



Ohio Supreme Court Rules Against General Contractor in Construction Defect Coverage Dispute

On October 9, 2018, the Ohio Supreme Court issued a decision in *Ohio Northern University v. Charles Construction Services, Inc.*, Slip Op. 2018-Ohio-4057, finding that a general contractor was not entitled to defense or indemnity from its CGL insurer in a construction defect suit brought by a project owner post-project completion. With this decision, Ohio has solidified its place amongst a diminishing number of states, including Pennsylvania and Kentucky, which hold that there is no coverage for defective construction claims because those losses do not present the level of fortuity required to trigger CGL coverage. This places Ohio amongst the worst in the country on this issue at a time when numerous states have abandoned old precedent and moved towards policyholder friendly analysis.

Ohio Northern University (“ONU”) hired Charles Construction Services, Inc. (“CCS”) to construct the University Inn and Conference Center, a new hotel and conference center on their campus in Ada, Ohio. CCS purchased CGL insurance from Cincinnati Insurance Company (“CIC”) insuring the project. Following completion of the project, ONU sued CCS alleging defects in the construction of the completed project, including allegations that windows improperly installed by one subcontractor led to damage to walls built by another subcontractor. CIC agreed to defend CCS under a reservation of rights but intervened in the action between ONU and CCS to pursue a declaratory judgment that it had no obligation to defend or indemnify its insured for the alleged losses.

The trial court ruled in favor of CIC and held that under the Supreme Court’s 2012 decision in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, it was “constrained to conclude that the CGL [policy] issued in this case does not provide coverage because the subcontractors’ alleged defective workmanship is not an ‘occurrence.’” On appeal, Ohio’s Third District Court reversed, ruling in favor of the insured general contractor. Although *Custom Agri* was still “good law,” it took a narrower view of the holding in that case and, moreover, noted numerous holes in CIC’s position: notably, that *Custom Agri* did not address the impact of products-completed operations coverage or various exclusionary provisions and their corresponding exceptions which seem to suggest coverage for claims such as those made by ONU. CIC appealed the ruling to the Ohio Supreme Court.

CCS’ briefing to the Supreme Court of Ohio argued that CIC must have anticipated exposure for completed operations construction defects claims based on the premiums paid by CCS for that coverage. CCS pointed out that, at the policy’s inception, it paid \$7,793.00 for \$2 million of products-completed operations coverage. After an audit conducted three years into the construction of the project, CIC increased the premium for those limits to nearly \$28,000.00. CCS argued that this increase “can only be explained by the exposure CIC perceived from potential liability on completed construction.”

CCS also painstakingly reviewed the meaning and impact of various policy exclusions in its bid for coverage under the CIC policy. For example, CCS argued that the subcontractor exception to exclusion (I), “Damage to Your Work,” makes sense only if the insured’s completed work would be covered under the products-completed operations hazard but for the operation of the exclusion – an argument that many policyholders have made in numerous cases across the country when faced with a denial of construction defect claim from their insurer.

The Ohio Supreme Court was unpersuaded. Unlike the appellate court, the Supreme Court held that the *Custom Agri* case was directly on point to the coverage issues at hand. It concluded that faulty work – whether the insured’s own, or work performed by subcontractors – cannot be considered fortuitous and, therefore, does not meet the definition of “occurrence.” “[P]olicies are not intended to protect owners from ordinary business risks” that are normal, frequent or predictable consequences of doing business that the insured can manage. Here, we cannot say that the subcontractors’ faulty work was fortuitous.” *Ohio N. Univ.*, 2018-Ohio-4057, at ¶ 29.

The Court's analysis ignored the arguments advanced by CCS as well decisions from other jurisdictions which would have found in favor of the general contractor. The vast majority of states would have easily held that the "occurrence" requirement was satisfied, since subcontractor work caused water infiltration which damaged other non-defective work. Here, however, the Court took a broad-brush approach to the issue, opting instead for a superficial analysis of what it means for a loss to be fortuitous. Moreover, the Court completely ignored CCS' well-presented argument that CIC must have anticipated exposure for post-completion construction defect claims due to the premiums it paid for completed-operations coverage.

It is still true that the majority of courts nationally recognize that faulty workmanship may be an "occurrence," provided the contractor did not subjectively intend to cause damage or, in some states, provided the faulty work caused damage to something other than the insured's own work product. Unfortunately, the Ohio Supreme Court has confirmed its adherence to the minority position holding that there is no coverage for these claims. The decision highlights the need for policyholders and their brokers to include appropriate endorsements in jurisdictions like Ohio, Kentucky, and Pennsylvania which modifies the "occurrence" definition in standard CGL policies to clarify that coverage is triggered by construction defect claims. Most insurers writing coverage in those jurisdictions can offer solutions – but the insured usually has to know enough to ask for the fix, otherwise the insurer will be sure to take advantage of pro-insurer case law wherever it can.

To read the full decision, [click here](#).

To view our State Survey on Defective Construction as an "Occurrence," [click here](#).

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