Insurance Coverage/Perchloroethylene: Federal Court Addresses Whether Duty to Defend Triggered Through Insured's Actions Addressing Contamination



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

09/26/2025

The United States District Court (S.D. Indiana) ("Court") in a September 23rd Order addressed insurance coverage issues associated with an apartment complex contaminated by perchloroethylene ("PCE"). *See Thompson Thrift Development, Inc., et al., v. The Cincinnati Insurance Company*, 2025 WL 2711770.

The questions addressed included:

- Did actions requested by the Arizona Department of Environmental Quality ("ADEQ") constitute a "suit" triggering a duty to defend?
- Was there an obligation to indemnify because of the insured's payment of certain environmental and legal costs?

Watermark at Peoria AZ, LLC and Thompson Thrift Development, Inc. (collectively, "Thompson") own and manage an apartment complex in Peoria, Arizona. A dry-cleaning business was determined to be next to the apartment complex.

Environmental sampling in 2022 is stated to have identified a high concentration of PCE on the apartment complex property. The source of the PCE was not definitively determined to be the dry cleaners. Additional environmental investigative work at the apartment complex including air sampling inside a vacant unit 1061, was stated to identify PCE concentrations at levels posing a risk to human health.

Thompson submitted a notice of claim to Cincinnati Insurance Company ("Cincinnati") stating that tests have confirmed the presence of PCE. Cincinnati asked to be informed immediately if Thompson Thrift received any third-party claim or notice from any governmental agency.

Thompson informed Cincinnati that it was going to report the PCE contamination to ADEQ. Further, Thompson stated that the law required this to be reported and also decided to inform the property's tenants.

The tenant in unit 1026 asked that her apartment be tested. Elevated levels of PCE were identified. Upon request of the tenant, Thompson terminated her lease and covered her moving expenses. Because unit 1026 was on the opposite side of the property from the dry cleaners, the Court indicated that there was concern that the dry-cleaning business was not the only source of the PCE contamination.

ADEQ requested that Thompson:

- Keep the unit unoccupied because of the sampling results while the agency pursues legal investigations.
- Requested the results of the environmental tests into the following year, including when data was requested ASAP.

Thompson viewed ADEQ's request to keep the unit vacant as a "soft command" and an implication that if this was not done the agency could shut down other units. Further, Thompson's environmental consultant testified that ADEQ typically allowed engaged parties to perform testing and share data, rather than by prescribing exact steps that needed to be taken.

Thompson also enrolled the apartment complex in ADEQ's Joint Voluntary Remediation Program ("VRP").

Thompson filed suit in Indiana state court against Cincinnati (which removed the case to the federal court) requesting a determination that the commercial general liability ("CGL") and umbrella policies provide defense and indemnity coverage. Cincinnati field a cross motion for summary judgment that there was no duty to defend or indemnify.

The Court stated that Cincinnati had a "duty to defend" only in the event of a "suit" seeking covered damages.

Cincinnati argued that there was no "suit" against Thompson that triggered the duty to defend. Thompson responded that ADEQ's demands were sufficiently coercive to qualify as a suit.

Indiana law is stated to have interpreted "suit" to include both actual lawsuits and coercive and adversarial administrative proceedings. The proceeding is required to have cognizable degree of coerciveness or adversariness or a substantial entry-level burden of coercion.

Thompson designated evidence that it argued showed ADEQ's actions were an implicit threat of formal enforcement actions.

The Court, however, determined:

- No designated evidence that ADEQ told Thompson that it faced liability, formal enforcement actions, or civil penalties for not complying with ADEQ's requests.
- ADEQ called the activities an investigation.
- There was no evidence of an administrative order or formal demand.
- ADEQ's requests for data from Thompson's testing was characterized as the type of information gathering expected in an ongoing investigation rather than a formal proceeding aimed at legal liability.
- Thompson's "goal" was to avoid imposed liability (i.e., to make sure ADEQ was satisfied so that it would not pursue anything further).

The Court also rejected Thompson's argument that its participation in the Arizona VRP is a suit. Thompson's objective in enrolling in this program was to pursue a No Further Action determination that would clear itself of ADEQ. This was deemed inconsistent with an argument that it faced coercive action in the VRP process.

The tenant's demand to have her lease terminated was also deemed to not qualify as a "suit". Thompson was noted to not have alleged that the tenant's demand exposed it to enforcement actions or civil penalties. There was no measure of coercion involved.

Thompson also argued that even if there was no duty to defend, that Cincinnati was required to indemnify "those sums that the insured becomes legally obligated to pay as damages". However, the environmental cleanup and legal costs incurred in response to the PCE contamination were held to not be pursuant to any legal requirement. In other words, the Court determined that there was no showing of a "legal obligation" to incur costs to avoid liability as required for duty to indemnify.

The Court granted Cincinnati's motion for summary judgment regarding both the duty to defend and obligation to identify issues.

A copy of the Order can be downloaded here.