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Voluntary cleanups covered: Court

By DAVE LENCKUS

OLYMPIA, Wash - In a major policyholder victory, Washington's highest court says commercial general liability insurers must cover pollution cleanup liabilities that policyholders voluntarily assume, even when the state has not border cleanup.

Citing public policy concerns, the court on May 19 unanimously rejected the insurers' argument that coverage is not triggered when a policyholder voluntarily clean as a waste site before it faces a third-party claim, like a cleanup order.

The court said that Washington's pollution liability statute itself is tantamount to a third-party claim. Fooling otherwise would force policyholders to wait for a cleanup order rather than cooperate with the state, which could mitigate the hazard and cleanup costs, the court said.

"The decision says you don't have to sit idly by and wait for a cleanup order to get insurance. You can be proactive," said plaintiff's attorney Robert M. Horkovich, who represented Tacoma, Wash. -based Weyerhaeuser Co.

Although most states have enacted pollution liability laws, the decision is only the second time a state High Court has ruled on the issue. The Wyoming Supreme Court ruled similarly in 1968.

But, insurer attorneys say the decision raises several questions, including whether policyholders' liability admissions that threaten their coverage and how well policyholders have to inform insurers about their cleanup actions.

"The thing about a decision like this is that it could have far-reaching consequences that you can't even dream of," said a insurer attorney Bud London of London and Fischer in New York.

The ruling stems from a March 1992 suit that Weyerhaeuser filed against 33 insurers and numerous Lloyd's of London syndicates and London underwriters that wrote primary and excess CGL. coverage for the wood products manufacturer from 1951 through 1965.

Weyerhaeuser sought a ruling that the insurers must defend and indemnified in pollution liability cases involving 42 sites across the nation some of which Weyerhaeuser owns.

Weyerhaeuser says that it should be covered for the cost of cleaning the sites it owns because the pollution threatens groundwater Weyerhaeuser vowed to clean the sites regardless of its coverage.

Mr. Horkovich, an attorney with Anderson Kill Olick & Oshinsky, in New York, said Weyerhaeuser attempted to negotiate with its insurers throughout the cleanup process, but that insurers refused to participate.

The sites include ponds, landfills, wholesale distribution centers and sites with underground storage tanks that have been contaminated with substances including action, diesel fuel, chlorine, PCPs and Mercury, court records show.

The coverage litigation was unusual from the onset because of the concerted efforts by Weyerhaeuser's risk manager to maintain good relations with the defendant insurers and encourage a settlement. Cheri J. Hawkins, Weyerhaeuser's assistant treasurer and director of insurance, personally wrote each of the insurers when suit was filed expressing the company's hope that the dispute could be settled amicably (BI, March 16, 1992).

The Company had never sued one of its insurers before.

Among the defendants, only Commercial Union Insurance Co., Twin Camp City Fire Insurance Company, and the London underwriters did not settle with Weyerhaeuser.

The terms of the settlements were not disclosed.

A trial court in July 1993 dismissed Weyerhaeuser's complaint regarding 15 other sites ruling that the company had not faced any third-party claims for property damage at the sites. Remediation costs at those sites, about half dozen of which are located in Washington, totaled about $28 million.

A state appeals court on its own last November certified the case to the state Supreme Court because of public policy concerns.

The high court's 9-0 ruling written by Chief Justice James A. Anderson, focused on the dilemma faced by policyholders with pollution liabilities: Acting on their own to clean up polluted sites can reduce cleanup costs but could jeopardize their coverage.

Justice Anderson noted that cleanup work was mandated by various state and federal statutes that impose strict and joint and several liability for pollution damage. And, the company was required by law to report contamination.

Pointing out that Weyerhaeuser and the insurers agreed that CGL policies provide coverage for all sums that Weyerhaeuser is legally obligated to pay for property damage stemming from the pollution, Camp Justice Anderson wrote: "The policy language does not specify whether this liability must be imposed by formal legal action (or threat of such) for my statute which imposes liability."

If insurers intended to provide coverage only when a lawsuit was filed or threatened, that requirement "could have been included in the policy," Justice Anderson said.

"We declined to add language to the words of insurance contract that are not contained in the parties' agreement," he wrote.

The court also noted that it would put policyholders in an untenable position if it excepted the defendants' arguments: Policyholders would lose their coverage if they cleaned up sites before receiving a cleanup order from

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the state. But, policyholders and wait for a cleanup order could be denied coverage for not taking steps to mitigate the pollution dam age.

That would "result in fundamental unfairness to policyholders who reasonably believed they had insurance coverage for certain kinds of property damage caused by pollution."

Not, Justice Anderson also tried to allay in surers' fears that the ruling could lead to unin tended coverage for policyholders' costs to comply with pollution laws.

Pointing to the high court's decisions in oth er pollution coverage cases, Justice Anderson explained that Weyerhaeuser's insurance "does not cover safety measures or other preventive costs taken in advance and any damage to property."

Weyerhaeuser still faces additional coverage disputes with Commercial Union, Twin City and that London underwriters over the original sites and about 20 more. The trial scheduled to begin in October will consider issues like whether Weyerhaeuser expected or intended to cause the pollution. More than $100 million of coverage is at stake in that case.

Insurer attorneys disagreed over how influen tial for Washington ruling will be to other courts, but they expect that most state high courts will address the issue if the Superfund law is not reformed.

The decision, though, raises potential prob lems for policyholders as well as insurers into small and even more litigation some insurer attorneys said.

For example, the CGL insurers for a policy holder that follows in Weyerhaeuser's foot steps can argue the policyholder avoided its coverage by admitting liability. "If you want someone to pay for you, you should at least let them look at (the case) without tying their hands behind them back," Mr. London said.

The issue will be even more complicated in cases involving more than one potentially re sponsible party for a polluted site, said David C. Rosten of Altheimer & Gray in Chicago. "If a PRP says, ' I belong to this group, this is how much I'll pay,' insurers will say they're not sure you're paying the right amount."

Mr. Ralston also foresees a potential problem should policyholders tried to burnish their public image by cleaning up substances that state or federal environmental agencies have not determined to be hazardous and Tennessee team recovery of those costs from insurers.

However, the decision could lead to lower cleanup costs by expediting the cleanup proc ess, he said.

David M. Spector, a partner with Mayer, Brown & Platt, in Chicago, said a principal problem that the decision raises-but that the court does not address-is how policyholders and ensures "will work out of the duty to co operate" under CGL policies. The parameters of the duty "under the circumstances are hard to envision," he said.

"Will the insurers insist on simply been kept informed? Will they want a prior right of ap proval? camp will they take over the remedia tion effort by themselves? I suspect issues like this will be considered on REIT man and will torment most policyholders and insurers called upon to address circumstances like this in the future," he said.

But David P. Rosenblatt of Burns & Levin son does not believe the case sounds the pol lution coverage "death knell" for insurers in Washington or elsewhere. Insurers still can raise exclusions like the public property ex clusion which denies coverage or pollution cleanups on the policyholders property.

The Boston law firm represents both insurers and PRPs but not in environmental coverage lawsuits.

For Miss Hawkins, Weyerhaeuser's risk man ager, the case validates her attempt to initiate a kinder, gentler coverage lawsuit. Referring to the 13 insurers that settle the case with Weyerhaeuser, she said, "I think it definitely had an impact on their willingness to come forward and settle."

But she said she was particularly frustrated in trying to reach a settlement with the Lloyd's underwriters and the London market. The settlement with the other insurers was fa cilitated because of the willingness of insur ance company officials to meet with Weyer haeuser officials, Ms. Hawkins explained. Lloyd's underwriters and the London market companies were not accommodating, though, she added.

A Lloyd's spokesman was unable to com ment.

The attorney for the defendant insurers, Frankie Crane of Williams, Kastner & Gibbs in Seattle, did not return phone calls.