dri The Voice of the Defense Bar




The Critical Path

The Newsletter of the Construction Law Committee

4/8/2016 **Volume 20 Issue 1**

In this Issue

Join a Committee

Committee Leadership

Committee Chair

Leadership Notes

From the Chair: The Seminar Is Almost Here!

by Michael Sams

We have moved the date of our Seminar! It traditionally had been held in October, but that timeframe was too close to the DRI Annual Seminar and it competed with other organizations' seminars, all of which drew down attendance. **This year we are holding the Seminar in New Orleans from June 1 – June 3 and hope to see you there!**

We think this could be our best seminar ever, with balanced programming in the areas of construction law, more traditional insurance defense type issues, and insurance coverage. We will cover construction 101 all the way through much more advanced, detailed programming in breakout sessions.

There also will be a terrific opportunity for networking, beginning the first night. On the evening of June 1, we will have a networking reception at the New Orleans World War II Museum, recognized as the finest World War II related museum in the country. On the evening of the second, we will have another networking reception followed by our now traditional dine-arounds, where you can sign up to go to one of New Orleans' great restaurants with one of a group of 10 other lawyers; a great way to meet new people and catch up with old friends. Folks then seem to traditionally find their way to a fun watering hole after dinner to close out the evening. There's also networking opportunities over breakfast and first time attendees' breakfast. Accordingly, if you don't know anyone, you will after a seminar with us. For the rest of you, it's a great opportunity to reconnect during a great couple days of education.

To register, please visit http://www.dri.org/Event/20160050 and to book your hotel, visit https://www.starwoodmeeting.com/events/start.action?id=1602019434&key=DAA428B

Partnering

Our Committee also recognizes that although we must continue with our core function of providing top flight education, it is beneficial for all of us to broaden our Committee's contacts for networking purposes. As part of this, we are making significant strides in partnering with construction organizations. The concept is simple. We can provide first class, top-flight construction-related, legal risk management education to them and their members. As part of providing that education, we get the benefit of networking with their members and remaining current on hot topics in the construction industry.

This year, for instance, we are sending four of our Committee members to the Construction Financial Management Association's (CFMA) national meeting in San Antonio, Texas, to speak to their contractor members concerning various contract risk management issues. Meanwhile, our Substantive Law Groups are hard at work in developing webinars (if you are interested in participating ? let me know). These webinars will be marketed to the various construction organizations as well, one of which already has expressed an interest in potentially inviting our speakers to present at its seminar. As a sign of our connection to the industry, Michael Kennedy, General Counsel to Associated General Contractors, and David Jaffe, the Vice President of Legal Advocacy - Office of General Counsel of the National Association of Home Builders, are both part of our seminar in New Orleans.

Our efforts in partnering are picking up steam quickly and we invite you to get involved and share in the related benefits of the networking that comes from it.

I hope to see you in New Orleans!

***Michael Sams** is a founding member and shareholder of the Boston-based firm*

Michael P. Sams
Kenney and Sams
mpsams@kandslegal.com

Vice Chair
Diana M. Gerstberger
XL Catlin
diana.gerstberger@xlcatlin.com

Newsletter Editor
Ryan L. Harrison
Paine Bickers LLP
rlh@painebickers.com

Click to view entire Leadership

Upcoming Seminar

Don't forget to bring a colleague with you—group discounts are available! Call DRI Customer Service at **312.795.1101** for more information.

DRI Publications

Insurance Bad Faith: A Compendium of State Law

DRI Social Links

Kenney & Sams, P.C. Mr. Sams is Chair of DRI's Construction Law Committee. He is General Counsel to the Gould Construction Institute and previously served on the Boards of the Construction Financial Management Association and the National Association of the Remolding Industry. Mr. Sams also has served as President of the Massachusetts Defense Lawyers Association (2012-2013).

Featured Article

A Primer on Ohio's Construction Claim Statute of Repose

by Andrew L. Smith

A statute of repose is a statute that cuts off certain legal rights if they are not acted on by a certain deadline. It is an absolute deadline for a plaintiff to bring a claim. In the world of construction law, a statute of repose provides certainty – after a certain date, contractors, subcontractors, design professionals, and the like cannot be sued for work undertaken and completed on a project.

Ohio's Statute of Repose (R.C. 2305.131)

Ohio has a 10-year statute of repose for construction claims found at R.C. 2305.131(A)(1):

> [N]o cause of action to recover damages for bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property and no cause of action for contribution or indemnity for damages sustained as a result of bodily injury, an injury to real or personal property, or wrongful death that arises out of a defective and unsafe condition of an improvement to real property shall accrue against a person who performed services for the improvement to real property or a person who furnished the design, planning, supervision of construction, or construction of the improvement to real property later than ten years *from the date of substantial completion of such improvement.* (Emphasis added).

For instance, in *McClure v. Alexander*, 2d Dist. No. 2007 CA 98, 2008-Ohio-1313, a homeowner, Robert McClure, entered into a contract in 1988 with Mike Alexander, of Mike Alexander Construction, for the construction of an addition to his home. The project was completed in June of 1989. In August of 2004, McClure discovered that the walls to his addition had become rotten due to water damage. The extent of the damage required him to demolish the addition. Alexander died January 7, 2007. On August 10, 2007, McClure filed a Complaint against Deborah Alexander, Executor of the Estate of Mike Alexander, formerly DBA Mike Alexander Construction. He sought damages of $70,000.00, arguing the "rot was caused by siding that had been applied incorrectly directing water in toward the wall instead of away from the wall."

Alexander filed a Motion to Dismiss, arguing the claims were barred by the 10-year statute of repose. The trial court found for Alexander as the damage occurred 15 years after the contract completed. The Second District Court of Appeals agreed, dismissing all claims against Alexander as time-barred.

Legislative Purpose

The present version of R.C. 2305.131 was passed by the Ohio legislature in Senate Bill 80, and took effect in April 2005.

As part of the basic legislation enacting the provision, the General Assembly promulgated a "statement of findings and intent" providing an explanation as to why the statute of repose had been passed. Under section (B)(2) of the statement, the General Assembly stated that the bill was enacted in recognition of the fact that, once the construction of any improvement to real property has been completed, the person who provided services for the construction will not only lose control over the improvement itself, but also will "lack control over other forces, uses, and intervening causes that may cause stress, strain, or wear and tear to the improvement."

When Exactly is the Cutoff Date?

PDF Version

Ohio attempts to resolve the rather complicated issues that result from multiphase construction projects statutorily. Indeed, according to section G of the statute:

> "[S]ubstantial completion" means the date the improvement to real property is first used by the owner or tenant of the real property or when the real property is first available for use after having the improvement completed in accordance with the contract or agreement covering the improvement, including any agreed changes to the contract or agreement, whichever occurs first.

When considering the time a cause of action "accrues" in construction cases, Ohio courts traditionally use the delayed-damages rule. *Velotta v. Leo Petronzio Landscaping, Inc*., 69 Ohio St.2d 376, 433 N.E.2d 147 (1982). The delayed-damages rule considers when all elements of a cause of action have come into existence. *Id*. at 379. For instance, "to establish actionable negligence, one must show in addition to the existence of a duty, a breach of that duty and injury resulting proximately therefrom." *Mussivand v. David*, 45 Ohio St.3d 314, 318, 544 N.E.2d 265 (1989).

In addition, if an alleged defect is discovered during the 10-year period but less than two years before the expiration, the plaintiff may still bring a claim within two years of discovery of the defect. *See R.C. 2305.131(A)(2).* The statute also provides exceptions if: (1) the defendant engages in fraud; or (2) there is an express warranty beyond the 10-year statute of repose period. *See R.C. 2305.131(C) and (D).* The remedial nature of the statute is to be construed "to effectuate the legislative purpose." *Gibson v. State Farm Mut. Ins. Co*., 123 Ohio App.3d 216, 704 N.E.2d 1 (1997).

Last year the Ohio Supreme Court in *Oaktree Condo. Assn. v. Hallmark Bldg. Co*., 139 Ohio St. 3d 264, 2014-Ohio-1937, 11 N.E.3d 266, decided a very complicated issue under the statute. The Court held a cause of action that has accrued, but on which no suit has actually been filed by the effective date of a statute of repose (i.e. April 2005), is governed by the relevant statute of limitations for the time of filing that particular type of cause of action.

In the *Oaktree* case, 13 years after construction was completed, the Oaktree Condominium Association discovered there was a defect in the construction of the foundation of their buildings. In 2003 at the time of discovery of the defect, there was no real-property-construction statute of repose in effect in Ohio. However, by the time Oaktree filed a lawsuit against the builder of the condominiums in 2007, the General Assembly had enacted a 10-year statute of repose. As a result, the trial court and court of appeals ruled Oaktree's claims were time-barred.

The Ohio Supreme Court determined R.C. 2305.131 was unconstitutional as applied to Oaktree in this peculiar situation. Because of the constitutional prohibition on passage of retroactive laws, Oaktree had to be afforded a reasonable time to file its accrued action. Reasonableness should be governed by the relevant statute of limitations, which in this case was four years from accrual of the cause of action (R.C. 2305.09). The Complaint was filed within four years of its accrual, and was therefore timely under the applicable statute of limitations. Therefore, the Court held the claims could proceed even though the construction claims were not technically filed within 10 years after the construction project was completed.

Scope of Statute

There is also no language in R.C. 2305.131 indicating the statute was only intended to apply to professionals or licensed workers. Rather, the language of subsection (A)(1) is stated in broad terms (i.e. a "person" who provides services for an improvement on real property). *See, e.g., Tutolo v. Young*, 11th Dist. No. 2010-L-118, 2012-Ohio-121, ¶31 (plaintiff unsuccessfully argued defendant could not be covered by the statute of repose because he was never a licensed carpenter or contractor).

In sum, the 10-year statute of repose in Ohio found at R.C. 2305.131 provides an absolute cutoff date for anyone to file suit involving a construction claim of any nature. The statute has been broadly applied by Ohio courts, and should be considered whenever evaluating a construction claim or lawsuit stemming from a past project. If the statute of repose applies, it can operate to eliminate a causes of action early on it suit, as a matter of law.

Andrew L. Smith *is a senior associate attorney in the Cincinnati, Ohio office of Smith, Rolfes & Skavdahl Company, LPA who concentrates his practice in the areas of construction law, product liability defense, and bad faith litigation defense. Andrew has extensive experience in state and federal court handling complex civil litigation matters. He is also the co-host of BearcatsSportsRadio.com and an avid UC Bearcats follower.*

Articles of Note

Construction of Construction Coverage: Poor Workmanship Constitutes an "Occurrence."

by Natalie C. Schaefer

On June 18, 2013, the Supreme Court of Appeals of West Virginia reversed a long history of precedent when it concluded that defective workmanship causing bodily injury or property damage constituted an "occurrence" under a commercial general liability (CGL) policy. *Cherrington v Erie Ins. Prop and Cas. Co*., 745 S.E.2d 508 (W.Va. 2013).

I. Factual Background

The *Cherrington* case arose from a familiar and not uncommon construction dispute. Ms. Cherrington entered into a "cost plus" contract with Pinnacle for the construction of a home, as well as landscaping and interior furnishings. Ms. Cherrington worked with Mr. Mamone during the construction process, who allegedly worked on his own behalf and also as an agent of Pinnacle. The Court also addressed other issues related to coverage under a homeowners and umbrella policies, which are not covered in this article.

After the home was completed, Ms. Cherrington observed various defects in the house. Ms. Cherrington filed suit against Pinnacle and Mr. Mamone, as an individual defendant. She alleged that Pinnacle was negligent in construction of her home and breached its fiduciary duty and engaged in misrepresentations by not securing materials and furnishings for the project within the contemplated contract price.

During the relevant time frames, Pinnacle had a commercial general liability policy ("CGL") through Erie Insurance Company. Mr. Mamone had a homeowner's insurance policy and umbrella policy with Erie. Due to the filing of Ms. Cherrington's lawsuit, Defendants Pinnacle and Mr. Mamone requested Erie to provide coverage and a defense in accordance with their respective policies. Erie denied both coverage and a duty to defend under each respective policy.

Pinnacle and Mr. Mamone filed a Third-Party Complaint for declaratory relief against Erie seeking coverage under their respective policies of insurance. Erie filed a motion for summary judgment, relying on long-standing precedence that poor workmanship does not constitute an "occurrence" under such policies.

The lower court granted Erie's motion for summary judgment. Consistent with prior West Virginia jurisprudence, the lower court determined that Ms. Cherrington had failed to state a claim that would be covered by any of the policies of insurance issued to Pinnacle or Mr. Mamone. Specifically, the court found that Pinnacle's CGL policy provided coverage for "bodily injury" or "property damage" but that Ms. Cherrington's allegations of emotional distress, without physical manifestation, did not constitute a "bodily injury" under the policy's definition of that term. Likewise, the circuit court concluded that Ms. Cherrington had failed to establish covered "property damage" insofar as the damages she alleged in her complaint were economic losses for diminution in the value of her home or excess charges she was required to pay under the contract. Citing Syl. pt. 3, *Aluise v. Nationwide Mut. Fire Ins. Co.,* 218 W.Va. 498, 625 S.E.2d 260 (2005).

The circuit court also determined that Ms. Cherrington had not established that an "occurrence" or "accident" had caused the damages she allegedly had sustained because faulty workmanship, in and of itself, or absent a separate event, is not sufficient to give rise to an "occurrence." Citing *Corder v. William W. Smith Excavating Co.*, 210 W.Va. 110, 556 S.E.2d 77 (2001); *State Bancorp, Inc. v. United States Fid. & Guar. Ins. Co*., 199 W.Va. 99, 483 S.E.2d 228 (1997). Thus, the court found that even if Ms. Cherrington had sustained covered losses, there had been no "occurrence" to trigger coverage under Pinnacle's CGL insurance policy.

Additionally, the circuit court found that even if Pinnacle's CGL policy provided coverage for Ms. Cherrington's claims, coverage would still be barred by the operation of the policy's exclusions. The circuit court further found that, for the same reasons, coverage was not provided by Mr. Mamone's personal policies of insurance because Ms. Cherrington had not sustained a "bodily injury" or "property damage" and because no "occurrence" had caused her loss. Additionally, the circuit court determined that even if Mr. Mamone's homeowners or umbrella policies provided coverage, such coverage would be barred by the operation of the policies' business pursuits exclusion because "the subject litigation arose out of Mr. Mamone's

continuous or regular activity for the purpose of gaining a profit or livelihood." Citing *Huggins v. Tri–County Bonding Co*., 175 W.Va. 643, 337 S.E.2d 12 (1985); Syl. pt. 1, *Camden Fire Ins. Ass'n v. Johnson* , 170 W.Va. 313, 294 S.E.2d 116 (1982).

Pinnacle, Mr. Mamone, and Ms. Cherrington appealed these rulings to the Supreme Court of Appeals of West Virginia.

II. Analysis

The Court's analysis started by recognizing that it had previously addressed the issue presented on appeal: is defective workmanship a covered "occurrence" under the provisions of a CGL policy of insurance? Citing Syl. Pt. 2, *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc*., 206 W. Va. 506, 526 S.E.2d 28 (1999), the Court recited its previous holding:

A. Workmanship as an "Occurrence" Under CGL Policy

The first policy the Court addressed was the policy of CGL insurance that Erie issued to Pinnacle. The CGL policy that Erie issued to Pinnacle defines the scope of the policy's coverage in pertinent part as follows:

> We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. This insurance applies to "bodily injury" and "property damage" only if: 1) The "bodily injury" or "property damage" is caused by an "occurrence"[.]"

The policy then defines the term "occurrence," referenced in its insuring clause, as an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

The *Cherrington* Court noted that absent from the policy's definitional section, however, is the term "accident," which is used in the policy's definition of occurrence" but which is not defined by the subject policy. The Court previously considered the proper meaning to be accorded to the term "accident" when it is used, but not defined, in a policy of insurance. In the sole Syllabus point of *Columbia Casualty Co. v. Westfield Insurance Co.,* 217 W.Va. 250, 617 S.E.2d 797 (2005), the Court held as follows:

> In determining whether under a liability insurance policy an occurrence was or was not an "accident"—or was or was not deliberate, intentional, expected, desired, or foreseen—primary consideration, relevance, and weight should ordinarily be given to the perspective or standpoint of the insured whose coverage under the policy is at issue.

The Court addressed the same in prior cases*:* whether defective workmanship a covered "occurrence" under the provisions of a policy of CGL insurance. The decision in *Erie Insurance Property and Casualty Co. v. Pioneer Home Improvement, Inc.,* 206 W.Va. 506, 526 S.E.2d 28 (1999), began a trilogy of "seminal cases" by concluding that a claim for faulty workmanship is not covered by a CGL policy; see also, *Corder v. William W. Smith Excavating Co.,* 210 W.Va. 110, 556 S.E.2d 77 (2001); *Webster County Solid Waste Authority v. Brackenrich and Associates, Inc.,* 217 W.Va. 304, 617 S.E.2d 851 (2005).

The *Cherrington* Court then observed that after its holdings, a majority of other states have reached the opposite conclusion. The Court stated: "[a]lthough we fully understand that the doctrine of stare decisis is a guide for maintaining stability in the law, we will part ways with precedent that is not legally sound." *State v. Sutherland,* 231 W.Va. 410, 417, 745 S.E.2d 448, 455, 2013 WL 2460632, slip op. at 15 (No. 11–0799 June 5, 2013).

The *Cherrington* Court then explained that "[i]t goes without saying that the damages incurred by Ms. Cherrington during the construction and completion of her home, or the actions giving rise thereto, were not within the contemplation of Pinnacle when it hired the subcontractors alleged to have performed most of the defective work." To the contrary, "[c]ommon sense dictates that had Pinnacle expected or foreseen the allegedly shoddy workmanship its subcontractors were destined to perform, Pinnacle would not have hired them in the first place."

Thus, "the more sound approach to interpreting the subject policy is to find that defective work performed by a subcontractor on behalf of an insured does give rise to an "occurrence" under a policy of CGL insurance to maintain consistency with the policy's stated intention to provide coverage for the work of subcontractors."

B. Other Provisions of the CGL Policy

After determining poor workmanship constitutes an "occurrence" the Court then addressed whether the remainder of the policy's insuring clause has been satisfied. Pinnacle's CGL policy provided that:

> [w]e will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. This insurance applies to "bodily injury" and "property damage" only if:
>
> 1) The "bodily injury" or "property damage" is caused by an "occurrence"[.]

Therefore, the Court had to determine if the claimed losses satisfy the definition of "bodily injury" or "property damage" so as to be covered under the subject policy.

The CGL policy at issue herein defines "bodily injury" as "bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time." Because there was no indication that Ms. Cherrington's emotional distress had physically manifested itself, the Court concluded that she had not sustained a "bodily injury" to trigger coverage under Pinnacle's CGL policy.

"Property damage" was defined as:

> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
>
> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

The Court then held that Ms. Cherrington had demonstrated that she sustained "property damage" as a result of the allegedly defective construction and completion of her home.

The Court next considered "Exclusion L" which stated:

> This insurance does not apply to:
>
> ....
>
> **l. Damage to Your Work**
>
> "Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard."
>
> This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The *Cherrington* Court noted that the language in Exclusion L was plain and, by its own terms, excluded coverage for the work of Pinnacle but *not* Pinnacle's subcontractors. Specifically, the first paragraph of Exclusion L did not provide coverage for the insured's own work. However, the second paragraph created an exception where the work at issue has been performed by subcontractors. Because the majority of the construction was performed by Pinnacle's subcontractors, and because Exclusion L expressly did not preclude coverage for subcontractors, the *Cherrington* Court held that coverage is not barred by the operation of Exclusion L.

The Court then addressed Exclusion M, which provided as follows:

> This insurance does not apply to:
>
> ....
>
> **m. Damage to Impaired Property or Property Not Physically Injured**
>
> "Property damage" to "impaired property" or property that has not been physically injured, arising out of:
>
> 1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or

2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

The Court therefore explained that Exclusion M explicitly precluded coverage for two reasons: (1) a shortcoming in "your product" or "your work" and (2) an issue arising from the insured's or the insured's agent's failure to perform his/her contractual obligations.

With respect to this first criterion, Exclusion M precluded coverage for the very same work of subcontractors that Exclusion L specifically found to be covered by the subject policy. Thus, the Court concluded that an absurd and inconsistent result would occur because, on the one hand, Exclusion L of the policy provides coverage for the work of subcontractors, while, on the other hand Exclusion M bars coverage for the exact same work. Thus, the Court found that the first provision of Exclusion M did not operate to bar coverage for the work performed by Pinnacle's subcontractors. The second provision likewise did not operate to bar coverage because the parties did not contend that the construction and structural damages to Ms. Cherrington's home resulted from breach of contract or failure to perform contractual obligations.

Because the *Cherrington* Court categorically explained that that it was "common sense" that poor subcontractor work constituted an "occurrence" under a CGL policy, the entire landscape of construction/contractor coverage in West Virginia is redefined.

Natalie Schaefer *is a Member/Owner of Shuman, McCuskey, and Slicer, PLLC and exclusively practices civil litigation defense throughout West Virginia in multiple areas, including the insurance, energy, trucking/commercial transportation, product liability, construction, retail and hospitality, and governmental entity industries. I defend employers, manufacturers, distributors, retailers, construction, engineering, and architectural companies, mining companies, and commercial trucking companies in (1) pre-suit investigations; (2) all phases of litigation from the initial pre-suit investigation through trial and appeal; (3) mediation/arbitration/ADR; and (4) preventive risk management consultation.*

Unintended Consequences – New Jersey Supreme Court to Decide Issue of Whether Consequential Damages are Covered By CGL Policy

by Mark D. Shifton and Gary Strong


In a recent case, the New Jersey Superior Court, Appellate Division held that consequential damages caused by subcontractors on a construction project constitute "property damage" caused by an "occurrence" under a CGL policy issued to the general contractor, and that damages caused to common elements and unit-owners' property – but not the allegedly defective work itself – would be covered under the general contractor's insurance policy. *Cypress Point Condominium Association, Inc. v. Adria Towers, L.L.C., et al.*, 441 N.J. Super. 369 (App. Div. 2015), *certif. granted*, 223 N.J. 355 (2015). This decision, which the New Jersey Supreme Court has since certified for review, has far-reaching consequences for contractors and their insurers.

This case started as most construction do – after taking title to the building, the Cypress Point Condominium Association sued the developer and several of its subcontractors, alleging a "laundry list" of construction deficiencies, including defects in the installation of the roof, masonry flashing, gutters and leaders, brick and EIFS façade, windows, doors, and exterior sealants. A few background facts (which are not discussed in the Appellate Division's opinion) are helpful: Selective Insurance issued a CGL insurance policy to MDNA, one of developer's subcontractors. After MDNA failed to respond to the Condominium Association's complaint in the underlying construction defect action, a default judgment was entered and a proof hearing was scheduled to determine the amount of damages. The Condominium Association's counsel notified Selective of the hearing; however, Selective informed the Association that it would not defend or indemnify MDNA because, under its interpretation of its policy, the Condominium Association's allegations of construction defects did not constitute an "occurrence" under the policy. Selective's policy contained the following language:

SECTION I - COVERAGES

COVERAGE A. BODILY INJURY & PROPERTY DAMAGE LIABILITY

1. Insuring Agreement.

a. We will pay those sums that the Insured becomes legally obligated to pay as damages because of . . . "property damage" to which this insurance [policy] applies.

. . .

b. This insurance applies to . . . "property damage" only if:

1. The . . . "property damage" is caused by an "occurrence" that takes place in the "coverage territory"; and
2. The . . . "property damage" occurs during the policy period.

. . .

SECTION V — DEFINITIONS

. . .

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

. . .

16. "Property damage" means:

Physical injury to tangible property, including all resulting loss of use of that property . . .; or
Loss of use of tangible property that is not physically injured.

Following the proof hearing, the trial court held MDMA liable for approximately $1 million of the Condominium Association's damages. The Condominium Association subsequently filed a declaratory judgment action against Selective, seeking an order that Selective owed a duty to indemnify MDMA for the total amount of the Condominium Association's damages allocated by the trial court. The trial court granted Selective's motion for summary judgment, holding that the Condominium Association's allegations of faulty workmanship did not constitute "property damage" caused by an "occurrence" under the terms of Selective's policy.

On appeal, the Superior Court of New Jersey, Appellate Division reversed, holding that the Condominium Association's alleged consequential damages indeed amounted to "property damage" (because the alleged faulty workmanship damaged common areas and unit owners' property, such as drywall, wall finishes, and wood flooring) as well as an "occurrence" (because the alleged consequential damages amounted to "continuous or repeated exposure to substantially the same general harmful conditions."), and that the alleged consequential damages were covered under the policy. In reaching its holding, the Appellate Division distinguished the oft-cited and seminal case of *Weedo v. Stone-E-Brick*, 81 N.J. 233 (1979), as well as the more recent case of *Firemen's Insurance Co. v. National Union Fire Ins. Co.* , 387 N.J. Super. 434 (App. Div. 2006). The Court noted that both *Weedo* and *Firemen's* involved 1973 ISO forms, whereas this case involved a 1986 ISO form, and that there were two significant differences in these forms. First, "occurrence" was defined differently in the two forms (which meant that the trial court's reliance upon *Firemen's* was misplaced). Second, the 1986 ISO form contained a significant exception to an exclusion that was not contained in the 1973 form – the "subcontractor's exception," which read:

2. Exclusions.

This insurance does not apply to:

....

1. Damage to Your Work [the "Your Work" Exclusion]

"Property damage" to "your work" arising out of it or any part of it. . .

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

The policy defines “Your Work” as:

> Work or operations performed by you or on your behalf; and
> Materials, parts or equipment furnished in connection with such work or operations.

The subcontractor’s exception operates to provide an exception to the typical “your work” exclusion, allowing for coverage if the defective work was performed by a subcontractor rather than the policyholder itself. The mere existence of the subcontractor’s exception, the Appellate Division noted, supported the argument that consequential damages caused by a subcontractor’s deficient work were covered – if the parties to an insurance contract did not have this intention, it would beg the question as to the very existence of the exception itself.

Although it was just decided last year, the repercussions of *Cypress Point* have already begun to cause ripples across New Jersey, as two similar cases going up to the Appellate Division have led to the same result - *Belmont Condominium Association, Inc. v. Arrowpoint Capital Corporation,* 2015 WL 4416582, *1 (N.J. App. Div., July 21, 2015); *Bob Meyer Communities, Inc. v. James R. Slim Plastering, Inc.,* 2014 WL 10105409, *1 (N.J. App. Div., July 21, 2015).

The Appellate Division has now made it clear that consequential damages resulting from a subcontractor’s poor workmanship does indeed constitute “property damage” and an “occurrence,” and is covered by a standard CGL policy. Yet, *Cypress Point* remains to be settled by the New Jersey Supreme Court. If the New Jersey Supreme Court affirms the Appellate Division, New Jersey will join the ranks of several states – including Florida, Illinois and Minnesota – that have clarified this longstanding and important point of dispute.

Mark D. Shifton *is a Partner in the Princeton, New Jersey and New York City offices of Seiger Gfeller Laurie LLP. He represents owners, design professionals, and contractors in construction disputes, and advises and represents clients on sustainable development and “green” building issues. He can be reached at mshifton@sgllawgroup.com.*

Gary Strong *is a Senior Associate in the Princeton, New Jersey and New York City offices of Seiger Gfeller Laurie LLP. He represents developers, contractors, subcontractors, and design professionals in construction claims. He can be reached at gstrong@sgllawgroup.com.*

Considerations When preparing for an OSHA Interview

by John Surma and Collin Warren

In 2014, the most recent year for which statistics are available, the construction industry accounted for just over twenty percent of all workplace fatalities- a rate of death higher than any other industry. OSHA directs a substantial amount of its resources towards the construction industry and employers in construction frequently ask what they should do when an OSHA Compliance Safety and Health Officer (CSHO) seeks to interview a company witness. While counsel is always recommended in preparing employees for such interviews, the following are general considerations that should be considered when preparing company employees for their interaction with OSHA:

> 1. The interview is not OSHA’s “right,” but instead, is conducted at the employee’s election and consent. Employees should be made aware of this fact and that the employee has the right to decline giving an interview.
>
> 2. The witness can request the presence of counsel or a colleague during the interview. The CSHO may resist, especially if the employer is providing counsel at no cost, but the witness must stand firm in stating their desire to have counsel present. If the CSHO or someone else with OSHA objects to a company-provided lawyer on the basis of a potential “conflict of interest,” the witness should inform OSHA that the existence of a potential conflict is for them to raise, not OSHA.
>
> 3. Employers can insist that management and supervisory employees have another member of management or a company-provided attorney present during the interview.

4. If the witness elects to be interviewed, they should always tell the truth! An employee cannot be terminated, discriminated against or even threatened for talking to OSHA. An employee can, however, face criminal charges if they provide false information to OSHA.

5. The witness can request that the interview not be recorded or that they be allowed to record the interview as well.

6. The witness does not have to sign anything, especially a statement prepared by the CSHO. In fact, signing such "statements" is usually never a good idea as they are often one-sided, they often leave out facts and statements that do not support OSHA's case, they often do not capture everything discussed during the interview, and the statements tend to include many facts and statements taken out of context. If the witness elects to sign a statement, they should review and make sure the statement is 100% accurate and complete.

7. The witness should make certain that they understand the question being asked before answering. The witness should be prepared to look for imbedded inaccuracies in leading questions, such as, "You know we are here today because of a health and safety violation, correct?"

8. Witnesses should be cautioned against guessing or speculating when giving an answer.

9. All questions should be answered directly and concisely, without meandering or rambling.

10. Every person interviewed should keep in mind that the typical product of an OSHA investigation is a citation(s) and monetary penalty(ies). OSHA rarely looks to exonerate, but instead, OSHA generally desires to secure evidence to support issuing citations.

11. All witnesses, especially those in management and supervision, should avoid making admissions and agreeing to anything that is not 100% correct.

12. Witnesses should keep in mind that they can ask the investigator questions. If there is a question as to where the interrogation is going, the witness should ask and demand that the investigator be open and honest with them.

13. Silence is *not* the enemy. Rarely do people get in trouble for not talking. If there are long pauses or "staring contests" the witness should refrain from talking just to break the silence. This is not a conversation over a cup of coffee with an old friend. Every question is being asked for a reason.

14. If an answer is not known, the witness should tell the CSHO that he or she does not know the answer to the question. There is nothing wrong with telling the investigator "I don't know" or "I don't remember," assuming that is the truth.

15. If the same question is asked multiple times, witnesses should stand firm in their answer and not give in to repeated questions. If the witness is subject to abuse, intimidation, threats, coercion, or any other tactic that makes the employee uncomfortable, it should be immediately documented and reported to the area director or regional office for OSHA.

16. If the questioning leads one to think they are being targeted for a criminal investigation, the Fifth Amendment should be asserted. Since these interviews are "non-custodial" a statement can be used against the witness without a *Miranda* warning.

The need to properly prepare for OSHA inspections and interviews of employees and managers has never been more critical than it is now. The consequences of OSHA inspections have increased dramatically over the last several years with record numbers of six and seven figure penalties. The per-citation penalties are going to increase dramatically this year. The number of criminal prosecutions for worker safety violations have reached record levels each of the past several years. The December 17, 2015, memo of Deputy United States Attorney Sally Quillian Yates concerning the criminal prosecution of worker safety violations promises an even greater increase in the number of criminal prosecutions.

John D. Surma *is a Special Counsel in Adams and Reese LLP OSHA, Construction, Labor and Employment, and Toxic Tort practice groups. He is resident of the firm's Houston office. His practice focuses on defending employers in OSHA, MSHA, and other regulatory matters. Mr. Surma is an active member of the DRI Construction, Government Enforcement and Corporate Compliance, Labor and Employment, and Toxic Tort and Environmental Law Committees.*

Collin Warren *is a Partner in Adams and Reese LLP Construction, Labor and Employment and OSHA practice groups. He is a resident of the firm's Houston office. His practice focuses on defending employers in litigation and administrative actions. He is a member of DRI, the State Bar of Texas and the Houston Bar Association.*

Is There a New Standard of Care for Engineers in Virginia?

by Steven A. Neeley

When choosing products to incorporate into a design, engineers often review literature and specifications from product manufacturers to determine whether the product is suitable for the design or project. But can an engineer rely entirely on manufacturers' literature without doing its own research or testing to confirm that the product is suitable for a design? A recent opinion of the Virginia Supreme Court suggests that it may not be.

In *William H. Gordon Assoc., Inc. v. Heritage Fellowship, United Church of Christ a/k/a Heritage Fellowship Church, et al.*, Record No. 150279, 2016 WL 550371 (Va. Feb. 12, 2016) [PDF], the court held that an engineer breached its standard of care by relying solely on a manufacturer's product literature instead of doing its own independent testing or research.

The Facts

The case arose out of the construction of a new sanctuary for Heritage Fellowship Church in Reston (Fairfax County), Virginia. In July 2006, Heritage hired William H. Gordon Associates, Inc. to design the final site plans and to design a rain tank system to draw off storm water from the property. The contract incorporated Gordon's Standard Terms and Conditions. Those terms and conditions provided that Gordon was "entitled to rely on the accuracy and completeness of work and information supplied by third parties," and that Gordon would use the "degree of care and skill ordinarily exercised under similar conditions by reputable members of our profession practicing in the same or similar locality."

Gordon submitted its design for the rain tank system to Heritage in late 2006. The design called for the system to be installed 10 feet underground and to be covered and paved over for use as a parking lot. A Heritage representative signed and approved the design on December 27, 2006. It was submitted to Fairfax County for approval on January 9, 2007. County officials approved the design more than two years later on August 5, 2009.

In November 2009, Heritage hired Whitener & Jackson, Inc. (W&J) to construct the sanctuary and parking lot and to install the rain tank system that Gordon designed. In October 2010, W&J contacted Gordon and raised some concerns about the rain tank design. W&J questioned whether the rain tank was suitable for the site given the high water table at the property, and identified a number of issues concerning the installation and performance of the rain tank system.

Gordon responded to the RFI but did not reevaluate the selected rain tank or address W&J's installation concerns. Instead, Gordon referred to the manufacturer's drawings and assured W&J that the groundwater concerns would not impact the functionality of the design.

W&J completed the installation during April and May 2011. Three months later, in August 2011, the rain tank and parking lot above it collapsed. As a result, Gordon was forced to design a new stormwater management system, which W&J installed in August 2012.

The Trial Court's Decision

Unhappy with the collapse of the prior rain tank, Heritage refused to pay for the installation of the new system and kept the $402,425 retainer owed to W&J under the construction contract. W&J sued Heritage in January 2013. Heritage filed a

counterclaim against W&J in April 2013 and then sued Gordon in August 2013 for preparing a negligent rain tank design.

At trial, Heritage and W&J both blamed Gordon for the failure of the rain tank and the collapse of the parking lot. They each argued that Gordon breached its standard of care by relying on the specifications from the rain tank manufacturer (a non-engineer) instead of doing its own testing and research to confirm that the rain tank was suitable for the site.

After an 8-day bench trial, the Fairfax County Circuit Court ruled in favor of both Heritage and W&J. The trial judge determined that the sole proximate cause of the rain tank collapse was Gordon's design and its failure "to meet its standard of care as a Virginia professional engineer." The judge required Gordon to pay $490,634.21 in damages that Heritage owed to W&J under the construction contract, plus an additional $846,647.84 in delay and other damages that Gordon owed to Heritage under the engineering contract.

The Virginia Supreme Court's Decision

Gordon appealed and challenged the trial court's rulings on a number of fronts. Gordon asserted that Heritage's claim for negligent design was barred by Virginia's five-year statute of limitations for breach of a written contract. Gordon argued that Heritage's claim accrued in December 2006, when Heritage finally approved the rain tank design. Because Heritage did not assert its negligent design claim until August 2013, Gordon argued that the claim was untimely.

With respect to the merits, Gordon asserted that its design was not negligent. Gordon argued that it is standard practice in the engineering industry to rely on a manufacturer's specifications and that using such information satisfies an engineer's standard of care. Gordon also argued that W&J assumed responsibility for the rain tank design when it entered into the construction contract with Heritage.

a. Gordon's statute of limitations challenge.

The Supreme Court rejected Gordon's arguments and affirmed the trial court's ruling on the merits. On the statute of limitations issue, the court explained that a cause of action for negligent design accrues on the date that the design is "finally approved." But, in the court's view, Gordon's engineering contract clearly contemplated that the design would not be considered "finally approved" until the county government reviewed and approved the design. Since that did not occur until August 2009, Heritage's August 2013 suit against Gordon was within the five-year limitations period.

b. Gordon's standard of care as an engineer.

The court also affirmed the trial court's ruling finding that Gordon breached its standard of care. Relying on the testimony of Heritage's experts, the court found that Gordon violated
§ 10-20-760(A)(1) of Title 18 of the Virginia Administrative Code. That provision prohibits a professional engineer from affixing his seal to an unlicensed person's work unless that person was employed by or under contract with that engineer when performing the work:

> No professional shall affix a seal, signature, and date or certification to a plan, plat, document, sketch, or other work constituting the practice of the professions regulated that has been prepared by an unlicensed or uncertified person unless such work was performed under the direct control and personal supervision of the professional while the unlicensed or uncertified person was an employee of the same firm as the professional or was under written contract to the same firm that employs the professional.

In the court's view, Gordon breached this standard of care by (i) adopting the rain tank manufacturer's specifications (which were unverified) without doing its own testing; (ii) not fully understanding the manufacturers' recommendations; and (iii) failing to consider that the water table at the Heritage site was much higher than at prior rain tank installation sites. Interestingly, the disclaimers that Gordon included in its engineering contract with Heritage did not alter the analysis.

c. Whether W&J assumed the risk of Gordon's design.

The court also rejected Gordon's argument that W&J accepted the risk of the rain tank design when it signed the construction contract with Heritage. In the court's view, the construction contract left no design discretion to W&J. W&J was required to

follow Gordon's design and could only be held responsible for deviations from that design. Since the evidence in the record established that W&J substantially complied with the design, there was no basis to hold W&J responsible for the collapse of the system.

Implications for Engineers in Virginia

Numerous design professional associations—including the American Council of Engineering Companies, National Society of Professional Engineers, and the Virginia Section of the American Society of Civil Engineers—have expressed concern about the potential implications of the *Gordon* court's ruling. They filed an amicus brief in support of Gordon and argued that engineers are not required to "reinvent the wheel" and are entitled to rely on manufacturers' literature and industry publications without independently verifying the accuracy of the information. They also asserted that, if affirmed, the trial court's ruling would discourage innovative designs and improperly shift liability for defective products from product manufacturers to the engineers that incorporate those products into a design. It would also discourage engineers from incorporating untested, state-of-the-art products into a design. Surprisingly, the court did not meaningfully address these strong arguments in its decision.

But, even though the *Gordon* decision is certainly not a positive development for engineers, there is still hope that its effects will not be as grave as many fear. The decision was highly fact-dependent and may ultimately be limited to its facts. Indeed, the court highlighted the fact that Gordon was presented with at least some evidence suggesting that the rain tank was not suitable because the water table at the Heritage site exceeded the manufacturer's specifications. In that light, the decision may best be viewed as holding only that reliance on specifications alone is insufficient when there is other evidence suggesting that a project exceeds those specifications. Whether *Gordon* actually imposes a new across-the-board requirement that engineers independently verify the accuracy of a manufacturer's product information remains to be seen.

Steven A. Neeley's *construction practice includes assisting owners, general contractors and subcontractors in claims or disputes in both state and federal court litigation and alternative dispute resolution proceedings. He also serves clients with government contract needs, including assistance with contract claims and bid protests.*

Prior to joining Husch Blackwell, Steve was a special assistant and assistant attorney general in the Criminal Section of the Public Safety Division for the Office of the Attorney General for the District of Columbia. He served as a criminal prosecutor in traffic and misdemeanor criminal cases before the District of Columbia Superior Court.

Steve can be reached at steve.neeley@huschblackwell.com.

DRI's Construction Law Committee: Fostering Excellence in a Perpetually Evolving Legal Sector

by Ellen H. Greiper

DRI has been the leading organization supporting defense counsel and claims handlers for more than five decades, providing unparalleled educational and networking opportunities to thousands of members across the globe. DRI's ongoing commitment to education, justice, balance, economics, professionalism, and diversity is promulgated by its implementation of thirty substantive law committees, with its expansive Construction Law Committee leading the charge.

Construction law is perpetually evolving, and the group's fluidity allows its members to keep abreast of developing trends, influential and often far-reaching Court decisions, and modifications to statutory laws. Such dissemination of information is accomplished by way of a wide array of methods, including online news and communication resources, educational materials and publications, and members' participation in any of the group's five Specialized Litigation Groups.

One further medium for the exchange of information is the Committee's regular seminars. These seminars provide invaluable learning and networking opportunities for members, as well as unique opportunities for industry leaders to interact with claims professionals. While the primary objective of the seminars is to educate members on "all things construction law," they also serve to foster relationships which have proved to be nothing but mutually beneficial. The upcoming seminar in New Orleans, LA entitled "Preparing a Foundation for a Stormy Future" promises to deliver on these objectives. The program will be spearheaded by panels of esteemed industry leaders who will present on various topics, including areas that have not yet

been fully developed but undoubtedly will become highly relevant to the practice of construction law, such as challenges in the energy sector and catastrophic losses generated by evolving geophysical processes.

This is a very exciting time in construction law, and it is imperative that we evolve as the practice evolves. We encourage you to contact us to learn more about the benefits of joining the Construction Law Committee and how your participation can help further hone your skills and develop your practice. Please feel free to contact Marketing Chair Ellen H. Greiper at egreiper@goldbergsegalla.com or Committee Chair Michael P. Sams at mpsams@kandslegal.com.

Ellen H. Greiper
Marketing Chair, DRI Construction Law Committee

Ellen Greiper *is a partner in Goldberg Segalla's Construction, OSHA and Worksite Safety, and General Liability Practice Groups. he has more than two decades of experience defending multi-party construction defect cases in the federal and state courts of New York. An appointed arbitrator and mediator, she also is a frequent speaker and author on emerging topics in the general liability and construction arenas. In addition, Ms. Greiper was recently appointed by Professional Women in Construction (PWC) to serve on the Board of Directors of its New York Chapter. She is also the editor of Goldberg Segalla's Labor Law Update, which examines the latest developments regarding New York's Labor Law and construction site accidents.*

News & Announcements

DRI Launches New Online Career Center

DRI recently launched its new interactive job board, the DRI Career Center. With its focus on the legal industry, the Career Center offers DRI members—and the industry at large—an easy-to-use and highly targeted resource for online employment connections.

Both members and non-members can use the DRI Career Center to reach qualified candidates. Employers can post jobs online, search for qualified candidates based on specific job criteria, and create an online resume agent to email qualified candidates daily. They also benefit from online reporting that provides job activity statistics.

For job seekers, DRI Career Center is a free service that provides access to employers and jobs in the legal industry. In addition to posting their resumes, job seekers can browse and view available jobs based on their criteria and save those jobs for later review if they choose. Job seekers can also create a search agent to provide email notifications of jobs that match their criteria.

Visit the new DRI Career Center today!