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Washington expands CGL cover Liability for others' pollution is insured: Court

By DAVE LENCKUS

OLYMPIA, Wash.-Comprehensive general liability insurance policyholders nationwide likely will cite a Washington Supreme Court decision to expand pollution cleanup coverage to policyholders that must clean sites contaminated solely by third parties during the policyholders' coverage periods.

Policyholder and insurer attorneys say they believe that the case, which drew amicus briefs from insurance industry groups, marks the first time a state supreme court has ruled on that pollution coverage issue.

The 5-4 decision on Dec. 21, 2000, aids policyholders seeking coverage under pre-1986 general liability policies that contained sudden and accidental pollution exclusions. Many courts, including Washington's high court, have ruled that exclusion does not bar policyholders from recovering pollution cleanup coverage even in cases of gradual pollution, as long as the policyholder neither expected nor intended to pollute.

Under federal and state environmental laws, many of those policyholders seeking coverage face the full or the major cost of cleaning up waste sites, because most of the other companies that dumped waste there have gone out of business.

Attorneys involved in the case decided by Washington's high court said their clients would not allow them to comment on the ruling.

Other attorneys, though, disagreed over the ruling's significance and potential impact on future pollution coverage litigation nationwide. "I think it was a very strong victory for policyholders and continues the trend in Washington toward reading a policy as broadly as it was intended to apply to a broad range of pollution damages," said policyholder attorney Paul J. Lawrence, a partner with Preston Gates Ellis

L.L.P. in Seattle.

Mr. Lawrence, who persuaded the court in a previous case to limit the sudden and accidental pollution exclusions applicability predicted that the court's most recent decision would influence other courts. Courts in other jurisdictions have examined that earlier case and other Washington Supreme Court decisions while considering cases before them.

"There's always a value and influence by being the first out of the block," Mr. Lawrence observed.

But insurer attorney Jule Rousseau said he thought that the ruling would have little influence on other courts.

"Anything that comes out of Washington is not much of a surprise if it's pro-policyholder. Washington seems to be the best place to recover money if you're a policyholder," said Mr. Rousseau, a partner with London Fischer L.L.P. in New York.

Mr. Rousseau predicted that courts elsewhere would be more inclined to agree with a pro-insurer ruling from a California state appellate court rejected the federal appellate court ruling that influenced the Washington Supreme Court.

The Washington high court's ruling is the latest decision in a protracted pollution coverage dispute between Weyerhaeuser Co. of Tacoma, Wash., and Boston-based Commercial Union Insurance Co.

In March 1992, Weyerhaeuser sued dozens of insurers, including numerous Lloyd's of London syndicates and London underwriters, that wrote primary and excess CGL coverage for the wood products manufacturer from 1951 through 1985. Weyerhaeuser wanted the insurers to defend and indemnify it in pollution liability cases involving 42 hazardous

waste sites across the nation. Weyerhaeuser owns only some of the sites, but it has been named as a responsible party for all of the sites under the Comprehensive Environmental Response, Compensation and Liability Act, which created Super-fund, and under various state laws. In some cases, Weyerhaeuser is the only responsible party that remains in business and therefore must fully fund the cost of cleaning those sites. Prior to the first phase of the litigation, all but one of the insurers settled with Weyerhaeuser for undisclosed sums in return for Weyerhaeuser releasing them from all liability.

Only Commercial Union, the successor to Employers' Surplus Lines Insurance Co., did not settle. The Employers'/Commercial Union excess policy provided Weyerhaeuser with \$1.5 million of limits per occurrence from Jan. 1, 1970, through Jan. 31, 1973.

In the first two phases of the litigation, juries awarded Weyerhaeuser coverage for six of nine sites.

Before the coverage dispute's third and final phase, Weyerhaeuser dropped its coverage demand for 23 sites so it could concentrate on recovering insurance to pay for cleaning the 10 largest sites. Commercial Union then settled that phase by agreeing to pay Weyerhaeuser \$4 million plus certain future costs.

In January 1998, a trial court ordered Commercial Union to pay Weyerhaeuser more than \$8.4 million in jury verdicts, a declaratory judgment and attorneys' fees. Commercial Union appealed several trial court rulings to a state appellate court, which directly passed the case to the state Supreme Court.

The December 2000 Supreme Court ruling that attorneys found most compelling was that CGL insurers must cover all sums that

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policyholders are legally obligated to pay to remediate third-party property damage that occurred during their policy periods, even if the policyholders did not cause any of the damage during that time

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The ruling benefits Weyerhaeuser in two cases in which it is responsible for cleaning landfills. Both a Wisconsin site and a Washington site for which Weyerhaeuser won coverage in earlier phases of the litigation began operating as sanitary landfills and were contaminated by third parties during the period that Commercial Union covered Weyerhaeuser. But Weyerhaeuser did not ship waste to either site until 1974, so it did not incur any liability for those sites due to its own actions until after its coverage period had expired.

Commercial Union argued that it should not be held responsible for the more than \$1.6 million of total cleanup costs at the two sites, because the damage was "caused by a stranger to the policy." The insurer noted that a California appellate court in 1998 ruled that coverage exists only when a policyholder is liable for damage at the time it occurred.

But in a majority opinion written by Justice Richard Sanders, Washington's high court noted that another California appellate court had ruled oppositely years earlier.

Moreover, the state Supreme Court ruled, the 9th U.S. Circuit Court of Appeals, which has jurisdiction over both California and Washington, resolved the discrepancy between the California appellate courts by ruling for policyholders last year.

Washington's high court called the 9th Circuit's ruling "persuasive." It also stressed that CERCLA and a Washington cleanup statute impose strict, joint and several, and retroactive liability on Weyerhaeuser to clean up the damage that occurred at the landfills during Weyerhaeuser's policy period.

Therefore, "the nature of the liability imposed by the federal and state statutes compels coverage where the insurer has agreed to pay 'all sums which the insured shall become obligated to pay as damages by reason of the liability imposed upon the insured by law,"

'Weyerhaeuser contracted-and paid higher premiums-for comprehensive coverage encompassing just such a situation,' says Justice Richard Sanders.

the court ruled, quoting the Commercial Union policy.

"Although the parties may not have predicted liability of this nature would be imposed, it is nevertheless a legal liability imposed upon Weyerhaeuser by an occurrence as defined in Weyerhaeuser's insurance policy. Weyerhaeuser contracted-and paid higher premiums-for comprehensive coverage encompassing just such a situation" Justice Sanders wrote.

Mr. Lawrence, the policyholder attorney, said history suggests that the ruling will in fluctuate with other courts, though not determinative."

Insurer attorneys criticized the ruling, which they characterized as minority view among courts.

"The whole theory seems just incredible," said Laura Foggan, who represents the industry-supported Insurance Environmental Litigation Assn. The IELA filed an amicus brief in the case.

Both Ms. Foggan, a partner with Wiley, Rein & Fielding, in Washington, D.C., and Mr. Rousseau noted that California's 1st Appellate Court decided one week after the *Weyerhaeuser* decision to reject the 9th Circuit's reasoning. In *Tosco Corp. vs. General Insurance Co. of America*, the California Appellate Court upheld a trial court's summary judgment that insurers are not required to defend or indemnify policyholders against environmental and asbestos liability claims arising from property that the policyholder did not own during its policy period.

"So *Tosco* is more important" than *Weyerhaeuser*, Mr. Rousseau asserted.

In other rulings that attorneys said were first-of-their kind decisions from a state supreme court, Washington's high court determined that:

•Commercial Union was not entitled to offset its Phase I and II liabilities by the settlement funds that Weyerhaeuser received from its other insurers. Commercial Union argued that those funds more than covered all proven and insured damages at the 42 original sites

as well as attorneys' fees.

But the high court, which heavily weighed a 1996 state appellate court ruling on the same issue, ruled that the settlements covered far more than Weyerhaeuser's current pollution cleanup liabilities. They covered all past, present and future liability claims as well as "certainty by avoiding the risks of an adverse trial outcome

Because Commercial Union failed to prove what percentage of those settlements were earmarked for cleanup costs, the insurer is not entitled to offsets, the court ruled.

•Commercial Union's excess policy contained a property liability limit of \$1.5 million per occurrence but no aggregate limit for such losses. The policy's aggregate limit applied only to product liability and personal injury claims, the court ruled.

Commercial Union argued that its total exposure under the policy is \$4.5 million-a figure it arrived at by adding aggregate limits of \$1.5 million for property liability, product liability and personal injury liability.

The Washington Supreme Court's majority rejected that argument, because the policy did not once reflect Commercial Union's contention that its total exposure would be capped at \$4.5 million.

Policyholder attorneys say the ruling is important for all policyholders because many excess insurers used the same or a similar policy form.

The court, however, reversed the trial court and ruled that Commercial Union's policy imposes a \$500,000 deductible per incident with no aggregate.

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Weyerhaeuser Co. vs. Commercial Union Insurance Co., Washington Supreme Court, Dec. 21, 2000; No. 67694-1. Tosco Corp. vs. General Insurance Co. of America, California 1st Appellate Court of Appeal, Dec. 28, 2000; Nos. A082765, A084044, A086154.