

## Litigation Team Obtains Summary Judgment in Case Involving Sinkholes at Bulk Propane Storage Facility

9.27.17

In *Heller's Gas Inc. v. International Insurance Co. of Hannover SE*, 2017 U.S. Dist. LEXIS 151072 (M.D. Pa. Sept. 18, 2017), a newly constructed commercial bulk propane distribution facility in Carlisle, Pennsylvania experienced sinkholes following days of heavy rains in 2011 and thereafter sought coverage under its commercial property policy with its insurer. While the sinkholes eroded the land under the tank farm causing one of the tanks to allegedly lean and the remainder of the tanks to be "at risk," the only physical damage was to a single above-ground pipe. The insurer paid its limit for emergency removal expenses and denied the remainder of the claim since the damage to pipe was within the applicable deductible. The distributor thereafter sued the insurer for breach of contract and bad faith.

On behalf of the insurer, we moved for summary judgment on all claims because damage to land was not covered under the policy, there was no direct physical loss to the bulk propane storage tanks, and that the loss, in any event, was excluded under the policy's flood exclusion. Judge Matthew Brann of the United States District Court for the Middle District of Pennsylvania agreed with our arguments and awarded our insurer client summary judgment on all claims. As to direct physical loss, the Court recognized that there was no physical damage to the tanks beyond the single pipe and that property leaning, or at risk of collapse, was not deemed a collapse under the express language of the policy. The Court also rejected the distributor's argument that direct physical loss may occur when a facility merely loses use of property.

Alternatively, the Court found that the loss was excluded by the policy's flood exclusion, which included surface waters. The Court first concluded that the exclusion was not waived by the insurer merely because it did not mention the exclusion by name in its initial denial letter. Turning to the substance of the exclusion, the Court found that there was no dispute that the property had sustained significant accumulations of rainfall that constituted surface water under the exclusion. Moreover, since the exclusion included anti-concurrent causation language (*i.e.*, language that excludes the loss in full if caused in part by the excluded peril), it was unnecessary for the insurer to prove that the surface water was the sole or proximate cause of the alleged loss.

Turning last to the distributor's bad faith claim, the Court agreed that the insurer's coverage determination was correct and, therefore, there could be no bad faith claimed premised on the unreasonable denial of coverage.

Edward M. Koch and Michael W. Jervis represented the insurer.

Theodore A. Adler and Michael T. Traxler of Reager & Adler represented the distributor.