ALERT
OCTOBER 19, 2012

GLOBAL INSURANCE
News Concerning Insurance Coverage Issues

COZEN O'CONNOR
www.cozen.com

Ohio Supreme Court Rules that Claims of Defective Workmanship Against a Builder Do Not Constitute an Occurrence Under a CGL Policy

Jacob C. Cohn • 215.665.2147 • *jcohn@cozen.com*
Joseph A. Arnold • 215.665.2795 • *jarnold@cozen.com*
Scott B. Galla • 215.665.2109 • *sgalla@cozen.com*

On October 12, 2012, the Ohio Supreme resolved a long-simmering conflict among Ohio's intermediate appellate courts by answering the following certified question:

> Are claims of defective construction/ workmanship brought by a property owner claims for "property damage" caused by an "occurrence" under a commercial general liability policy?

The court answered in the negative, ruling that claims of defective construction or workmanship against a builder do not constitute an occurrence under CGL policies. *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, No. 2011-1486, slip op. (Ohio Oct. 16, 2012). With this ruling, Ohio joins a number of states (including neighboring Pennsylvania) that hold CGL insurers have no duty to defend or indemnify builders for construction defect claims.

In the underlying lawsuit, pending in the Northern District of Ohio, a contractor tasked to build a feed-manufacturing plant sued Custom Agri Systems, Inc. (Custom Agri) for faulty construction of a steel grain bin, a key component of the plant. Custom Agri sought defense and indemnity from Westfield Insurance Company (Westfield). Westfield disclaimed coverage on the basis that faulty workmanship did not constitute property damage caused by an occurrence. Westfield intervened in the action and the parties filed cross-motions for summary judgment.

The district court granted summary judgment for Westfield, finding that the contractual liability exclusion precluded coverage. *Younglove Constr., LLC v. PSD Dev., LLC*, 767 F. Supp. 2d 820, 825 (N.D. Ohio 2011). The court declined to rule on the "open question under Ohio law whether a CGL policy covers defective construction claims." In response to Custom Agri's appeal, Westfield filed a motion to certify the "open question" to the Ohio Supreme Court. Based on the absence of controlling precedent, the Sixth Circuit granted Westfield's motion.

The Ohio Supreme Court examined the policy language, analyzed the purpose of CGL policies, and looked to other appellate courts in determining that defective workmanship did not constitute an occurrence under a CGL policy. The court looked to case law as well as treatises for the "natural and commonly accepted meaning" of the word "accident" and determined that the purpose of CGL policies is to insure against consequential risks rather than "business risks" under the control and management of the insured. The court noted that business risks, like the faulty work of a subcontractor, can instead be mitigated via performance bonds.

The court also noted that the majority of intermediate Ohio appellate courts define accident as "unexpected as well as unintended," and, therefore, hold that defective workmanship claims do not constitute an occurrence under a CGL policy. Indeed, the court quoted Ohio's Eleventh

District Court of Appeals in holding that the "key issues are whether the contractor controlled the process leading to the damages and whether the damages were anticipated." *JTO, Inc. v. State Auto. Mut. Ins. Co.*, 956 N.E.2d 328 (Ohio Ct. App. 11th Dist. 2011). Looking to its "sister court," the court noted that the Kentucky Supreme Court recently held that the "doctrine of fortuity" was inherent in the word "accident." *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 74 (Ky. 2010). Thus, the Ohio Supreme Court concluded that faulty workmanship is distinct from an accident and, therefore, is not a covered occurrence, a ruling that is consistent with the majority of appellate courts in Ohio as well as the "spirit of fortuity that is fundamental to insurance coverage." A nearly unanimous decision, the lone dissenting judge asserted, among other things, that the decision improperly foreclosed the possibility that other faulty construction claims could constitute an occurrence where the resulting damage was unintentional, an argument that could resurface in future litigation involving the issue.

To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:

Jacob C. Cohn at jcohn@cozen.com or 215.665.2147
Joseph A. Arnold at jarnold@cozen.com or 215.665.2795
Scott B. Galla at sgalla@cozen.com or 215.665.2109