By
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Muddy Rules for Cleanup Claims

Insight: An environmental claims bill paves new routes to Oregon's state courts.

Oregon Gov. John Kitzhaber signed Senate Bill 814 into law June 10, creating sweeping reforms on environmental claims-handling regulations and available remedies for insureds facing liability for cleanup of contaminated property in the state.

The legislation amends the existing Oregon Environmental Cleanup Assistance Act. An insured aggrieved by one or more unfair environmental claims settlement practices may now file suit to recover "the actual damages sustained, together with the costs of the action, including reasonable attorney fees and litigation costs."

Unfair practices include failing to make "timely" payments when due and failing to "diligently" respond to tenders. Likewise, an insurer is now obligated to pay interest to the insured on amounts the insurer is "legally obligated to pay" as defense or indemnity if the insured is not reimbursed within 30 days of the date it requests reimbursement or makes payment, whichever is later. These terms are not defined in the OECAA—either existing or as amended—which means there likely will be disputes between insurers and insureds as to what is actually required.

The amended law raises questions of constitutionality in several areas.

Compounding the problem of uncertainty for insurers is the fact that they may be penalized for failing to comply with the new rules: An insurer that "unreasonably" violates one of the unfair environmental claims settlement practices may be required to pay treble damages to the insured. Reasonableness is generally a subjective determination.

These issues, and the fact that insureds are entitled to recover their attorney fees if they prevail on a claim, will likely prompt more insureds to pursue lawsuits against their insurers—meritorious or not. Moreover, because the legislation states it is retroactive, an insured may seek to recover punitive damages for actions taken before the insurer could be on notice that such conduct is prohibited. This raises questions of constitutionality. Prior to commencing litigation, however, the insured must provide 20 days' written notice of the basis for the cause of action to both the insurer and office of the Director of the Department of Consumer and Business Services. An insurer should use this time to obtain an independent evaluation of the claims asserted against the insurer and attempt to resolve the dispute outside of litigation, if appropriate. If litigation is inevitable, the insurer should make sure the insured understands the basis of the insurer's position.

Additional provisions of the new legislation appear to rewrite existing policy terms, at least arguably rendering anti-assignment clauses and non-cumulation clauses unenforceable, and limiting the scope of the "owned property" exclusion. It is not clear how these provisions are to be read with the existing OECAA, which states the rules of construction in the statute do not apply if they are contrary to the intent of the parties. If the legislation is applied to impair existing contracts, constitutional challenges will likely follow on this issue as well.

Further guidance from the courts is needed to understand the full impact of the legislation. To protect themselves from future liability, insurers should take care to strictly comply with all claims handling regulations and be prepared to issue payments on claims as soon as the amount owed is known. BR

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