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Don't Assume Your Policy Means What It Seems To Say: "Suit" Doesn't Always Mean Just "Lawsuit"

Insurance policies grant coverage and then chip away at that broad coverage through exclusions, exceptions and limitations on the insurer's duties. The duty to defend an insured under a typical comprehensive general liability (CGL) policy, for instance, is limited to a "suit against the Insured seeking damages . . . ." Last week, the Ninth Circuit Court of Appeals ruled that the meaning of the word "suit" as used in this context did not mean only courtroom lawsuits. In a case that attracted the intervention of the State of Oregon and the Complex Insurance Claims Litigation Association, the Court concluded that "suit" also included enforcement letters delivered by the Environmental Protection Action (EPA) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). The ruling underscores why insureds should not give up on efforts to seek coverage for significant claims without first doing their homework.

In *Anderson Brothers, Inc. v. St. Paul Fire & Marine Insurance Co.*, 2013 WL 4615055 (9th Cir. Aug. 30, 2013), the insured owned and leased property within a designated Federal "Superfund" site. The insured received a letter from the EPA under Section 104(e) of CERCLA seeking the insured's "cooperation" in the EPA's investigation of the release of hazardous substances at the Site. While compliance with the request was voluntary, under CERCLA the insured could have been subject to an EPA enforcement action and penalties of $32,500 per day for noncompliance. The insured tendered the letter to its carrier and requested a legal defense and indemnity. The carrier declined.

Almost two years later, the insured received a second letter from the EPA notifying the insured that it was a potentially responsible party for the contamination at the site and that the insured may be required to clean it up and pay damages for harm to natural resources. The letter urged the insured to cooperate with the EPA and other potentially responsible parties to allocate clean-up costs as a way to avoid litigation with the EPA. The insurer again declined to provide the insured with a legal defense to this letter.

The insured sued the insurer, alleging that the refusal to defend the EPA action was a breach of the CGL policy. The insurer countered that the letters were not "suits" and did not trigger any defense obligations created by the insurance contract. The dispute framed by the parties was not new, but has been widely litigated by state and federal courts with many different outcomes. Such disparities are to be expected because insurance contracts are interpreted according to state laws, while CERCLA is a Federal statutory regime that also must be considered.

To resolve the dispute, the Ninth Circuit looked beyond the policy terms to the unique aspects of both CERCLA and Oregon's law. The Court noted that the letters triggered a process by which the insured could face substantial civil liability for failing to cooperate with the EPA.

Failure to participate in settlement talks also could trigger joint and several liability with other potentially liable parties for the entire remediation cost. Because of the substantial penalties for noncompliance, the Court noted that many courts had found that the receipt of an EPA letter under CERCLA is the "functional equivalent" of a suit in that it required a defense from the outset. The Court agreed.

The Court also found no reason to deviate from this reasoning under Oregon law. Rather, the Oregon Environmental Cleanup Assistance Act defined the term "suit" as used in CGL policies to include EPA action which "directs, requests or agrees that an insured take action with respect to contamination. . ." unless the intent of the parties is shown to be otherwise. The Court found no evidence that the insured and insurer intended for a meaning other than that used in the Oregon statute.

Because the Court concluded that "suit" included the EPA letters, the insurer was found to have breached its duty to defend under the policies and required to not only reimburse the costs of defense but also attorney's fees. The ruling is a significant victory for policyholders facing EPA enforcement under CERCLA. It also demonstrates, however, that there are situations in which policy language should not be quickly dismissed by policyholders as inapplicable or unhelpful. Coverage disputes can at times turn on facts and laws outside the policy that need to be analyzed. Policyholders with claims of any significance should not quickly dismiss potential coverage under a policy based on just a quick read of the policy terms.

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