NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ASH GROVE CEMENT COMPANY, a Delaware corporation, Plaintiff - Appellee, STATE OF OREGON, Intervenor, v. LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts insurance company, Defendant - Appellant.	No. 13-35900 D.C. No. 3:09-cv-00239-HZ MEMORANDUM*

ASH GROVE CEMENT COMPANY, a Delaware corporation, Plaintiff - Appellee, STATE OF OREGON, Intervenor, v.	No. 13-35905 D.C. No. 3:09-cv-00239-HZ

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland insurance company,

Defendant - Appellant.

ASH GROVE CEMENT COMPANY, a Delaware corporation,

Plaintiff - Appellant,

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Massachusetts insurance company; UNITED STATES FIDELITY & GUARANTY COMPANY, a Maryland insurance company,

Defendants - Appellees.

No. 14-35298

D.C. No. 3:09-cv-00239-HZ

Appeal from the United States District Court
for the District of Oregon
Marco A. Hernandez, District Judge, Presiding

Argued and Submitted May 2, 2016
Portland, Oregon

Before: GOODWIN, TALLMAN, and HURWITZ, Circuit Judges.

Liberty Mutual Insurance Company ("Liberty") and United States Fidelity and Guaranty Company ("USF&G") appeal a declaratory judgment, entered after a bench trial, holding that they have a duty under Oregon law to defend Ash Grove Cement Company. Ash Grove cross-appeals the denial of a portion of its

attorneys' fee request. We have jurisdiction under 28 U.S.C. § 1291, and affirm.

Ash Grove operates two cement plants on the east shore of the Willamette River within the Portland Harbor Superfund Site (the "Site"). *See* 65 Fed. Reg. 75179-01(III)(A) (Dec. 1, 2000) (listing Portland Harbor on the National Priorities List). In January 2008, Ash Grove received an information request from the U.S. Environmental Protection Agency ("EPA") pursuant to section 104(e) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9604(e), regarding contamination at the Site (the "104(e) letter"). On January 29, 2008, Ash Grove forwarded the 104(e) letter to Liberty and USF&G (the "Insurers").

In January 2009, Ash Grove filed a complaint in Oregon state court seeking a declaratory judgment that the Insurers and Hartford Accident and Indemnity Company ("Hartford") had a duty to defend and indemnify Ash Grove for certain expenses it incurred related to the 104(e) letter, damages for breach of contract, and attorneys' fees. The defendants subsequently removed the case to the District of Oregon.[1]

1. In July 2010, Ash Grove settled its claims against Hartford. The district court properly rejected the Insurers' argument that "the injuries for which damages were sought in the two actions" were "identical," because the settlement

[1] The duty to indemnify claim has been stayed.

broadly settled all potential claims between the parties, not just those related to the Site. *See Maduff Mortg. Corp. v. Deloitte Haskins & Sells*, 779 P.2d 1083, 1090 (Or. Ct. App. 1989).

2. The Insurers argue that the 104(e) letter is not a "suit" under Oregon law.[2] But, we have previously held that a 104(e) letter is a "coercive information demand[]" that is "an attempt to gain an end through legal process," and is therefore a "suit" under Oregon law. *Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923, 932-33, 935 (9th Cir. 2013).

3. We have also rejected the Insurers' argument that the intent of the parties could not have been to treat a 104(e) letter as a "suit," because the policies distinguish between a "claim" and a "suit." *Id.* at 933-34. Likewise, we have addressed and rejected the Insurers' contention that a 104(e) letter cannot constitute a "suit" because it does not require that an "insured take action with respect to contamination within the State of Oregon" under Oregon Revised Statute § 465.480(2)(b). *Id.* at 934-35.

4. The Insurers argue that the 104(e) letter contains no allegations of "property damage" which could impose liability on Ash Grove sufficient to trigger

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[2] All policies at issue require the Insurers to defend any "suit" against Ash Grove.

the duty to defend.[3] This position was also specifically rejected in *Anderson Bros.*, 729 F.3d at 936-37.

5. *Anderson Bros.* also disposes of the Insurers' argument that requiring an insurer to defend a 104(e) letter would violate the Oregon Constitution and the United States Constitution by retroactively and materially expanding the scope of the defense obligation. *Id.* at 936.

6. The Insurers maintain that, even if the 104(e) letter constitutes a suit, their duty to defend ceased after Ash Grove submitted its response to the letter. But Oregon law provides that the duty "continue[s] as to each unit [of property] until the Record of Decision for that unit [i]s filed." *Schnitzer Inv. Corp. v. Certain Underwriters at Lloyd's of London*, 104 P.3d 1162, 1169 (Or. Ct. App. 2005), *aff'd*, 137 P.3d 1282 (Or. 2006). Aside from their argument that the duty to defend ended when the response to the section 104(e) letter was submitted, the Insurers do not contend that the district court erred in requiring them to establish that the expenses Ash Grove incurred were "in fact unreasonable or unnecessary" as defense costs. *See Aerojet-General Corp. v. Transp. Indem. Co.*, 948 P.2d 909,

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[3] The Liberty policies from 1963 to 1966 cover "damages because of injury to or destruction of property, including the loss of use thereof, caused by accident," while policies from 1967 to 1970 cover "property damage to which this policy applies, caused by an occurrence." The USF&G policies all state that USF&G "will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of . . . property damage to which this insurance applies, caused by an occurrence. . . ."

924 (Cal. 1997).

7. The Insurers also posit that, if the 104(e) letter constitutes a suit, the district court erred in holding that Oregon law does not require a formal tender of a claim before the duty begins. The district court correctly, however, cited a decision of the Oregon Court of Appeals, *see Or. Ins. Guar. Ass'n v. Thompson*, 760 P.2d 890, 893 (Or. Ct. App. 1988), suggesting that the duty is triggered by notice of the claim, and the Insurers have provided no citation to any contrary Oregon authority.

8. Ash Grove challenges the district court's award of attorneys' fees under Oregon Revised Statutes § 742.061(1), which provides for "a reasonable amount" of fees in any action in which an insured's "recovery exceeds the amount of any tender made by the defendant." We find no abuse of discretion in the district court's award. *See Med. Protective Co. v. Pang*, 740 F.3d 1279, 1282 (9th Cir. 2013) (stating standard of review).

a. After finding counsel's handling of the case "average," the court did not abuse its discretion in granting fees at the average rates in the Oregon State Bar Survey, the "initial benchmark" adopted as a policy matter by the District of Oregon.

b. The district court did not exceed its "authority to make across-the-board cuts," when it provided "a concise but clear explanation of its

reasons," *Gates v. Deukmejian*, 987 F.2d 1392, 1399-1400 (9th Cir. 1993) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983)). The court identified and explained in a 38-page opinion why substantial reductions were warranted in a record establishing excessive and duplicative billing, and "replete" with "needless peer review, particularly between experienced outside and local counsel," that "unnecessarily increased the cost of litigation."

c. Contrary to Ash Grove's arguments, in declining to award fees for certain document review, the district court did not find that it was unreasonable to expend 278 hours reviewing 7,872 documents. Rather, the court properly ruled that the absence of detailed time entries prevented it from determining whether "the amount of time billed is reasonable for the described task."

d. Because Ash Grove did not submit evidence from which the district court could have determined attorney DRS's billing rate, the court did not err in refusing to award any fees for his time. *See Strawn v. Famers Ins. Co. of Or.*, 297 P.3d 439, 449 (Or. 2013) ("Strawn, as the party seeking an award of fees, has the burden of establishing the reasonableness of the fee amount that he requests.").

AFFIRMED.[4]

[4] The Insurers' Motion to Certify Questions to the Oregon Supreme Court, **ECF No. 26**, is **DENIED.**

United States Court of Appeals for the Ninth Circuit

Office of the Clerk
95 Seventh Street
San Francisco, CA 94103

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate ECF system or, if you are a pro se litigant or an attorney with an exemption from using appellate ECF, file one original motion on paper.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)
Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to -3)

(1) A. Purpose (Panel Rehearing):

- A party should seek panel rehearing only if one or more of the following grounds exist:
  - ► A material point of fact or law was overlooked in the decision;
  - ► A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
  - ► An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Purpose (Rehearing En Banc)

- A party should seek en banc rehearing only if one or more of the following grounds exist:

- ► Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
- ► The proceeding involves a question of exceptional importance; or
- ► The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing may be filed within 14 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(a)(1).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms.*
- You may file a petition electronically via the appellate ECF system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms.*

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-7806.

Petition for a Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
  - ► Thomson Reuters; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Jean Green, Senior Publications Coordinator);
  - ► and electronically file a copy of the letter via the appellate ECF system by using "File Correspondence to Court," or if you are an attorney exempted from using the appellate ECF system, mail the Court one copy of the letter.

Form 10. Bill of Costs ..... ***(Rev. 12-1-09)***

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

This form is available as a fillable version at:
http://cdn.ca9.uscourts.gov/datastore/uploads/forms/Form%2010%20-%20Bill%20of%20Costs.pdf.

Note: If you wish to file a bill of costs, it MUST be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with 9th Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and 9th Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____ 9th Cir. No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, 9th Cir. R. 39-1	**REQUESTED** *(Each Column Must Be Completed)*				**ALLOWED** *(To Be Completed by the Clerk)*			
	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page*	TOTAL COST
Excerpt of Record			$	$			$	$
Opening Brief			$	$			$	$
Answering Brief			$	$			$	$
Reply Brief			$	$			$	$
Other**			$	$			$	$
			TOTAL:	$			**TOTAL:**	$

* *Costs per page*: May not exceed .10 or actual cost, whichever is less. 9th Circuit Rule 39-1.

** *Other*: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to 9th Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys' fees **cannot** be requested on this form.

Continue to next page

Form 10. Bill of Costs - *Continued*

I, _____ , swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature _____

("s/" plus attorney's name if submitted electronically)

Date _____

Name of Counsel: _____

Attorney for: _____

(To Be Completed by the Clerk)

Date _____ Costs are taxed in the amount of $ _____

Clerk of Court

By: _____ , Deputy Clerk