Hard Hat Case Notes

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Supreme Court of Oregon Is the Latest to Rule That Faulty Workmanship May Constitute an Occurrence Under a Commercial General Liability Insurance Policy

With the recent decision of its supreme court, in *Twigg v. Admiral Ins. Co.*, 373 Or. 475 (2025), Oregon has become the latest state to join the modern trend of interpreting commercial general liability (CGL) insurance policies to provide coverage for faulty workmanship. In the *Twigg* decision, the court went to great lengths to reconcile its ruling with its earlier decision in *Oak Crest Constr. Co. v. Austin Mutual Ins. Co.*, 329 Or. 620 (2000), which has long been interpreted to bar CGL coverage for faulty workmanship. Whether *Oak Crest* had just been misunderstood, or whether the court wanted to avoid admitting it was overruling *Oak Crest*, there is little doubt now that the door has been opened for contractors and subcontractors to obtain CGL coverage for claims of faulty workmanship.

Plaintiffs Weston and Carrie Twigg hired Rainier Pacific Development LLC (Rainier Pacific), a general contractor, to build their home in 2011. After taking possession of their new home, the Twiggs identified and reported a number of construction defects; the defect with most significance to the ultimate litigation concerned the concrete slab poured to create the garage floor. The slab was "sloped and cracked in the middle" and sloped "toward the house, raising the risk of water damage." After the Twiggs reported this and other issues to the contractor, Rainier Pacific agreed to make repairs but failed to do so to the Twiggs' satisfaction; the Twiggs initiated arbitration proceedings. Eventually the Twiggs and Rainier Pacific settled their dispute via the "Repair Agreement," under which Rainier Pacific was to make certain repairs by a certain time. Rainier Pacific again failed to perform to the Twiggs' satisfaction. The Twiggs again initiated arbitration proceedings, obtained an award, and attempted to enforce that award; when they were unable to successfully enforce, the Twiggs sued Rainier Pacific's CGL insurance carrier, Admiral Insurance Company (Admiral), for satisfaction of their award.

In their suit against Admiral, the Twiggs claimed that Admiral had a duty arising from the CGL policy to satisfy the judgment the Twiggs had obtained for the "property damage" that Rainier Pacific's faulty workmanship had caused to their home. Admiral answered that because the arbitration award was based on Rainier Pacific's breach of the Repair Agreement—i.e., was a breach of contract claim, rather than a tort claim—it had no indemnity obligation under the Oregon Supreme Court's ruling in *Oak Crest*. Admiral argued that *Oak Crest* held that a breach of contract claim, as a categorical matter, cannot trigger a CGL policy. Admiral's argument flowed from *Oak Crest*'s interpretation of the

triggering language within CGL policies. Specifically, such policies grant coverage for "'property damage' caused by an 'occurrence,'" which is further defined as an "accident." Admiral's position, supported by *Oak Crest*, was that Rainier Pacific's breach of the Repair Agreement could not be considered an accident, could not be an occurrence, and, therefore, could not trigger coverage. Admiral succeeded at the trial court and the intermediate appellate court and the case was appealed to the Oregon Supreme Court.

The Oregon Supreme Court interpreted its *Oak Crest* decision as more nuanced than Admiral argued—and more nuanced than the decision had previously been interpreted. In doing so, the court went to great lengths to situate *Oak Crest* as subordinate to another case in its jurisprudence—*Hoffman Constr. Co. v. Fred S. James & Co.*, 313 Or. 464 (1992), which set out the interpretive framework for resolving disputes over insurance policy language. In applying the *Hoffman* framework to the triggering language of Admiral's policy, the court relegated *Oak Crest* to a single data point in its analysis. As interpreted by the court, *Oak Crest* did not stand for a categorical bar to CGL coverage for breach of contract claims (i.e., faulty workmanship claims pled as breaches of contract) but rather stood only for the proposition that a claim that arises "solely from a breach of contract" will not trigger a CGL policy. As the court put it, *Oak Crest* determined that "when used in a CGL policy, 'accident' has a 'tortious connotation,'" which the court ruled meant that for a CGL policy to provide coverage, there must be some other duty, beyond a duty at contract, that was breached.

The court then considered whether the Twiggs were required to have pled a tort claim (they had not) in order to prevail over Admiral. The court utilized a variety of interpretive tools before determining that the actual policy language was ambiguous on this point; pursuant to the *Hoffman* framework, the court ruled that the policy must be interpreted against the insurer. As such, the court ruled the Twiggs did not need to plead their claim in tort but, rather, needed only to "establish that there was a basis in fact for imposing tort liability on Rainier Pacific, even though the same facts may have established Rainier Pacific's liability in contract." At bottom, the Twiggs could bring their claim as a breach of contract suit and still trigger the CGL policy, so long as there was some basis in fact to support a concurrent tort liability.

The court then applied its holding and remanded the case for further proceedings to determine, for example, whether the Twiggs could demonstrate that Rainier Pacific negligently installed their garage floor—in which case, they would be entitled to indemnification from Admiral.

***Author's Note**:* While the *Twigg* court reconciled its decision with its prior *Oak Crest* holding, *Oak Crest* had long been perceived as a significant impediment to obtaining CGL coverage for defective work under Oregon law. The *Twigg* decision, wherein the court claimed not to overrule *Oak Crest*, very clearly charts a different path for the state. This decision aligns Oregon with the modern trend toward coverage for defective work and will impact the construction (and insurance) industries in Oregon.

Twigg v. Admiral Ins. Co., 373 Or. 475 (2025)

US District Court for the District of Colorado Decision Rules Master Services Contract Was a Construction Agreement Implicating State's Anti-Indemnity Statute

BKV Barnett, LLC (BKV) operated a Texas oil and gas well and Electrical Drilling Technologies, LLC (EDT) contracted to supply the site with electrical power under a Master Service Contract (MSC). As part of its services, EDT was to provide power lines, power poles, and other electrical equipment. The parties agreed that BKV could request that EDT perform work pursuant to the terms of the MSC, which MSC was governed by Colorado law. The MSC also contained various provisions that imposed certain indemnity, insurance, and defense obligations on EDT.

Following a lightning strike at the site that caused a loss of power, BKV contacted EDT and instructed it to remedy the problem. EDT subcontracted out the repairs and, while performing the work, one of EDT's subcontractor's workers was injured. The worker subsequently filed suit against BKV for his injuries; BKV sought defense of the suit, indemnification, and insurance coverage from EDT under the indemnity, insurance, and defense obligations of the MSC. EDT refused and BKV filed suit to enforce the MSC.

The US District Court for the District of Colorado considered a motion for summary judgment filed by BKV, and the court's decision turned on whether the MSC was considered a construction agreement under Colorado law and, therefore, whether Colorado's anti-indemnity statute applied. BKV argued that EDT was providing a service (electrical power) and that any construction-related work performed in connection with that service was "incidental." EDT cited the definition of "construction agreement" in Colorado's Anti-Indemnity Statute and argued that since its work (as demonstrated by an invoice it submitted for the repair work) involved "materials or labor for the construction, alteration, renovation, [or] repair … of any … structure" (i.e., a utility pole and associated elements), the work fell within the definition of a construction agreement. The court agreed with EDT, denied BKV's motion for summary judgment, and ordered BKV to show cause why summary judgment should not be entered against it.

Author's Note: While this result may not have much impact beyond the litigants themselves, it serves as a reminder for parties to carefully consider choice of law provisions in contracts; had BKV considered Colorado's anti-indemnity statute when negotiating the MSC, it likely would not have included a choice of law provision naming Colorado. It is also a reminder that the parties' labels concerning their roles and relationship to one another are not binding in dispute resolution. While the parties here clearly labeled their agreement a service agreement, the court was under no obligation to accept that at face value, which was ultimately dispositive to the outcome of their dispute. Parties should bear this in mind when drafting agreements—whether that means acknowledging that a service agreement is actually a construction agreement or honestly assessing a party's role (e.g., construction manager versus prime contractor versus

subcontractor versus material supplier) or carefully evaluating whether a liquidated damages provision is actually an unenforceable penalty.

BKV Barnett, LLC v. Electric Drilling Technologies, LLC, No. 23-cv-139, 2024 WL 4308184 (D. Colo. Sept. 26, 2024)