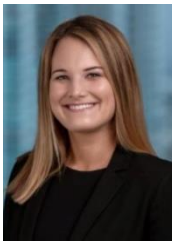
Insurance Insights From 5th Circ. Blue Bell Coverage Ruling

By Geoffrey Fehling and Casey Coffey
Published in Law360 | July 24, 2023

The U.S. Court of Appeals for the Fifth Circuit recently held that Blue Bell Creameries USA Inc.'s commercial general liability insurers do not have a duty to defend the ice cream company in a shareholder lawsuit, which arose from a Listeria outbreak.

The decision in Discover Property & Casualty Insurance Co. v. Blue Bell Creameries underscores the importance of coordination of different coverages and policies across insurance programs, as well as the potential perils policyholders may face if forced to seek recovery for certain losses under nontraditional policies.

Background

In 2015, a Listeria outbreak caused bodily injury to a number of Blue Bell's customers, resulted in a nationwide recall of Blue Bell products and triggered the share price of Blue Bell's stock to drop. In 2017, a shareholder filed a derivative action, alleging that the company's executive officers breached their fiduciary duties.

According to the shareholder lawsuit, the officers' actions "resulted in a Company-wide failure to maintain standards and controls necessary for the sanitary and safe production and distribution of the Company's ice cream products."

That failure led to the contamination, the bodily injury and, ultimately, the economic impact. Blue Bell sought coverage for the defense costs incurred from the lawsuit.

The Coverage Dispute

Blue Bell's insurers asked the U.S. District Court for the Western District of Texas to determine whether they had a duty to defend or indemnify the ice cream company in the shareholder litigation.[1]

The district court granted summary judgment in favor of the insurers based on three separate grounds. Blue Bell appealed the decision and the Fifth Circuit recently affirmed the district court's determination, agreeing that the shareholder lawsuit does not stem from an occurrence.

The parties agreed that the duty to defend only applied where the bodily injury or property damage was caused by an occurrence, which was defined as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

The Fifth Circuit stated that, "[u]nder Texas law, a person's act is not an accident 'when [1] he commits an

Insurance Insights From 5th Circ. Blue Bell Coverage Ruling
By Geoffrey Fehling and Casey Coffey
Published in Law360 | July 24, 2023

intentional act that [2] results in injuries that ordinarily follow from or could be reasonably anticipated from the intentional act.'"

Here, the court noted that the complaint contained no allegations that the officers were acting involuntarily. Rather, there were allegations that the officers "knowingly disregarded contamination risk and safety compliance" and "willfully failed to exercise their authority."

In addition, the complaint alleged facts "showing that the Listeria outbreak and the attendant financial harm could be reasonably anticipated." Thus, the court affirmed the district court's determination that there was no occurrence.

Takeaways

While product recalls[2] often raise insurance issues,[3] the Fifth Circuit decision is noteworthy. For one, the decision centered around the interpretation of occurrence in commercial general liability policies. This is different because shareholder suits like those faced by Blue Bell usually implicate directors and officers, or D&O, liability policies.

However, here, Blue Bell sought coverage for the shareholder suit under its commercial general liability policies, which traditionally do not respond to those kinds of demands. A company may look to other policies if it does not have D&O coverage or the D&O policy did not apply.

Another explanation is that existing D&O coverage was depleted in responding to other claims against the company or its officers and directors, which could have happened here.

In any event, the ruling is a mixed bag for policyholders. On one hand, the court reversed the district court's determination that the board members were not additional insureds, finding that the officers were acting within their roles when deciding whether operations should continue despite the Listeria outbreaks.

On the other hand, the ruling took the complaint allegations at face value and held that the injuries resulted from uncovered, intentional acts.

Blue Bell's coverage defeat serves as a reminder that companies of all sizes and industries should consider D&O coverage to avoid coverage gaps.

Companies should also review existing D&O policies to ensure that the policy provides appropriate coverage for shareholder suits and similar claims like those faced in this case.

Companies that are at risk for product recalls, for example, should be cautious of broad bodily injury or property damage exclusions and broad pollution exclusions that could severely limit or negate coverage for traditional D&O exposures due to attenuated links to outbreaks implicating bodily injury or involving bacteria.

Narrowing the scope of exclusions, such as broad preambles and similar causation language, and negotiating appropriate carve-backs to these exclusions, is paramount to avoid unexpected denials.

The best time to evaluate and, if needed, enact those changes is at the time of policy placement or renewal, so policy language can be improved before a claim arises.

Insurance Insights From 5th Circ. Blue Bell Coverage Ruling
By Geoffrey Fehling and Casey Coffey
Published in Law360 | July 24, 2023

Notes

1. https://www.huntoninsurancerecoveryblog.com/2022/05/articles/recall/hunton-coverage-lawyers-provide-update-on-recall-related-coverage-disputes/.

2. https://www.huntoninsurancerecoveryblog.com/2023/06/articles/recall/salad-lovers-and-policyholders-rejoice-court-affirms-coverage-for-romaine-lettuce-recall/.

3. https://www.huntoninsurancerecoveryblog.com/2020/12/articles/excess/court-rejects-insurers-late-notice-defense-allowing-meat-and-poultry-producer-recall-claim-to-proceed/.

Geoffrey Fehling *is a partner in the firm's Insurance Coverage group in the Boston office. Geoff is an experienced litigator and advocate who helps policyholders maximize the value of their insurance assets. He can be reached at +1 (617) 648-2806 or gfehling@HuntonAK.com.*

Casey Coffey *is an associate in the firm's Insurance Coverage group in the Miami office, Casey's practice focuses on complex insurance litigation and advising policyholders in insurance coverage matters. She can be reached at +1 (305) 536-2707 or ccoffey@HuntonAK.com.*