Published on *The National Law Review* https://natlawreview.com

Ohio Supreme Court – Claims for Property Damage to Insured's Own Work Caused by Defective Workmanship Not Covered Under CGL Insurance Policies

Article By:

Clifford J. Shapiro

The Ohio Supreme Court has held that commercial general liability (CGL) insurance policies do not cover claims for the repair or replacement of faulty or defective workmanship, but that resulting property damage can trigger coverage as an "occurrence." ***Westfield Ins. Co. v. Custom Agri. Sys., Inc., Slip Op.*** No. 2012-Ohio-4712 (available at: http://1.usa.gov/TJCQZF). This decision limits the scope of coverage under CGL policies in Ohio for construction industry policyholders, and puts property owners and general contractors at more risk for the defective work of subcontractors.

Westfield arose out of a suit for damages caused by a defectively constructed grain bin. The general contractor brought a third-party complaint against the subcontractor that constructed the grain bin who, in turn, sought insurance coverage from its CGL policy. The insurance company that issued the policy, Westfield, refused to provide coverage for the subcontractor on the ground that the claims for defective workmanship do not arise out of an "occurrence." After a series of decisions and appeals in Federal Court, the Sixth Circuit Court of Appeals asked the Ohio Supreme Court to decide whether under Ohio law "claims of defective construction/workmanship brought by a property owner [are] claims for 'property damage' caused by an 'occurrence' under a commercial general liability policy."

The majority decision holds that the subcontractor's defective work on the grain bin was not, in and of itself, an accidental "occurrence," and that the CGL policy therefore provided no coverage for the claim. The decision determines whether coverage exists by examining the alleged damages to determine whether an "unanticipated" or "fortuitous" accident was caused by the insured. Under this approach, if the property damage is only to the insured's own work, there is generally no coverage. On the other hand, if the property damage is consequential and derives from the work the insured performed, coverage generally will lie. Based on this analysis, the majority decision find that there was no "occurrence," and therefore no coverage, because the damages at issue were all for the repair or replacement of the insured's own defective work. The decision notes that this analysis is consistent with decisions issued by courts in Arkansas and Kentucky, as well as the majority of lower courts in Ohio.

Justice Pfeifer lodged a lengthy dissent based, in part, on two articles authored by Clifford Shapiro, Chair of the Barnes and Thornburg Construction Law Practice Group. According to the dissent, "a

strong recent trend in the case law" rejects the analysis of the majority and interprets the term "occurrence" to encompass unanticipated property damage resulting from poor workmanship. These other cases recognize that focusing on the type of damage resulting from faulty construction do not truly address the issue of whether there has been an "occurrence." This is because the CGL policy includes numerous construction-specific exclusions that are intended to define the scope of the coverage for construction defect claims. As such, an analysis of the "occurrence" issue that focuses on the alleged damages "simultaneously fails to evaluate the policy as a whole and collapses what should be a separate and specific analysis of the policy exclusions into the coverage grant analysis of the term 'occurrence.'"

According to the dissent, the better-reasoned Ohio appellate cases recognize that a CGL policy is not the equivalent of a performance bond but also recognize that the rationale for that proposition is not that the allegations of negligent construction or design practices do not fall within the broad coverage for property damage caused by an occurrence, but that the damages resulting from such practices are usually excluded from coverage by the standard exclusions found in such policies. The dissent concludes: "The majority in this case makes an overbroad generalization about CGL policies in Ohio. Answering a question it should not even be answering, the majority misinterprets the contract and misapplies Ohio law, leaving us on the wrong side of the divide of states that have considered this question."

National Law Review, Volume II, Number 360