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Anderson Brothers, Inc. v. St. Paul Fire and Marine Insurance Co.

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***Anderson Brothers, Inc. v. St. Paul Fire and Marine Insurance Co.*, ___ F.3d ___, 2013 WL 4615055, 2013 U.S. App. LEXIS 18156, (9th Cir. Aug. 30, 2013).**

Katelyn J. Hepburn

I. ABSTRACT

The United States Court of Appeals for the Ninth Circuit considered whether a letter from the EPA notifying a party of potential liability under CERCLA is a "suit," triggering an insurance company's duty to defend. Applying Oregon contract law, the Ninth Circuit affirmed the decision of the United States District Court for the District of Oregon, holding that the letters from the EPA were "functional equivalents" to a suit under the insured's policy and the insurer's denial to defend was a breach of the policy.

II. INTRODUCTION

Anderson Brothers, Inc. v. St. Paul Fire and Marine Insurance Co.,[1] concerns the definition of the word "suit" as it is used for general liability insurance purposes where the Environmental Protection Agency ("EPA") issues letters informing potentially responsible parties ("PRPs") that they may be liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA").[2] The Ninth Circuit held that "suit" in this context was to be interpreted in its broadest sense as "the attempt to gain an end by any legal means."[3] The court applied this definition to letters sent by the EPA to Anderson Brothers, Inc. ("Anderson"), an Oregon corporation, notifying it of its potential liability under CERCLA for previously owned property.[4] The court found that pursuant to Oregon law the letters were "suits" under the policy. This subsequently triggered the defendant-appellant, St. Paul Fire and

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[1] *Anderson Brothers, Inc. v. St. Paul Fire and Marine Insurance Co.,* ___ F.3d ___, 2013 WL 4615055, U.S. App. LEXIS 18156, (9th Cir. Aug. 30, 2013).
[2] *Anderson Brothers,* 2013 WL 4615055 at *1.
[3] *Id.* at *4.
[4] *Id* at *1.

Marine Insurance Co.'s ("St. Paul"), duty to defend, thus making its denial of coverage a breach of contract.[5]

III. FACTUAL AND PROCEDURAL BACKGROUND

Congress enacted CERCLA in 1980 to assign liability, provide compensation, and administer cleanup and emergency response for the release of hazardous substances into the environment.[6] Under CERCLA, the EPA designates priority contaminated "superfund sites" and subsequently imposes joint and several strict liability on all entities that owned or operated facilities on the site where hazardous substances were released.[7] In 2000, the Portland Harbor was deemed a superfund site and the EPA began its investigation into PRPs that had previously owned land at the harbor.[8]

In January 2008, Anderson received a letter from the EPA, issued pursuant to Section 104(e) of CERCLA, seeking information related to the release of hazardous chemicals within the Portland Harbor Superfund Site (the "Site").[9] The letter included an "Information Request" form regarding Anderson's ownership and operations within the Site, and stated that a response was required by law and failure to do so "could result in an enforcement action and civil penalties of $32,500 per day."[10] Anderson tendered the letter to St. Paul, seeking a defense pursuant to two comprehensive general liability policies it held through the insurer.[11] The policy stated that the insurer had the "right and duty to defend any suit against the insured" for property damage.[12] St.

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[5] *Id*.
[6] 42 U.S.C. § 9601.
[7] *Anderson Brothers,* 2013 WL 4615055 at *1.
[8] *Id*.
[9] *Id*.
[10] *Id.*
[11] *Id.* at *2.
[12] *Id.*

Paul denied coverage arguing that the duty to defend was not triggered because the letters were not "suits" under the policy.[13]

In November 2009, Anderson received a "General Notice Letter" from the EPA which identified Anderson as a PRP for the site and urged Anderson to communicate and participate in the process of allocating clean-up costs among other PRPs.[14] Anderson again tendered the letter to St. Paul seeking legal defense.[15] St. Paul denied coverage on the same grounds.[16]

Anderson brought a breach of contract claim against St. Paul. The State of Oregon intervened on Anderson's behalf to defend the constitutionality of the Oregon Environmental Cleanup Assistance Act ("OECAA"), which provides the definition of "suit" the court applied.[17] At trial, the District Court rejected St. Paul's argument, granted Anderson's motions for partial summary judgment, and St. Paul appealed.[18]

IV. ANALYSIS

A. Regulatory and Statutory Framework

Under CERCLA, the EPA has broad power to hold PRPs strictly liable for cleanup costs of previously owned property that has been contaminated.[19] The purpose of the EPA's general notice letter is to compel PRPs to act as early in the settlement process as possible in order to avoid being held jointly and severally liable for the entire amount of the cleanup less the settlement amount.[20] The harsh realities of failing to respond to a general notice letter have lead multiple courts to hold that a "policyholder's receipt of a PRP notice from the U.S. EPA . . . is

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[13] *Anderson Brothers,* 2013 WL 4615055 at *2.
[14] *Id*. at *3.
[15] *Id* at *2.
[16] *Id*.
[17] *Id*.
[18] *Id*.
[19] *Anderson Brothers,* 2013 WL 4615055 at *3.
[20] *Id.* at *4.

the 'functional equivalent' of a 'suit.'"[21] In *Pintler,* the Ninth Circuit held that under Idaho law "insurance coverage should not depend on whether the EPA may choose to proceed with its administrative remedies or go directly to litigation."[22] Applying this framework to the case at hand, the court found no reason under Oregon law why it should not reach the same conclusion in this case.[23]

B. Defining "Suit"

The OECAA provides a definition of "suit" for purposes of "comprehensive general liability policies involving administrative actions by the EPA."[24] It states generally that any administrative action against an insured party, which instructs the party to act with respect to contamination of property, is equivalent to a lawsuit in a general liability insurance policy.[25] However, the definition does not apply if the parties show that they intended for the policy not to cover these types of administrative actions.[26] Under Oregon law, the intent of the parties who enter into an insurance contract is determined first by looking to the plain meaning of the policy terms, then to the structure and content of the policy.[27] If the parties' intent cannot be deduced from the policy, the dispute is resolved in the favor of the insured.[28] The court found no evidence in this case that the parties' intent was contrary to the definition in the OECAA, and as a result, applied it accordingly.[29]

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[21] *Id*. (citing *Land O'Lakes, Inc. v. Employers Mut. Ins. Co. of Wis.*, 836 F.Supp.2d 1007, 1020 (D. Minn. 2012)).
[22] *Id*. (citing *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1516, 1517 (9th Cir. 1991) (applying Idaho law)).
[23] *Anderson Brothers,* 2013 WL 4615055 at *4.
[24] *Id*.
[25] *Id*. at *5 (citing Or. Rev. Stat. § 465.480(2)(b)(2013)).
[26] *Id*. (citing Or. Rev. Stat. § 465.480(8)(2013)).
[27] *Id*.
[28] *Id*. (citing *N. Pac. Insurance Co. v. Hamilton*, 332 Or. 20, 22 P.3d 739, 742 (Or. 2001) (The policy is construed against the insurer because, "any reasonable doubt as to the intended meaning of [an ambiguous] term will be resolved against the insurance company and in favor of extending coverage to the insured.")).
[29] *Anderson Brothers,* 2013 WL 4615055 at *7.

To classify communications between the EPA and an insured party as a "suit," the statute requires: (1) That there is an "action or agreement" by the EPA; (2) "against" the insured; (3) in which the EPA "directs, requests, or agrees" that the insured "take action" with respect to contamination of property; (4) within the State of Oregon.[30] In applying this definition, the court found that: (1) the EPA "acted" when it sent the 104(e) and general notice letters; (2) the letters were found to be "against" the insured because they were in opposition to Anderson; (3) the EPA "requested" information and "directed" Anderson to enter into settlement discussions which constituted compelling the party to "take action" under the statute; (4) the letters were clearly in regards to environmental contamination of a site located in the state of Oregon.[31] Under this analysis, the court found that both letters constituted the initiation of "suits" for purposes of triggering the duty to defend under a general liability insurance policy.[32]

CONCLUSION

In *Anderson Brothers*, the Ninth Circuit clarified that insurers are required to defend policyholders put on notice by letters from the EPA for their potential liability under CERCLA.[33] This decision lessens the burden of what is required to show an initiation of a suit for the purposes of comprehensive general liability insurance coverage. This expansion will assist PRPs under CERCLA in demanding recalcitrant insurance companies to defend.

[30] *Id.*
[31] *Id*. at *8.
[32] *Id.*
[33] *Id*.