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Environmental Law Update

06/05/2014

Washington Court Rules Insurer's Duty to Defend Environmental Liability is Triggered by Agency's Explicit or Implicit Threat of Immediate and Severe Consequences

A party faced with strict liability under the Washington Model Toxics Control Act (MTCA) for the costs of cleaning up environmental contamination often has insurance that might apply, but a lingering question has been at what point is the party's insurer obligated to defend? The Washington Court of Appeals has now ruled that a letter from the Department of Ecology (Ecology) that merely acknowledges receipt of a voluntary report of contamination and intent to remediate is insufficient to trigger the insurer's duty to defend. As foreshadowed 20 years ago by the Washington State Supreme Court in *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, the Court of Appeals has now ruled that the duty to defend is triggered only when there is an explicit or implicit threat of immediate and severe consequences because of the contamination. The court, however, did not explain what language would constitute an "explicit or implicit" threat.

In *Gull Industries, Inc. v. State Farm Fire and Casualty Company*, the plaintiff owned a gas station in Sedro Wooley and had liability insurance that provided for a duty to defend the insured in the event of a "suit" against the insured. The policies, which were issued in the 1970s and 1980s, did not define what constituted a "suit." In 2005 Gull notified Ecology that there had been a release of petroleum at the gas station and Ecology acknowledged receipt of that notice. Subsequently, Gull tendered claims for defense and coverage to the insurers for the costs of cleanup, but the insurers rejected the tender. Gull then sued the insurers seeking coverage for the Sedro Wooley site and 200 other sites that Gull formerly owned in Washington.

The insurers argued there was no duty to defend because there was no "suit" that triggered the duty. The trial court agreed and dismissed Gull's lawsuit against the insurers. Division One's decision on June 2, 2014, upheld that ruling.

The Court of Appeals noted that Washington courts had not yet considered what constitutes a "suit" for purposes of triggering the duty to defend environmental liability claims and that courts around the country have wrestled with the issue with varying results. The court said that the undefined term "suit" in the policies at issue is ambiguous in the environmental liability context and could include administrative enforcement acts that are the functional equivalent of a lawsuit. But the court would not go so far as to say that the mere possibility of liability under MTCA by itself, without any enforcement action by Ecology, is the functional equivalent of a suit that would trigger the duty to defend. The test for the functional equivalent of a "suit," according to the court, is whether the agency action is adversarial or coercive in nature.

Under that test, the letter to Gull from Ecology did nothing more than acknowledge receipt of the notice that a release had occurred on the property and that Gull intended to conduct a voluntary cleanup. It did not state an express or implied threat of immediate and severe consequences by reason of the contamination. The court said: "[T]he duty to defend implies the necessity to 'defend' against something. In the face of no adversarial or coercive interaction whatsoever, an average policyholder would not likely believe such a duty was triggered."

The *Gull* decision presents a dilemma for property owners faced with MTCA liability. The statute makes a property owner or operator strictly liable for environmental contamination, which necessitates significant expenses for investigation, remediation and defense to mitigate potential liability to the state and third parties. In many situations, however, Ecology does not demand that a party conduct a cleanup; a party simply enrolls in the site in Ecology's voluntary cleanup program. But participation is hardly "voluntary" if failure to do so can result in substantial liability with limited defenses. Nevertheless, under the *Gull* ruling, a potentially liable MTCA party cannot expect an insurer to defend it unless and until (at a minimum) an agency communicates a threat of immediate and severe consequences.

The *Gull* decision may have limited applicability since most insurance policies after the late 1980s have absolute pollution exclusion clauses, precluding coverage or contain express definitions of the "suit" requirement. But for sites where there may be insurance policies covering activities before the late 1980s, it will take at least a directive from Ecology to conduct cleanup or face liability before the duty to defend potentially is triggered.

For more information, please contact the Environmental Practice Group at Lane Powell: environs@lanepowell.com