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Washington expands CGL cover

Liability for others' pollution is insured: Court

By DAVE LENCKUS

OLYMPIA, Wash.-Comprehensive general li ability insurance policyholders nationwide likely will cite a Washington Supreme Court decision to expand pollution cleanup coverage to policyholders that must clean sites contami nated solely by third parties during the policy holders' 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 pol icyholders seeking coverage under pre-1986 gerneral liability policies that contained sud den and accidental pollution exclusions. Many courts, including Washington's high court, have ruled that exclusion does not bar policy holders 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 compa nies 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 cverage litigation nationwide.

"I think it was a very strong victory for policy holders 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 acciden tal pollution exclusion s applicability predict ed that the cQurt s most recent decision would influence other courts. Courts in other juris dictions 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. Law rence observed.

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

"Anything that comes out of Washington is not much of a surprise if it's pro-policyholder. Washirigton seems to be the best place to re cover 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 else- where would be more inclined to agree with a pro-insurer ruling from a California state ap pellate court rejected the federal appellate court ruling that influenced the Washington Supreme Court.

The Washington high court's ruling is the la tent decision in a protra cted pollution cover age dispute between Weyerhaeuser Co. of Ta coma, 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 pollu tion 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 re turn 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 occurrencefrom Jan. 1,1970, throughJan. 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 de mand for 23 sites so it could concentrate on recovering insurance to pay for cleaning the 10 largest sites. Commercial Union then set tled that phase by agreeing to pay Weyer haeuser $4 million plus certain future costs.

In January 1998, a trial court ordered Com mercial Union to pay Weyerhaeuser more than $8.4 million in jury verdicts, a declaratory judgment and attorneys' fees. Commercial Un ion 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 CCL insurers must cover all sums that

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

Other attorneys, though, disagreed over the ruling's significance and potential impact on future pollution cverage litigation nation wide.

"I think it was a very strong victory for poli cyholders and continues the trend in Washing ton toward reading a policy as broadly as it was intended to apply to a broad range of pol lution damages," said policyholder attorney Paul J. Lawrence, a partner with Preston Gates Ellis L.L.P. in Seattle.

The ruling benefits Weyerhaeuser m two cases in which it is responsible for cleaning landfills. Both a Wisconsin site and a Wash ington site for which Weyerhaeuser won cov erage in earlier phases of the litigation began operating as sanitary landfills and were con taminated by third parties during the period that Commercial Union covered Weyerhaeus er. 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 be tween the California appellate courts by rul ing for policyholders last year.

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

Therefore, "the nature of the liability im posed by the federal and state statutes com pels 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 Un ion policy.

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

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

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

"The whole theory seems just incredible," said Laura Foggan, whe represents the indus try-supported Insurance Environmental Liti gation 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 Ap pellate Court decided one week after the *Weyerhaeuser* decision to reject the 9th Cir cuit's reasoning. *In Tosco Corp. vs. General Insurance Co. of America*, the California Ap pellate Court upheld a trial court's summary judgment that insurers are not required to de fend or indemnify policyholders against envi ronmental and asbestos liability claims aris ing from property that the policyholder did not own during its policy period.

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

In other rulings that attorneys said were first-of-their kind decisions from a state su preme court, Washington's high court deter mined that:

•Commercial Union was not entitled to off set its Phase I and II liabilities by the settle ment 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 pollu tion 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 courtruled.

•Commercial Union's excess policy con tained a property liability limit of $1.5 mil lion per occurrence but no aggregate limit for such losses. The policy's aggregate limit ap plied only to product liability and personal injury claims, the court ruled.

Commercial Union argued that its total ex posure under the policy is $4.5 million-a fig ure it arrived at by adding aggregate limits of $1.5 million for property liability, product li ability and personal injury liability.

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

Policyholder attorneys say the niling is im portant 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, Califor nia 1st Appellate Court of Appeal, Dec. 28, 2000; Nos. A082765, A084044, A086154.