

Insurers See Ways Around Chubb's Superfund Loss In 9th Circ.

By Bibeka Shrestha

Law360, New York (March 18, 2013, 8:49 PM ET) -- With its recent ruling against Chubb Insurance Co., the Ninth Circuit eliminated a shortcut under the federal Superfund law that allowed insurers to win back money spent on environmental cleanup, but carriers itching to cut their losses still have several options at their fingertips, attorneys say.

Friday's 2-1 decision stops insurers from launching subrogation lawsuits under Section 107 of the Comprehensive Environmental Response Compensation and Liability Act to offset their payments on pollution claims. Insurance companies that bring subrogation suits step into the shoes of their policyholders and go after the parties that caused the damages the insurers were forced to cover.

The Ninth Circuit majority ruled that carriers should bring these types of suits under state laws or under CERCLA's Section 112(c) — which brings with it tougher standards, including the requirement that policyholders first make a claim against other potentially responsible polluters before insurers can target them in subrogation suits.

For John Nevius, an Anderson Kill & Olick PC shareholder, the decision means insurers will have to work with their policyholders before they launch subrogation suits against other potential polluters.

"That's good public policy," said Nevius, who filed an amicus brief for United Policyholders in the case. "If they cooperate with their policyholder, then they should be able to recoup these costs, if the policyholders are legitimately entitled to some compensation."

In reaction to the ruling, insurers would be free to slap conditions on to their policies to facilitate subrogation. And policyholders may not be all that reluctant to abide by those conditions if an insurance payout hangs in the balance, according to Perkins Coie LLP partner Leon Kellner.

"Usually if it doesn't hurt me, I'll comply with what the insurance company wants me to do, if it means getting a check, all things being equal," Kellner said.

After Friday's ruling, carriers could moreover hike premiums on policies covering pollution costs, especially if they saw their chances of recouping their losses as diminished.

"Perhaps, this will result in a modest increase in premiums, but that's what insurance is about — evaluating the costs associated with certain risks," Nevius said.

Either way, insurers will have to follow CERCLA's Section 112 closely from here on out, according to Kellner.

"What this decision says is that for an insurance company to obtain its subrogation rights, they're going to have to dot the i's and cross the t's with their policyholder," Kellner said.

The Ninth Circuit set out its rule in a subrogation lawsuit Chubb had brought against Ford Motor Co., Sun Microsystems Inc., Chevron Corp., and others after shelling out \$2.4 million to reimburse a senior citizens' home for pollution costs at a Palo Alto, Calif. site.

The majority found that opening the gates to subrogation under both Section 107 and Section 112 would run counter to CERCLA's goals of speeding up pollution cleanups, imposing liability on polluters and encouraging settlements.

Instead, it would create "perverse incentives" for insurers to sue third parties who might not even be liable for pollution, in an effort to score both premiums for environmental coverage from policyholders and potentially lucrative recoveries from Section 107 subrogation suits, the majority warned.

According to the ruling, allowing Section 107 claims would render Section 112 practically useless. Insurers would go forward with Section 107 subrogation suits to avoid Section 112's requirement that policyholders go first, the decision said.

"Adding other avenues of subrogation whereby the insurance company doesn't have to cooperate with its policyholder would just complicate things more, and CERCLA's already complicated enough," Nevius said.

The Ninth Circuit majority supported its decision with the holding that CERCLA's Section 107 plainly applies to those who become liable for cleanup costs — not the insurers that cover the costs.

Insurers don't meet the Section 107 standard merely by reimbursing policyholders for these expenses and stepping into their shoes, the ruling said, since the policyholders alone would be held accountable for any future pollution costs that crop up.

Nevius said that point was an important one for policyholders found to be potentially responsible parties, or PRPs, at Superfund sites.

"Let's say new contamination is found — you're going back to the PRP. You're not going to go back to the insurance company," Nevius said. "They walk away, but the PRP never does and never can."

U.S. Circuit Judges Ronald Gould and Milan Smith Jr. and U.S. District Judge Kevin Duffy, sitting by designation from the Southern District of New York, sat on the Ninth Circuit panel.

Chubb is represented by Kirk Chamberlin of Chamberlin Keaster & Brockman LLP.

The defendants are represented by Paul Hastings LLP, Marten Law PLLC, Bryan Cave LLP, Rogers Joseph O'Donnell & Quinn and McKay Burton & Thurman PC.

The case is Chubb Custom Insurance Co. v. Space Systems/Loral Inc. et al., case No. 11-16272, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Kat Laskowski and Chris Yates.

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