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Policyholders Get EPA Coverage Clarity From Texas Justices

By **Jeff Sistrunk**

Law360, New York (July 1, 2015, 2:32 PM EDT) -- In recently ruling that a U.S. Environmental Protection Agency proceeding against an alleged polluter is a "suit" triggering an insurer's duty to defend, the Texas Supreme Court freed policyholders from the dilemma of either defending themselves without insurance or rolling the dice in a civil suit to try to secure coverage.

A divided state high court on Friday answered a certified question from the Fifth Circuit in favor of Waste Management Inc. predecessor McGinnes Industrial Maintenance Corp. in a coverage dispute over more than $2 million in defense costs and fines the company incurred in connection with EPA proceedings over its dumping of the toxic chemical dioxin into pits near the San Jacinto River in the mid-1960s.

The Texas Supreme Court joined a majority of other jurisdictions that have considered the issue, ruling 5-4 that EPA proceedings under the Comprehensive Environmental Response Compensation and Liability Act of 1980 constitute a suit under commercial general liability policies.

The decision eliminates policyholders' uncertainty as to whether they will be covered for EPA proceedings under legacy CGL policies and releases them from the catch-22 of having to decide whether to defend the proceedings themselves or open themselves up to a more formal court action in hopes of tapping into coverage, according to attorneys.

"Policyholders who have had environmental claims denied should consider revisiting their claims to see if this decision affects the denial, and the decision will impact coverage determinations on future environmental liability claims," said Tamara Bruno, a senior associate at Pillsbury Winthrop Shaw Pittman LLP.

The majority of the high court reasoned that before the enactment of CERCLA, the EPA had to sue in order to enforce a cleanup and that the effect of the law was to redefine “suit” in cleanup claims as an EPA proceeding that may end up in court.

“McGinnes argues that EPA proceedings are the functional equivalent of a suit, but in actuality, they are the suit itself, only conducted outside a courtroom,” Chief Justice Nathan L. Hecht wrote for the majority.

The state high court noted in Friday's opinion that its ruling extending coverage for “suits” to EPA

demands, known as "potentially responsible party" letters, put the state in line with 13 of 16 jurisdictions that have considered the question.

"We are gratified that the Texas Supreme Court's well-reasoned decision aligns with the developing national consensus on this question and that the court recognized the practical impact of EPA PRP letters on Texas policyholders," said W. Brad Nes of Morgan Lewis & Bockius LLP, who represented the Superfund Settlements Project, a nonprofit association of major corporations and policyholders, as an amicus in the case.

The Texas Supreme Court's decision is a significant victory for policyholders seeking coverage for the defense of EPA proceedings under older CGL policies that lack a definition of the term "suit" and don't contain pollution and other exclusions, according to attorneys. The costs of defending such proceedings can climb into the millions of dollars and potentially exceed the amount of an eventual settlement, which may be covered by a CGL policy, attorneys say.

"In this type of case and other similar cases where the dispute process is resolved through an administrative investigation or proceeding, it would be unreasonable to not have coverage for the defense costs — especially if the settlement of that investigation or proceeding would also be covered," said Noah Nadler, an attorney at Wick Phillips Gould & Martin LLP.

Despite the majority's assertion that EPA enforcement proceedings under CERCLA are unusual, some attorneys say policyholders could wield the decision to argue that demands made by other agencies with the ability to impose administrative penalties also qualify as "suits."

"What's bad about this decision is that its interpretation of the word 'suit' is so broad as to create issues for insurance companies down the road, potentially making them have to defend claims where their policies don't require them to do so," said Peri Alkas, a partner at Phelps Dunbar LLP. "This takes away certainty for carriers. How is an insurer supposed to know, if a citation is coming from a different agency, whether it is a citation that commands compliance?"

David White, counsel in Thompson & Knight LLP's Dallas office, disagreed, saying he thinks it is "very unlikely" that the insurance industry will see a broadening of coverage for other types of administrative proceedings following the Texas high court's ruling.

"Federal courts, including the Fifth Circuit, frequently deny coverage for administrative proceedings under other types of policies that explicitly require formal adjudication in a court or arbitration; these courts adhere to the insuring agreements as written," White said.

In addition, White pointed out, most modern policies contain exclusions that explicitly disclaim coverage for administrative proceedings.

"This suit is an outlier that should not affect coverage in most modern insurance disputes," he said.

According to Laura Foggan, leader of Wiley Rein LLP's insurance appellate group, the "extraordinarily spirited" dissent suggests that the law on the issue of whether an EPA PRP letter can be a suit is more divided than the majority indicated.

Foggan, who represented the Complex Insurance Claims Litigation Association — a trade association of major property and casualty insurance companies — as an amicus in the case, added that there are still

unsettled questions about CERCLA coverage under Texas law, including whether CERCLA cleanup costs are damages under CGL policies.

"This decision underscores that whether a PRP letter can fall within the meaning of 'suit' is very much a live issue," Foggan said. "Policyholders' contention that their position on a PRP letter as a 'suit' is winning overwhelmingly is shown to be unsound by a case like this, where the insurers very nearly prevailed, and there was a strong dissent."

McGinnes is represented by David Michael Gunn, Chad Flores, William R. Peterson and Russell S. Post of Beck Redden LLP, Donald Hamilton Kidd of Perdue and Kidd LLP, and Jodi DeAnn Spencer Johnson of Thacker Martinsek LPA.

The insurers are represented by J. Wiley George, Kendall M. Gray, Courtney E. Ervin and Shaprecia Bryson of Andrews Kurth LLP

The case is McGinnes Industrial Maintenance Corp. v. The Phoenix Insurance Co. et al., case number 14-0465, in the Supreme Court of Texas.

--Editing by Kat Laskowski and Christine Chun.