

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

SEP 24 2026

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

TETRA TECH EC, INC., formerly known
as Tetra Tech FW, Inc.,

Plaintiff - Appellant,

v.

AIG SPECIALTY INSURANCE
COMPANY,

Defendant - Appellee,

v.

TETRA TECH, INC.,

Cross-defendant - Appellant.

No. 25-7620

D.C. No.

3:24-cv-06367-WHO

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
William Horsley Orrick, District Judge, Presiding

Argued and Submitted September 1, 2026
San Francisco, California

Before: BYBEE and BRESS, Circuit Judges, and SILVER, District Judge.**

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

** The Honorable Roslyn O. Silver, United States District Judge for the
District of Arizona, sitting by designation.

Appellants (collectively “Tetra Tech”) appeal the district court’s grant of summary judgment in favor of appellee (“AIG”), Tetra Tech’s insurer. The district court held AIG has no duty to defend Tetra Tech against three lawsuits (collectively “Underlying Lawsuits”) alleging bodily injury and environmental damage resulting from Tetra Tech’s remediation work for the U.S. Navy at the former Hunters Point Naval Shipyard (“Hunters Point”) in San Francisco. We review de novo a grant of summary judgment, *Dees v. County of San Diego*, 960 F.3d 1145, 1151 (9th Cir. 2020), and review de novo the district court’s interpretation of the insurance policy under California law, *Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 624 (9th Cir. 1996). We affirm.

Under California law, an insurer has a broad duty to defend an insured “if the underlying complaint alleges the insured’s liability for damages *potentially* covered under the policy, or if the complaint might be amended to give rise to a liability that would be covered under the policy.” *Montrose Chem. Corp. v. Superior Ct.*, 861 P.2d 1153, 1160 (Cal. 1993). Tetra Tech, as the insured, bears the initial burden to “establish[] potential liability by reference to the factual allegations of the complaint, the terms of the policy, and any extrinsic evidence upon which the insured intends to rely.” *Id.* If an insured relies on extrinsic evidence to establish a possibility of coverage for the claim, the extrinsic evidence “must be *known by the insurer* at the *inception* of the third party lawsuit.”

Gunderson v. Fire Ins. Exch., 37 Cal. App. 4th 1106, 1114 (1995).

Here, Tetra Tech failed to establish potential liability for damages covered under its insurance policies with AIG (“Policies”). In pertinent part, the Policies cover claims for damages “caused by Pollution Conditions resulting from Covered Operations,” but only if the Pollution Conditions were “unexpected and unintended from the standpoint of the Insured.” It is undisputed that Tetra Tech faces potential liability for damages caused by Pollution Conditions resulting from Tetra Tech’s activities at Hunters Point. However, Tetra Tech has not met its burden to establish potential liability for the “unexpected and unintended” creation of Pollution Conditions based on the factual allegations in the Underlying Lawsuits.

First, there are no factual allegations in any of the three Underlying Lawsuits supporting Tetra Tech’s potential liability for unexpected and unintended Pollution Conditions. The three lawsuits all allege the same fraudulent scheme in which Tetra Tech employees—some of whom pleaded guilty to federal crimes—intentionally mislabeled and certified radioactive soil as “clean,” then processed and disposed of “clean” soil while circumventing the proper safety procedures for contaminated soil. As alleged, Tetra Tech’s intentional mistreatment and mishandling of contaminated soil created the Pollution Conditions that caused the asserted damages.

Tetra Tech argues that allegations of “remediating radioactive material in

soil improperly, resulting in potentially radioactively-contaminated soil being shipped offsite as well as being used as backfill for trenches,” establish that “the plaintiffs could potentially recover for injuries caused by ‘improper’ remediation of soils without a finding that Tetra Tech intended or expected the resulting Pollution Conditions.” However, the Underlying Lawsuits unequivocally allege that Tetra Tech’s remediation work was “improper” because Tetra Tech knowingly mislabeled contaminated soil, then handled it as if it were clean. There are simply no factual allegations in the Underlying Lawsuits that can be reasonably interpreted as suggesting that Tetra Tech’s work was improper because it accidentally mislabeled or mishandled the soil. In other words, the Underlying Lawsuits unambiguously allege only that Tetra Tech knew its work was improper and thus expected the Pollution Conditions. The factual allegations supporting every pertinent claim in the Underlying Lawsuits establish Tetra Tech is potentially liable only for damages caused by Pollution Conditions that, from Tetra Tech’s standpoint, were an expected result of its knowingly fraudulent work.

Tetra Tech also suggests that references to “negligence” in the allegations and causes of action in the Underlying Lawsuits establish a potential that Tetra Tech could be liable for unexpected Pollution Conditions. Not so. “The scope of the duty [to defend] does not depend on the labels given to the causes of action in the third party complaint; instead it rests on whether the *alleged facts* or *known*

extrinsic facts reveal a possibility that the claim may be covered by the policy.”

Cunningham v. Universal Underwriters, 98 Cal. App. 4th 1141, 1148 (2002). Tetra Tech relies on “the misapprehension that all claims for negligence must at least potentially come within” coverage for accidental conduct, but “[n]egligent’ and ‘accidental’ are not synonymous.” *Am. Int’l Bank v. Fid. & Deposit Co.*, 49 Cal. App. 4th 1558, 1572–73 (1996). Here, the negligence claims in the Underlying Lawsuits are exclusively based on factual allegations of nonaccidental conduct—that Tetra Tech expected to create the Pollution Conditions, and the Pollution Conditions caused foreseeable harm.

Next, Tetra Tech argues we must “acknowledge the potential” of coverage based on Tetra Tech’s denials that the Pollution Conditions were expected from Tetra Tech’s standpoint. We disagree. “An insured cannot defeat an insurer’s motion for summary judgment on its duty to defend by merely asserting, without any evidentiary support, that it did not expect the particular happening or consequence.” *Upper Deck Co., LLC v. Fed. Ins. Co.*, 298 F. Supp. 2d 994, 1001 (S.D. Cal. 2002), *aff’d*, 358 F.3d 608 (9th Cir. 2004); *see Montrose*, 861 P.2d at 1161 (noting that to establish potential coverage, “an insured cannot manufacture a dispute on summary judgment, ipse dixit, by refusing to concede the truth of a fact without adducing some evidentiary support for its position”).

Tetra Tech relies on *Gray v. Zurich Insurance Co.*, 419 P.2d 168 (Cal.

1966), where an insured specifically told his insurer that he acted in self-defense, thus establishing potential coverage for nonintentional tortious conduct. *Id.* at 170, 177. But in *Gray* and similar cases, “the insured offered evidence he had made his insurer aware of the complaint and *the facts of his defense* which” established potential coverage. *Royal Globe Ins. Co. v. Whitaker*, 181 Cal. App. 3d 532, 538 (1986) (emphasis added) (noting “the same is true in” *Mullen v. Glens Falls Ins. Co.*, 73 Cal. App. 3d 163, 170 (1977)). Here, by contrast, Tetra Tech offered no evidence that AIG was aware of any facts that could establish potential coverage for unexpected Pollution Conditions. Tetra Tech now speculates it might disprove the allegations of expected Pollution Conditions at trial, but this speculation is not supported by extrinsic facts, much less extrinsic facts “*known by the insurer* at the *inception*” of the Underlying Lawsuits. *Gunderson*, 37 Cal. App. 4th at 1114. As such, Tetra Tech’s unsupported denials and speculation are insufficient to establish potential coverage.

Lastly, a possibility of amending the complaints in the Underlying Lawsuits does not establish the potential for covered liability. To meet its burden, Tetra Tech may show “the complaint[s] might be amended to give rise to a liability that would be covered under the policy.” *Montrose*, 861 P.2d at 1160. However, “[o]nly amendments that would include new *causes of action* clearly supported by the facts already pled in the complaint may support a finding of potential liability. Mere

speculation that the [third-party claimant] will allege *new facts* in its suit against the [insured] cannot satisfy the [insured's] burden of proof.” *Olympic Club v. Those Interested Underwriters at Lloyd’s London*, 991 F.2d 497, 503 (9th Cir. 1993) (citations omitted); see *Friedman Prof. Mgmt. Co., Inc. v. Norcal Mut. Ins. Co.*, 120 Cal. App. 4th 17, 34–35 (2004) (“An insured is not entitled to a defense just because one can imagine some additional facts which would create the potential for coverage.”).

Tetra Tech speculates that, for example, a jury might find Tetra Tech liable for improperly remediating soil even “if Tetra Tech thought the soil it used as fill was clean.” But this hypothetical—proposing Tetra Tech *accidentally* created the Pollution Conditions—is not supported by the factual allegations in the Underlying Lawsuits. This possible amendment alleging new facts cannot satisfy Tetra Tech’s burden of establishing potential liability for unexpectedly creating Pollution Conditions.

Because we affirm the grant of summary judgment on this ground, we need not address the district court’s alternative grounds based on exclusions in the insurance policies.

AFFIRMED.