

IN THE SUPREME COURT OF OHIO

WESTFIELD INSURANCE COMPANY,)
)
Petitioner)
)
v.)
)
CUSTOM AGRI SYSTEMS, INC.)
)
Respondent)

CASE NO. 2011-1486

On Consideration of Certified Questions
from the United States Court of Appeals
for the Sixth Circuit, Case No. 11-3213

MERIT BRIEF OF PETITIONER WESTFIELD INSURANCE COMPANY

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INTRODUCTION

This is an insurance coverage action in which Respondent Custom Agri Systems, Inc. (“CAS”) seeks liability insurance coverage from Petitioner Westfield Insurance Company (“Westfield”) for damages arising from the design and installation of a steel grain bin (“Bin”) as part of a Feed Manufacturing Plant being constructed by Younglove Construction, LLC (“Younglove”) in Upper Sandusky, Ohio (“Project”).

The owner of the Project, PSD Development, LLC (“PSD”), contracted with Younglove to design and construct the Project. Unfortunately, a dispute arose between PSD and Younglove regarding the quality of some of the work and materials being provided by Younglove and its subcontractors. Consequently, PSD withheld some of the payment that would otherwise be owed to Younglove. PSD and Younglove were unable to amicably resolve their dispute and litigation ensued in federal district court.

CAS was one of Younglove’s subcontractors. When Younglove was sued, it filed a Third-Party Complaint against CAS for contribution and indemnity seeking to hold CAS responsible for any damages arising from defective design and installation of the Bin.

At all pertinent times to the foregoing, CAS was an insured under Policy No. CMM 3702668 issued by Westfield (“Westfield Policy”). When CAS was sued, it demanded that Westfield defend and indemnify it with respect to Younglove’s claims. Westfield investigated the allegations and determined that it was unlikely that there was coverage, but out of an abundance of caution, Westfield agreed to provide CAS with a defense under reservation of rights. Westfield subsequently intervened in the litigation and cross-claimed for declaratory judgment against CAS to resolve the issue of whether it must defend and indemnify CAS.

During the course of the proceedings, discovery revealed that:

- (1) PSD and Younglove were parties to a written contract governing the work on the Project and the Bin.
- (2) Younglove and CAS were parties to a written contract governing CAS' work on the Project and the Bin.
- (3) PSD stated only two claims against Younglove: (a) Breach of Contract, and (b) Breach of Warranty.
- (4) Younglove stated only two claims against CAS: (a) Contribution; and (b) Indemnity—which were based entirely upon PSD's claims against Younglove.
- (5) The only property CAS is alleged to have damaged is property that it provided or installed pursuant to its contract with Younglove.

There was no evidence or argument:

- (1) that CAS caused damage to other parts of the Project; or
- (2) that CAS caused damage to other property owned by PSD or Younglove.

In short, the allegations against CAS were not that its work or materials damaged other property of PSD or Younglove, but that CAS failed to provide the work and materials it had promised under its contract with Younglove.

The federal district court ultimately found that Westfield did not have an obligation to defend or indemnify CAS under the Westfield Policy, and CAS appealed this ruling to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). Recognizing a split in authority across Ohio and across the country, the Sixth Circuit then requested this Court to answer the following questions:

- (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?

- (2) If such claims are considered “property damage” caused by an “occurrence,” does the contractual liability exclusion in the general liability policy preclude coverage for claims for defective construction/workmanship?¹

In the context of this case, this Court should answer these questions as follows:

- (1) The first question should be answered “no” because the damages sought against CAS were not sums that CAS became legally obligated to pay as damages because of “property damage” caused by an “occurrence” because the only property allegedly damaged by CAS was the Bin that CAS designed and installed itself.
- (2) The second question should be answered “yes” because contractual liability was the sole basis for the damages claimed against CAS and the contractual liability exclusion barred coverage for all such damages.

Thereafter, this matter should be returned to the Sixth Circuit for resolution of the remaining issues between the parties (if any).

¹Appx. 00033-00043.

STATEMENT OF THE CASE AND FACTS

A. Litigation over the Project

In 2006, Younglove entered into an \$8.5 million contract with PSD to design and construct the Project.² Younglove, in turn, subcontracted with CAS to design and construct the Bin as part of the Project.³

During the construction process, Younglove learned that some of the concrete that it was using had lower than expected compressive strengths.⁴ As it turned out, the concrete problems had little to do with CAS' work on the Project, but it led to an ongoing dispute with PSD regarding the quality of all of the work and materials being employed by Younglove and whether such work and materials complied with contractual requirements and construction standards.

As a result of this dispute, shortly after the Project was substantially complete, PSD notified Younglove that it was withholding over \$1 million in payments otherwise due for the Project.⁵

²First Amended Complaint (Doc. 69), Ex. B. As this appeal is only before this Court on certified questions, the record on appeal remains with the Sixth Circuit. Pursuant to the rules governing appeals in the Sixth Circuit, the electronic docket in *Younglove Constr., LLC v. PSD Dev., LLC*, et al., Case No. 3:080cv091447-JGC, in the United States District Court of the Northern District of Ohio available through that court's CM/ECF system, constitutes the record on appeal. Fed. R. App. P. 10(a); Cir. R. 10; Cir. I.O.P. 11. References to the record are made by reference to the document number (Doc. __) in that electronic docket. References to the Supplement to the Briefs are made by reference to (Supp. __).

³Motion for Summary Judgment of Westfield Insurance Company (Doc. 115), Ex. B (Supp. 769-770); *Id.*, Ex. C, pp. 740-741(a) (Supp. 780-782)).

⁴Motion of PSD Development, LLC for Partial Summary Judgment on its Counterclaim and Summary Judgment on Count One of Younglove Construction, LLC's Amended Complaint (Doc. 106), pp. 2-9 and accompanying Fed. R. Civ. P. 56 evidence; Plaintiff Younglove Construction, LLC's Motion for Summary Judgment under Seal (Doc. 97), pp. 3-6 and accompanying Fed. R. Civ. P. 56 evidence.

⁵(Doc. 106), pp. 2-20 and accompanying Fed. R. Civ. P. 56 evidence; (Doc. 97), pp. 3-6 and accompanying Fed. R. Civ. P. 56 evidence.

Consequently, Younglove filed a mechanic's lien against the Project.⁶ Four months later, Younglove filed suit to marshal the lien and collect damages.⁷

PSD counterclaimed against Younglove for: (1) breach of contract, and (2) breach of warranty.⁸ PSD also moved to dismiss Younglove's tort claims on the basis of the exclusivity of the contract claims. In doing so, PSD argued:

The dispute in this case involves a written construction contract (the "Contract") under which Younglove promised to build a feed mill (the "Facility") for PSD in Upper Sandusky, Ohio, according to standards specified in the Contract, and PSD promised to pay in exchange . . . ***Essentially, this litigation boils down to PSD's contention that Younglove materially breached its contractual obligations and warranties by, among other things, providing defective construction materials and construction work, and Younglove's contention that it did not materially breach and thus PSD is obligated to pay remaining amounts that it withheld on grounds of Younglove's breaches.*** (Emphasis added).⁹

In other pleadings, PSD argued: "While Younglove has interposed purported tort claims in this case, these 'claims' have no basis in law and fail to state a cause of action . . . [c]learly, these are nothing

⁶(Doc. 69), ¶18, Ex. C.

⁷(Doc. 1). The First Amended Complaint was filed a little over a year later. (Doc. 69).

⁸(Doc. 13). An Amended Counterclaim was filed about a year later. (Doc. 70). The breach of warranty claim is contractual because it is based solely upon the warranties attendant to the parties' contract rather than upon implied warranty. *Chemtrol Adhesives, Inc. v. Am. Mfgs. Mut. Ins. Co.* 42 Ohio St.3d 40, 48-51, 537 N.E.2d 624 (1989) (where the parties are in privity of contract, in the absence of injury to persons or damage to other property, the only remedies available are those provided for breach of the parties' contract); *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc.*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶¶6-13 (applying *Chemtrol Adhesives* to dispute between contractor and subcontractor over the concrete work provided with respect to construction of hotel); *Pavlovich v. Nat'l City Bank*, 435 F.3d 560, 569 (6th Cir. (Oh.) 2006).

⁹Motion to Dismiss Counts Two, Four, Five, Six and Seven of the Amended Complaint of Younglove Construction, LLC (Doc. 105), p. 1. Ultimately, the district court granted PSD's Motion to Dismiss. (Doc. 218).

more than a transparent attempt to obtain punitive damages for breach of contract.”¹⁰ In discovery motions, PSD argued: “Younglove turns its back on PSD’s actual damage claim—*that Younglove’s defective design and construction of the feed mill deprived PSD of the benefit of its bargain*, and the value of [sic] feed mill has been diminished.”(Emphasis added)¹¹ Such argument was consistent with the other pleadings and evidence in this case.¹² For instance, in response to discovery, PSD stated:

. . . PSD’s damages in this case are for all direct and indirect costs to repair the defective construction Younglove provided in breach of its contractual duties and warranties, as well as the diminution in value of the MPK Plant for repairs that are not economically feasible to complete, such that PSD receives the benefits of its bargain with Younglove.¹³

With respect to the Bin, PSD sought damages for repair, lack of use, diminution in value, and breach of contract for failure to install the Bin to specifications.¹⁴ PSD made no claim that any contents of the Bin were damaged.¹⁵ Rather, PSD claimed that it did not get the benefit of its bargain—it did not get what it paid for. Younglove’s contribution and indemnity claims against CAS

¹⁰(Doc. 213), p. 13, FN 8.

¹¹(Doc. 213), p. 6.

¹²*See eg.* (Docs. 106, 138). The district court characterized PSD’s claims as follows: “They’re simply saying we contracted for a building of this description. We didn’t get that building in this respect.” (Doc. 213), Ex. A, p. 20. *See* other analogies made by PSD and the district court at (Doc. 213), Ex. A, pp. 14-18.

¹³Motion to Supplement Motion for Reconsideration filed By Intervenor Westfield Insurance Company (Doc. 259), Ex. A, p. 3, Response to Request for Admission No. 1. (Supp. 1022).

¹⁴(Doc. 70); (Doc. 115), Ex. E p. 746 (Supp. 787).

¹⁵(Doc. 115), Ex. E, p. 103, lns. 6-14 (Supp. 788); *id.*, p. 151, lns. 11-24 (Supp. 789); *id.*, p. 152; lns. 1-4 (Supp. 789).

were entirely predicated upon PSD's contract claims.¹⁶ If PSD did not get the benefit of its bargain, Younglove claimed that it was partly CAS' fault.

The nature of PSD's allegations is not surprising since the problems with the Bin were never characterized as substantial. A maintenance person had noticed minor "damage" to the top edge and roof of the Bin.¹⁷ PSD's expert subsequently "found that the bin damage was not 'horribly significant'" and recommended that PSD simply "fill [the Bin] back up and reattach the roof" which should generally return the Bin to its original position (subject to temporary removal of a portion of the west side and re-attachment after filling).¹⁸ The expert did not initially know the exact cause of the minor damage, but theorized it could have been caused by: (1) asymmetric discharge of grain due to misuse of the Bin; (2) differential settlement of the Bin's concrete foundation due to inadequate compressive strength of the concrete; or (3) a combination of both.¹⁹ Later, however, PSD's expert "ruled out differential settlement as a cause of damage to the bin" and pronounced that "the cause of the damage to the steel bin to a reasonable degree of engineering probability was an asymmetric

¹⁶Plaintiff Younglove Construction LLC's Third-Party Complaint against Custom Agri Systems (Doc. 76), ¶¶5-21.

¹⁷(Doc. 93), p. 3.

¹⁸(Doc. 93), p. 6.

¹⁹(Doc. 93), p. 4. Portions of the Owner/Operator's Manual are attached to (Doc. 210), Ex. A).

discharge from the western-most discharge opening while the bin was full or nearly full.”²⁰ That is, PSD did not empty the Bin properly.²¹

B. The Coverage Litigation

At times pertinent to the foregoing, CAS was insured under the Westfield Policy which included both commercial general liability (“CGL”) coverage and commercial umbrella (“Umbrella”) coverage. Baseline CGL Coverage was provided by Commercial General Liability Coverage Form CG0001 (12/04) and (12/07)(“CGL Coverage Form”)²². The CGL Coverage Form included Coverage A constituting Bodily Injury and Property Damage Liability Coverage. Baseline Umbrella Coverage was provided by way of Form EC 70 01 (10/01)(“Umbrella Coverage Form”), which provided coverage in excess to CGL Coverage.²³ While the Umbrella Coverage provided higher limits of liability than CGL Coverage, it did not provide broader coverage than CGL coverage in this case.

When CAS was sued, it demanded defense and indemnity from Westfield. In response, Westfield defended CAS under reservation of rights, intervened in the litigation and filed a

²⁰Motion for Reconsideration filed by Intervenor Westfield Insurance Company (Doc. 214), pp. 1-2 (Supp. 974-975).

²¹PSD claimed that there was no misuse because the Bin did not have the promised unloading capacity and neither CAS nor Younglove provided the training or signage required by the Younglove Contract. (Doc. 138), pp. 2-6. *See also*, (Docs. 144, 146 and 149).

²²The 2007-2008 Policy contained a December 2004 edition of the CGL Coverage Form and 2008-2009 Policy contained a December 2007 edition of the Form. Unless otherwise indicated, both editions were the same or substantially similar and references are in this Brief are made to the 2004 Form at (Doc. 115), Ex. A, Bates Nos. 102-117 (Supp. 143-158).

²³(Doc. 115), Ex. A, Bates Nos. 247-262 (Supp. 288-303)

declaratory judgment cross-claim against CAS to determine the rights and responsibilities of Westfield and CAS under the Westfield Policy.²⁴

Westfield and CAS subsequently filed cross-motions for summary judgment with respect to the insurance coverage under the Westfield Policy.²⁵ Westfield argued, in pertinent part, that it was not obligated to defend or indemnify CAS with respect to the foregoing allegations because:

- (1) Neither PSD nor Younglove were seeking damages that fell within the insuring agreements of the Westfield Policy because the insuring agreements did not include coverage for legal theories and damages for failure to provide work and materials in conformance with contractual obligations without damage to other property.
- (2) Even if the damage sought against CAS fell within the insuring agreements of the Westfield Policy, they were nonetheless excluded by the contractual liability exclusion.²⁶

Initially, the district court granted summary judgment for CAS on the duty to defend, but reserved judgment on the duty to indemnify.²⁷ In doing so, the district court correctly found that the contractual liability exclusion precluded coverage for the direct contract claims against CAS, but incorrectly found that “consequential damages” (or damage to other property) were potentially or arguably sought against CAS. However, Westfield filed a motion for reconsideration and the district court reversed itself and granted summary judgment to Westfield on all issues.²⁸ In doing so, the

²⁴(Doc. 52) (Supp. 1-7). CAS’ Answer to Westfield’s declaratory judgment cross-claim is found at (Doc. 60)(Supp. 9-15).

²⁵(Doc. 115)(Supp. 16-41); (Doc. 148)(Supp. 858-881); (Doc.158)(Supp. 939-947).

²⁶Westfield raised additional arguments that are not a part of the appeal to this Court. *See infra*. FN 25.

²⁷Appx. 00001-00020.

²⁸Appx. 00021-00032.

district court correctly concluded that the only damages sought by PSD and Younglove were damages for “the benefit of the bargain” and the Westfield Policy did not provide coverage for such damages.

Thereafter, CAS appealed to the Sixth Circuit and the Sixth Circuit certified questions to this Court for resolution of conflicted areas of law governing the coverage dispute between Westfield and CAS.

ARGUMENT

CERTIFIED QUESTION NO. I: 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?

A. The scope of the CGL insuring agreement & rules of interpretation

Certified Question No. I essentially asks whether the claims against CAS fall within the insuring agreements of the Westfield Policy. The answer to this question starts with the language of the insuring agreements. As the Umbrella Coverage Form provides no greater substantive coverage than the CGL Coverage Form, the analysis focuses on the CGL insuring agreement which provides, in pertinent part:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

* * *

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a.** 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. We will have the right and duty to defend the insured against any “suit” seeking those damages. However, we will have no

duty to defend the insured against any “suit” seeking damages for “bodily injury” or “property damage” to which this insurance does not apply. We may, at our discretion, investigate any “occurrence” and settle any claim or “suit” that may result. But:

* * *

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlement under Coverage A or B . . .

b. This insurance applies to “bodily injury” and “property damage” only if:

(1) The “bodily injury” or “property damage” is caused by an “occurrence” . . .^[29]

Furthermore, the CGL Coverage Form provides the following definitions applicable to the insuring agreement:

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

* * *

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

* * *

17. “Property damage” means:

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

²⁹(Doc. 115), Ex. A, Bates No. 102 (Supp. 143).

- 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 . . . [³⁰]

Generally, when analyzing the meaning of these words and phrases, this Court has explained:

An insurance policy is a contract . . . When confronted with an issue of contractual interpretation, the role of a court is to give effect to the intent of the parties to the agreement . . . We examine the insurance contract as a whole and presume that the intent of the parties is reflected in the language used in the policy . . . We look to the plain and ordinary meaning of the language used in the policy unless another meaning is clearly apparent from the contents of the policy . . . When the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties . . . As a matter of law, a contract is unambiguous if it can be given a definite legal meaning . . . (Citations omitted) (Emphasis added).

Westfield Ins. Co. v. Galatis, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶¶9-14. Importantly, insurance policy provisions are “to be construed in light of the subject matter with which the parties are dealing and the purpose to be accomplished.” *Bobier v. Nat’l Cas. Co.*, 143 Ohio St. 215, 54 N.E.2d 798 (1944), paragraph one of the syllabus; *The Travelers Ins. Co. v. The Buckeye Union Cas. Co.*, 172 Ohio St. 57, 157 N.E.2d 792 (1961), paragraph one of the syllabus. The meaning of the policy provisions is to be considered “from the instrument as a whole, and not detached or isolated parts thereof.” *Gomolka v. State Auto Mut. Ins. Co.*, 70 Ohio St.2d 166, 172-173, 436 N.E.2d 1347 (1982). If those provisions have a specific contractual definition, have acquired a “commercial or technical meaning” or have a “special meaning manifested in the contractual context”, that meaning must be applied. *Id.*

³⁰(Doc. 115), Ex. A, Bates Nos. 114-116 (Supp. 155-157).

B. The context of the CGL insuring agreement is tort liability.

In this regard, the hazard covered by the CGL Coverage Form is CAS' *legal liability* to pay certain types of *damages*. The CGL insuring agreement speaks of "damages", "judgments", "settlements", "suits" and the like. It is couched not just in the language of law, but in the language of *tort* law. It provides insurance against legal liability for damages due to accidental bodily injury or property damage. This combination of legal concepts has been universally used as the boundary line dividing tort liability from contract liability. See *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S.858, 866-875, 90 L.Ed.2d 865 (1986) (describing the interaction between tort and contract law and the limits of each and concluding "when the harm to the product itself occurs . . . the resulting loss . . . is essentially the failure of the purchaser to receive the benefit its bargain—traditionally the core concern of contract law."); *Floor Craft Floor Covering, Inc. v. Parma Comm. Gen. Hosp.*, 54 Ohio St.3d 1, 17-18, 560 N.E.2d 206 (1990) ("The controlling policy consideration underlying tort law is the safety of persons and property—the protection of personas and property from losses resulting from injury. The controlling policy consideration underlying the law of contracts is the protection of expectations bargained for"); *Corporex*, 106 Ohio St.3d at 414 ("Tort law is not designed * * * to compensate parties for losses as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts"). Thus, it should not be surprising that many legal authorities have found that the insuring agreement is triggered *only by* the tort liability of the insured. See e.g. *VBF, Inc. v. Chubb Grp. of Ins. Cos.*, 263 F.3d 1226, 1231 (10th Cir. 2001) ("The phrases 'legally obligated to pay' and 'liability imposed by law' refer only to tort claims and not contract claims.");

Fed. Ins. Co. v. New Hampshire Ins. Co., No. 10-30892, 2011 U.S. App. LEXIS 14946, at *9 (5th Cir. July 19, 2011) (“[I]t is well settled that the use of the phrase “legally obligated to pay” in an insurance policy limits coverage to damages arising out of tortious acts and does not cover contractual obligations”); *Data Specialities, Inc. v. Transcontinental Ins. Co.*, 125 F.3d 909, 912-913 (5th Cir. 1997) (addressing authorities from across the country and concluding “In light of the interpretation of the phrase ‘legally obligated to pay as damages’ given by courts of other states and by insurance treatises, the necessary requirement for coverage is that the insured’s tortious conduct must have caused the damages”); *Action Ads, Inc. v. Great Am. Ins. Co.*, 685 P.2d 42, 43-45 (Wy. Sup. Ct. 1984) (“Courts universally have interpreted liability-coverage provisions, identical to that found in appellant’s policy, as referring to liability sounding in tort, not in contract”); Rhodes, *The Law of Commercial Insurance*, §II.2.3 Contractual Liability (1996) (“The standard liability policy is designed to cover risks generally classified as torts . . . claims for breach of contract generally do not involve bodily injury caused by an occurrence.”)

This conclusion, however, may be too broad. In the seminal 1943 work *Comprehensive Liability Insurance*, E. W. Sawyer, an attorney for the National Bureau of Casualty and Surety Underwriters (one of the forerunners of the Insurance Services Office (“ISO”) that became the scrivener for most insurance forms including those used in the Westfield Policy)³¹ explained that contractual liability exclusions were added to the earliest CGL policies as an apparent “unnecessary precaution” to remove any doubt that “the policy does *not* include liability assumed under a contract or agreement *not* defined in the policy.” Sawyer, *Comprehensive Liability Insurance*, 48 (1943)(emphasis added)(see <http://babel.hathitrust.org/cgi/pt?id=wu.89095150264>). Historically,

³¹See Stempel, *Stempel on Insurance Contracts*, 3rd Ed., §14.01[A] (2009).

it was recognized that a limited set of “fairly well standardized” contracts³² were intended to be covered by CGL coverage. *Comprehensive Liability Insurance*, at 28-32. This limited set of contracts included leases, easements, sidetrack agreements, agreements to indemnify municipalities and elevator or escalator maintenance agreements—all of which typically included provisions allocating the tort liability of the contracting parties. *Id.*, at 102.³³ The earliest CGL-type insuring agreements “specifically mention[ed] liability assumed by the insured ‘under contract as defined herein’.” *Id.*, at 46. Other than this limited set of contracts associated with tort liability, no other contractual liability was covered. *Id.* at 29-32. Why? To avoid unnecessary expense to the insured in the form of premiums for the purchase of coverage for hazards that may pose little or no risk to the particular insured. If all contractual liability of all insureds were covered, the cost of insurance would become prohibitive to a large section of the market. *Id.* at 116. This limited contractual liability coverage was a corollary to tort liability and continued in the modern CGL forms such as

³²Such contracts would later become “incidental contracts” and then “insured contracts” as exceptions to the contractual liability exclusion in later versions of CGL forms. *Stempel on Insurance Contracts*, at §14.14 (“The current definition of insured contract . . . is limited to the most common business dealings in which a policyholder must frequently agree to be potentially liable in order to do business with landlords, haulers, landowners, governments, and others.”).

³³See e.g. *Mt. Vernon Fire Ins. Co. v. Monier Constr. Co.*, No. 95 Civ. 0645, 1996 U.S. Dist. LEXIS 11297, at *11, FN 3 (S.D.N.Y. Aug. 7, 1996) (“A sidetrack agreement concerns the allocation of liability between a railroad and an adjacent property owner.”); *Amerisure Mut. Ins. Co. v. Carey Transp., Inc.*, 578 F.Supp.2d 888, 917, FN 20 (W.D. Mich. 2008) (describing a sidetrack agreement to apportion liability between the parties); *U.S.F.&G. v. Housing Authority*, 114 F.3d 693, 694-695 (8th Cir. 1997) (describing defense and indemnity provisions in an elevator maintenance agreement); *London & Lancashire Indemn. Co. v. Crook*, 241 Wis. 571, 573-574, 6 N.W.2d 681 (1942) (describing indemnity and bond provisions in commercial lease); *First. Am. Nat’l Bank. v. Tenn. Gas Transmission Co.*, 58 Tenn. App. 189, 428 S.W.2d 35 (1967) (describing defense and indemnity provisions in commercial easement agreement).

those used in the Westfield Policy.³⁴ Indeed, when the insurance industry adopted the post-1986 changes to the CGL Coverage Form in the Westfield Policy, it explained the scope of contractual liability as follows: “Coverage for liabilities assumed under leases of premises, sidetrack agreements, and other specific kinds of contracts. Coverage also extends to all other contracts relating to named insured’s business, *but only for tort liabilities assumed.*” ISO Commercial Lines Policy and Rating Simplification Project, Introduction and Overview, Commercial General Liability, p. 14 (April 1985) (“ISO Circular”) (Emphasis added) (Appx. 00060). Whether this Court is inclined to follow other courts that have imposed a broad rule that precludes coverage for all contractual liability or not, the language, structure, history and context of the insuring agreement dictates that this Court should employ the concepts of tort law when interpreting the insuring agreement and such interpretation will inform the answers to the Certified Questions in this case.³⁵

C. In the context of tort liability, accidental property damage requires damage to property other than the work or product of the insured defendant.

With such tools in mind, we turn back to the insuring agreement in the Westfield Policy which provides coverage, in pertinent part, for damages because of accidental bodily injury or

³⁴*The Law of Commercial Insurance*, at §II.2.3 (“The current version of the policy form extends coverage for liability assumed pursuant to an ‘insured contract’ . . . In most situations, the exclusion will serve to remove breach of contract claims from the scope of the coverage even if they might otherwise fall within policy definitions extending coverage.”).

³⁵In addition the language of the insuring agreement, the CGL Coverage Form is full of the language of tort liability. *E.g.* exclusions pertaining to liquor liability (Doc. 115, Ex. A, Bates No. 103) (Supp. 144); workers compensation (*id.*) and employer’s liability (*id.*); provisions governing payment of prejudgment interest and judgments (*id.*, at Bates No. 109) (Supp. 150); provisions related to defense and indemnity of indemnitees of the insured (*id.*); definitions of other insureds based upon their activities and relationships to the insured (*id.*, at Bates No. 110)(Supp. 151); notice provisions (*id.*, at Bates Nos. 111-112)(Supp. 152-153); and definitions (*id.*, at Bates Nos. 113-117) (Supp. 154-158). Many of these provisions would have little or no meaning outside the context of tort law.

property damage. We can easily discontinue any consideration of accidental bodily injury because none is alleged in this case. The question then becomes: what is the scope of coverage for damages because of accidental property damage?

Turning first to the concept of what constitutes *accidental* injury of any kind, the Westfield Policy employs the term “occurrence” (defined as an “accident”) which universally and unambiguously means an unexpected and unintended event. See *Gearing v. Nationwide Ins. Co.*, 76 Ohio St.3d 34, 37-40, 1996-Ohio-113; *Physician’s Ins. Co. of Ohio v. Swanson*, 58 Ohio St.3d 189, 193, 569 N.E.2d 906 (1990); Segalla, *9A Couch on Insurance 3d.*, §129:3 (2008) (recognizing that the term “accident” is universally recognized as “an event or happening which is undesigned, unintended, unforeseen or unexpected or cannot otherwise be reasonably anticipated”); *Randolf v. Grange Mut. Cas. Co.*, 57 Ohio St.2d 25, 29, 385 N.E.2d 1305 (1979) (“[T]he word ‘occurrence,’ defined as ‘accident,’ was intended to mean just that an unexpected, unforeseeable event”).³⁶ In the abstract, accident or event could refer to act of nature or some fortuitous event. However, in the context of tort liability, it is axiomatic that accident or event refers to an accident or event related to an act or omission of the insured. Tort law does not impose liability for acts of God or other such events. It imposes liability based upon an act or omission of the insured that either causes injury or allows foreseeable injury to occur. See *e.g. Westfield v. Hunter*, 128 Ohio St.3d 540, 2011-Ohio-1818, at ¶27 (“While most of the endeavors of mankind occur upon the surface of the earth and without it, harm could not occur, the law nevertheless imposes liability for negligent personal

³⁶The use of the term “unforeseeable” is likely too broad. If an event is unforeseeable under tort law, it may well be unactionable.

conduct upon the recognition that, in most cases, human behavior is the primary cause of the harm and condition on earth only secondary”).

Turning next to “property damage”, this Court has correctly recognized that while “property damage” might commonly be considered to include “damage to the [insured’s] product [or work] itself”, where the insured and claimant are in privity of contract there must be damage to property *other than* the insured’s product or work for the claimant to have a tort cause of action against the insured. *Chemtrol Adhesives*, 42 Ohio St.3d at 42-51.³⁷ “[A]ny protection against the product’s self-inflicted damage . . . is better viewed as arising under the contract and not under the law of negligence.” 42 Ohio St.3d at 46. Thus, within the context of insurance coverage designed to cover the tort liability of the insured, the plain and simple meaning of “property damage” requires damage to property *other than* work or product provided by the insured. Damage limited to the work or product provided by the insured under contract would properly be characterized as “economic loss” that arises from the expectations of the parties to the contract. 42 Ohio St.3d at 45; *Corporex*, at ¶¶3-13 (finding that alleged damages due to insured subcontractor’s failure to properly perform concrete work for construction project constituted “economic losses” that could not be recovered in tort by the property owner).³⁸ Economic losses do not qualify as “property damage” as defined in the

³⁷See also, Restatement (Third) of Torts: Products Liability §§1, 21 (1998) (limiting tort liability to “harm to persons or property” defined as “harm to: (1) the plaintiff’s person; or (b) the person of another when harm to the other interferes with an interest of the plaintiff protected by tort law; or (c) the plaintiff’s property *other than the defective product itself*.”)(emphasis added).

³⁸In the seminal case *Seely v. White Motor Co.*, 63 Cal.2d 9, 16, 403 P.2d 145 (1965), the Supreme Court of California held that liability for such damages was predicated upon what the defendant had promised, noting: “Had the defendant not warranted the truck, but sold it ‘as is,’ it should not be liable for the failure of the truck to serve plaintiff’s business needs.” Under tort principles, however, “the manufacturer would be liable even though it did not agree that truck would perform as plaintiff wished or expected it do.” *Id.*

insuring agreement. *See Couch on Ins.* §129:1 (such policies are designed “to provide coverage for tort liability for physical damages to others and not for contractual liability of the insured for economic losses”); *Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 238, 405 A.2d 788 (1979).³⁹

Of course, neither “property damage” nor “occurrence” are to be considered in abstract isolation. They are but components of the full insuring agreement which provides coverage for “those sums that the insured becomes legally obligated to pay as damages because of. . . ‘property damage’ . . . caused by an ‘occurrence’”. *See Travelers Ins. Co.*, 172 Ohio St. 507 at paragraph four of the syllabus. When these terms are causally linked in such a close manner, the combined result is an insuring agreement *designed* for tort claims. As explained in one treatise:

[C]laims for breach of contract generally do not involve bodily injury or property damage caused by an occurrence. Accordingly, the insurer will not accept the risks of nonperformance of contracts or similar problems associated with surety bonds. The insurer will not accept the risk that the contract will be poorly performed, resulting a claim for the failure to preform in a workmanlike manner, if the only damage is to the insured’s work product. The insurer does not cover breach of contract actions which are essentially business risks assumed by the insured.

³⁹ (“The risk intended to be insured is the possibility that the goods, products or work of the insured, once relinquished or completed, will cause bodily injury or damage to property *other than to the product or completed work itself*, and for which the insured may be found liable. The insured * * * may be liable as a matter of contract law to make good on products or work which is defective * * *. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. *The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained.*” *Id.* (quoting Henderson, Insurance Protection for Products Liability and Completed Operations--What Every Lawyer Should Know, 50 Neb.L.Rev. 415, 441 (1971))(Emphasis added).

The Law of Commercial Insurance, at §II.2.3. This simply states what should be obvious—whether one accidentally or purposely breaches a contract generally makes little difference to a contract cause of action. Likewise, whether a breach of contract results in “bodily injury” or “property damage” generally makes little difference to a contract cause of action. While such failures may be actionable, the cause of action lies in the contractual expectations of the parties which, historically and contextually, falls outside the scope of coverage provided by CGL policies because they are economic losses. Where, however, the insured engages in activity that accidentally damages property *other* than the work or product of the insured (often described as “collateral”, “resultant” or “consequential” damage), the insuring agreement is triggered. While it may be technically accurate to assert, as some courts have, that “*the insuring agreement* does not [expressly] mention torts, contracts, or economic losses,”⁴⁰ it is self-evident that tort concepts form the context for the insuring agreement. It would be grossly inaccurate to ignore that context when determining the meaning of an insuring agreement for legal liability for damages imposed for accidental bodily injury or property damage.

Nevertheless, some courts have taken the view that any interpretation of the insuring agreement that requires damage to “other” property should be rejected because it renders a particular exclusion--Exclusion 1.--completely meaningless with respect to construction defect claims and improperly eliminates consideration of the subcontractor exception which has been argued to be

⁴⁰*Lamar Homes, Inc. v. Mid-Continent Cas. Co.*, 242 S.W.3d 1, 13 (Tex. Sup. Ct. 2007) (emphasis added).

designed to broadly provide coverage for construction defect claims.⁴¹ However, this argument fails for two reasons.

First, there is no conceivable interpretation of Exclusion 1. that could qualify as a broad general grant of coverage for construction defect claims. The plain language of Exclusion 1. does not allow such an argument. Exclusion 1. provides:

I. 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.^[42]

[This exclusion only applies to that particular part of “your work” out of which the property damage arises.⁴³]

Thus, the exclusion bars coverage for damages because of “property damage” to “your work”, *but only* to the extent that “your work” is included in the “products completed operations hazard.”

“Your work” is defined as follows:

22. “Your work”:

a. Means:

- (1)** Work or operations performed by you or on your behalf; and

⁴¹See e.g. *Lamar*, 242 S.W.3d at 12-16; *U.S. Fire Ins. Co. v. JSUB, Inc.*, 979 So.2d 871, 879-880 (Fla. Sup. Ct. 2007). Although Exclusion 1. is not directly before this Court, it warrants consideration because of its connection with arguments that the CGL insuring agreement should be read more expansively than the tort liability context permits.

⁴²(Doc. 115), Ex. A, Bates No. 106 (Supp. 147).

⁴³The bracketed clause is found at (Doc. 115), Ex. A, Bates No. 130. (Supp.171).

- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of “your work;” and
- (2) The providing of or failure to provide warnings or instructions.^[44]

“Products-completed operations hazard” is defined, in pertinent part, as follows:

16. “Products-completed operations hazard”:

- a.** Includes all . . . “property damage” occurring away from premises you own or rent and arising out of . . . “your work” *except:*

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned
...

* * *

- b.** Does *not* include . . . “property damage” arising out of:

- (1) The transportation of property unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the “loading or unloading” of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule,

⁴⁴(Doc. 115), Ex. A, Bates No. 117 (Supp. 158).

states that products-completed operations are subject to the General Aggregate Limit.^[45]

Thus, Exclusion 1. *only* applies to “property damage” to “your work” that is complete, abandoned and that does not fall within the three additional exceptions provided in the “products-completed operations hazard”. If, as PSD alleged against Younglove in this case⁴⁶, the general contractor caused damage to its own work *during* the construction process, then Exclusion 1., by its very terms, is not applicable.⁴⁷ If the “property damage” falls within the “products-completed operations hazard,” the exception to the exclusion is only triggered if the general contractor happens to use a subcontractor and that portion of the general contractor’s work was damaged by that particular subcontractor. For contractors that do not use subcontractors or where the contractor’s work is not damaged by a subcontractor, the exception to the exclusion is inapplicable. Even where the exception to the exclusion is applicable, it is well-established that exceptions to exclusions do not and cannot expand the initial scope of the insuring agreement. *See Ohio Valley Livestock Corp. v. Farm Bureau Ins.*, 2d Dist. No. 81 CA 63, 1982 Ohio App. LEXIS 13643, at *15-17; *LISN v. Commercial Union Ins. Cos.*, 83 Ohio App.3d 625, 631-632, 615 N.E.2d 650 (9th Dist. 1992). Thus, to interpret an exception to Exclusion 1. as providing a broad grant of coverage for construction defect claims is manifestly unreasonable.

⁴⁵(Doc. 115), Ex. A, Bates No. 117 (Supp. 158)(emphasis added)

⁴⁶(Doc. 106), pp. 2-13.

⁴⁷Under modern “trigger” theories, “property damage” is deemed to occur from the moment of the first exposure to injurious conditions. *See e.g. Plum v. West Am. Ins. Co.*, 1st Dist. No. C-050115, 2006-Ohio-452 at ¶16; *Westfield Ins. Co. v. Milwaukee Ins. Co.*, 12th Dist. No. CA2004-12-298, 2005-Ohio-4746 at ¶19; *GenCorp., Inc. v. AIU Ins. Co.*, 104 F.Supp.2d 740, 752 (N.D. Ohio 2000). Thus, in many (or most) cases, some or all of the “property damage” will occur *while* the contractors are still working on the job, and therefore Exclusion 1. will be inapplicable.

Second, it is not necessary that every provision of every policy be applicable to every claim. The presence of provisions in a standardized insurance contract that may not be applicable to a particular insured's business hazards does not mean that the policy's insuring agreement should be judicially expanded. Such provisions may be directed at different types of insureds in different situations. As explained in *Seaco Ins. Co. v. Davis-Irish*, 300 F.3d 84, 87 (1st Cir. (Me.) 2002):

The insurance industry often uses standard forms . . . The purchaser (and, thus, the named insured) may be a corporation, a partnership, or an individual doing business as a sole proprietor. There is nothing sinister about an insurer's use of such a "one size fits all" policy form.

Not surprisingly, the provisions of such a policy function somewhat differently depending upon the identity and status of the named insured . . . The fact that those paragraphs, by their plain language, are not apposite when the named insured is a corporation does not afford us license to stretch the words of the policy and give them unintended effect . . .

It is well-recognized that in standardized contracts it is not necessary that every contract term be applicable to every possible scenario. As explained in the Restatement of Contracts, § 203(a), at Comment b:

Superfluous terms. Since an agreement is interpreted as a whole, it assumed in the first instance that no part of it is superfluous . . . ***On the other hand, a standard form may include provisions appropriate only to some of the transactions in which the form is used; or the form may be used for an inappropriate transaction. Even agreements tailored to particular transactions sometimes include overlapping or redundant or meaningless provisions.*** (Emphasis added).

See also *Galatis*, at ¶¶40-41 ("It is unnecessary for each . . . classifications to apply to every insurance policy"). It may be that a particular insured would prefer to have broader coverage for a particular claim than what is currently provided by the CGL Coverage Form. However, the CGL Coverage Form is designed to provide basic tort liability coverage for accidental property damage and bodily injury to a myriad of businesses and claims—not just construction businesses and defective

construction claims. Any gap between a particular insured's desired coverage and the provisions of the present insuring agreement is best addressed by contract negotiation or regulatory endeavors.⁴⁸

D. The majority of decisions hold that accidental property damage requires damage to property other than the work or product of the insured defendant.

In this case, PSD sought to recover damages from Younglove to provide it with the benefit of its bargain. PSD did not claim that Younglove and/or CAS accidentally damaged property that PSD already owned. Rather, PSD claimed that Younglove and/or CAS promised work and materials of a particular high quality and character, but delivered work and materials of a lesser quality and character. Therefore, PSD did not receive the benefit of the bargain, so it now seeks damages to raise the quality of the work and materials to the level Younglove and/or CAS promised. All such damages properly qualify as economic losses. The overwhelming majority of Ohio authorities hold that such damages do not constitute damages because of "property damage" caused by an "occurrence". See e.g. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003-Ohio-3048, at ¶36 (holding that negligent nondisclosure of "structural damage" during sale of property "was not an accident that resulted in property damage but, rather, an accident that allegedly caused economic damages" that fell outside the insuring agreement of similar policy language); *Cincinnati Ins. Co. v. CPS Holdings*, 115 Ohio St.3d 306, 2007-Ohio-4917, at ¶¶14-19 (holding that umbrella policy with similar policy language was not triggered because financial losses due to administrator's mismanagement of natural gas contracts did not constitute "property damage"); *B.C. & G Weithman v. The Ohio Cas. Grp. of Ins. Cos.*, 3rd Dist. No. 3-92-51, 1993 Ohio App. LEXIS 2238, at *5-8

⁴⁸For example, there has been a movement to legislatively compel insurers to provide coverage for all defective workmanship claims with statutes being enacted in at least four states: Arkansas, Colorado, Hawaii and South Carolina. These statutes are not addressed in detail here because they do not change the meaning of the language used in the Westfield Policy.

(holding that sub-contractor's suit against general contractor to recovery monies withheld by contractor to effect repairs due to sub-contractor's poor workmanship on construction project was not a claim for "property damage" even assuming repair of sub-contractor's work was necessary); *Rodeen v. Royaltowne Wood Works, Inc.*, 8th Dist. No. 59601, 1992 Ohio App. LEXIS 21, at *1-6 (holding that damages for refusal to complete construction of house at agreed price, defective labor and materials, money not applied to construction contract, delay in construction, repair of defects and emotional distress did not constitute "property damage"); *Am. Mfrs. Mut. Ins. Co. v. Den-Mat Cerinate Dental Labs.*, 7th Dist. No. 99 C.A. 123, 2001-Ohio-3539, 2001 Ohio App. LEXIS 264 at *4 ("strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury to tangible property covered by a comprehensive general liability [policy]"); *Monarch Constr. Co. v. Great Am. Ins. Co.*, 1st Dist. No. C-960645, 1997 Ohio App. LEXIS 2716 at *10-11 ("failure to comply with contractual obligations or implied warranties resulting in monetary damages" not "property damage" caused by an "occurrence"); *The Home Ins. Co. of Illinois v. OM Grp., Inc.*, 1st Dist. No. C-20643, 2003-Ohio-3666, at ¶¶9-10, *appeal not allowed by* 100 Ohio St.3d 1486, 2003-Ohio-5992 (holding that claims against product manufacturer that product failed to protect utility poles from natural decay did not constitute claims that product manufacturer caused "property damage" to utility poles and therefore did not trigger CGL policy); *Westfield Ins. Co. v. J.A. Raeder, Inc.*, 5th Dist. No. 91AP120095, 1992 Ohio App. LEXIS 3693, at *2-3 (finding no coverage for claims of breach of construction contract, breach of express and implied warranties to construct facility in a workmanlike manner, negligence and misrepresentation because "the policy unambiguously does not provide coverage because the property damage alleged . . . was not caused by an 'occurrence' as defined in the policy"); *Bogner*

Constr. Co. v. Field & Assocs. Inc., 5th Dist. No. 08 CA 11, 2009-Ohio-116 at ¶44 (“defective workmanship does not constitute an accident or an ‘occurrence’ under a Commercial General Liability policy”); *Auto Owners Mut. Ins. Co. v. Kendrick*, 5th Dist. No. 08-COA-028, 2009-Ohio-2169 at ¶43 (breach of contract claim arising out of defectively constructed house does not qualify as an “occurrence” under the terms of a commercial general liability policy); *Environmental Exploration Co. v. Bituminous Fire & Marine Ins. Co.*, 5th Dist. No. 1999CA00315, 2000 Ohio App. LEXIS 4985, at *24-25 (“[general commercial liability] policies . . . are not intended to insure ‘business risks’—risks that are the ‘normal, frequent, or predictable consequences of doing business, and which management can and should control or manage.”); *Royal Plastics, Inc. v. State Auto. Mut. Ins. Co.*, 99 Ohio App.3d 221, 225-226, 650 N.E.2d 180 (8th Dist. 1994) (“[T]he insurance policy defines ‘occurrence’ to mean ‘an accident’ . . . The . . . complaint contains absolutely no allegation of ‘accident’ and simply contains claims by a manufacturer against a component parts supplier that improperly manufactured component parts.”); *Heile v. State Auto. Mut. Ins. Co.*, 136 Ohio App.3d 351, 353-354, 736 N.E.2d 566 (1st Dist. 1999) (“[C]ourts in Ohio, as well as the majority of courts in jurisdictions throughout the country, have concluded that defective workmanship does not constitute an ‘occurrence’ in policies such as the one here. The courts generally conclude that defective workmanship is not what is meant by the term ‘accident’ under the definition of ‘occurrence.’”); *Erie Ins. Exchange v. Colony Dev. Corp.*, 136 Ohio App.3d 419, 421, 736 N.E.2d 950 (10th Dist. 2000) (“[C]laims for defective workmanship do not allege an ‘occurrence’ under a commercial general liability policy *unless* such claims allege collateral or consequential damage stemming from the defective work.”); *Beaverdam Contracting, Inc. v. Erie Ins. Co.*, 3rd Dist. No. 1-08-17, 2008-Ohio-4953 at ¶44 (“General liability policies are not intended to insure against

a breach of contract or poor workmanship involved in the regular performance of the work[.]”); *Ohio Cas. Ins. Co. v. Hanna*, 9th Dist. Nos. 07CA0016-M, 07CA0017-M, 2008-Ohio-3203 at ¶16 (“commercial general liability policies are not intended to insure ‘risks that are the normal, frequent, or predictable consequences of doing business’”); *Paramount Parks, Inc. v. Admiral Ins. Co.*, 12th Dist. No. CA2007-05-66, 2008-Ohio-1351 at ¶25 (“[A] CGL policy . . . does not insure against claims for defective or negligent workmanship or construction because defective workmanship does not constitute an ‘accident[.]’”); *Acuity v. City Concrete L.L.C.*, No. 4:06cv0415, 2006 U.S. Dist. LEXIS 79720 at *14 (N.D. Ohio Oct. 17, 2006) (“[Insofar] as the underlying state court suits allege [faulty workmanship], and economic or business damages, these allegations do not give rise to [the insurer’s] duty to defend because they are outside the scope of the CGL policy”).

These Ohio authorities are consistent with the overwhelming majority of cases outside of Ohio holding that CGL coverage is not triggered by claims of defective workmanship unless there is damage to property other than the insured’s work or product. *See e.g. Town & Country Property, LLC v. Amerisure Ins. Co.*, — So.2d —, 2011 Ala. LEXIS 183, *16-22 (2011) (faulty workmanship is not covered unless there is damage to other property); *Essex Ins. Co. v. Holder*, 372 Ark. 535, 539-540, 261 S.W.3d 456 (2008) (same); *Group Builders, Inc. v. Admiral Ins. Co.*, 123 Haw. 142, 148-149, 231 P.3d 67 (2010) (“We hold that under Hawaii law, construction defect claims do not constitute an ‘occurrence’ under a CGL policy”); *Lagestee Mulder, Inc. v. Consolidated Ins. Co.*, No. 09-C-7793, 2011 U.S. Dist. LEXIS 129308, *5-7 (N.D. Ill. Nov. 8, 2011) (faulty workmanship is not covered unless there is damage to other property); *Pursell Constr. Inc. v. Hawkeye-Security Ins. Co.*, 596 N.W.2d 67, 71 (Iowa 1999) (“We agree with the majority rule and now join those jurisdictions that hold that defective workmanship standing alone, that is, resulting in damages only

the work product itself, is not an occurrence under a CGL policy”); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 69, 79-80 (Ky. 2011) (“We join the majority of other courts who have considered this question by holding that ‘a claim for faulty workmanship, in and of itself, is not an ‘occurrence’ under a commercial general liability policy”); *Baywood Corp. v. Maine Bonding & Cas. Co.*, 628 A.2d 1029, 1031 (Me. 1993) (faulty workmanship is not covered unless there is damage to other property); *Auto-Owners Ins. Co. v. Home Pride Cos., Inc.*, 268 Neb. 528, 533-536, 684 N.W.2d 571 (2004) (same); *Concord Gen. Mut. Ins. Co. v. Green & Co. Bldg. & Dev.*, 160 N.H. 690, 693-695, 8 A.3d 24 (2010) (same); *Acuity v. Burd & Constr., Inc.*, 721 N.W.2d 33, ¶16 (N.D. 2006) (same); *Kvaerner Metals v. Comm. Union Ins. Co.*, 589 Pa. 317, 332-336, 908 A.2d 888 (2006) (same); *Corner Constr. Co. v. U.S.Fidelity & Guaranty Co.*, 638 N.W.2d 887, ¶27 (S.D. 2002) (same); *Webster Cty. Solid Waste Authority v. Brackenrich & Assocs., Inc.*, 217 W.Va. 304, 617 S.E.2d 851 (2005), paragraph three of the syllabus (“Rather than providing coverage for a product or work performance that fails to meet contractual requirements, the [CGL] policy is specifically designed to insure against the tort liability for physical injury sustained by third parties as a result of the product or work performed or damages sustained by others from the completed product or finished work. Because faulty workmanship claims are essentially contractual in nature, they are outside the risks assumed by a traditional commercial general liability policy”).

Based upon the foregoing, this Court should answer Certified Question No. I “no” because the damages sought against CAS were not sums that CAS became legally obligated to pay as damages because of “property damage” caused by an “occurrence” because the only property allegedly damaged by CAS was the Bin that CAS designed and installed itself.

CERTIFIED QUESTION NO. II: If such claims are considered “property damage” caused by an “occurrence,” does the contractual liability exclusion in the general liability policy preclude coverage for claims for defective construction/workmanship?

Certified Question No. II asks this Court to determine the nature of the claims against CAS-- and if those claims are contractual in nature, to determine whether they are excluded by the contractual liability exclusion, Exclusion b.

Exclusion b. provides, in pertinent part:

2. Exclusions

This insurance does not apply to:

* * *

b. Contractual Liability

“Bodily injury” or “property damage” for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an “insured contract”, provided the “bodily injury” or “property damage” occurs subsequent to the execution of the contract or agreement . . .⁴⁹

There are two exceptions to the exclusion: (1) damages for “property damage” that CAS would have regardless of such contract; and (2) damages for “property damage” that CAS would have pursuant to an “insured contract” which is defined as follows:

9. “Insured contract” means:

⁴⁹(Doc. 115), Ex. A, Bates No. 103 (Supp. 144).

- a. A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an “insured contract”;
- b. A sidetrack agreement;
- c. Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
- d. An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
- e. An elevator maintenance agreement;
- f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, *provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf.* Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.

Paragraph f. does not include that part of any contract or agreement:

- (1) That indemnifies a railroad for “bodily injury” or “property damage” arising out of construction or demolition operations within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, road-beds, tunnel underpass or crossing;
- (2) That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - (a) Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions,

reports, surveys, field orders, change orders or drawings and specifications; or

- (b) Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
- (3) Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damages arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.^[50](emphasis added).

The exclusion is applicable, in the first instance, to “‘bodily injury’ or ‘property damage’ for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement.” The definitions of “bodily injury,” “property damage” and “insured” are provided in the Westfield Policy and present little problem in terms of interpretation. The pivotal question is the meaning of the phrase: “obligated to pay damages by reason of assumption of liability in a contract or agreement.”

The word “assume” means “to undertake; to engage; to promise” or “to take upon one’s self.” *Ballentine’s Law Dictionary* (2010). The word “liability” means “legal responsibility . . . the condition of being bound in law and justice to . . . discharge some obligation; a contractual obligation.” *Id.* Thus, the plain meaning of the phrase “obligated to pay damages by reason of assumption of liability in a contract or agreement” is being required to pay damages because of a contractual undertaking. That is, damages due to breach of contract.

⁵⁰(Doc. 115), Ex. A, Bates No. 123 (Supp. 164). The highlighted language was amended by the foregoing endorsement to further limit the scope of contractual liability coverage being provided under the “insured contract” exception to Exclusion b. Compare with the original at (Doc. 115), Ex. A, Bates Nos. 114-115 (Supp. 155-156).

This was the position correctly taken by the Supreme Court of Texas in *Gilbert Texas Constr., LP v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 127-129 (Tex. Sup. Ct. 2010). In *Gilbert*, the Texas high court addressed Exclusion b. in detail and correctly concluded that it extended to **any** breach of contract that did not fall within the exclusion's exceptions. *Gilbert* then went on to examine caselaw from across the country, the history of the exclusion, the interaction with the insuring agreement and other provisions of the CGL Coverage Form. The Texas high court found the exclusion was unambiguous and explained: "The exclusion is straightforward and not reasonably subject to two interpretations. It applies to liabilities the insured assumes by contract or agreement and not just to a particular subset of liabilities such as indemnity contracts." 327 S.W.3d at 133.⁵¹ This Court should follow the reasoning in *Gilbert* and similar authorities with respect to Exclusion b.⁵²

⁵¹The exclusion speaks of the "assumption of liability in a contract," but later includes exception f. which provides an exception to the exclusion for contracts in which the insured "**assume[s] the tort liability of another party** to pay for 'bodily injury' or 'property damage' to a third person or organization." (Emphasis added). If this defense and indemnity provision is an exception to the exclusion, then the main portion of the phrase "assumption of liability in a contract" cannot reasonably be interpreted to mean the same thing.

⁵²See also *See Victoria's Secret Stores, Inc. v. Epstein Contracting, Inc.*, 10th Dist. No. 01AP-896, 2002-Ohio-2009, at *4-5 (finding that Exclusion b. would preclude coverage whether claims were characterized as negligence or breach of contract), *appeal denied*, 96 Ohio St.3d 1494, 2002-Ohio-4534, 774 N.E.2d 762; *Bosak v. H & R Mason Contractors, Inc.*, 8th Dist. No. 86237, 2005-Ohio-6732 at ¶22 (finding that breach of contract claim in defective construction litigation was expressly excluded); *Akers v. Beacon Ins. Co. of Am.*, 3rd Dist. No. 9-86-16, 1987 Ohio App. LEXIS 8550, at *9-10; *LISN, Inc. v. Comm. Union Ins. Cos.*, 83 Ohio App.3d 625, 631, 615 N.E.2d 650 (9th Dist. 1992); *State Auto. Mut. Ins. Co. v. Fairfield Homes, Inc.*, 5th Dist. No. 11-CA-89, 1989 Ohio App. LEXIS 4351, *7-10; *Nationwide Mut. Ins. Co. v. CPB Int'l. Inc.*, 562 F.3d 591, 599 (3d Cir. (Pa.) 2009)("[T]he CGL policy clearly excludes from coverage breaches of contract"); *State Farm Fire & Cas. Co. v. Tillerson*, 334 Ill. App.3d 404, 410, 777 N.E.2d 986 (2002); *Global Gear & Mach. Co., Inc. v. Capitol Indemn. Corp.*, No. 5:07-CV-00184, 2010 U.S. Dist. LEXIS 86745, *13-14 (W.D. Ky. Aug. 23, 2010); *Trinity Universal Ins. Co. v. Turner Funeral Home, Inc.*, Nos. 1:02-CV-231, 1:02-CV-298, 1:03-CV-083, 2003 U.S. Dist. LEXIS 27205, *24-25 (E.D. Tenn. Dec. 12,

Under the undisputed facts, as a matter of law, the claims against CAS can only sound in contract and cannot sound in tort. There is no evidence that CAS' contractual obligations are subject to either of the exceptions to Exclusion b. Accordingly, Exclusion b. is a complete bar to coverage in this case.

Based upon the foregoing, this Court should answer Certified Question No. II --"yes"-- because contractual liability was the sole basis for the damages claimed against CAS and the contractual liability exclusion bars all such damages.

CONCLUSION

By answering these certified questions, the Court will clarify the boundaries between the types of risks and losses covered by common, standardized CGL policies and those that remain with construction businesses, property owners, bond issuers and first party property insurers. It will not eliminate coverage litigation related to construction defect claims, but it will reduce such litigation by establishing that where a construction business simply fails to deliver what was promised and the property owner sues to receive the benefit of its bargain there is no coverage under standard CGL policies. In this regard, it will help insureds, insurers and local courts to be able to more efficiently address increasingly complicated construction defect claims.

2003); *Union Ins. Co. v. Williams Contracting, Inc.*, No. 3:05-CV-00075, 2006 U.S. Dist. LEXIS 35919, *14-20 (W.D. Va. June 2, 2006).

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*724 F. Supp. 2d 847, *; 2010 U.S. Dist. LEXIS 73450, ***

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Younglove Construction, LLC, Plaintiff v. PSD Development, LLC, et al., Defendants

Case No. 3:08CV1447

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

724 F. Supp. 2d 847; 2010 U.S. Dist. LEXIS 73450

July 21, 2010, Filed

SUBSEQUENT HISTORY: Motion to strike denied by Younglove Constr., LLC v. PSD Dev., LLC, 2010 U.S. Dist. LEXIS 91954 (N.D. Ohio, Sept. 3, 2010)
 Vacated by, On reconsideration by, Summary judgment granted by, Summary judgment denied by Younglove Constr., LLC v. PSD Dev., LLC, 2011 U.S. Dist. LEXIS 9029 (N.D. Ohio, Jan. 31, 2011)

CASE SUMMARY

PROCEDURAL POSTURE: Third-party defendant insured subcontractor claimed that intervening defendant insurer had to defend and indemnify the insured in the instant litigation under the insured's insurance contract with the insurer. The insurer moved for summary judgment on its duty to defend and indemnify. The insured counter-moved for summary judgment on the insurer's duty to defend. The insurer also moved to certify two questions to the Ohio Supreme Court.

OVERVIEW: The court held that even if the insured's policy covered defective construction, the contractual liability exclusion in the policy removed such claims from coverage. Consequential damages, however, even those resulting from defective construction, were covered by the insured's insurance policy. The main question, then, was whether any of the exclusions that the insurer cited unambiguously removed such consequential damages claims from coverage. The court found that the contractual liability exclusion, damage to property exclusion, damage to your product exclusion, damage to your work exclusion, damage to impaired property or property not physically injured exclusion, professional services exclusion did not "clearly and indisputably" eliminate the insured's coverage for at least the consequential damage claims of defendant. Thus, the insurer had an absolute duty to defend the insured in the instant litigation. Having found that the insurer had an absolute duty to

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defend the insured, the court held that it would be premature to speculate on indemnification based on an incomplete set of facts.

OUTCOME: The court granted the insured's summary judgment motion and denied the insurer's summary judgment motion regarding the insurer's duty to defend, denied the insurer's summary judgment motion regarding its duty to indemnify, and denied the insured's motion for certification.

CORE TERMS: coverage, insured, bin, summary judgment, duty to defend, property damage, subcontractor, insurer, contractual liability, consequential, insurance policy, defective construction, consequential damages, indemnify, insure, damages claims, contractor, impaired, citation omitted, professional services, sub-exclusions, preclude coverage, roof, real property, physically injured, engineering, meanwhile, policy coverage, moving party, breach of contract

LEXISNEXIS® HEADNOTES

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Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview

HN1 Federal jurisdiction once acquired on the ground of complete diversity of citizenship is unaffected by the subsequent intervention of a party whose presence is not essential to a decision of the controversy between the original parties. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Absence of Essential Element of Claim

HN2 A party is entitled to summary judgment on motion under Fed. R. Civ. P. 56 when the opposing party fails to show the existence of an essential element for which that party bears the burden of proof. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Nonmovants

HN3 On a motion for summary judgment, the moving party must first show the absence of a genuine issue of material fact. Once the moving party meets that initial burden, the non-moving party must then set forth specific facts showing that there is a genuine issue for trial. Fed. R. Civ. P. 56(e). The non-moving party cannot rest on its pleadings or merely reassert its previous allegations. Rule 56(e) requires the non-moving party to go beyond the unverified pleadings and present evidence in support of its position. More Like This Headnote

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > Appropriateness

HN4 In deciding a motion for summary judgment, a court accepts the non-moving party's evidence as true and construes the evidence in the light most favorable to the non-moving party. A court shall grant summary judgment only if the materials offered in support of the motion show that there is no genuine issue as to any material facts, and that the moving party is thus entitled to summary judgment as a matter of law. More Like This Headnote

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Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview 

HN5 A federal court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits. Where no dispute exists regarding choice of law, federal courts apply the law of the forum state. More Like This Headnote

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend 

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Indemnification 

Insurance Law > General Liability Insurance > Obligations > Defense 

Insurance Law > General Liability Insurance > Obligations > Indemnification 

HN6 The duties to defend and indemnify are distinct, and an insurer may have to defend an insured, even if it ultimately need not indemnify the insured. More Like This Headnote | *Shepardize*: Restrict By Headnote

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend 

Insurance Law > General Liability Insurance > Obligations > Defense 

HN7 Where the insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim. An insurer, therefore, has an absolute duty to defend an action when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy. Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage. The rule applies to all insurance policies, even in the absence of such language. More Like This Headnote | *Shepardize*: Restrict By Headnote

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend 

Insurance Law > General Liability Insurance > Obligations > Defense 

HN8 The reason for the rule that an insurer has an absolute duty to defend an action when the complaint contains an allegation in any one of its claims that could arguably be covered by the insurance policy is that an insurer's duty to defend may arise at a point subsequent to the filing of the complaint, and under the Federal Rules of Civil Procedure the dimensions of a lawsuit are not determined by the pleadings because the pleadings are not a rigid and unchangeable blueprint of the rights of the parties. More Like This Headnote | *Shepardize*: Restrict By Headnote

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend 

Insurance Law > General Liability Insurance > Obligations > Defense 

HN9 An insurer need not defend any action or claims within the complaint when all the claims are clearly and indisputably outside the contracted coverage. More Like This Headnote

Insurance Law > Claims & Contracts > Good Faith & Fair Dealing > Duty to Defend 

00003

Insurance Law > General Liability Insurance > Obligations > Defense 

HN10  If any arguable basis for coverage exists, an insurer has an absolute duty to defend. More Like This Headnote

Insurance Law > Claims & Contracts > Policy Interpretation > Ambiguous Terms > Construction Against Insurers 

Insurance Law > Claims & Contracts > Policy Interpretation > Exclusions 

HN11  Interpretation of an insurance policy is a question of law. If policy provisions are susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured, and an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded. More Like This Headnote

Civil Procedure > Appeals > Appellate Jurisdiction > Certified Questions 

HN12  The Rules of Practice of the Supreme Court of Ohio permit it to answer questions a federal court certifies to it if the court find there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of the Ohio Supreme Court. Ohio Sup. Ct. Prac. R. XVIII, § 1. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN13  Business risks are risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage. Business risk exclusions in a commercial general liability policy, and this general concept, are expressed in a number of different ways but are always a function of the perception that an insured should not be able to look to its commercial general liability insurance policy to protect it against the costs of having to repair or replace its work because it was improperly performed in the first place. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN14  At its core, the business risk concept expresses a principle that general liability coverage is designed to protect against the unpredictable, potentially unlimited liability that can result from business accidents. Commercial general liability coverage is not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damage person bargained. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN15  Business risk exclusions in a commercial general liability policy are intended to insure business risks which are outside of the insured's control, such as accidental injury to persons or property, and not those which are within the control of the insured, such as the risk of not performing well and the risk of causing personal injury and property damage. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > General Overview 

HN16  Commercial general liability policies do not insure an insured's work itself; rather, the policies generally insure consequential risks that stem from the insured's

work. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN17  General business risk exclusions in a commercial general liability insurance policy do not defeat an insurer's duty to defend if there are allegations of "collateral" damage, though the exclusions remove the business risks themselves from coverage. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN18  Commercial general liability policies are intended to insure the risks of an insured causing damage to other persons and their property, but they are not intended to insure the risks of the insured causing damages to the insured's own work. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN19  Business risk exclusions in a commercial general liability insurance policy deny coverage for faulty work itself, but not for damage resulting from faulty work. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN20  General liability coverage analysis largely turns on the damages sought. If the damages are for the insured's own work, there is generally no coverage. If the damages are consequential and derive from the work the insured performed, coverage generally will lie. The underwriting intent is to exclude coverage for the contractor's business risks, but provide coverage for unanticipated consequential damages. More Like This Headnote | *Shepardize*: Restrict By Headnote

Insurance Law > General Liability Insurance > Exclusions > General Overview 

HN21  An exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN22  A damage to your product exclusion in a commercial general liability insurance policy operates to bar coverage for damage to anything a contractor installs but does not apply to damage to the underlying support or its contents allowed by or caused by a contractor's negligence. Ohio courts have clarified, however, that the work product exclusion does not apply where the damage to the insured's product is caused by another of its products. Structures attached to land arguably constitute "real property" excepted from definition as "your product." More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Work Product 

HN23  A damage to your work exclusion is the exclusion that addresses coverage for property damage to completed work performed by or on behalf of the named insured. It applies only to work within the product-completed operations hazard and, thus, has no bearing on works in progress. This exclusion does not apply where the "damaged work" at issue was performed by the insured's subcontractors. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > General Overview 

00005

HN24 ✎ A professional services exclusion in a commercial general liability insurance policy does not apply to those damages resulting from an insured's construction activities, including those performed on its behalf by subcontractors, because construction activities are not professional services. [More Like This Headnote](#)

[Insurance Law](#) > [General Liability Insurance](#) > [Exclusions](#) > [General Overview](#) 🗨

HN25 ✎ Even though a professional services exclusion in a commercial general liability insurance policy removes from coverage the rendering of professional services including plans, designs and specifications, this exclusion does not remove coverage for the other construction or consequential damages claims. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Insurance Law](#) > [General Liability Insurance](#) > [Obligations](#) > [Indemnification](#) 🗨

HN26 ✎ An insurer's duty to defend is separate and distinct from its duty to indemnify. Moreover, once a duty to defend is recognized, speculation about the insurer's ultimate obligation to indemnify is premature until facts excluding coverage are revealed during the defense of the litigation and the insurer timely reserves its rights to deny coverage. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

✎ Available Briefs and Other Documents Related to this Case:

[U.S. District Court Motion\(s\)](#)
[U.S. District Court Pleading\(s\)](#)
[Miscellaneous Expert Witness Filing\(s\)](#)

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JUDGES: James G. Carr, U.S. District Judge.

OPINION BY: James G. Carr

OPINION

[*849] ORDER

This is a contract dispute between a subcontractor and insurance company as to whether the subcontractor's policy requires the insurance company to defend and indemnify it in the instant litigation. Third-party defendant Custom Agri Systems, Inc. (Custom Agri) claims that intervening defendant Westfield Insurance Co. (Westfield) must defend and indemnify Custom Agri in the current litigation under Custom Agri's insurance contract with Westfield.

Jurisdiction is proper under 28 U.S.C. § 1332. ¹

FOOTNOTES

¹ Although both Custom Agri and Westfield are Ohio corporations, and thus not diverse, ^{HN1} federal jurisdiction once acquired on the ground of complete diversity of citizenship is unaffected by the subsequent intervention of a party whose presence is not essential to a decision of the controversy between the original parties[.]” *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 66 n.1, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996) (citing **[**3]** *Wichita R.R. & Light Co. v. Pub. Util. Comm'n of Kan.*, 260 U.S. 48, 54, 43 S. Ct. 51, 67 L. Ed. 124 (1922)).

Here, Westfield's intervention is not essential to the original controversy, so its presence does not eliminate federal jurisdiction over the instant case.

[*850] Pending are: 1) Westfield's motion for summary judgment on Westfield's duty to defend and indemnify Custom Agri [Doc. 115]; 2) Custom Agri's countermotion for summary judgment on Westfield's duty to defend Custom Agri [Doc. 148]; and 3) Westfield's motion to certify two questions of Ohio law to the Ohio Supreme Court [Doc. 159].

For the following reasons, Custom Agri's motion for summary judgment [Doc. 148] shall be granted, Westfield's summary judgment motion [Doc. 115] shall be denied, and Westfield's motion for certification [Doc. 159] shall be denied.

Background

On April 3, 2006, Younglove Construction, LLC (Younglove) entered into a contract with PSD Development, LLC (PSD). Under this contract, Younglove was to ensure design and construction of an animal feed manufacturing facility for PSD.

In turn, Younglove hired Custom Agri as a subcontractor to design and construct a steel grain bin for this project. Custom Agri then obtained the bin from Brock Grain **[**4]** Systems

(Brock), and subcontracted: 1) the design and installation of the cement foundation and discharge openings for the bin to Krietemeyer Silo (Krietemeyer); and 2) the erection of the bin to Jerry O'Conick.

Custom Agri completed its portion of the project, and the bin began operation in approximately October, 2007.

From late 2006 through 2007, a dispute developed between Younglove and PSD regarding the quality of materials and work performed, and regarding certain damages that PSD claimed flowed therefrom.

In late 2007, PSD informed Younglove that PSD was withholding partial payment because of the dispute.

In early 2008, Younglove filed a mechanic's lien against the project, and this litigation ensued when Younglove sued PSD for the balance of payments due.

PSD counterclaimed for damages from Younglove, and Younglove filed a third-party complaint against Custom Agri for contribution and indemnity. Custom Agri, in turn, filed similar complaints against its subcontractors and also demanded that Westfield defend and indemnify it in the instant litigation.

PSD asserts several claims possibly triggering Custom Agri's liability: 1) defective construction of the bin; 2) defective construction **[**5]** and/or installation of the foundation; 3) resultant damages from uneven settling of the foundation; 4) resultant damage to the bin due to it "bend [ing] out of shape"; 5) resultant damage to the "top edge and roof of the bin"; 6) financial damage from inability to use the bin; 7) improper and/or inadequate safety signage and warnings regarding the bin; and 8) resultant damage to the strength and durability of the entire facility from these issues. [Doc. 70-1, at 12-13 PP 31-39].

At all pertinent times, Westfield insured Custom Agri under a commercial general liability (CGL) policy.

[*851] Standard of Review

HN2 A party is entitled to summary judgment on motion under Rule 56 when the opposing party fails to show the existence of an essential element for which that party bears the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

HN3 The moving party must first show the absence of a genuine issue of material fact. *Id.* at 323.

Once the moving party meets that initial burden, the non-moving party "must [then] set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quoting Fed. R. Civ. P. 56(e)). The non-moving **[**6]** party cannot rest on its pleadings or merely reassert its previous allegations. Rule 56(e) "requires the non[-]moving party to go beyond the [unverified] pleadings" and present evidence in support of its position. *Celotex Corp.*, *supra*, 477 U.S. at 324.

HN4 In deciding a motion for summary judgment, a court accepts the non-moving party's evidence as true and construes the evidence in the light most favorable to the non-moving party. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 456, 112 S. Ct. 2072, 119 L. Ed. 2d 265 (1992). A court shall grant summary judgment only if the materials offered in support of the motion show that there is no genuine issue as to any material facts, and that the moving party is thus entitled to summary judgment as a matter of law. *Celotex Corp.*, *supra*, 477 U.S. at 323.

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Discussion

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FOOTNOTES

² **HNS** A federal court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). Where no dispute exists regarding choice of law, federal courts apply the law of the forum state. *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 764 (6th Cir. 2008) (observing that the forum state's law applies when parties fail to dispute **[**7]** choice of law).

Here, the parties do not dispute the application of Ohio law, so I apply Ohio law to this case.

The two questions at issue between Custom Agri and Westfield are whether Westfield must: 1) defend and, if so, 2) indemnify Custom Agri as to PSD's relevant claims in the instant litigation.

HNS The two duties are distinct, and an insurer may have to defend an insured, even if it ultimately need not indemnify the insured. *City of Sharonville v. Am. Employers Ins. Co. (Sharonville)*, 109 Ohio St. 3d 186, 189, 2006 Ohio 2180, 846 N.E.2d 833(2006).

I. Westfield's Duty to Defend

The Ohio Supreme Court has stated: **HNT** "[W]here the insurer's duty to defend is not apparent from the pleadings in the action against the insured, but the allegations do state a claim is potentially or arguably within the policy coverage, or there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded, the insurer must accept the defense of the claim." *Sanderson v. Ohio Edison Co.*, 69 Ohio St. 3d 582, 585-86, 1994 Ohio 379, 635 N.E.2d 19 (1994) (quoting *City of Willoughby Hills v. Cincinnati Ins. Co. (Willoughby Hills)*, 9 Ohio St. 3d 177, 180, 9 Ohio B. 463, 459 N.E.2d 555 (1984)). An insurer, therefore, "has an absolute duty to defend an action when the complaint contains **[**8]** an allegation in any one of its claims that could arguably be covered by the insurance policy[.]" *Sharonville, supra*, 109 Ohio St. 3d at 189 (internal citation omitted). ³ **[*852]** "Once an insurer must defend one claim within a complaint, it must defend the insured on all the other claims within the complaint, even if they bear no relation to the insurance-policy coverage." *Id.* (internal citation omitted).

FOOTNOTES

³ Courts formulating and applying this broad duty to defend rule originally did so in the context of insurance policies obligating the insurer to defend suits "even if any of the allegations of the suit are groundless, false or fraudulent." *E.g., Sanderson, supra*, 69 Ohio St. 3d at 586.

The Ohio Supreme Court has recently clarified that the rule applies to all insurance policies, even in the absence of such language. *Cincinnati Ins. Co. v. Colelli & Assocs.*, 95 Ohio St. 3d 325, 325-26, 2002 Ohio 2214, 767 N.E.2d 717 (2002) (limiting to its facts *Preferred Risk Ins. Co. v. Gill*, 30 Ohio St. 3d 108, 114, 30 Ohio B. 424, 507 N.E.2d 1118 (1987), which had held that a narrower duty to defend existed in the absence of the "groundless, false or fraudulent" insurance policy language).

HNS The reason for this rule is that an insurer's duty to defend "may arise at a point **[**9]** subsequent to the filing of the complaint[.]" and "under the Federal Rules of Civil Procedure the dimensions of a lawsuit are not determined by the pleadings because the

pleadings are not a rigid and unchangeable blueprint of the rights of the parties." *Willoughby Hills, supra*, 9 Ohio St. 3d at 179 (internal quotation and citation omitted).

HN9 An insurer "need not defend any action or claims within the complaint[, however,] when all the claims are clearly and indisputably outside the contracted coverage." *Ohio Gov't Risk Mgmt. Plan v. Harrison*, 115 Ohio St. 3d 241, 246, 2007 Ohio 4948, 874 N.E.2d 1155 (2007).

HN10 If any arguable basis for coverage exists, therefore, Westfield has an absolute duty to defend Custom Agri. *Sharonville, supra*, 109 Ohio St. 3d at 189. ⁴

FOOTNOTES

⁴ **HN11** Interpretation of an insurance policy is a question of law. *Sharonville, supra*, 109 Ohio St. 3d at 187 (internal citation omitted). If policy provisions "are susceptible of more than one interpretation, they will be construed strictly against the insurer and liberally in favor of the insured[.]" and "an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded." *Id.*

A. Coverage

PSD is suing Younglove, and **[**10]** Younglove in turn suing Custom Agri, on two general theories relevant to disposition of these motions: 1) defective construction; and 2) consequential damages stemming from such defective construction. ⁵

FOOTNOTES

⁵ Although PSD's counts are for "breach of contract" and "breach of warranty," PSD's allegations also imply tort claims, which may also constitute "claim[s that are] potentially or arguably within the policy coverage, and [about which] there is some doubt as to whether a theory of recovery within the policy coverage has been pleaded[.]" *Sanderson, supra*, 69 Ohio St. 3d at 585-86. Such allegations are also relevant to potential coverage. *Id.*

1. Defective Construction

It is an open question under Ohio law whether defective construction claims fall under the auspices of a CGL policy like that Custom Agri has with Westfield. *Compare Erie Ins. Exch. v. Colony Dev. Corp. (Colony I)*, 136 Ohio App. 3d 406, 414, 736 N.E.2d 941 (10th Dist. 1999) (holding that such a policy does protect against such claims); *Ind. Ins. Co. v. Alloyd Insulation Co.*, 2002 Ohio 3916, 2002 WL 1770491, *4 (Ohio Ct. App. 2d Dist.) (same); *Cincinnati Ins. Co. v. G.L.H., Inc.*, 2008 Ohio 3853, 2008 WL 2940663, *7 (Ohio Ct. App. 6th Dist.) (same), *vacated on other grounds*, **[**11]** 2008 Ohio 5028, 2008 WL 4408597 (Ohio Ct. App. 6th Dist.), *with Heile v. Herrmann*, 136 Ohio App. 3d 351, 354, 736 N.E.2d 566 (1st Dist. 1999) (holding that such a policy does not protect against such claims); **[*853]** *Royal Plastics, Inc. v. State Auto. Mut. Ins. Co.*, 99 Ohio App. 3d 221, 225-26, 650 N.E.2d 180 (8th Dist. 1994) (same); *Env'tl. Exploration Co. v. Bituminous Fire & Marine Ins. Co. (Bituminous)*, 2000 Ohio App. LEXIS 4985, 2000 WL 1608908, *6 (Ohio Ct. App. 5th Dist.) (same); *Ohio Cas. Ins. Co. v. Hanna*, 120 Ohio St. 3d 1420, 2008 Ohio 6166, 897 N.E.2d 654, 2008 WL 2581675, *4 (Ohio Ct. App. 9th Dist.) (same); *Westfield Ins. Co. v. R.L. Diorio Custom Homes, Inc. (Diorio)*, 187 Ohio App. 3d 377, 2010 Ohio 1007, 932 N.E.2d 369, 2010 WL 918030, *3 (Ohio Ct. App. 12th Dist.) (same).

I need not resolve this question, however, because I find that even assuming *arguendo* that Custom Agri's policy covers defective construction, the contractual liability exclusion removes such claims from coverage. See Part I.B.1, *infra*. ⁶

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FOOTNOTES

6 It is because the contractual liability exclusion removes such claims from coverage that I must deny Westfield's request that I certify questions to the Ohio Supreme Court. [Doc. 159].

HN12 The Rules of Practice of the Supreme Court of Ohio permit it to answer questions I certify to it if I "find [] there is a question of Ohio law that may be determinative [****12**] of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." Ohio Sup. Ct. Prac. R. XVIII, § 1.

Here, however, Westfield's first question is not determinative of the proceeding in light of my interpretation of the contractual liability exclusion. Westfield's second question, meanwhile, does not raise a question that merits certification either, because: 1) the contractual liability exclusion's interpretation is clear from the exclusion's language; and 2) even if answered in the affirmative -- as I do -- it is not determinative of the proceeding. See, e.g., *Super Sulky, Inc. v. U.S. Trotting Ass'n*, 174 F.3d 733, 744 (6th Cir. 1999).

Westfield's motion for certification [Doc. 159] is, therefore, denied.

Custom Agri's insurance policy thus does not provide coverage for defective construction claims.

2. Consequential Damages

Consequential damages, however, even those resulting from defective construction, are covered by Custom Agri's insurance policy. See *Heile, supra*, 136 Ohio App. 3d at 354 (holding as not covered the defective construction claims, because "[t]he damages alleged by [the property owner] all relate to [the insured]'s (or his subcontracters') [****13**] own work, not to any consequential damages stemming from that work" (emphasis added)); *Royal Plastics, supra*, 99 Ohio App. 3d at 225-26 (same); *Bituminous, supra*, 2000 Ohio App. LEXIS 4985, 2000 WL 1608908, *6 (same); *Hanna, supra*, 120 Ohio St. 3d 1420, 2008 Ohio 6166, 897 N.E.2d 654, 2008 WL 2581675, *4 (same); *Diorio, supra*, 2010 Ohio 1007, 2010 WL 918030, *3 (same).

The main question, then, is whether any of the exclusions that Westfield cites unambiguously removes such consequential damages claims from coverage.

B. Exclusions

Westfield points to six exclusions in Custom Agri's policy that Westfield claims apply and remove PSD's claims from coverage under Custom Agri's policy. All but one -- the professional services exclusion -- constitute what courts generally refer to as "business risk" exclusions.

HN13 "Business risks" are "risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." *Heile, supra*, 136 Ohio App. 3d at 353. These exclusions--and this general concept--are "expressed in a number of different ways but [are] always a function of the perception that an insured should not be able to look to its [CGL] policy to protect it against the costs of having to repair or replace its work because [****14**] it was improperly performed in the first place." *Erie Ins. Exch. v. Colony Dev. Corp. (Colony II)*, 2003 Ohio 7232, 2003 WL 23096010, *5 (Ohio Ct. App.).

[***854**] Such exclusions -- and the doctrine underlying them -- moreover:

ha[ve] become a fixture of insurance coverage law. **HN14** At its core, the "business risk" concept expresses a principle that general liability coverage is designed to

protect against the unpredictable, potentially unlimited liability that can result from business accidents. CGL coverage is not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damage person bargained.

2003 Ohio 7232, [WL] at *4 (internal quotation and citation omitted); *see also Westfield Ins. Co. v. Riehle*, 113 Ohio App. 3d 249, 254, 680 N.E.2d 1025 (1996) ("Generally, Ohio courts have found that **HN15** such standard exclusions are intended to insure business risks which are outside of the insured's control, such as accidental injury to persons or property, and not those which are within the control of the insured, such as the risk of not performing well and the risk of causing personal injury and property damage.").

Put differently, **HN16** CGL policies "do not insure an insured's work itself; rather, the **[**15]** policies generally insure *consequential* risks that stem from the insured's work." *Heile, supra*, 136 Ohio App. 3d at 353 (emphasis added).

1. Contractual Liability Exclusion

The first exclusion Westfield claims applies is that for "contractual liability," which excludes: "'property damage' for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages: (1) That the insured would have in the absence of the contract or agreement[.]" [Doc. 115-10, at 3].

Westfield points to several cases holding that the contractual liability exclusion prevents recovery for claims premised on a breach of contract. *See LISN, Inc. v. Commercial Union Ins. Cos.*, 83 Ohio App. 3d 625, 631, 615 N.E.2d 650 (1992); *Victoria's Secret Stores, Inc. v. Epstein Contr., Inc. (In re Victoria's Secret Stores)*, 2002 Ohio 2009, 2002 WL 723215, *4-5 (Ohio Ct. App.); *Akers v. Beacon Ins. Co. of Am.*, 1987 Ohio App. LEXIS 8550, 1987 WL 16260, *3 (Ohio Ct. App.).

Custom Agri, meanwhile, identifies a single case that it purports holds the opposite: *Nat'l Eng'g & Contr. Co. v. United States Fid. & Guar. Co. (National Engineering)*, 2004 Ohio 2503, 2004 WL 1103993, *6 (Ohio Ct. App.).

The cases the parties **[**16]** cite are not directly on point. In *LISN, Akers* and the related case of *State Automobile Mutual Insurance Co. v. Fairfield Homes, Inc.*, 1989 Ohio App. LEXIS 4351, 1989 WL 139822, *3 (Ohio Ct. App.), Ohio courts merely held that the contractual liability exclusion does not *expand* coverage beyond the scope of the coverage granting provisions. *LISN, supra*, 83 Ohio App. 3d at 631-32; *Akers, supra*, 1987 Ohio App. LEXIS 8550, 1987 WL 16260, *3. In *Victoria's Secret, supra*, 2002 Ohio 2009, 2002 WL 723215, *3, meanwhile, the court discussed the application of the contractual liability exclusion, but under New Jersey law.

Only *National Engineering* guides my interpretation of this exclusion. The court there held that **HN17** general "business risk exclusions do not defeat an insurer's duty to defend if there are allegations of 'collateral' damage[.]" though the exclusions remove the business risks themselves from coverage. 2004 Ohio 2503, 2004 WL 1103993, *6.

Many Ohio courts have recognized this distinction in interpreting insurance policy business risk exclusions. *See, e.g., Heile, supra*, 136 Ohio App. 3d at 353 (stating that CGL policies "do not insure an insured's work itself; rather, the policies generally insure consequential **[*855]** risks that stem from the insured's work"); *Beaverdam Contracting, Inc. v. Erie Ins. Co.*, 2008 Ohio 4953, 2008 WL 4378153, *5 (Ohio Ct. App.) **[**17]** ("Courts have generally concluded that **HN18** [CGL] policies are intended to insure the risks of an insured causing damage to other persons and their property, but they are not intended to insure the risks of the insured causing damages to the insured's own work."); *Colony II, supra*, 2003 Ohio 7232, 2003 WL 23096010, *4-5 (holding that **HN19** business risk exclusions denied coverage for faulty work itself, but not

for damage resulting from faulty work); *Holub Iron & Steel Co. v. Mach. Equip. & Salvage Co.*, 1986 Ohio App. LEXIS 7540, 1986 WL 7762, *2 (Ohio Ct. App.) ("For instance, if a contractor negligently installs a roof which must be removed and replaced, he must bear the cost of removing the faulty roof and installing a new one but the insurance will pay for any damage allowed or caused to the underlying building or its contents.").

The court in *Indiana Insurance Co.* put it most clearly:

HN20 Coverage analysis largely turns on the damages sought. If the damages are for the insured's own work, there is generally no coverage. If the damages are consequential and derive from the work the insured performed, coverage generally will lie. The underwriting intent is to exclude coverage for the contractor's business risks, but provide coverage for **[**18]** unanticipated consequential damages.

2002 Ohio 3916, 2002 WL 1770491, *3.

While the court in *National Engineering* never specifically referenced the contractual liability exclusion, the thrust of its holding about business risks generally -- echoed in the cases cited immediately above -- applies squarely to this exclusion. The exclusion's language removes from coverage claims that seek "damages by reason of the assumption of liability in a contract [.]" [Doc. 115-10, at 3]. Such damages are only those for explicit breaches of contract, not for damages stemming therefrom. This narrow reading is required due to the Ohio Supreme Court's instruction that **HN21** "an exclusion in an insurance policy will be interpreted as applying *only to that which is clearly intended to be excluded.*" *Sharonville, supra*, 109 Ohio St. 3d at 189 (emphasis added).

PSD's breach of contract actions against Younglove -- and possibly Custom Agri also -- thus fall squarely under the contractual liability exclusion and are excluded from coverage, because they seek "damages by reason of the assumption of liability in a contract[.]" **[**19]** [Doc. 115-10, at 3]. PSD's consequential damage claims, however, are not excluded from coverage under this exclusion.

2. Damage to Property Exclusion

The second exclusion Westfield claims applies is that for "Damage to Property," which excludes:

"[p]roperty damage" to:

....

(5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired or replaced because "your work" ⁷ was incorrectly performed on it.

[Doc. 115-10, at 5-6].

FOOTNOTES

⁷ The policy defines "your work" as: "(1) Work or operations performed by you or on your behalf; and (2) Materials, parts or equipment furnished in connection with such work or operations." [Doc. 115-10, at 17].

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The policy, however, states: "Paragraph (6) of this exclusion does not apply to [*856] 'property damage' included in the 'pro ducts-completed operations hazard.'" [*Id.*, at 6]. It defines the "pro ducts-completed operations hazard" as:

[i]nclud[ing] all "bodily injury" and "property damage" occurring away from premises you own or rent and [**20] arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

[*Id.*, at 16 (emphasis added)].

Westfield concedes that "[b]oth [sub-]exclusions apply to 'works in progress.'" [Doc. 115-4, at 12 (internal citation omitted)]. Westfield nonetheless argues that these sub-exclusions apply because "all such 'property damage' would be deemed to occur at the time Younglove and Custom Agri were working on the Project-which was the moment of the first exposure to injurious conditions." [*Id.*, at 13].

Custom Agri responds that the property damage PSD identifies occurred after construction of the bin ended and PSD put it to use.

Sub-exclusion [**21] (5) only applies when the alleged damages occur while the insured "[is] performing operations." [Doc. 115-10, at 5]. Sub-exclusion (6), meanwhile, only applies when the alleged damages occur before the insured has completed or relinquished possession of the work. [Doc. 115-10, at 6, 16]. Ohio courts have consequently held that both of these sub-exclusions apply only to "works in progress." *E.g.*, *Spears v. Smith*, 117 Ohio App. 3d 262, 266, 690 N.E.2d 557 (1996).

In *Spears*, the court held that the sub-exclusions did not apply because "damage to those portions of the home built by subcontractors [] did not surface until after the Spearses began residing in their new home." *Id.* In *I.G.H. II, Inc. v. Spilis*, 2007 Ohio 2258, 2007 WL 1378379, *4 (Ohio Ct. App.), by contrast, the court held that these sub-exclusions precluded coverage when the insured killed numerous lawns by misapplying pesticide, notwithstanding the fact that the property damage took time to show.

Here, like the house damage in *Spears* and unlike the lawn damage in *I.G.H. II*, the alleged consequential damage potentially occurred after Custom Agri completed its work and turned the bin over to PSD. PSD's amended counterclaim [**22] alleges that the bin was damaged when it "settled unevenly[.]" [Doc. 70-1, at 13 P 33]. PSD further alleges that defective elements of the bin "caused the bin to bend out of shape, which has in turn caused damage to the top edge and roof of the bin."

[*857] These claims demonstrate that at least these consequential damages arguably occurred after Custom Agri turned over the bin to PSD. The "damage to property" exclusion thus

does not preclude coverage for at least these claims.

3. Damage to Your Product Exclusion

The third exclusion Westfield claims applies is that for "Damage to Your Product," which excludes: "'[p]roperty damage' to 'your product' arising out of it or any part of it." [Doc. 115-10, at 6].

The policy defines "your product" as, in relevant part: "(1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by . . . you; [and] . . . (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products." [*Id.*, at 17].

Westfield seems to point to this exclusion -- as well as the next two -- to show that Custom Agri's policy does not cover damage to Custom Agri's product or work, because **[**23]** a CGL policy is not intended to insure "business risks." *Riehle, supra*, 113 Ohio App. 3d at 254.

Custom Agri responds that, while this -- and the next -- exclusion may "preclude coverage for property damage to Custom Agri's product or work itself[.]" it "do[es] not preclude coverage for property damage incurred by PSD arising out of Custom Agri's product or work[.]" [Doc. 148, at 15 (emphasis added)].

HN22 This exclusion "operates to bar coverage for damage to anything the contractor installs but does not apply to damage to the underlying support or its contents allowed by or caused by [a] contractor's negligence." *Holub Iron & Steel Co., supra*, 1986 Ohio App. LEXIS 7540, 1986 WL 7762, *2. Ohio courts have clarified, however, that the work product exclusion does not apply where the "damage to the insured's product [is] caused by another of its product[s]." *Ferro Corp. v. Blaw Knox Food & Chem. Equip. Co.*, 2002 Ohio 5472, 2002 WL 31260495, *4 (Ohio Ct. App.).

Two Ohio courts of appeal, moreover, have held that structures attached to land arguably constitute "real property" excepted from definition as "your product." *Dublin Bldg. Sys. v. Selective Ins. Co.*, 172 Ohio App. 3d 196, 203-04, 2007 Ohio 494, 874 N.E.2d 788 (2007); *Cincinnati Ins. Co., supra*, 2008 Ohio 3853, 2008 WL 2940663, *7. **[**24]** In *Dublin Building Systems*, the court held that the "your product" exclusion did not prevent coverage for structures attached to the land, because "the term 'real property' is generally recognized as including both land and the structures affixed thereto." 172 Ohio App. 3d at 204.

Here, as in *Dublin Building Systems*, the concrete foundation and bin were allegedly and arguably attached to the real property, and thus damages to those items do not fall within the "your product" exclusion. The alleged consequential damage caused to other Custom Agri or PSD products -- such as the roof and sides of the bin, and the financial damages from inability to store corn in the bin -- are also not precluded by this exclusion. See *Riehle, supra*, 113 Ohio App. 3d at 254; *Ferro Corp., supra*, 2002 Ohio 5472, 2002 WL 31260495, *4; *Holub Iron & Steel Co., supra*, 1986 Ohio App. LEXIS 7540, 1986 WL 7762, *2.

The "your product" exclusion thus does not preclude coverage for PSD's claims against Custom Agri for such damages or consequential damages.

4. Damage to Your Work Exclusion

The fourth exclusion Westfield claims applies is that for "Damage to Your Work," which excludes: "'[p]roperty damage' to 'your work' arising out of it or any part of it and included **[**25]** in the 'products-completed **[*858]** operations hazard.'" [Doc. 115-10, at 6].

This exclusion, however, "does not apply if the damaged work or the work out of which the damages arises was performed on your behalf by a subcontractor." [*Id.*].

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HN23 This "is the exclusion that addresses coverage for property damage to completed work performed by or on behalf of the named insured." *Spears, supra*, 117 Ohio App. 3d at 267. It "appl[ies] only to work within the product-completed operations hazard [and thus] . . . has no bearing on works in progress." *Id.* The court in *Spears*, however, found that this exclusion did not apply because "[t]he 'damaged work' at issue . . . was performed by [the insured]'s subcontractors." *Id.* at 268; *see also Colony I, supra*, 136 Ohio App. 3d at 416 (holding inapplicable this exclusion where "subcontractors performed work on behalf of [the insured]"); *Cincinnati Ins. Co., supra*, 2008 Ohio 3853, 2008 WL 2940663, *7 (rejecting applicability of the "your work" exclusion where "G.L.H. submitted evidence in its opposition to summary judgment that some of the alleged damage was caused by work performed by subcontractors"); *Hanna, supra*, 120 Ohio St. 3d 1420, 2008 Ohio 6166, 897 N.E.2d 654, 2008 WL 2581675, *7 (rejecting applicability of the "your work" ****26** exclusion where the insured damaged a subcontractor's work); *Colony II, supra*, 2003 Ohio 7232, 2003 WL 23096010, *7 (same); *Acme Steak Co. v. Great Lakes Mech. Co.*, 2000 Ohio 2566, 2000 WL 1506199, *8 (Ohio Ct. App.) (same).

Here, as in *Spears, Cincinnati Insurance, Hanna, Colony I* and *Colony II*, the "your work" exclusion's subcontractor exception applies. Custom Agri subcontracted to: 1) Brock to provide the allegedly defective grain bin; 2) Krietemeyer for design and installation of the foundation; and 3) O'Conick for erection of the bin. The damages PSD asserts thus at least arguably arise out of work that subcontractors performed for Custom Agri. Other, consequential, damages also possibly stem from Custom Agri's work, and conceivably do not regard simply Custom Agri's work, but third-party preexisting property. *Colony I, supra*, 136 Ohio App. 3d at 416.

The conclusion that this exclusion does not bar coverage is especially justified in light of a CGL policy's intent to insure against "business risks," but not consequential damages thereto. *E.g., Heile, supra*, 136 Ohio App. 3d at 353; *Riehle, supra*, 113 Ohio App. 3d at 254.

The "your work" exclusion thus does not preclude coverage for PSD's subcontractor-derivative ****27** or consequential damage claims against Custom Agri.

5. Damage to Impaired Property or Property Not Physically Injured Exclusion

The fifth exclusion Westfield claims applies is that for "Damage to Impaired Property or Property Not Physically Injured," which excludes:

"[p]roperty damage" to "impaired property" ⁸ or property that has not been physically injured, arising out of:

[*859] (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.

[Doc. 115-10, at 6].

FOOTNOTES

⁸ The policy defines "impaired property" as:

tangible property, other than "your product" or "your work," that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

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b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by:

a. The repair, replacement, adjustment or removal of "your product" or "your work;" or

b. Your fulfilling the terms of the contract or agreement.

[Doc. 115-10, at 14].

This exclusion, however, "does ****28** 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." [*Id.*].

For this exclusion to apply, therefore, there must be property damage either to: 1) physically uninjured property; or 2) "impaired property," which is "tangible property, other than 'your product' or 'your work.'" [*Id.*, at 6, 14].

The court in *Westfield Insurance Co. v. Coastal Group, Inc.*, 2006 Ohio 153, 2006 WL 120041, *4 (Ohio Ct. App.), held that the exclusion applied and property was not physically injured where an insured "claimed 'property damage' in the form of loss of use of her buildings." The court excluded the insured's other claims under the "impaired property" prong of this exclusion because the insured faced solely "breach of contract claim[s]" involving tangible property unusable because of those contractual failures. *Id.*

In *Acme Steak Co.*, *supra*, 2000 Ohio 2566, 2000 WL 1506199, *9, meanwhile, the court held that this exclusion did not apply where the insured faced claims cognizable under other theories than simply breach of contract -- namely, for collateral damages.

Here, like *Acme Steak* and unlike *Coastal Group*, there ****29** was arguably property damage to physically injured property, and also collateral damage not encompassed by breach of contract claims. PSD's consequential damage claims against Custom Agri thus fall outside the scope of this exclusion.

This exclusion does not apply also for another reason: The property damage to the foundation and bin potentially arose out of "sudden and accidental physical injury" [Doc. 115-10, at 6] after PSD put the products to their intended use. In *United Steel Fabricators, Inc. v. Fidelity & Guaranty Insurance Underwriters, Inc.*, 1993 Ohio App. LEXIS 1422, 1993 WL 69258, *3 (Ohio Ct. App.), the court held that the "impaired property" exclusion did not prevent coverage because cracks in the joints of abridge arguably arose "suddenly" and "accidentally" after the insured put the bridge to use.

Similarly, here the settling of the foundation and the damage to the roof and bin potentially occurred suddenly and accidentally after PSD put the bin to use.

The "impaired property" exclusion thus does not preclude coverage for PSD's consequential damage claims against Custom Agri.

6. Professional Services Exclusion

The sixth exclusion Westfield claims applies is that for "Contractors -- Professional Liability," ****30** which excludes:

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"property damage" . . . arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:

- a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and
- b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in [*860] connection with construction work your perform.

[Doc. 115-11, at 11].

The insurance policy then states that "professional services" include: "a. Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders, or drawings and specifications; and b. Supervisory or inspection activities performed as part of any related architectural or engineering activities." [*Id.*].

The policy explicitly notes, however: "Professional services do *not* include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor." [*Id.* (emphasis added)].

Clarifying this distinction, [**31] Ohio courts have noted that ^{HN24} "this exclusion does not apply to those damages resulting from [an insured]'s construction activities, including those performed on its behalf by subcontractors [, because c]onstruction activities are not professional services." *Colony I, supra*, 136 Ohio App. 3d at 417.

The exception to this exclusion quoted above echoes this distinction, and Westfield admits as much in its motion for summary judgment. [Doc. 115-4, at 16 ("Although the Professional Liability Exclusion does not generally apply to construction activities, it does apply to damages due to design of the Bin.")].

^{HN25} Even though the professional services exclusion therefore removes from coverage "the rendering of professional services including plans, designs and specifications," *Gen. Accident Ins. Co. v. Ins. Co. of N. Am.*, 69 Ohio App. 3d 52, 61, 590 N.E.2d 33 (1990), such as the design of the bin or foundation, this exclusion does not remove coverage for the other construction or consequential damages claims alleged against Custom Agri. *Colony I, supra*, 136 Ohio App. 3d at 417.

The "professional liability" exclusion thus does not preclude coverage for PSD's construction-based or consequential damage claims against [**32] Custom Agri.

7. Conclusion on Exclusions and Westfield's Duty to Defend

Having thus found that none of the exclusions Westfield identifies "clearly and indisputably" eliminates Custom Agri's coverage for at least PSD's consequential damage claims, *Harrison, supra*, 115 Ohio St. 3d at 246, I hold that Westfield has an absolute duty to defend Custom Agri in the instant litigation. *Sharonville, supra*, 109 Ohio St. 3d at 189 (internal citation omitted).

Custom Agri's motion for summary judgment on Westfield's duty to defend is, therefore, granted, and Westfield's motion on the same issue is denied.

II. Westfield's Duty to Indemnify

Westfield seeks summary judgment also on indemnification, arguing that its contract with Custom Agri precludes coverage for all of PSD's claims.

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Custom Agri responds that, so long as its claims are "arguably or potentially within the relevant policy's grant of coverage" such that Westfield's duty to defend attaches, discussion of indemnification prior to determination of the facts is premature. [Doc. 148, at 10].

Custom Agri is correct:

HN26 An insurer's duty to defend is separate and distinct from its duty to indemnify. . . . Moreover, once a duty to defend is recognized, **[**33]** speculation about the insurer's ultimate obligation to indemnify is premature until facts excluding coverage are revealed during the defense of **[*861]** the litigation and the insurer timely reserves its rights to deny coverage.

Colony I, supra, 136 Ohio App. 3d at 412-13; see also *WAS, Inc. v. Alea London, Ltd.*, 161 Ohio App. 3d 111, 113, 2005 Ohio 2533, 829 N.E.2d 727(2005).

Having found that Westfield has an absolute duty to defend Custom Agri in this action, I believe it would be premature for me to speculate on indemnification based on an incomplete set of facts.

Westfield's motion for summary judgment on indemnification is therefore denied, without prejudice.

Conclusion

For the foregoing reasons, it is hereby:

ORDERED THAT:

1. Custom Agri's countermotion for summary judgment [Doc. 148] be granted and Westfield's motion for summary judgment [Doc. 115] be denied regarding Westfield's duty to defend;
2. Westfield's summary judgment motion [Doc. 115] be denied, without prejudice, regarding its duty to indemnify; and
3. Westfield's motion for certification [Doc. 159] be denied.

So ordered.

/s/ James G. Carr

U.S. District Judge

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*767 F. Supp. 2d 820, *; 2011 U.S. Dist. LEXIS 9029, ***

Younglove Construction, LLC, Plaintiff v. PSD Development, LLC, et al., Defendants

Case No. 3:08CV1447

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, WESTERN DIVISION

767 F. Supp. 2d 820; 2011 U.S. Dist. LEXIS 9029

January 31, 2011, Filed

SUBSEQUENT HISTORY: Summary judgment denied by Younglove Constr., LLC v. PSD Dev., LLC, 2011 U.S. Dist. LEXIS 15689 (N.D. Ohio, Feb. 16, 2011)

PRIOR HISTORY: Younglove Constr., LLC v. PSD Dev., LLC, 724 F. Supp. 2d 847, 2010 U.S. Dist. LEXIS 73450 (N.D. Ohio, 2010)

CASE SUMMARY

OVERVIEW: Intervenor insurer filed a motion for reconsideration of an order requiring it to defend defendant subcontractor in the contract litigation between plaintiff contractor and defendant owner. The court found, inter alia, that the original order was based on the owner's claims for consequential damages, which triggered the insurer's duty to defend. However, based on the insurer's new evidence, any liability the insured might face in the underlying litigation derived directly from its subcontract with the contractor. As such it was excluded by the commercial general liability policy.

OUTCOME: Motion for reconsideration granted, order vacated, insurer's motion for summary judgment granted, and insured's cross-motion for summary judgment denied.

CORE TERMS: bin, reconsideration, coverage, duty to defend, consequential, defective construction, consequential damages, contractor's, reconsider, insured's, feed, contractual liability, new evidence, subcontractor, corn, interlocutory, engineering, collateral, storage, repair, insure, grain, damages claims, damages resulting, summary judgment, indemnify, plant, grain bin, manufacturing, architectural

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LEXISNEXIS® HEADNOTES

Hide

Civil Procedure > Jurisdiction > Diversity Jurisdiction > Citizenship > General Overview 

Civil Procedure > Parties > Intervention > General Overview 

HN1  Federal jurisdiction, once acquired on the ground of complete diversity of citizenship, is unaffected by the subsequent intervention of a party whose presence is not essential to a decision of the controversy between the original parties. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule 

HN2  Fed. R. Civ. P. 59(e) and its 28-day limit for filing apply only to final orders. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders 

HN3  District courts possess the authority and discretion to reconsider and modify interlocutory judgments any time before final judgment. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders 

HN4  Every order short of a final decree is subject to reopening at the discretion of a district judge. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Newly Discovered Evidence 

Civil Procedure > Appeals > Appellate Jurisdiction > Interlocutory Orders 

Civil Procedure > Appeals > Standards of Review > Clearly Erroneous Review 

HN5  Three circumstances justify reconsideration of an interlocutory order: (1) when there is an intervening change of controlling law; (2) new evidence available; or (3) a need to correct a clear error or prevent manifest injustice. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

HN6  A motion for reconsideration gives a court a chance to correct its mistakes before the Court of Appeals has to. More Like This Headnote

00022

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

HN7 ✖ However commonplace the filing of motions for reconsideration may be, they are extraordinary in nature and, because they run contrary to finality and repose, should be discouraged. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

HN8 ✖ It is not the function of a motion for reconsideration either to renew arguments already considered and rejected by a court or to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue. More Like This Headnote

Civil Procedure > Jurisdiction > Diversity Jurisdiction > General Overview 

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview 

HN9 ✖ A federal court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > Forum & Place 

HN10 ✖ Where no dispute exists regarding choice of law, federal courts apply the law of the forum state. More Like This Headnote

Civil Procedure > Judgments > Relief From Judgment > Motions to Alter & Amend 

Civil Procedure > Judgments > Relief From Judgment > Motions to Reargue 

HN11 ✖ Nothing in a court's case management procedures should discourage the filing of a well-founded and justified motion for reconsideration. Sometimes the court overlooks something that really matters, or fails to address an argument that, if considered, might change the result. In which case, calling the court's attention to that fact is both appropriate and desirable. But motions for reconsideration rarely have such basis. Most often they only express disagreement with the court's analysis. The proper venue for that lament is the Court of Appeals. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > Damages 

HN12 ✖ Under Ohio law damages "consequential" to excluded claims may nonetheless be covered under a commercial general liability policy. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > General Overview 

HN13 ✖ Commercial general liability policies generally insure consequential risks that stem from an insured's work. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > General Overview 

00023

HN14 The contract liability exclusion is a "business risk" exclusion. Business risk exclusions emphasize that commercial general liability policies are intended to insure against the unpredictable, potentially unlimited liability that can result from business accidents, and are not intended to insure "business risks"--risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > General Overview

HN15 In the context of a commercial general liability insurance policy, business risk exclusions ensure that damage resulting from a contractor's own work is excluded as liability insurance should not be a warranty or performance bond for general contractors. Importantly, business risk exclusions do not defeat an insurer's duty to defend if there are allegations of "collateral" damage, e.g., damage to property other than the insured's property. More Like This Headnote

Insurance Law > General Liability Insurance > Exclusions > Breach of Contract

HN16 Claims for economic losses deriving from defective construction sound in contract. These are not the consequential or collateral damages Ohio courts consider covered by commercial general liability policies. More Like This Headnote

Insurance Law > General Liability Insurance > Coverage > Products & Workmanship

HN17 There is coverage under a commercial general liability policy only when defective construction causes damage to other property. More Like This Headnote

COUNSEL: [1]** For Younglove Construction, LLC, Plaintiff, 3rd Party Plaintiffs: Byron S. Choka, LEAD ATTORNEY, James R. Jeffery, Spengler Nathanson - Toledo, Toledo, OH; Todd A. Harpst, LEAD ATTORNEY, Ryan P. Kennedy, Roetzel & Andress - Akron, Akron, OH.

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For Clouse Construction Corp., 3rd Pty Defendant: James R. Gucker, Tiffin, OH.

For Brock Grain Systems, A Division of CTB, Inc., 3rd Pty Defendant: Roy A. Hulme, Reminger & Reminger - Cleveland, Cleveland, OH.

JUDGES: James G. Carr ✕, U.S. District Judge.

OPINION BY: James G. Carr ✕

OPINION

[*821] ORDER

This dispute arises out of contract litigation between Younglove Construction, LLC (Younglove) and PSD Development, LLC (PSD). Younglove filed a third-party complaint against subcontractor Custom Agri Systems, Inc. (CAS), and CAS turned to its insurance company, Westfield Insurance Co. ✕(Westfield) to defend and indemnify it in the litigation.

Westfield intervened, seeking a declaratory judgment that it had no duty to defend or indemnify CAS under the terms of its policy. On July 21, 2010, I held that Westfield must defend CAS in the pendant litigation under CAS's insurance contract with Westfield. [Doc. 196]; *Younglove Const., LLC v. PSD Dev., LLC*, 724 F. Supp. 2d 847 (N.D. Ohio 2010).

Jurisdiction is proper under 28 U.S.C. § 1332. [****3**] ¹

FOOTNOTES

¹ Although both CAS and Westfield are Ohio corporations, and thus not diverse, *HN1* "federal jurisdiction once acquired on the ground of complete diversity of citizenship is unaffected by the subsequent intervention 'of a party whose presence is not essential to a decision of the controversy between the original parties[.]'" *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 66 n.1, 117 S. Ct. 467, 136 L. Ed. 2d 437 (1996) (citing *Wichita R.R. & Light Co. v. Pub. Util. Comm'n of Kan.*, 260 U.S. 48, 54, 43 S. Ct. 51, 67 L. Ed. 124 (1922)).

Here, Westfield's intervention is not essential to the original controversy, so its presence does not eliminate federal jurisdiction over the instant case.

Pending is Westfield's motion for reconsideration [Doc. 214] of my July 21, 2010 decision. For the following reasons, Westfield's motion shall be granted.

Background

1. Underlying Litigation

PSD contracted with Younglove to design and build an animal feed manufacturing plant. CAS worked as a subcontractor for Younglove on the project, designing and constructing a steel grain bin. Around October, 2007, CAS completed the project and the bin began operating. CAS obtained components for the bin from [*822] Brock Grain Systems. CAS also subcontracted the design and installation of the bin's [****4**] cement foundation and discharge openings to Kreitemeyer Silo and the erection of the bin to Jerry O'Conick.

A dispute arose between Younglove and PSD regarding the quality of the materials and the work performed, eventually culminating in the suit and countersuit of this litigation. Younglove filed a third-party complaint against CAS for contribution and indemnity, incorporating by reference the allegations of PSD's counterclaim. CAS filed complaints against its subcontractors, and also

demanded that Westfield defend and indemnify it in the litigation.

2. Policy Provisions

At all pertinent times, Westfield insured CAS under a commercial general liability (CGL) policy. Under the policy, Westfield must "pay those sums that the insured becomes legally obligated to pay as damages because of [. . .] 'property damages' [. . .] caused by an 'occurrence.'" [Doc. 115-10, at 3].

Several exclusions limit the scope of coverage. Under these provisions, the CGL policy does not apply to:

b. Contractual Liability

"[P]roperty damage" **[**5]** for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement

* * *

j. Damage to Property

"Property damage" to:

* * *

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

- (6) That particular part of any property that must be restored, repaired or replaced because "your

* * *

k. Damage to Your Product

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

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.

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, **[**6]** 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.

[Doc. 115-10, at 4-6].

The Westfield Policy also contains a "Professional Liability Exclusion":

1. This insurance does not apply to . . . "property damage" . . . arising out of the rendering of or failure to render any professional services by you or on your behalf, but only with respect to either or both of the following operations:

[*823] a. Providing engineering, architectural or surveying services to others in your capacity as an engineer, architect or surveyor; and

b. Providing, or hiring independent professionals to provide, engineering, architectural or surveying services in connection with construction work you perform.

2. Subject to Paragraph 3. below, professional services include:

a. The preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, **[**7]** field orders, change orders, or drawings and specifications; and

b. Supervisory or inspection activities performed as part of any related architectural or engineering activities.

3. Professional services do not include services within construction means, methods, techniques, sequences and procedures employed by you in connection with your operations in your capacity as a construction contractor.

[*Id.* at 11].

3. PSD's Claims Implicating CAS

PSD's Amended Counterclaim [Doc. 70-1] alleged, *inter alia*, that a grain bin CAS provided under a subcontract with Younglove was defective. Specifically, PSD asserts: 1) "the grain bin was intended to store corn, ² purchased at optimal pricing, for future use in the feed manufacturing process"; and 2) Younglove knew that the bin would be filled and emptied as often as three times a week.

FOOTNOTES

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² Both during the May 11, 2010 phone conference [Doc. 248, at 30] and in its memorandum

in response to Westfield's motion for reconsideration [Doc. 220, at 2], PSD asserts that it intended to store wheat—not corn—in the bin. The type of grain is, however, not germane to the pending motion or this order

According to PSD, the design of the bin was defective because the discharge **[**8]** openings are too small to allow discharge of the requisite volume of product. Furthermore, PSD claims that the defectively-designed bin discharge openings caused asymmetrical flow channels, resulting in damage to the top edge and roof of the bin. ³ This damage prevented corn from being stored in the bin and prevented Kalmbach Feeds, the intended beneficiary of the contract, from purchasing corn at optimal seasonal pricing.

FOOTNOTES

³ PSD's complaint alleges that this design flaw, alone or in combination with the improper design and construction of the concrete foundation for the grain bin, caused the damage to the bin itself. [Doc. 70-1, at 12]. PSD has also claimed that Younglove failed to provide training or adequate signage as required under the contract. [Docs. 70-1, 138]. Improper use of the bin could also have caused the damage. [Doc. 93, at 4].

PSD has stipulated that it is not seeking lost profits related to feed production and sales of feed. Instead, the sole measure of damages PSD seeks from Younglove in this litigation is the cost of repair or the diminution in the feed manufacturing plant's value to the extent that repair is not economical. [Docs. 248, 220]. PSD also seeks damages **[**9]** related to the bin, claiming losses due to its inability to purchase and store corn during harvest for later resale at a higher price while the bin underwent repairs. PSD asserts that the lost storage claim is "consequential damages." [Doc. 220].

4. Procedural History

On July 21, 2010, I held that Westfield has a duty to defend CAS in this litigation. [Doc. 196]; *Younglove, supra*, 724 F. Supp. 2d at 861. I determined that CAS's policy excluded coverage for breach of contract claims, including PSD's defective construction claims. *Id.* at 853. In reaching this conclusion, I understood that **[*824]** PSD sought consequential damages stemming from such defective construction, and that PSD's allegations implied tort claims. *Id.* at 852 n.5. I found that these claims triggered Westfield's duty to defend under the policy. *Id.* at 853-860.

Westfield filed the pending motion for reconsideration of that order. It claims that new evidence and the changing complexion of the theories and damages sought in this case leave large segments of my July 21, 2010, order unsupported by the evidentiary record. Westfield also asks me to make the order final under Fed. R. Civ. P. 54(b) so that it may appeal the judgment.

Standard **[**10]** of Review⁴

FOOTNOTES

⁴ CAS asserts that Westfield's motion to reconsider is technically a Fed. R. Civ. P. 59(e) "Motion to Alter or Amend a Judgment," and that the motion was therefore filed out of rule. Westfield is correct, however, that **HN3** Fed. R. Civ. P. 59(e) (and its twenty-eight-day limit for filing) apply only to final orders. The July 21, 2010, summary judgment order was not a final order.

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HN3 "District courts possess the authority and discretion to reconsider and modify interlocutory

judgments any time before final judgment." *Rodriguez v. Tenn. Laborers Health & Welfare Fund*, 89 Fed. App'x 949, 952 (6th Cir. 2004) (unpublished disposition); see *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (**HN4** "[E]very order short of a final decree is subject to reopening at the discretion of the district judge."); *Mallory v. Eyrich*, 922 F.2d 1273, 1282 (6th Cir. 1991).

HN5 Three circumstances justify reconsideration of an interlocutory order: 1) when there is "an intervening change of controlling law; 2) new evidence available; or 3) a need to correct a clear error or prevent manifest injustice." *Louisville/Jefferson Co. Metro Gov't v. Hotels.com, L.P.*, 590 F.3d 381, 389 (6th Cir. 2009) [****11**] (citing *Rodriguez, supra*, 89 Fed. App'x at 952).

HN6 A motion for reconsideration gives me a chance to correct my mistakes before the Court of Appeals has to. *E.g., White v. New Hampshire Dep't of Employment Sec.*, 455 U.S. 445, 451, 102 S. Ct. 1162, 71 L. Ed. 2d 325 (1982). **HN7** However commonplace the filing of such motions may be, motions for reconsideration are "extraordinary in nature and, because they run contrary to finality and repose, should be discouraged." *E.g., Braithwaite v. Dep't of Homeland Sec.*, 2010 U.S. Dist. LEXIS 32065, 2010 WL 1392605, *1 (N.D. Ohio). **HN8** It is not the function of a motion for reconsideration "either to renew arguments already considered and rejected by a court or to proffer a new legal theory or new evidence to support a prior argument when the legal theory or argument could, with due diligence, have been discovered and offered during the initial consideration of the issue." *Id.*

Discussion

In the July 21, 2010 order, I ruled that although the CGL policy did not cover claims for defective construction, the policy nonetheless required Westfield to defend CAS in this litigation. My ruling relied on my understanding that some of PSD's claims could be categorized as seeking consequential damages, and may even sound in tort. If [****12**] so, that triggered Westfield's duty to defend.

Now that PSD's claims regarding the bin supplied by CAS have been defined and new evidence presented on those claims, it is sensible that I reconsider the effect of the policy exclusions in this case. ⁵

FOOTNOTES

⁵ **HN9** A federal court exercising diversity jurisdiction applies the choice of law rules of the state in which it sits. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). **HN10** Where no dispute exists regarding choice of law, federal courts apply the law of the forum state. *Lulaj v. Wackenhut Corp.*, 512 F.3d 760, 764 (6th Cir. 2008). Here, the parties do not dispute the application of Ohio law, so I apply Ohio law to this case.

[***825**] The law underlying my decision has not changed, and so if any arguable basis for coverage still exists, Westfield has an absolute duty to defend CAS and its motion for reconsideration must fail. *Sharonville v. Am. Emp'r Ins. Co.*, 109 Ohio St. 3d 186, 189, 2006 Ohio 2180, 846 N.E.2d 833 (2006).

I. My "Rule" re. Motions to Reconsider

CAS refers to my "rule" about motions to reconsider. In light of its reference to a "rule," I wish to try to clarify my attitude towards such motions.

On our court's public website I have posted a narrative description of [****13**] some "dos and don'ts." My purpose in doing so is simply to give those attorneys who have not appeared before

me, or who may not do so regularly, an introduction to some personal idiosyncracies. But those comments are not "rules," and they do not end with "So ordered."

Within that narrative, I try to express how strongly I dislike and disfavor motions to reconsider. Before adopting my current default approach of imposing sanctions where such motions should not have been filed, I tried other, less rigid and harsh approaches. Without effect.

My current practice works better than anything else at reducing unfounded motions for reconsideration.

HN11 Nothing in my case management procedures should discourage the filing of a well-founded and justified motion for reconsideration. Sometimes I overlook something that really matters, or fail to address an argument that, if considered, might change the result. In which case, calling my attention to that fact is both appropriate and desirable.

But motions for reconsideration rarely have such basis. Most often they only express disagreement with my analysis. The proper venue for that lament is the Court of Appeals. There is a cost to making me listen to **[**14]** songs of that sort.

The pending motion is entirely appropriate. The foundation on which my order rested proved in time incapable of bearing the weight of my decision. That being so, I would prefer to clear it away, rather than forcing counsel to ask the Court of Appeals to break out its wrecking ball.

II. Coverage

Westfield urges reconsideration of my order because new evidence shows that: 1) the damage to the bin resulted from "off-center discharge when unloading the bin caused by improper operating procedures"; and 2) PSD is not seeking the type of consequential damages that formed the basis of my decision.

In my July 21, 2010, order, I recognized that while it is an open question under Ohio law whether a CGL policy covers defective construction claims, the contractual liability exclusion in CAS's policy removes defective construction claims from coverage.

HN12 Under Ohio law, however, damages "consequential" to such excluded claims may nonetheless be covered under a CGL policy. *See, e.g., Heile, supra*, 136 Ohio App. 3d at 353 (observing that **HN13** CGL policies "generally insure consequential risks that stem from the insured's work"). Because six months ago it appeared that PSD's allegations "imply **[**15]** tort claims," I found that the contractual liability exclusion did not unambiguously remove **[*826]** such consequential damages claims from coverage.

The question therefore is whether it now appears that PSD's claim for damages resulting from the lost grain storage space are "consequential" to the contract claims, or whether the contract liability exclusion removes this claim from coverage.

HN14 The contract liability exclusion is a "business risk" exclusion. Business risk exclusions emphasize that CGL policies "are intended to insure against 'the unpredictable, potentially unlimited liability that can result from business accidents,'" *Interstate Props. v. Prasanna Inc.*, 2006 Ohio 2686, 2006 WL 1474235, *9 (Ohio App. Ct. 2006), and "are not intended to insure 'business risks'—risks that are the normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage," *Heile, supra*, 136 Ohio App. 3d at 353.

HN15 Such exclusions:

ensure that damage resulting from a contractor's own work is excluded as liability insurance should not be a warranty or performance bond for general contractors.

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Importantly, business risk exclusions do not defeat an insurer's duty to defend **[**16]** if there are allegations of "collateral" damage, e.g., damage to property other than the insured's property.

Nat'l Eng'g & Contracting Co. v. U.S. Fidelity & Guar. Co., 2004 Ohio 2503, 2004 WL 1103993, *6 (Ohio App. Ct. 2004).

In my July 21, 2010, opinion, I relied on *National Engineering, supra*, 2004 Ohio 2503, 2004 WL 1103993, and *Indiana Insurance Co.*, 2002 Ohio 3916, 2002 WL 1770491 (Ohio App. Ct. 2002), in finding that the contractual liability exclusion did not apply to exclude coverage of PSD's consequential damage claims. But PSD's only "consequential damage claim" is the claim for damages resulting from the loss of storage space. This claim sounds in contract, arising from an assumed risk of doing business, and the contractual liability exclusion therefore does apply.

As the court in *Indiana Insurance Co.*, stated, "the underwriting intent is to exclude coverage for the contractor's business risks, but provide coverage for unanticipated consequential damages." 2002 Ohio 3916, 2002 WL 1770491, *3. PSD's claim is not for an unanticipated consequential loss, but rather seeks the benefit of its bargain with Younglove.

Env. Exploration, supra, 2000 Ohio App. LEXIS 4985, 2000 WL 1608908, *6 The court in *National Engineering* found that similar claims for economic losses were not collateral or consequential damages, explaining **[**17]** that "allegations of plant downtime and use of employees to help repair [damage] are insufficient evidence of collateral damage," and emphasizing that "a commercial liability policy is simply not a performance bond and is not intended to insure the contractor's work performed or work product." 2004 Ohio 2503, 2004 WL 1103993, at *6; see also (holding that insurer had no duty to defend where damages alleged, including loss of use, lost profits and replacement costs, all related to defective work, "not to any consequential damages deriving from such work").

HN16 Claims for economic losses deriving from defective construction sound in contract. These are not the consequential or collateral damages Ohio courts consider covered by CGL policies. Ohio courts have found **HN17** coverage under a CGL policy only when defective construction causes damage to other property. Compare *Nat. Eng'g, supra*, 2004 Ohio 2503, 2004 WL 1103993; *Erie Ins. Exch. v. Colony Dev. Corp.*, 136 Ohio App. 3d 419, 736 N.E.2d 950 (2000); and *Acme Steak Co., Inc. v. Great Lakes Mech. Co.*, 2000 Ohio 2566, 2000 WL 1506199, *8 (Ohio App. Ct.) with *Helle, supra*, 136 Ohio App. 3d at 354; *Royal Plastics, Inc. v. [**827] State Auto. Mut. Ins. Co.*, 99 Ohio App. 3d 221, 650 N.E.2d 180 (1994); **[**18]** *Env. Exploration, supra*, 2000 Ohio App. LEXIS 4985, 2000 WL 1608908.

PSD's claim for lost storage damages are excluded from CAS's policy with Westfield, and do not trigger Westfield's duty to defend. Any liability CAS might face in this litigation derives directly from its subcontract with Younglove, and as such is excluded from coverage by the contract liability exclusion of its CGL policy.

I note that because this opinion resolves all disputed questions between Westfield and CAS, this judgment is final for the purposes of seeking an interlocutory appeal. It is not necessary, therefore, for me to certify my decision for interlocutory appeal.

Conclusion

For the foregoing reasons, it is hereby:

ORDERED THAT:

1. Westfield's motion for reconsideration [Doc. 214] be, and the same hereby is granted;

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2. The order entered July 21, 2010 [Doc. 196], be, and the same hereby is vacated;
3. Westfield's motion for summary judgment [Doc. 115] be, and the same hereby is granted; and
4. CAS's cross-motion for summary judgment [Doc. 148] be, and the same hereby is denied.

So ordered.

/s/ James G. Carr ▾

U.S. District Judge

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11-1486

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 11-3213

FILED

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

AUG 29 2011

LEONARD GREEN, Clerk

YOUNGLOVE CONSTRUCTION, LLC.,
 Plaintiff,
 v.
 PSD DEVELOPMENT, LLC, et al.,
 Defendants,
 CUSTOM AGRI SYSTEMS, INC.,
 Third-Party Defendant-Appellant,
 WESTFIELD INSURANCE CO.,
 Intervenor-Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE NORTHERN
DISTRICT OF OHIO

ORDER OF
CERTIFICATION TO THE
SUPREME COURT OF OHIO

FILED
 AUG 30 2011
 CLERK OF COURT
 SUPREME COURT OF OHIO

Before: COLE, MCKEAGUE and WHITE, Circuit Judges.

HELENE N. WHITE, Circuit Judge. Custom Agri Systems, Inc. ("Custom") appeals the summary judgment for its insurer, Westfield Insurance Co. ("Westfield") in this dispute over coverage under the terms of a commercial general liability ("CGL") policy. Westfield moves to certify two questions of state law to the Ohio Supreme Court. Custom does not oppose the motion.

I.

Younglove Construction, LLC ("Younglove") entered into a contract with PSD Development, LLC ("PSD") for the construction of a feed manufacturing plant in Sandusky, Ohio.

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When PSD withheld payment, Younglove brought this diversity suit against PSD and three other defendants seeking damages for breach of contract and related causes of action. In its answer, PSD alleged, among other things, that it sustained damages as a result of defects in a steel grain bin located on the project. The bin was constructed by Custom, as a subcontractor, and Younglove filed a third-party complaint against Custom for contribution and indemnity. Custom filed similar third-party complaints against the subcontractors it used to construct the bin and turned to its insurer, Westfield, to defend and indemnify it in the litigation. Westfield intervened in order to pursue a judgment declaring that it had no such duty under the terms of its CGL policy with Custom.

Custom was being sued under two general theories: 1) defective construction; and 2) consequential damages resulting from the defective construction. Westfield argued that none of the claims against Custom sought damages because of "property damage" caused by an "occurrence," and therefore none of the claims was covered under the CGL policy. In the alternative, Westfield argued that even if the claims did constitute property damage caused by an occurrence, they were removed from coverage by a contractual liability exclusion in the policy.

Westfield and Custom filed cross-motions for summary judgment. The motions were granted in part and denied in part on July 21, 2010. The parties agreed that the case was governed by Ohio law, and the district court acknowledged that it is an open question under Ohio law whether defective construction claims fall under the auspices of a CGL policy. Rather than decide the issue, the district court assumed that Custom's policy covered defective construction and went on to find that the contractual liability exclusion removed such claims from coverage. With respect to claims for consequential damages, the court found that consequential damages were covered even if defective construction claims were not, and that Westfield had a duty to defend Custom in the litigation. The

district court subsequently reconsidered its July 21 order, and granted summary judgment for Westfield. *Younglove Constr., LLC v. PSD Dev., LLC*, 767 F. Supp. 2d 820 (N.D. Ohio 2011).

II.

A. Merits of Certification

Pursuant to Ohio Supreme Court Practice Rule 18.1, the Ohio Supreme Court may answer a question of law certified to it by a court of the United States. "This rule may be invoked when the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court." Ohio S. Ct. Prac. R. 18.1. "Certification ensures that federal courts will properly apply state law." *Scott v. Bank One Trust Co., N.A.*, 577 N.E.2d 1077, 1081 (Ohio 1991).

The parties agree that there is no controlling legal authority from the Supreme Court of Ohio governing the issue of whether a claim for defective construction or workmanship constitutes an "occurrence" within the meaning of a CGL policy. A logical corollary to this issue is the question of whether a contractual liability exclusion in a CGL policy precludes coverage of such claims. Rather than speculate, the better course is to provide the Supreme Court of Ohio with the opportunity to decide these issues. See *Am. Booksellers Found. for Free Expression v. Strickland*, 560 F.3d 443, 447 (6th Cir. 2009).

B. Certified Questions of State Law

We certify the following questions of state law to the Supreme Court of Ohio pursuant to Rule 18.1 of the Rules of Practice of the Supreme Court of Ohio:

(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?

(2) If such claims are considered "property damage" caused by an "occurrence," does the contractual liability exclusion in the commercial general liability policy preclude coverage for claims for defective construction/workmanship?

C. The Information Required by Rule 18

We provide the following information in accordance with Rule 18.2(A)-(E):

(1) Name of the case: *Younglove Construction, LLC v. PSD Development, LLC, et al.*

(2) Statement of the facts: Please refer to § 1 of this order for a full recitation of the pertinent facts.

(3) Names of each of the parties:

a. Third-Party Defendant-Appellant: Custom Agri Systems, Inc.

b. Intervenor-Appellee: Westfield Insurance Company

(4) Names, addresses, and telephone numbers of counsel for each party:

a. Third-Party Defendant-Appellant's Counsel:

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(5) Designation of one of the parties as the moving party: Intervenor-Appellee: Westfield Insurance Company.

D. Instructions to the Clerk

In accordance with Rule 18.3 of the Rules of Practice of the Supreme Court of Ohio, Mr. Leonard Green, Clerk of the United States Court of Appeals for the Sixth Circuit, is hereby instructed to serve copies of this certification order upon counsel for the parties and to file this certification under the seal of this court with the Supreme Court of Ohio, along with appropriate proof of service.

III.

For the above stated reasons we **CERTIFY** questions of state law to the Supreme Court of Ohio.



Helene N. White
United States Court of Appeals for the Sixth Circuit

McKEAGUE, Circuit Judge, dissenting. I respectfully dissent because I do not think that certification is proper in this case. First, I begin by noting that the procedural posture of this motion to certify makes certification problematic. In the this case, Westfield initially moved to certify these two questions at the district court. R.159, Motion to Certify. The decision to certify a question to a state supreme court “rests in the sound discretion of the federal court,” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), and the district court here declined to exercise that discretion by denying the motion, R.196, Order, at 7 n.7. But rather than appealing the denial of the motion, which we would review for abuse of discretion, see *Simmons-Harris v. Zelman*, 234 F.3d 945, 961 (6th Cir. 2000) (“This Court reviews the district court’s denial of certification for an abuse of discretion.”) (citing *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995)) overruled on other grounds by *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Hazel v. General Motors Corp.*, 142 F.3d 434, 1998 WL 180522, at *2 (6th Cir. April 8, 1998) (unpublished) (citing *J.C. Wyckoff & Assocs., Inc. v. Standard Fire Ins. Co.*, 936 F.2d 1474, 1484 n.10 (6th Cir. 1991)), Westfield tries for the end around by simply renewing the motion. By granting the motion to certify, the majority has allowed Westfield to evade abuse of discretion review and complete the play. In my opinion, the proper course would have been for Westfield to appeal district court’s denial of the motion to certify. See, e.g., *Waeschle v. Dragovic*, 576 F.3d 539, 551 (6th Cir. 2009) (reversing a district court’s denial of a motion to certify the question of state law).

Next, before getting to the merits of certification, I wish to emphasize that we use the certification process sparingly. The threshold issue in determining whether to certify is whether the state-law question before us “is new and state law is unsettled.” *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (quoting *Transamerica*, 50 F.3d at 372; see also *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (noting that certification of a

“novel or unsettled question of state law . . . may save time, energy, and resources and help build a cooperative judicial federalism.”). Further, certification of an unsettled question of state law is most appropriate where the question is “important,” and “has arisen solely in federal court.” *Curtis 1000, Inc. v. Martin*, 197 F. App’x 412, 426 (6th Cir. 2006) (quoting *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994)); see also *Hensley v. City of Columbus*, No. 02-3778, 2004 WL 1152836, at *1 (6th Cir. Feb. 20, 2004) (certifying “an *important* question of first impression under Ohio law that is determinative of the cause”) (emphasis added); *Grover by Grover v. Eli Lilly and Co.*, 33 F.3d 716, 719 (6th Cir. 1994) (“Certification has proved to be an important tool for federal courts sitting in diversity, since it frees them from having to speculate how state courts will decide *important* questions of state law.”) (emphasis added); *Scott v. Bank One Trust Company, N.A.*, 577 N.E.2d 1077, 1080 (Ohio 1991) (noting that certification keeps federal courts from guessing “how state courts will decide *important* questions of state law.”) (citation and internal quotation marks omitted) (emphasis added). Certification is only appropriate under these conditions because we do not wish to “trouble our sister state courts every time an arguably unsettled question of state law comes across our desks.” *Pennington*, 553 F.3d at 450 (citation and quotation marks omitted); see also *Free Abbott Laboratories, Inc.*, 164 F.3d 270, 274 (5th Cir. 1999) (“[W]e are chary about certifying questions of law absent a compelling reason to do so; the availability of certification is such an important resource to this court that we will not risk its continued availability by going to that well too often.”) (citation and quotation marks omitted); *McCarthy v. Olin Corp.*, 119 F.3d 148, 153 (2d Cir. 1997) (“Certification should not be used as a device for shifting the burdens of this Court to those whose burdens are at least as great.”) (citations and internal quotation marks omitted). Indeed, “[w]hen we see a reasonably clear and principled course, we will seek to follow it ourselves.” *Pennington*, 553 F.3d at 450 (citation and internal quotation marks omitted).

In my opinion, in resolving the instant case, the district court identified and followed a clear and principled course. I acknowledge that the first certified question—whether claims of defective construction or workmanship brought by a property owner are claims for “property damage” caused by an “occurrence” under a CGL policy—is an open question under Ohio law. Had the district court based its decision on this question, I might have viewed this motion differently. The district court, however, concluded that the second certified question—whether the contractual liability exclusion in the CGL policy excluded claims for defective construction or workmanship—was determinative, and that it was unnecessary to reach the first question. Accordingly, in my view, there is absolutely no reason to certify the first question at this stage of the litigation.¹ See *Estate of Owensby v. City of Cincinnati*, 414 F.3d 596, 605 (6th Cir. 2005) (holding that certification to the Ohio Supreme Court “is inappropriate at this stage because the question . . . would not be determinative of the proceeding”) (citation and internal quotation marks omitted); *Super Sulky, Inc. v. U.S. Trotting Ass’n*, 174 F.3d 733, 744 (6th Cir. 1999) (declining to certify an unresolved question under Ohio law where the district court was able to make a determinative ruling on different grounds); see also *City of Chicago, Ill. v. StubHub!, Inc.*, 624 F.3d 363, 365 (7th Cir. 2010) (“Certification of a state-law issue is appropriate, however, only if that issue is dispositive.”).

With respect to the second question, the district court analyzed Ohio precedent, and concluded that the proper interpretation of the exclusion was that it excluded such claims. Westfield—by citing several cases that support their position, that the exclusion does exclude claims for defective construction or workmanship, and a single case, *Nat’l Eng’g & Contracting Co. v. U.S.*

¹However, if a merits panel of this Court were to determine that the district court’s analysis on the second question was incorrect, it might then become appropriate for the panel, or the district court on remand, to certify this question to the Ohio Supreme Court. Until then, we should not be in the business of certifying questions that need not be resolved.

Fidelity & Guar. Co., No. 03AP-435, 2004 WL 1103993 (Ohio Ct. App. May 11, 2004), that they claim stands for the contrary position—suggests that there is a split in Ohio authority that makes the question unsettled. I disagree. Westfield has misconstrued the holding of *Nat'l Eng'g*, because the court in that case actually held that this type of “exclusion generally operates to exclude coverage for damage to the work of the insured as a result of poor or defective work performance.” *Id.* at *8. It was only because the complaint in that case *also* contained allegations of collateral damage that the court held that the insurer had a duty to defend. *Id.* at *6. In the instant case, the district court initially made a similar holding, finding that Westfield had a duty to defend because “some of the claims could be categorized as seeking consequential damages, and may even sound in tort.” *Younglove Constr.*, 767 F. Supp. 2d at 823–24. However, the court reconsidered that decision, and found that there were actually no claims for consequential or collateral damages. *Id.* at 826–27. According, the court held, Westfield had no duty to defend because the exclusion applied to *all* of the possible claims. *Id.* at 827.

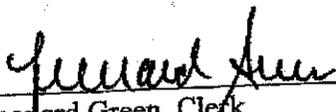
Thus, the determinative second question is neither new nor unsettled. The apparent unanimity of the Ohio appellate courts on the question, in the absence of “a strong showing that the [Ohio Supreme Court] would act in a different manner,” provides us with ample guidance to interpret state law. *Derungs v. Wal-Mart Stores, Inc.*, 374 F.3d 428, 433 (6th Cir. 2004). By certifying a question that need not be resolved, and another that is not unsettled, I believe that we are troubling our busy sister court, rather than avoiding the potential for a “friction-generating error.” *Planned Parenthood of Cincinnati Region v. Strickland*, 531 F.3d 406, 410 (6th Cir. 2008).

In short, I whole-heartedly believe that there are instances in which certification of an unsettled and important question of state law is most appropriate, *see, e.g., Planned Parenthood of Cincinnati Region*, 531 F.3d at 411–12 (certifying a question regarding the interpretation of a

previously unconstrued state statute to the Ohio Supreme Court where interpretation of the statute might avoid the need to reach the constitutionality of the statute), but under these circumstances, I believe that certification is unwarranted.

PROOF OF SERVICE

The foregoing Certification Order was electronically sent this 29th day of August, 2011, to Daniel G. Hazard and Jim Miller, Miller, Hoch & Carr, 1446 Reynolds Road, Suite 220, Maumee, Ohio 43537, counsel for third party defendant-appellant; and to Richard M. Garner and Roni R. Sokol, Davis & Young, Fifth Third Center, Suite 1200, 600 Superior Avenue, E., Cleveland, Ohio 44114, counsel for intervenor-appellee.



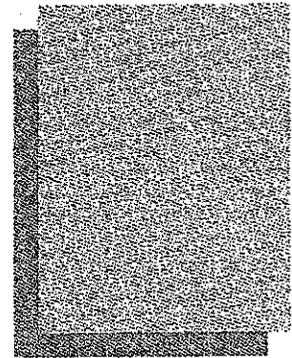
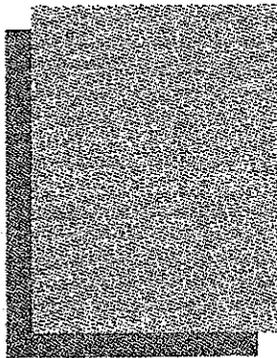
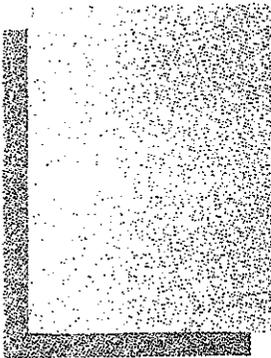
Leonard Green, Clerk

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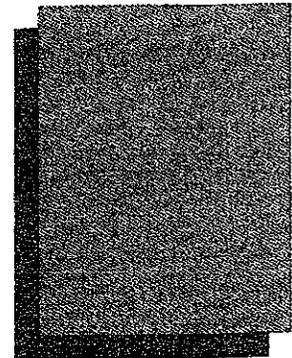
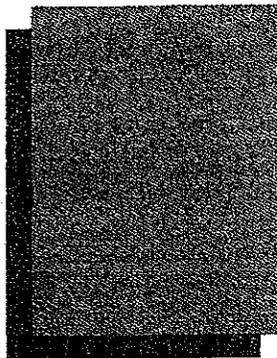
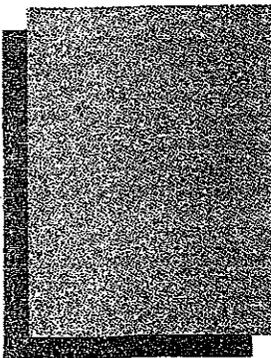


ISO COMMERCIAL LINES
POLICY AND RATING
SIMPLIFICATION PROJECT

INTRODUCTION AND OVERVIEW



COMMERCIAL GENERAL LIABILITY



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Introduction to Insurance Services Office, Inc.'s
New Commercial General Liability Program

Foreword

Insurance Services Office, Inc. is introducing a new Commercial General Liability Policy which is the first major revision for this line of insurance since 1966.

The policy form is the result of years of effort and the most extensive industry review of a new policy form in ISO's history. ISO distributed more than 1,500 copies of an exposure draft to a broad cross-section of industry interests—nearly 250 groups and individuals in all—for their review and comment. Insurers, producers, buyers, reinsurers, educators, lawyers, risk managers, adjustors, consumers and trade associations all provided advice, and more than 30 organizations reported the suggestions and reactions of their members.

Of course, not every suggestion could be adopted, because some were diametrically opposed to one another. But ISO considered every single suggestion, and the policy we are introducing reflects many changes—big and small—made as a result of the industrywide review.

To help insurers and their representatives learn about the new policy, ISO is undertaking the most extensive information effort in its history. This booklet is but one element of that program.

This booklet acquaints you with the new Commercial General Liability Program:

- why the program was designed as it was,
- what are some of the factors to consider in choosing between the alternative versions of the new policy, and
- how the classifications and rules are changing.

Included are comparisons highlighting how the two versions of the new policy form differ from the old form and from each other in some major areas.

We believe you'll find this booklet will help you sort out the new policy form's effects on you and your operations.

INTRODUCTION TO INSURANCE SERVICES OFFICE, INC.'S NEW COMMERCIAL GENERAL LIABILITY PROGRAM

Insurance Services Office, Inc. will offer the insurance marketplace a choice between two attractive alternative versions of a modernized, simplified, commercial general liability policy form.

One version, the "occurrence" version, provides coverage for bodily injury and property damage that occurs during the policy period. The other version, the "claims-made" version, provides coverage if the claim for damages because of bodily injury or property damage is first made during the policy period. The only differences between the two versions of the policy form are in the provisions related to what activates or triggers coverage.

The "occurrence" trigger is provided in recognition of continued marketplace demand for a modern "occurrence" form. The "occurrence of injury or damage" language that triggers coverage in the new policy is essentially unchanged from the coverage trigger in the policy it replaces.

The claims-made language for triggering coverage is a brand new alternative. The "claims-made" policy's unique features that assure reliability of coverage make it unlike any other claims-made policy now in use. The introduction of this "claims-made" trigger—and the continued availability of an "occurrence" trigger, too—calls for informed judgment and a rational assessment of the alternatives by insurers, producers and ultimately, by consumers.

Why Change?

Assessing and adjusting to the new policy forms will certainly require some effort on the part of all concerned. So, you may ask: Why not leave well-enough alone? Why change anything at all?

Here's why:

1. Litigation relating to the existing "occurrence" policy has been costly and time-consuming. For the most part such litigation—which continues to go on to the detriment of insurers and policyholders—has centered on latent bodily injury and long-term exposure issues involving substances such as asbestos and DES. A key issue in dispute is: When did the injury or damage occur? That's extremely important in the context of insurance because the answer determines which "occurrence" policy or policies apply. Litigation over that question is likely to affect more and more insureds of all sizes in all types of business, as new cases arise where the time when bodily injury or property damage occurred is at issue.
2. Many insureds have to rely on policy limits provided by old "occurrence" policies to respond to current claims, because the injury or damage may have occurred long before the claim is made. Those old policies may have been purchased many, many years before claims emerge, settlements are reached and judgments rendered—and years before inflation eroded the value of the old policies' limits.

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3. Some courts have adopted legal theories in latent-injury or long-term exposure cases, which hold that injury occurred during a long series of "occurrence" policies. That leaves many contracts—and sometimes many insurers—with primary defense and indemnity obligations for a single claim. Often, such situations arise when there are many claims for similar or related injury. As a result, insurers don't know how much is at stake, and for how long, under these contracts. That makes it difficult to determine accurate premiums and loss reserves. And beyond that, such "stacking" of limits poses a serious threat to the very solvency of some insurers. In view of this, some insurers and reinsurers have become increasingly reluctant to handle "occurrence" coverage. Without some change, there could be a real insurance-availability problem.
 4. Under the existing policy form, the only limit that applies to some parts of the coverage is a per-occurrence limit, so the insurer's liability for injury that occurs during the policy period increases with the number of "occurrences" held to have produced the injury. That liability could be astronomical, depending on how courts interpret the term "occurrence." "Stacking" per-occurrence limits within a single policy further threatens insurance availability and insurer solvency. (The existing policy form does, however, put aggregate limits on many parts of the coverage, including products and completed operations.)
 5. Some courts—after long and costly lawsuits—have interpreted the "sudden and accidental" exception in the existing policy form's pollution exclusion so broadly that insurers and reinsurers are exposed to unknown but potentially gigantic losses totally unforeseen when existing policies were written or priced. Moreover, pollution coverage is particularly vulnerable to all the "occurrence" issues arising under the existing policy form, because pollution-related damage or injury is often latent, there can be many causes of the injury, and there may be no aggregate limits on the coverage.
 6. Need exists to consolidate and modernize ISO's advisory commercial general liability policy forms. Today many forms are needed to provide the scope of coverage that most buyers consider standard.
 7. To improve efficiency and reduce costs, the existing policy forms, manual rules and rating procedures need to be streamlined and made more adaptable to automated policywriting.
 8. Insurance buyers and regulators want more readable and understandable insurance contracts for all lines of insurance.
- How does ISO's new General Liability Program improve things?

Here's how:

1. The "claims-made" version of the new policy form reduces arguments and expensive litigation over what policy responds to a particular claim for injury or damage. By responding to claims first made during the policy term, the "claims-made" version generally makes it unnecessary to determine when injury or damage "occurred."
2. With "claims-made," *today's* claims are covered by *today's* policy with up-to-date—not out-of-date—limits of insurance.
3. The "claims-made" version of the policy form reduces the potential under some legal theories for stacking the limits of several policies in long-term exposure or latent-injury cases. The "claims-made" form is designed to have one—and only one—precisely identified policy respond to a claim for covered injury or damage. "Claims-made" introduces greater certainty and continuity into claims-handling and improves the accuracy of rates and loss reserves while covering exactly the same kinds of injury and damage as the "occurrence" alternative.
4. Both new policy forms—"claims-made" and "occurrence"—put aggregate limits on all coverages to specify at the outset of the policy term the total amount available for indemnification.
5. Given the extreme difficulty of fashioning language to provide coverage only for the "sudden" emission of pollutants, that is, language that will hold up in the courts as insurers intend, the new basic general liability policy forms—"occurrence" and "claims-made"—provide only certain off-premises coverage without distinction between "sudden" and "gradual" emission of pollutants. Coverage for emissions from the insured's premises, whether sudden or gradual, will be provided under special forms and endorsements.
6. The coverages provided by the old Broad Form Endorsement are built right into both new forms. So are the coverages for explosion, collapse, and underground perils, which are optional under the existing policies. Thus, the new forms automatically provide the scope of coverage most commonly sought by buyers and made available by insurers in today's marketplace.
7. The new program streamlines the policy forms, manual rules and rating procedures to make them more readily adaptable to cost-saving automated policywriting.
8. Both versions of the new policy form use simplified language in keeping with trends toward more readable and understandable insurance contracts for all lines of insurance.

**"OCCURRENCE" AND "CLAIMS-MADE":
SOME CONSIDERATIONS IN CHOOSING**

Choosing between the "claims-made" and "occurrence" versions of ISO's new policy form is made easier by the fact that *both versions are identical except for the triggers of coverage and related provisions.*

"Occurrence" or "Claims-made": The Differences

Both versions provide continuous, reliable coverage, without gaps, for the broad spectrum of business insureds. There is no difference in the kinds of injury and damage covered by either version, so an insured can purchase either version with complete assurance that no claim will go uncovered merely because of which policy is chosen. But claims for damages may be assigned to different policy periods, depending on which policy version is chosen. Therefore, a number of factors should be considered in selecting which of the new forms to use.

"Occurrence"

Under the "occurrence" form, the policy in effect when the bodily injury or property damage occurs responds to the claim. This is *not* a change from ISO's current policy. It is important to note that both the old and the new "occurrence" policies are triggered by injury or damage *that occurs* during the policy period and not by the "occurrence" that causes the injury or damage, or by the insured's negligent act or omission.

Under the "occurrence" forms—old and new:

- If the injury or damage occurs during the policy period, the coverage applies no matter when resulting claims are made.
- Cancellation or non-renewal after the injury or damage occurs does not affect coverage for the resulting claims.
- If the injury or damage is held to have occurred over several policy periods, all the policies in effect during these periods may be required to provide primary coverage for a single claim.
- Claims for injury that occurred long ago will be assigned back to previous policies that may have inadequate limits and/or coverages.
- Policy records may need to be kept open indefinitely for possible future claims.
- Keeping limits current and adequate may be difficult.
- Disputes and litigation may arise in determining when the injury occurred.

"Claims-made"

Under the "claims-made" form, bodily injury or property damage is covered by the policy in effect when the first claim for the injury or damage is made in writing against any insured. The form excludes bodily injury and property damage that occurred before a Retroactive Date to be entered by the company on the Declarations page. Normally, the Retroactive Date will be the inception date of the

insured's first "claims-made" policy. But the company may choose to eliminate this provision and provide retroactive coverage by writing "none" in the Retroactive Date blank, or choose to provide some retroactive coverage by using a Retroactive Date earlier than the first "claims-made" policy's inception date. In either case, coverage for a claim first made during the "claims-made" policy will be excess over any applicable prior insurance.

The "claims-made" form has been designed to ensure that no injury or damage occurring during the period of "claims-made" insurance need go uncovered because of cancellation, non-renewal, renewal with an advanced Retroactive Date, or replacement with insurance that is not on a "claims-made" basis for bodily injury or property damage. In any of these cases, the form provides an automatic 60-day "tail" period on the expiring policy. Claims first made during that "tail" period for injury or damage that occurred before the end of the policy period will be considered first made on the last day of the policy period.

The form also guarantees that the insured may purchase an endorsement extending the "tail" period without time limit. With this endorsement, claims first made *at any time* after the policy period, for injury or damage that occurred before the end of the policy period, will be considered first made on the last day of the policy period.

With these "tail" periods guaranteed, the form itself precludes coverage gaps.

The insured need *not* request a policy change or pay any additional premium to obtain the 60-day "tail" period.

A specific policy provision, as well as ISO's manual, guarantee that the price for the "tail" endorsement will not exceed a stated maximum. That maximum will be 200% of the liability premium paid for the expiring policy.

Under the "claims-made" form:

- One and only one "claims-made" policy will respond to a given claim. Coverage is pinpointed in the most recent applicable policy.
- Disputes over which policy applies will be reduced.
- Limits can be kept current to reflect expected claims patterns.
- Policy files need not be kept open indefinitely.
- There is complete continuity of coverage upon renewal or replacement.
- If the policy is cancelled or not renewed after injury or damage occurs, the built-in option to buy the extended reporting period option ("tail") must be exercised to obtain coverage for resulting future claims, unless all those claims are first made within the automatic 60-day "tail" period, or replacement "claims-made" coverage can be found with the same Retroactive Date as the expiring policy, or no Retroactive Date.

Tailoring the "Claims-made" Policy

Under certain circumstances, the "claims-made" insurer may wish to:

- use no Retroactive Date, but eliminate the excess coverage for specific injury and damage known to have occurred during previous "occurrence" policy periods;
- eliminate prospective coverage for injury or damage arising out of specific products, work or locations; or
- avoid exposing additional sets of "claims-made" policy limits upon policy renewal to future claims for injury and damage that occurred as of the end of a "claims-made" policy period.

For these purposes, ISO has designed a special endorsement excluding coverage with respect to accidents, products, work or locations described on a schedule. Again, care has been taken to avoid coverage gaps. In cases where specific exclusions for accidents, products, work or locations are introduced on renewal, the special endorsement itself guarantees:

- an automatic 60-day "tail" period, without an additional premium, on the expiring policy; and
- the availability of an endorsement providing a "tail" period without time limit on that expiring policy

for injury and damage arising out of the newly excluded accidents, products, work or locations. The expiring "claims-made" policy, with these "tails," will then pick up future claims for all such covered injury or damage that had occurred before the specific exclusion took effect.

For a quick overview of how these provisions and options will work, see the section entitled "'Claims-made' Summary" at the end of this introduction.

In addition, a complete set of endorsements is available for use with both versions of the policy. This gives the underwriter complete flexibility in tailoring coverage for individual accounts and classifications. While most of these endorsements are simplified adaptations of existing forms, new endorsements are included to eliminate products/completed operations and many of the Broad Form coverages when appropriate.

"Occurrence" or "Claims-made": The Price

ISO will provide advisory manual rates for both versions of the Commercial General Liability Policy.

"Occurrence"

ISO advisory rates for the new "occurrence" contract will be based on the rates for the old "occurrence" policy, modified to reflect:

- the incorporation of the "Broad Form" coverages in the basic policy form
- the new aggregate limit

- a combined single limit for bodily injury and property damage
- a new classification and rating structure.

"Claims-made"

The new ISO "occurrence" rates will be the basis for pricing the "claims-made" contract. Those "occurrence" rates will be modified by:

- A discount to reflect the fact that the time between policy inception and the average claim date is shorter under a "claims-made" policy than under an "occurrence" policy, so "claims-made" losses come earlier and are less affected by inflation. When applied to the "occurrence" rates, the discount produces rates for "mature claims-made," which responds on a primary basis to all claims first made during the policy period for covered injury and damage.
- A set of further discounts to be applied in the first four years of "claims-made" coverage to reflect the fact that, during that period, fewer claims will be covered because some of them will be for injury or damage that occurred before the Retroactive Date. This discount decreases each year because more claims will be covered as the "claims-made" program matures.

If no Retroactive Date is entered, the rates will be higher than they would be with a Retroactive Date, but still lower than the "occurrence" rates.

Shortening the "IBNR" (incurred but not reported) period between premium collection and claims payment will result in more accurate pricing by class.

Rating Plans

To track the new policy's rating structure, the new experience rating plan introduces, for general liability, a premium-at-present-rate type calculation instead of the collected premium calculation now used. This new plan applies to both the "occurrence" and "claims-made" contracts.

***PART OF THE PROGRAM:
CLASSIFICATION AND RULES***

Classifying Risks

As part of the overall simplification of general liability insurance, major general liability sublines are combined into two sublines: premises/operations and products/completed operations.

The general liability classification listings are completely revised to:

- Introduce a common exposure base for the premises/operations and products/completed operations coverages for each classification. The common exposure base for determining rates for both sublines will be:
 - gross sales for most manufacturing and mercantile classes.
 - payroll for most contracting classes.
 - number of units for apartments.
 - area for office buildings.

- Introduce an inflation-sensitive exposure base where appropriate.
- Help in the automation of general liability insurance.
- Modernize classifications.
- Clarify the intended application of current classifications.

The general liability module of ISO's Commercial Statistical Plan is being updated to accommodate the new program. Statistical code numbers are all new. Upon publication, the revisions will be consolidated within the Commercial Lines Manual Classification Table.

Rewriting the Rules

The General Liability Rules are:

- Revised to track with changes made in the coverages provided under the new Commercial General Liability Policy
- Redesigned to conform with the revised classification and rating structure
- Consolidated into one set of rules for all classifications instead of separate sets of rules for each individual subline.

The rules are also amended to include:

1. a new step-by-step procedure for determining premium.
2. pricing for the "tail" coverage that's capped at a stated maximum.
3. a transition program that limits any premium increases that may result from a change in a risk's exposure base to 25 percent a year for five years. Premium decreases caused by the exposure-base change are limited to a value that offsets the increases. The transition program only applies to about 120 store classes.

More than General Liability

ISO's Commercial General Liability Program is part of a broader program to simplify the policy forms and rating of all commercial lines of insurance. As part of that broader program, ISO has developed new, simplified contracts for all commercial lines of insurance, using non-technical and personalized language wherever practical.

The ISO endorsement portfolio is revamped to eliminate many forms, to add new ones, and to redraft all forms in a style and format that are consistent with the basic policies. The total program is being introduced in phases.

What It Means

Any change takes some getting used to, and adjusting to change requires some extra effort to learn about and adapt to the new way of doing things. That will certainly be true during the transition to the new Commercial General Liability Policy.

But in the long run, extra effort and adjustment will benefit insurers, producers and consumers in the form of modernized coverages, more predictable losses, reduced policywriting expenses and simplified policy language.

"Claims-Made" Summary

"CLAIMS-MADE" SUMMARY**Trigger of Coverage for Bodily Injury and Property Damage**

- Claims first made against any insured during the policy period.

Retroactive Date Provision

- Excludes bodily injury and property damage that occurs before a date entered on the Declarations page.
- Provision can be nullified by writing "none" in place of a date.

"Tail" Endorsement (CG 27 01)

- Provides that claims first made after the policy period for injury or damage that occurred before the end of the policy period will be considered first made during the policy period.

Special Endorsements

- CG 27 02 excludes specific accidents, products, work or locations.
- CG 27 03 provides 60-day "tail" period on expiring policy for specific accidents, products, work or locations.
- CG 27 04 provides "tail" without time limit on expiring policy for specific accidents, products, work or locations.

POINTS TO REMEMBER**If "Claims-Made" Policy Is:**

- Issued with no Retroactive Date
- Issued with a Retroactive Date

Remember That:

Coverage is excess over prior "occurrence" policies. Specific liabilities may be excluded via CG 27 02.

Coverage excluded for bodily injury and property damage occurring prior to Retroactive Date. Coverage excess over any "occurrence" policies in effect before the policy period but after the Retroactive Date. CG 27 02 may still be used to exclude specific known liabilities.

POINTS TO REMEMBER (continued)

If "Claims-Made" Policy Is:

- Renewed or replaced with "claims-made" policy containing the same Retroactive Date
- (a) Renewed or replaced with "claims-made" policy containing advanced Retroactive Date; or
- (b) Renewed or replaced with an "occurrence" policy; or
- (c) Cancelled or not renewed and not replaced
- Renewed with "claims-made" policy newly excluding specific accidents, products, work or locations via CG 27 02.

Remember That:

Coverage continues without interruption.

60-day "tail" period automatically provided under expiring policy. "Tail" endorsement CG 27 01 is available on that policy.

Special endorsement CG 27 03 provides 60-day "tail" period on expiring policy for accidents, products, work or locations excluded. Endorsement CG 27 04 available on expiring policy to provide "tail" period without time limit for excluded accidents, products, work or locations.

Coverage Highlights

**ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS**

COVERAGE HIGHLIGHTS (Refer to Policies for Details)

	CURRENT "OCCURRENCE" POLICY	NEW "OCCURRENCE" POLICY	NEW "CLAIMS-MADE" POLICY
<p>1. <i>Coverages</i></p>	<p>Bodily Injury Liability, Property Damage Liability, Supplementary Payments, Broad Form Endorsement (GL 04 04) provides broadened contractual liability, as well as Personal Injury and Advertising Injury, Premises Medical Payments, Host Liquor, Fire Legal Liability, Broad Form Property Damage, Incidental Medical Malpractice, Non-Owned Watercraft, Limited Worldwide Liability, Additional Persons Insured, Extended Bodily Injury, and Automatic Coverage for Newly Acquired Organizations.</p>	<p>All coverage of current policy and broad form integrated into basic policy form, with extensions and restrictions described below. Presentation of coverage is consolidated and simplified.</p>	<p>Same as new "occurrence" policy.</p>
<p>2. <i>Limits of Liability</i></p>	<p>"Per occurrence" limits apply separately to bodily injury and property damage. Aggregate limits apply to products-completed operations hazard and property damage coverage for manufacturers and contractors. Broad Form Endorsement imposes separate aggregate on Personal Injury and Advertising Injury Liability, together with per person limit on medical payments and per occurrence limit on fire damage legal liability.</p>	<p>"Per occurrence" limit applies to bodily injury and property damage combined. Separate aggregate limits apply to products-completed operations hazard and all other coverages combined. Separate sublimits apply per person to Personal and Advertising Injury, per person to medical payments, and per fire to Fire Damage Legal Liability.</p>	<p>Same as new "occurrence" policy.</p>
<p>3. <i>Contractual Liability</i></p>	<p>Broad Form endorsement extends coverage of basic form to any oral or written contract relating to the named insured's business, with specific exclusions. Aircraft, auto, and watercraft exclusions do not apply to this coverage.</p>	<p>Coverage for liabilities assumed under leases of premises, sidetrack agreements, and other specific kinds of contracts. Coverage also extends to all other contracts relating to named insured's business, but only for tort liabilities assumed. Same exclusions applicable as in current "occurrence" policy, but auto exclusion also applies. Coverage will be available under Business Auto Policy.</p>	<p>Same as new "occurrence" policy.</p>
<p>4. <i>Alcoholic Beverages Exclusion</i></p>	<p>Applies to named insureds in liquor business. Statutory liability of premises owner also excluded. Broad Form provides Host Liquor Coverage.</p>	<p>Statutory liability of premises owner not excluded. Host Liquor coverage automatically included.</p>	<p>Same as new "occurrence" policy.</p>

**ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS**

COVERAGE HIGHLIGHTS (Refer to Policies for Details)

	CURRENT "OCCURRENCE" POLICY	NEW "OCCURRENCE" POLICY	NEW "CLAIMS-MADE" POLICY
5. <i>Workers Compensation & Employers Liability</i>	Exclusions designed to dovetail with Workers Comp and E. L. coverages.	Exclusions broadened to eliminate coverage for dual capacity suits and consequential bodily injury to family members. These coverages have been explicitly included in the new Workers Comp policy filed by NCCI.	Same as new "occurrence" policy.
6. <i>Pollution Liability</i>	Excluded unless due to sudden and accidental emissions. No exception for products-completed operations hazard.	Excluded if emission originates on named insured's premises or a waste disposal or treatment facility. Off-site emissions covered unless pollutants are waste or unless the pollutants are brought to jobsite in connection with insured's or subcontractor's operations. No coverage for costs or liabilities arising out of clean-up or monitoring operations done at governmental request or direction. Resulting coverage embraces products-completed operations exposure for both sudden and gradual emissions.	Same as new "occurrence" policy.
7. <i>Auto, Aircraft and Watercraft</i>	Ownership, maintenance, use, operations, loading and unloading excluded with certain exceptions. Exclusions do not apply to contractual coverage of Broad Form.	Exclusions have been consolidated. No change in scope of exclusion or exceptions to it, except for elimination of contractual coverage for auto use, which will now be covered under the ISO Business Auto Policy (see 3, above). New language specifically excludes coverage for liability arising out of the entrustment of autos to others. Exclusion of snowmobiles has been eliminated. Coverage is also provided for the operation of machinery or equipment attached to certain vehicles defined as "autos."	Same as new "occurrence" policy.
8. <i>Mobile Equipment</i>	Covered except when being transported by an auto. Definitions of auto (excluded) and mobile equipment (covered) are intended to be mutually exclusive. No distinction made between road and operational use.	No change in scope of coverage. New definition defines as "Auto" certain vehicles which have machinery or equipment attached but are essentially road vehicles. A new provision in the auto exclusion assumes coverage for the operations of the attached equipment. On-the-road coverage will come from the Business Auto Policy.	Same as new "occurrence" policy.

**ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS**

COVERAGE HIGHLIGHTS (Refer to Policies for Details)

CURRENT "OCCURRENCE" POLICY	NEW "OCCURRENCE" POLICY	NEW "CLAIMS-MADE" POLICY
<p>9. Property Damage</p> <p>Various exclusions address property damage to the insured's products or work or to property in the insured's care, custody or control. Generally, such damage is not covered if due to an inherent defect in the product or work itself, or to negligence in handling or working on the entrusted property. Recall or withdrawal of products, work, or property incorporating them is specifically excluded. Other loss of use, including loss of use of uninjured property, is covered if due to physical injury inflicted on other property by the insured's products or work, or if due to sudden and accidental physical injury to the products or work themselves after they are put to use. Broad Form Endorsement narrows concept of care, custody or control so that coverage is provided for parts of property other than those on which the insured is actually working at the time of the damage. Endorsement also covers damage caused by faulty workmanship to other parts of work in progress, and damage to, or caused by, a subcontractor's work after the insured's operations are completed.</p> <p>Excluded unconditionally.</p>	<p>Exclusions have been completely rewritten and clarified with no change in overall scope of coverage. "Broad Form" coverage has been incorporated in the new provisions. Real property is specifically eliminated from the definition of "your product," so that the broad form coverage for work and completed operations clearly applies. Care, custody, or control exclusion has been restricted to personal property to clarify further the application of these provisions. A new definition of "impaired property" clarifies the application of the "failure to perform" and "sistership" exclusions (m and n).</p>	<p>Same as new "occurrence" policy.</p>
<p>10. Alienated Premises</p>	<p>Exclusion does not apply to premises built and held for sale by named insured, providing coverage for contractors who build on speculation.</p>	<p>Same as new "occurrence" policy.</p>

**ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS**

COVERAGE HIGHLIGHTS (Refer to Policies for Details)

	CURRENT "OCCURRENCE" POLICY	NEW "OCCURRENCE" POLICY	NEW "CLAIMS-MADE" POLICY
11. <i>Personal and Advertising Injury</i>	Coverage provided in Broad Form Endorsement.	Coverage in basic policy, simplified with no change in scope. Coverage triggered, as in current policy, by offense committed during policy period.	Same as new "occurrence" policy.
12. <i>Medical Payments</i>	Coverage provided in Broad Form Endorsement.	Coverage in basic policy, simplified with no change in scope. Payments for first aid, currently provided under Supplementary Payments, have been moved to Medical Payments section.	Same as new "occurrence" policy.
13. <i>Supplementary Payments</i>	Defense Costs provided in addition to policy limits.	No change. Pre-judgment interest included in Supplementary Payments in addition to policy limits. Maximum payment for expenses incurred by insured increased from \$25 to \$100 per day.	Same as new "occurrence" policy.
14. <i>Persons Insured</i>	Named insured, spouses of individual proprietors, partners, members, executive officers, directors, stockholders, real estate managers, and operators of mobile equipment included in basic form. Legal representatives and property custodians included through assignment condition if named insured dies. Spouses of partners and employees other than executives included by Broad Form endorsement, with additional exclusions for employees. Endorsement also provides limited, automatic coverage for newly acquired organizations.	Separate, consolidated section lists all persons insured under current policy and Broad Form. Coverage for newly acquired organizations applies only to injury, damage, and civil offenses occurring after the acquisition. Exclusions for unnamed partnerships and joint ventures extended to include past, as well as present, enterprises.	Same as new "occurrence" policy.

**ISO GENERAL LIABILITY POLICY REVISION
COMPARISON OF CURRENT AND REVISED CONTRACTS**

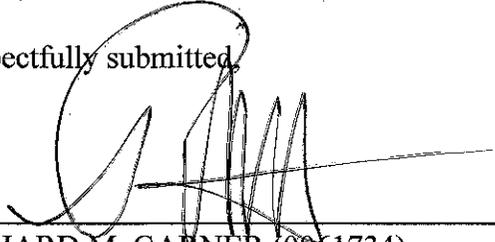
COVERAGE HIGHLIGHTS (Refer to Policies for Details)

	CURRENT "OCCURRENCE" POLICY	NEW "OCCURRENCE" POLICY	NEW "CLAIMS-MADE" POLICY
15. <i>Other Insurance</i>	Coverage is excess for Fire Legal Liability, Broad Form Property Damage, Non-owned Watercraft. Coverage is contingent for newly acquired organizations and those responsible for operators of mobile equipment who are not employed by the named insured. Contribution is by equal shares unless prohibited by one or more of the other policies. In that case, contribution is pro-rata.	Same as current policy, but coverage is also excess for non-owned autos and aircraft.	Same as new "occurrence" policy, but coverage is also excess over any applicable prior insurance, if no Retroactive Date is used or there was "occurrence" coverage after the Retroactive Date. The coverage of the Extended Reporting Period Option is also excess over any subsequent insurance also applicable to a covered claim.
16. <i>Severability</i>	Contract applies separately to each insured against whom claim is made or suit is brought except with respect to limits.	New provision also states that contract applies as if each named insured were the only named insured.	Same as new "occurrence" policy.
17. <i>Extended Reporting Period</i>	Not applicable.	Not applicable.	Provides automatic "tail" period of 60 days and guarantees availability of endorsement providing "tail" period without time limit. Claims first made during a "tail" period for injury or damage that occurred before the end of the policy period (and after any applicable Retroactive Date) will be considered first made on the last day of the policy period.
18. <i>Limited Worldwide Products Coverage</i>	Applies to injury and damage anywhere in world, if original suit is brought in U.S., its territories or possessions, or Canada and the product was sold for use or consumption there.	Coverage expanded to products made or sold in U.S., its territories or possessions, or Canada, regardless of place of intended use. The term "original suit" is replaced by "suit on the merits" for clarity.	Same as new "occurrence" policy.

INSURANCE SERVICES OFFICE, INC.

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Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the forgoing was served by ordinary U.S. Mail, on this 30th day of

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