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High Court's Chubb Snub Shifts Insurer Approach To Cleanups

By **Bibeka Shrestha**

Law360, New York (January 16, 2014, 4:41 PM ET) -- After the U.S. Supreme Court on Monday refused to scrutinize the Ninth Circuit's decision blocking Chubb Insurance Co. from recouping Superfund costs, attorneys say insurers will put more pressure on policyholders to agree to beefed-up cooperation requirements, while continuing to push the issue in other circuits.

Chubb this week hit the end of the road on its attempt to use Section 107 of the Comprehensive Environmental Response, Compensation and Liability Act to recoup the $2.4 million it chipped in on behalf of its policyholder for a cleanup in Palo Alto, Calif. The insurer claimed in its subrogation lawsuit that Ford Motor Co. and others should reimburse it for that payment because they were responsible for pollution at the site.

The Ninth Circuit ruled that insurers seeking to bring subrogation claims cannot proceed under Section 107 and must instead pursue reimbursement under CERCLA's Section 112, which requires policyholders to first make a claim against other potentially responsible polluters before their insurers can bring subrogation claims, according to the March 15 decision. Chubb's Section 112 claim under the federal Superfund law failed before the Ninth Circuit because its policyholder had not done precisely that.

Steve Raptis, a partner at Manatt Phelps & Phillips LLP, said the decision changed the world for insurers that were previously confident that the broad subrogation provisions in their policies and the subrogation sections under CERCLA would clear the way for recoupment from other potentially responsible parties.

“They thought they had their bases covered,” Raptis said. “I don't think they were expecting this decision.”

Insurers have a strong interest in preserving their right to recoup Superfund payments because pollution cleanups can often lead to hefty bills. With the Ninth Circuit's ruling against Chubb intact, insurance companies will now be focusing on recouping payments for cleanup through the law's Section 112, potentially through changes in their policy language, attorneys say.

Mindy DeYoung, a principal at Riddell Williams PS who focuses on environmental litigation, said insurance carriers may require more policyholder cooperation in making claims against other potentially responsible parties in the wake of the Chubb decision.

“Whether it's written directly into the policy itself or whether it's a process that's being done as the

insurance claim is being handled waits to be seen," DeYoung said.

Laura Foggan, a partner at Wiley Rein LLP, said many insurance policies have clauses requiring policyholders to take steps to protect the insurer's subrogation rights, and carriers will be relying on those terms more often.

"There may be more requirements for policyholders to act to protect insurers' rights," Foggan said.

While standard clauses require policyholders to cooperate with their insurers after submitting a claim, current policy language likely won't spur policyholders to pursue claims against other potentially responsible parties, or PRPs, at their own expense, according to Raptis. Policyholders should, therefore, be on the lookout for new provisions that insurers try to introduce, he said.

"If the policyholder is inclined to [bring claims against other PRPs] — whether as a result of the insurer saying pretty please or as a result of a specific provision the insurer puts in the policy — the [policyholder's] biggest concern is just making sure the insurer is prepared to pay the costs of pursuing those claims." Raptis said.

Concerns have been voiced that cleanups could be delayed as insurers press policyholders to make claims against other PRPs but, there are some checks in place. States require insurers to promptly handle claims for coverage, and companies face stiff pressure under federal and state environmental laws to undertake cleanups or else face severe penalties for delay.

Insurers that pursue subrogation lawsuits in the future will have to tell courts explicitly that their policyholders have made claims against the Superfund or against other PRPs to avoid seeing their complaints thrown out, DeYoung said. There's a chance that carriers could raise premiums on policyholders to absorb the risk of potentially not being able to recoup their payouts following the Chubb decision, she said.

Peter Halprin, an Anderson Kill PC attorney who filed an amicus brief in the Ninth Circuit for United Policyholders, also said that carriers will try to get involved in the cleanup process earlier or push policyholders to satisfy the new requirements set out in the Ninth Circuit ruling. But he was skeptical that the decision would stunt growth in the environmental insurance market, where carriers are increasingly taking on "new and exotic risks," he said.

"Any claim on their side that this will radically alter things or inhibit that growth is overstated," Halprin said.

While insurers pursuing subrogation suits in the Ninth Circuit will have to meet the requirements of CERCLA Section 112 for the time being, that may not be the case in other jurisdictions, Foggan pointed out.

"The question posed about the interpretation of CERCLA Section 107 was one of first impression," Foggan told Law360. "Insurers may well continue to pursue all theories for recovery, including possible Section 107 claims, in other circuits, where the case law remains undeveloped."

And if a circuit split develops, the question may bounce right back to the U.S. Supreme Court.

Chubb was represented by Michael Nardi of Seltzer Caplan McMahon Vitek LC and Kirk Chamberlin

of Chamberlin Keaster & Brockman LLP.

The defendants were represented by Latham & Watkins LLP, Rogers Joseph O'Donnell PC and Bryan Cave LLP, among others.

The case is Chubb Custom Insurance Co. v. Space Systems/Loral Inc. et al., case number 13-412, in the Supreme Court of the United States.

--Editing by Elizabeth Bowen and Christine Chun.
