

## 4th Circ. Allows Insurer To Seek Arbitration In Foam Case

By **Caroline Simson**

Law360 (March 5, 2026, 6:03 PM EST) -- The Fourth Circuit on Wednesday overturned an order barring Illinois Union Insurance Co. from seeking to arbitrate in London a dispute within multidistrict litigation over alleged contamination from firefighting foam for failing to obtain consent from co-lead counsel.

In a **published opinion**, the appeals court concluded that U.S. District Judge Richard M. Gergel had wrongly refused to grant permission to Illinois Union to file its motion to stay the proceedings pending arbitration. Illinois Union was targeted in the litigation because it provided insurance policies to the alleged predecessors of chemical company BASF Corp., which manufactured components for the aqueous film-forming foam at issue in the suit.

Judge Gergel in his decision pointed to a case management order requiring Illinois Union to seek the consent of co-lead counsel. The insurer told the court that it had not sought consent because the co-lead counsel for defendants led the representation of the manufacturing defendants in the MDL. The interests of those defendants, including BASF, did not align with those of Illinois Union, the insurer said.

Illinois Union eventually did seek consent, but it was not granted. The judge acknowledged that fact in his decision, but ultimately, he denied Illinois Union permission to file its motion because lead counsel hadn't provided its "authority," the opinion said.

That was "a step too far," the panel said.

"Perhaps the district court did not intend for its order to go that far," according to the opinion. "But as written, conditioning Illinois Union's ability to file a Section 3 motion on the consent of lead counsel, that order neutered the mandatory provisions of the [Federal Arbitration Act]."

The appeals court went on to acknowledge the challenges that come with administering a massive multidistrict case like this one, in which the plaintiffs sued after allegedly being exposed to contaminants linked to the firefighting foam. In such cases, certain motions might be heard at a different time in an MDL than in a traditional case, the decision said.

"But 'the fact that a proceeding occurred in a[n] MDL setting does not alter the substantive rights of the litigants,'" the panel said. "And a court's obligation to grant a meritorious stay motion under 9 U.S.C. Section 3 is absolute. A district court cannot avoid that obligation by preventing the filing of that motion in the first place."

Wednesday's opinion involves two lawsuits. One suit was filed by plaintiffs including David Bouvet who were stationed at military sites in Wisconsin and claim they were exposed to firefighting foam-related chemicals at those sites. A second suit was initiated by Wausau, Wisconsin, asserting that the city's water system was contaminated as a result of firefighting activities involving the chemical foam.

The plaintiffs also sued Illinois Union, seeking to recover under the BASF predecessors' policies, according to court records. The cases were filed in Wisconsin state court before being consolidated in the MDL in the District of South Carolina.

Counsel for the plaintiffs Napoli Shkolnik PLLC partner Paul J. Napoli told Law360 that "this decision underscores the immense challenges U.S. District Judge Richard Mark Gergel faces in managing one of the largest multidistrict litigations in history, involving thousands of cases."

"While the appellate court vacated the denial of leave to file a motion, it explicitly affirmed the 'broad discretion' and 'inherent authority' district courts like Judge Gergel's have to maintain efficient and consistent proceedings," he said. "This ruling highlights Judge Gergel's commitment to orderly MDL management, even as it remands for further consideration, and reinforces the vital role transferee judges play in promoting fairness for all parties in complex litigation."

Counsel for Illinois Union could not immediately be reached for comment Thursday.

In the broader MDL being adjudicated in a district court in Charleston, various parties have sued BASF and other defendants over injuries and contamination allegedly caused by the firefighting foam.

Illinois Union, which has corporate ties to global insurance provider Chubb, issued three excess liability insurance policies to companies including Ciba Corp. providing coverage for losses exceeding \$15 million. The policies provided that disputes would be arbitrated in London.

Illinois Union subsequently sought to pause the court proceedings relating to claims that it said fell under the arbitration clause in the BASF predecessors' policies. But the district court refused, pointing to a case management order stipulating that the insurer first had to seek consent from the co-lead counsel for defendants named in the cases.

Judges Roger L. Gregory, A. Marvin Quattlebaum Jr. and Nicole G. Berner sat on the panel for the Fourth Circuit.

Illinois Union Insurance Co. is represented by Jonathan D. Hacker, Jason M. Zarrow and Anton Metlitsky of O'Melveny & Myers LLP, Robert F. Walsh and Lynndon K. Groff of White & Williams LLP and Kevin K. Bell of Robinson Gray Stepp & Laffitte LLC.

Wausau, Donald Bouvet and the other individual plaintiffs are represented by Paul J. Napoli and Andrew Croner of Napoli Shkolnik PLLC.

The cases are Donald Bouvet v. Illinois Union Insurance Co., case number 25-1143, and City of Wausau v. Illinois Union Insurance Company, case number 25-1143, both in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Stephen Berg.