Indiana Federal Court Holds No Coverage for $50M Default Judgment for Lack of Timely Notice of Class Action

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In *Greene v. Kenneth R. Will,* a CGL insurer recently prevailed in a declaratory judgment action arising from an underlying class action alleging pollution and nuisance claims against the insured, VIM Recycling LLC, an Indiana-based waste-recycling facility.[1] "[T]his case has some whiskers on it," the Indiana federal district court recounted in its exhaustive decision granting the insurer relief. The court relieved the insurer of indemnifying a $50 million default judgment against the insured, which, the court observed, "proved to be a bad neighbor" and "nuisance in both the legal and colloquial sense." The court held that the insured failed to provide timely notice of the class action.

"The judgment against the [insured] came about when a group of nearby homeowners decided that they had had enough of VIM's polluting behavior and brought this class action to recover damages for environmental violations, nuisance and negligence based on the impact of the waste facility on their homes and property," the court explained. Eventually, the court entered a default judgment against the insured for $50,568,750, plus an award of $273,339.85 in attorney's fees. Because the insured was "judgment-proof," the class action plaintiffs "aligned" with the insured "hoping to collect on their monumental judgment" from the insured's CGL insurer. Within a few weeks' time, the class action plaintiffs sued the insurer seeking a declaration of coverage for the default judgment against the insured.

The *Greene* court held, as a matter of law, that the insured failed to give the insurer "timely notice" of the class action; therefore, the insurer owed no duty to defend or indemnify the insured under the CGL policy. In so holding, the *Greene* court observed that the insured was sued in 2009, then hired its own counsel who remained in the case until the action was appealed, following dismissal. Even after the action was remanded by the appellate court, the insured still took no action to notify the insurer of the suit's existence. The insured's private counsel later withdrew from the case in 2011, the insured sought to represent itself, and, "for reasons that are entirely unclear," the insured never notified its insurer. The court entered defaults in 2012 and 2013, and default judgment was sought in 2015 following the class settlement in 2014.

Thus, for about five years, and after the class action had been dismissed, appealed, remanded, and finally settled, the insured did not notify the insurer of the suit. While the insurer did become aware—before default judgment was entered—of "second-hand information" about the existence of the suit (from coverage counsel retained in a related matter), it was "clearly not in time to permit [the insurer] to promptly take all the steps in defense of the action that it would have wanted to take" to avoid a default judgment against the insured. The insurer was entitled to, but did not receive, "prompt notice," and the existence of second-hand information "does not satisfy [the insured's] obligation" to provide such notice, the court concluded.

The *Greene* case demonstrates courts' willingness to hold insureds to account for failing to satisfy policy conditions, such as the notice-of-suit condition. However, the issues of notice and prejudice, which featured prominently in *Greene*, are mixed questions of law and fact. For notice, legal issues can swing on how courts in a particular jurisdiction interpret a policy's conditions language, while fact issues often depend on who provided the notice, when notice was provided, and the manner in which notice was provided. For prejudice, legal issues arise over the burdens a particular jurisdiction places on the insured or insurer to prove prejudice, the standards of proof to satisfy those burdens, and whether there are rebuttable presumptions of prejudice. In some jurisdictions there is an irrebuttable presumption of prejudice against the insurer if no notice is received before judgment is entered against the insured.

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[1] 2019 U.S. Dist. LEXIS 92821 (N.D. Ind. June 4, 2019).

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