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## Note

### Liability Coverage for "Damages Because of Property Damage" Under the Comprehensive General Liability Policy

#### INTRODUCTION

Liability insurance,<sup>1</sup> a recently developed risk-spreading mechanism,<sup>2</sup> plays a vital role in modern economics and society. Most commercial ventures could not survive in the fast-paced market system without the protection of liability insurance, which transfers defined liability risks from insured businesses to professional risk bearers.<sup>3</sup> With the risks transferred, ventures need not retain funds to self-insure against potential liability. As a result, commodity prices decrease in proportion to the lower cost of protection,<sup>4</sup> and psychological inhibitions to expansion and innovation caused by gambling on the chance of liability are reduced.<sup>5</sup> Furthermore, the public not only bene-

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1. A liability insurer promises to pay on behalf of the insured all sums that the insured is legally obligated to pay as damages arising out of the risks named in the policy. Unlike indemnity insurance, under which the insured must suffer an actual loss before the insurer is liable, the obligation of a liability insurer accrues as soon as the insured's liability attaches. *See, e.g.,* Ahmed v. American S.S. Owners Mut. Protection & Indem. Ass'n, 444 F. Supp. 569, 571 (N.D. Cal. 1978), *aff'd in part, remanded in part*, 640 F.2d 993, 995 (9th Cir. 1981) (contrasting liability and indemnity policies); White v. Goodville Mut. Casualty Co., 226 Kan. 191, 194-95, 596 P.2d 1229, 1231-32 (1979) (same).

2. The origins of liability insurance can be traced to a policy issued in 1886 to an employer, protecting against responsibility to employees for damages. *See* Caverly, *The Background of the Casualty and Bonding Business in the United States*, [6] INS. COUNS. J., Oct. 1939, at 62, 63. In contrast, marine insurance, the earliest form of insurance as it is known today, can be traced to the fourteenth century. *See* Caffrey, *Background and Developments in Casualty Insurance*, 34 INS. COUNS. J. 145, 145 (1967).

3. The risk bearer, an insurance company, in turn transfers the cost of bearing the risk to a pool of similarly situated ventures in the form of premiums. J. LONG & D. GREGG, PROPERTY AND LIABILITY INSURANCE HANDBOOK 30 (1965).

4. S. HUEBNER, K. BLACK JR. & R. CLINE, PROPERTY AND LIABILITY INSURANCE 7 (3d ed. 1982) (only the relatively small premium must be passed on to consumer as cost of doing business, rather than sums sufficient to cover entire loss).

5. *Id.* (insurance increases marketplace efficiency of ventures by relieving

fits from an active economy, but also is assured the continued protection of a products liability law made viable by the availability of funds to pay judgments.<sup>6</sup>

The efficacy of liability insurance is purely illusory, however, when policies do not adequately delineate the liability risks transferred. Complicated and ambiguous language leaves insureds unable to predict the scope of purchased liability protection; uncertainty minimizes the benefits of insurance. Instead of gambling on possible liability, ventures gamble on policies' coverage. Funds must be retained to self-insure, commodity prices increase correspondingly, and change and expan-

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them of anxiety resulting from possibility of losses); J. LONG & D. GREGG, *supra* note 3, at 6. One commentator asserts that the absence of liability insurance would do more than merely inhibit marketing practices—it would destroy the capitalistic state:

[I]n the modern capitalistic state there is, too, the single naturally precious commodity that is just as vital to the very existence of the state—private liability insurance. Cease that institution and every industrial wheel, from the watchmaker's tiny mainspring to the turbines of the power plant, will cease its revolutions. No manufacturer, railroader, fabricator, druggist or industrialist will continue to risk his fortune.

Belli, *The Social Value of Liability Insurance*, 13 HASTINGS L.J. 169, 172 (1961).

Although such a forecast may be overstating the case, liability insurance may be essential to the survival of some industries. For example, it is doubtful that many ventures would find it economically feasible to expand into hazardous but useful fields if they were unable to transfer the risk of potentially catastrophic losses. *See, e.g.*, S. HUEBNER, K. BLACK JR. & R. CLINE, *supra* note 4, at 8 (development of nuclear power largely dependent on availability of insurance protection).

6. Products liability law gains both justification and vitality from the availability of liability insurance. The ability of manufacturers, distributors, and vendors to make an equitable distribution of the risks of loss underlies much of the expansion of products liability law in recent decades. *See, e.g.*, *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 379-80, 161 A.2d 69, 81 (1960) (court's abolition of privity requirement in implied warranty actions justified in part by manufacturers' and distributors' better ability to spread losses). The role of liability insurance in this risk-spreading ability was outlined in the prophetic concurrence of Justice Traynor of the California Supreme Court in *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944):

Those who suffer injury from defective products are unprepared to meet its consequences. The cost of an injury or the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. . . . However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

With an estimated sixty to seventy thousand products liability claims filed against liability insurance policies in 1976 alone, *see* Schwartz, *Administration Initiatives to Address the Product Liability Remedies that Meet the Problem's Causes*, 16 FORUM 711, 712-13 (1981), liability insurance's role in the continued growth of products liability law cannot be doubted.

sion are inhibited because of uncertainty over the scope and extent of coverage. The consumer protection provided by products liability law proves illusory when insurance coverage and operating capital are inadequate to satisfy liability judgments.<sup>7</sup>

Unfortunately, complicated and ambiguous language abounds in most liability insurance policies.<sup>8</sup> The language of

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7. In the mid-1970s, products liability insurance was alleged to be either unavailable or unaffordable for many manufacturers. Schwartz, *supra* note 6, at 711-12. One of the anticipated consequences of this situation was that products liability judgments would be unenforceable against these uninsured parties. *Id.* at 712. In response to this fear, Congress passed the Product Liability Risk Retention Act of 1981, Pub. L. No. 97-45, 95 Stat. 949 (codified at 15 U.S.C. §§ 3901-3904 (1982)). This Act allows sellers to form "purchasing groups" for obtaining group-rate commercial insurance and "risk retention groups" for self-insuring as a body. See Schwartz, *supra* note 6, at 714; see generally Shea, *The Product Liability Risk Retention Act of 1981*, PRAC. LAW., Mar. 1, 1982, at 9.

8. A typical description of liability insurance policy language is found in *Brainard v. Aetna Casualty & Sur. Co.*, 17 Misc. 2d 810, 812, 187 N.Y.S.2d 435, 437 (1959):

The Court cannot help but comment that the language, both in extent and ambiguity, in modern insurance policies is an abomination. Inclusions, exclusions, definitions and coverages set forth in the contracts present the most formidable type of obfuscation which no trained person, let alone a layman, can truthfully say is anything but the cant of the insurers. It is, unfortunately, not within the province of this Court to order that policies be written briefly and lucidly.

Despite the *Brainard* court's inhibition against compelling brief and lucid policy language, many courts attempt to achieve this result indirectly by strictly construing ambiguities in the policy language against the insurer and by applying the doctrine of reasonable expectations, under which the reasonable coverage expectations of insureds are enforced. See generally Abraham, *Judge-Made Law and Judge-Made Insurance: Honoring the Reasonable Expectations of the Insured*, 67 VA. L. REV. 1151 (1981).

As contracts, insurance policies are governed by the rule of construction directing that ambiguities be construed against the drafter, who in almost all insurance contexts is the insurer. 13 J. APPLEMAN & J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 7401, at 197-246 (rev. ed. 1976). Liberal applications of this rule have opened courts to charges of manufacturing ambiguities to justify coverage. See Kuvin, *Liability Imposed by Law*, 24 INS. COUNS. J. 153, 155-56 (1957). The rule, however, remains a powerful incentive for clarifying policy language. See Tinker, *Comprehensive General Liability Insurance—Perspective and Overview*, 25 FED'N INS. COUNS. Q. 217, 222 n.10 (1975) (crediting one policy revision to court decision finding coverage based on policy ambiguities). The doctrine of reasonable expectations's enforcing of insureds' coverage expectations has likewise impelled language clarifications in hopes of reducing the expectations' reasonableness.

Some state legislatures directly compel understandable language in insurance policies by demanding that the policies meet standards of readability. Best known are those statutes requiring the policies to pass the "Flesch Test," which measures readability by such factors as language technicality, number of syllables per word, and sentence length. See, e.g., 31 PA. ADMIN. CODE § 64.12 (Shepard's 1980) (applies to policies covering private passenger automobiles); MASS. GEN. LAWS ANN. ch. 175, § 2B (West Supp. 1983) (applies to all insurance policies of which more than 50 copies are delivered). Although simplicity of language does not necessarily mean clarity of coverage, Tinker, *supra*, at 222,

the liability policy most frequently purchased by commercial ventures, the Comprehensive General Liability Policy (CGLP),<sup>9</sup> has generated enormous confusion over the coverage it grants. The CGLP is a standardized liability policy promulgated by a group of organizations including the United States's leading insurance companies.<sup>10</sup> It and other standardized liability policies were first developed in 1940<sup>11</sup> in response to confusion resulting from the previous practice of each insurer drafting its own policy provisions.<sup>12</sup> These standardized provisions have developed into virtual "boiler-plate" clauses for most liability insurance forms.<sup>13</sup>

In a continuing effort to clarify insurers' coverage obligations and to keep trend with court decisions and the developing needs of insureds, the policy forms were revised in 1943, 1955, 1966, and, most recently, in 1973.<sup>14</sup> Both the 1966 and 1973 forms remain important: the 1966 CGLP continues to dominate court cases involving property damage liability coverage,<sup>15</sup> but the

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the statutes do focus the insurance industry's attention on insureds', rather than courts', ability to understand policies.

9. See Tyler & Wilcox, *Pollution Exclusion Clauses: Problems in Interpretation and Application Under the Comprehensive General Liability Policy*, 17 IDAHO L. REV. 497, 498 (1981) (commercial ventures of all types most often use the Comprehensive General Liability Policy for liability protection).

10. See Fish, *An Overview of the 1973 Comprehensive General Liability Insurance Policy and Products Liability Coverage*, 34 J. MO. B. 257, 257 (1978) (most major capital stock and mutual insurance companies are members of the drafting organization); Tinker, *supra* note 8, at 218-19 (same).

11. The first standard provisions policy of any kind was the basic automobile liability policy issued in 1935 by the National Bureau of Casualty Underwriters and the American Mutual Insurance Alliance. Tinker, *supra* note 8, at 218. There are presently some 20 different standardized liability policies. Other primary policies include Owners, Landlords and Tenants; Manufacturers and Contractors; Completed Operations and Products Liability; Contractual Liability; Storekeeper's Liability; Druggists Liability; Comprehensive Personal Liability; and Farm Employers' Liability and Farm Employees' Medical Payments. S. HUEBNER, K. BLACK JR. & R. CLINE, *supra* note 4, at 356.

12. See Bardenwerper, *foreword* to DEFENSE RESEARCH INSTITUTE, INC., NO. 1, GENERAL LIABILITY INSURANCE—1973 REVISIONS at 3 (1974).

13. See Fish, *supra* note 10, at 257 (most comprehensive general liability policies use identical language); Tinker, *supra* note 8, at 219 (standardized CGLP provisions establish the "norm" for all insurance companies).

14. Tinker, *supra* note 8, at 221. The Insurance Services Office, current promulgator of the standard CGLPs, has issued two new revisions to be effective on November 1, 1985. See 1985 Comprehensive General Liability Policy (unpublished policy issued by Insurance Services Office, Inc.) (1st rev. numbered GL 00 01 11 85; 2d rev. numbered GL 00 02 11 85).

15. See, e.g., *Aetna Casualty & Sur. Co. v. General Time Corp.*, 704 F.2d 80, 83 (1983) (construing 1966 language); *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669 (W.D. Wis. 1982) (same). Several reasons account for this continued dominance. First, many policies are written for a three-year period, Tinker, *supra* note 8, at 218, and those written shortly before 1973 remained ef-

1973 CGLP can be expected eventually to usurp this dominant position.<sup>16</sup>

One acute difficulty presented by the two most recent CGLP revisions stems from language granting coverage for liability awards imposed against insureds because of damage to third persons' property.<sup>17</sup> The "Insuring Agreements" set forth in the policies contain the operative language granting coverage,<sup>18</sup> and explicitly control the outer limits of insurers' cover-

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fective for that period, *id.* Moreover, some insurers continued to use the 1966 language for various insurance policies even after 1973 revision was introduced. See, e.g., *Willets Point Contracting Corp. v. Hartford Ins. Group*, 75 A.D.2d 254, 429 N.Y.S.2d 230 (1980) (umbrella liability policy issued in 1975). In addition, the 1966 as well as the 1973 policy is "occurrence" based. If the property damage occurs during the policy period, the CGLP covers liability resulting from actions brought within the statute of limitations, even if the policy period has since expired. Because of liberal judicial constructions of when applicable statutes of limitations begin to run and when property damage occurs, the 1966 and 1973 policies contemplate a long "tail" of liability. See *Shea, Better Insurance and Contractual Protection from Product Liability*, PRAC. LAW., Mar. 1, 1983, at 45, 46-47. One of the 1985 CGLP revisions, however, eliminates this tail by covering only claims made during the policy period. See 1985 Comprehensive General Liability Policy, *supra* note 14, § 1, coverage A, 1(b), at 1 (2d rev.). Finally, the slow movement of claims through court dockets undoubtedly contributes to the repeated appearance of the 1966 policy language in decisions.

16. The 1966 policy should appear less frequently in court disputes as statutes of limitations run and court dockets clear with the passage of time. The 1973 policy's appearances should increase concurrently.

17. Coverage under this language should not be confused with that granted by property and other casualty insurance. Liability insurance does not provide compensation for the property damage, but only protects the insured against legal liability incurred because of the damage.

18. The policies are actually composed of three parts: the Declarations part, the General Liability jacket part, and the Comprehensive General Liability part. The Declarations part contains the names of the insurer and the insured, the premium amount, and other items particular to the parties' relationship. The General Liability jacket part contains provisions common to all standardized liability policies, such as policy definitions, general conditions, and supplementary payments. *Obrist, New Comprehensive General Liability Insurance Policy*, in DEFENSE RESEARCH INSTITUTE, INC., No. 30, THE NEW COMPREHENSIVE GENERAL LIABILITY INSURANCE POLICY—A COVERAGE ANALYSIS 6 (1966), reprinted in DEFENSE RESEARCH INSTITUTE, INC., No. 1, *supra* note 12, at 37. The Comprehensive General Liability part contains several provisions applicable to the particular coverage, entitled Exclusions, Persons Insured, Limits of Liability, Policy Period, and Territory. *Reichenberger, The General Liability Insurance Policies—Analysis of 1973 Revisions*, in DEFENSE RESEARCH INSTITUTE, INC., No. 1, *supra* note 12, at 5, 13-18. When the Declarations, General Liability, and Comprehensive General Liability parts are combined, a complete CGLP is formed.

The 1966 revision initiated the three-part format in response to confusion engendered by the former practice, which included all coverages in one basic policy form and indicated by a premium entry those coverages purchased by the insured. *Bardenwerper, supra* note 12, at 3; see, e.g., *Maretti v. Midland Nat'l Ins. Co.*, 42 Ill. App. 2d 17, 28, 190 N.E.2d 597, 602 (1963) (describing one pre-1966 policy as containing "such a bewildering array of exclusions, defini-

age obligations.<sup>19</sup> No coverage exists under the policies if it is not triggered by the Insuring Agreements.<sup>20</sup> The 1966 and 1973 Insuring Agreements contain identical language obligating the insurer "to pay on behalf of the insured all sums for which the insured shall become legally obligated to pay as damages because of . . . property damage to which this [policy] applies caused by an occurrence."<sup>21</sup> The clause obligating the insurer to pay all "damages because of . . . property damage" that the insured is legally liable to pay principally governs coverage for property damage liability. Despite its facially simple language, this clause yields several perplexing issues concerning the coverage it grants, and although it has engendered an immense body of judicial discussion, it has received little detailed analysis by insurance commentators.

This Note examines questions concerning the scope of coverage for property damage liability granted by the 1966 and 1973 CGLP's "damages because of . . . property damage" clause. Part I focuses on what types of damage qualify as "property damage," considering the types of property covered and the required form of damage. Part II examines the proper construction of the policies' "because of" requirement, determining what types of consequential damages arising from property damage are covered. The Note resolves what coverage should be inferred from the CGLP property damage provision and contrasts results under the 1966 and 1973 revisions.

## I. THE "DAMAGES BECAUSE OF . . . PROPERTY DAMAGE" CLAUSE

All coverage disputes bred by the clause "damages because of . . . property damage" center around the meaning and role of

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tions and conditions that the result is confounding almost to the point of being unintelligible"). The format has proven relatively successful, with the 1973 and 1985 policies retaining the three-part package.

19. Tinker, *supra* note 8, at 222-23. Among standardized, business-related liability policies, the CGLP contains the broadest and most liberal Insuring Agreement. See H. LEGG, A BRIEF OUTLINE OF INSURANCE 109-10 (1971). This undoubtedly contributes to the CGLP's continued popularity as the primary insuring instrument used by commercial ventures. See *supra* note 9 and accompanying text.

20. See Tinker, *supra* note 8, at 223.

21. See Gowan, *Completed Operations and Products Liability Insurance Coverage of the New Comprehensive General-Automobile Policy*, 1966 A.B.A. SEC. INS., NEGLIGENCE & COMPENSATION L. 265, 285 app. (reprinting 1966 Insuring Agreement at 283-93 app.); Tinker, *supra* note 8, at 300 app. (reprinting 1973 Insuring Agreement at 287-308 apps. A & B). The 1985 revision retains the language of the 1966 and 1973 Insuring Agreements.

the term "property damage," which the CGLP drafters defined in both the 1966 and 1973 revisions. The 1966 definition is misleadingly simple, defining "property damage" as "injury to or destruction of tangible property."<sup>22</sup> After this simple language caused problems in determining the scope of coverage for property damage liability, the 1973 revision redefined "property damage" as:

- (1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period . . . .<sup>23</sup>

Disputes over the scope of coverage for property damage liability granted by the "damages because of . . . property damage" clause result from difficulties in interpreting and applying these definitions. Questions of interpretation arise from uncertainty over the type of "property"<sup>24</sup> and the form of "damage"<sup>25</sup> contemplated by the "property damage" definitions.

#### A. TYPE OF "PROPERTY" THAT MUST BE DAMAGED

Prior to the 1966 revision, the standard CGLP forms provided coverage for "injury to or destruction of property."<sup>26</sup> Courts in cases such as *Wells Labberton v. General Casualty Co.*<sup>27</sup> concluded that the generic term "property" in pre-1966 policies could "reasonably be construed to include obligations, rights and other intangibles."<sup>28</sup> To circumvent such reasoning, the 1966 revisions qualified "property" with "tangible," and this clarification was retained in the 1973 policy. By specifying "tangible" property, the 1966 and 1973 "property damage" definitions contemplate only property which is physical—capable of being touched and objectively perceivable<sup>29</sup> and not incorpo-

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22. Gowan, *supra* note 21, at 284 (1966 Insuring Agreement).

23. Tinker, *supra* note 8, at 295 (1973 Insuring Agreement). The 1985 revision retains the 1973 "property damage" definition, with only a minor editorial change.

24. See *infra* text accompanying notes 26-43.

25. See *infra* text accompanying notes 44-92.

26. Narko, *The 1972 Comprehensive General Liability Policy: Response to a Continuing Need*, 61 ILL. B.J. 34, 34-35 (1972); see J. LONG & D. GREGG, *supra* note 3, at 1188.

27. 53 Wash. 2d 180, 332 P.2d 250 (1958) (defective fertilizer applicator sprayed fields inadequately, diminishing wheat yield).

28. See *id.* at 186-87, 332 P.2d at 254 (quoting *Citizens State Bank v. Vidal*, 114 F.2d 380, 382-83 (10th Cir. 1940)).

29. *Lay v. Aetna Ins. Co.*, 599 S.W.2d 684, 686 (Tex. Civ. App. 1980) (property assignment and fees are not capable of being touched, and therefore, are not tangible property); *Spoor-Lasher Co. v. Aetna Casualty & Sur. Co.*, 48



real "obligations, rights and other intangibles."<sup>30</sup> These revisions eliminate coverage of items traditionally referred to as "intangible property," including property that represents value but has no intrinsic marketable value of its own (such as stock,<sup>31</sup> investments,<sup>32</sup> copyrights,<sup>33</sup> and promissory notes<sup>34</sup>), property regarded as intangible rights (such as goodwill<sup>35</sup> and reputation<sup>36</sup>), and economic interests (such as overhead,<sup>37</sup> prof-

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A.D.2d 938, 939, 369 N.Y.S.2d 811, 814 (1975) (the arbitrary closing off of a street causing a merchant to lose revenue because its premises were inaccessible to the public is not damage to tangible property).

30. The insurance industry's decision to avoid further application of the *Labberton* "obligations, rights and other intangibles" reasoning is understandable. Most successful liability judgments hinge on injuries to "legally enforceable claim[s] of one person against another, that the other shall do a given act or shall not do a given act." RESTATEMENT (FIRST) OF PROPERTY § 1 (1936). Although many of these injuries may be the proper subject of specialized insurance, a form tailored for wide use is not intended for such indiscriminate application. See J. LONG & D. GREGG, *supra* note 3, at 502. Moreover, the broad definition of "property" would inject a measure of unpredictability into an industry that relies for its profit on its ability to make accurate predictions. See C. ELLIOTT, PROPERTY AND CASUALTY INSURANCE 7 (1960) ("To a very great extent, the success of the insurance operation will depend upon the relationship of the actual loss ratio (the actual amount of money paid for losses relative to the premiums earned) to the expected loss ratio."). Courts are constantly recognizing new intangible property rights, such as the right to enjoy unrestricted sunlight, see *Prah v. Maretti*, 108 Wis. 2d 223, 321 N.W.2d 182 (1982), and the right to share in government largess, see *Sherbert v. Verner*, 374 U.S. 398 (1963) (state cannot deny unemployment benefits on grounds encroaching on freedom of religion); see generally Reich, *The New Property*, 73 YALE L.J. 733 (1964) (examining new forms of property created by government largess). Limiting coverage to damage to "tangible" property restricts coverage of these new judicially-created intangible property rights.

31. Cf. *Giddings v. Industrial Indem. Co.*, 112 Cal. App. 3d 213, 218-19, 169 Cal. Rptr. 278, 281 (1980) ("Moreover, strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability policy.").

32. See *id.*, 169 Cal. Rptr. at 281; *Hartford Accident & Indem. Co. v. Case Found. Co.*, 10 Ill. App. 3d 115, 123-24, 294 N.E.2d 7, 13-14 (1973).

33. See *General Ins. Co. of Am. v. Chopot*, 28 Wash. App. 383, 386, 623 P.2d 730, 732 (1981).

34. Cf. *Temco Metal Prods. Co. v. St. Paul Fire & Marine Ins. Co.*, 273 Or. 716, 717-18, 543 P.2d 1, 2 (1975) (payment of money on forged checks does not constitute injury to or destruction of tangible property).

35. See, e.g., *Liberty Mut. Ins. Co. v. Consolidated Milk Producers' Ass'n*, 354 F. Supp. 879, 882-84 (D.N.H. 1973); *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 51 Cal. 2d 558, 565-66, 334 P.2d 881, 885-86 (1959); *Ludwig Candy Co. v. Iowa Nat'l Mut. Ins. Co.*, 78 Ill. App. 3d 306, 308-10, 396 N.E.2d 1329, 1331-32 (1979).

36. See, e.g., *Johnston v. Tally Ho, Inc.*, 303 A.2d 677, 679 (Del. Super. Ct. 1973); *Ludwig Candy Co.*, 78 Ill. App. 3d at 308-10, 396 N.E.2d at 1331-32.

37. See *Hogan v. Midland Nat'l Ins. Co.*, 3 Cal. 3d 553, 561-63, 91 Cal. Rptr. 153, 157-58, 476 P.2d 825, 830 (1970); *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 51 Cal. 2d 558, 565-66, 334 P.2d 881, 885-86 (1959); *American States Ins. Co. v. Hurd Bros., Inc.*, 8 Wash. App. 867, 870, 509 P.2d 1015, 1017 (1973).

its,<sup>38</sup> investment value,<sup>39</sup> and productivity<sup>40</sup>).

The boundaries of the "property damage" definitions can be visualized by considering a third party's factory which collapses through an insured's negligence. The factory is tangible property, and one strand of the "property damage" definitions is satisfied.<sup>41</sup> The lost profits suffered by the third party as a result of the factory's collapse, however, are economic losses, which are intangible and thus outside the "property damage" definitions.<sup>42</sup> Thus, the collapse of the factory may constitute "property damage" while injuries flowing from it do not.<sup>43</sup>

#### B. FORM OF "DAMAGE" THAT THE TANGIBLE PROPERTY MUST SUFFER

Not only must the damaged property be tangible, but the damage must be in a form specified by the definitions. The 1966 "property damage" definition demands that "injury to or destruction of" tangible property be shown, whereas the more precise 1973 definition requires proof of "physical injury to," "destruction of," or "loss of use of" tangible property.

Coverage under the definitions is uncontested when the tangible property's material substance is damaged, or, as it is more commonly phrased in insurance policies, when physical

38. See *Lowenstein Dyes & Cosmetics v. Aetna Life & Casualty Co.*, 524 F. Supp. 574, 577 (E.D.N.Y. 1981); *McCollum v. Insurance Co. of N. Am.*, 132 Ariz. 129, 131-32, 644 P.2d 283, 285-86 (1982); *Ludwig Candy Co. v. Iowa Nat'l Mut. Ins. Co.*, 78 Ill. App. 3d 306, 310, 396 N.E.2d 1329, 1332 (1979).

39. *Hartford Accident & Indem. Co. v. Case Found. Co.*, 10 Ill. App. 3d 115, 123-24, 294 N.E.2d 7, 13-14 (1973); cf. *McCollum v. Insurance Co. of N. Am.*, 132 Ariz. 129, 132, 644 P.2d 283, 285-86 (1982) (loss of future profit).

40. *Sentry Ins. Co. v. S & L Home Heating Co.*, 91 Ill. App. 3d 687, 690, 414 N.E.2d 1218, 1221 (1980).

41. To satisfy the other strand requires a showing that the tangible property suffered the requisite form of damage. See *infra* text accompanying notes 44-92.

42. See *supra* text accompanying notes 29-40.

43. Coverage may still exist for damages compensating for the lost profits, however, if the collapsed factory is found to be covered "property damage." Then, the lost profits would *result* from property damage and the award may be covered as "damages because of . . . property damage." See *infra* text accompanying notes 93-128.

The impact of defining "property damage" to exclude intangible losses from direct coverage will vary for different ventures. Ventures must examine the essential purposes for which they require liability insurance and plan accordingly. A newspaper, for instance, would not be sufficiently covered under the 1966 and 1973 CGLPs because those policies do not protect against liability for libel, which concerns damage to the injured party's reputation—an intangible right. The newspaper would be better protected against libel risks under a version of a personal injury liability insurance policy or under a specialized policy for newspapers.

injury to tangible property has occurred. "Destruction of" tangible property is explicitly provided for under both "property damage" definitions. Substantive damage that is less than total destruction is also encompassed under the definitions as a "physical injury." Although only the 1973 policy specifically includes "physical injury to" tangible property, the 1966 definition's unqualified "injury to" tangible property cannot reasonably be interpreted to exclude physical injuries.<sup>44</sup>

Not all forms of damage to tangible property, however, affect its material substance. Some types of damage decrease the property's value without changing its physical makeup. The "property damage" definitions blur when nonphysical injuries occur. Whether the nonphysical injuries of lost use<sup>45</sup> and diminished value<sup>46</sup> of tangible property constitute "property damage" present the principal issues in this definition.

### 1. Lost Use of Tangible Property.

Lost use of tangible property occurs when the insured's product is incorporated into a larger tangible entity and the incorporated product causes the entire entity to fail. For example, a motor supplied by the insured is incorporated into an engine. The motor fails, but no physical harm occurs to the rest of the engine.<sup>47</sup> The motor's failure, however, may decrease or eliminate use of the entire engine. A more concep-

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44. Rotted potatoes, *see* Stauffer Chem. Co. v. Insurance Co. of N. Am., 372 F. Supp. 1303 (S.D.N.Y. 1973), rusted roofs, *see* Yakima Cement Prods. Co. v. Great Am. Ins. Co., 22 Wash. App. 536, 590 P.2d 371, *rev'd*, 608 P.2d 254 (1980), cut cables, *see* C.W. Davis Supply Co. v. Newark Ins. Co., 3 N.Y.S.2d 127 (1969), and torn paper gaskets, *see* Elco Indus. v. Liberty Mut. Ins. Co., 90 Ill. App. 3d 1106, 414 N.E.2d 41 (1980), are all physically injured tangible property, and are considered "property damage" under the definitions.

45. *See infra* text accompanying notes 47-71.

46. *See infra* text accompanying notes 72-92.

47. Property damage to the motor itself is excluded from coverage under the CGLP—liability insurance policies are not meant to be performance bonds. Although the insured may be legally liable for the defective quality of its work or product, no coverage exists for property damage to these items under the CGLP. Both the 1966 and 1973 policies exclude coverage for (1) "property damage to the named insured's products arising out of such products," and (2) "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." Gowan, *supra* note 21, at 287 app. (exclusions (l) and (m) in the 1966 policy); Tinker, *supra* note 8, at 303 app. (exclusions (n) and (o) in the 1973 policy). These exclusions do not apply to other property damage arising out of such products or work. 3A L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 50.01B(1), at 19-18, and § 50.01B (2), at 19-24 (rev. ed. 1979); *see e.g.*, Pittsburgh Bridge & Iron Works v. Liability Mut. Ins. Co., 444 F.2d 1286, 1290 (3d Cir. 1971) (damage to tramway containing insured's defective saddle not within exclusionary clause); Paxton-Mitchell Co. v. Royal

tually difficult situation arises when the tangible property is not physically incapable of full use, but prevention of meaningful access causes it to stand idle or to operate at less than full capacity. To illustrate, a crane collapses in front of a supermarket entrance. Because of the blockage, the store is incapable of being used. Thus, a loss of use of tangible property has occurred.<sup>48</sup> Because lost use of tangible property often arises unaccompanied by physical injury, resolution of whether it constitutes "property damage" under the CGLP is extremely important.

Questions about the inclusion of lost use of tangible property occur only in conjunction with the 1966 "property damage" definition because the 1973 policy explicitly includes, in section (2) of its "property damage" definition, "loss of use of tangible property which has not been physically injured or destroyed."<sup>49</sup> The 1966 policy, unfortunately, contains no such clear language. The only reference to loss of use in the 1966 policy comes in the

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Indem. Co., 279 Or. 607, 613-16, 569 P.2d 581, 585-87 (1977) (damage to truck equipped with insured's cranes not within exclusionary clause).

48. Wendorff, *The New Standard Comprehensive General Liability Insurance Policy*, 1966 A.B.A. SEC. INS., NEGL. & COMPENSATION L. 250, 256. This illustration was used in the drafters' guidelines to the 1966 CGLP to illustrate loss of use of tangible property and its treatment under the policy. See Tinker, *supra* note 8, at 232; 3A L. FRUMER & M. FRIEDMAN, *supra* note 47, § 50.01A, at 19-16. An unusual fact situation involving the same principle was presented in *Cute-Togs of New Orleans, Inc. v. Louisiana Health Serv. & Indem. Co.*, 376 So. 2d 999 (La. App. 1979), *rev'd on other grounds*, 386 So. 2d 87 (La. 1980), where an employee's absence caused machinery to stand idle. The employee quit when he discovered defendant's negligent failure to process his medical insurance policy. 376 So. 2d at 1000. The court held that the equipment's idleness was loss of use of tangible property. See *id.* at 1001.

Loss of use must be distinguished from loss of the right to use. In the latter situation, the tangible property remains fully operational but the intangible right to enjoy is blocked. See *Inland Constr. Corp. v. Continental Casualty Co.* 258 N.W.2d 881, 884 (Minn. 1977) (conversion injures only owner's intangible right to enjoy property). But see *United States Fidelity & Guar. Co. v. Mayor's Jewelers*, 384 So. 2d 256, 258 (Fla. 1980) (stolen property is rendered totally useless).

Lost use of tangible property must also be distinguished from lost productivity. Productivity is an economic term which measures the amount of output per unit of time. Lost productivity is loss of an anticipated economic benefit—an intangible injury outside the "property damage" definitions. See *Sentry Ins. Co. v. S & L Home Heating Co.*, 91 Ill. App. 3d 687, 690-91, 414 N.E.2d 1218, 1221-22 (1980) (employees' lost productivity not "property damage"). Lost productivity, however, may be evidence of lost use of tangible property. See *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 683 (W.D. Wis. 1982) (reduced usefulness of plant shown by loss of productivity). The two terms, however, should not be used synonymously. But see *Borden, Inc. v. Howard Trucking Co.*, 372 So. 2d 242, 244 (La. App. 1979) (loss of use and loss of productivity used interchangeably).

49. See *supra* note 23 and accompanying text.

"damages" definition, which states that "'damages' includes . . . damages for loss of use of property resulting from property damage."<sup>50</sup> This omission leaves room for argument on both sides concerning whether lost use of tangible property is "property damage" under this revision.

Some commentators argue that the 1966 definition's qualification requiring loss of use of property to result from property damage implies *physical* injury to tangible property.<sup>51</sup> They contend that interpreting the "property damage" definition to include nonphysical injuries to tangible property would necessarily include the nonphysical injury of loss of use of tangible property and thus would render the reference to "loss of use of property resulting from property damage" superfluous and meaningless. In order to follow long-established rules of construction requiring that all words in a policy be recognized as having a purpose, these commentators require a *physical* injury to satisfy the 1966 "property damage" definition of "injury to or destruction of tangible property."<sup>52</sup> As a nonphysical injury, lost use of tangible property is not "property damage," and is covered only when it "result[s] from property damage" as required by the "damages" definition.

Although some case law supports the above argument,<sup>53</sup> a majority of courts and commentators consider loss of use of property to constitute "property damage" under the 1966 policy.<sup>54</sup> Proponents of this position generally rely on one of two relatively unpersuasive rationales. The first finds that the ref-

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50. Gowan, *supra* note 21, at 283. This separate "damages" definition was eliminated entirely by the 1973 revision. See Reichenberger, *supra* note 18, at 10.

51. See, e.g., Tarpey, *The New Comprehensive Policy: Some of the Changes*, 33 INS. COUNS. J. 223, 227 (1966); Tinker, *supra* note 8, at 232-33.

52. See Tinker, *supra* note 8, at 232-33.

53. See, e.g., *Dreis & Krump Mfg. Co. v. Phoenix Ins. Co.*, 548 F.2d 681, 687 (7th Cir. 1977) (uselessness of housing structure for brake resulting from brake's defectiveness not "property damage"; "actual" injury required); *Willets Point Contracting Corp. v. Hartford Ins. Group*, 75 A.D.2d 254, 258-59, 429 N.Y.S.2d 230, 233 (1980), *aff'd*, 53 N.Y. 879, 440 N.Y.S.2d 619, 423 N.E.2d 42 (1981) (business's lost use through wrongful access blockage not "property damage" under 1966 policy); see also, e.g., *Hamilton Die Cast, Inc. v. United States Fidelity & Guar. Co.*, 508 F.2d 417, 419-20 (7th Cir. 1977) (incorporation of defective threading into tennis rackets not physical injury and therefore not "property damage").

54. See, e.g., *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 682-83 (W.D. Wis.) (plant's decreased operating capacity is "property damage"), *aff'd*, 718 F.2d 842 (7th Cir. 1982); *Cute-Togs of New Orleans, Inc. v. Louisiana Health Serv. & Indem. Co.*, 376 So. 2d 999 (La. App. 1979), *rev'd on other grounds*, 386 So. 2d 87 (La. 1980) (machinery's lost use is property damage); *Obrist*, *supra* note 18, at 7 (lost use of tangible property is "property damage");

erence to lost use in the "damages" definition evidences the drafters' intent to include lost use of tangible property as "property damage."<sup>55</sup> This justification, however, ignores the qualification in the "damages" definition requiring that lost use *result* from property damage.<sup>56</sup> The "damages" definition facially distinguishes between "loss of use of property" and "property damage" rather than equating them.

The second justification concludes that lost use of tangible property is "property damage" within the terms of the definition itself. "Injury" as used in the 1966 "property damage" definition of "injury to or destruction of tangible property"<sup>57</sup> is not separately defined. Because undefined words are given their "common, popular and ordinary meaning" under rules of insurance policy construction,<sup>58</sup> proponents of coverage argue that "injury" can be reasonably construed as including both physical and nonphysical harm or damage.<sup>59</sup> Loss of use of tangible property is certainly a harm to that property and, thus, is "property damage" under the 1966 definition. This justification, however, reads the "property damage" definition in a contextual vacuum. When the "property damage" definition is interpreted as including lost use of property, the "damages" definition must be read as embracing only "damages for loss of use of property" for the two definitions to lie together consistently. This reading effectively removes the remainder of the "damages" definition, which states that loss of use is included when "resulting from property damage."<sup>60</sup>

Consequently, both supporters and opponents of including lost use of tangible property in the 1966 "property damage" def-

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Wendorff, *supra* note 48, at 255-56 (same); 3 R. LONG, LAW OF LIABILITY INSURANCE app. B § 6, at 38 app. (rev. ed. 1974) (same).

55. See, e.g., 3 R. LONG, *supra* note 54, at 38 app. ("Tangible property rendered useless is injured and hence is covered, since the definition of damages includes 'loss of use of property resulting from property damage.'").

56. See *supra* note 50 and accompanying text.

57. See *supra* text accompanying note 22.

58. 13 J. APPLEMAN & J. APPLEMAN, *supra* note 8, § 7384, at 71; 1 C. COUCH, COUCH: CYCLOPEDIA OF INSURANCE LAW § 15:17, at 671 (2d ed. 1959).

59. See, e.g., United States Fidelity & Guar. Co. v. Mayor's Jewelers, 384 So. 2d 256, 258 (Fla. 1980) ("injury" is any wrong or damage, including nonphysical damage); Yakima Cement Prods. Co. v. Great Am. Ins. Co., 22 Wash. App. 536, 545, 590 P.2d 371, 376 (1979) (both physical and nonphysical damage covered under the definition), *rev'd on other grounds*, 93 Wash. 2d 210, 608 P.2d 254 (1980); Pittway Corp. v. American Motorists Ins. Co., 370 N.E.2d 1271, 1274 (Ill. App. 1977) (same). But see Temco Metal Prods. Co. v. St. Paul Fire & Marine Ins. Co., 273 Or. 716, 718, 543 P.2d 1, 2 (1975) (injury to inanimate object ordinarily construed as physical injury).

60. See *supra* note 50 and accompanying text.

inition advance their position by essentially rewriting the policy language. Supporters omit the phrase "resulting from property damage" in the "damages" definition,<sup>61</sup> while opponents add the qualifying term "physical" before "injury to or destruction of tangible property."<sup>62</sup> Although questionable from the standpoint of technical interpretation, including lost use of tangible property within the "property damage" definition appears to be the proper interpretation, given the desire to fulfill insureds' coverage expectations. It is doubtful whether a reasonable insured would give the "damages" and "property damage" definitions the technical reading required to conclude that physical injury to tangible property is necessary to satisfy the 1966 "property damage" definition. Such delicate shadings have escaped even the most knowledgeable of insurance commentators.<sup>63</sup> Moreover, courts do not favor technical constructions that violate common sense.<sup>64</sup> If the drafters had intended to require a physical injury, they would presumably have qualified the definition explicitly<sup>65</sup> rather than relying on a strained and technical construction.

An explanatory memorandum prepared by the drafters in conjunction with the 1966 policy bolsters this conclusion:

This definition [of "property damage"], together with the definition of "damages," is intended to produce the same effect as present policies. The definition limits coverage to legal damages for injury to tangible property. . . . But, of course, damages for injury to tangible property include as before, damages for its loss of use.<sup>66</sup>

The drafters' intent to reproduce the previous policies' effect under the 1966 policy is instructive. By 1966, several cases interpreting the language "injury to or destruction of property" contained in the pre-1966 policies<sup>67</sup> had held that "injury" encompassed both physical and nonphysical damage.<sup>68</sup> Commen-

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61. See *supra* notes 57-60 and accompanying text.

62. See *supra* text accompanying notes 51-52.

63. See, e.g., *Obrist, supra* note 18, at 7; ("property damage" definition includes loss of use of tangible property); *Wendorff, supra* note 48, at 255-56 (same); 3 R. LONG, *supra* note 54, at 38 app. (same).

64. See *Alabama Farm Bureau Mut. Casualty Ins. Co. v. Preston*, 287 Ala. 493, 496, 253 So. 2d 4, 6 (1971); *Cook v. National Fidelity & Casualty Co.*, 100 Neb. 641, 646, 160 N.W. 957, 958 (1916); *Continental Casualty Co. v. Summerfield*, 87 Nev. 127, 134, 482 P.2d 308, 312 (1971).

65. See *United States Fidelity & Guar. Co. v. Mayor's Jewelers*, 384 So. 2d 256, 258 (Fla. 1980) ("If . . . property is damaged only when it suffers actual, physical damage, it would have been relatively simple to include the word 'physical' in its definition.").

66. See *Wendorff, supra* note 48, at 255.

67. See *supra* note 26 and accompanying text.

68. See, e.g., *Bundy Tubing Co. v. Royal Indem. Co.*, 298 F.2d 151, 153 (6th Cir. 1962) (heating system suffered "property damage" when rendered useless

tators suggested prior to the completion of the 1966 policy that this interpretation could be avoided by qualifying "injury" with the word "physical."<sup>69</sup> By ignoring this suggestion, the drafters implicitly manifested their intent to allow the nonphysical interpretation to continue. In addition, the filing memorandum<sup>70</sup> prepared by the 1973 drafters indicates that the new "property damage" definition specifically covering lost use of tangible property was designed to clarify, not change, the intent of the 1966 provision.<sup>71</sup> The fair and reasonable reading of the 1966 "property damage" definition, therefore, includes nonphysical injuries to tangible property.

## 2. Diminution in Value of Tangible Property.

An insured frequently incurs liability when its defective work or product forms a component in another's tangible property, causing diminution in value of that tangible property.<sup>72</sup> A defective motor, for example, can cause an engine to diminish in market value, and the engine's diminished value can result in legal liability for the motor's supplier.<sup>73</sup>

The 1966 policy should be interpreted as covering diminu-

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by defective tubing); *Hauenstein v. Saint Paul Mercury Indem. Co.*, 242 Minn. 354, 357-58, 65 N.W.2d 122, 125 (1954) (diminution in house value due to defective plaster is "property damage").

69. See, e.g., Andersen, *Current Problems in Products Liability Law and Products Liability Insurance*, 31 INS. COUNS. J. 436, 446 (1964).

70. State laws require prior approval of insurance contracts before they can be marketed within the state. The usual procedure is to "file" these contracts with the insurance commissioner or other appropriate official. J. LONG & D. GREGG, *supra* note 3, at 239.

71. *Tinker*, *supra* note 8, at 232.

72. See, e.g., *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 22 Wash. App. 536, 590 P.2d 371 (1979) (defective panels), *rev'd*, 93 Wash. 2d 210, 608 P.2d 254 (1980); *Pittway Corp. v. American Motorists Ins. Co.*, 56 Ill. App. 3d 338, 370 N.E.2d 1271 (1977) (defective valves in aerosol cans); *Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 72-73, 332 N.E.2d 319, 322, 371 N.Y.S.2d 444, 447 (1975) (defective ski bindings).

73. Cf. *American Motorists Ins. Co. v. Trane Co.*, 544 F. Supp. 669, 683 (W.D. Wis. 1982) (defective heat exchangers caused plant to diminish in value), *aff'd*, 718 F.2d 842 (7th Cir. 1982). The property's present value must actually decrease. When it merely fails to increase in value, the loss is of anticipated profits, an intangible injury not included within the "property damage" definitions. See *supra* notes 37-40 and accompanying text; see, e.g., *McCollum v. Insurance Co. of N. Am.*, 132 Ariz. 129, 132, 644 P.2d 283, 286 (1982) (insureds' failure to make agreed-upon improvements to real property is loss of speculative profits, and not "property damage"); *Fresno Economy Import Used Cars, Inc. v. United States Fidelity & Guar. Co.*, 76 Cal. App. 3d 272, 279, 142 Cal. Rptr. 681, 685 (1977) (false representation that car is more valuable than it is causes loss of anticipated value but is not "property damage"); *General Ins. Co. of Am. v. Western Am. Dev. Co.*, 43 Or. App. 671, 675, 603 P.2d 1245, 1247 (1979) (property which is merely worth less than expected is not "property damage").



tion in value. Under the technical reading of the 1966 CGLP implying the condition of "physical" injury in the "injury to or destruction of tangible property" language,<sup>74</sup> diminution in value would not be "property damage" because it is a nonphysical injury to tangible property. This construction, however, contradicts common sense, as discussed above.<sup>75</sup> The "injury" in the "property damage" definition must be construed as including both physical and nonphysical injury.<sup>76</sup> Diminution in value of tangible property harms that property, and thus constitutes the "injury to or destruction of tangible property" required by the 1966 "property damage" definition.<sup>77</sup>

The result is different under the 1973 "property damage" definition. Section (1) of the 1973 CGLP covers "physical injury to or destruction of tangible property,"<sup>78</sup> while section (2)

74. See *supra* notes 51-52 and accompanying text.

75. See *supra* notes 63-65 and accompanying text.

76. See *supra* notes 66-71 and accompanying text.

77. See cases cited *supra* note 72. See also cases interpreting the pre-1966 "injury to or destruction of property" to include diminution in value of property, e.g., *Bowman Steel Corp. v. Lumbermens Mut. Casualty Co.*, 364 F.2d 246, 249 (3d Cir. 1966) (defective siding caused diminution in value of building); *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 51 Cal. 2d 558, 565, 334 P.2d 881, 885 (1959) (defective doors caused diminution in value of houses), *modified and aff'd*, 63 Cal. 2d 602, 407 P.2d 868, 47 Cal. Rptr. 564 (1965); *Hauenstein v. Saint Paul Mercury Indem. Co.*, 242 Minn. 354, 357-58, 65 N.W.2d 122, 125 (1954) (defective plaster caused diminution in value of building). The defective work or product can contribute, of course, to the diminution in value. To avoid confronting policy provisions excluding coverage for property damage to insureds' work or product, see *supra* note 47, several courts require a diminution in value in excess of the value of the defective incorporated work or product. See, e.g., *Goodyear Rubber & Supply Co. v. Great Am. Ins. Co.*, 471 F.2d 1343, 1344 (9th Cir. 1973) (damage to ship greatly exceeded cost of defective gaskets); *Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 N.Y.2d 69, 72-73, 332 N.E.2d 319, 322, 371 N.Y.S.2d 444, 447 (1975) (diminution in value caused by defective ski straps must exceed cost of strap replacements).

A unique argument against allowing diminution in value to constitute "injury to or destruction of tangible property" was set forth in obiter dicta in *Stone & Webster Eng'g v. American Motorist Ins.*, 458 F. Supp. 792 (E.D. Va. 1978), *aff'd*, 628 F.2d 1351 (4th Cir. 1980). The court stated that to allow diminution in value of tangible property to constitute "property damage" would mean that any event that diminishes property values, including wars, strikes, and interest rate increases, would result in "property damage," and such coverage was beyond the parties' contemplation. 458 F. Supp. at 796 n.1. The error in the court's reasoning is the conclusion that all injuries that meet the "property damage" definition are covered by the policy. For instance, under the terms of the Insuring Agreements, the insured must be "legally obligated" to pay "damages" before the policy will cover the property damage. See *supra* text accompanying note 21. Except under extreme circumstances, legal liability for damages will not be imposed upon an insured for wars, strikes, or interest rates increases. Consequently, injuries resulting from those events can satisfy the "property damage" definition, yet not be covered.

78. See *supra* note 23 and accompanying text.

reaches only the "loss of use of tangible property which has not been physically injured."<sup>79</sup> Although courts and commentators have yet to fully confront or recognize this issue, diminution in value of tangible property does not fall within either category, and thus, presumably, is not "property damage" under the 1973 policy.

Because the policy does not separately define the term "physical injury" in section (1),<sup>80</sup> "diminution in value" could be covered if regarded as a "physical injury." Although some cases have loosely referred to diminution in value in this way,<sup>81</sup> such a characterization is improper. Physical injury's "common, popular and ordinary meaning"<sup>82</sup> envisions material, substantive, and objectively perceivable harm. Diminution in value of tangible property is an incorporeal and intangible harm measured by market forces, not an injury to the material substance of the tangible property. Moreover, to interpret "physical injury" as encompassing diminution in value would render the word "physical" in the phrase meaningless.<sup>83</sup> Diminution in value of tangible property also does not fit within the CGLP's section (2). Diminution in value of tangible property is not synonymous with loss of use of tangible property. Although the two injuries may coexist in some fact situations, they differ in character and measurement. For example, a

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79. See *id.*

80. See *id.*

81. See, e.g., *McCollum v. Insurance Co. of N. Am.*, 132 Ariz. 129, 131, 644 P.2d 283, 285 (1982) (characterizing diminution-in-value precedents as holding that an actual, physical injury must be shown); *Aetna Ins. Co. v. State Motors Inc.*, 109 N.H. 120, 123-24, 244 A.2d 64, 66-67 (1968). The policy in *Aetna* defined "property damage" as "physical injury to or destruction of tangible property." The court relied on precedents construing the pre-1973 language to include diminution in value of tangible property to conclude that "[t]he above cases clearly establish that recovery may be had for property damage, including diminution in market value, which may result to tangible property other than the property purchased from the insured." *Id.* at 124, 244 A.2d at 67. The court then found that the property damage of diminished value of tangible property was excluded under a separate policy provision. See *id.*, 244 A.2d at 67.

The *Aetna* court made the common mistake of examining previous case law rather than the present policy. An insurance policy is a contract and is governed by its provisions. Although case law can and should be examined when the policy provisions are the same (or differ in only irrelevant respects), the addition of the word "physical" in the definition the court was examining made the policy substantially different from those involved in previous cases.

82. See *supra* note 58 and accompanying text.

83. See *Wyoming Sawmills, Inc. v. Transportation Ins. Co.*, 282 Or. 401, 406, 578 P.2d 1253, 1256 (1978) (en banc) ("The inclusion of this word ['physical'] negates any possibility that the policy was intended to include . . . depreciation in value, within the term 'property damage'. The intention to exclude such coverage can be the only reason for the addition of the word.").

structure covered with defective siding that mottles and discolors may be fully useful even though its market value is diminished as a result of its unsightly appearance.<sup>84</sup> Neither section of the 1973 property damage definition, therefore, expressly covers diminution in value.

The narrower scope of the 1973 definition can be expected to change the manner in which insureds, and courts sympathetic to insureds, designate the harm resulting in liability.<sup>85</sup> One method of including under the 1973 definition many injuries traditionally termed as diminution in value of tangible property would be to characterize them as physical injuries under an "accession" theory. "Accession" derives from ancient property principles that regarded anything fixed to realty as part of that realty.<sup>86</sup> Application of the accession theory, in certain circumstances, could support a finding that an entity is physically injured by the incorporation of a defective part. Under the accession theory, the defective product would become an inseparable part of the entity. The defects in the product would therefore be defects in the entity and, arguably, "physical injury" to the entity.

A version of this theory was applied in *Pittsburgh Plate Glass Co. v. Fidelity & Casualty Co.*<sup>87</sup> The insured's paint flaked and peeled after being applied to jalousies, a type of venetian blind. The policy language defined property damage as "physical injury to or physical destruction of tangible property."<sup>88</sup> In concluding that property damage had occurred, the court stated:

Once the paint has been baked on to the steel and aluminum parts of the jalousies, the paint is no longer identifiable as a separate entity but is intended to and does become a part of the finished product. Thereafter, any damage to the finished product, such as flaking or peeling of paint, is property damage covered by the liability insurance policies

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84. Cf. *Hauenstein v. Saint Paul Mercury Indem. Co.*, 242 Minn. 354, 65 N.W.2d 122 (1954) (appearance of defective plaster caused house's diminution in value); *Dakota Block Co. v. Western Casualty & Sur. Co.* 81 S.D. 213, 132 N.W.2d 826 (1965) (discolored bricks caused diminution in value of school building), *aff'd in part, rev'd in part*, 82 S.D. 546, 150 N.W.2d 729 (1967).

85. Curiously, neither the drafters nor the commentators have commented on the noninclusion of diminished value of tangible property under the 1973 "property damage" definition. With no published opinions responding directly to the noninclusion, the courts' reaction to the discontinuance of a favored coverage trigger of the 1966 policy is as yet uncertain.

86. *Handler v. Horns*, 2 N.J. 18, 23-24, 65 A.2d 523, 526 (1949) (trade fixtures removable if removal achieved without material damage to premises).

87. 281 F.2d 538 (3d Cir. 1960).

88. *Id.* at 539 n.1.

here in question.<sup>89</sup>

Although courts may be tempted to revive the theory to trigger inclusion of the injury under the 1973 "property damage" definition,<sup>90</sup> such a move should be rejected.<sup>91</sup> Accession would inject an increased uncertainty into the 1973 "property damage" definition. Accession concepts are undeveloped in insurance contract law, leaving unclear how the product must adhere to the entity, what form of injury or defects the product must suffer to physically injure the entity, and how policy provisions excluding coverage for property damage to insureds' work and product are affected.<sup>92</sup> Applying an accession theory would be detrimental to ventures that depend on clear and unambiguous language to determine the scope of coverage, and would render meaningless all insurance industry attempts to clarify policy language.

## II. CONSEQUENTIAL DAMAGES ARISING FROM PROPERTY DAMAGE

Technically, the "property damage" definitions do not determine the scope of liability coverage but serve only to define the term as used elsewhere within the policies.<sup>93</sup> Under the Insuring Agreements' "damages because of . . . property damage" clause, however, the definition of "property damage" will often delineate the scope of coverage for property damage liability. Damages compensating for "property damage"<sup>94</sup> are

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89. *Id.* at 541.

90. Because diminution in value clearly constituted "property damage" under the 1966 revisions, courts did not need to apply the accession theory. *See supra* notes 74-77 and accompanying text.

91. *See Saint Paul Fire & Marine Ins. Co. v. Coss*, 80 Cal. App. 3d 890, 892-93, 145 Cal. Rptr. 836, 839 (1978) (rejecting application of accession theory under 1973 policy to defective materials incorporated into structure).

92. *See Hauenstein v. Saint Paul Mercury Indem. Co.*, 242 Minn. 354, 357, 65 N.W.2d 122, 125 (1954) ("The law of accession . . . has no justifiable use as a vehicle for importing ambiguity into the language of an insurance contract where none otherwise exists."). A possible method of avoiding conflicts with the exclusions from coverage of an insured's work or product would be to require that the insured show damages greater than the value of the insured's work or product. *Cf. Sturges Mfg. Co. v. Utica Mut. Ins. Co.*, 37 N.Y.2d 69 332 N.E.2d 319, 321, 371 N.Y.S.2d 444 (1975) (diminution in value caused by incorporation of defective ski straps must exceed cost of the incorporated defective item).

93. *Tinker*, *supra* note 8, at 219.

94. Numerous equations are used to measure the appropriate award for "property damage." Traditional textbook measurements include cost of repair for physically injured tangible property, reasonable rental cost of replacement for lost use of tangible property, and amount of diminution in value for the corresponding injury to tangible property. Occasionally, when damages are diffi-

"damages because of . . . property damage" and, unless negated by other policy language,<sup>95</sup> are covered. Likewise, most losses not within the "property damage" definitions are not "damages because of . . . property damage," and are outside the scope of covered property damage liability. Many question, however, whether the "damages because of . . . property damage" clause covers those losses that would not have occurred but for the "property damage." To illustrate, when a business's factory collapses, the business may consequently suffer great loss of profits and damage to its business reputation and goodwill from failure to meet contracts requiring the factory's products. Although these consequential injuries are not themselves "property damage,"<sup>96</sup> these injuries might be covered by liability policies because they arise from property damage to the factory. Coverage depends on the role given "property damage" within the "damages because of . . . property damage" clause.

Insurers frequently contend that coverage under the "damages because of . . . property damage" clause is limited by the scope of the "property damage" definitions:<sup>97</sup> only damages compensating for injuries falling within the definitions<sup>98</sup> are covered by the phrase. Because intangible losses are not "property damage,"<sup>99</sup> damages compensating for those losses are not "damages because of . . . property damage," even when the intangible losses flow *from* property damage. This position

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cult to compute or, because of special circumstances, prove inadequate compensation when measured by traditional formulas, awards compensating for the "property damage" may be measured by other, non-"property damage" injuries. *See, e.g.,* *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 47 Cal. Rptr. 564, 569, 407 P.2d 868, 873 (1965) (houses' diminution in value measured, in part, by overhead costs incurred during repair); *Hartford Accident & Indem. Co. v. Crider*, 392 F. Supp. 162, 171-72 (N.D. Ill. 1974) (damages for physical injury to casings measured by lost profits). That the damages are measured by a non-"property damage" loss, such as overhead costs and lost profits, is irrelevant when the damages directly compensate for the property damage, and not for the non-"property damage" loss. *See* *Hartford Accident & Indem. Co. v. Crider*, 392 F. Supp. 162, 172 (N.D. Ill. 1974); *Geddes & Smith, Inc. v. Saint Paul Mercury Indem. Co.*, 47 Cal. Rptr. 564, 569, 407 P.2d 868, 873 (1965).

95. *See, for example,* the type of property damage discussed *supra* note 47.

96. *See supra* notes 31-40 and accompanying text.

97. *See, for example,* the insurer's arguments in *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 22 Wash. App. 536, 546, 590 P.2d 371, 377 (1979) (contending that overhead costs are not covered by the policy because they are not "property damage"), *rev'd*, 608 P.2d 254 (1980); *Central Armature Works v. American Motorists Ins. Co.*, 520 F. Supp. 283, 289 (D.D.C. 1980) (contending that lost profits are not covered); *General Ins. Co. v. Gauger*, 13 Wash. App. 928, 931-32, 538 P.2d 563, 566 (1975) (same).

98. *See supra* notes 22-23 and accompanying text.

99. *See supra* notes 29-40 and accompanying text.

views the "property damage" definitions as the ultimate determinant of the scope of coverage for property damage liability.

No case law directly supports this contention. In *Geddes & Smith, Inc. v. Saint Paul Mercury Indemnity Co.*,<sup>100</sup> however, the California Supreme Court held that intangible losses are never covered under policy language requiring damage to tangible property. In *Geddes*, the insured supplied defective doors which were installed in a number of houses. The court ruled that the houses' diminished values constituted property damage,<sup>101</sup> but denied coverage for damages compensating for lost profits and goodwill because the injuries were not to tangible property.<sup>102</sup> The *Geddes* court did not discuss whether the lost profits and goodwill resulted from the houses' diminished values because it found the presence of property damage to the houses irrelevant to any coverage for lost profits and goodwill damages: "Such damages are no less outside the coverage of the policy because there was also damage to the houses."<sup>103</sup>

Several other courts examining the 1966 CGLP have rejected the *Geddes* approach and viewed the "property damage" definition<sup>104</sup> as a starting point, rather than a stopping point, for determining coverage.<sup>105</sup> These courts conclude that once "property damage" is found, all losses stemming from that damage are covered, including intangible losses.<sup>106</sup> Unfortunately, the reasoning in these decisions is unpersuasive. A few

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100. 51 Cal. 2d 558, 334 P.2d 881 (1959) (en banc).

101. *Id.* at 565, 334 P.2d at 885.

102. *Id.* at 565-66, 334 P.2d at 885-86.

103. *Id.* at 566, 334 P.2d at 886; see also *Liberty Mut. Ins. Co. v. Consolidated Milk Prods. Ass'n*, 354 F. Supp. 879 (D.N.H. 1973) (adopting the *Geddes* reasoning verbatim). In *Liberty Mutual*, the insured sold defective creamers to the third-party claimant who resold them to food processing and serving establishments. The court ruled that products in which the cream was used suffered property damage. See *id.* at 882. The lost profits and goodwill allegedly suffered by the third-party claimant were held to be outside the policy, with *Geddes* cited as authority. The *Liberty Mutual* court, like the *Geddes* court, did not examine whether any causal connection existed between the property damage to products using the cream and the lost profits and goodwill.

104. See *supra* note 22 and accompanying text.

105. Courts have not yet confronted this coverage issue under the 1973 policy language.

106. See, e.g., *Aetna Casualty & Sur. Co. v. General Time Corp.*, 704 F.2d 80 (2d Cir. 1983) (lost profits resulting from defective motors incorporated into zone valves); *Central Armature Works v. American Motorists Ins. Co.*, 520 F. Supp. 283 (D.D.C. 1980) (lost profits resulting from negligently repaired scrap metal shredder); *General Ins. Co. of Am. v. Gauger*, 13 Wash. App. 928, 538 P.2d 563 (1980) (lost profits resulting from defective crop seed); *Yakima Cement Prods. Co. v. Great Am. Ins. Co.*, 22 Wash. App. 536, 590 P.2d 371 (1979) (increased overhead cost resulting from defective concrete panels), *rev'd on other grounds*, 93 Wash. 2d 210, 608 P.2d 254 (1980).

courts treat their coverage holdings as well-settled law and consequently fail to undertake a meaningful analysis of the policy language.<sup>107</sup> The remaining courts rest their decisions on two apparently interdependent grounds: (1) that the "property damage" definition, "injury to or destruction of tangible property," does not demand physical injury to tangible property; and (2) that the term "damages" used in the phrase "damages because of . . . property damage" does not restrict coverage of consequential damages.<sup>108</sup>

The first ground, that the "property damage" definition does not require physical injury to tangible property, does not support the conclusion that the definition covers damages resulting from injuries to "obligations, rights and other intangibles"<sup>109</sup> when those injuries result from property damage. Without exception, courts have recognized that injuries such as increased overhead costs and lost profits, reputation, and goodwill do not involve tangible property and, standing alone, are never "property damage."<sup>110</sup> Nothing in the 1966 definition suggests that an intangible loss magically transforms into an "injury to . . . tangible property" merely because it is consequential to covered property damage. The 1966 definition, "injury to or destruction of tangible property,"<sup>111</sup> no more supports coverage of these consequential intangible losses<sup>112</sup> than

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107. See *Aetna Casualty & Sur. Co. v. General Time Inc.*, 704 F.2d 80, 84 (2d Cir. 1983) (stating that coverage of all direct and consequential damages is the accepted general rule of New York); *Central Armature Works v. American Motorists Ins.*, 520 F. Supp. 283, 289 (D.D.C. 1980) (resolving coverage of consequential damages through reliance on precedents); see also *Thomas J. Lipton, Inc. v. Liberty Mut. Ins. Co.*, 34 N.Y.2d 356, 357 N.Y.S.2d 704 (1974) (supports coverage of lost profits without discussion).

108. *Safeco Ins. Co. v. Munroe*, 165 Mont. 185, 191-92, 527 P.2d 64, 68 (1974) (lost profits resulting from ruined crop and other property damage caused by defective crop seed); *General Ins. Co. of Am. v. Gauger*, 13 Wash. App. 928, 538 P.2d 563 (1980) (lost profits resulting from ruined crop caused by defective crop seed); *Yakima Cement Prods. Co.*, 22 Wash. App. at 546, 590 P.2d at 377 (increased overhead costs resulting from property damage caused by defective cement panels); see also *United Properties Inc. v. Home Ins. Co.*, 311 N.W.2d 689, 692 (Iowa Ct. App. 1981) (lost profits resulting from defective tennis court coating).

109. *Labberton v. General Casualty Co.*, 53 Wash. 2d 180, 186-87, 332 P.2d 250, 254 (1958).

110. See *supra* notes 35-40 and accompanying text.

111. See *supra* note 22 and accompanying text.

112. This odd justification apparently stems from reasoning and language used in early court decisions considering whether lost crop yield caused by defective products is "property damage" under various CGLP forms. One of the first cases to recognize that such a loss was property damage was *Saint Paul Fire & Marine Ins. Co. v. Northern Grain Co.*, 365 F.2d 361 (8th Cir. 1966), which held that diminution in a wheat field's productivity was synonymous with dimi-

section (1) of the 1973 definition, requiring "physical injury to or destruction of tangible property,"<sup>113</sup> negates it.

Somewhat more persuasive is the second justification, which rests on the broad use of the word "damages" in the Insuring Agreement clause, "damages because of . . . property damage." "Damages," in the 1966 policy, is defined as including "loss of use of property resulting from property damage."<sup>114</sup> This definition is not restrictive, and does not exclude the possibility that consequential damages are included within the scope of the "damages" definition.<sup>115</sup> This justification is also valid for the 1973 CGLP, where "damages" is undefined.<sup>116</sup>

This justification alone, however, is insufficient to support coverage for all consequential losses that are not themselves "property damage." Although the term "damages" does not exclude such coverage, it does not stand independently in the "damages because of . . . property damage" clause. If the qualifying phrase "because of . . . property damage" is interpreted to restrict "damages" to those compensating for direct "property damage," intangible losses will never be covered. If, on the other hand, the phrase is interpreted to include damages compensating for *all* injuries resulting from property damage, damages for consequential losses stemming from "property damage," including intangible losses, would be covered as "damages because of . . . property damage."

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nution in its value, *see id.* at 366. The court supported its finding by citing diminution in value cases that "squarely recognize[d] that consequential damages, including the diminution in value of property, caused by the use or application of a deficient or inferior product fall within the coverage provisions of an insuring agreement." *Id.* at 366. If the insurer had wished to avoid such "consequential damages" as diminution in value, the court indicated that it should require "physical" injuries. *Id.* at 367 & n.6 (citing *Pittsburgh Plate Glass Co. v. Fidelity & Casualty Co.*, 281 F.2d 538, 539 n.1 (2d Cir. 1960), where insurer explicitly required "physical" injury).

Courts subsequently applying *Northern Grain's* reasoning have not recognized that its use of the phrase "consequential damages" operated only to distinguish nonphysical injuries, such as diminution in value, from physical injuries. Judicial confusion is evident in another crop yield case, *Safeco Ins. Co. v. Munroe*, 165 Mont. 185, 192, 527 P.2d 64, 68 (1974), where the court based its finding of coverage for consequential loss of profits on the absence of any requirement of "tangible" damage to tangible property. *See also Yakima Cement Prods. Co.*, 22 Wash. App. at 546, 590 P.2d at 377 (adopting the *Safeco* reasoning to conclude that "once there is injury to tangible property [the insured is] entitled to recover all other damages flowing from that injury whether tangible or intangible").

113. *See supra* note 23 and accompanying text.

114. *See Gowan, supra* note 21, at 285; *supra* note 50 and accompanying text.

115. *Tinker, supra* note 8, at 254.

116. *See supra* note 50.



The validity of the alternative interpretations ultimately rests on the meaning of "because of" in the clause. To reach the interpretation limiting coverage to the scope of the "property damage" definitions, "because of" must be read as "equivalent to," "to the extent of," or "no more than."<sup>117</sup> To reach the second interpretation, which includes damages for all injuries resulting from property damage, "because of" must mean "on account of," "as a consequence of," or "arising from."<sup>118</sup> The latter interpretation is the "common, popular and ordinary meaning"<sup>119</sup> of "because of,"<sup>120</sup> the meaning applied by courts dealing with similar insurance policy language,<sup>121</sup> and therefore the meaning that should be applied here. Damages for intangible losses such as increased overhead costs, lost profits, reputation, and goodwill are covered when those intangible losses result from covered "property damage." Because such intangible losses result from "property damage," damages compensating for the losses occurred "because of . . . property damage."

This reading of the phrase "because of" limits coverage of consequential intangible losses to situations where the insured can show a causal connection linking the losses to covered property damage and, concurrently, renders coverage highly elastic, with its scope adjusting to the causal connection between the "property damage" and other injuries.<sup>122</sup> This elasticity could not have been unexpected by the insurance

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117. *Cf. Greenwood Cemetary, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 316, 232 S.E.2d 910, 913 (1977) (insurer's contention that "damages . . . for . . . mental anguish" does not include corresponding punitive damages interprets "for" as meaning "'equivalent to' (and therefore not greater than) or 'to the amount, value or extent of'").

118. *Cf. id.* (insured's contention that "damages . . . for . . . mental anguish" includes corresponding punitive damages interprets "for" as meaning "'by reason of' or 'because of, on account of.'").

119. *See J. APPLEMAN & J. APPLEMAN, supra* note 8, § 7384, at 71; *supra* note 58 and accompanying text.

120. *See* THIRD NEW INTERNATIONAL DICTIONARY 194 (1965) (definition of "because of"); FUNK & WAGNALLS NEW "STANDARD" DICTIONARY OF THE ENGLISH LANGUAGE 248 (1962) (same).

121. *Wymore v. Farmers Mut. Ins. Co.*, 182 Neb. 763, 764, 157 N.W.2d 194, 195 (1968) (clause excluding bodily injuries to persons on premises "because of" a business conducted there does not include injuries to independent contractor fixing roof; "[B]ecause of' means 'by reason of: on account of.'"); *see* *Globe Indem. Co. v. People*, 43 Cal. App. 3d 745, 750-51, 118 Cal. Rptr. 75, 79 (1974) (damages compensating state for fire suppression costs are damages "because of" property damage); *Saucier's Case*, 122 Me. 325, 330-31, 119 A. 860, 862 (1923) ("because [of employment]" in the Workmen's Compensation Act means "by reason of; on account of" employment).

122. *See* *Globe Indem. Co. v. People*, 43 Cal. App. 3d 745, 756, 118 Cal. Rptr. 75, 83 (1974) (Brown, J., dissenting) ("The majority in substance has made the

industry when it adopted the 1966 and 1973 policies. Similar controversies had previously arisen over coverage of punitive damages resulting from bodily injury or property damage,<sup>123</sup> and over consequential damages resulting from bodily injury,<sup>124</sup> with the decisions predominantly favoring insureds.

A difficulty bound to plague insurers and insureds is determining whether the required causal connection exists. Because liability insurance policy language is rarely, if ever, invoked in liability suits, which determine damages,<sup>125</sup> specific proofs linking defined "property damage" to intangible losses may not be available. An insurer would be well advised, when defending a suit, to request submission of specific questions on causal connection to the fact-finder to aid the insurer's coverage decision and bolster its position should the insured challenge that decision. In cases submitted without such specific proofs, courts should take care not to imply causal connections when common sense dictates otherwise.

*Yakima Cement Products Co. v. Great American Insurance Co.*<sup>126</sup> presents a classic example of improper implication of a

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coverage under the policy coextensive with the amount of damages the insured may be liable for "because of the negligently caused fire.").

123. Prior to 1962, courts were virtually unanimous in holding that the CGLP Insuring Agreements embraced punitive as well as compensatory damages. See, e.g., *Pennsylvania Threshermen & Farmers' Mut. Casualty Ins. Co. v. Thornton*, 244 F.2d 823 (4th Cir. 1957); *General Casualty Co. of Am. v. Woodby*, 238 F.2d 452 (6th Cir. 1956); *United States Fidelity & Guar. Co. v. Janich*, 3 F.R.D. 16 (S.D. Cal. 1943). But see *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 17, 39 P.2d 776, 779 (1934). Although no argument exists as to the coverage of punitive damages under the 1966 and 1973 Insuring Agreements, see Morrison, *Insuring Punitive Damages*, BEST'S INS. REV. (PROPERTY-CASUALTY), Jan. 1982, at 28, an increasing number of courts are holding that insuring punitive damages violates public policy, following the seminal case of *Northwestern Nat'l Ins. Co. v. McNulty*, 307 F.2d 132 (5th Cir. 1962), see Kendrigan, *Public Policy's Prohibition against Insurance Coverage for Punitive Damages*, 36 INS. COUNS. J. 622, 622-25 (1969). As of January 1982, 21 jurisdictions held that punitive damages were insurable, while 16 jurisdictions found them to be uninsurable on grounds of public policy. Morrison, *supra*, at 30.

124. See, e.g., *Commercial Union Ins. Co. v. Gonzalez Rivera*, 358 F.2d 480, 484 (1st Cir. 1966) (damages for children's mental pain and suffering covered as consequential damages of father's bodily injury); *Lumbermen's Mut. Casualty Co. v. Yeroyan*, 90 N.H. 145, 146, 5 A.2d 726, 727 (1939) (damages covered for husband's loss of consortium resulting from wife's injuries). Although at one time insurers customarily denied such consequential coverage, the present trend is just the reverse: "If any insurer operating today sought to exclude such coverage, it would find no support from the courts and, in all likelihood, would be ousted by the insurance commissioners from doing business in their states." 8A J. APPLEMAN & J. APPLEMAN, *supra* note 8, § 4893, at 59.

125. Foster, *Humpty Dumpty*, 28 INS. COUNS. J. 130, 131 (1961).

126. 22 Wash. App. 536, 590 P.2d 371 (1979), *rev'd*, 93 Wash. 2d 210, 608 P.2d 254 (1980).

causal connection. In *Yakima*, an insured supplied cement panels to a contractor for incorporation into two structures. After installation, the panels were discovered to be defective. Although the contractor took immediate steps to repair the panels, construction was delayed and exposed roof materials rusted. The Washington appellate court found that the structures' diminished values resulting from both the panels' incorporation and the rusted roof materials were "injury to or destruction of tangible property."<sup>127</sup> The court then determined that overhead costs from the delayed construction were covered as consequential to the rusted roof materials:

Having found injury to tangible property in the form of physical damage to the roof, Great American's contention that consequential damages are not covered by the policy must fail. . . . [O]nce there is injury to tangible property, Yakima was entitled to recover all other damages naturally flowing from that injury whether tangible or intangible. . . . Therefore, the sum, . . . representing consequential damages, is also recoverable by the insured.<sup>128</sup>

The court's fact statement indicates that most, if not all, of the overhead costs were traceable to repair of the defective panels, and were completely unrelated to the rusted roof materials. Conceivably, the consequential damages were still covered as stemming from the panels' diminished value. The court's decision, however, completely ignores this possibility, clinging to a fictitious causal connection to justify coverage.

Reliance on such a causal connection is clearly improper, as the only coverage of consequential intangible losses justified by the 1966 and 1973 CGLPs is that provided in the policies' language. The relatively simple language requiring damages to be "because of" property damage requires consequential damages to be causally related to the property damage. If courts ignore this requirement, as did the *Yakima* court, the incentive to insurers to couch policies in clear, understandable language will be severely reduced. Such a result would be harmful to ventures that depend on definite and certain coverage language to realize the full benefits of liability insurance.

### CONCLUSION

This Note concludes that physical injury to tangible property is included under the 1966 "property damage" definition by necessary implication and under the 1973 definition by specific language. Lost use of tangible property satisfies the 1966 "in-

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127. 22 Wash. App. at 544-45, 590 P.2d at 376.

128. 22 Wash. App. at 546, 590 P.2d at 377 (citations omitted).

jury to" tangible property definition because loss of use is an "injury" under the meaning of the "property damage" definition, and diminution in value of tangible property is likewise an "injury" included under the 1966 definition. Although lost use of tangible property continues to be covered under the 1973 "property damage" definition, diminution in value of tangible property does not. This Note cautions courts against adopting novel theories of "physical injury" to find coverage for injuries normally characterized as diminution in value of tangible property. It further argues that damages for intangible losses are covered as "damages because of . . . property damage" when those losses stem from covered property damage. Care should be taken to avoid implying improper causal connections between the property damage and the intangible losses.

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