SMITH FREED & EBERHARD P.C.

OREGON LAW UPDATE

case in point ...

Clarity Through Murky Waters: The Duty to Defend and Indemnify Insureds for Environmental Remediation Expenses Above Policy Limits

From the desk of Jeff Eberhard: An insurer's duties to its insured in environmental actions can be difficult because they are not lawsuits in the usual sense of the word. The issue of which payments reduce policy limits occurs when an environmental agency requires cleanup efforts by the insured, and the insurer indemnifies the insured for those efforts. Another issue in the context of environmental actions is when the duty to defend ends. A recent case clarifies both points.

Claims Pointer: A federal court, applying Oregon law, held that (1) an insurer's payments, to indemnify its insured, for environmental cleanup costs are the equivalent of payments of "judgments or settlements" that exhaust the insurance policy limits and (2) the duty to defend ends when the policy limits are exhausted. In other words, as the policy's indemnity limits drain away, so does an insurer's duty to defend.

Siltronic Corp. v. Employers Ins. Co. of Wausau, 921 F. Supp. 2d 1099 (2013).

Siltronic owned property located on the Willamette River (the "River") in a predominately industrial area. Around December of 2000, a 5 ½ mile section of the River next to the property was placed on the Superfund List by the United States Environmental Protection Agency (the "EPA"). The area expanded to include 10 river miles and was known as the Portland Harbor Super Fund Site. Siltronic had 6 insurance policies, each providing for $1 million in liability limits, and separate coverage for defense costs. The applicable portion of each of the identical policies read as follows "the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of […] property damage to which this insurance applies […] but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlement."

In 2000, the Oregon Department of Environmental Quality (the "DEQ") issued an order requiring Siltronic to conduct a remedial investigation of the property and implement source control measures. In 2001, the EPA issued an Administrative Order on Consent for Remedial Investigation which included Siltronic as a potential responsible party. In 2003 Siltronic notified Wausau of the EPA and DEQ actions against it. In September 2003, Wausau began to pay Siltronic's defense costs which it incurred in response to the EPA and DEQ's demands. Wausau tracked whether the amounts paid were incurred to defend Siltronic or whether the payments were to indemnify Siltronic for its remediation efforts. In February 2004, DEQ issued an Order requiring Siltronic to perform additional remediation regarding the release of trichloroethene ("TCE") and its byproducts in the River. The Order also required Siltronic to identify and implement source control measures for unpermitted discharges or releases of TCE and its associated hazardous substances into the River. In 2006 Siltronic and other potential responsible parties entered into a settlement agreement which was incorporated into a later Consent Judgment. Between 2006 and 2009, Wausau provided a number of payments on Siltronic's behalf, and each payment provided that the payment was intended to indemnify Siltronic for its various liabilities.

In September 2009, Wausau declared exhaustion of coverage limits and refused to pay additional defense costs, noting that between 2003 and 2009, it paid the full $6 million in indemnity costs and $7,699,837 in defense costs. Granite State, the umbrella policy provider, concluded that its payment of Siltronic's indemnity and defense was premature since Wausau still had a continuing obligation to defend. Siltronic tendered payments of defense costs to Wausau and it denied coverage.

In 2011, Siltronic filed for declaratory judgment regarding the parties' various rights and responsibilities under the insurance policies. Siltronic argued that Wausau had a

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case in point ...

continuing duty to defend it with regard to the ongoing DEQ and EPA proceedings, until all of the issues were resolved in a final consent decree. Wausau argued that the liability limits of the six policies were exhausted, because Wausau's indemnification payments for clean-up costs constituted payments of "judgments or settlements."

The Court's analysis turned on the definition of "judgments or settlements" in the insurance policies. Specifically, the Court found that Wausau's payment of environmental cleanup costs were the equivalent of judgment or settlement payments. The Court explained that ORS 465.480 treats environmental claims as if they were lawsuits and the statute also provides that an insurer may not be required to pay defense or indemnity costs in excess of the applicable policy limits. Thus, the payments Wausau made between 2003 and 2009 constituted "judgments or settlements" because the various orders and agreements included language of finality. The Court also noted that an insurer may not prematurely tender the policy limits in order to avoid prolonged defense costs.

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