

OREGON LAW UPDATE

EPA Letters May Constitute “Suits” and Trigger an Insurer’s Duty to Defend

From the Desk of Jack Levy: In this case the Ninth Circuit Court of Appeals held that EPA letters putting the recipient on notice of liability and the EPA’s intent to pursue compensation qualify as “suits” and can trigger an insurer’s duty to defend.

Claims Pointer: Insurers should be aware that a letter sent from the EPA to an insured land owner may constitute a “suit,” and thus may trigger a liability insurer’s duty to defend. Such a letter constitutes a suit if it is (1) an action or agreement by the EPA; (2) that is against or with the insured; (3) in which the EPA directs, requests, or agrees that the insured take action; and (4) that action involves contamination within Oregon. Insurers should analyze any tender of EPA letters using these elements as a guideline for determining whether the duty to defend has been triggered.

case in point ...

Anderson Bros. v. St. Paul Fire & Marine Ins. Co., in the United States Court of Appeals for the Ninth Circuit, 12-35346; 12-35454 (August 30, 2013).

Anderson Brother, Inc. (“Anderson”) owned and leased land within the Portland Harbor Superfund Site (“the Site”). St Paul Fire & Marine Insurance Company (“St. Paul”) insured Anderson under two comprehensive general liability policies.

In January 2008, Anderson received a letter from the EPA providing notice of an investigation into the release of hazardous substances at the Site. The letter included a lengthy questionnaire regarding Anderson’s activities at the Site. Anderson forwarded the letter to St. Paul and requested that the insurer provide a legal defense pursuant to the liability policies. St. Paul denied that request.

In November 2009, the EPA sent Anderson another letter, notifying Anderson that it may be liable for contamination discovered during the investigation. Again, Anderson tendered the letter to St. Paul and requested a defense. St. Paul denied the request. Anderson then sued St. Paul in district court, alleging that St. Paul had breached its duty to defend in response to the EPA letters. The district judge granted Anderson’s motion for partial summary judgment, concluding that the letters did trigger St. Paul’s duty to defend. St. Paul appealed.

On appeal, St. Paul argued that the letters did not qualify as “suits” because they were not filed in court and therefore St. Paul had no duty to defend. The Court turned to the language of the Oregon Environmental Cleanup Assistance Act (“OECAA”), which

defines the term “suit” and instructs courts to apply that definition when interpreting environmental claims arising under comprehensive general liability policies. Under the OECAA, a “suit” is defined as “Any action or agreement by the [EPA] against or with an insured in which . . . the [EPA] . . . directs, requests, or agrees that an insured takes action with respect to contamination within the State of Oregon.” The Court noted that in another case the term “suit” was held to be ambiguous. Therefore, the OECAA would guide the Court of Appeals’ decision in regards to the EPA letters sent to Anderson.

The Court rejected two additional arguments raised by St. Paul as to why the letters did not trigger the duty to defend Anderson. First, the Court rejected the argument that the letters were insufficiently coercive and therefore could not be considered “suits.” The letters, the Court found, were designed to coerce information in an attempt to “gain an end by any legal process.” Therefore, the letters were “suits.” The Court held: “under Oregon law, at least in environmental cases, the word ‘suit’ is ordinarily ambiguous.”

Second, the Court rejected St. Paul’s argument that the EPA letters amounted, at most, to demand letters and therefore merely triggered a duty to investigate, not necessarily to defend. The Court noted that the EPA’s letters were not typical demand letters. They were formal steps in a legal proceeding that “inexorably” leads to the EPA attempting to hold property owners liable for environmental contamination.

In finding that the EPA letters met the OECAA definition of “suit,” the Court held that St. Paul was obligated to defend Anderson under the terms of the liability policies.



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