

Weston Hurd Client Advisory - October 2012
Ohio Supreme Court Rules that
Claims for Defective Construction Work or
Workmanship are not Claims for
"Property Damage" Caused by an "Occurrence"
Under a CGL Policy

Prepared by John G. Farnan, Esq.

In *Westfield Insurance Company v. Custom Agri Systems, Inc.*, 2012-Ohio-4712, decided October 16, 2012, the Ohio Supreme Court finally, after years of litigation in the Ohio lower courts, definitively answered this question certified to it by the United States Court of Appeals for the Sixth Circuit:

(1) 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 Ohio Supreme Court answered "no" to this certified question. In doing so, the court explained that all the claims that Westfield was being asked to defend and indemnify related to its insured's work itself, *i.e.* the alleged defective construction and workmanship on a steel grain bin. Westfield's CGL policy had the standard language defining a policy "occurrence" to mean "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

Although the Westfield policy did not define the term "accident," the Ohio Supreme Court attributed to that term its normal meaning of "unexpected as well as unintended." The Ohio Supreme Court ruled that " * * * [T]he fortuity principle essential to the notion of what constitutes insurance * * * ."

The Ohio Supreme Court explained its rationale:

"We agree that claims for faulty workmanship, such as the one in the present case, are not fortuitous in the context of a CGL policy like the one here. In keeping with the spirit of fortuity, that is fundamental to insurance coverage, we hold that the CGL policy does not provide coverage to Custom for its alleged defective construction of and workmanship on the steel grain bin. Our holding is consistent with the majority of Ohio courts have denied coverage for this type of claim. The majority view is that claims of defective construction or workmanship are not claims for "property damage" caused by an "occurrence" under a CGL policy. * * * " *Id.* at ¶14.

The Ohio Supreme Court declined to answer a second certified question as to whether a CGL policy's contractual liability exclusion precludes coverage for claims for defective construction/workmanship because that question assumed that claims for defective construction stated claims for "property damage" caused by an insurance policy "occurrence."

This was finally a bright-line decision by the Ohio Supreme Court on this issue. The decision was 6 to 1 with only Justice Pfeifer dissenting.

Carriers should note that this decision will not apply to those cases that allege that consequential damage resulted from the alleged defective construction or poor workmanship. This case applies only to those cases in which the insurer is asked to defend or indemnify claims that are limited to repairing or replacing the insured's defective construction or defective workmanship. Nevertheless, this decision definitively resolves this issue which has been debated for years in the Ohio courts.

In the event that a claim does assert consequential damages to property, then the analysis must be made whether there are any applicable exclusions. This latter inquiry is usually a matter requiring a careful review of all the evidence available including the allegations of the complaint and any available expert reports.

This decision can be found at:

[Westfield Insurance Company v. Custom Agri Systems, Inc.](#)



John G. Farnan is a Partner with Weston Hurd LLP. He practices primarily in the areas of insurance coverage, personal injury, premises liability, commercial litigation and appellate practice. Since 2006, John has been named an *Ohio Super Lawyer* in Insurance Coverage by [Law & Politics Media, Inc.](#) and since 2011, he has been named to the [Best Lawyers in America](#). He can be reached at (216) 687-3288 (direct) or at JFarnan@westonhurd.com.

For more information about Mr. Farnan and Weston Hurd, please visit www.westonhurd.com.

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