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6th Circ.'s PFAS Ruling Shows Novelty A Matter Of State Law

By **Shane Dilworth**

Law360 (June 16, 2023, 2:49 PM EDT) -- A Sixth Circuit ruling affirming the dismissal of an insurer's dispute with a personal protective equipment maker over coverage for injuries firefighters say they sustained from exposure to forever chemicals serves as a crucial reminder that novel insurance issues are matters of state law, experts say.

In **an unpublished** ruling June 13, the three-judge panel agreed with U.S. District Judge Pamela A. Baker that an Ohio trial court is better suited to decide an unresolved question of whether the development of cancer from PPE made by Fire-Dex LLC containing so-called forever chemicals constitutes an occupational disease.

The federal appeals court acknowledged that Admiral Insurance Co.'s suit seeking court affirmation of its denial of coverage for injuries stemming from injuries caused by per- and polyfluoroalkyl substances, or PFAS, is "a small part of the developing national story."

Sixth Circuit Judge Chad A. Readler wrote the opinion for the court and noted that PFAS, also known as forever chemicals, are used in numerous household products marketed as waterproof, as well as aqueous film-forming foam and protective equipment worn by firefighters.

Medina, Ohio-based Fire-Dex is named as a defendant in a number of lawsuits brought by firefighters claiming they developed cancer as a result of their exposure to equipment containing PFAS. The suits are currently centralized in a multidistrict litigation proceeding in South Carolina federal court, according to the opinion.

The dispute between Admiral and Fire-Dex flared up after the carrier denied Fire-Dex's request for coverage. The insurer lodged an action in the U.S. District Court for the Northern District of Ohio in **June 2022**, seeking a court order stating that it properly denied coverage. Fire-Dex moved to dismiss the suit, contending the federal court did not have authority to decide the case. Judge Baker agreed with the policyholder.

Focus on Procedure

Experts on both sides of the bar said they were intrigued by the federal appeals court's focus on the jurisdictional issue rather than substantive questions of coverage.

Carrier-side counsel William B. Orberson of Phillips Parker Orberson Arnett PLC in Louisville, Kentucky, told Law360 that he was not surprised by the decision of both the Sixth Circuit and Judge Baker to "punt" on the substance of Admiral Insurance Co.'s Declaratory Judgment Act suit given the amount of discretion available to the court.

"I think policyholder attorneys will argue that is part of a growing trend where federal courts are not wanting to become involved in insurance coverage matters and declaratory judgment actions," he said.

Orberson added that the fact that the opinion is unpublished limits its precedential value and demonstrates that federal courts still have a considerable amount of discretion when deciding jurisdiction.

Larry Mason, an insurance coverage partner at Goldberg Segalla LLP in Chicago, told Law360 that while he does not think other federal appeals courts would have handed down a similar ruling, the Sixth Circuit looked to its own precedent in Grand Trunk Western Railroad Co. v. Consolidated Rail Corp. Grand Trunk established factors a court should consider when deciding whether to exercise jurisdiction under the Declaratory Judgment Act.

"At the end of the day, the court is correct that this case turns on an unsettled issue of Ohio insurance law," he said.

Fellow insurance coverage attorney Scott Seaman of Hinshaw & Culbertson LLP told Law360 that it is important to note that the Sixth Circuit did not conduct its own analysis to determine if the federal court properly declined to exercise its jurisdiction over the dispute. Instead, the panel reviewed the lower court's decision under an abuse of discretion standard. He also said the doors of a federal courthouse should not be slammed shut on insurers seeking declaratory relief where a declaration would resolve a dispute.

"It is difficult to see how entertaining a declaratory judgment action here actually would encroach improperly upon the jurisdiction of the state or present comity issues," Seaman said. "It is true that insurance coverage decisions generally present matters of state law; however, federal courts regularly exercise diversity jurisdiction to decide issues of state law on a wide range of issues, including insurance coverage disputes."

A prime example of how federal courts are capable of handling novel insurance issues is highlighted by coverage cases stemming from business losses resulting from the COVID-19 pandemic. Seaman pointed out that federal judges at both the district court and appellate levels proved themselves to be "quite capable" of ruling on the claims with and without existing state law precedent.

"There have been very few occasions where federal courts certified questions to state supreme courts," he said. "When one analyzes the federal court decisions and compares them to state court rulings, it would be difficult to argue federal courts are unable to resolve insurance coverage cases properly or efficiently."

'Refreshing' Ruling for Policyholders

Michael Levine, an insurance recovery partner at Hunton Andrews Kurth LLP's Washington, D.C., office, told Law360 that the ruling is a refreshing decision for policyholders, especially in light of how the majority of federal courts responded to novel issues raised by COVID-19 business interruption cases by siding with carriers.

"It's refreshing because this is something we fought for in the COVID business-interruption cases," he said.

Levine explained federal courts routinely preempted decisions by state high courts involving similar insurance coverage issues arising from the coronavirus by refusing to stay cases in favor of pending state court actions and refusing to certify questions for decision by the final arbiters of state law issues.

"Yet here, under remarkably similar circumstances, that's exactly what they did," Levine said.

Policyholder attorney Paul A. Rose of Brouse McDowell in Akron, Ohio, told Law360 that the ruling is good news for policyholders and could be beneficial to the federal judicial system. That's because "federal district court judges may have limited experience with insurance cases, and the cases can be significant burdens on federal judicial resources," Rose said.

"Perhaps this decision will encourage federal trial court judges to look harder at whether they want to exercise their discretion to retain jurisdiction over declaratory judgment actions in coverage cases," he said. "Perhaps they'll be less inclined to do so and more inclined to defer to the jurisdiction of the state courts, which policyholders, consistent with this decision, generally believe are better suited to resolve insurance coverage cases."

Barnes & Thornburg LLP's Kevin Dreher, who represents policyholders, agreed, telling Law360 that

the Sixth Circuit's ruling is "a broad statement by a federal court that its is not going to step on a state court's toes when addressing an issue of first impression."

Dreher also seconded the appeals court's finding that coverage disputes involving PFAS are a new and developing area of litigation that will continue to evolve as federal and state regulators continue to monitor and assess the human health and environmental risks posed by forever chemicals. For example, Dreher pointed out that regulations on safe levels of PFAS are useful for answering insurance questions on property damage and bodily injuries.

He also said rulings out of courts in Minnesota, Michigan, New York and Texas "are really at the cutting edge of developing the issues that involve underlying liability, which is resulting in the insurance coverage cases being filed there."

The Barnes & Thornburg partner also said he is unaware of any coverage disputes proceeding in states with no regulations on the chemicals.

Undecided Coverage Question

While the Sixth Circuit did not hand down a concrete ruling on the coverage issues raised by Admiral, it did highlight that a reason Judge Baker correctly declined jurisdiction stemmed from a dearth of Ohio case law on occupational disease. The panel noted there is no direct ruling on whether a firefighter's development of cancer from wearing PPE containing PFAs can be considered an occupational hazard subject to an exclusion in an insurance policy.

The Sixth Circuit's discussion of the occupational disease exclusion and its rejection of Admiral's assertion that Ohio has established case law that the court could apply the occupational disease exclusion to the suits brought against Fire-Dex piqued Levine's interest.

The panel pointed out that Ohio courts have only interpreted occupational diseases in worker's compensation cases involving that involved accusations of exposure to a disease while on the job. However, the suits against Fire-Dex are brought by end users of equipment made with PFAS that they wore as part of their work.

Goldberg Segalla's Mason opined that Fire-Dex could face an uphill battle when the occupational disease argument reaches an Ohio trial court, explaining that the Connecticut Supreme Court's 2019 ruling in R.T. Vanderbilt Co. v. Hartford Accident & Indemnity Co. et al. is persuasive. In R.T. Vanderbilt, Connecticut's high court deciding an issue of first impression interpreted a substantially similar occupational disease exclusion and ruled it barred coverage, he noted.

"My prediction is that while Admiral Insurance Co. has not succeeded in having its coverage dispute resolved in its preferred forum, the ultimate resolution of this case will be favorable," Mason said. "Unlike many insurers confronted with PFAS claims, Admiral has the advantage of its occupational disease exclusion endorsement."

Hunton Andrews Kurth's Levine concluded that he believes the insurer's focus on the occupational disease exclusion, and not the so-called total pollution exclusion, demonstrates the insurance industry's lack of confidence on the pollution exclusion's applicability in cases involving PFAS.

Levine said Admiral may not have raised the pollution exclusion in recognition that the provision should not apply to cases involving PFAS because PFAS are products, whether in their unincorporated state or as components in other products such as the flame retardant PPE made by Fire-Dex.

"Pollution exclusions historically have been represented by insurers to not apply to products," the policyholder attorney said. "Insurers obtained regulatory approval to apply the exclusions to traditional environmental pollution and contamination, and that's how insurers should be held to apply them here."

The parties and their representatives did not respond to requests for comment.

Judges R. Guy Cole Jr., Chad A. Readler and Stephanie Dawkins Davis sat on the panel for the Sixth Circuit.

Admiral is represented by David W. Walulik of Frost Brown Todd LLC.

Fire-Dex is represented by Justin S. Greenfelder and Jude B. Streb of Buckingham Doolittle & Burroughs LLC.

The case is Admiral Insurance Co. v. Fire-Dex, case number 22-3992, in the U.S. Court of Appeals for the Sixth Circuit.

--Additional reporting by Hope Patti. Editing by Neil Cohen and Emma Brauer.
