

SUPREME COURT OF OHIO FURTHER LIMITS COVERAGE FOR CONTRACTORS UNDER STANDARD CGL POLICIES

OCTOBER 2018

The Ohio construction industry eagerly awaited the Supreme Court of Ohio's decision in *Ohio Northern Univ. v. Cincinnati Ins. Co.*, where the Court was asked to decide whether a commercial general liability ("CGL") policy provided coverage for a subcontractor's allegedly faulty work. Would the Court follow the trend in other jurisdictions and find coverage? Or would the Court expand its prior decision in *Westfield Ins. Co. v. Custom Agri Systems, Inc.* and further limit the coverage available under CGL policies? Regardless of the outcome, the Court's decision was set to have a profound impact on the scope of contractors' insurance coverage in Ohio.

On October 9, 2018, the Supreme Court of Ohio held that CGL policies do not provide coverage for a subcontractor's defective work. In so holding, the Court severely limited coverage available to contractors and subcontractors for faulty work in Ohio under CGL policies.

THE *CUSTOM AGRICULTURE* DECISION

Standard CGL policies generally provide coverage for property damage or bodily injury that is caused by an "occurrence." In 2012, the Supreme Court of Ohio examined whether property damage resulting from a contractor's own faulty workmanship constitutes a covered "occurrence" in *Custom Agri*, 133 Ohio St.3d 476, 2012-Ohio-4712, 979 N.E.2d 269. In holding it did not, the Court focused on the fact that the policy at issue, like most CGL policies, defined the term "occurrence" to mean an "accident." *Id.* at ¶ 9. While the term "accident" was not defined in the policy, the Court determined that the common meaning of the word involves "fortuity," or a chance occurrence. *Id.* at ¶ 14.

Since property damage caused by a contractor's own faulty work does not arise from an "accident" and is not fortuitous, the Court held the faulty work was not covered under the CGL policy. *Id.* at ¶ 21. The Court emphasized that CGL policies are not intended to protect business owners from ordinary business risks. Instead, they are designed to insure consequential risks stemming from the insured's work. *Id.* at ¶ 10. The Court's decision in *Custom Agri* left insureds and insurers alike wondering under what circumstances, if any, CGL policies would provide coverage for damage caused by faulty work.

THE BACKDROP OF *OHIO NORTHERN*

In *Ohio Northern*, the Court was presented with a situation where a contractor attempted to secure coverage for property damage caused by its subcontractors' allegedly faulty work under a CGL policy. By way of background, Ohio Northern University ("Ohio Northern") contracted with Charles Construction Services, Inc. ("Charles Construction") to build a luxury hotel and conference center on its campus. *Ohio Northern*, 2018-Ohio-4057, at ¶ 4. During construction, Charles Construction was an insured under a CGL policy issued by Cincinnati Insurance Company ("Cincinnati Insurance"). Like the policy in *Custom Agri*, Charles Construction's CGL policy covered only "occurrences." But it also contained clauses that contractors believed would cover subcontractors' work, including a completed-products operation hazard clause, which provided that the policy's property damage exclusion did not apply to property damage arising out of Charles Construction's completed work. The policy also included a separate exclusion negating coverage for damage to Charles Construction's work, but the exclusion expressly stated that it did not apply to damage arising from work performed by subcontractors. *Id.* at ¶¶ 4-5, 19-21.

After Charles Construction completed the project, Ohio Northern discovered water damage caused by allegedly faulty workmanship and filed suit. Cincinnati Insurance provided a defense to Charles Construction under a reservation of rights, but later sought a declaration that there was no coverage based on the *Custom Agri* decision, despite the policy's completed-products operation hazard and subcontractor work provision.

THE COURT DOUBLES DOWN ON *CUSTOM AGR*

The Court started its analysis by noting that the policy's insuring clause, like the policy in *Custom Agri*, provided coverage only for bodily injuries and property damage caused by "occurrences." *Id.* at ¶ 22. As in *Custom Agri*, the policy defined an "occurrence" as an "accident." *Id.* Thus, the Court held that if there was no "accident," it could decide the case without ever considering the potential impact of the completed-products operation hazard and subcontractor work provision. *Id.*

In considering whether *Ohio Northern* involved an "accident," the Court followed its precedent in *Custom Agri* and unanimously held that "a subcontractor's faulty work does not meet the definition of an 'occurrence' because it is not based in fortuity." *Id.* at ¶ 27. The Court recognized that a number of jurisdictions have interpreted similar policies to provide coverage for property damage arising out of defective work performed by an insured's subcontractor. *Id.* at ¶ 31. Nonetheless, the Court held that Cincinnati Insurance was not required to defend or indemnify Charles Construction in connection with Ohio Northern's lawsuit since there was no "occurrence" under Ohio law. *Id.* at ¶ 35.

KEY TAKEAWAYS

Given the Court's decisions in *Custom Agri* and *Ohio Northern*:

1. Contractors and subcontractors should have an attorney or professional insurance broker perform a careful insurance review of their policies, including whether to secure specific professional liability policies and/or inquire whether carriers will write endorsements to their CGL policies;
2. Contractors and subcontractors should review their contracts to ensure indemnity and insurance requirements are appropriately addressed;
3. Insurers may have greater leeway to challenge whether they have coverage obligations under CGL policies based on the Court's fortuity requirement; and
4. The Ohio legislature, as the Court noted, could expand coverage for contractors and subcontractors by passing legislation requiring CGL policies to define "'occurrence' to include '[p]roperty damage ... resulting from faulty workmanship.'"

ADDITIONAL INFORMATION

For additional information, please contact:

- [SETH WAMELINK](mailto:seth.wamelink@tuckerellis.com) | 216.696.3791 | seth.wamelink@tuckerellis.com
- [KEVIN YOUNG](mailto:kevin.young@tuckerellis.com) | 216.696.4691 | kevin.young@tuckerellis.com
- [PATRICIA SEIFERT](mailto:patricia.seifert@tuckerellis.com) | 216.696.5361 | patricia.seifert@tuckerellis.com
- [PAUL JANOWICZ](mailto:paul.janowicz@tuckerellis.com) | 216.696.5787 | paul.janowicz@tuckerellis.com

This Client Alert has been prepared by Tucker Ellis LLP for the use of our clients. Although prepared by professionals, it should not be used as a substitute for legal counseling in specific situations. Readers should not act upon the information contained herein without professional guidance.

©2018 Tucker Ellis LLP. All rights reserved.