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Georgia Federal Court Holds That Pollution Exclusion Bars Coverage Under Liability Policy for Claims Arising From Discharge of PFAS Into Waterways

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On December 5, 2022, the U.S. District Court for the District of Georgia held that a total pollution exclusion (TPE) in a CGL policy relieved the insurer of any obligation to defend or indemnify a recycling company in a putative class action alleging PFAS contamination of Georgia waterways. *See Grange Ins. Co. v. Cycle-Tex Inc., et al.*, Order, Civ. A. No. 4:21-cv-00147-AT (N.D. Ga. Dec. 5, 2022). The decision adds to a slowly-developing body of case law addressing coverage issues arising out of PFAS-related claims.

In *Grange*, the insured, Cycle-Tex, Inc., was the operator of a thermoplastics recycling facility in Dalton, Georgia. Cycle-Tex and other defendants – which included chemical suppliers, carpet manufacturers, intermediaries, the City of Dalton and the Dalton-Whitfield Solid Waste Authority – were named in a putative class action complaint alleging that residents of Dalton had been injured as a result of the defendants' discharge of PFAS into local waterways. The complaint sought damages for: (1) alleged harm to the residents' health by virtue of ingesting contaminated water; (2) alleged property damage resulting from the contamination of the public water supply; and (3) the payment of surcharges and heightened water rates as a result of the alleged contamination.

Cycle-Tex tendered the suit to its CGL insurer, which agreed to provide a defense under an ROR. After commencing a declaratory judgment action against Cycle-Tex and the named class action plaintiff, the insurer moved for a summary judgment ruling that it had no duty to defend or indemnify based on the TPE in its policy. The TPE stated, in part, that there would be no coverage for:

(1) "Bodily injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time[;]

[or]

(2) Any loss, cost, or expense arising out of any:

> (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize or in any way respond to, or assess the effects of "pollutants". . . .

In its decision granting the insurer's motion[1], the court saw "no doubt" that the PFAS chemicals at issue constituted "pollutants," which the policy defined as "any solid, liquid, gaseous or thermal irritant or contaminant, including . . . chemicals . . . ." The court also cited cases in which Georgia state courts have "repeatedly emphasized the 'broad' reach of the term 'pollutants' within [TPEs]." The court concluded that both the "bodily injury" – specifically via the ingestion of PFAS chemicals – and the "property damage" alleged in the underlying complaint "plainly" fell within subparagraph (1) of the TPE. The court also determined that the damages sought for surcharges and heightened water rates were subject to subparagraph (2) of the TPE, because they constituted "loss[es], cost[s], or expense[s]" that arose out of a request, demand, or statutory or regulatory requirement to "clean up, remove, contain, treat, detoxify or neutralize or in any way respond to" PFAS chemicals from the public water supply. Because all of the alleged damages "unambiguously" fell under the TPE, the court found the insurer had no duty to defend – and, therefore, no duty to indemnify – Cycle-Tex under Georgia law.

Grange joins a small handful of decisions considering the application of pollution exclusions to PFAS-related claims. *See also Tonoga, Inc. v. N.H. Ins. Co.*, 159 N.Y.S.3d 252 (N.Y. Sup. Ct. App. Div. 3d Dep't 2002); *Colony Ins. Co. v. Buckeye Fire Equip. Co.*, 2020 U.S. Dist. LEXIS 194709 (W.D.N.C. Oct. 19, 2020), *aff'd*, 2021 U.S. App. LEXIS 34305 (4th Cir. Nov. 18, 2021). More such decisions will likely follow.

[1]As to Cycle-Tex, which had failed to appear, the court converted the insurer's motion to one for default judgment.