OREGON ENACTS ENVIRONMENTAL CLAIMS LEGISLATION

by Curt Feig, Esq. & Jamie Clausen, Esq.

In August 2003, both Houses of the Oregon Legislature passed SB 297 (the "Bill"), without signature by the Governor. The Bill became law in September 2003, with an effective date of January 1, 2004.

Senate Bill 297 was a compromise attempt to pass some of the more important provisions of HB 3420, which failed to pass out of its committee. SB 297 principally addresses issues of allocations and lost policies. It also codifies some earlier court decisions on categorization of costs. While many aspects of the Bill appear to be modeled after Washington's Environmental Claims Handling Regulations, WAC 284-30-900 et seq., several of the Bill's provisions are broader than Washington's regulations and represent a legislative expansion of Oregon law beyond existing case law.

A. Scope

SB 297 applies to all environmental claims tendered by "insureds" under general liability policies. The Bill defines an "environmental claim" as any claim alleging liability for personal injury or property damage arising from the release of pollutants.

The Bill also makes it clear that, while it will apply to Primary, Excess, and Umbrella General Liability policies, it will not apply to Homeowners' policies, auto policies, D&O policies or E&O policies. It is worth noting that the Oregon Bill, unlike the Washington regulations, does not limit its scope to Oregon residents. Instead it applies to all named or additional insureds with a property interest in an affected site located within the State of Oregon. The Bill defines "insured" as "any person included as a named insured on a general liability insurance policy who has or had a property interest in a site in Oregon that involves an environmental claim." The Bill does not otherwise affect choice of law decisions.

B. Suit Requirements

The Bill mandates that any action taken by the United States Environmental Protection Agency ("EPA") or the Oregon Department of Environmental Quality ("DEQ"), or at their written request, will be deemed the equivalent of a lawsuit for purposes of interpreting general liability policies, and costs associated with investigation or other satisfaction of such claims should not be denied as voluntary payments.

This portion of the Bill does not represent a major change in law, as this premise has already been upheld by...
Message from the Chair

We are pleased to continue providing you important news and developments in the area of insurance coverage in this edition of the National Insurance Coverage Practice Group's Observer. Our lead articles highlight important developments from two ends of the country. First, Curt Feig and Jamie Clausen of Seattle discuss new legislation in Oregon effective January 1, 2004 that will alter the practice of environmental claims handling in that state.

Second, Gregory Hopp of our Chicago office brings news of an important victory for insurers from Texas state court, in which claims of asbestos plaintiffs against the insurers of asbestos manufacturers were dismissed. This decision has industry-wide implications. Please note that the decision will be the subject of a DRI presentation I will be making on December 4, 2003 in New York City (see “Coverage Attorneys ‘In The Spotlight’”). You may want to take a moment to review that section to see if any of the scheduled presentations that are described would be useful to you. If you have any interest in these topics but cannot make the seminar, please contact me or the speaker so that we can get more information for you.

We also call your attention in the “Recent Victories” section to a number of key decisions favoring insurers in which Cozen O’Connor attorneys were lead counsel.

Please let us know if you have any comments on this issue or a topic that you would like us to address in a future newsletter. In closing, we wish you and yours a safe and joyous holiday season and a fruitful new year.

Sincerely,

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Oregon courts. These court decisions were, in effect, already codified in the Oregon Environmental Cleanup Assistance Act. Under that Act, any action taken by the DEQ or EPA, in which the agency "directs, requests or agrees" that an insured should take action with respect to contamination of a site, is equivalent to a "suit or lawsuit," as those terms are used in an applicable "general liability insurance policy." OR. REV. STAT. § 465.480(2)(b) (2001).

C. Allocation

Each insurer with a duty to pay defense costs or with an indemnity obligation for an environmental claim under a CGL policy that employs the "all sums" language is deemed to be liable for all defense costs and indemnity payments up to policy limits, regardless of the existence of any other applicable insurance. If there is more than one insurer who is liable, however, the insured must give notice to those other insurers. Should the insured decide to bring suit against only one insurer, the Bill requires that this insurer be selected based on three factors: time on risk, limits, and type of policy. The Bill provides no guidelines regarding how these factors are to be weighted, considered or applied. An insurer so sued is entitled to know the identity of all other potentially liable insurers. Any insurer that pays on such a claim is entitled to contribution from other insurers, and a court should determine allocation on the basis of years on risk, limits, type of policy, and coverage defenses. Again, the Bill provides no guidance regarding how a court is to implement the allocation on the basis of the factors.

Allocation to the policyholder is permitted in one very narrowly defined circumstance. SB 297 explicitly states that in any allocation, the court should allocate to the insured any part of the time period of the environmental claim where the insured was "uninsured." Under the Bill, an insured will be considered "uninsured" any time after 1971 where the insured failed to purchase a CGL policy that would cover the claim, provided such a policy was "commercially available" at that time.

These allocation provisions create a very different framework for making allocation decisions than has existed in the past. Although the phrase "joint and several" is not used in the Bill, the practical effect of these provisions on allocation are to render each of an insured's insurers jointly and severally liable for covered costs associated with environmental claims.

D. Cost Categorization

SB 297 further provides a rebuttable presumption that the costs of a remedial investigation are defense costs, and a rebuttable presumption that the costs of a feasibility study are indemnity costs. These same presumptions have been used by trial courts in Oregon to categorize costs.

E. Lost Policies

The lost policy provisions in SB 297 are modeled on Washington's Environmental Claims Handling Regulations. The Bill requires both the insurer and the insured to share with each other all documents establishing facts related to the lost policy. If this exchange results in information "tending to show" the existence of an insurance policy, the insurer is obligated to the best of its ability to "reconstruct" such a policy based on the forms used at the time. Reconstruction of such a policy is not deemed an admission that such a policy was issued.

The standard for determining the existence of a lost policy is a preponderance of the evidence. If the insured can show by a preponderance of the evidence that a general liability policy was issued but cannot provide information tending to show the policy's limits, then the limits are assumed to be the minimum issued by the insurer for that form of policy for that year. However, where the insured is able to produce evidence tending to show other limits, the burden is on the insurer to establish different limits or other relevant policy exclusions.

F. Effective Dates

SB 297 contains no specific effective date, and therefore will go into effect January 1, 2004. SB 297 explicitly states that it will apply to all claims where final judgment has not been entered prior to the effective date of the Bill.
Significantly, under a specific provision of the Bill, an insurer who is a party to an environmental claim that does reach final judgment by the effective date of the Bill will not have a right of contribution against any other insurer who reached binding settlement with the insured prior to SB 297's effective date. Thus, in what may be the Bill's most controversial provision, the Oregon legislature has extinguished all rights of contribution against already settled insurers that would otherwise have been created by the Bill with respect to any insurer involved in an environmental claim that has not been settled or reached a final judgment by January 2004.

Each case is unique and may present particular issues not discussed herein. The full implications of this new legislation are untested and will be more fully developed in the future. For more information, contact Curt Feig (Seattle) at 206.224.1242 or cfeig@cozen.com.

ASBESTOS "DIRECT ACTION" CLAIMS DISMISSED BY TEXAS TRIAL COURT

by Gregory D. Hopp, Esq.

As asbestos plaintiffs' attorneys have expanded their search for deep pockets, "direct action" claims have been filed against insurers in Ohio, West Virginia and Texas, among other jurisdictions. These claims are not "direct actions" in the technical sense of the term, as plaintiffs are not seeking to recover based upon coverage written for companies that manufactured asbestos or used it in their products. Instead, these claims allege that insurers are independently liable for the plaintiffs' injuries because of the insurers' knowledge of asbestos hazards. The insurers argued successfully to a Texas trial court in October that these allegations fail to state a claim under Texas law, and a judge dismissed eleven of the suits. Abrego v. Owens-Corning Fiberglas Corp., et al., No. 99-03861-G, Order Granting Special Exceptions of Insurance Defendants (117th Dist. Ct., Nueces County, Tex. Oct. 15, 2003).

The Texas petitions alleged causes of action labeled negligent undertaking, conspiracy and concert of action. Specifically, the insurers were alleged to have "inspected machinery, boilers, and facilities such as chemical plants, refineries and buildings at which the plaintiffs were exposed and simultaneously knew of the health hazards associated with exposure to asbestos." Like the "negligent undertaking" allegations, the petitions' conspiracy claim was based upon the insurance industry's acquisition of knowledge regarding the general hazards associated with exposure to asbestos. Specifically, plaintiffs alleged that the insurers conspired to advance a fraudulent state of the art defense on behalf of their policyholders. The insurers advanced a number of strong arguments in support of their "special exceptions," a device by which pleadings can be challenged in Texas. As an initial matter, insurers argued that the plaintiffs did not allege the existence of any confidential, contractual or other special relationship with insurers upon which any such duty could be predicated. Moreover, the Texas Supreme Court has refused to impose on insurers extra-contractual duties to third parties, because those duties would necessarily compromise the duty owed by insurers to their insureds. See Transport Ins. Co. v. Faircloth, 898 S.W.2d 269, 280 (Tex. 1995). Texas law in fact precludes insurers from disclosing confidential information about their insureds to third-party claimants. Rocor Int'l v. National Union Fire Ins. Co., 77 S.W.3d 253, 259 (Tex. 2002).

In addition, the insurers sought dismissal of the plaintiffs' negligent undertaking claim on the ground that it was barred by statute. Article 5.15-3(e) of the Texas Insurance Code specifically precludes lawsuits that assert that liability insurers could have prevented an accident by providing information, conducting inspections or undertaking any other safety program. Using virtually identical language, Section 411.003(a) of the Texas Labor Code precludes lawsuits that assert that workers' compensation insurers could have prevented accidents in connection with operations of the employer. These statutes specifically bar claims against insurers based on a negligent undertaking theory. See Travelers Indem. Co. of Illinois v. Fuller, 892 S.W.2d 848 (Tex. 1995).
The insurers also argued that plaintiffs did not assert the elements necessary to establish a negligent undertaking claim. Specifically, plaintiffs failed to allege: (1) any affirmative act by insurers that would establish an assumption of any duty to plaintiffs or to the public at large; (2) an increased risk of harm caused by any conduct of insurers; or (3) any reliance by the plaintiffs upon insurers’ alleged undertaking. See Fort Bend County Drainage Dist. v. Sbrusch, 818 S.W.2d 392 (Tex. 1991). Finally, the insurers argued that the plaintiffs had failed to show any direct relation between the alleged acts and omissions and their injuries.

The insurers mounted similarly strong arguments with respect to the conspiracy allegations. Plaintiffs could not, the insurers argued, assert the elements necessary to establish a cause of action for civil conspiracy, because Texas law requires an agreement to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. See Juhl v. Arlington, 936 S.W.2d 640, 644 (Tex. 1996). Thus, "parties cannot engage in a civil conspiracy to be negligent." Triplex Communications Ins. v. Riley, 900 S.W.2d 716, 720 (Tex. 1995). In other words, because negligence by definition is not an intentional wrong, one cannot agree or conspire to be negligent. Juhl, 936 S.W.2d at 644.

Finally, the insurers pointed out that the Texas Supreme Court has refused to adopt a "concert of action" theory. Id. at 643-45. Moreover, states that have adopted a "concert of action" theory of liability have applied it only to conduct evincing deviant activity and posing a high degree of risk to others, such as drag racing or shooting high-powered rifles. Id. The allegations that the insurers concealed information available at the same time to others hardly fit within this category of activity.

The Texas trial court accepted these arguments, and dismissed the plaintiffs’ petitions in their entirety. This is certainly not the final chapter in the story. Plaintiffs have moved to reconsider; there may be an appeal; there are other suits pending in other courts. But the insurers’ success at this early stage of the proceedings is an important victory for the insurance industry, both in Texas and nationally.

For further information, please contact William P. Shelley (Philadelphia) at 215.665.4142, or at wshelley@cozen.com, or Gregory D. Hopp (Chicago) at 312.382.3102, or at ghopp@cozen.com.

Recent Victories

Michael Hamilton (Philadelphia) and Jennifer McHugh (Philadelphia) recently obtained a significant appellate victory in the Pennsylvania Commonwealth Court for their client, Southeastern Pennsylvania Transportation Authority (SEPTA). In an issue of first impression, the court ruled that SEPTA cannot be held liable under Pennsylvania's insurance bad faith statute because, as a self-insurer, SEPTA is not bound by the statute. In this case the plaintiff asserted that SEPTA improperly handled his claim for first party benefits under Pennsylvania’s motor vehicle laws. This holding has far-reaching implications with respect to other self-insured entities in the Commonwealth of Pennsylvania. The decision is also important because the court ruled that SEPTA could not be liable for the breach of good faith and fair dealing because there was no contract with the claimant and, hence, no privity between the parties.

Christopher Kende (New York), Lori Nugent (Chicago), Ted Pannkoke (Chicago), Tim Tompkins (Seattle), Jodi McDougall (Seattle) and Melissa White (Seattle) obtained summary judgment in a Missouri state court in favor of their insurer clients in a complex declaratory judgment action disputing excess/umbrella cover for a $16 million punitive damage award against insured Pinnacle Realty, as a result of its failure to install window guards in a St. Louis housing project, leading to the death of a four-year old child. The court held that the policy language expressly excluded cover for the award because the definition of "bodily injury" did not include "fines or penalties." The court also held coverage for such an award would be against Missouri public policy. A parallel action is proceeding in Washington state.
Thomas M. Jones (Seattle) and Michael Handler (Seattle) prevailed recently on an appeal from federal district court to the Ninth Circuit Court of Appeals on behalf of their insurer client. The court agreed that odors emanating from the City of Yakima’s wastewater treatment plant are "pollutants." Therefore, damages caused by the odors were held to be excluded from coverage under the absolute pollution exclusion. There is a split of authority across the country on this issue, and it is therefore a significant Ninth Circuit decision, applying Washington law.

Tim Tompkins (Seattle) and Melissa White (Seattle) won summary judgment of dismissal on behalf of their insurer clients in a breach of contract/bad faith denial of coverage lawsuit. The underlying claim arose out of mold problems at an apartment complex. Twenty-eight tenants initiated a class action lawsuit seeking damages for personal injuries related to mold exposure. The insured admitted it had failed to disclose the apartments in question to the insurers. The trial court rejected the insured's argument that the broad coverage territory language ("anywhere in the United States") extended coverage to locations and activities beyond the recitations in the declarations and dismissed the claims.

Noteworthy Events

William H. Howard (Philadelphia) has been re-appointed as Co-Chair of the Environmental Coverage Subcommittee of the ABA Section of Litigation, Insurance Coverage Litigation Committee. The Committee will be holding its Annual Meeting (with coverage-related seminars and roundtables) in Tucson on March 4 - 6, 2004. For information concerning the Committee, the Subcommittee, or the Committee’s bi-monthly publication, Coverage, please contact Bill at 215.665.2173 or whoward@cozen.com.


J.C. Ditzler (Seattle) was seconded this year to the London insurance market for a period of six months. During this time, J.C. has worked directly with leading Lloyd’s and Company Market claims and underwriting personnel respecting a broad array of insurance policies and programmes in place throughout North America. This work includes assisting in the drafting of various specialty lines wordings, risk assessment, claim analysis and complex litigation management across virtually all classes of insurance currently being written in the London insurance market.

Larry Altenbrun, Michael Ballnik, Robert A. Meyers and Melissa O’Loughlin White (Seattle) have been named “Rising Stars 2004” in the December 2003/January 2004 issue of Washington Law & Politics. The honor was bestowed on Washington’s top lawyers who are 40 or under or have been in practice 10 years or fewer. Earlier, Thomas M. Jones, W. Rivers Black, J.C. Ditzler, Curt Feig, Jodi McDougall, Chris Nicoll and Tim Tompkins (Seattle) were honored as “Super Lawyers” in the same publication.

Erica Anderson (Paralegal, Seattle) has been named a "rising star" in the November-December edition of Legal Assistant Today, a national publication. This award celebrates new paralegals and their contributions to the profession. Erica was one of only three "rookie" paralegals honored.

Coverage Attorneys "In the Spotlight"

Christopher Kende (New York) spoke recently at the Union Internationale des Avocats annual Congress in Lisbon on the Terrorism Risk Insurance Act. Please contact Chris at 212.908.1242 if you would like more information.
William Shelley (Philadelphia) and Michael Hamilton (Philadelphia) will be speaking at the Defense Research Institute's Insurance Coverage and Practice Symposium on December 4-5, 2003, in New York City. Bill will be speaking on December 4 on the dismissal with prejudice that Cozen coverage attorneys obtained for their insurer clients in the "direct action" asbestos claims that were pending in Texas state court (see article in this issue). Michael will be speaking on December 5 on the duty to defend multiple insureds. For more information, please contact DRI at www.dri.org or 312.795.1101.

Zac Chacon (Chicago) will be speaking at the PLRB conference in Chicago on March 14-17, 2004. Zac's presentation is entitled "E-Commerce and Electrical Property Claims - Critical Coverage Considerations." For more information, please contact PLRB at www.plrb.com or 630.724.2200.

Kellyn J.W. Muller (Philadelphia) will speak on December 10, 2003 on "Valued Policy and Blanket Policies" at a seminar entitled Property Insurance in the New Millennium: Measuring and Paying the Covered Claim, sponsored by the Property Insurance Law Committee of the Tort Trial & Insurance Practice Section of the ABA. Jay Levin (Philadelphia) will chair the program, which will be at the New York Sheraton Hotel & Towers in New York City. For more information, contact ABA CLE at 1-800-285-2221 and ask for Debbie, or direct dial her at 312-988-5708.

M. Jarrett Coleman (Dallas) will be speaking on mold litigation in Texas on December 4, 2003 in Houston and December 11, 2003 in Dallas at a seminar entitled Insurance Law for Attorneys Representing Insurers. CLE credit will be available. For more information contact the sponsor, the University of Houston Law Foundation at www.law.uh.edu/cle or 713.743.2069.
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