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Client Alert

Another Landmark Insurance Case for Policyholders

On January 16, 2004, the Indiana Court of Appeals resolved more important issues in favor of Indiana policyholders. In *PSI Energy Inc. v. The Home Ins. Co., et al.*, Cause No. 32 A01-0204- CV-146, PSI sought coverage under its comprehensive general liability (“CGL”) insurance policies for environmental liabilities at six manufactured gas plants, the last of which ceased operations in 1950. Environmental agencies have alleged that tar, a valuable by-product from the manufactured gas process, contaminated soil and ground water at each of the sites. PSI alleged in its action against the insurers that damage from the contamination had continued throughout the period from 1950 through 1985 and that the policies issued during that period must pay for the costs of cleanup.

Lost Policies

Several of the insurers argued that because PSI had been unable to produce copies of their policies, PSI could not meet its burden of proving that coverage existed for these claims. The trial court had agreed with the insurers. But the Court of Appeals reversed. It held that PSI did not have to prove the policy language verbatim, but only the substance of the policies. The Court held that PSI could present the broad range of other evidence it had assembled to prove the policies, including its history of premium payments, employee testimony, and expert testimony concerning the likely terms in such policies. The Court held that expert testimony, even where the expert could not testify with absolute certainty as to the likely terms in the lost policies, is admissible, when supported by the kind of other evidence that PSI had assembled.

Expected or Intended Damage

The Court held that the concept of “fortuity” — meaning that the damage giving rise to a liability cannot be expected or intended by the policyholder — is inherent in all CGL policies. But, the Court held that a policyholder can prove this point based on a subjective, rather than objective, basis. This means that mere negligence or even recklessness on the part of the policyholder will not result in a denial of coverage. The issue is to be decided, based on what the policyholder actually subjectively believed.

Trigger

The Court followed the Indiana Supreme Court decision in *Allstate Ins. Co. v. Dana Corp.*, 759 N.E.2d 1049 (Ind. 2001) and held that where damage occurs over a multi-year period, each policy within that period is triggered and obligated to pay “all sums.” This is so even where, as with PSI’s earlier policies, the policy requires that the “occurrence” “commence during the policy period.” The Court saw no difference between this language and the language in *Dana* requiring that an “‘occurrence’ take place during the policy period.” In a few later policies which define “occurrence” as “one happening,” a “series of happenings” or “one event,” the Court held that PSI must show an event causing damage during the policy period.



Notice

The insurers also argued that some of PSI's claims should be denied because of alleged "late notice." The insurers argued that PSI should have provided notice as soon as it became aware of any potential liability. The Court held that "the duty to notify an insurance company of potential liability is a condition precedent to the company's liability to its insured" and that "noncompliance with notice of claim provisions, which results in an unreasonable delay, triggers a presumption of prejudice to the insurer's liability to prepare an adequate defense." However, the Court also found that environmental liability cases are unique, in that they require "lengthy site investigation and expert opinion" to determine exactly when the covered occurrence actually took place — unlike the automobile and personal injury cases upon which the insurers had based their argument. This information, the Court ruled, was "essential to PSI's determination of which Insures were potentially liable under the numerous policies it had purchased between 1950 and 1985." Thus, the Court concluded that there were issues of fact concerning the timeliness of PSI's notice. Moreover, because the insurers had not alleged any specific prejudice there also was an issue as to whether the insurers were actually prejudiced by the timing of the notice.

Justiciability

Are the insurance questions ripe for review? The issue was raised by an excess insurer whose policies it claimed incepted well above the current cost of the cleanup. The Court held that under Indiana's Declaratory Judgment Act, PSI had the right to proceed against this excess insurer for a declaration as to the parties' rights and obligations under even high-level excess policies because, while current costs had not yet reached the level of those policies, site investigations were still on-going and the state environmental agency had not determined what level of cleanup would be required.