5th Circuit Slaps Down Another Oil and Gas Insurer for Denying Coverage

This has not been a good summer in the Fifth Circuit for oil and gas insurers denying claims. In Cox Operating, L.L.C. v. St. Paul Surplus Lines Insurance Co., 795 F.3d 496 (July 30, 2015), the Fifth Circuit upheld a jury award of over $9 million in damages and over $13 in penalties. Then, in Weiser-Brown Operating Co. v. St. Paul Surplus Lines Insurance Co., Docket No. 13-20442 (Sep. 16, 2015), the Fifth Circuit upheld a jury award of over $2 million damages and a judge's award of over $1.2 million in penalties.

The *Cox* decision relates to Cox's efforts to collect from its insurer for millions of dollars Cox spent in cleaning up pollution and debris after Hurricane Katrina damaged its oil and gas facilities in Eloi Bay and Quarantine Bay in Plaquemines Parish, Louisiana. St. Paul provided both a $1 million primary commercial general liability policy and a $20 million umbrella policy. Both policies provided coverage for pollution clean-up costs that result from a sudden and accidental pollution incident. Although St. Paul paid just under $1.5 million of the over $10.9 million in claims submitted by Cox for its clean-up, St. Paul refused to pay the difference. The jury awarded Cox the full difference plus another $13,064,948.28 in penalty interest because St. Paul had not, within 30 days after Cox's claim notice, "commence[d] an investigation of Cox['s] claim" or "request[ed] from Cox … all items, statements, and forms that St. Paul reasonably believed, at that time, would be required from Cox."

Like the jury, the Fifth Circuit had no sympathy for St. Paul. Even though Cox had submitted over $2 million in claims after the one-year reporting period specified in the policies, the Fifth Circuit held that St. Paul's denial of Cox's claim constituted a waiver of this reporting requirement. Cox had reported the pollution event within a year; that it took over a year to complete the clean-up would not prejudice Cox. The Fifth Circuit also rejected St. Paul's argument that it should get a credit for the $5 million that Cox was paid by other insurers for its separate ROWD (removal of wreckage and debris) policy; the Fifth Circuit agreed with Cox that the $9 million jury award was for an amount "over and above" what Cox had already recovered. Finally, the Fifth Circuit rejected St. Paul's numerous efforts to set aside the $13 million penalty award. Because St. Paul dilly-

dallied in responding to Cox, the Fifth Circuit had no hesitation in upholding the 18% interest penalty under the Texas Prompt Payment of Claims Act, Tex. Ins. Code § 542.054. Although St. Paul was able to convince the Texas Association of Defense Counsel to file an amicus brief supporting its petition for rehearing on the penalty issue, the Fifth Circuit had just one follow-up word to say: denied.

The *Weiser-Brown* decision tells a similar tale. Weiser-Brown spent millions associated with the "loss of control" of an oil well it operated in Lavaca County, Texas and made a claim to St. Paul under its control-of-well insurance policy. A jury awarded $2,290,457.03 in damages to Weiser-Brown, and the district court awarded another $1,232,328.14 under the Texas Prompt Payment of Claims Statute.

On appeal, St. Paul just attacked the penalty award. But again, St. Paul's arguments fell short. Even though St. Paul had promptly acknowledged Weiser-Brown's claim with a request for further information, it never indicated in its various follow-up letters that any request for information remained unfulfilled or that determination of coverage was contingent on receiving more information. Because St. Paul did not accept or reject Weiser-Brown's claims within 15 days after Weiser-Brown's last submission of documentation (the applicable time-period under the version of the statute in effect at the time), the district court imposed the 18% penalty interest from that date, and the Fifth Circuit affirmed.

The bottom line for insurers is that they should not be cavalier in dealing with their oil and gas insureds. The bottom line for oil and gas companies is that they should give prompt notice to their insurers and respond to timely requests for information, but that they should not surrender whenever an insurer pushes back: courts and juries in the Fifth Circuit have shown little pity for insurers who do not honor their contracts.

If you are an oil company with a coverage dispute or just have questions about your insurance coverage, please feel free to give us a call.