



# Your Work's Exceptional Subcontractors

Ohio courts have provided clarity on the "Your Work" exclusion and subcontractor exceptions to that language.

By Andrew Smith

The "Your Work" exclusion is often quickly cited in reservation of rights letters and coverage decision letters. However, this policy exclusion is frequently misinterpreted and misunderstood, particularly when it comes to the work of subcontractors.

Generally speaking, a commercial general liability insurance policy is designed to cover bodily injury, property damage, or personal and advertising injury to others. Commercial general liability policies are not intended to protect business owners against every risk of operating a business. As stipulated in an Ohio appellate decision in *Heile v. Herrmann*, "Business risks" are considered the "normal, frequent, or predictable consequences of doing business, and which business management can and should control or manage." Courts have generally concluded that CGLs are intended to insure the risk of an insured's causing damage to other persons or their property, but they are not intended to cover the risk of the insured's causing damages to the insured's own work.

In sum, a CGL policy is not a performance bond or an all-risk policy. CGL policies are not intended to insure against a breach of contract or poor workmanship but instead are intended to insure against "the unpredictable, potentially



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unlimited liability that can result from business accidents," according to the court in *Erie Ins. Exchange v. Colony Dev. Corp.*

Since policy language is construed against the insurer, "an exclusion in an insurance policy will be interpreted as applying only to that which is clearly intended to be excluded," according to the Ohio court in *City of Sharonville v. Am. Employers Ins. Co.* This is an important consideration if you are on the fence or unsure whether or not to invoke the "Your Work" exclusion. A court will construe policy language against the insurer, and the burden is on the insurer to demonstrate sufficient evidence supporting the exclusion.

## The Exclusion at Work

The public policy behind the "Your Work" exclusion is that the contractor controls the quality of his own work and it is fair to hold him liable if the work is faulty. While application of the "Your Work" exclusion may seem simple, do not be fooled.

If the contractor's CGL policy includes a "Your Work" exclusion, damage to the structure resulting from alleged construction defects might not be covered. However, the CGL policy will cover the risk of injury to people and damage to property other than the completed work itself (assuming no other exclusions apply). For example, if the siding applied to the exterior of a building falls and injures a pedestrian or an automobile, the CGL policy would likely cover these claims.

By way of example, in *Ohio Cas. Ins. Co. v. Hanna*, Mr. Hanna hired Amish workers to frame a new house, but a tornado leveled it a few months later. The Amish workers began framing the house again but had to stop when the weather turned cold. Mr. Hanna hired Quality to complete the job. While finishing framing and installing the roof rafters of the home, the company caused the frame to go out of plumb and out of square, leading to problems with the roof, doors, drywall, wood trim, and windows.

The court reasoned that, because the "Your Work" exclusion applies only to property damage to "your work" arising out of "your work," it would apply in this case only if Quality's

## Drones Spy Cracks, Measure Temps on Bridges

The Minnesota Department of Transportation is researching using drones to inspect bridges across the state. Close-ups of bridges and supports along with temperature changes in concrete structures are all possible using high-definition and infrared cameras attached to the unmanned aerial vehicles. The UAVs allow inspectors to consider the structure in real time, giving them specific insights into the effects of weather or other variables that could affect bridge integrity or stability. The employment of drones is projected to reduce costs and traffic delays associated with bridge

inspection. This is particularly important in states like Minnesota, the "Land of 10,000 Lakes," where bridges are common. Drones are already used in California to evaluate the structural integrity of public works, such as dams and roadways affected by recent rains, snows and floods. MnDOT plans its final phase of drone testing for this spring and could begin using them as a regular tool next year. The agency says the drones would not replace human inspectors but would be another tool in engineers' arsenal allowing them access to numerous spots that otherwise would take more time and money. ■



work caused damage to Quality's own work. The court held the exclusion did not apply:

Quality's out-of-plumb installation of the windows did not cause property damage to other work performed by Quality. **Rather, it caused damage to third-party property**, specifically, the Hannas' prefabricated windows' cranks and gears. This Court, therefore, concludes that neither "your work" exclusion applies to the Hannas' window claims. (Emphasis added.)

Likewise, in *Am. Home Assur. Co. v. Tutor-Saliba Corp.*, the complaint alleged the defendants' defective work caused damage to what was the product of non-defective work. The complaint alleged incorporation of defective material and work into the overall construction "damaged the previously existing work resulting in damages to Plaintiff" and "resulted in the complete loss of use of the previously constructed existing work." Thus, the "Your Work" exclusion was inapplicable, and the duty to defend was invoked. The court reasoned the complaint claimed defendants' defective work caused damage to other property and also to non-defective portions of their work.

To the contrary, in *Motorists Mut. Ins. Co. v. Owners Ins. Co.*, the court focused on a very simple complaint alleging, "Defendant negligently performed construction services in such a manner to cause water damage to Plaintiff insured's real property in the amount of \$18,187.81." The court held the "Your Work" exclusion applied and the insurer had no duty to defend the contractor based on the complaint's allegations.

When considering the "Your Work" exclusion, the first question you must answer is whether the complaint alleges the insured caused damage to property outside of the work completed by the insured. Look for collateral consequences and outside damage, no matter how slight. If the insured simply caused damage to the insured's own work, then the "Your Work" exclusion is applicable.

### The Subcontractor Exception

The next step is to consider the subcontractor exception to the "Your Work" exclusion. If invoked, the exception will allow coverage for the loss. A common subcontractor exception is as follows:

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.

Courts have used this exception to find in favor of coverage involving the work of the excepted subcontractors. The exception doesn't distinguish between ongoing and completed projects. The articulated rationale of the exception is that a contractor cannot control a subcontractor's negligence as it can its own.

Who is a "subcontractor"? Another factor which must be considered is the scope of the subcontractor exception. Courts have offered varying definitions of the term "subcontractor," but in general, the term is broadly defined. Black's Law Dictionary defines subcontractor as "[o]ne who takes a portion of a contract from a principal contractor or another subcontractor." Webster's Third New International Dictionary defines subcontractor as "an individual or business firm that contracts to perform part or all of another's contract." In *J.T. Weybrecht's Sons Co. v. Hartford Accident & Indemnity Co.*, the Ohio Supreme Court held: "The ordinary meaning of the word 'subcontractor' will include such a materialman who contracts to furnish material to a contractor for use in performing his contract."

There are limits on who can be classified as a subcontractor under the subcontractor exception, and the details matter. For example, the court in *Web Constr. Inc. v. Cincinnati Ins. Co.* held that issues of material fact existed as to whether a concrete supplier provided standard-mix or custom-fabricated concrete and whether it performed significant on-site work for purposes of qualifying as a subcontractor. This is because courts usually base their evaluation of whether a materials supplier is a subcontractor on whether or not it custom fabricates the product and has an

on-site presence, as seen in *Bldg. Specialties, Inc. v. Liberty Mut. Fire Ins. Co.*

Courts require something more than mere supply of standard inventory items. According to *Couch on Insurance*, "A manufacturer or supplier will... typically only constitute a subcontractor for purposes of the exception where the manufacturer or supplier custom fabricates the materials to the owner's specifications or otherwise performs part of the on-site construction work which the insured had contracted to perform." Similarly, *Bruner and O'Connor on Construction Law* states, "A supplier that fabricates or otherwise provides unique materials should have little difficulty meeting the requirement of being a subcontractor."

To complicate matters, courts are split on whether the subcontractor's work must have actually caused the damage. For instance, the 4th Circuit held a policyholder could recover for the costs of repairing damages caused by its negligence where the damaged work was merely performed by a subcontractor. In *Limbach Co. v. Zurich Am. Ins. Co.*, Limbach Company subcontracted with Morse Diesel/Essex to install a prefabricated, insulated, underground steam line. Limbach in turn subcontracted with Legacy to excavate the trench for the steam pipe. It was undisputed that Limbach's improper unpacking of the steam pipe caused a leak in the steam line, which in turn damaged the insulation, backfill around the steam line, and the landscaping in the area. The 4th Circuit (applying Pennsylvania law) held, however, that the cost of repairing the damaged backfill—which had been poured by Legacy—was not excluded, basing its decision on the subcontractor exception.

Don't be so quick to disregard a detailed assessment of the "Your Work" exclusion. No matter how simple the construction defect complaint allegations or how minor the property damage, always remember to consider deeper details of the exclusion, including the important subcontractor exception. ■

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