

THOUGHT LEADERSHIP

News

FIFTH CIRCUIT CONFIRMS THAT AN EXCESS LIABILITY INSURER IS NOT REQUIRED TO SHOW PREJUDICE BEFORE DENYING COVERAGE BASED ON LATE NOTICE OF THE TRIGGERING EVENT

Newsbrief

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Last week, the Fifth Circuit affirmed a District Court's decision granting an insurer's Motion for Summary Judgment on the Pleadings and held that the excess insurer was not required to show prejudice before denying coverage based on late notice on an occurrence based policy. The original Policy contained an absolute pollution exclusion clause; however, the parties specifically negotiated a "pollution buy-back" exclusion whereby the insurer agreed to provide coverage for the direct or indirect consequence of released or escaped pollutants so long as the triggering event is reported within 30 days after having become known.

In *Star Indem. & Liability Co. v. SGS Petroleum Service Corp.*, 12-20545, 2013 WL 3013873 (5th Cir. June 18, 2013), the insurer sought a declaratory judgment that it was not required to show prejudice before denying coverage to the insured for liability arising out of a pollution occurrence which the insured did not report within thirty days, as required by the policy. Plaintiff argued that the insurer did not suffer any prejudice from its failure to provide notice to the insurer within the required 30 days. The insured did not report the triggering incident until 59 days after it learned of the pollution discharge. Drawing parallels from an earlier decision, the Court explained that to extend the 30 day notice period would have exposed the insurer "to a risk broader than the risk expressly insured against the policy." The Court noted that both the insured and insurer are sophisticated commercial parties with comparable bargaining power, that the language in the policy was plain, and that timely reporting of the claim was one of the events necessary to trigger coverage.

As such, the Court concluded that the notice provision of the policy was an essential part of the bargained-for exchange under the occurrence-based policy and was specifically negotiated.