

Insurers, Cos Face Off On EPA Letters' Effect On Coverage

By **Jess Davis**

Law360, Dallas (December 23, 2014, 7:01 PM ET) -- Trade groups representing insurers and corporate policyholders have staked out opposing positions as amici in a Texas Supreme Court case that asks whether commercial general liability policies are triggered by the U.S. Environmental Protection Agency's "potentially responsible party" letters.

In an amicus brief filed Friday, the Superfund Settlements Project argued Texas would be out of line with a majority of the country if it adopts a minority position advocated by the insurers, which the group says "would seriously threaten the much needed uniformity and predictability created by the developing national consensus on this question."

The high court accepted the case as a certified question from the Fifth Circuit and will hear oral argument Jan. 15 as McGinnes Industrial Maintenance Corp., a predecessor to Waste Management Inc., claims Travelers Indemnity Co. and subsidiary The Phoenix Insurance Co. breached their duty to defend. The case arose after the EPA found McGinnes had dumped dioxin, a toxic chemical, into pits near the San Jacinto River in 1965 and 1966, and McGinnes sued Travelers to cover its expenses in fighting the EPA.

The SSP, a nonprofit association of major corporations and policyholders from various sectors of American industry, argues corporate policyholders reasonably expect a PRP letter initiates a "suit" that triggers their CGL insurers' duty to defend under national, standard form insurance policies.

"It is an attempt by EPA to gain an end — environmental cleanup — through force of legal process," the SSP said. "That is, a PRP letter carries with it immediate and severe legal implications for the recipient, in many respects more so than a complaint does in the context of a lawsuit. Accordingly, a PRP letter constitutes a 'suit' within the meaning of a standard-form CGL policy, triggering the duty to defend."

The industry's position runs counter to an amicus brief filed in October by the Complex Insurance Claims Litigation Association, a trade association of major property and casualty insurance companies. CICLA argued to the Texas judges that McGinnes is trying to distort the term "suit" to encompass every out-of-court administrative act, when it says PRP letters are more akin to "claims" than "suits," and aren't covered under CGL policies.

The group says Texas should hew to the ruling by a district judge rejecting the McGinnes claim for coverage, arguing the trial court properly interpreted "suit" to mean a formal lawsuit before a neutral judge.

“This requirement provides clear guidance to insurers and policyholders and increases certainty, fairness and predictability, which are crucial to insurers’ ability to assess accurately the risks they have contractually assumed,” CICLA wrote. “The application of this bright-line rule further serves to prevent unnecessary coverage litigation.”

A federal judge ruled in April 2013 that Travelers didn’t have to cover the more than \$2 million McGinnes spent in its dispute with the EPA over the PRP letters and held the agency's enforcement actions didn’t constitute litigation that would trigger coverage.

After McGinnes appealed, the Fifth Circuit in June held there was no controlling Texas precedent on the question of whether the EPA’s letters and administrative orders, issued pursuant to the Comprehensive Environmental Response, Compensation and Liability Act, constitute a suit within the meaning of the policies, and sought guidance from the Texas justices.

The CGL policies at issue, covering several years in the late 1960s and early 1970s, provide that the insurer “shall have the right and duty to defend any suit” against McGinnes that seeks damages on account of property damages, even if the allegations are groundless. The policy doesn’t define “suit.”

McGinnes is represented by David M. Gunn, Russell S. Post, Chad Flores and William Peterson of Beck Redden LLP, Donald H. Kidd of Perdue & Kidd LLP, and Jodi D. Spencer Johnson of Thacker Martinsek LPA.

Travelers and Phoenix are represented by J. Wiley George and Kendall M. Gray of Andrews Kurth LLP.

SSP is represented by Brad Nes, Daniel Chefitz, Gerald Konkell and Michael Steinberg of Morgan Lewis & Bockius LLP.

CICLA is represented by Wade Crosnoe of Thompson Coe Cousins & Irons LLP and by Laura A. Foggan of Wiley Rein LLP.

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

--Editing by Patricia K. Cole.