THE SUPREME COURT OF OHIO

Ohio Northern University	:	
	:	
Plaintiff/Appellee,	:	**Case No. 2017-0514**
	:	
vs.	:	
	:	Appeal from the Hancock County
Charles Construction Services, Inc.	:	Court of Appeals, Third Appellate
	:	District, Case No. 05-16-01
Defendant/Appellee,	:	
	:	
vs.	:	
	:	
	:	
The Cincinnati Insurance Company	:	
	:	
Intervenor-Appellant.	:	

REPLY BRIEF OF APPELLANT THE CINCINNATI INSURANCE COMPANY

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INTRODUCTION

Two things are clear from the briefs filed by Appellees and their amici.

First, there should no longer be any question that the operative facts and insurance policy provisions in the CIC Policy are identical to those in *Westfield Ins. Co. v. Custom Agri Systems, Inc.*, 133 Ohio St.3d 476, 2012-Ohio-4712.[1] After spending years arguing otherwise, when presented with the indisputable record from *Custom Agri Systems*, ONU and CCS now sheepishly largely concede the point. Merit Brief of Appellee Ohio Northern University ("ONU's Brief"), p. 9-11 ("[T]he Policy clarifies that . . . 'property damage' must be caused by an 'occurrence' . . . '[c]ompleted operations' is not separate coverage"); Brief of Charles Construction Services, Inc. ("CCS' Brief"), p. 8 ("The CIC policy follows the standard form for the basic CGL coverage"); see also Merit Brief of Amici Curiae Associated Builders and Contractors, et al. ("ABC's Brief"), p. 9 (noting that it is "true that completed operations is not a 'separate coverage'"). It is simply incontestable that *Custom Agri Systems* interpreted identical policy language under legally indistinguishable facts thereby undermining the crux of Appellees' position before the Third Appellate District and the resultant decision. While this alone should resolve the issues in this case, Appellees continue to argue that the same policy language should be interpreted differently in this case than it was just a few years ago in *Custom Agri Systems* under similar facts.

Second, recognizing the manifest futility of trying to distinguish *Custom Agri Systems*, Appellees and their amici now urge this Court to overrule *Custom Agri Systems*—which they seek to recast as an ill-begotten, poorly-reasoned, isolated holdover from a less-enlightened age.

[1] For purposes of clarity, consistency and brevity, the same abbreviations used in the Merit Brief of Appellant The Cincinnati Insurance Company ("CIC's Brief") are used in this Reply Brief.

However, none of their contentions provides a reasonable basis to do so under *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849.

For the reasons set forth below, as well as those in CIC's Brief, the contentions of Appellees and their amici are without merit and should be rejected. *Custom Agri Systems* is on all fours and should be dispositive of the outcome of this case. Consequently, this Court should reverse the Third Appellate District and enter judgment for CIC.

ARGUMENT

A. The policy language and facts in this case are legally indistinguishable from those in *Custom Agri Systems*.

The insuring agreement in the CIC Policy provides coverage for those sums that CCS "becomes legally obligated to pay damages because of 'property damage'. . . caused by an 'occurrence'". (CIC' Brief, pp. 8-11). This is identical to the policy language that drove the holding in *Custom Agri Systems*. 2012-Ohio-4712, ¶9.[2]

[2] In a continuing effort to suggest that the "products completed operations hazard" is somehow separate and distinct from the CGL coverage, Appellees contend that subsequent premium increases for CCS' CGL coverage supports their position. (ONU's Brief, pp. 12-14; CCS' Brief, pp. 2-5). There are two problems with this suggestion. First, it fails to address the obvious—the insuring agreement for the "products completed operations hazard" is admittedly the same as for the standard CGL coverage at issue in *Custom Agri Systems*. Therefore, the premium analysis is irrelevant. Second, the Appellees fail to make a persuasive "differential diagnosis"—that is, that the premium increase necessarily supports their position. Not only did Appellees make no effort to factually develop or explain this argument in the lower courts, but the evidence upon which they rely actually shows ***a premium rate reduction*** (from ".871" to ".737"). (Supplement, SUPP 000015, SUPP 000069). The overall premium went up, however, because the basis (against which the premium rate was charged increased from $3.5M to nearly $25M in three years (Id.). This could not have been attributable solely to the damages ONU sought from CCS because those damages were only $6M. (ONU's Brief, p. 3). Apparently, the overall CGL premium increased because the amount of work CCS was doing and insuring increased. As Justices DeWine and Fischer recently noted: "courts should be cautious when comparing insurance premiums to ascertain the contracting parties intent." *William Powell Co. v. OneBeacon Ins. Co.*, 1st Dist No. C-160291, 2016-Ohio-8124, ¶38. Such evidence is generally only used to "ice the cake". *Cincinnati Ins. Co. v. ACE INA Holdings, Inc.*, 175 Ohio App.3d 266, 2007-Ohio-5576, ¶41. Here, it is irrelevant.

The damages sought by the owner in this case, ONU, from the general contractor, CCS, arose, at least in part, from the alleged faulty work of CCS' subcontractors. (ONU's Brief, p. 3; CCS' Brief, p. 1). Legally indistinguishable facts drove the holding of *Custom Agri Systems*. (CIC' Brief, pp. 12-20). Appellees finally concede this, but contend that either: (1) such facts were legally irrelevant to the holding in *Custom Agri Systems*; or (2) that this Court was oblivious to these facts. Neither contention has merit. Not only were the facts in the record in *Custom Agri Systems*, but they were appended to the insurer's Merit Brief, argued by the insurer in its Merit Brief and relied upon in the sole dissenting opinion. (CIC's Brief, pp. 12-20; Merit Brief of Petitioner Westfield Insurance Company in *Westfield Ins. Co. v. Custom Agri Systems, Inc*., No. 2011-1486, in the Supreme Court of Ohio, Appx. 00001 to 00043 [available from this Court's online docket]).[3] Accordingly, there is no reasonable basis to claim that this Court was ignorant of these facts in *Custom Agri Systems.* Furthermore, for all the reasons set forth in the dissenting opinion in *Custom Agri Systems*, these facts were not irrelevant, but were central to the holding. 2012-Ohio-4712, ¶¶22-36. The focus of *Custom Agri Systems* was whether the damages sought against the insured triggered the standard CGL insuring agreement. Because the damages did not trigger the insuring agreement, the exclusions were correctly deemed irrelevant—which is why this Court dismissed the Second Certified State-Law Question in *Custom Agri Systems* as moot. 2012-Ohio-4712, ¶¶20-21. There was no need to opine on an irrelevant issue.

[3] ONU tries to attribute some significance to the fact that the insurer in *Custom Agri Systems* was represented by some of the same lawyers as CIC in this case. (ONU's Brief, p. 22). While true, there is no relevance to contention. Most lawyers represent a wide range of clients with a wide range of interests, and such representation is compartmentalized by case. For instance, ONU's counsel in this case regularly represents OII. See e.g. *Scott L. Smith, et al. v. Erie Ins. Co*., No. 2015-1419, in the Supreme Court of Ohio. This does not mean that ONU's counsel actually supports OII's position in this case or that his arguments for ONU should have any bearing on OII's arguments in this case.

B. The application of standard CGL coverage to construction-related cases is driven by the damages sought against the particular insured.

Contrary to the contentions of Appellees and their amici, *Custom Agri Systems* did not hold that CGL coverage is ***never*** applicable to construction-related cases. It simply applied the tried and true national majority view that when claims against the insured are for the cost to repair or remediate a product or project created or built by the insured there is no accidental property damage, ie. damages because of property damage caused by an occurrence, as to trigger the standard CGL insuring agreement. 2012-Ohio-4712, ¶¶20-21.[4] In so doing, this Court relied upon the well-respected analysis in Franco, Insurance Coverage for Faulty Workmanship Claims under Commercial General Liability Policies, 30 Tort & Ins. L. J. 785 (1994) to correctly observe that application of CGL coverage in construction-related cases "largely turns on the damages sought". 2012-Ohio-4712, ¶13.[5] Franco further elaborated:

> The contractor . . . has a contractual business risk that he may be liable to the owner resulting from the failure to properly complete the building project itself in a manner so as to not cause damage to it. This risk is one the general contractor effectively controls and one which the insurer does not assume because it has no effective control over those risks and cannot establish predictable and affordable rates . . . Unlike the surety on a performance bond, a CGL insurer has no recourse against a contractor for the employment of defective materials or shoddy workmanship on the construction project.

Franco, at 786. The section concludes:

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[4] This well-established rule has led this Court to conclude that, under such circumstances, there should not be any viable tort claims that can be brought by the owner against the insured. See *Corporex Dev. & Constr. Mgt., Inc. v. Shook, Inc*., 106 Ohio St.3d 412, 2005-Ohio-5409, ¶¶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); see also Merit Brief of Petitioner Westfield Insurance Company in *Westfield Ins. Co. v. Custom Agri Systems, Inc*., No. 2011-1486, in the Supreme Court of Ohio, pp. pp. 13-20 (available from this Court's online docket)(further analyzing the historical and philosophical link between CGL coverage and tort liability).

[5] Appellees and their amici recognize the continuing authority of Franco in their Briefs. (See ONU's Brief, pp. 7-8, 11).

> In sum, poor performance is a cost of doing business; it is not part of the insurance objective of shifting risk . . . A contractor's poor performance is outside the scope of CGL coverage . . . CGL policies are not intended to cover replacement or repair of contractors' work. If insurance proceeds could be used to repair or replace poor construction, a contractor could receive payment for negligently performed work and then later receive payment from the insurer to repair and replace that work . . . Insurance for defective workmanship creates a disincentive for contractors to perform in a workmanlike manner.

Franco, pp. 786-787. Franco's conclusions continue to be echoed by today's legal commentators. See 9A Couch on Ins. §129:4 (2017)("A claim for faulty workmanship, in and of itself, is not an occurrence under a commercial general liability policy because a failure of workmanship does not involve the fortuity required to constitute an accident")(footnotes omitted); Oh. Ins. Coverage §4:38 (2017)("[C]laims of defective construction or workmanship are not claims for 'property damage' caused by an 'occurrence' under a CGL policy"); Rhodes, the Law of Commercial Insurance (1996), §II.2.3. ("The insurer will not accept the risk that the contract will be poorly performed, resulting in a claim for the failure to perform in a workmanlike manner").[6]

CCS and ONU both concede that this holding of *Custom Agri Systems* is consistent with the national majority view. (ONU's Brief, p. 20 ["Westfield—by its plain reading—does nothing more than confirm the ***well-established principle*** that CGL insurance is not intended to cover repair of an insured's **own defective work**"][bold emphasis in original; bold italicized emphasis added]; CCS' Brief, p. 6 ["an insured assumes the business risk of its own faulty work"]).[7]However, they contend that this "well-established principle" should not apply in this

[6] Thus, ONU's argument that "***every*** insurance textbook since 1986 confirms the existence of this coverage" and that "[n]ew textbooks will have to be written" if this Court adheres to *Custom Agri Systems* is without support. (See ONU's Brief, pp. 25-26)(emphasis added).

[7] In the construction defect insurance context, however, "consequential damages" (or "collateral damages") means "damages, losses or injuries to property ***other than [the insured's] products***".

case because CCS used subcontractors to perform some or all of its work. This contention is demonstrably false.

As directed by *Custom Agri Systems*, and conceded by CCS and ONU, CGL coverage for this case is determined by application of the CIC Policy to "the damages sought" against CCS by ONU. In this regard, it is undisputed that ONU sued CCS for failing to deliver the hotel and conference center that was promised in the Contract. Under the Contract, CCS was legally responsible not only for its own work, but also for the work of any subcontractors it utilized to fulfill the Contract. (CIC's Brief, pp. 3-4). ONU did not sue CCS' subcontractors in tort for accidental property damage to The Inn (which would be its right if such torts had been committed). Nor did it sue CCS for vicarious liability because of the tortious conduct of CCS' subcontractors--the subcontractors were not employees or agents of CCS. Rather, CCS was sued by ONU because CCS failed to fulfill its ***own*** obligations under the Contract to ensure that all work on the Inn was properly completed. In this regard, Appellees agree with the facts as set forth at pp. 3-7 of CIC's Brief. (See CCS' Brief, p. 1 ["The essential facts of this case are uncontested . . . it is unnecessary to burden the Court with a lengthy counterstatement of the facts"]; ONU's Brief, pp. 2-4 [essentially restating the facts alleged by CIC]). ONU sought damages against CCS for failing to ensure that all work on The Inn was properly integrated, sequenced and performed in a way that would not cause the structure to be prematurely and/or unnaturally damaged by exposure to the elements. CCS could not, and did not, defend itself on the basis that it did nothing wrong and instead its subcontractors were solely responsible. Why?

GRE Ins. Grp v. Int'l EPDM Rubber Roofing Systems, Inc., 6th Dist. No. L-95-306, 1996 Ohio App. LEXIS 2665, at *32; 9A Couch on Ins. §129:4. Appellees assert that ONU is seeking "consequential damages" from CCS because work by one of CCS' subcontractors may have damaged work by another of CCS' subcontractors. (ONU's Brief, pp. 20-22; CCS' Brief, p. 13). As explained throughout CIC's Merit Brief and this Reply Brief, this cannot be true with respect to CCS because the entire Inn was CCS' work.

Because CCS was contractually responsible for all work to The Inn.[8] Therefore, the damages alleged by ONU against CCS fall squarely into the "well-established principle" that ONU and CCS concede is the national majority rule and the gravamen of *Custom Agri Systems*.

This does not mean that CGL coverage will ***never*** be triggered by construction-related cases—as decried by Appellees and their amici. Rather, the trigger of standard CGL coverage will always depend upon the nature of the damages sought against the particular insured.[9] In this regard, a CGL policy does not protect the insured from every loss. It protects the insured, in pertinent part, from accidental property damage.[10] Not every loss qualifies as accidental property damage. For example, if a contractor were to drop materials from a building under construction and they damaged a passing car causing property damage, a subsequent claim by the passing motorist for accidental property damage to the vehicle would trigger the standard CGL insuring agreement—even though the claim is related to construction. Why? Because the damages sought are for damage to something other than the insured's own work, ie. accidental property damage. However, if the same dropped materials damaged the contractor's own work to the building, and a claim were subsequently made by the owner for the damage to the contractor's own work, the standard CGL insuring agreement would not be triggered. The contractor would be expected to incur the additional cost necessary to repair the contractor's own work without recourse to CGL coverage. If the contractor was unwilling or unable, then the

[8] However, CCS could and did bring a Third-Party Complaint against various subcontractors for indemnity under its contracts with them. (CIC's Brief, p. 4).

[9] ONU strangely argues that it is an additional insured under the CIC Policy. (ONU's Brief, p. 4). However, no one is seeking damages from ONU and there is no apparent relevance to this argument.

[10] In this regard the historical development and scope of CGL coverage was well-addressed in the Merit Brief of Petitioner Westfield Insurance Company in *Westfield Ins. Co. v. Custom Agri Systems, Inc*., No. 2011-1486, in the Supreme Court of Ohio, pp. 10-29 (available from this Court's online docket).

contractor's bond, if any, might provide the financial resources to pay for the work to be completed.[11] Franco, at 786. However, when the insured is the general contractor responsible for the entire construction project, CGL coverage is not triggered if the only damages sought by the claimant are damages to the project itself.

Because the trigger of coverage depends upon the damages sought against the particular insured, this analysis can be further developed for situations where the insured is a subcontractor rather than the general contractor. A subcontractor is not responsible for the entire construction project, but rather is only responsible for the scope of work within its subcontract. Accordingly, where a subcontractor allegedly damages a part of the construction project that is not within its subcontract, a claim against the subcontractor for such damages may trigger the insuring agreement of the subcontractor's CGL policy. Thereafter, the exclusions of the subcontractor's CGL policy will determine whether coverage would ultimately apply. Under such a scenario, if the owner were to sue the general contractor, and the general contractor were to sue the subcontractor that caused the damage, the general contractor would find that its CGL coverage was not triggered because the damages sought by the owner were for the general contractor's own work (i.e. ensuring proper construction of the entire project) while the subcontractor would find that its CGL policy was triggered—subject to any limitations imposed by the policy's

[11] ONU asserts that it did not pursue CCS' bond in this case because "like most bonds, it expired on project completion. That is one of the reasons the industry added the 'completed operations' section to CGL coverage back in 1986, rather than coming up with a new form of bond." (ONU's Brief, p. 8). However, not only did ONU make no effort to factually develop or explain this argument in the lower courts, but recent similar construction cases against bonding companies suggests that ONU's for this omission is inaccurate. See e.g. *Waverly City School District Bd. of Ed., et al. v. Triad AR, Inc., et al*, No. 2013CV318, in the Court of Common Pleas for Pike County, Ohio (see allegations against bonding company in complaints); *Dayton City School District Bd. of Ed., et al. v. DNK Architects, Inc., et al*., No. 2015 CV 00620, in the Court of Common Pleas for Montgomery County, Ohio (see allegations against bonding company in complaints).

exclusions. The difference in outcome is driven by the nature of the damages sought against each. For the general contractor, the damages sought are to fix its own faulty work. However, the general contractor's third-party claim against the subcontractor seeks damages to something other than the subcontractor's work. Under such circumstances, it does not really matter that the claims against the subcontractor are construction-related. It is the nature of the damages sought against the subcontractor that drives the determination of whether its CGL policy is triggered or not.[12]

To delve one step deeper into the coverage analysis, when "coverage" is discussed, it is important to recall that two interrelated duties of the insurer are involved: (1) the duty to defend; and (2) the duty to indemnify. It is well-established under Ohio law that where a liability insurer has contracted to defend, the insurer's duty to defend its insured against all damages is triggered when there a potential duty to indemnify any of the damages. *Cincinnati Ins. Co. v. Anders*, 99 Ohio St.3d 156, 2003 Ohio 3048, at ¶¶16-21 (describing the development of Ohio law regarding the duty to defend); *Willoughby Hills v. Cincinnati Ins. Co.*, 9 Ohio St.3d 177, 178-180, 459 N.E.2d 555 (1984); *Preferred Mut. Ins. Co. v. Thompson*, 23 Ohio St.3d 78, 491 N.E.2d 688 (1986). As a result, in complex cases such as this one, where the allegations against the insured include even a potential for indemnity, insurers must defend their insured against all allegations.

[12] Appellees complain that CIC has taken inconsistent positions in recent other "consequential damages" cases—to wit, *Cincinnati Ins. Cos. v. Motorists Mut. Ins. Co.*, 9th Dist. No. 13CA0016-M-2014-Ohio-3864. (ONU's Brief, p. 19). However, even a cursory review of the *Motorists* decision reveals that while the case was related to an electrical subcontractor's work on a residential home, the critical event in the case was an electrically-caused house fire that "consumed . . . the home and destroyed or substantially damaged many of the personal items, including furniture, works of art, clothing, appliances and the like." 2014-Ohio-3864, at ¶11. Such damages are quintessential "consequential damages" because they are not part of the subcontractor's work on the home. Consequently, the Ninth Appellate District held that *Custom Agri Systems* was irrelevant because "the complaint did not exclusively seek to recover damages stemming from [the insured's] work in installing the lighting. Rather, it sought damages from the consequential risks that stemmed from the work of [the insured]." 2014-Ohio-3864, at ¶16.

In this case, CIC did just that—at a cost of over $750,000—until it was judicially determined that CIC did not owe coverage to CCS. Thus, even in cases where the insurer is ultimately determined to have no coverage, the insurer may provide the insured, as CIC did in this case, a defense worth hundreds of thousands (or even millions) of dollars. Such realities have caused this Court to observe:

> The duty to defend can be the most important coverage of a commercial general liability policy and comprises an increasingly significant part of the insurer's exposure . . . In situations involving complex litigation, the cost of defense can often exceed the cost of indemnity.

Pilkington N. Am., Inc. v. Travelers Cas. & Sur. Co., 112 Ohio St.3d 482, 2006-Ohio-6551, ¶34.[13]

Based upon the foregoing, Appellees' assertions that CIC's well-supported position in this case results in illusory coverage or coverage negation are without merit. (ONU's Brief, pp. 14-17; CCS' Brief, pp. 15-18). In *Ward v. United Foundries, Inc.*, 129 Ohio St.3d 292, 2011-Ohio-3176, ¶24, this Court unanimously held: "When there is some benefit to the insured from the face of the endorsement, it is not an illusory contract." Even assuming the validity of Appellees' arguments (which this Court should not), it is indisputable that CCS received a substantial benefit from the CIC Policy in the form of a defense. Even if that benefit was not as broad as CCS would have liked, *Ward* precludes a finding of illusory coverage. Id.

Nor is there is reasonable basis to argue a negation of coverage. *Custom Agri Systems* did not represent a retroactive, seismic shift in the law. Rather, it distilled down into a single holding the national and state majority positions that had existed for decades. See 2012-Ohio-4712, ¶¶20-21; Merit Brief of Petitioner Westfield Insurance Company in *Westfield Ins. Co. v.*

[13] Importantly, in most CGL policies, including the CIC Policy, defense obligations have no limits.

Custom Agri Systems, Inc., No. 2011-1486, in the Supreme Court of Ohio, pp. 10-29 (available from this Court's online docket). Appellees' sweeping, self-serving declarations that ***all*** legal commentators, ***all*** legal decisions, everyone selling insurance and everyone involved in the construction industry believed that the kind of damages sought by ONU against CCS were covered under CGL policies are belied by the litany of authorities upon which *Custom Agri Systems* was decided (as well as those identified at pp. 16-22 of OII's Brief). As explained below in greater detail, the simple fact of the matter is that for many decades the nation has been divided on this issue—and likely will continue to be. That is the nature of our federal system. Different states may address the same issue differently, and the laboratories of democracy allow for more than one answer to the same question.

C. Neither exclusions nor exceptions to exclusions expand the scope of an insurance policy's insuring agreement.

It is universally held that the grant of coverage provided by a policy's insuring agreement cannot be expanded by exclusion or exceptions to exclusions. (CIC's Brief, p. 18). This legal axiom is well-explained in Ohio Ins. Coverage §4:38 (2017):

> As has been seen . . . it is necessary first to determine whether there was an "occurrence" before considering applicability of the expected or intended injury exclusion, because if there is no "occurrence," there is no coverage and, therefore, no need to determine whether any exclusions apply. The same concept applies to the business risk exclusion (and, indeed, to all exclusions). Before considering whether any of the business risk exclusions apply, first it must be determined whether supplying a defective product or engaging in faulty work constitutes an "occurrence." The Ohio Supreme Court recently resolved this question, finding claims of defective construction or workmanship are not claims for "property damage" caused by an "occurrence" under a CGL policy . . . Accordingly, it is unlikely that court will reach the analysis of whether the business risk exclusions apply to defective product claims. (footnotes omitted).

As evidenced by the insurer's argument and the dissenting opinion, *Custom Agri Systems* clearly grappled with this issue and resolved it in a manner contrary to Appellees' contentions in this case.[14]

Appellees and their amici counter that unless *Custom Agri Systems* is reversed or modified in this regard, then the so-called "subcontractor exception" to Exclusion l. will be rendered "meaningless" in violation of basic contract interpretation principles. (ONU's Brief, pp. 14-17; CCS' Brief, pp. 15-18). However, *Custom Agri Systems* does not render the "subcontractor exception" to Exclusion l. meaningless, it simply makes it inapplicable to the kinds of damages sought against CCS by ONU in this case. In *Galatis*, this Court addressed a similar argument--the difference between a policy provision being inapplicable and a policy provision being meaningless--in the context of who qualified as an insured for uninsured/underinsured motorists ("UM/UIM") coverage issued to a corporation:

> In *Ezawa*, we relied upon the *Scott-Pontzer* definition of 'you" to find that the second class of insureds under Form CA 2133—"if you are an individual, any family member"—extends uninsured motorist coverage to a family member of an employee. In addition to relying upon the logic of *Scott-Pontzer*, *Ezawa* also erred by not interpreting the second class of insureds as a nullity. Insurance policies are no longer written in manuscript for each policyholder, but rather are standard forms designed to insure a variety of entities, including individuals. "There is nothing sinister about an insurer's use of a 'one size fits all' policy form." *Seaco Ins. Co. v. Davis-Irish*, 300 F.3d at 87.
>
> The second class of insureds applies when the policyholder is an individual. It is simply inapposite when the policyholder is a corporation, just as it is inapposite where an individual policyholder resides alone, and

[14] At p. 21 of ONU's Brief, ONU suggests that the insurer *Custom Agri Systems* "conceded ONU's exact position here in its merit brief". However, in *Custom Agri Systems*, in the context of explaining why Exclusion l. did not change the scope of the standard CGL insuring agreement, the insurer hypothetically explained how Exclusion l. would apply in states where general construction defect damages sought by an owner against a general contractor triggered the standard CGL insuring agreement. There is no reasonable interpretation of that hypothetical that could accurately be described as "conced[ing] ONU's exact position" in this case.

> as the fourth class in inapposite where no one is entitled to recover for another's bodily injury. One who argues a contorted use of an inapposite section of a standard form "confuses superfluity with inapplicability." Id.

2003-Ohio-5849, ¶¶40-41. The principles that drove this holding in *Galatis* are applicable in this case. Once it was determined that the damages sought by ONU against CCS were not damages because of property damage caused by an occurrence under *Custom Agri Systems,* exclusions in the CIC Policy became inapplicable—not meaningless. There is no need to try to "jam square pegs into round holes" to give inapplicable exclusions meaning.

This is not a strained or unreasonable interpretation of the modern CGL form. Standard forms have standard terms, but not every standard term is applicable to every claim. As observed in *Galatis*:

> The insurance industry customarily uses standardized forms promulgated by the Insurance Services Office, Inc. ("ISO"). the ISO forms are generically written to provide for the insurance needs of a wide range of policyholders. Combinations of the various standardized forms are used to create a customized policy for each policyholder. This is accomplished by using base forms such as Commercial Auto, Personal Auto, Personal Umbrella, or Commercial General Liability, which are supplemented by state-specific endorsements that expand or limit the extent of insurance coverage in accordance with the desire of the parties and with each state's laws.

2003-Ohio-5849, ¶15. Exclusion l. is a standard provision of the modern CGL form—whether that CGL form is in a policy issued to a law firm, a barbershop, a grocery store or some other business unrelated to construction. It is included no matter what state is involved. Consequently, as explained at pp. 22-23 of CIC's Brief, it would be a mistake to view the language of Exclusion l. exclusively through the lens of one industry or one state. The abstract contention that the exception to Exclusion l. can only mean that CGL coverage was intended to apply to the kind of damages sought against CCS by ONU is unfounded unless one assumes that CGL coverage only applies to the construction industry and/or only applies in states where

general construction defect damages trigger the CGL insuring agreement—which, of course, it does not.

D. There is no basis to overrule *Custom Agri Systems*.

At pp. 22-25 of CIC's Brief, CIC explained why there was no legal basis to overrule *Custom Agri Systems*. Appellees and their amici make two principal counterarguments: (1) other states—either judicially or legislatively--have recently reached conclusions contrary to *Custom Agri Systems* (ONU's Brief, pp. 22-26; CCS' Brief, pp. 15-23; ABC Brief, pp. 24-28); and (2) failure to overrule *Custom Agri Systems* will have a profound adverse impact on Ohio's construction industry and increase construction-related litigation. (ABC Brief, pp. 28-32; Merit Brief of Amici Curiae The Ohio Home Builders Association and The National Association of Home Builders in Support of Appellees Ohio Northern University and Charles Construction Services, Inc. ("OHBA Brief"), pp. 20-21). As explained below, in reverse order, neither of these counterarguments has merit.

Custom Agri Systems provides a simple, clear precedent to guide construction defect coverage. There is no evidence that it is causing increased litigation or impairing Ohio business. As correctly pointed out by OII at pp. 5-6 of its Amicus Brief, and tacitly conceded at p. 29 of ABC's Brief, the number of construction defect coverage cases in the six years since *Custom Agri Systems* has been nominal. Comparatively, when *Galatis* limited *Scott-Pontzer* and overruled *Ezawa* just four years after those cases were decided, this Court alone had nearly a hundred related cases pending before it. See *In Re: Uninsured and Underinsured Motorist Coverage Cases*, 100 Ohio St.3d 302, 2003-Ohio-5888. Likewise, no explanation is given for how *Custom Agri Systems* is negatively impacting Ohio's construction industry, and anecdotal evidence would suggest that, nearly six years after *Custom Agri System*, the industry is doing

very well.[15] Comparatively, *Scott-Pontzer* and *Ezawa* had contributed to skyrocketing insurance premiums and collapse of the commercial UM/UIM market in Ohio.[16] While it is not necessary that a case create the kind of chaos that *Scott-Pontzer* did before it is overruled, neither Appellees nor their amici have made any real effort to explain how or why *Custom Agri Systems* "defies practical workability". They simply disagree with its holding.

The crux of their argument to overturn *Custom Agri Systems* is the wrong-headed contention that *Custom Agri Systems* is an unsupportable outlier. With respect to Ohio cases, however, *Custom Agri Systems* made clear that it was relying upon the clear majority view of Ohio cases. 2012-Ohio-4712, ¶¶14-15. With the exception of the Third Appellate District's decision below, there is no evidence that this has changed. With respect to national cases, nearly half of the states in the Union follow common law clearly consistent with the *Custom Agri Systems*.[17] This includes four states in which judicial decisions consistent with *Custom Agri*

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[15] See http://www.ideastream.org/news/construction-industry-among-ohios-biggest-job-gainers-in-2017 (last visited on April 28, 2018); https://www.mydaytondailynews.com/news/construction-jobs-expected-increase-2017/q2d9HPcnAvxoNCfNS2UTSL/ (last visited on April 28, 2018).

[16] Ohio Dept. of Insurance, Uninsured and Underinsured Motorists Coverage in Ohio, Report Required by Senate Bill 97 (see https://www.insurance.ohio.gov/Legal/Reports/Documents/Senate_Bill_97_Report.pdf, last visited on May 1, 2018).

[17] *Westfield Ins. Co. v. Miranda & Hardt Contracting & Bldg. Servs. LLC*, No. N14C-06-214, 2015 WL 1477970, *3 (Del.Super.Ct. Mar. 30, 2015); *Stoneridge Dev. Co., Inc. v. Essex Co*., 382 Ill.App.3d 731, 756-757, 888 N.E.2d 633 (2008); *Cincinnati Ins. Co. v. Motorists Mut. Ins. Co.*, 306 S.W.3d 609 (Ky.2011); *Baywood Corp. v. Maine Bonding & Cas. Co*., 628 A.2d 1029, 1031 (Me. 1993); *Woodfin Equities Corp. v. Hartford Mut. Ins. Co*., 110 Md.App. 616, 678 A.2d 116, 131-133 (Ct.App.1996); *Commerce Ins. Co. v. Betty Caplette Bldrs., Inc*., 420 Mass. 87, 92, 647 N.E.2d 1211 (1995); *Concord Gen. Mut. Ins. Co. v. Green & Co. Bldg. & Dev. Corp*., 160 N.H. 690, 8 A.3d 24, 28 (2010); *Oak Crest Constr. Co. v. Austin Mut. Ins. Co*., 329 Or. 620, 998 P.2d 1254, 1257-1258 (2000); *Kvaerner Metals v. Commercial Union Ins. Co*., 589 Pa. 317, 335-336, 908 A.2d 888 (2006); *Gen. Acc. Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc*., 716 A.2d 751 (R.I. 1998); *Century Sur. Co. v. River Cities Constr*., LLC, No. 11-cv-057, 2012 WL 12870246, *3-4 (E.D. Wash. Oct. 11, 2012); *Employers Mut. Cas. Co. v. Bartile Roofs, Inc*., 618 F.3d 1153, 1174 (10th Cir. (Wyo.) 2010)(addressing both Wyoming and Utah law).

Systems were legislatively superseded rather than overruled—indicating judicial approval of the interpretation of CGL coverage in *Custom Agri Systems*.[18] In other states, the law is uncertain. For instance, Appellees focus much attention on *Black & Veatch Corp v. Aspen Ins*. (UK) Ltd., 882 F.3d 952 (10th Cir. 2018) in which the Tenth Circuit predicted that New York would adopt a rule contrary to *Custom Agri Systems*. (ONU's Brief, pp. 17-18, 22; CCS' Brief, pp. 20-21). However, in doing so, *Black & Veatch*, failed to analyze a long line of New York state and federal cases that held directly contrary. See *Aquatectonics, Inc. v. Hartford Cas. Ins. Co*., No. 10-CV-2935, 2012 WL 1020313 (E.D.N.Y Mar. 26, 2012), *5-7 (addressing multiple New York cases to find that faulty workmanship does not constitute an occurrence).[19] Should a federal court located half away across the country have the final word on a state's position on such an important issue in the face multiple state court decisions to the contrary? Probably not. To be fair, however, Appellees correctly point out that there are a number of states that do support their arguments.

The point of this exercise is not to count or critique cases or to argue the "trendiness" of certain holdings, but to simply point out that *Custom Agri Systems* is far from being an outlier. Rather, *Custom Agri Systems* is a well-reasoned, well-supported decision on one side of a great national divide—while Appellees are on the other. If a change to Ohio law or CCS' future

[18] Ark.Code.Ann.§23-79-155 (superseding *Essex Ins. Co. v. Holder*, 370 Ark. 535, 261 S.W.3d 456 (2008); C.R.S. §13-20-808 (superseding, among others, *Gen. Security Indemn. Co. of Az. v. Mountain States Mut. Cas. Co.*, 205 P.3d 529 (Colo. 2009)); Haw. Rev. Stat. §431:1-217 (superseding, among others, *Group Builders, Inc. v. Admiral Ins. Co*., 123 Haw. 142, 231 P.3d 67 (2010)); S.C. Code §38-61-70 (superseding, among others, *L-J, Inc. v. Bituminous Fire & Marine Ins. Co*., 366 S.C. 117621 S.E.2d 33 (2005)).

[19] *Black & Veatch* has other significant problems. For instance, like Appellees, it relied heavily on French, Revisiting Construction Defects as "Occurrences" Under CGL Insurance Policies, 19 U.Pa. J. Bus. L. 101 (2016). 882 F.3d at 959-966. However, French is patently wrong in some respects. For example, French asserts that *Custom Agri Systems* is among the cases that demonstrate "near unanimity" that CGL coverage is triggered by "defective workmanship done by contractors"—which, of course, *Custom Agri Systems* does not hold. French, at 124, FN93.

coverage is desired, there are undisputed legislative and policy revision solutions. In short, there is no reason to overrule *Custom Agri Systems*. It was not wrongly decided at the time and there has not been a change in circumstances that justifies overturning it.[20]

In final, last-ditch effort to avoid application of *Galatis*, at least one amicus half-heartedly argues that *Galatis* should not apply to *Custom Agri Systems* with the same force as other cases because the insured in that case failed to file a brief. (See Brief of Amicus Curiae Associated General Contractors of Ohio, Ohio Contractors Association, and American Subcontractors Association ["AGC Brief"], p. 5). No Ohio authorities are provided for this argument, and the federal authorities that are provided: (1) are limited to summary proceedings (which *Custom Agri Systems* clearly was not); and (2) apply a much different standard than *Galatis*.[21] No such limitation should be be placed upon a reported decision of this Court--issued after briefing and oral argument--simply because one of the parties did not file a brief for unknown reasons.[22]

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[20] Nor should this case be dismissed as improvidently allowed. Unlike a decision to reverse or affirm, dismissing the appeal could actually lead to chaos as the lower courts try to discern whether a dismissal means this Court was rejecting or embracing the Third Appellate District's decision. Sometimes it is important for this Court to revisit recent decisions to ensure that they are being properly applied. For instance, after this Court decided *Robinson v. Bates*, 112 Ohio St.3d 17, 2006-Ohio-6362, it found it advisable over several years to readdress different aspects of that holding in *Jaques v. Manton*, 125 Ohio St.3d 342, 2010-Ohio-1838 and *Moretz v. Muakkassa*, 137 Ohio St.3d 171, 2013-Ohio-4656, rather than permit turmoil in the lower courts.

[21] See *Gray v. Mississippi*, 481 U.S. 648, 650-651, FN 1 (1987)(addressing the precedential value of a per curiam summary reversal of judgment without briefing, and noting: "The Court . . . at times has said that summary action here does not have the same precedential effect as does a case decided upon full briefing and argument"); *Hohn v. U.S.*, 524 U.S. 236, 251 (1998).

[22] At p. 12 of the ABC Brief, amicus counsel suggests that the insured's insolvency was the reason for its non-participation. However, Custom Agri Systems' website indicates that it has been in business for decades and continues to be in business today. http://www.casindustries.com/meet-cas/ (last visited on May 1, 2018). There is nothing in the record of this case or *Custom Agri Systems* to support the suggestion of insolvency (nor does counsel for CIC, who was involved in *Custom Agri Systems* believe this assertion to be true).

CONCLUSION

As explained above and in CIC's Brief, to argue that this case is distinguishable from *Custom Agri Systems* on the basis of "products-completed operations" coverage is to make a distinction without a difference. *Custom Agri Systems* should control.

Moreover, there is neither a legal nor a practical basis to overrule *Custom Agri Systems*. From a legal standpoint, none of the *Galatis* factors are present in this case. From a practical standpoint, nationally, there is a wide range of views regarding the application of CGL coverage to construction defect claims, and the insurance markets, regulators and state legislatures are in the process of sorting out those views in ways that are more far more efficient and effective than retroactive judicial decisions on events that are years in the past.

Based upon all of the foregoing, this Court should reverse the Third Appellate District and enter judgment for CIC.

Respectfully submitted,

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