

Oregon High Court: Gradual Pollution Covered Under CGL Insurance Policies



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In a landmark decision, the Oregon Supreme Court recently reversed years of pro-insurance company rulings on the existence of insurance coverage for pollution in Oregon, and confirmed the availability of liability insurance coverage for gradual pollution. The Court ruled that the “qualified pollution exclusion” contained in most general liability insurance policies from 1970 to 1986 is ambiguous so that liabilities arising out of unexpected and unintended pollution are covered under the exclusion’s exception for “sudden and accidental” pollution.

In an unanimous opinion written by Justice Graber, the Oregon Supreme Court reversed the 1994 Oregon Court of Appeals ruling in *St. Paul Fire Ins. Co. v. McCormick & Baxter Creosoting Co.*, which had affirmed the trial court’s summary judgment ruling in favor of the insurance companies. Because the Oregon Supreme Court found the qualified pollution exclusion to be ambiguous, the Court construed it in favor of providing coverage.

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Oregon Joins the Ranks

Oregon joins the ranks of the growing number of state supreme courts finding coverage for pollution related costs, including costs for remediating gradual pollution, despite the existence of the controversial exclusion. Oregon is the tenth state to have its highest court interpret the exclusion in favor of policyholders; nine states’ supreme courts have ruled in favor of insurance companies.

This decision strikes a heavy blow upon the insurance industry, which watched this case closely and filed extensive *amicus curiae* briefs in

addition to the six other insurance company defendants’ briefs. Along with the Court’s pro-policyholder ruling on the qualified pollution exclusion, the Court also ruled in favor of policyholders on several other issues, including:

- The “trigger” issue where the Court ruled that more than one insurance policy may cover damages arising out of a single pollution incident as long as the damage existed during the subsequent policy periods; and
- On the “caused by accident” language of general liability insurance policies where the Court ruled that pollution arising out of long term general business practices still may be deemed “accidental” in order to trigger coverage.

Qualified Pollution Exclusion

The Oregon Supreme Court reversed the lower courts’ rulings that the qualified pollution exclusion precludes insurance coverage for all liabilities arising out of gradual pollution. The Court ruled that the exclusion is ambiguous because it is subject to more than one reasonable interpretation. It found that policyholders’ interpretations of the exclusion are reasonable and thus, the exclusion must be construed against its drafters, the insurance companies, and in favor of providing insurance coverage.

In determining that the exclusion was ambiguous, the Court relied on several significant facts. First, the Court found that the “sudden and accidental” term used in the exclusion historically was used by the insurance industry in Business Interruption and Boiler and Machinery insurance policies prior to its use in the qualified pollution exclusion. Because “sudden and accidental” had been regularly interpreted by courts to mean “unexpected and unin-

tended,” with no temporal limitation, the insurance industry knew or should have known that such interpretation would be applied to “sudden and accidental” as used in the exclusion.

Second, the Court acknowledged that dictionaries and other reference materials often define the word “sudden” to mean “unexpected” and not merely abrupt. Third, the drafting history evidence regarding the exclusion, at a minimum, supports the argument that the exclusion reasonably could be interpreted to exclude only “expected and intended” pollution. Lastly, the number of courts that have held in favor of the policyholder when called on to interpret the meaning of the exclusion indicates that the interpretation advocated by policyholders is reasonable.

Caused by Accident

In ruling in favor of the policyholder on the “caused by accident” language contained in most CGL insurance policies, the Court reversed the lower courts’ rulings that pollution arising out of routine business practices could not be, as a matter of law, “caused by accident.” The lower courts’ rulings effectively eliminated insurance coverage for all pollution liabilities unless caused by a distinct and abrupt spill or leak. In reversing the lower courts, the Oregon Supreme Court held that the relevant inquiry is whether the pollution damage was “expected or intended.” Thus, policyholders’ liabilities arising out of years of harmful waste disposal practices are covered as long as the resulting property damage was neither expected or intended.

Triggering Insurance Coverage

The Oregon Supreme Court also rejected the insurance companies’ assertion that only one insurance policy could be triggered for each pollution claim. In a ruling that will have substantial precedential effect on insurance coverage cases beyond the environmental liability context, the Court ruled that, as long as the damage or injury existed during the insurance policy period, the applicable insurance coverage is “triggered.” Thus, insurance coverage under more than one policy can be used to pay the costs associated with the same pollution liability. This ruling is especially significant when the amount of damages exceeds more than one insurance policy’s limits.

Conclusion

This decision completely changes the playing field for policyholders facing environmental liabilities in Oregon. Insurance companies have repeatedly denied insurance coverage to Oregon policyholders facing costs associated with environmental clean-ups because of the qualified pollution exclusion and the “caused by accident” language in insurance policies. These policyholders—many of whom face costly litigation battles and millions of dollars of environmental liabilities—should now be able to receive the insurance coverage to which they are entitled for environmental litigation and clean-up costs.

Resolution of these critical insurance coverage issues by Oregon’s highest court will provide unequivocal guidance to the Oregon courts handling dozens of pending environmental insurance coverage cases, as well as guidance with regard to the many insurance coverage claims that have not yet reached the point where litigation is necessary.

This decision is also nationally significant. There are thousands of environmental insurance coverage cases pending in the United States. Many states’ higher courts have yet to resolve these issues. The split in authority regarding the proper interpretation of the qualified pollution exclusion supported the Court’s conclusion that the exclusion may be subject to more than one reasonable interpretation. This well-reasoned and unanimous decision from the most recent state supreme court addressing the proper interpretation of the exclusion should influence the remaining courts to make a similar decision when they inevitably face the same issue. ■

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