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THREE MIDWEST STATES CURB AND LIMIT COVERAGE

Between August and October, the State Supreme Courts of Kentucky, Ohio and Wisconsin issued opinions significantly limiting the scope of insurance coverage. In three cases involving noteworthy and expensive claims for property damage, the high courts reversed their appellate courts to take away insurance for the claimed losses.

First, in *American Mining Insurance Company v. Peter Farms, LLC,* 2018 WL 3913781, the Kentucky Supreme Court held that there was no coverage for the insured mining company's trespass and conversion of 19,012 tons of coal extracted from the wrong property resulting from the insured's mistaken belief as to the property line. The Court explained that under the fortuity doctrine whether the claimed damages were covered by the insured's CGL policy "depend[ed] upon [the mining company's] intent and control regarding its excavation and conversion of" the claimant's coal. Finding that the insured's actions over several months were under its complete control and that the mining company did intend to "mine and sell the coal it extracted[,]" the Court held there was no "accident" causing the loss to the claimant's foliage and coal mined beneath his land. According to the Court, without an accident, there was no "occurrence" causing property damage as required by the insured's Commercial General Liability Policy.

Similarly, in *Ohio Northern University v. Charles Construction Services, Inc.*, 2018 WL 4926159, the Ohio Supreme Court reversed the Court of Appeals and held that no coverage existed for the general contractor sued for damages resulting from the faulty work of its subcontractors. In a nod to the Supreme Court of Kentucky, the Ohio high court agreed that the fortuity doctrine is an essential rule to the applicability of a CGL policy and the concept that accidents trigger coverage.

This case involved a general contractor, Charles Construction that undertook with the assistance of various subcontractors building a conference center and luxury hotel at Ohio Northern University. The approximate cost of the project was $8 million. After construction was completed, the university learned of leaks causing extensive water damage to the new buildings in 2011, and subsequently, significant "structural defects". The cost to make the necessary repairs was estimated at $6 million.

The university filed a lawsuit against the general contractor for breach of contract and related claims for damage to the inn. Charles Construction, in turn, filed a third party action over against many of its subcontractors. Following the filing of university's second amended and final complaint in 2014, the general contractor tendered the suit to its CGL carrier, Cincinnati Insurance Company for defense and indemnity. The insurer intervened in the pending action and filed a declaratory judgment action seeking a judgment that it had no duty to defend or indemnify Charles Construction for any of the university's alleged damages under the express terms of the CGL policy. The policy included $2 million products-completed operations hazard coverage.

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The trial court following the precedent of the Supreme Court's earlier decision in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St. 3d 476, 2012-Ohio-4712 granted the CGL insurer's motion for summary judgment finding the carrier had no duty to defend the general contractor. Distinguishing the *Custom Agri* case, still good law as "to the construction defects caused by the insured's own work[,]" the Court of Appeals reversed the trial court. Taking the products-completed operations hazard clause together with other subcontractor-specific CGL-policy terms, the Court of Appeals found an ambiguity in the CGL policy regarding faulty work of a subcontractor causing property damage and overturned the judgment entered in favor of the insurer.

The Supreme Court, however, refused to depart from its reasoning in *Custom Agri* to follow the clear trend of state supreme courts deciding the issue of coverage for defective workmanship of a general contractor's subcontractor causing property damage to the overall project. Instead, the Court stuck to the policy language in the Insuring Agreement for Coverage A that requires "property damage" to be caused by an "occurrence" in order to be covered. Focusing on the definition for an "occurrence" contained in the policy, that is an "accident, including continuous or repeated exposure to substantially the same general harmful conditions[,]" the Court concluded that faulty work performed by a subcontractor "is not fortuitous." Rather, the work of subcontractors is a business risk within the management and control of the insured general contractor. Coverage for such business risks is not contemplated nor provided by a CGL policy.

In the third CGL "occurrence" case, *Secura Insurance v. Lyme St. Croix Forest Company, L.L.C.*, 2018 WL 5534110, the Wisconsin Supreme Court applied the cause theory to take $1.5 million in coverage off the table regarding damage to multiple properties from the "German Road Fire" which raged over three days 2013. In reversing the Court of Appeals, the high court specifically rejected the lower court's interpretation that there was a new and different occurrence "each time the fire spread to a new piece of real property and caused damage."

Explaining that the fire from a single cause spread over 7,442 acres, burning uninterrupted and continuously for 3 days constituted a single event and, therefore, one occurrence the Court applied the $500,000 per occurrence property damage limit contained in the policy's "Logging and Lumbering Operations Endorsement." Through the Supreme Court's correction of the Court of Appeals' faulty conclusion of multiple occurrences arising from damage to real and personal property of many claimants (each time the fire crossed a property line), the high court found the CGL policy's general aggregate limit of $2 million did not apply, effectively removing $1.5 million in coverage. Rather, the "Logging and Lumbering Operations Endorsement" $500,000 per-occurrence limit for property damage resulting from a fire "arising from logging and lumbering operations" capped the insurance applicable to the destructive three day blaze. The Supreme Court found that the "average person" would reasonably conclude the "cause and result" were so closely connected to constitute a single event.