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PRP Letters Now Trigger Insurer's Duty To Defend

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Oregon is the latest state to join the majority of jurisdictions that find the U.S. Environmental Protection Agency potentially responsible party ("PRP") letters to constitute a "suit," thereby triggering an insurer's duty to defend. Specifically, in Anderson Brothers Inc. v. St. Paul Fire & Marine Insurance Co., No. 12-35454 (Ninth Circuit, Oct. 10, 2013), the United States Court of Appeals for the Ninth Circuit (interpreting Oregon law) confirmed its earlier decision holding that letters from federal environmental regulators that alert companies to potential liability trigger a general liability carrier's duty to defend because they qualify as suits.

Background

In Anderson Brothers, Anderson Brothers Inc. received letters from the EPA notifying it of potential Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") liability for contamination at the Portland Harbor Superfund site.

The first letter, issued pursuant to section 104(e) of CERCLA, required Anderson Brothers to complete a detailed questionnaire about its activities at the site. The purpose of the questionnaire was to determine Anderson Brothers' potential liability under CERCLA. Failure to comply threatened severe civil penalties.

A second letter, issued pursuant to sections 106 and 107 of CERCLA, identified Anderson Brothers as a PRP and encouraged Anderson Brothers to participate in settlement negotiations with the EPA and other PRPs.

Anderson Brothers was insured under a standard-form general liability policy issued by St. Paul Fire and Marine Insurance Co. Anderson Brothers tendered the EPA letters to St. Paul for a defense, but St. Paul refused, contending that the policy obligates St. Paul to defend only suits and that the EPA's letters did not constitute such a suit because they were not filed in a court of law.

After undertaking its own defense, Anderson Brothers brought the instant lawsuit against St. Paul, seeking a declaration that St. Paul was obligated to defend Anderson Brothers in connection with the EPA letters. Anderson Brothers moved for summary judgment, which was granted.

The U.S. District Court for the District of Oregon held that both letters were suits in light of CERCLA's unique strict liability regime. St. Paul appealed to the Ninth Circuit, where the district court's decision was affirmed. On Oct. 10, 2013, the Ninth Circuit unanimously rejected St. Paul's petition for rehearing.

Holding

Affirming summary judgment for Anderson Brothers, the Ninth Circuit held that a letter issued by the EPA pursuant to section 104(e) of CERCLA constitutes a "suit" under Oregon law within the meaning of a general liability insurance policy, thereby implicating the insurance carrier's

duty to defend and requiring the carrier to pay the policyholder's attorneys' fees and site investigation costs. Absent that duty to defend, the policyholder was responsible for the substantial cost of its attorneys, environmental consultants and investigation, among other things.

In reaching its holding, the court reasoned that the term "suit," while not defined in the St. Paul policy, must be construed in accordance with applicable Oregon environmental statutes, which supply a definition for courts to apply when determining coverage for administrative actions by the EPA.

In the context of general liability insurance, Oregon's Environmental Cleanup Assistance Act, Or.Rev.Stat. §§ 465.475-465.480 ("OECAA"), defines the term "suit" as any action or agreement by the EPA against a policyholder that directs, requests or agrees that the policyholder take action with respect to contamination. The statute provides that such definition must be applied unless there is clear evidence of contrary intent by the parties.

Here, the court found no evidence of contrary intent and, further, found the term, as used in the St. Paul policy, to be ambiguous. Consequently, the statutory definition would apply.

The court then turned to whether the letters received by Anderson Brothers met the statutory definition of a suit. The court held that the section 104(e) letter and the general notice letter each came within the statutory definition of a suit because both letters directed that Anderson Brothers take action with regard to environmental contamination.

In so holding, the court rejected St. Paul's argument that the letters were not sufficiently coercive to meet the statutory definition because the letters, and the intrusive questionnaire, exposed Anderson to extensive liability and represented an attempt by the EPA to gain an end by legal process.

The court also rejected St. Paul's argument that the definition of "suit" somehow rendered the policy term "claim," without meaning. The court distinguished the EPA's demand letters from the sort of demands that amount to a claim, such as a demand of a right or a demand for compensation.

Rather, the EPA letters are formal steps in a legal process administered by the EPA that inevitably leads to strict liability for environmental contamination. Therefore, treating the letters as suits does not diminish the meaning of the term "claim" as it is used in the policies; "claim" continues to refer to normal demand letters.

Finally, the court held that even though neither EPA letter specifically demanded a sum from Anderson Brothers to compensate for the contamination, it was enough that the letters contained allegations that, if proven, could impose liability for conduct covered by the policy.

Implications

Anderson Brothers is significant for policyholders because it refutes the position frequently taken by insurance carriers that they will defend only actual lawsuits filed in courts of law and that a 104(e) letter or similar PRP demand letter does not trigger the policies' duty to defend.

To the contrary, the decision mandates that carriers must provide a legal defense in connection with the often extensive and burdensome task of responding to EPA investigations that typically are not initiated by formal lawsuits. This is of particular importance today, where stricter corporate budgets allocate fewer resources for investigatory activities, such as those mandated by

the EPA under CERCLA, and where a heightened sensitivity to environmental concerns has fueled expansive regulatory activity by the EPA, as well as by local state environmental agencies.

Finally, the Ninth Circuit's decision and reasoning in Anderson Brothers are consistent with decisions from a majority of states that already recognize that a formal lawsuit is not necessary to trigger a carrier's defense and investigation obligations under general liability insurance policies. This decision, along with another recent similar decision (see, e.g., Wells Cargo Inc. v. Transport Insurance Co. (D. Idaho Oct. 26, 2011)), may prove instrumental in helping to conform the remaining minority jurisdictions.

Policyholders who have been the target of PRP letters or similar demands and who previously have not sought insurance coverage because they were not a named defendant in a formal lawsuit should immediately reach out to their historical general liability carriers for defense.

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