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Ninth Circuit Affirms Dismissal of Breach of Contract, Washington Consumer Protection Act and Insurance Fair Conduct Act Claims Against Boiler & Machinery Insurer.

By Stuart D. Jones

On September 2, 2011, the 9th Circuit Court of Appeals issued a memorandum opinion in *Cowiche Growers, Inc. v. Continental Casualty Company*, U.S. Court of Appeals No. 10-36072 (9th Cir., Sept. 2, 2011) that affirmed a summary judgment the Honorable Rosanna M. Peterson (U.S. District Court for the Eastern District of Washington) granted in favor of Bullivant Houser Bailey's client, Continental Casualty Company. Both the trial court and the appellate court upheld Continental Casualty's denial of a claim under a boiler and machinery policy for damage to apples stored in a controlled temperature warehouse after exposure to airborne ammonia refrigerant.

The refrigerant leaked from the refrigeration system of the warehouse shortly after one of the insured's maintenance employees replaced a valve. The employee discovered a cloud of refrigerant escaping from the connection between the valve and the refrigeration piping "at the location where the gasket would be." There was no evidence of damage at the connection between the valve and the refrigeration piping. The employee removed the old gasket, inserted a new one, reassembled the piping and valve connection, and recharged the refrigeration line. The system then functioned properly, and did not leak.

The insured subsequently submitted a claim under the boiler and machinery policy for the diminished market value of apples that had been exposed to the refrigerant. After Continental Casualty investigated, it denied coverage. The insured filed a lawsuit alleging breach of the insurance contract and violations of Washington's Consumer Protection Act, RCW 19.86.090, and Insurance Fair Conduct Act, RCW 48.30.015.

The boiler and machinery insurance policy defined a "Covered Cause of Loss" as "a 'Breakdown' to 'Covered Equipment,'" and "Breakdown" was defined as a "sudden and accidental direct physical loss to 'Covered Equipment' which manifests itself by physical damage, necessitating its repair or replacement, unless such loss or damage is otherwise excluded within this Coverage Form." The trial court granted summary judgment in Continental Casualty's favor as a matter of law where the insured offered no evidence that any part of the refrigeration equipment sustained direct physical damage.

The Ninth Circuit panel agreed. The Court rejected the insured's arguments that differing definitions of "breakdown" in the original contract and an endorsement created ambiguity, and found that "the original definition was unambiguously 'deleted and replaced in its entirety' by the language of the endorsement."

The Continental Casualty policy also provided that "'Breakdown'. . . [did] not mean or include: (1) Malfunction, including but not limited to adjustment, alignment, calibration, cleaning or modification. . . (3) Leakage at any valve, fitting, shaft seal, gland packing, joint or connection." The appellate court ruled that these limitations provided an alternative ground to uphold Continental Casualty's denial of coverage. And, having found that there was a reasonable basis to deny coverage, the Ninth Circuit affirmed dismissal of the allegations of bad faith and violations of the Consumer Protection Act.

Continental Casualty Company was represented by **Stuart Jones**.