

Wastewater Pond Closure/Insurance Coverage: Federal Appellate Court Addresses Claim Notice Issue



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

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The United States Court of Appeals for the Sixth Circuit (“Court”) addressed in a December 14th Opinion whether insurance coverage was properly denied because of the failure of the policyholder to notify the insurance company “as soon as practicable”.

Coverage was sought for costs associated with the closure of wastewater ponds.

Canton Drop Forge (“Canton”) manufactures metal parts for the energy, aerospace, and transportation industries. The company utilized man-made ponds for several decades to treat its wastewater.

Oil accumulated in these ponds. The oil was generated through the manufacturing process and subsequently discharged into the ponds as processed wastewater.

A United States Environmental Protection Agency (“EPA”) inspector is stated to have told Canton in 2012 that the ponds would need to undergo closure. The company subsequently (and unsuccessfully) attempted to enter the State of Ohio’s Voluntary Action Program. Participation in this program would have meant that federal enforcement would not be instituted.

In 2013 EPA is stated to have formally notified Canton that its ponds violated state and federal regulations for two reasons:

1. The ponds constituted surface impoundments of hazardous waste and lacked a permit
2. Failure to determine whether the used oil on the bottom and sides of the ponds constituted hazardous waste

Canton is stated to have negotiated with EPA and the Ohio Environmental Protection Agency (“Ohio”) for 18 months. Such negotiations ended in September 2014. The company entered into an agreement to pay a civil penalty and to undertake closure of the ponds.

Contaminated water and soil were removed from the ponds and replaced with clean sand, clay, and gravel. Ohio concluded in August 2016 that the pond closure had been successfully completed.

Canton sent a letter to Travelers Casualty & Surety Company (“Travelers”) in November 2016 seeking insurance coverage for the previously referenced closure costs. Travelers denied the request on several bases which included failure to provide timely notice of the claims.

Canton instituted suit seeking reimbursement for the cleanup costs under both primary and umbrella policies for an amount exceeding \$5,000,000.

The lower court granted summary judgment to Travelers on several grounds. Canton appealed.

The Court notes that the terms of the primary insurance policy required Canton to give notice of an occurrence affecting coverage “as soon as practicable.” Further, the umbrella policy required notice of an occurrence “reasonably likely to involve” coverage “as soon as practicable.”

The Court cites Ohio law as stating that an insurer may deny coverage based on the breach of a timely notice provision when the insurer “is prejudiced by the insured’s unreasonable delay.” An unreasonable duty in notice is stated to give rise to a presumption of prejudice to the insurer.

The insured may thereafter rebut such presumption. Late notice is stated to potentially prejudice an insurer if they:

. . . lose options to protect their interests, “leaving them to deal with decisions made by the insured.”

The Court concludes that Canton failed to give timely notice. It cites in support of this conclusion the following events:

- EPA’s request that the ponds be closed in 2012
- EPA and Ohio’s order that the ponds be closed in 2014

The Court notes that Travelers was not notified until Canton had already negotiated its liabilities with EPA and Ohio and spent over \$5,000,000. It also concludes that Canton has no evidence creating a genuine issue as to whether it had reason not to be aware of its insurance coverage with Travelers.

The delay is deemed unreasonable as a matter of law.

Prejudice is also found by the Court. This is deemed to be because of Travelers having no involvement in negotiating the liability for which Canton sought reimbursement. Similar reasoning is applied to the umbrella policies.

The lower court’s judgment is affirmed and Canton’s claim is dismissed based on a failure to timely notify the insurance companies.

A copy of the Opinion can be downloaded [here](#).