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Coverage For Voluntary Cleanups:

Washington Supreme Court: No Claim Nor Threat Required For Coverage

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Policyholders who initiate environmental cleanups rather than wait for formal governmental action against them do not forfeit coverage under standard form comprehensive general liability (CGL) insurance policies. On May 19, 1994, the Supreme Court of the State of Washington in *Weyerhaeuser Company v. Aetna Cas. & Sur. Co.* unanimously held that no overt legal threat against a policyholder is required to trigger coverage under these policies. No "PRP" letter or lawsuit is required. Environmental statutes imposing liability for environmental property damage can themselves activate insurance coverage.

The Supreme Court of Washington addressed the following issue:

> Can there be insurance coverage under a Comprehensive General Liability (CGL) policy for property damage when the policyholder has incurred environmental cleanup costs pursuant to statute, but where the involved government entity has not made an overt threat of formal legal action?

The court concluded the following:

> ... Comprehensive General Liability (CGL) insurance policies, which provide coverage for all sums which the insured shall be obligated to pay by reason of the liability imposed by law for damages on account of property damage, may provide coverage when an insured engages in the cleanup of pollution damages in cooperation with an environmental agency. Such policies can reasonably be read to provide coverage for actions taken to cleanup pollution damages required under environmental statutes which impose strict liability for such cleanup.

Trial Court Reversed

Weyerhaeuser Company faced environmental liability at a number of sites because statutes had been passed imposing environmental liability. Rather than wait for government enforcement actions, Weyerhaeuser engaged in environmental cleanup in cooperation, rather than in an adversarial relationship, with government agencies.

Weyerhaeueser's liability insurance companies denied coverage for the ensuing insurance coverage claim. On March 6, 1992, Weyerhaeuser commenced a comprehensive action against a large number of these companies, seeking coverage for liability at some 42 environmental sites. In July 1993, a Washington state trial court dismissed Weyerhaeuser's claim with regard to 15 of these sites on the basis that there was no "third party claim for damages" against Weyerhaeuser.

The sites dismissed by the trial court included landfills, underground storage tanks, ponds, and distribution centers allegedly damaged by a variety of materials. An affidavit by the Washington state environmental cleanup program director and an amicus brief submitted by the Washington Department of Ecology described the certainty of liability for independent cleanups. In the absence of an independent cleanup by the policyholder, all the sites would eventually become the subject of a state directed—and more expensive—cleanup action.

The Washington Supreme Court rejected the trial court's dismissal, ruling that policyholders should not lose their insurance coverage when cooperating with the government and cleaning up

the environment. Chief Justice James A. Andersen, writing for the unanimous court, held:

> The insurance contracts provide coverage when the policyholder becomes obligated to pay by reason of the liability "imposed by law." The policy language does not specify whether this liability must be imposed by formal legal action (or threat of such) or by a statute which imposes liability. In the case where there has been property damage and where a policyholder is liable pursuant to an environmental statute, a reasonable reading of the policy language is that coverage is available, if it is not otherwise excluded.

No "Claim" or Overt Threat Required

The court expressly rejected attempts by the insurance company defendants to add a requirement of a formal "claim" or overt threat of legal action to liability insurance policies. The court noted that such a requirement could have been included in the CGL policy, but was not.

There is nothing in the insurance policy language which requires a "claim" or an overt threat of legal action and, therefore, the insurers' argument that a claim is a prerequisite to coverage seems to us to be an effort to add to the language of the policies. If the insurers intended to provide coverage only if there were a lawsuit or a threat of such, that requirement could have been included in the policy. In this case, the policy language does not require an adversarial claim or a third party threat or a formal threat of legal action. We decline to add language to the words of an insurance contract that are not contained in the parties' agreement.

The Weyerhaeuser case is the first time a state high court comprehensively has addressed these issues. The court, however, did look at two similar cases from other jurisdictions. In *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.* (Maryland High Court, 1993) the court found that the policyholder was legally obligated to pay in the absence of an express government order to do so. The Weyerhaeuser court also found *Compass Ins. Co. v. Cravens, Dargen & Co.* (Wyoming Supreme Court, 1988) to be pertinent. In Compass, the court found that an insurance company's promise to pay must include an obligation of good faith and reasonableness. Similarly, the Weyerhaeuser court found that "forcing a policyholder to both promptly act to mitigate further environmental damage, and to await formal threat of legal action creates an unreasonable conflict" that nullifies a policyholder's liability insurance in the environmental context.

The Cleanup Dilemma

Policyholders with cleanup liability often face a serious dilemma. The Weyerhaeuser court explained:

> The denial of coverage in this case is not just a statement that the claim is premature and could be asserted at a later time. If Weyerhaeuser cleans up after a government "request" (but before threat of legal action) then the threat of legal action (which the insurers argue is what triggers coverage) would never materialize. Hence, there could never be coverage (emphasis added).

The court used a hypothetical denial of coverage to illustrate its point:

> The following scenario occurs under the insurers' position. If pollution has damaged other property, and an environmental agency has told the landowners they are statutorily responsible to remedy the situation, but has not yet threatened suit, the policyholders have two options: (1) clean up and forgo any possibility of recovering from their liability insurance because of lack of overt threat or (2) refuse to negotiate with the agency and refuse to clean up and wait to be sued or to be threatened with suit. If the second option is taken the policyholder also may not have any insurance coverage (at least for damage that occurred after knowledge) because it has failed to mitigate its damage or because the pollution was expected or intended.

The court noted that requiring a policyholder to face such a dilemma would result in fundamental unfairness to policyholders who reasonably believed they had insurance coverage for environmental damage.

The Weyerhaeuser opinion is a watershed in the evaluation of environmental liability in the insurance context. For many policyholders who determine that initiating environmental cleanup themselves is the most efficient, effective and least expensive option, Weyerhaeuser is an endorsement of that proactive approach. Policyholders should not be required to sit idly by as environ-

mental damage worsens in order to recover the proceeds of their liability insurance policies. Weyerhaeuser will permit policyholders to avoid being gored on the horns of this dilemma. ■

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