To Bee or Not to Bee

CA Court Finds Denial of Coverage Based on Exclusion was Premature Where Facts had not Been Judically Determined

While I typically discuss cases concerning pollution, today I will change a few letters around and discuss pollination. The case, *Unigard Insurance Co. et al. v. George Perry and Sons Inc. et al.*,[1] asks whether there is coverage for a lawsuit brought against a commercial farm that is alleged to have killed off bee colonies used for pollination.[2] The farm, owned by George Perry & Sons Inc. ("Perry"), allegedly used a pesticide that killed off the bee colonies that Perry had hired from Gary Mattes ("Mattes") pursuant to an oral agreement. The bees, operating well outside of their weight class, were hired to pollinate Perry's crops of watermelons and pumpkins. Interestingly, the bees would be brought to the farm in either large hives or "nukes," which are smaller versions of hives.[3]

Unfortunately for the bees, the pesticides that Perry used on its crops caused "catastrophic losses to [Mattes'] bee hives resulting in more than a 95 percent die off in 2012 alone." Mattes sued Perry, alleging negligence in the spraying of the pesticides that lead to the death of the bees.[4] Perry then sought coverage under the liability policies that Perry had purchased from Nationwide and Unigard. The insurers denied coverage for the claims in part based on the policies' Rented Property or Services Contract exclusions.

In their summary judgment motions, Nationwide and Unigard argued that the oral contract between Perry and Mattes was a rental contract because the complaint, invoices, and other documents stated that the bees had been "rented." However, the court held that that a fact finder could determine that the contract was really for pollination services because Mattes was providing services beyond just the procurement of bees, and because Mattes indicated that he might procure the bees from other parties. Ultimately, noting that exclusions are to be interpreted narrowly, the court found that there was a genuine dispute of facts such that summary judgment as to whether the Rented Property or Services Contract exclusion applied was inappropriate.

Insurers make similar arguments in the construction industry with relation to Professional Services exclusions. A complaint will often contain "mixed claims," alleging that the cause of property damage was the contractor's negligence in rendering professional services and also in performing ordinary construction activities. In these cases, a commercial general liability insurer will often deny coverage based on the policy's Professional Services exclusion, even though the underlying complaint included allegations of negligence unrelated to professional services.

In these situations, policyholders should push back on the denial of coverage. As can be seen from the Perry decision, whether an exclusion applies often requires a factual determination. Insureds should not take as gospel that an exclusion applies just because an insurer has raised it. The facts of the case should be carefully examined, as they can paint different stories. Finally, given most insurers' general reluctance to try cases to verdict, surviving summary judgment can often result in a favorable settlement opportunity for the insured.

The insurance professionals at Saxe Doernberger & Vita, P.C., including myself, are always here to assist clients with their coverage needs. You can reach me at pbw@sdvlaw.com or by phone at 203-287-2107.

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[1] Case number 2:18-cv-00188, currently in the U.S. District Court for the Eastern District of California.

[2] The two insurance cases (involving Perry's different insurers) were consolidated.

[3] Unsurprisingly, it is noted that "Perry did not 'want [Mattes] working any bees while the pickers are out here [in the field].'" *Nationwide Agribusiness Ins. v. George Perry & Sons, Inc.*, No. 217CV01910KJMCKD, 2018 WL 4214890, at *3 (E.D. Cal. Sept. 5, 2018).

[4] The bees do not appear to have a worker's compensation claim pending.