Court of Appeals Docket Nos. 13-35900; 13-35905; 14-35298

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LIBERTY MUTUAL INSURANCE COMPANY and UNITED STATES FIDELITY AND GUARANTY COMPANY,
Appellants and Cross-Appellees,

v.

ASH GROVE CEMENT COMPANY,
Appellee and Cross-Appellee.

Appeal from the United States District Court
for the District of Oregon,
Case No. 3:09-cv-00239-HZ
The Honorable Marco A. Hernandez

BRIEF OF AMICI CURIAE UNITED POLICYHOLDERS, THE MARINE GROUP, LLC, MMGL CORP., AND SCHNITZER STEEL INDUSTRIES, INC. IN SUPPORT OF APPELLEE AND CROSS-APPELLANT ASH GROVE CEMENT CO.

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DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, Amicus United Policyholders is a non-profit 501(c)(3) organization, has no parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

Amicus The Marine Group, LLC, is a California limited liability company, has no parent corporation, and no publicly traded entity owns 10 percent or more of its stock.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page

STATE CASES

TABLE OF AUTHORITIES
(continued)

Page

CONSTITUTIONS

FEDERAL STATUTES

STATE STATUTES

TABLE OF AUTHORITIES
(continued)

Page

FEDERAL RULES

FEDERAL REGULATORY GUIDANCE

OTHER AUTHORITIES

INTEREST OF AMICI CURIAE[1]

United Policyholders ("UP"), a non-profit 501(c)(3) organization, is a resource for insurance consumers in all 50 states. UP's reputation as a valuable information source for courts was confirmed when the Supreme Court cited its amicus brief in *Humana v. Forsyth*, 52 U.S. 299, 314 (1999). UP has filed amicus briefs on behalf of insureds in this and other courts in over 350 cases. Insurance regulators, academics and journalists routinely seek UP's input on insurance and legal matters. UP's Executive Director has been appointed an official consumer representative to the National Association of Insurance Commissioners for six consecutive years. Accordingly, UP offers expertise on insurance policy matters that will greatly assist the court.

The Marine Group, LLC, MMGL Corp., and Schnitzer Steel Industries, Inc. are corporations which the U.S. Environmental Protection Agency ("EPA") has identified as potentially responsible parties ("PRPs") at the Portland Harbor Superfund Site, and are or have been engaged in litigation with their liability insurers over coverage of proceedings under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA").

Appearing in support of Appellee Ash Grove Cement Co. ("Ash Grove"), Amici submit that this Court should affirm the district court's holdings that:

[1]Pursuant to FRAP 29(a), all other parties have consented to this brief's filing.

(1) A "104(e)" request issued by EPA constitutes a "suit" under Oregon law, regardless of when or whether it is followed by a PRP letter;

(2) The duty to defend a suit triggered by a 104(e) request continues until the CERCLA process concludes as to the Insured; and

(3) The Oregon Environmental Cleanup Assistance Act, ORS §§465.475-480 ("OECAA"), is constitutional as applied.

PRELIMINARY STATEMENT[2]

In 1999, Oregon's legislature enacted OECAA to address significant delays in PRPs' cleanup of environmental sites, which it determined stemmed from chronic disputes and resulting litigation between PRPs and their insurers concerning the construction and application of comprehensive general liability ("CGL") policies to environmental claims. The legislature enacted OECAA to expedite resolution of those insurance claims and facilitate speedier environmental investigations and cleanups, a vital public policy objective.

Among other things, OECAA codifies rules of construction for certain undefined CGL policy terms that, notwithstanding Oregon common law consistent with those rules of construction, remained subject to recurrent dispute. Appellants Liberty Mutual Insurance Company ("Liberty Mutual") and United States Fidelity & Guaranty Company ("USF&G") challenge application of one such rule of

[2]Pursuant to FRAP 29(c), Amici states that no party or person other than Amici authored or contributed funding for this brief.

construction as applied to the policy term "suits" to encompass claims asserted by EPA in so-called "104(e) requests" issued under CERCLA.

In addressing this question, this Court will not be writing on a clean slate. In *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923 (9th Cir. 2013), this Court held that a CERCLA 104(e) request constituted a "suit" under Oregon law, observing that, unlike a typical demand letter which an insured is "free to ignore," a 104(e) request compels response "to an intrusive questionnaire the answers to which expose[] it to extensive liability." *Id.* at 933-34. The Court recognized that a 104(e) request is the first step in an integrated CERCLA administrative process which a vast majority of courts – including this one – had long held functionally equivalent to a "suit."

In this case, three years before *Anderson*, the district court independently concluded a 104(e) request was a first step of a "suit" that Appellants had a duty to defend under Ash Grove's standardized CGL policies (the "Policies"). Both *Anderson* and the district court recognized that CERCLA actions differ from other regulatory proceedings because EPA can hold any owner of a historically polluting property jointly, severally and strictly liable for an entire Superfund Site, no matter how little or remotely the property contributed to the pollution. Both decisions acknowledge that a 104(e) request is not some benign investigation tool, but notice that EPA intends to hold the recipient liable under CERCLA.

The district court underscored that CERCLA's strict, joint and several liability scheme, coupled with extremely limited available defenses, forces targeted entities to settle with EPA to avoid potentially massive liability, and that the process benefits earlier-settling PRPs over later ones. Accordingly, the district court properly held that reasonable efforts to minimize liability by discussing settlement with EPA and other PRPs after receiving a 104(e) request are covered defense costs, even if a PRP letter[3] has not yet arrived.

Appellants attempt to distinguish these holdings by mischaracterizing a 104(e) request as a stand-alone proceeding that ends when an insured complies with its discovery requests, rather than what it truly is: a first step in the lengthy CERCLA process, the lip of a funnel into environmental liability. That artificial separation of a 104(e) letter from the rest of the CERCLA process is the foundation for each of Appellants' arguments, all of which fall once the fallacy is removed.

Perhaps recognizing that their attempt to uncouple the 104(e) request from the rest of the CERCLA process is unsupportable, Appellants also urge this Court to ignore its own binding precedent in *Anderson*, attacking that decision as wrongly decided. But *Anderson* was decided correctly and this panel is bound by it, irrespective of Appellants' view of its merits.

[3]A PRP letter is interchangeably called a "General Notice letter." *Anderson*, 729 F.3d at 930 n.5. We use the term "PRP letter" unless quoting another source.

Appellants alternatively attempt to limit *Anderson* by claiming its holding regarding 104(e) requests somehow applies only when the insured has also received a PRP letter. This distinction is illusory – the *Anderson* Court held unambiguously that the PRP letter *and* the 104(e) request were each independently sufficient to trigger a "suit" the insurers must defend. *Anderson*, 729 F.3d at 929, 937-38. Appellants also assert that: (1) the district court's definition of "suit" eliminates the Policies' distinction between "claims" and "suits," and (2) the Policies require that a "suit" seek monetary damages to invoke coverage. This Court rejected both of those arguments in *Anderson* as well. *Id.* at 933-34, 936.

Appellants further contend that if OECAA mandates that a "suit" includes a 104(e) request, it unconstitutionally impairs existing contractual relationships. The Court rejected that argument, too, in *Anderson*. *Id*. at 935-36. By merely resolving ambiguous policy provisions consistent with Oregon's common law, OECAA could not possibly impair contractual rights. Even if it somehow could, OECAA would still be constitutional, because any modest effect would be reasonable in light of Oregon's important public interest in remediating environmental hazards.

Indeed, the only issue Appellants raise that *Anderson* does not squarely foreclose is when Appellants' duty to defend the suit triggered by a 104(e) request terminates. The district court properly held that the duty "continues until no set of facts exists under which the insurers may be responsible for indemnifying Ash

Grove." Doc. No. 208 at 12. As the district court aptly noted, "[t]he duty to defend in court is not limited to costs incurred to draft and file an Answer[.]" *Id.* at 13. Rather, the duty continues until the litigation concludes or all potentially covered claims are extinguished.

Because CERCLA proceedings are the "equivalent of a suit," the district court properly held that the rule governing them is no different – Appellants' duty to defend continues until the CERCLA process runs its course to judgment or settlement with contribution protection. Until then, Ash Grove remains exposed to CERCLA liability. There is no basis to artificially uncouple the CERCLA suit's triggering event from the rest of the process.

ARGUMENT

I. THIS COURT'S DECISION IN *ANDERSON* REQUIRES AFFIRMANCE OF THE DISTRICT COURT'S HOLDING THAT A 104(E) REQUEST IS A "SUIT"

Appellants' central argument is that a 104(e) request is not a "suit" under Oregon law. At the time of the district court's order, no other court had directly considered this question.[4]

[4]However, after the district court's decision but before this Court decided *Anderson*, another district court reached the same conclusion. *Century Indem. Co. v. Marine Group, LLC*, 848 F.Supp.2d 1238, 1255-56 (D. Or. 2012) ("[A] suit arises when an insured's rights are genuinely in jeopardy. … [A]t least as early as the 104(e) notices, the agency actions and communications gave rise to a 'suit' as a matter of law."). Earlier, the Minnesota Supreme Court reached the same result in considering a state statute nearly identical to CERCLA. *SCSC Corp. v. Allied Mut. Ins. Co.*, 536 N.W.2d 305, 315 (Minn. 1995) (overruled on other grounds) ("[T]he

This Court answered the question conclusively last year in *Anderson*, when it held – as the district court did here – that a 104(e) request is a "suit" under Oregon law. 729 F.3d at 937-38. The Court held unambiguously that either a 104(e) request or a PRP letter constitutes a "suit," because either initiates the CERCLA process against the insured. As the Court explained, "[i]n light of the unique role settlement and coercive information demands play in CERCLA, there is little doubt that each letter was an attempt to gain an end through legal process." *Anderson*, 729 F.3d at 933 (emphasis added).[5]

At issue in *Anderson* was a standard CGL policy, identical in all relevant aspects to Appellants' Policies. Because the nature of the 104(e) requests and applicable law were also substantively identical, *Anderson* is controlling. Appellants seemingly acknowledge this, but attempt to re-litigate *Anderson* by repeatedly arguing it was wrongly decided. Appellants are wrong, though it would make little difference if they were right. The Court "must … follow this precedent

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term 'suit,' as used in a CGL policy, includes action taken by the MPCA in the form of an RFI.").

[5]Indeed, OECAA provides that "*[a]ny* action or agreement by … [EPA] against or with an insured in which ... [EPA] in writing directs, requests or agrees that an insured take action with respect to contamination … is equivalent to a suit." Thus, the term should not necessarily be limited to 104(e) requests or PRP letters, but may also include other writings meeting these criteria within the CERCLA process. *See, e.g.*, *Marine Group*, 848 F.Supp.2d at 1255 (finding letter sent with EPA approval by neutral "convener" encouraging companies to participate in allocation process was a covered "suit" under OECAA).

as the law of the circuit, [Appellants]' arguments that it is incorrect or imprudent notwithstanding." *U.S. v. Parker*, 651 F.3d 1180, 1184 (9th Cir. 2011).

Equally meritless are Appellants' attempts to limit *Anderson*'s reach by arguing that the Court's holding somehow depended on the insured's receipt of a PRP letter – which came significantly afterwards. *Anderson* was crystal clear: "both the 104(e) Letter and the General Notice Letter were 'suits' within the meaning of the Policies." *Anderson*, 729 F.3d at 937 (emphasis added). In fact, the Court held the 104(e) request was what triggered the duty to defend, because EPA sent that letter first. *Id.* at 929, 937.

Appellants rehash other arguments this Court rejected in *Anderson* as well. They assert that the district court's definition of "suit" eliminates the Policies' distinction between "suits" and "claims," but this Court rejected that argument in *Anderson*. As the Court observed, a 104(e) request is "not [a] normal demand letter," and treating it as a "'suit[]' does not diminish the meaning of the term 'claim' as it is used in the Policies" because "'claim' continues to refer to normal demand letters." *Id.* at 934.[6] Similarly, Appellants assert that the 104(e) request fails to allege covered "damages," despite *Anderson*'s rejection of that argument.

[6]The contrasting implications of a 104(e) request and a "normal demand letter" also differentiate a 104(e) request from numerous other types of government agency requests. Thus, Liberty Mutual's assertion that the district court's decision would turn "any letter from any government agency requesting just about anything at all" into a suit (Liberty Mutual Br. at 5) lacks merit.

Id. at 936. Finally, as discussed below, Appellants challenge OECAA's constitutionality on grounds *Anderson* also rejected. *Id.* at 935-36.

Hence, Appellants' arguments are foreclosed by controlling precedent. The only question arguably not decided in *Anderson* is how far the duty to defend extends absent a subsequent PRP letter. For reasons that follow, Amici agree with the district court that the answer is the same as in all other "suits": the duty continues until the matter concludes or all potentially covered claims against the insured are extinguished.

II. BECAUSE THE 104(E) REQUEST COMMENCES CERCLA PROCEEDINGS, THE DISTRICT COURT PROPERLY HELD ITS RECEIPT INITIATES COVERAGE FOR THE DURATION OF THE CERCLA PROCESS

Appellants attempt to artificially separate a 104(e) request from the rest of the CERCLA process, of which it is not only an integral part, but a seminal step. Abstracting a 104(e) request from the ensuing CERCLA proceedings makes no more sense than suggesting a summons stands separate from the balance of a lawsuit. Similarly, Appellants' contention that the duty to defend ends when an insured complies with a 104(e) request is akin to asserting the same duty ends in a civil proceeding once the insured files an answer or serves discovery. This becomes clear once the 104(e) request is seen in its proper context as an initial step in the CERCLA process.

A. A 104(e) Request Is a First Step in a Comprehensive CERCLA Process Potentially Leading to the Insured's Joint, Several and Strict Liability

CERCLA "establishes a retroactive strict liability regime that imposes joint and several liability upon past and current landowners or operators of properties or facilities from which hazardous substances have been released or disposed into the environment." *Carson Harbor Village, Ltd. v. Unocal Corp.*, 270 F.3d 863, 880 (9th Cir. 2001) (en banc); *Anderson*, 729 F.3d at 926. It "was enacted to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites." *Pritkin v. DOE*, 254 F.3d 791, 794-95 (9th Cir. 2001) (citations omitted). CERCLA "establishes a procedure to facilitate hazardous waste site clean-ups and ensures that whoever undertakes the clean-up can recover those costs from [PRPs]." *Id.*

CERCLA's expansive liability scheme allows EPA to compel PRPs to conduct and fund cleanups of "Superfund Sites" that EPA determines pose environmental hazards. "The statute imposes strict liability on … [PRPs] for the cleanup costs of an environmental hazard, even if the person did not contribute to the contamination." *Chubb Custom Ins. Co. v. Space Sys.*, 710 F.3d 946, 956-57 (9th Cir. 2012). A party may be held liable simply because it owned or operated a polluting facility, even if the pollution occurred years before their arrival. 42 U.S.C. §9607(a)(1). *See Hercules, Inc. v. EPA*, 938 F.2d 276, 281 (D.C. Cir. 1991)

("CERCLA explicitly supports the imposition of remediation obligations on parties who were not responsible for contamination … on the sole basis that a party is the current owner or operator of a site contaminated by some previous owner or operator.").

Moreover, because CERCLA liability is joint and several, "a responsible party may be held liable for the entire cost of cleanup even where other parties contributed to the contamination." *Chubb*, 710 F.3d at 957 (quoting *Cal. Dep't of Toxic Substances Control v. Hearthside Residential Corp.*, 613 F.3d 910, 912 (9th Cir. 2010)). This is critical, because it exposes anyone EPA identifies as a PRP to potentially crushing liability, creating a zero sum game among PRPs with powerful incentives to settle early with EPA and seek to establish the responsibility of other parties to reduce one's own exposure.

B. EPA 104(e) Requests Demand Information That Supports Targeted PRPs' Liability and Compels Them to Settle Promptly to Avoid Mounting Exposure

Generally speaking, the CERCLA process unfolds as follows: First, EPA identifies a location as a Superfund Site requiring remedial action based on evidence that a "hazardous substance [has been] released or there is a substantial threat of such a release into the environment." 42 U.S.C §9604(a)(1). Second, EPA begins to identify PRPs it can hold responsible for conducting or funding the necessary investigations and remedial action, focusing on any "vessel, facility,

establishment, place, property, or location which is adjacent" to the Superfund Site. 42 U.S.C. §9604(e)(1).

EPA's investigation of PRPs often begins with information requests under 42 U.S.C. §9604(e) – also titled CERCLA §104(e) – via a "104(e) request." 104(e) requests are used to ascertain the scope of the recipient's responsibility and ability to pay for remediation, identify additional PRPs and, where necessary, obtain further evidence supporting formal designation of the recipient as a PRP. As EPA's guidance on "Use and Enforcement of CERCLA Information Requests and Administrative Subpoenas" explains:

> Initial attempts to gather information about a given site commonly will be through the use of information requests issued under CERCLA §104(e). While an information request may be sent in advance of a general notice letter, as a component of the general notice letter, or after the general notice letter, as needed, an effort should be made to issue initial information requests earlier rather than later in the PRP search process to aid in the process of establishing liability and clarifying the universe of PRPs.

http://www2.epa.gov/sites/production/files/documents/cerc-infreq-mem.pdf at 11.

As the guidance makes clear, these requests are hardly benign "means by which EPA can gather information,"[7] simply to "determine whether or not a PRP

[7]USF&G Br. at 4.

notice should be sent."[8] Rather, EPA uses 104(e) requests "to aid in the process of establishing liability." *Id.*

Even when EPA issues a 104(e) request "in advance of a general notice letter," EPA already views the recipient as a PRP. Indeed, EPA's guidance refers to 104(e) recipients as PRPs, and directs EPA to obtain information tying them to the site and determining the extent of their liability:

> Initial information requests typically should seek the following types of information:
>
> - Relationship ***of the PRP*** to the site;
>
> - Business records relating to the site, including, but not limited to, manifests, invoices, and record books;
>
> - Any data or reports regarding environmental monitoring or environmental investigations at the site;
>
> - Descriptions and quantities of hazardous substances transported to, or stored, treated or disposed at the site;
>
> * * *
>
> - [I]nformation relating to ability to pay for or perform a cleanup.

Id. at 11-12 (emphasis added). Likewise, EPA's "Notice Letter Guidance" instructs that "[t]he information request should indicate that it is ***the PRP's responsibility*** to inform EPA whether information they provide to EPA is confidential[.]" http://www2.epa.gov/sites/production/files/documents/tran-notlet-mem.pdf at 9 (emphasis added). This is why *Anderson* properly held that a 104(e)

[8]Liberty Mutual Br. at 3.

request "triggered the [insurer's] duty to defend" because it "put [the insured] on notice of the EPA's belief that [the insured] was responsible for the release or disposal of hazardous substances at the Site[.]" 729 F.3d at 936.

The recipient of a 104(e) request does not have the realistic option of ignoring it. "The government possesses powerful pre-litigation discovery resources, backed by the threat of crippling statutory penalties and court imposed civil contempt," and "[EPA] has honed its broad information-seeking authority under Section 104(e) of [CERCLA] into what looks like an ordinary litigation interrogatory." Daniel Riesel, *Environmental Enforcement: Civil and Criminal* §2.01, at p.2-2 (1997 & 2012 Supp.). "This is a formidable, persuasive device, as the respondent is precluded from testing the validity of the request until the government actually seeks to enforce." *Id.* §2:02, at p.2-5. Not only can EPA seek $32,500 in fines *per day* of non-compliance, *see Anderson*, 729 F.3d at 934, but a well-crafted response to the 104(e) request is often a PRP's best opportunity to persuade EPA and other PRPs who could make contribution claims against it that its liability should be minimal or non-existent.

Indeed, "[t]he ability of an investigation target to resist ultimate enforcement often depends on the responses and reactions to the investigating agency's administrative interrogatories," Riesel §1.05, at p.1-25, and "a careless or inartful answer can come back to haunt the recipient in subsequent administrative or

judicial proceedings." *Id.* §2.01, at p.2-2. A response to a 104(e) request therefore includes an important and indispensable component of legal advocacy, requiring thoughtful participation of counsel experienced in defending environmental claims. It must provide complete and legally appropriate answers that protect the insured's interests and draw EPA's attention to facts that may eliminate or reduce liability.

At the third step of the CERCLA process, EPA issues PRP letters when "there is sufficient evidence to make a preliminary determination of [PRPs'] potential liability under §107 of CERCLA." EPA "Notice Letter Guidance," http://www2.epa.gov/sites/production/files/documents/tran-notlet-mem.pdf at 8.[9] "The enforcement battle is often over before the shooting starts," Riesel §1.05, at p.1-25, as a PRP has no recourse for challenging EPA's determination in court except by refusing to settle or to comply with EPA's orders, and then defending against EPA's inevitable civil action "to recover response costs or damages" under 42 U.S.C. §9607. *See* 42 U.S.C. §9613(h); *Fairchild Semiconductor Corp. v. EPA*, 984 F.2d 283, 286-87 (9th Cir. 1993).

Even then, both the scope of judicial review and a PRP's defenses are extremely limited. *See* 42 U.S.C. §§9613(j), 9607(b). "Judicial review seldom

[9]"If there is doubt about whether available information supports issuance of the general notice, separate information request letters may be sent to such parties prior to issuing the notice." *Id.* Once again, EPA guidance presupposes a PRP letter will follow the 104(e) request, and makes clear that the purpose of the 104(e) request is to obtain "sufficient evidence" supporting the PRP's liability.

involves plenary litigation, and … agency decisions will not be overturned unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to statute." Riesel §1.05A[4], at p.1-40.5. A target that unsuccessfully resists PRP designation may be forced to pay all of EPA's investigation and remediation costs, plus treble damages. 42 U.S.C. §9607(a), (c)(3). As this Court recognized, this exposure, and the low probability of successful defense, effectively compels PRPs to settle with EPA. *Anderson*, 729 F.3d at 929.

In large cases the various stages of the process can overlap, as EPA issues 104(e) requests and PRP letters on a rolling basis due to the sheer number of PRPs, the complexity of the site, and the length of the information-gathering process. This is well illustrated by the Portland Harbor Superfund Site, where EPA continues to analyze information many years after inception of the process, while PRPs are simultaneously engaged in a parallel EPA-sponsored allocation process. EPA, like all government agencies, has limited resources and so may not pursue all PRPs at once. It has no need to do so, since there is no statute of limitations or other time limit to issue a PRP letter, even after EPA issues a 104(e) request and receives a response. To the contrary, EPA indefinitely retains authority to impose obligations on a PRP, unless and until it enters into a consent order or decree with the PRP and any obligations under it are fulfilled.

At some point after the first PRP letters are issued, EPA may begin settlement discussions with those PRPs, and may seek to have specific PRPs perform the remedial investigation/feasibility study and the remedies ultimately selected. Those PRPs, in turn, are encouraged to identify additional PRPs.[10] The PRPs' goal is to limit their own individual liability as much as possible either through direct negotiations with EPA or, as is likely to be the case at Portland Harbor, in an EPA-authorized allocation process. PRPs that settle with EPA are accorded protection from contribution actions by PRPs who have not settled – but settling PRPs *can* seek contribution from non-settling PRPs. 42 U.S.C. §9613(f). The fact that such contribution claims, which historically would be asserted in a civil action, may be resolved within the CERCLA process reinforces how the CERCLA process itself operates as a suit, and that a 104(e) request is one of the documents that may mark its commencement.

The CERCLA process gives significant advantages to the PRPs that join in the settlement process earliest because they can develop the administrative record and have greater influence on settlement discussions. PRPs that join the process later, particularly after allocation agreements have been reached among some or all of the earlier PRPs, have much less influence. These later-arriving PRPs may be

[10]This is likely how EPA first identified Ash Grove as a PRP, as Ash Grove received both the 104(e) request and an EPA-approved letter from the "convening" neutral more than seven years after EPA sent its first letters concerning the Portland Harbor Superfund Site. *See* Liberty Mutual Br. at 9-10.

forced to settle under much less favorable terms, because refusing to settle exposes them to contribution claims from settling PRPs and EPA action for cleanup costs that its prior settlements have not covered. As one court explained:

> Early involvement in the settlement discussions is thus often crucial to protect one's interests. Any court action by EPA is limited to the administrative record, and judicial review considers only whether the EPA "decision was arbitrary and capricious or otherwise not in accordance with law." Thus, participation in the development of that record can be crucial. Settlement of EPA claims against potentially responsible parties, with protection against claims for contribution, is a desired goal. The situation was such that the opportunity to protect [the Insured-PRP]'s interests could well have been lost, long before any lawsuit would be brought.

Hazen Paper Co. v. U.S. Fidelity & Guar. Co., 407 Mass. 689, 697 (1995).

C. The District Court Properly Recognized the 104(e) Request's Role in Triggering CERCLA's Enforcement Process and an Insurer's Duty to Defend Through its Completion

As explained above, the first notification of possible CERCLA liability a PRP receives from EPA varies. Sometimes it is a 104(e) request, sometimes a PRP letter, sometimes some other correspondence,[11] and sometimes a combination. Regardless of which letter comes first, its receipt notifies the PRP that it is a target of EPA action and faces a pressing risk of significant liability. These types of letters mark the start of a CERCLA process that is the "functional equivalent" of a

[11]For example, PRPs at Portland Harbor received the EPA-approved letter from the "convening" neutral to join the EPA-supported allocation process.

suit that "inexorably leads to the EPA seeking to hold [the recipient] strictly liable for environmental contamination." *Anderson,* 729 F.3d at 933-34.

Because either document initiates the same CERCLA process against the PRP, there is no reason to treat them differently for insurance purposes. Just as this Court has held that either letter triggers defense coverage under a CGL policy, *id.* at 933, it should confirm that coverage triggered by either letter continues until the CERCLA process concludes. Indeed, Appellants do not dispute that a PRP letter triggers their duty to defend for the duration of the CERCLA process. The same should hold true for a 104(e) request.

Appellants' contention that coverage triggered by receipt of a 104(e) request should extend only until the insured responds is based on an artificial characterization of a 104(e) request as a stand-alone proceeding that ends with an insured's compliance. As discussed above, a 104(e) request is only the initial step in a process that ends with determination of the insured's CERCLA liability, and both 104(e) and PRP letters are "attempt[s] to gain" the same "end by [a] legal process." *Schnitzer Investment Corp. v. Lloyd's of London*, 197 Or.App. 147, 156-57 (Or. App. 2005). *See Anderson*, 729 F.3d at 933 ("The 104(e) letter compelled Anderson to respond to an intrusive questionnaire the answers to which exposed it

to extensive liability,"[12] and the PRP letter "left little doubt that EPA was seeking to obtain Anderson's cooperation through the legal process.").

Similarly, Appellants' argument that a statutory penalty is the only consequence of failing to respond to a 104(e) request is a straw man. Because a 104(e) letter is an integral step in the CERCLA process, the liability ramifications of failing to provide a well-considered response will likely be catastrophic.

Appellants' approach would unfairly inhibit an insured from affirmatively acting to limit its CERCLA exposure, awaiting a PRP letter while its best opportunity to make a record limiting its liability slips away. That approach is neither fair nor reasonable, and collides with the hornbook insurance principle that the duty to defend continues as long as potential liability exists for a potentially covered claim. *Ledford v. Gutoski*, 319 Or. 397, 400 (1994).

To be sure, there are limits to what an insurer must cover, just as in any case. CGL policies typically cover "reasonable and necessary" defense costs. That is precisely the approach the district court took here. The court held on summary judgment that the costs of preparing required responses to the 104(e) request were covered defense costs as a matter of law, but coverage for other costs Ash Grove

[12]USF&G quotes only the first half of this sentence in arguing that this Court "distinguished [the PRP letter's] legal process from the earlier 104(e) Request, which compelled the insured 'to respond to an intrusive questionnaire.'" USF&G Br. at 52. The part USF&G omits defines the "end by any legal process" that the 104(e) request seeks: the same "extensive liability" that a PRP letter seeks.

incurred to protect itself was "a factual issue which requires resolution at trial." Doc. No. 208 at 13. After a lengthy bench trial that included substantial expert testimony regarding the CERCLA process,[13] the district court concluded most of those costs were "reasonable and necessary … to advocate Plaintiff's position for an early exit as a de minimis party," but some were not.[14] Doc. 367 at 18.

The district court performed exactly the type of analysis all courts should follow when considering the scope of an insurer's duty to defend a CERCLA claim. That analysis comported with this Court's later holding in *Anderson* that a 104(e) request triggers defense coverage by beginning the CERCLA process, ensured reasonable and necessary defense costs were covered, and allowed the parties to present evidence where there were reasonably disputed questions of fact regarding the nature of expenses incurred. That approach protects insurers from uncovered costs while allowing insureds to swiftly and proactively do what is reasonable and necessary at the start of the CERCLA process to limit their risk – an endeavor that benefits insureds and insurers alike.

In this case, Ash Grove's evidence – including expert testimony concerning EPA's CERCLA process – confirmed it remained at risk of insured liability, and

[13]*See, e.g.*, Doc. No. 367 at 15-16 (expert Jeffrey Ring "has had experience in CERCLA cases since 1982" and had been responsible for responding to over thirty 104(e) requests).

[14]Amici do not concede that the district court was correct in concluding certain costs Ash Grove incurred were not reasonable and necessary.

that its proactive efforts to explore early resolution with EPA and other PRPs were reasonable and necessary to defend against that risk. This would have been true whenever a 104(e) request triggered the CERCLA process, and it was all the more true here, where EPA was already negotiating with other PRPs, some of whom had previously advised Ash Grove that they would seek contribution from it if Ash Grove was not part of a comprehensive settlement with EPA. *See, e.g.*, Doc. Nos. 116 at 2-3; 367 at 8-9.

Accordingly, the Court should affirm the district court's holding that the legally-mandated response to a 104(e) request and other reasonable and necessary expenses Ash Grove incurred to defend itself against CERCLA liability are covered defense costs under Oregon law, and that coverage continues as long as Ash Grove faces exposure under CERCLA, regardless of when or if EPA issues a PRP letter.

III. OECAA IS CONSTITUTIONAL

Appellants argue that "if the Court concludes that (a) OECAA applies, and (b) its definition of 'suit' includes a 104(e) Request," it violates the Contracts Clause of the U.S. and Oregon Constitutions by "fundamentally – and unconstitutionally – alter[ing] the ... Policies."[15] Appellants are mistaken.

[15]USF&G Br. at 42-43.

First, this argument is foreclosed by this Court's previous decision in *Anderson*. Second, even if *Anderson* were not controlling, OECAA meets all the criteria to be upheld as a constitutional regulation of contracts: it does not impair any contractual relationship because OECAA primarily acts to fill in the gaps where there is no contract language directly on point. For example, here the term "suit" is not defined by the Policies. In any event, even if OECAA were directly contrary to any unambiguous contract language – and it is not – any adjustment of contractual obligations would neither be substantial nor unreasonable in light of the significant and legitimate public purposes served.

A. Legislative Background

In the late 1990s, Oregon's legislature recognized a serious problem facing the State: environmental cleanups ordered by regulatory authorities were being delayed significantly because of coverage disputes between PRPs and their insurers. The legislative purpose set forth in OECAA underscores the public interest in addressing this problem:

> **Legislative findings.** The Legislative Assembly finds there are many insurance coverage disputes involving insureds who face potential liability for their ownership of or roles at polluted sites in this state. The State of Oregon has a substantial public interest in promoting fair and efficient resolution of environmental claims[.]

ORS §465.478.

A recurring issue in these disputes was the scope of the *undefined* term "suit" in standard CGL policies. Because the policy forms were written long before CERCLA, insurers never contemplated or addressed whether they would cover the CERCLA process, as no process like it then existed. The term "suit" was therefore ambiguous as applied to CERCLA, and insurers litigated its application every time a policyholder sought coverage for an environmental claim. This, in turn, caused major delays in cleaning Oregon's hazardous waste sites while coverage issues in each case were litigated.[16]

In 1994, the Oregon Court of Appeals resolved the ambiguity caused by the insurance industry's failure to define "suit" in standard form policies when it "held that an administrative agency's enforcement of environmental laws under which the insured was going to have to pay constituted a 'suit' for purposes of an insurance policy." *Schnitzer Investment Corp.*, 197 Or.App at 156 (discussing *St. Paul. Fire v. McCormick & Baxter Creosoting*, 126 Or.App. 689, 700-01 (Or. App. 1994)). But insurance companies nevertheless continued denying coverage for environmental claims and attempting to litigate the applicability of that decision to different variations of CGL policies and different agency actions.

Oregon's legislature recognized the need to reduce this lengthy and recurring litigation to meet the State's significant interest in expediting remediation

[16]The State of Oregon briefed these problems in detail, with supporting evidence, in the district court. *See* Doc. No. 101 and exhibits thereto.

of hazardous waste sites. The legislature therefore "codified [the] same construction of the term ['suit']" Oregon courts had routinely used when addressing ambiguous policies. *Certain Underwriters at Lloyd's London v. Massachusetts Bonding & Ins. Co.*, 239 Or.App. 99, 121 n.13 (Or. App. 2010) (describing ORS §465.480(2)(b)).

Although this codification leads to the same result as Oregon common law, it was intended to discourage protracted litigation over established issues and allow courts to expedite otherwise lengthy proceedings without the need to repeatedly consider prolonged structural and contextual arguments where the parties did not expressly agree on an interpretation. Instead, if the term "suit" is defined by the policy, Oregon courts apply the unambiguous intent of the parties. ORS §465.480(7). If not, the statutory construction applies, and lengthy litigation over the term's meaning is avoided. *Id.* at §§465.480(1)(a), (2)(b). *See Anderson*, 729 F.3d at 934 ("Having concluded that Anderson and St. Paul did not express an intent contrary to the OECAA definition, we now apply the OECAA definition to that term.").[17] This serves the State's interest in expediting coverage litigation and, in turn, resolution and remediation of the underlying environmental claims.

[17]Appellants expend considerable ingenuity arguing that ORS §465.480(7) – OECAA's "escape clause" – permits them to deploy the same structural and textual arguments available before OECAA was enacted. *See* Liberty Mutual Br. at 40-42; USF&G Br. at 34-38. *Anderson* forecloses this argument, and it strains

B. The Court Need Not Reach the Constitutional Issue Because OECAA Does Not Alter Existing Contractual Rights in Any Way Relevant to this Action

It is black letter law that a Court should not reach unnecessary constitutional questions. *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). Because the Policies do not define "suit," OECAA does not alter contractual rights in any way. The contracts are silent on the dispositive question, and the legislature merely filled the gap in the same manner it has in myriad other ways. For example, the Uniform Commercial Code provides many gap-filling provisions when a contract is silent on terms.[18] OECAA does precisely the same thing, which raises no constitutional issue whatsoever.

C. OECAA Comports With The Contracts Clause of the U.S. and Oregon Constitutions

Even if it were necessary to reach the constitutional issues, both the U.S. and Oregon Constitutions contain Contract Clauses providing that the State may not "impair the [o]bligation of [c]ontracts." U.S. Const., Art. I, sec. 10; Oregon Const., Art. I, sec. 21. Neither prohibition is absolute. *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977); *Kilpatrick v. Snow Mountain Pine Co.*, 105 Or.App.

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credulity to suggest this clause was intended to revive the *status quo ante* in light of the statutory purpose to simplify and accelerate proceedings.

[18]*See, e.g.*, U.C.C. §§ 2-307 (unspecified delivery to be in single lot), 2-308 (unspecified place of delivery to be seller's place of business), 2-310 (supplying time of payment when unspecified).

240, 243 (Or. App. 1991). Courts employ a three-level analysis to determine if a law offends the Contracts Clause, determining *first*, whether it substantially impairs the contractual relationship; *second*, if so, whether the impairment is justified by significant and legitimate public purposes; and *third*, whether the adjustment of rights and responsibilities is based on reasonable conditions and of appropriate character to the purposes justifying the regulation. *Energy Reserves Group, Inc. v. Kansas City Power & Light Co.*, 459 U.S. 400, 411 (1983).[19]

Appellant's constitutional challenge is foreclosed at the first step of this analysis, because this Court already held in *Anderson* that "[Appellant]'s rights under the Policies are not diminished by resort to OECAA's definition of 'suit,'" since that definition necessarily leads to the same result as Oregon common law. 729 F.3d at 936. Appellants themselves acknowledge that *Anderson* "rejected the constitutional challenge," yet argue "the Court's ambiguity analysis is incorrect." But the panel may not revisit decided precedents. *Parker*, 651 F.3d at 1184.

Even if *Anderson* were not dispositive, Appellants *admit* OECAA leads to the same result as common law would in its absence,[20] defeating any notion that it

[19]Analysis under Oregon's contracts clause is effectively identical to the federal analysis. *Wilkinson v. Carpenter*, 277 Or. 557, 562 (1977).

[20]Liberty Mutual Br. at 33 ("The *Mass. Bonding* court described the OECAA as having codified the 'same construction of the term suit as the Oregon courts had reached in previous cases.' ***The court is right*** – there is nothing in the statutory language that compels a different result than the case law.") (emphasis added).

impairs their rights. Further, because OECAA applies only when the policy does not supply a clearly intended definition of "suit" – and its rules of construction explicitly "***do not*** apply if the application of the rule results in an interpretation contrary to the intent of the parties," ORS §465.480(7) (emphasis added) – OECAA does not impair Appellants' rights.[21] Indeed, Appellants offered no evidence at trial of any mutual intent at the time of contracting concerning the definition of "suit." *See Fry v. D. H. Overmyer Co*., 269 Or. 281, 297-98 (1974) (evidence of contracting party's unilateral intention was properly excluded and irrelevant to determining contracting parties' mutual intent).

Even assuming OECAA somehow impaired Appellants' rights, any impairment would not be "substantial," particularly given how extensively the insurance industry "has been regulated in the past." *Energy Reserves*, 459 U.S. at 411. Oregon insurers have long been regulated by a comprehensive insurance code aimed at providing "a uniform and complete system of regulation and supervision of the insurance business." *Lovejoy v. City of Portland*, 95 Or. 459, 457 (1920). Appellants therefore had every reason to anticipate further regulatory supervision, especially of undefined policy terms. *See Campanelli v. Allstate Life Ins. Co.*, 322

[21]The fact that OECAA cannot defeat the parties' mutual intent renders a nullity Appellants' argument that it would be unconstitutional "[i]f this Court were to … find that the statute requires a broader definition of suit ***than that intended*** under the [Policies][.]" Liberty Mutual Br. at 37 (emphasis added).

F.3d 1086, 1098-99 (9th Cir. 2003) (holding legislation reviving time-barred insurance claims constitutional in light of extensive regulation of insurance).

Finally, even if, hypothetically, any impairment of contractual rights were substantial, it would be constitutional because "OECAA has a significant and legitimate public purpose in protecting the citizens of Oregon from serious environmental contamination . . . ." *Century Indemnity*, 848 F.Supp. at 1261. OECAA serves this purpose by codifying a presumptive meaning for an ambiguous policy term to discourage unnecessary litigation and expedite resolution consistent with existing case law. That definition is reasonable, fair, consistent with common law, and provides certainty to insureds and insurers alike while facilitating Oregon's compelling interest in prompt environmental remediation.

Because the presumptive interpretation is consistent with common law and expressly provides an exception where the parties intended a contrary meaning, the statutory adjustment of rights is "based upon reasonable conditions and of appropriate character to the public purpose justifying the regulation." *Energy Reserves*, 459 U.S. at 411-12. Because OECAA provides a facially reasonable method for achieving Oregon's significant state interest, the Court must "properly defer to legislative judgment." *Id.* at 413.

CONCLUSION

For the foregoing reasons, Amici urge the Court to affirm the district court's holdings that: a 104(e) request triggers a "suit" under the CERCLA process that Appellants have a duty to defend; the duty extends until the CERCLA process concludes or EPA otherwise grants Appellant binding relief from liability related to the Portland Harbor Superfund Site, and; OECAA is constitutional.

Dated: September 12, 2014 Respectfully submitted,

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STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Amici state that they are not aware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 29-2, the foregoing amicus brief is proportionately spaced, has a typeface of 14 points or more and contains 6,972 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing BRIEF OF AMICUS CURIAE UNITED POLICY HOLDERS, THE MARINE GROUP, LLC, MMGL CORP., AND SCHNITZER STEEL INDUSTRIES, INC. IN SUPPORT OF APPELLEE AND CROSS-APPELLANT ASH GROVE CEMENT CO., with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2014.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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