

WI – See *Panlan v. Sigmund*, 695 N.W.2d 903 (Wis. Ct. App. 2005) (the “contractual-liability” exclusion does not negate coverage for plaintiff's tort claims).

3. If the contract was an “insured contract,” this exclusion does NOT apply.

Was the obligation to pay damages for the property damage assumed in a contract? If YES → Deny Claim

Was the contract an insured contract? If YES → Coordinate indemnitee's own coverage

EXCLUSION J

Exclusion J – Damage to Property

1. If the premises where the property damage occurred was owned, rented or occupied by the insured at the time the policy went into effect, then this exclusion applies, unless the premises was rented to the named insured for less than seven (7) days.

MN – See *Domtar, Inc. v. Niagara Fire Ins. Co.*, 563 N.W.2d 724 (Minn. 1997).

WI – See *Dells Club Condo. Owners Ass'n v. Bergman*, 514 N.W.2d 723 (Wis. Ct. App. 1993).

2. If the property damage arose from any part of premises that were sold, given away or abandoned by the insured, then this exclusion applies subject to the exceptions below.

MN – See *David A. Williams Realty & Constr., Inc. v. West Bend Mut. Ins. Co.*, 1991 WL 115127 (Minn. Ct. App. 1991) (insured sold the premises before it was aware of damages, thus the exclusion applies).

WI – See *Dells Club Condo. Owners Ass'n, Inc. v. Bergman*, 514 N.W.2d 723 (Wis. Ct. App. 1993) (insured sold the premises so the exclusion applies).

- A The premises built by or on behalf of the named insured.

MN – See *Auto-Owners Ins. Co. v. NemMech Cos., Inc.*, 678 N.W.2d 477, 484 (Minn. Ct. App. 2004) (coverage for property damage caused by faulty mechanical systems was not excluded under J(2) because the faulty mechanical system was “the work” of the developer).

3. If the property was loaned to the insured for a period greater than seven (7) days, then this exclusion applies.
4. If the damaged property was personal property and in the care, custody, or control of the insured, then this exclusion applies, subject to the exceptions below.
 - A. The damage was only incidental to the property upon which the insured was working.

MN – See *Ohio Cas. Ins. Co. v. Terrace Enterprises*, 260 N.W.2d 450, 453 (Minn. 1977) (“if the property damage is *incidental* to the property upon which the work is performed by the insured, it is not within his care, custody, or control”).

WI – See *Meiser v. Aetna Cas. & Sur. Co.*, 98 N.W.2d 919 (Wis. 1959) (scratched windows were incidental to the work insured was performing and were not under the care, custody, or control of the insured).

- B. The property was rented to the named insured for less than seven (7) days.

5. If a particular part of real property was damaged arising out of the work of the named insured, or its contractor/subcontractor, on that particular part then this exclusion applies to that damage.

MN – See *Acceptance Ins. Co. v. Ross Contractors*, 2008 WL 2796593 (Minn. Ct. App. 2008) (exclusion applies only to damage from ongoing work, not damage after completion) (unpublished); *Grinnell Mut. Reinsurance Co. v. Ripley*, 2009 WL 5088774 (Minn. Ct. App. 2009) (exclusion applies to property damage when the complaint seeks damages for repair, replacement, improvement, and lost value due to defective construction itself and not flood damage caused by the defective construction) (unpublished).

WI – See *General Cas. Ins. Co. v. Feuling Concrete Const.*, 538 N.W.2d 859 (Wis. Ct. App. 1995) (exclusion applies to property damage that occurs while the work is being undertaken). See *Acuity v. Society Ins.*, 2012 WL 15376 *24 (Wis. Ct. App. 2012) (the exclusion applies “only to those parts of a building on which the defective work was performed, which is determined based on the scope of the construction agreement”).

Was the property damage to that particular part of real property on which the named insured or its contractors or subcontractors are performing operations if the property damage arises out of those operations? If YES → Deny Claim

6. If a particular part of property must be replaced, restored, or repaired because “your work” was incorrectly performed on it, then this exclusion applies, subject to the exceptions below.

- A. The damage occurred after the work had been completed.

MN – See *Acceptance Ins. Co. v. Ross Contractors*, 2008 WL 2796593 (Minn. Ct. App. 2008) (the exception to J(6) applied because the work was completed before the defects were discovered) (unpublished).

WI – See *Weaver v. Dren*, 557 N.W.2d 257 (Wis. Ct. App. 1996) (although damage occurred after the work was completed, the faulty workmanship for which compensation is sought occurred contemporaneously with the work's performance, thus the exception did not apply).

Was the property damage to that particular part of any property damage which must be restored, repaired, or replaced because the named insured's work was incorrectly repaired on it? If YES → Deny Claim

- B. The work occurred away from the premises owned or rented by the named insured.

WI – See *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65, 82 (Wis. 2004) (property damage occurred away from premises the insured owned or rented).

EXCLUSION K

Exclusion K – Damage to Your Product

If there was “property damage” to, or arising out of, “your product,” then this exclusion applies.

MN - See *Am. Trailer Serv., v. Home Ins. Co.*, 361 N.W.2d 918, 920 (Minn. Ct. App. 1985) (there must be a causal connection between the damage and the product sold, rather than “merely the incidental instrumentality through which damage was done”).

WI – See *Jacob v. Russo Builders*, 592 N.W.2d 271, 277 (Wis. Ct. App. 1999) (exclusion applies to costs incurred from damage to masonry work such as repairing and replacing the defective masonry work, but costs for relocation and loss of use are covered); *Pamperin Rentals II, LLC v. R.G. Hendricks & Sons Const., Inc.*, 822 N.W.2d 736 (Wis. Ct. App. 2012) (noting that incidental and consequential damages resulting from insured’s use of defective concrete were not covered, but other damage done to asphalt did not fall within exclusion “k” and could be covered).

Did the property damage arise out of the named insured’s product? If YES → Deny Claim

EXCLUSION L

Exclusion L – Damage to Your Work

If there was “property damage” to or arising out of “your work” that is included in the “products-completed operation hazard,” then this exclusion applies.

MN – See *Corn Plus Coop. v. Cont’l Cas. Co.*, 516 F.3d 674, 679 (8th Cir. 2008) (where insured performed defective welding on an ethanol plant, the “your work” exclusion barred coverage of the cost of repairing the welding).

WI – See *Stuart v. Weisflog’s Showroom Gallery, Inc.*, 753 N.W.2d 448, 464 (Wis. 2008) (“your work” exclusion applied where damages to the contractor’s own work resulted from the contractor’s defective design).

Exception: If the damaged work or the work out of which the damage arises was performed on the named insured’s behalf by a subcontractor, then this exclusion does not apply.

MN – See *Wanzek Constr., v. Employers Ins. of Wausau*, 679 N.W.2d 322, 329 (Minn. 2004) (a supplier who custom-fabricates materials and provides on-site services in connection with their installation is considered a subcontractor, triggering the subcontractor exception to the exclusion).

WI – See *Am. Fam. Ins. Co. v. Am. Girl*, 673 N.W.2d 65, 82 (Wis. 2004) (subcontractor exception applies where general contractor’s work was damaged as a result of subcontractor’s defective soil engineering).

Exception: Insured’s work

MN - *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 612 (Minn. 2012) (noting exclusion “L” only applies to goods and products, and did not exclude coverage for the contractor’s work).

Is the property damage to the named insured’s work within the products completed operations hazard?

If YES, was the damaged work or work out of which the damage arose performed on the named insured’s behalf by a subcontractor? If NO → Deny Claim

EXCLUSION M

Exclusion M – Damage to Impaired Property or Property Not Physically Injured

If there was property damage to impaired property arising out of the named insured’s product, work, or delay or failure to perform a contract, the exclusion applies. Impaired property is defined as tangible property that cannot be used or is less useful because it incorporates “your product” or “your work”, is known or thought to be defective, deficient, inadequate, or dangerous. Impaired property includes property that can be restored to use.

MN – See *Corn Plus Coop. v. Cont’l Cas. Co.*, 516 F.3d 674, 680 (8th Cir. 2008) (where insured performed defective welding on an ethanol plant, the plant was considered “impaired property,” triggering the exclusion and barring coverage for loss of use resulting from the defective work); *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 612 (Minn. 2012) (Exclusion “M” excluded the work performed by the contractor but did not exclude coverage for moisture damage caused by the work performed by the contractor).

WI – See *Armament Sys. & Procedures v. Federated Mut. Ins. Co.*, 581 N.W.2d 594 (Wis. Ct. App. 1998) (barring recovery because baton holders could be restored by adjusting insured’s product); *Heritage Mut. Ins. Co. v. Beckart Envtl.*, 570 N.W.2d 252 (Wis. Ct. App. 1997) (barring recovery for loss of use of electroplating plant that did not function properly and had to be closed down because it incorporated the insured’s effluent treatment system).

Does the claim involve property damage to property that has been physically injured arising out of the named insured’s “work” or its delay or failure to perform a contract? If YES → Deny Claim

If there is property damage to other property that has not been physically injured arising out of the named insured’s product, work, or delay or failure to perform a contract, then this exclusion applies, subject to the exception below.

Exception: Loss of use of other property arising out of sudden and accidental injury to “your product” or “your work” after it has been put to its intended use.

MN - See *Atlantic Mut. Ins. Co. v. Judd Co.*, 367 N.W.2d 604, 607 (Minn. Ct. App. 1985) (subcontractor’s idle time does not qualify as “loss of use”).

Did the property damage arise out of the named insured’s product? If YES → Deny Claim

Does the claim involve property damage to impaired property arising out of the named insured’s “work” or its delay or failure to perform a contract?

If YES, does the claim involve loss of use of other property arising out of sudden and accidental physical injury to the named insured’s product or work? If NO → Deny Claim

EXCLUSION N

Exclusion N – Recall of Product, Work or Impaired Property

If the named insured's "product" or "work" or impaired property containing the insured's "work" or "property" has been recalled from the market because of a known or suspected defect, deficiency, inadequacy, or dangerous condition, then this exclusion applies.

MN - See *Bright Wood Corp. v. Bankers Standard Ins. Co.*, 665 N.W.2d 544, 547 (Minn. Ct. App. 2003) (coverage barred when window manufacturer had to recall all windows containing the insured's product due to defect in the insured's product); *Atlantic Mut. Ins. Co. v. Judd Co.*, 380 N.W.2d 122, 125-126 (Minn. 1986) (the exclusion did not apply to defective pipes and fittings because the only materials repaired or replaced were those that were actually defective).

WI - See *Menasha Corp. v. Lumbermen's Mut. Cas. Co.*, 361 F. Supp. 2d 887, 895 (E.D. Wis. 2005) (coverage barred where defects in the insured's product led to product recall).

Are damages claimed for loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of the named insured's product or work, or impaired property if withdrawn or recalled from the market or use because of a known or suspected defect or deficiency? If YES → Deny Claim, If NO → Claim Allowed

SUPPLEMENTAL

DUTY TO DEFEND THE INSURED

An insurer's duty to defend its insured depends on the allegations set forth in the complaint that, if proven at trial, the allegations would require the insured to pay the judgment.

MN - See *Hornberger v. Wendel*, 764 N.W.2d 371 (Minn. Ct. App. 2009) (citing *Prabm v. Rupp Constr. Co.*, 277 N.W.2d 389, 390 (Minn. 1979)) ("[T]he obligation to defend is contractual in nature and is determined by the allegations of the complaint.").

WI - See *Elliot v. Donahue*, 485 N.W.2d 403, 407 (Wis. 1992) (citing *Sola Basic Indus. Inc. v U.S. Fid & Guar. Co.*, 280 N.W.2d 211 (Wis. 1979))(duty to defend "is predicated on allegations in a complaint which, if proved, would give rise to recovery under the terms and conditions of the insurance policy.").

The insurer has the duty to defend the insured against all allegations in the complaint, even though only one theory of liability in the complaint falls within the coverage of the policy.

MN - See *Grossman v. Am. Fam. Mut. Ins. Co.*, 461 N.W.2d 489 (Minn. Ct. App. 1990) (citing *Jostens, Inc. v. Mission Ins. Co.*, 387 N.W.2d 161, 165 (Minn. 1986)) (insurer has duty to defend "when any part of the claim is 'arguably' within the scope of the policy's coverage.").

WI - See *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 (Wis. 2009) (citing *U.S. Fire Ins. Co. v. Good Humor Corp.*, 496 N.W.2d 730, 737 (Wis. Ct. App. 1993)) ("[I]f coverage exists, an insurer must defend the entire suit even though some of the allegations fall outside the scope of coverage.").

REIMBURSEMENT OF DEFENSE COSTS

If the insurer breached its duty to defend the insured, then the insured may recover its defense costs.

MN - See *Gopher Oil Co. v. Am. Hardware Mut. Ins. Co.*, 588 N.W.2d 756, 769 (Minn. Ct. App. 1999) (citing *Morrison v. Swenson*, 142 N.W.2d 640, 647 (Minn. 1966)) ("An insured may recover its defense costs in a declaratory judgment action against an insurer based on a breach by the insurer of its duty to defend.").

WI - See *Employers Mut. Cas. Co. v. Horace Mann Ins. Co.*, 707 N.W.2d 280, 283 (Wis. Ct. App. 2005) (citing *Loosmore v. Parent*, 613 N.W.2d 923, 929 (Wis. Ct. App. 2000)) ("When an insurer breaches a duty to defend the insured, the insurer is responsible for all defense costs.").

The insurer may be reimbursed by the insured for defense costs, depending on the jurisdiction.

- Under **Minnesota** jurisdiction, an insurance agreement must specifically provide the right to seek reimbursement of defense costs when defense is provided by insurer with no obligation to provide it.
- Under **Wisconsin** jurisdiction, if the insurer provided a defense to its insured for uncovered claims, the insurer is entitled to a reimbursement of defense costs.

ADDITIONAL INSURED

Policy holders have the option of adding additional insureds to their CGL policies. The precise coverage available to the additional insured depends on the language of the endorsement. Courts have interpreted policies issued prior to 2004 to afford coverage to additional insureds for both vicarious liability due to the named insured's negligence and liability due to the additional insured's own negligence.

MN - See *Andrew L. Youngquist, Inc. v. Cincinnati Ins. Co.*, 625 N.W.2d 178, 184-185 (Minn. Ct. App. 2001) (coverage under an additional insured endorsement "was not limited to vicarious liability for [the named insured's] acts.").

WI - See *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613 (Wis. Ct. App. 2005) (coverage for the additional insured was not limited solely to the liability the additional insured might be exposed to as a result of the named insured).

However, additional insured endorsements issued after 2004 seek to limit coverage to vicarious liability due to the named insured's negligence. The endorsements state that coverage is only available for property damage caused in whole or in part by the named insured's acts or omissions.

OTHER INSURANCE

If the policy is primary, and other insurance is excess, the primary policy pays first. If other insurance is also primary, there are two methods for apportionment of indemnification:

- Contribution by equal shares (if permitted by other insurance policies). Under this method, each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

- By limits (when other insurance policies do not permit contribution by equal shares). Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

SEPARATION OF INSURED

MN - See *N. States Power Co. v. Fid. and Cas. Co. of N.Y.*, 523 N.W.2d 657, 664 (Minn. 1994) (when damage is due to a continuous process, the total amount of the property damage should be allocated to the various policies in proportion to the period of time each was on the risk).

WI - See *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 626 (Wis. 2009) (whether an insurer is liable for all sums or for the insurer's pro rata share depends on the language of the insurance contract); Wis. Stat. § 631.43 (preventing multiple insurers from reducing the aggregate protection of the insured below the lesser of the actual insured loss suffered by the insured or the total indemnification promised by the policies if there were no "other insurance" provisions).

CGL policies are excess over Fire, Extended Coverage, Builder's Risk, and Installation Risk Insurance. If the policy is excess and other primary insurers have a duty to defend, the policy does not provide for defense costs. However, if no primary insurer defends, the excess insurer will provide a defense, but will also be entitled to the insured's rights against the primary insurers.

When a policy is excess, it must pay its share of the amount of the loss that exceeds the sum of (1) the amount other insurers would pay in the absence of excess insurance, (2) deductibles under other insurance, and (3) self-insured amounts.

Defense Costs

MN - If there are multiple primary insurers on the risk, the insured may seek coverage from any insurer. Each insurer has a separate and distinct obligation to defend. See *Iowa Nat'l Mut. Ins. Co. v. Universal Underwriters Ins. Co.*, 150 N.W.2d 233, 236-237 (Minn. 1967). However, "a primary insurer that has a duty to defend, and whose policy is triggered for defense purposes, has an equitable right to seek contribution for defense costs from any other insurer who also has a duty to defend the insured, and whose policy has been triggered for defense purposes." *Cargill v. Ace Am. Ins. Co.*, 784 N.W.2d 341, 354 (Minn. 2010).

If there are multiple primary insurers on the risk and none provide a defense, the insured may recover its defense costs from any insurer and, as between insurers, there is equal liability for defense costs. See *Jostens v. Mission Ins. Co.*, 387 N.W.2d 161, 167 (Minn. 1986) If multiple insurers have voluntarily participated in a defense of a common insured and liability is allocated pro rata by time on the risk, then defense costs will be apportioned equally among the insurers. See *Wooddale Builders v. Md. Cas. Co.*, 722 N.W.2d 283, 304 (Minn. 2006)

WI - There is no pro rata approach to the duty to defend. If coverage exists, an insurer must defend the entire suit even though some of the allegations fall outside the scope of coverage. See *Plastics Eng'g Co. v. Liberty Mut. Ins. Co.*, 759 N.W.2d 613, 627 (Wis. 2009); see *Burgraff v. Menard, Inc.*, 875 N.W.2d 596, 610 (Wis. 2016) (reaffirming the decision in *Plastics Engineering* that liability cannot be prorated among multiple primary insurers when this is not written in the insurance policy).

Most CGL policies contain a "Separation of Insureds" provision. This provision provides that insurance coverage applies separately to each insured against whom a claim is made or a suit is brought. Consequently, exclusions are also applied only with reference to the particular insured seeking coverage.

MN - See *Travelers Indem. Co. v. Bloomington Steel*, 718 N.W.2d 888, 895 (Minn. 2006) (in a suit against a corporation and its sole shareholder, exclusion for expected or intended injury applied to shareholder but not automatically to corporation).

WI - See *J.G. v. Wangard*, 753 N.W.2d 475, 488 (Wis. 2008) (citing *Taryn E.F. v. Joshua M.C.*, 505 N.W.2d 418, 422 (Wis. Ct. App. 1993)) (exclusion for the intentional acts of "any covered person" precludes coverage to all persons covered by the policy if any one of them engages in excludable conduct).

BUSINESS RISK DOCTRINE

MN - *Bor-Son Bldg Corp. v. Emp'rs Commercial Union Ins. Co.*, 323 N.W.2d 58, 64 (Minn. 1982) (the standard comprehensive general liability policy does not provide coverage to an insured-contractor for a breach of contract action grounded upon faulty workmanship or materials, where the damages claimed are the costs of correcting the work itself). Under the "business risk" doctrine, CGL policies generally do not provide coverage for "contractual liability for defective materials and workmanship." See *Thommes v. Milwaukee Ins. Co.*, 641 N.W.2d 877, 881 (Minn. 2002). Rather, CGL policies primarily provide coverage for "tort liability to third parties." *Id.*

However, the "business risk" doctrine does not preclude parties from contracting for the coverage they desire. As long as they do not omit coverage required by law or contravene applicable statutes, the extent of coverage is governed by the contract. *Id.* at 882. For example, if parties use 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.*

WI - Wisconsin courts have recognized that CGL policies are not intended to cover the insured's business risks. See *Am. Fam. Mut. Ins. Co. v. Am. Girl*, 673 N.W.2d 65 (Wis. 2004) ("[B]usiness risk exclusions eliminate coverage for liability for property damage to the insured's own work or product-liability that is typically actionable between the parties pursuant to the terms of their contract, not in tort.").

INSOLVENT SHARES

When multiple insurers cover a common insured, the insured generally bears the risk of one or more of the insurers becoming insolvent. Assuming that the policy periods of the various insurers are consecutive and do not overlap, and that the policy language does not support assumption of insolvent shares, insolvent shares will be allocated to the insured, and not to the remaining solvent insurers.

MN - See *H.B. Fuller Co. v. U.S. Fire Ins. Co.*, No. 09-02827 (D. Minn. July 18, 2011) (liability should be allocated to the insured for insolvent insurer's policy period).