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News

TEXAS SUPREME COURT EXPANDS DEFINITION OF "SUIT" TO INCLUDE EPA ENFORCEMENT PROCEEDINGS

Newsbrief
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In a surprising decision involving administrative action by the EPA against an insured under CGL policies providing coverage for related "suits" against the insured, in *McGinnes Industrial Maintenance Corporation v. Phoenix Insurance Company*, 2015 WL 4080146 (Tex. June 26, 2015),the Supreme Court of Texas recently answered "yes," to the following question certified to the Court by the United States Court of Appeals for the Fifth Circuit:

> Whether the EPA's PRP letters and/or unilateral administrative order, issued pursuant to CERCLA, constitute a "suit" within the meaning of the CGL policies, triggering the duty to defend.

In the 1960s, the insured dumped pulp and paper mill sludge into disposal pits near the San Jacinto River. In 2005, the EPA began investigating possible contamination and in 2007 served a general notice letter on the parent company offering "the opportunity to enter into negotiations with the EPA" regarding the cleaning of the site and to reimburse the EPA for costs incurred. In December 2008, the EPA sent another letter requesting detailed information and advising that failure to respond could subject the company to $32,500 per day in penalties. Then in July 2009, the EPA sent another letter to the insured letting it know that they determined the insured was responsible for cleaning up the site and demanded $378,863.61 in costs and requested a good faith offer to settle within 60 days. When no offer was made, the EPA issued a unilateral administrative order directing the insured to take remedial action and advising that a willful failure to comply would subject it to $37,500 in civil penalties and up to three times the resulting costs to the EPA.

During the time the dumping took place, McGinnes was insured under CGL policies issued by Phoenix Insurance and Travelers. And in May 2008, the insured requested a defense from the insurers in the EPA proceedings. The insurers refused asserting that the proceedings were not a "suit" under the policy as needed to trigger their duty to defend. The insured then filed a declaratory judgment action seeking coverage under the policies. The trial court agreed with the insurers' coverage position and granted judgment in their favor. The insured then appealed to the Fifth Circuit, and in turn, the certified question was sent to the Supreme Court of Texas.

The Supreme Court of Texas agreed with the insurers that "suit" commonly refers to court proceedings but, also can refer to an "attempt to gain an end by legal process." The court observed that the federal "Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) was intended to expedite the process by

authorizing the EPA to act on its own in conducting essentially, pretrial proceedings, without the need to initiate court action until the end of the process. The Court observed that the EPA issues notice letter that serve as pleadings, they can conduct discovery and engage in mediation through "invitations" to settle. Fines and penalties for willful non-cooperation are like court sanctions- only prescribed by statute. And lastly, there is very limited opportunity for judicial review, but only at the end of the process, and that review is limited to an abuse of discretion standard, based on the EPA's own record.

After noting that the overwhelming majority of other states have rejected the insurers' position, the court answered yes to the certified question finding that the EPA investigation and proceedings triggered the insurers' duty to defend.

Editors Note: This was a 5-4 decision by the Court and the dissenting opinion is both pointed and serves to illuminate the serious implications for Texas insurance law should the holding be applied beyond the facts in this case. It begins by stating: "If you do not like your insurance policy, the Supreme Court of Texas can now change it for you. Never mind all those times the Court has said "we may neither rewrite the parties' contract nor add to its language." And later, addressing the majority's decision to follow other states' position on the issue: "Because it seems like a good thing to do here (and on top of that, everyone else is doing it). My law professors (and my momma) taught me better. I respectfully dissent." See below for a link to the majority and dissent.