INSURED PRPS WATCHING CLOSELY AS NINTH CIRCUIT CONSIDERS WHETHER EPA 104(E) REQUEST IS A “SUIT” TRIGGERING DUTY TO DEFEND

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On Monday, May 2, 2016, Liberty Mutual Insurance Co. and U.S. Fidelity & Guaranty Co. urged the Ninth Circuit to certify to the Oregon Supreme Court the question of whether a CERCLA Section 104(e) information request issued by the U.S. Environmental Protection Agency to Ash Grove Cement Company triggered a duty to defend under a general liability insurance policy.

The insurers said they should not be required to cover the costs because Ash Grove Cement had not yet been sued. The district court held that CERCLA proceedings are the “equivalent of a suit,” and an insurer’s duty to defend continues until the CERCLA process runs its course to judgment or settlement with contribution protection. Because Ash Grove remains exposed to CERCLA liability throughout that time, the insurers’ are subject to the duty to defend. The district court held that the letter constituted a threatened legal action with serious penalties for not complying with the request. The court rejected the insurers’ argument that it was merely a request for information.

Ash Grove Cement argued that the Ninth Circuit already ruled on this issue in Anderson Brothers v. St. Paul Fire & Marine Insurance Co., which held that an EPA 104(e) letter constituted a suit under the Oregon Environmental Cleanup Assistance Act.

In October 2010, U.S. District Judge Garr M. King ruled that the EPA's 104(e) letter was the functional equivalent of a suit, thereby triggering the insurers’ obligation to cover Ash Grove Cement's response costs. The lower court then held that Liberty Mutual and USF&G had to cover just under $1.9 million of Ash Grove's $2.3 million claim for defense costs.

The insurers are also arguing on appeal that any alleged duty to defend Ash Grove Cement ended as soon as the company submitted its response to EPA’s 104(e) request because Ash Grove Cement has not incurred any other costs associated with EPA’s suit. The costs to date comprise of meetings with other PRPs. This argument is likely to fall flat because such PRP activities are considered a necessary component of cooperating with the EPA and complying with EPA’s demands at a Superfund site.

For the most part, new insurance policies carve out environmental exposure, unless the policies are specifically for environmental liability. Insurance carriers are facing the duty to defend CERCLA cases because of old policies that do not have pollution exclusion clauses.

This case is important for PRPs in the Ninth Circuit’s jurisdiction, including outside of the State of Oregon. If the Ninth Circuit allows the Oregon Supreme Court to review the case, it is likely that Ash Grove Cement will appeal that ruling. If the Oregon Supreme Court ultimately rules that the 104(e) letter is not a triggering suit, then there will be a split within the Ninth Circuit.