



## Construction Law and Insurance Recovery Experts

With comprehensive construction and insurance recovery practices, Brouse McDowell is uniquely suited to help its clients navigate the complex world of construction contracting and claims.

Our attorneys provide a full complement of legal resources to help at all stages of the construction project, from project conceptualization, design, contract drafting, implementation, monitoring and scheduling, to claims resolution.

And, with five Certified Specialists in Insurance Coverage Law, Brouse McDowell's Insurance Recovery group is one of the most experienced in the nation.

Our attorneys work collaboratively to better shift risk at the contracting stage, and to devise claim and litigation approaches that minimize liability and maximize insurance recovery in the event of a loss.

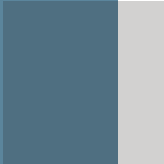
## Construction & Coverage Law Seasonal Newsletter

### Ohio Supreme Court Broadens Workers' Compensation Immunity for Subcontractors Participating in Self-Insured Projects

The Ohio Supreme Court recently broadened the workers' compensation immunity protections afforded to subcontractors on self-insured projects, by stating that enrolled subcontractors are immune from work-related claims by their own employees and claims by employees of other enrolled contractors on the same project.

On April 19, 2016, the Ohio Supreme Court decided the case of *Stolz v. J&B Steel Erectors, Inc.*, Slip Op. No. 2016-Ohio-1567, answering the following certified question from the United States District Court for the Southern District of Ohio: "Whether Ohio Rev. Code §§ 4123.35 and 4123.74 provide immunity to subcontractors enrolled in a Workers' Compensation self-insurance plan from tort claims made by employees of [other] enrolled subcontractors injured while working on the self-insured project." 2016-Ohio-1567 at ¶8. The Court answered yes - broadening subcontractor immunity on self-insured projects.

In Ohio, employers are required to pay premiums into a state insurance fund for the payment of workers' compensation claims. Certain eligible employers may instead self-fund their workers' compensation insurance rather than paying the state's fund. Employers participating in either arrangement then are generally immune from claims for damages by their employees for "any injury, occupational disease, or bodily condition, received or contracted by any employee in the course of or arising out of his employment." R.C. §4123.35(A).



In addition to enrolled and self-funding employers, an employer working on a construction project may self-insure the project if the project is scheduled for completion within six years and is estimated to cost more than one hundred million dollars. R.C. §4123.35(O). If the general contractor self-insures the project, it may provide coverage for itself and for other contractors and subcontractors who work on, or provide materials to, the project.

In exchange for self-funding insurance of the project, the general contractor gains workers' compensation immunity against work-related injury claims by its own employees as well as any employees of any subcontractors enrolled in its self-insurance plan. Subcontractors that enroll in the plan also receive protection against work-related injury claims by their own employees.

The issue addressed in *Stolz*, however, was whether one subcontractor enrolled in a self-funded plan is protected against claims by another enrolled subcontractor's employee. In *Stolz*, the plaintiff was injured on a self-funded job site. The plaintiff, who worked for a concrete subcontractor, asserted claims against the project's general contractor and several of the project's subcontractors enrolled in the self-funded plan, asserting that each had responsibility in some way for his injury. 2016-Ohio-1567. ¶5. The district court granted summary judgment to the general contractor based upon workers' compensation immunity, but denied summary judgment to the enrolled subcontractors, finding that these subcontractors were immune only from claims by their own employees. *Id.* at ¶7. At the subcontractors' request, the district court certified the question to the Ohio Supreme Court for resolution. *Id.* at ¶8.

Construing R.C. §4123.35(O) according to established principles of statutory construction, the Ohio Supreme Court found that §4123.35(O) affords broader protection to subcontractors than was granted by the district court. Analyzing the statute, the Court found that §4123.35(O) creates a "legal fiction" whereby the self-insuring general contractor becomes the "employer" of all enrolled subcontractors' employees for workers' compensation purposes. It is this legal fiction that provides immunity to the general contractor against claims by enrolled subcontractors' employees. *Id.* at ¶18.



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The Court held that this legal fiction precluded claims against other enrolled subcontractors because, under Ohio law, an employee “injured as a result of a co-employee’s negligent acts” that is compensable by workers’ compensation insurance “is precluded from pursuing any additional common-law or statutory remedy” against the co-employee. *Id.* at ¶22 (citing *Kaiser v. Strall*, 5 Ohio St.3d 91, (1983), paragraph one of the syllabus; and R.C. §4123.741). Further, because one employee cannot sue another employee for workplace injury that is covered by workers’ compensation insurance, the at-fault employee’s employer cannot be held vicariously liable. *Id.* at ¶22 (citing *Natl. Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 122 Ohio St.3d 594 (2009) (“a principal is vicariously liable only when an agent could be held directly liable.”). The Court held that an enrolled subcontractor is protected against workplace-related claims brought not only by its own employees, but also against claims by employees brought by other enrolled subcontractors.

The Ohio Supreme Court’s holding represents a major victory for construction project subcontractors working on projects that are self-funded. It also is a victory for general contractors and project owners who may ultimately receive an upstream benefit from their contractors’ reduced liability exposure and potentially reduced cost structure.

For questions or comments regarding this article, please contact P. Wesley Lambert at [wlambert@brouse.com](mailto:wlambert@brouse.com).

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Experienced attorneys from our **Construction Law and Insurance Recovery Group** will meet with individuals in your organization in an informal group setting to provide a legal overview on a variety of topics crucial to your business, including maximizing insurance coverage for your projects, project planning and contracting issues, and dispute avoidance and resolution. Prior to meeting, we will provide a “menu” of options on specific sub-issues within these broad topics for you to select. Feel free to select as many or as few as you like. We can travel to your place of business, meet in a conference room at our office, or reach you over the internet through our unique “webinar” service.

The seminar and lunch are on us! Please contact Amanda Leffler ([aleffler@brouse.com](mailto:aleffler@brouse.com)) or Jim Dixon ([jdixon@brouse.com](mailto:jdixon@brouse.com)) to get on the schedule or for more information.