SMITH FREED & EBERHARD P.C.

WASHINGTON CASE UPDATE

case in point...

Duty to Defend Triggered by Functional Equivalent of "Suit"

From the desk of Kyle Riley: What constitutes a "suit" in the context of a Commercial General Liability (CGL) policy? Is strict liability under environmental laws sufficient to trigger the duty to defend against "any suit"? Read on to see how Division One answered these questions.

Claims Pointer: The "duty to defend against any suit," a term routinely included in CGL policies, is not exclusively triggered by the filing of a formal complaint. It can also be triggered by adversarial or coercive action that rises to the functional equivalent of a lawsuit. Strict liability under environmental laws without an enforcement action, however, is insufficient to trigger the duty to defend.

Gull Industries, Inc. v. State Farm Fire and Casualty Company, --- P.3d ----, 2014 WL 2457236 (Wash.App. Div. 1)

When Gull Industries, Inc. (Gull) determined that their Sedro-Woolley gas station was leaking hydrocarbons, they began voluntary cleanup of the adjacent soil and ground water. After being notified by Gull of the contamination and cleanup efforts, the Department of Ecology (DOE) advised Gull that the contamination levels exceeded acceptable Model Toxics Control Act (MTCA) levels and that the state law requirements would need to be met. The owner or operator of contaminated property is strictly liable under the MTCA. Indeed, under the MTCA, the DOE may issue a formal letter, known as a Potential Responsible Party (PRP) letter, to the owner or operator of a contaminated property outlining the requirements for cleanup. Failure to comply with the order results in a civil penalty and liability for up to three times the cleanup costs incurred by the DOE.

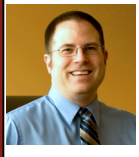
After receipt of the DOE's letter, Gull tendered its claims for defense and indemnification for the costs of the cleanup to its two insurers, State Farm Fire and Casualty Company (State Farm) and Transamerica Insurance Group (TIG). When both insurers refused tender, Gull brought suit against State Farm and TIG, asserting claims for declaratory judgment, breach of contract, breach of fiduciary duty, and bad faith.

At trial, Gull argued that, because it faced strict liability under the MTCA, the duty to defend was automatically triggered. In opposition, State Farm and TIG moved for partial summary judgment, arguing that they had no duty to defend. The trial court granted the insurers' motion, holding that the insurers had no duty to defend, and Gull appealed.

As most CGL policies do not specifically address coverage for property damage or defense costs incurred as a result of strict liability under environmental laws, courts must decide whether strict liability is sufficient to trigger defense coverage. Both Gull's State Farm policy and TIG policy stated that the insurers had a duty to defend Gull against "any suit" within the terms of the policy. The term, "any suit," however, was not defined. When policy terms are not defined, the court will give them their ordinary meaning and ambiguous language will be liberally construed in the insured's favor.

Washington courts had yet to address the definition of "suit" in the context of CGL policies. Some jurisdictions interpret "suit" narrowly, requiring a formal complaint to be filed in order to trigger the duty to defend. Others adopt a broad construction, and hold that the issuance of a PRP letter is the functional equivalent of a lawsuit and triggers the duty to defend. Still other courts have held that whether or not a "suit" exists depends on the level of coerciveness taken by the government agency. Mere correspondence, without coercive action, would be insufficient to trigger the duty to defend. After reviewing the various rules of other jurisdictions, the Washington Court of Appeals determined that a strict reading of "suit" was not appropriate. Instead, the court held that an agency action must be adversarial or coercive in nature in order to qualify as the functional equivalent of a lawsuit.

Here, no formal suit has been filed against Gull. The only communication between Gull and the DOE was a letter acknowledging Gull's voluntary cleanup of the contaminated property. Nothing in the letter implied that the DOE had formally reviewed and approved Gull's remedial action and, according to the appellate court, "the letter did not present an express or implied threat of immediate and severe consequences by reason of the contamination." As such, the functional equivalent of a lawsuit was not present and the duty to defend was not triggered. The Washington Court of Appeals affirmed the lower court's holding.



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