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3 Takeaways Squeezed Out of Juicer's Insurance Battle

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In *Tree Top Inc. v. Starr Indem. & Liab. Co.*, No. 1:15-CV-03155-SMJ, 2017 WL 5664718 (E.D. Wash. Nov. 21, 2017), the Eastern District of Washington rejected an insurer's attempt to escape insurance coverage for a Proposition 65 lawsuit filed against juice maker Tree Top Inc. Tree Top's insurer, Starr Indemnity and Liability Co., had argued that the Prop. 65 claims were not "first made" when the lawsuit was filed against Tree Top, but instead were "first made" over a year earlier when the Environmental Law Foundation sent a notice threatening a lawsuit under Prop. 65. According to Starr, since the claims were "first made" prior to the applicable insurance policy period, there was no coverage for the subsequent lawsuit. The district court rejected that view, holding that the ELF's Prop. 65 notice did not qualify as a "claim" that must be reported to the insurer. The decision has important implications and provides some lessons-learned for companies seeking insurance coverage for claims brought under Prop. 65 and other laws involving environmental harms and toxins.

Tree Top maintained a "claims-made" insurance policy with Starr during the July 2011–July 2012 policy period. The policy covers claims that are "first made" and reported to Starr during the policy period. The policy defines a "claim" as a "written demand for monetary, nonmonetary or injunctive relief made against Tree Top" or a "judicial proceeding commenced against Tree Top which is commenced by … service of a complaint …"

On June 14, 2010 — before the policy with Starr incepted — Tree Top had received a notice from the Environmental Law Foundation (a nonprofit environmental organization) informing Tree Top that ELF intended to sue to enforce certain regulations under California's Proposition 65. Prop. 65 is a California law aimed, in part, at reducing the public's exposure to chemicals in consumer products by requiring warning labels on products.

ELF's notice stated:

> Pursuant to Health and Safety Code § 25249.7(d), ELF intends to bring suit in the public interest against the entities in Exhibit "A" 60 days hereafter to correct the violation occasioned by the failure to warn all customers of the exposure to lead.

The notice did not contain any settlement offers or other demands for monetary or other relief.

Over a year later, on Sept. 28, 2011 — and during the coverage period under the Starr policy — ELF filed

a lawsuit in California state court against Tree Trop and others pursuant to Prop. 65. Tree Top reported the claim to Starr and requested coverage. However, Starr denied coverage on the basis that ELF's earlier June 14, 2010, notice was a "claim" that was "first made" prior to the policy's inception.

The primary question for the district court was whether the Prop. 65 notice qualified as a "claim," which is defined under the policy as a "written demand for monetary, non-monetary or injunctive relief." The court explained that the plain and ordinary meaning of "demand" contemplates the assertion of a right coupled with a request for some action on the part of the recipient. The court then concluded that the notice was not a "demand" because it did not request that Tree Top take any affirmative action; it merely provided notice of ELF's allegations and stated its intent to sue. Thus, the court held that the claim was "first made" during the Starr policy period when ELF filed suit against Tree Top.

In a subsequent order, the court addressed Starr's alternative argument that Washington's "known-risk" doctrine precluded coverage for Tree Top's Prop. 65 lawsuit. See *Tree Top Inc. v. Starr Indemn. & Liab. Co.*, No. 1:15-CV-03155-SMJ, Dkt. No. 55 (E.D. Wash. Nov. 28, 2017). Starr had argued that the failure to deem the Prop. 65 notice a "claim" would essentially allow an insured to be notified that a lawsuit would be filed against it, and then secure coverage in advance for that suit, merely because the suit had not actually been filed and served. The known-risk doctrine, however, provides a judicially created defense premised on the principle that an insured cannot collect on an insurance claim for a loss that the insured subjectively knew would occur at the time the insurance was purchased. The court recognized the defense but concluded that Tree Top's subjective knowledge was a factual inquiry that could not be resolved on summary judgment.

Implications and Lessons

Companies dealing with toxic or environmental claims can distill at least three important lessons from the Tree Top case.

First, the Tree Top decision can be seen as a positive development for insured companies who may have received notices from state and federal agencies or threats of citizen suits under Prop. 65 or similar laws. Often, particularly in the Prop. 65 or Superfund compliance monitoring context, these notices can be brief and contain little substantive information, and insureds may not contemplate that they would rise to the level of a "claim" that should be reported to the insurer. Indeed, contrary to the position taken by Starr in Tree Top, some insurers actually deny coverage for such notices on the basis that they are not yet a "claim." Tree Top provides some welcome breathing room for companies facing late-notice arguments.

Second, Tree Top should nonetheless also serve as a reminder to companies dealing with toxics and environmental compliance issues that the safest option is to report any and all notices to their insurer in order to avoid late-notice issues down the line. Regardless of whether a notice qualifies as a "claim," insurers may take the position that such notices should have been disclosed during the application or renewal process, and may even argue that nondisclosure justifies rescission of the entire policy. Coverage counsel familiar with toxics and environmental claims can assist in identifying whether a notice should be reported to the insurer.

Third, Tree Top illustrates that insureds may want to avoid "claims-made" policies entirely if timely notice is likely to be a challenge. General liability, product liability and directors' and officers' policies may permit coverage for Prop. 65 or similar claims on an "occurrence" basis, and insurers asserting late-notice

arguments under such "occurrence" policies will generally need to also demonstrate prejudice. Companies may also wish to consider adding specialty Prop. 65 liability policies to their insurance programs. Moreover, companies that require their vendors, manufacturers and partners to agree to purchase insurance coverage as a condition to a business engagement should consider structuring their contracts to specify that such insurance must be purchased on an "occurrence" basis. For these business relationships, a carefully structured insurance and indemnity agreement can help avoid the costly result of a future coverage fight.

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