

## NEWSLETTERS

### Limitations On Additional Insured Coverage In Ohio

March 16, 2017 | [Atlanta](#) | [Chicago](#) | [Columbus](#) | [Dallas](#) | [Delaware](#) | [Elkhart](#) | [Fort Wayne](#) | [Grand Rapids](#) | [Indianapolis](#) | [Los Angeles](#) | [Minneapolis](#) | [New York](#) | [South Bend](#)

#### ***Barnes & Thornburg Construction Law Update, March 2017***

When a construction project goes awry, the initial dispute is about the amount of damage to the property. But even when that issue is settled, there is often a lot of finger-pointing as to who is responsible for those damages. In many cases, that triggers another dispute, which requires the apportionment of fault among the various entities that worked on the project. Even then, the dispute may not be over, as parties may seek additional recovery under insurance policies.

A fall 2016 case decided by the U.S. District Court for the Southern District of Ohio, *Weitz Company, LLC, v. Acuity*, 2016 WL 6432835, presents just such a scenario. Weitz provides important lessons for general contractors in contracting with subcontractors – and for how to handle post-project disputes between general contractors and subcontractors.

The Weitz Company, LLC, was the general project for a residential senior living community known as Twin Lakes in Montgomery, Ohio. Weitz hired several subcontractors for the Twin Lakes project, including Miter Masonry. Miter was insured by Acuity at the time Miter performed work on the Twin Lakes project. Weitz worked on the Twin Lakes project from 2003-2005, when the project was completed. In 2011, Weitz was provided, for the first time, with formal notice of moisture infiltration issues at the Twin Lakes project. Miter was still insured by Acuity in 2011. In 2012, a formal arbitration demand was filed against Weitz based on the moisture infiltration issues.

The arbitration demand alleged that Weitz was liable to Twin Lakes for breach of contract, breach of warranty, and negligence on the Twin Lakes project. Following arbitration, a Modified Final Award was entered on June 4, 2015. The Arbitration Panel found in favor of Twin Lakes and entered judgment against Weitz. None of the subcontractors, nor any insurance company on behalf of the subcontractors, aided Weitz's defense of the arbitration claims against them. As part of the arbitration, the arbitration panel also determined that Weitz could recover the full amount of the arbitration award from the various subcontractors, including Miter. Weitz was also permitted to recover its attorney fees and arbitration expenses and costs.

Nevertheless, Weitz filed a lawsuit against Acuity, arguing that Weitz was an additional insured under Miter's policy with Acuity and seeking a declaratory judgment that Acuity had a contractual duty to defend Weitz as an additional insured under Miter's insurance policy with Acuity. Weitz alleged that, as an additional insured, it was entitled to a defense

## RELATED PRACTICE AREAS

Construction

provided by Acuity in the arbitration proceeding, and that it had suffered damages due to Acuity's failure to provide that defense. Specifically, Weitz sought to recover its attorneys' fees incurred in the arbitration, and full indemnification for the costs of Weitz's defense in the arbitration.

### **An Additional Insured?**

As a first step in the lawsuit, the court had to determine whether Weitz indeed was an additional insured under the policy. Miter's policy with Acuity did include an additional insured section, which provided for additional insured coverage of completed projects, but that section had an exclusion that the additional insured status does not apply to damage that occurs more than two years following Miter's final payment to Weitz. The project was completed in 2005 and the final payment was made at that time, so the court found that the additional insured coverage was only applicable through 2007. In this case, while Weitz claimed that the moisture infiltration issues were a problem during the project, there was no evidence that this was the case and Weitz admitted that they were not provided with formal notice of the moisture infiltration issues until 2011.

Additionally, the court found that Acuity was not required to defend Weitz because the arbitration panel found that Weitz had breached its contract with Twin Lakes by failing to perform in a workmanlike manner. The court reiterated that Ohio law holds that claims of defective construction are not claims for "property damage" caused by an "occurrence," when "occurrence" is defined as an "accident." In Ohio, when, as here, the insurance policy applies only to accidents, the policy does not cover faulty workmanship. This provided another basis on which Acuity was not required to defend Weitz in the underlying arbitration action.

The court went on to find that, even if Acuity had breached a duty to defend Weitz, Weitz would still not be entitled under Ohio law to recover the attorneys' fees it sought. The court found that Weitz had already been awarded all of its attorneys' fees incurred in the arbitration. Weitz's remaining claim for attorneys' fees was for the attorney fees incurred by Weitz in the declaratory judgment action. However, Ohio law does not provide for the recovery of attorneys' fees as part of prevailing in litigation. Attorneys' fees in Ohio are only awarded to the prevailing party when a statute or an enforceable contract provides for the award of attorneys' fees. The court found that none of those exceptions applied in this case. Furthermore, Ohio law explicitly states that attorneys' fees cannot be awarded to a party who prevails on a claim of declaratory relief.

The second category of damages Weitz sought was for consulting fees and expenses incurred in the arbitration. However, the court found that, under Ohio law, claims decided under arbitration are subject to res judicata. Res judicata generally prevents the re-litigation of issues that were previously finally decided. The court found that Weitz had already sought these fees in the arbitration and the arbitration panel awarded damages for them.

### **Four Important Takeaways**

There are four important takeaways. It is imperative to fully and completely understand the terms of any contract, such as the impact of the additional insured language. Furthermore, Weitz could have clarified its status as an additional insured through its own agreement with Miter. Another important takeaway is to seek all available damages in the first instance to avoid being barred from later seeking them. Weitz faced this

problem when it sought damages in the court case that they could have sought in the arbitration.

The final, and most important, takeaway is to document any issues on a project the moment they occur. Weitz argued that the moisture infiltration issues began during the project, but could not present any evidence to support that claim. Had Weitz had such evidence, it would have had a stronger argument that it would have been covered as an additional insured.

For more information about this topic and the issues in this article, please contact David Dirisamer in our Columbus office at (614)-628-1451 or [david.dirisamer@btlaw.com](mailto:david.dirisamer@btlaw.com)

Visit us online at [www.btlaw.com](http://www.btlaw.com)

*© 2017 Barnes & Thornburg LLP. All Rights Reserved. This page, and all information on it, is proprietary and the property of Barnes & Thornburg LLP. It may not be reproduced, in any form, without the express written consent of Barnes & Thornburg.*

*This Barnes & Thornburg LLP publication should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own lawyer on any specific legal questions you may have concerning your situation.*