

Wisconsin Court of Appeals Affirms Coverage for PCB Cleanup of Wisconsin's Lower Fox River

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On June 8, 2010, the Wisconsin Court of Appeals issued its decision in *Westport Insurance Corp. v. Appleton Papers Inc.*, No. 2009AP286 (Wis. Ct. App. June 8, 2010) ("Westport"), which affirmed a Brown County Circuit Court judgment declaring coverage existed under numerous policies for cleanup of polychlorinated biphenyls ("PCBs") released between 1954 and 1971 into the Lower Fox River from paper production mills the insured acquired in 1978. The ruling was not unanimous: Judge Joan F. Kessler authored the majority opinion (joined in by Judge Patricia S. Curley); Judge Ralph Adam Fine dissented. The majority opinion found no error in the trial court's rulings on:

Voluntary Payment and After-Acquired Liability. The insurers argued no coverage existed for insured's Lower Fox River liability, as it assumed that liability in a 1998 settlement agreement entered without insurer notice or consent, and after policy expiration. The majority ruled that the EPA's issuance of a Section 106 Order foreclosed this argument. Judge Fine's dissent would have remanded for a determination whether the settlement prejudiced the carriers.

Prior Litigation and PCB Knowledge. The Court of Appeals refused to hold erroneous the trial court's exclusion of evidence regarding the insured's prior litigation regarding liability for PCB cleanup (litigation that resulted in the 1998 settlement agreement), or the insured's knowledge of PCB contamination.

Late Notice Jury Instructions. The appellate court affirmed the trial court's late notice jury instructions, including an instruction that the jury could consider the legal effect of *City of Edgerton v. General Casualty Co.*, 184 Wis. 2d 750, 517 N.W.2d 463 (1994), overruled by *Johnson Controls, Inc. v. Employers Insurance of Wausau*, 2003 WI 108, 264 Wis. 2d 60, 665 N.W.2d 257.

Horizontal Exhaustion. The insurers argued for horizontal exhaustion given the trial court's earlier finding that the policies were jointly and severally liable, and given API's settlement of policies in every year of triggered coverage. Viewing this as an "allocation" issue, the Court of Appeals ruled insurers' argument barred by the "all sums" holding in *Plastics Engineering Co. v. Liberty Mutual Insurance Co.*, 2009 WI 13, 315 Wis. 2d 556, 759 N.W.2d 613.

The *Westport* court also held API could obtain a damage award under Wis. Stat. § 806.04(8) (Wisconsin's version of the supplemental relief provision of the Uniform Declaratory Judgment Act), ruled two Westport-specific issues (maintenance and exhaustion of underlying insurance) were unripe until API sought payment from Westport, and determined the issue of noncumulation was moot, as the parties who had preserved that issue on appeal were no longer in the case.

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