What 6th Circ. Ruling May Portend For PFAS Coverage Cases

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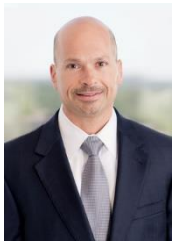

On June 13, the U.S. Court of Appeals for the Sixth Circuit rejected an insurer's attempt to avoid coverage for multiple PFAS-related underlying lawsuits, finding that the federal trial court below properly had declined to exercise subject-matter jurisdiction over the dispute.

The case, Admiral Insurance Co. v. Fire-Dex LLC, is one of the first coverage actions for claims arising out of exposure to PFAS, an abbreviation for perfluoroalkyl and polyfluoroalkyl substances.[1] The insurer sued in federal court and, under standards applicable to determining jurisdiction under the Federal Declaratory Judgment Act, the Sixth Circuit concluded that the district court had properly declined to exercise its jurisdiction because of federalism concerns.

The Sixth Circuit's decision only tangentially touches on the intricate coverage issues PFAS claims are likely to spawn, and entirely avoids discussion of whether so-called pollution exclusions should apply to preclude coverage for PFAS-related coverage disputes.

The near-total silence in the insurer's briefing and the Sixth Circuit's decision with regard to the pollution exclusion speaks perhaps loudest of all: Insurers may have less confidence than originally intimated in the applicability of the pollution exclusion to PFAS claims.

The Fire-Dex Decision

Fire-Dex began as a declaratory judgment action to determine whether Admiral Insurance Co. must defend its insured, Fire-Dex, in a host of underlying actions alleging injuries and damages caused by exposure to PFAS products.

Fire-Dex manufactures clothing for firefighters as well as aqueous firefighting foam, or AFFF; both of these end-products incorporate PFAS products. Underlying plaintiffs allege that apparel and AFFF made by Fire-Dex and used by firefighters "in the usual and normal course of performing their firefighting duties" exposed firefighters and their spouses to PFAS, resulting in injuries — primarily cancer.

Fire-Dex tendered the underlying actions to Admiral, which denied coverage and filed an action in the U.S. District Court for the Northern District of Ohio.

To argue that coverage did not apply, Admiral relied on various exclusions contained in its insurance policies, including exclusions for (1) occupational disease — no coverage for bodily injury "resulting from any occupational … disease arising out of any insured's operations, completed operations or products";

(2) prior existing damages; and (3) pollution under what Admiral labeled as a "total" pollution exclusion with a "hostile fire" exception.[2]

Fire-Dex moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(1), challenging subject-matter jurisdiction.

In its motion to dismiss, Fire-Dex argued that, notwithstanding the Declaratory Judgment Act, Admiral has no absolute right to seek a declaratory judgment in federal court, even where the suit otherwise satisfies subject-matter jurisdiction.

Rather, Admiral's bid for jurisdiction must be analyzed under what are commonly known as the Sixth Circuit's Grand Trunk factors, which stem from the Sixth Circuit's 1984 decision in Grand Trunk Western Railroad Co. v. Consolidated Rail Corp.[3]

Those factors include whether:

- The judgment would settle the controversy;
- The declaratory judgment would be useful in clarifying the legal relations;
- The case is being used merely for "procedural fencing" or as a basis for "res judicata;"
- A declaration would cause friction between federal and state courts and improperly encroach on state jurisdiction; and
- There is an alternative remedy that is better or more effective.

The Sixth Circuit has not, however, explained which factor is most important; rather, the factors are weighed according to the facts of the case.[4]

Fire-Dex argued, principally on grounds of federalism, that resolution of insurance coverage issues for PFAS products claims involves novel and unsettled matters of state law and, therefore, the Ohio state court is the preferred forum to initially resolve these issues.

Admiral countered, arguing that there was nothing novel about asking the court to apply the occupational disease and pollution exclusions in the policies, citing some 50 years of precedent in which Ohio courts have applied these exclusions in a variety of insurance coverage disputes.

The district court dismissed the action, accepting Fire-Dex's argument that jurisdiction would implicate federalism concerns.[5]

Central to the district court's dismissal was its determination that Ohio state court decisions did not give the district court enough guidance to adjudicate applicability of the occupational disease or pollution exclusions.

The district court explained that neither it nor the parties identified "a single case … in which an Ohio

state court (or any court) … concluded that an occupational disease and/or pollution exclusion either does or does not obligate an insurer to defend and/or indemnify an insured for PFAS exposure-related claims."[6]

Interestingly, the district court construed Ohio case law very narrowly: While parties presented Ohio cases interpreting the occupational disease and pollution exclusions, the district court found that none of them addressed either PFAS or exposure by end-users of the insured's products.[7]

Admiral appealed to the Sixth Circuit, arguing that Ohio case law on the occupational disease exclusion was sufficiently developed.[8] Admiral relegated its argument regarding the pollution exclusion to a footnote.[9]

The Sixth Circuit affirmed, holding that the district court had properly exercised its discretion to decline jurisdiction because the case involved a "novel issue of Ohio insurance law": whether illnesses arising from exposure to PFAS in a manufacturer's finished products meet the definition of an "occupational disease" under the occupational disease exclusion.[10] Nowhere does the opinion mention the pollution exclusion.

The Sixth Circuit rejected Admiral's argument that the court should decline jurisdiction only if Ohio courts were currently litigating the issue: The lack of guidance from Ohio courts, particularly on this insurance issue key to this case, alone implicated comity concerns.

According to the Sixth Circuit, "when unanswered questions of state law raise their heads, state courts are best suited to answer them, a proposition that has long been embraced in a host of settings."[11] The court emphasized that this is "[e]specially so" when, as here, the "case involves a dispute over insurance law."[12]

Key Takeaways

There are several key takeaways from the Fire-Dex opinion.

First, Fire-Dex represents a clear and refreshing departure from the approach taken by the Sixth Circuit, and federal courts in nearly every other circuit, to deciding COVID-19 business interruption insurance cases.

Those cases, even more than in Fire-Dex, involved motions to dismiss that presented novel issues: the physical characteristics of an entirely new disease. Those motions, moreover, revolved around disputed factual and legal issues concerning whether, how, and to what degree a novel disease may cause "physical loss or damage" under state law and boilerplate insurance policy provisions.

In fact, courts in COVID-19 insurance cases turned federalism — not to mention the Erie Doctrine — on its head, with state courts looking to the federal interpretations of state law to guide their own interpretations.[13] Just last year, the Ohio Supreme Court in EMOI Services LLC v. Owners Insurance Co.,[14] relied on the Sixth Circuit's 2021 decision in Santo's Italian Café LLC v. Acuity Insurance Co.[15] to guide its interpretation of "physical" under Ohio law.

Fire-Dex is the latest in the Sixth Circuit's inconsistent jurisprudence regarding jurisdiction over novel issues of insurance law; it recently decided that coverage for opioid claims was best decided by state courts — while, curiously, distinguishing another federal COVID-19 insurance case.[16]

Other examples of such inconsistency and failure to faithfully apply pleading standards, particularly with regard to COVID-19 and other novel state-law issues, can be found throughout the federal circuit courts. Such inconsistency and resulting unpredictability create greater risk for insureds — and insurers — who might turn to a federal court for guidance, and undermine confidence in the courts.

Second, and perhaps tellingly, Admiral relegated its argument regarding the pollution exclusion to a footnote, despite having raised it before the district court. Equally significant is that the Sixth Circuit did not give credence to the pollution exclusion at all. Admiral's near-total abandonment of its pollution-exclusion argument before the Sixth Circuit, and its omission from the Sixth Circuit's opinion, suggest an acknowledgment that the pollution exclusion may not apply to PFAS-related claims.[17]

Courts that have already considered the issue concur.[18]

Third, Fire-Dex suggests concern among insurers over the potentially huge cost of defending PFAS claims.

Admiral filed Fire-Dex preemptively to cut off its defense obligation for PFAS-related claims. With good reason: A recent tidal wave of PFAS claims is inundating companies that use, or have used PFAS, from manufacturers down to retailers, and in many cases, the primary insurer's duty to defend is not subject to the aggregate limits in commercial general liability insurance policies.

As a recent Bloomberg article noted, "[i]f PFAS went into a company's finished product, odds are it's being sued."[19]

The potential costs of PFAS litigation are staggering: CreditSights, a financial research firm, estimated that PFAS-related claims could cost 3M, which manufactures PFAS, more than $140 billion nationwide.[20] Companies staring down the barrel of million- or billion-dollar liabilities have started tapping their insurers for coverage. That the insurer sought to quickly cut off its defense in Fire-Dex is indicative of insurers' apprehension over these mounting costs.

In sum, Fire-Dex is a good development for those facing PFAS liabilities and policyholders generally: Unlike for novel COVID-19 insurance issues, Fire-Dex confirms that federal courts may decline to resolve novel PFAS state-law issues.

For policyholders who may be facing PFAS liabilities because they made PFAS products or products containing PFAS components, Fire-Dex highlights the need to carefully consider policy language as interpreted under applicable state law. As with many pivotal coverage issues, which state's law applies could be outcome-determinative.

And, as Fire-Dex illustrates, anxious insurers likely will not hesitate to rush to court to secure what they hope will be the most advantageous law and forum.

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Notes

1.) Admiral Insurance Co. v. Fire-Dex LLC, No. 22-3992, 2023 WL 3963623 (6th Cir. June 13, 2023).

2.) Admiral Ins. Co. v. Fire-Dex LLC, No. 1:22-cv-1087, 2022 WL 19559224, Am. Compl. (Oct. 28, 2022).

3.) Grand Trunk Western Railroad Co. v. Consolidated Rail Corp., 746 F.2d 323, 326 (6th Cir. 1984).

4.) Fire-Dex, 2023 WL 3963623, at *2.

5.) Admiral Ins. Co. v. Fire-Dex LLC, No. 1:22-cv-1087, 2022 WL 16552973, at *10 (N.D. Ohio Oct. 31, 2022).

6.) Id. at *6-9.

7.) Id.

8.) Fire-Dex, 2023 WL 1552021 (Jan. 25, 2023).

9.) Id. at *25 n.14.

10.) Fire-Dex, 2023 WL 3963623, at *3.

11.) Id. at *3 (citing R.R. Comm'n of Tex. v. Pullman Co., 312 U.S. 496, 500-02 (1941) (citations and quotations omitted).

12.) Id. ("[W]e consistently counsel district courts to decline jurisdiction when asked to decide unresolved coverage issues.").

13.) See generally id. at *3 ("By and large, insurance rules and regulations are reserved to the states for crafting…").

14.) EMOI Services LLC v. Owners Insurance Co., 170 Ohio St.3d 78, 82 (2022).

15.) Santo's Italian Café LLC v. Acuity Ins. Co., 15 F.4th 398, 402 (6th Cir. 2021).

16.) See Cardinal Health Inc. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., 29 F. 4th 792, 801-02 (6th Cir. 2022), distinguishing DiAnoia's Eatery, LLC v. Motorists Mut. Ins. Co., 10 F. 4th 192, 202 (3d Cir. 2021).

17.) See PFAS Product Liabilities and Defense Costs May Be Covered by Insurance.

18.) See Wolverine World Wide Inc. v. Am. Ins. Co., No. 1:19-cv-00010, 2021 WL 4841167, at *11 (W.D. Mich. Oct. 18, 2021); Colony Ins. Co. v. Buckeye Fire Equip. Co., No. 3:19-cv-00534, 2020 WL 6152381, at *3-4 (W.D. N.C. Oct. 20, 2020), aff'd, No. 20-2208, 2021 WL 5397595 (4th Cir. Nov. 18, 2021).

19.) https://news.bloomberglaw.com/pfas-project/companies-face-billions-in-damages-as-pfas-lawsuits-flood-courts.

20.) https://www.nytimes.com/2023/06/02/business/pfas-pollution-settlement.html.

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