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Notice-Prejudice Rule Does Not Apply to Reporting Requirements in Pollution "Buy-Back" Clause

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An insured failed to report a pollution occurrence within sixty days of becoming aware of the same, as required by a pollution buy-back provision in the policy. Accordingly, it forfeited coverage for liability arising out of those incidents. *Venoco, Inc. v. Gulf Underwriters Ins. Co.*, __ Cal. App. 4th __ (July 1, 2009).

Venoco, an oil company, operated oil wells near Beverly Hills High School (the "School"). In 2003, Venoco was sued by individuals claiming to have been exposed to toxic chemicals while they attended or were employed at the School. The exposures allegedly occurred from 1976 onward.

Gulf had issued a one-year liability policy to Venoco in effect from 1996 to 1997. The policy contained a pollution exclusion, but also contained a "buy-back" that provided limited coverage for pollution liabilities so long as certain requirements were met. One of the requirements was that Venoco report a pollution occurrence within sixty days of becoming aware of it.

Gulf rejected Venoco's request for a defense in 2003 citing Venoco's failure to comply with the pollution buy-back's sixty-day reporting period. Venoco sued, but Gulf successfully brought a motion for summary judgment, and the Court of Appeal affirmed the judgment in Gulf's favor.

The Court of Appeal rejected Venoco's various challenges to the validity of the sixty-day reporting requirement.

First, the court held that the reporting requirement was not hidden because it stood out as a separate paragraph and was "clear and explicit."

Second, the reporting timelines were "not unusual in the oil

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industry." Moreover, Venoco used two insurance brokers to negotiate with Gulf to purchase the pollution buy-back provision, suggesting that Venoco's own sophistication in this area weighed against its failure to timely report.

Third, Venoco's claim to have been unaware of the reporting requirement was undercut by Venoco's prior specific request that Gulf add such a provision.

Fourth, the appellate court disposed of Venoco's claim that California's notice-prejudice rule applied and that the sixty-day reporting requirement was thus inapplicable because Gulf did not prove it suffered actual and substantial prejudice as a result of the late notice. The *Venoco* court held that "where the policy provides that special coverage for a particular type of claim is conditioned on express compliance with a reporting requirement, the time limit is enforceable without proof of prejudice."

Similarly, the court rejected the contention that the reporting provision violated public policy. Venoco first notified Gulf in 2003, years after Gulf's policy expired, thus rendering Gulf subject to a surprise claim years after the policy had expired and denying Gulf an opportunity to plan for future risks and financial exposure. In this respect, the reporting requirement was analogous to that in a claims-made-and-reported policy, which is not subject to the notice-prejudice rule.

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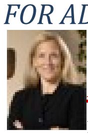

Amy B. Briggs Ms. Briggs' complex business litigation practice focuses on insurance coverage and bad faith disputes. Ms. Briggs has represented numerous policyholders, including financial institutions, large real estate entities, public retirement systems throughout California, pharmaceutical and medical device manufacturers, and nonprofit organizations in coverage disputes. She has successfully litigated first- and third-party coverage and bad faith claims arising under commercial general liability, property, fiduciary liability, employers' liability, and D&O and E&O policies. She has appeared and argued before the California Court of Appeal on multiple occasions.

Erin E. Stagg Ms. Stagg focuses on general commercial litigation. In her first two years of practice, she has already been a member of two trial teams. The first matter, which was resolved on the steps of the courthouse, resulted in an extremely favorable settlement for the client. After a three-month trial, the second matter resulted in the largest jury award in the United States in 2008. In that case, ICO Global Communications (Holdings) Limited prevailed on its breach of contract, fraud, and tortious interference claims against The Boeing Company and its subsidiary, Boeing

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