Liberty Mut. Ins. Co. v. Ash Grove Cement Co.

Year: 2014
Court: U.S Court of Appeals, 9th Circuit
Case Number: 13-35900; 13-35905; 14-35298

UP, joined by co-amici The Marine Group, LLC, MMGL Corp. and Schnitzer Steel Industries, Inc. urged the Court to uphold a correct ruling by an Oregon District Court that a 104(e) Request for Information Letter triggers the duty to defend under a commercial general liability policy covering environmental liabilities. A 104(e) letter, used by the U.S. Environmental Protection Agency under authority from the Comprehensive Environmental Response Compensation and Liability Act ("CERCLA" or "Superfund") to gather information on Potentially Responsible Parites ("PRPs") connected to a contaminated industrial site, begins the adversarial process and thus triggers an insurer's duty to defend. UP argued in its brief that a well-written response letter by the PRP is the best chance for a PRP to minimize its liability and shape the course of further negotiations and cost-sharing. This is sound public policy which promotes expeditious and equitable clean-up of Superfund sites. UP reminded the Court that this is the law in Oregon as well as in the 9th Circuit (see Anderson Bros 729 F.3d 923 (9th Cir. 2013) holding a 104(e) letter begins the functional equivalent of a "suit") and judgment for the insured should be affirmed. UPdate 5/11/16: Affirmed on all counts in favor of the insureds. Under Anderson Bros v. St. Paul Fire and Marine Ins. Co, 729 F.3d 923 (9th Cir. 2013) the Ninth Circuit held that a 104(e) letter is a "coercive information demand" that initiates a legal process sufficient to trigger the insurers' duty to defend under a liability policy.

UP's brief was drafted pro bono by David F. Klein, Esq., Barry S. Levin, Esq., Jimmy S. McBirney, Esq. of Orrick, Herrington, and Sutcliffe LLP and UP Executive Director Amy Bach Esq. and Staff Attorney Dan Wade, Esq.