Portland Harbor Superfund litigation has “super” implications for policyholders

Today was a big day for policyholders involved in the legendary Portland Harbor (Oregon) Superfund Site: two cases in which United Policyholders submitted *amicus curiae* briefs were up for argument before the Ninth Circuit. Both cases involve the duty to defend under “long-tail” CGL policies and the application of Oregon’s statutory protections for policyholders, including its unique statute relating to coverage disputes in environmental cases, the Oregon Environmental Cleanup Assistance Act (“OECAA”).

The first case argued, *Schnitzer Steel v. Continental Casualty (CNA),* centered on whether CNA was obligated to pay defense costs incurred by an attorney chosen not by the carrier but by the insured, at rates significantly higher than those charged by the insurer’s proposed counsel. The insured, Schnitzer, rejected defense counsel offered by the insurer based on lack of experience or conflicts of interest and instead hired out-of-state counsel. The insurer reimbursed the insured only at the much lower rates it had proposed, and the insured sued to recover the difference (which, by the time of trial several years into a very involved Superfund defense, had accumulated to over $8 million). The case went to trial before a jury, which awarded Schnitzer all of its damages, finding that Schnitzer was justified in rejecting the counsel CNA had proposed and that Schnitzer had acted appropriately in selecting alternative out-of-state counsel. After trial, the court awarded Schnitzer significant attorney fees under Oregon’s fee-shifting statutes, ORS 742.061

On appeal, CNA contended that the trial court had applied incorrect legal standards. CNA also appealed the attorney fee award – and that was the issue on which UP submitted its *amicus* brief, authored by Seth Row and Chris Rycewicz of Miller Nash Graham & Dunn LLP in Portland, Oregon. CNA argued that the attorney fee statute only applies if the coverage lawsuit is initially filed in state court because the statute says it applies to suits in “any court of this state.” Schnitzer filed the suit in federal court, which CNA contended is not a court “of” Oregon but merely a court *in* Oregon, meaning that Schnitzer would not be entitled to fees.

The trial court rejected that argument, finding that CNA's interpretation could not stand under the *Erie* principle that a federal court exercising diversity jurisdiction applies state substantive law as if it were a state-court trial judge. At oral argument, the appellate panel seemed to side with the trial judge, noting that CNA's interpretation of the statute would not only create *Erie* problems but also would (as UP's brief pointed out) encourage needless forum-shopping because insureds would simply file suit in state court, even if the case was sure to be removed to federal court. The appeals panel also commented that creating uncertainty about whether attorney fees would be awarded would undermine the purpose of the statute, which is to encourage insurers to pay claims promptly.

A win for the policyholder on the attorney fee issue would solidify the right to recover attorney fees in Oregon coverage disputes. That right is critically important because Oregon courts have rejected claims for "bad faith" against an insurer that wrongfully denies a defense, leaving exposure to attorney fees as the only true disincentive for denying a defense in Oregon.

The second case, *Ash Grove Cement v. Liberty Mutual Insurance, et al.,* centers on whether a "Section 104(e)" information demand from the Environmental Protection Agency (EPA) constitutes a "suit" triggering the insurer's duty to defend under a long-tail CGL policy. OECAA adopts a "rule of construction" for the term "suit" where that term is not defined in the policy, providing that "[a]ny action or agreement by … [EPA] against or with an insured in which … [EPA] in writing directs, requests or agrees than insured take action with respect to contamination … is equivalent to a suit." *See* ORS 465.480(2)(b). If you experienced *déjà vu* after reading that sentence, that's for good reason: the Ninth Circuit already decided that issue in favor of the policyholder in *Anderson Brothers v. St. Paul Fire & Marine*, 729 F.3d 923 (9th Cir. 2013). But the insurers in *Ash Grove* argued that the facts in *Anderson Bros.* were different, and argued in the alternative that the issue should be certified to the Oregon Supreme Court.

UP submitted an *amicus brief* in *Ash Grove,* urging the court to adhere to *Anderson Bros.,* and reminding the court a 104(e) letter often constitutes the first step in an integrated EPA process for imposing liability upon policyholders, who must respond early and cooperate with the EPA in order to minimize their exposure, a result that benefits policyholders and insurers alike. UP's brief was authored by David F. Klein, Esq., now of Pillsbury Madison Winthrop Shaw Pittman LLP, Barry S. Levin, Esq., and Jimmy S. McBirney, Esq. of Orrick, Herrington, and Sutcliffe LLP, and UP Executive Director Amy Bach Esq. and Staff Attorney Dan Wade, Esq.

A win for the policyholder in *Ash Grove* will cement the right of a policyholder to a paid-for defense, and therefore encourage cooperation early in the Superfund process, and by validating the approach taken by the Oregon legislature in the OECAA, will hopefully encourage other legislatures to create "rules of construction" for undefined terms in long-tail insurance policies to dissuade insurers from attempting to avoid their coverage obligations.