PLUNKETT COONEY

Pollution Exclusion, Intervention Coverage Update

December 15, 2022

Pollution Exclusion – Northern District of Georgia (Georgia Law)

Grange Ins. Co. v. Cycle-Tex, Inc.
No. 4:12-cv-147-AT (N.D. Ga. Dec. 5, 2022)

The U.S. District Court for the Northern District of Georgia considered whether it should grant summary judgment in favor of the plaintiff Grange Insurance Company (Grange) and against the defendants, Cycle-Tex, Inc. (Cycle-Tex) and Jarrod Johnson (Johnson) (collectively defendants) in a case in which Grange sought declaratory judgment regarding its duty to defend and indemnify Cycle-Tex in an underlying environmental contamination lawsuit. The court converted the summary judgment motion to a default judgment motion as to Cycle-Tex as a result of its failure to appear in the case. The district court then granted summary judgment and default judgment motions in favor of Grange and against the defendants respectively.

In November 2019, Johnson filed a class-action environmental contamination lawsuit against multiple defendants alleging that they contributed to or caused the discharge of PFAS into the nearby waterways, injuring Johnson and others. In 2020, Cycle-Tex was added to the lawsuit. Cycle-Tex is a thermoplastics recycling facility, and the lawsuit alleged that it discharged industrial wastewater into the city of Dalton's water system and surrounding waterways. Cycle-Tex submitted the claim under its policy issued by Grange, and in turn, Grange provided a defense in the underlying lawsuit subject to a reservation of rights. Grange then filed a declaratory judgment action against the defendants, seeking a ruling that it had no duty to defend or indemnify Cycle-Tex pursuant to the policy's total pollution exclusion.

The district court interpreted the clear language of the policy, and first held that PFAS chemicals were "pollutants" as that term was defined in the policy. Secondly, it held that bodily injury and property damage alleged, specifically via ingestion of PFAS chemicals and contamination of the waterways, fell within the ambit of the total pollution exclusion. Third, it held that the claimed harm by virtue of paying increased surcharges resulting from the city's implementation of an emergency filtration process also fell within the total pollution exclusion's provision regarding "loss, cost, or expense" arising out of any "[r]equest, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess the effects of 'pollutants.'" In summary, the district court found that the alleged damages against Cycle-Tex, as asserted by Johnson, unambiguously fell within the terms of the total pollution exclusion and ruled that Grange did not have a duty to defend or indemnify Cycle-Tex in the underlying contamination

lawsuit.

By: Joshua LaBar

Intervention – Ninth Circuit (California Law)

California Dep't of Toxic Substances Control v. Jim Dobbas, Inc.
--- F.4th ----, 2022 WL 17348632 (9th Cir. Dec. 1, 2022)

The U.S. Court of Appeals for the Ninth Circuit held that a group of insurers was permitted to intervene in a lawsuit against their collective insured, which had filed for bankruptcy and had dissolved in 2013. The decision reversed the finding of the trial court that prevented the insurers from intervening.

The California Department of Toxic Substances Control (DTSC) filed a lawsuit in 2014 against current and former owners of property at a Superfund site in Elmira, California to recover cleanup costs for operations at the site under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). One former owner, Collins & Aikman Products (C&A), was not initially named as a defendant in the suit but had worked with DTSC on cleanup until it filed for bankruptcy protection in 2005.

Through the bankruptcy, an agreement was reached whereby DTSC's ability to sue C&A was preserved, but DTSC agreed that it would only recover any judgment in a future lawsuit against C&A's insurers, not C&A directly. C&A was dissolved in 2013. Shortly after filing its 2014 lawsuit, DTSC petitioned the Delaware Court of Chancery to appoint a receiver to act on C&A's behalf and agreed to pay the reasonable costs of the receiver. When DTSC added C&A as a defendant in its 2014 lawsuit, the receiver declined to file an answer or otherwise defend C&A, leading to entry of default against C&A in the lawsuit.

A few years later, after settling with other defendants, DTSC moved for and was granted a default judgment of approximately $3.2 million against C&A. DTSC's insurance consultant notified C&A's insurers of the judgment. The insurers sought to intervene in the 2014 lawsuit and to set the default judgment aside, but the trial court denied both motions and the insurers appealed.

A panel of the U.S. Court of Appeals for the Ninth Circuit found that the insurers "had a legally protected interest in defending their helpless insured and preventing the entry of default judgment" under California's direct-action statute, and, thus, had constitutional standing to intervene in the lawsuit. The insurers' "contingent liability [for the default judgment] and its attendant costs (defending against the threatened direct action suit) creates injury in fact for standing purposes."

The appellate court further found that the requirements for Fed. R. Civ. P. 24(a), allowing intervention were met. In particular, the appellate court reversed the trial court's finding that the insurers had

forfeited any “legally protected ‘interest’” in the 2014 lawsuit by disclaiming coverage or reserving rights. The appellate court held that “what is dispositive here is that the insurers timely sought to intervene to defend their helpless insured and prevent a default judgment. An insurer's coverage position is irrelevant under the direct action statute so long as the insurer timely acts to defend a helpless insured and prevent its default.” Because all of the requirements of Fed. R. Civ. P. 24(a) were met and the insurers had constitutional standing to intervene, the appellate court found that the trial court’s denial of the motion to intervene was in error. It found, however, that it had no jurisdiction to hear the insurer’s appeal of the trial court’s denial of their motion to set aside the default entered by the clerk against C&A because such appeal was interlocutory.

By: Stephanie Brochert