



## Construction Law and Insurance Recovery Experts

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

## Construction & Coverage Law Seasonal Newsletter

### Tips in Evaluating Coverage for Construction Defect Claims

Construction activity exploded in 2015, and analysts predict that 2016 will be another strong year for the industry. While this is positive news, more new construction means more construction defect litigation. So if you're a contractor, subcontractor, landowner, or developer, it's critical that you are properly evaluating and managing these risks.

Faced with construction defect claims, companies will likely look to their commercial general liability (CGL) policies for help. And if they make a claim against their policy, there's a fair chance that their insurer will deny coverage. Indeed, whether CGL insurance covers property damage arising from construction defects remains a hotly-contested issue across the country. And in Ohio, coverage disputes have become more frequent due to court decisions ostensibly limiting a contractor's ability to obtain coverage for defective work.

**CGL Coverage for Defective Construction Claims.** CGL insurance provides liability coverage that protects a policyholder against third-party claims for bodily injury or property damage arising out its business operations. The standard CGL policy covers "property damage" that is caused by an "occurrence." The central issue in many coverage disputes involving a construction defect claim centers on the word "occurrence."

Courts in several states, including Ohio, have limited coverage for construction defect claims, finding that defective work itself is not an accident, but a foreseeable business risk. The seminal case on this issue in Ohio is *Westfield Ins. Co. v. Custom Agri Sys.*, 133 Ohio St.3d 476 (2012).

Although insurers frequently cite to *Custom Agri* to argue that there is no coverage for *any* defective construction or faulty workmanship claims under Ohio law, the Supreme Court's decision was not so sweeping. Rather, the Court adopted the rule that construction defects *are* covered "occurrences" within the meaning of CGL policies to the extent that property other than the policyholder's own work is damaged.



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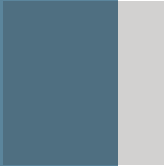
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When facing a construction defect claim, policyholders should remember the following:

- **Collateral or Consequential Damages Are Usually Covered.** Where the injured third party asserts damages that can be categorized as “collateral or consequential,” such cases present claims for covered occurrences under CGL policies. It is critical for a construction-industry policyholder to carefully examine the nature of the damage asserted by a third-party plaintiff. If the plaintiff alleges damage *solely* for defective work, such damage may not be covered. But if the plaintiff alleges damage to *other* property arising from defective work, such claims constitute “occurrences” under the policy and are covered unless otherwise excluded by the policy’s terms.
- **The Insurer’s Duty to Defend Is Much Broader than Its Duty to Indemnify.** CGL policies often include a duty to defend, as well as a duty to indemnify the policyholder. In Ohio, an insurer’s duty to defend is much broader than its duty to indemnify, and is triggered whenever a complaint is filed that arguably or potentially states a claim that might be covered by the policy. Thus, a complaint that alleges any type of collateral loss arising from defective construction would entitle the policyholder to a defense. This is true even if the majority of the plaintiff’s alleged damages constitute the repair or replacement of defective work, which might not be covered. Importantly, when an insurer has to defend *one* claim in a lawsuit, it must defend *all* claims in the lawsuit, making the defense cost coverage a valuable component of the policy.
- **Numerous Policies Might Apply to the Claim and Require the Insured to Provide Appropriate Notice.** Often, developers and contractors facing defective construction claims fail to notify all of the insurers that might cover the claim, subjecting the developer or contractor to a defense of late notice by the insurer. Though not an absolute bar to coverage, it’s better to avoid such a dispute by properly identifying, at the outset, those policies that might potentially respond to the claim. Concepts to consider include:
  - **Trigger.** Typical CGL policies are written on an occurrence-basis, which means that any policy in place during the alleged property damage may potentially respond to the loss. It does not matter when the accident (i.e. the defective work) occurred, and it does not matter when the claim is filed – the key inquiry is which policies were in place during the period of property damage. Importantly, that time period might span multiple policy periods, requiring notice to insurers under multiple policies.
  - **Additional Insured Coverage.** If your company is listed as an additional insured under a downstream contractor’s insurance policy, it may have a direct right to coverage under



that policy as well, including the right to a defense. The key question to ask is whether the plaintiff's claim against the additional insured arises from the actions or negligence of the downstream contractor. If so, notice should be provided to your contractor's insurer(s) as well.

- **Insured Indemnity Contracts.** Most construction agreements include indemnification provisions which require downstream contractors to indemnify upstream parties for loss arising from their actions or negligence. These indemnities themselves are often insured by the downstream contractor's insurance policy, and may also require that the insurer pay for the indemnified party's defense.

The denial of coverage can be frustrating and expensive for construction-industry participants, who are often forced to litigate coverage issues while simultaneously defending against the underlying defective construction lawsuit. Competent coverage counsel can help a policyholder analyze potential coverage for such claims, and help ensure that the insurer provides the coverage that it promised to provide.

For questions or comments regarding this article, please contact Charles D. Price at [cprice@brouse.com](mailto:cprice@brouse.com)

**“Lunch and Learn” Opportunities.** Brouse McDowell collaborates with its clients and business partners to provide unique opportunities for in-person seminars.

Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a “menu” of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique “webinar” service.

The seminar and lunch are on us! Please contact Amanda Leffler ([aleffler@brouse.com](mailto:aleffler@brouse.com)) or Jim Dixon ([jdixon@brouse.com](mailto:jdixon@brouse.com)) to get on the schedule or for more information.