

Client Alert

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“Scanty” Evidence, Big Implications for Court’s Denial of Insurer’s Summary Judgment Motion

Last Thursday, a federal district judge in New Jersey denied, in part, Travelers Indemnity Company’s (Travelers) motion for summary judgment on claims for indemnity costs because the plaintiff, E.M. Sergeant Pulp & Chemical Company (EMS), provided sufficient evidence to raise triable questions of fact. Although the evidence was just “barely sufficient” to keep the case alive, as the court put it, and despite no direct evidence that policies were even in place during the relevant time period, the evidence was nevertheless enough to defeat the insurer’s motion.

EMS, a distributor of industrial chemicals, sought coverage and defense costs from Travelers after being named in a government lawsuit alleging pollution of land that it owned from 1942 until 1982, now part of a Superfund site. Travelers denied coverage on the ground that “it had no relevant policy in effect at the time.” EMS subsequently sued for coverage.

During discovery, neither party could locate a policy that covered the underlying claims for the relevant time period. However, EMS uncovered: ledger entries suggesting that premium payments had been made for a policy that would cover the environmental claim; an insurance application referencing the settlement of another claim by Travelers during the relevant time period under a policy that likewise may have covered the environmental claim; and a note suggesting coverage at least through 1964.

In deciding Travelers’ motion for summary judgment, the federal judge acknowledged the “scanty” evidence proffered by EMS, but nevertheless found that EMS presented enough to deny the motion. Despite the small quantum of evidence, the court found the testimony of EMS’s “insurance archaeology” expert compelling. The expert opined that the indirect evidence and the history of certain types of insurance policies suggested that the policies issued to EMS likely covered the types of liability at issue in the underlying dispute. The judge also found persuasive the frequency with which witnesses and records are unavailable in the context of long-tail environmental cleanup claims, suggesting that the absence of such information here was nothing unusual. Accordingly, the court denied Travelers’ motion on the existence and scope of coverage. However, it also granted Travelers’ motion capping the amount of potential recovery.

The decision is a reminder of the challenges posed by long-tail claims, especially when neither party can locate the policy. But, the decision also is a reminder that courts will consider facts and opinions that tend to show that the policies existed, and even what the policies likely would have covered. It is important, therefore, that policyholders not be dissuaded from pursuing insurance recovery simply because they can no longer locate their insurance policy. Other evidence may exist — and be sufficient — for an experienced coverage team to use as the basis for a successful insurance claim. The case is *E.M. Sergeant Pulp & Chem. Co., Inc., et al. v. The Travelers Indem. Co., et al.*, Civ. No. 12-1741 (KM) (JBC) (D. N.J. filed Jan. 19, 2017).

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