

**ALERTS**

## Despite Modern Trend, Ohio Supreme Court Does Not Reconsider Prior Precedent

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The Ohio Supreme Court ruled on Oct. 9, 2018, that property damage caused by a subcontractor's faulty workmanship can never be an accidental "occurrence" within the meaning of the Commercial General Liability (CGL) insurance policy, and is therefore not covered. *Ohio Northern University v. Charles Construction Services Inc.*, Case No. 2017-0514 (2018). In reaching this conclusion, Ohio's highest court followed its own precedent instead of applying the reasoning used by the vast majority of courts that have reached the opposite conclusion in recent years.

Ohio Northern University (ONU) hired Charles Construction Services to oversee construction of an \$8 million University Inn and Conference Center. Charles Construction obtained a general liability policy from Cincinnati Insurance Company. After the project was completed, the University discovered extensive water infiltration and other damage to the building. The University sued Charles Construction for breach of contract, and Charles Services filed third-party claims against several subcontractors. Cincinnati initially agreed to defend Charles Construction in the litigation under a reservation of its rights, and then obtained a trial court ruling finding that it had no duty to defend. The Appellate Court reversed, and the Ohio Supreme Court agreed to review the Appellate Court's decision at Cincinnati's request.

The Ohio Supreme Court reversed, finding that Cincinnati owed no duty to defend or to indemnify Charles Construction. The analysis in the decision is based entirely on the court's 2012 decision in *Westfield Ins. Co. v. Custom Agri Sys., Inc.*, 133 Ohio St.3d 476, 979 N.E.2d 269 (2012). In that case, the court held that "property damage caused by a contractor's own faulty work" is not "fortuitous" and therefore is not an accidental "occurrence."

The court viewed the issue in Charles Construction to be "nearly identical," and therefore applied its reasoning in *Custom Agri*. Using that analysis, the court held that: "Property damage caused by a subcontractor's faulty work is not an 'occurrence' under a CGL policy because it cannot be deemed fortuitous. Hence, the insurer is not required to defend the CGL policy holder against suit by the property owner or indemnify the insured against any damage caused by the insured's subcontractor."

The Ohio Supreme Court acknowledged that its decision is contrary to several recent decisions. Those decisions include the Tenth Circuit's decision in *Black & Veatch Corp. v. Aspen Insurance (UK) Ltd.*, 882 F.3d 952 (10th Cir. 2018) (predicting that the highest New York court would hold that resulting damage from faulty subcontractor work constitutes an "occurrence"), the New Jersey Supreme Court decision that changed New



**Clifford J. Shapiro**

Partner

Chicago

P 312-214-4836

F 312-759-5646

[clifford.shapiro@btlaw.com](mailto:clifford.shapiro@btlaw.com)

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Jersey law in *Cypress Point v. Adria Towers*, 2016 WL 4131662 (2016) (holding that the term “accident” in the CGL policy encompasses unintended and unexpected harm caused by negligent conduct, and that consequential harm caused by negligent work is an accidental “occurrence”), and the Iowa Supreme Court decision that changed Iowa law in *National Surety Corp. v. Westlake Investments*, 880 N.W.2d 724 (Iowa 2016) (discussing in detail the history and evolution of the CGL policy to change and clarify Iowa law by holding that “defective workmanship by an insured’s subcontractor may constitute an occurrence under the modern standard-form CGL policy containing a subcontractor exception to the ‘your work’ exclusion.”)

The decision issued by Ohio’s highest court does not reconsider the court’s reasoning in *Custom Agri* or address the legal analysis that is now used by most other courts that have carefully considered (and, in several cases, reconsidered) this issue in recent years. Instead, the Ohio Supreme Court applied its prior decision in *Custom Agri* without discussion of the important changes to the policy terms that most courts have concluded require a different conclusion. According to the court: “Regardless of any trend in the law, we must look to the plain and ordinary meaning of the language used in the CGL policy before us.” The court added: “When the language of a written contract is clear, we may look no further than the writing itself to find the intent of the parties.”

Contrary to the court’s explanation, its analysis in *Custom Agri*, and now *Charles Construction*, actually fails to apply the terms of the modern day CGL insurance policy. Instead, these decisions apply an outdated judicial gloss not found in the insurance policy itself to conclude that inadvertent faulty workmanship can never be “fortuitous” or “accidental.” This reasoning is rooted in analysis that was used by courts and commentators before the CGL policy terms were materially changed, including in 1986. Those changes modified the exclusions to clarify that the CGL policy provides coverage for certain kinds of property damage caused by inadvertent faulty workmanship. In other words, the coverage grant in the modern day CGL policy specifically anticipates that coverage can exist for property damage caused the accidental “occurrence” of faulty workmanship. The CGL policy exclusions then define and narrow the scope of the insurance coverage that is actually provided when property damage is caused by faulty workmanship. In particular, due to the “subcontractor exception” in the “your work” exclusion, the modern day CGL policy specifically anticipates and provides insurance coverage for a general contractor when property damage is caused by the faulty work of its subcontractors. This is especially true where (as in *Charles Construction*) the property damage arises after operations are complete and the damage is to something other than the subcontractor’s defective work itself.

The Ohio Supreme Court’s decision is contrary to the clear trend in the law on this issue, a trend that is based on more careful analysis of the current CGL policy terms. It is most unfortunate that the Ohio Supreme Court elected not to use the *Charles Construction* case as an opportunity to reconsider and to correct the faulty reasoning and analysis in the court’s 2012 *Custom Agri* decision. For more analysis of the important “occurrence” issue, please see the 50 state survey of case law discussing this issue that was prepared by the Barnes & Thornburg Construction Law Practice Group. It can be accessed [here](#).

To obtain more information, contact the Barnes & Thornburg attorney with

whom you work or Clifford Shapiro, chair of the Construction Law Practice Group, at 312-214-4836 or [clifford.shapiro@btlaw.com](mailto:clifford.shapiro@btlaw.com).

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