Life After Edgerton:

The Transformation of Wisconsin Insurance Law After the Johnson Controls Decision

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September 10, 2003

Background

- Courts around the country have generally provided coverage for environmental liabilities under general liability policies, particularly those without pollution exclusions
- Insurers have raised various defenses over the years, including:
  - "all sums which the insured shall become legally obligated to pay as damages" – insurers argue that "damages" requires money damages, and that CERCLA instead seeks equitable relief, akin to an injunction
    - Argument derives from old legal distinction of "law vs. equity" courts
    - Policyholders argue that this distinction doesn't comport with the reality of CERCLA
  - "right and duty to defend any suit" – insurers argue that "suit" is limited to formal lawsuits
    - Policyholders argue that the language is ambiguous, and that it is contrary to public policy to motivate companies to force environmental regulators to sue them before engaging in cleanups

Edgerton and Its Progeny

- In 1994, the Wisconsin Supreme Court held in Edgerton that environmental remediation costs, in response to government directives, were not "damages" under general liability coverage, and that a "suit" only existed if there was an actual lawsuit, not, for example, a potentially responsible party (PRP) letter
- In 1997, however, the Wisconsin Supreme Court held in General Casualty Co. v. Hills that a private party lawsuit alleging environmental liability (without government directive) could be covered as "damages"
- Ultimately the lower courts set out a confusing 4-category test of what would be considered "damages," based on whether regulators were involved or not, and whether the government or a private party had brought the lawsuit
- Effectively, policyholders in Wisconsin had little or no chance of recovering environmental response costs unless the costs were completely devoid of government involvement
- Since many courts look to the law of where a site is located, companies headquartered outside Wisconsin also generally could not recover on Wisconsin site liabilities

Johnson Controls

- Johnson Controls first filed its environmental coverage action relating to 21 sites in 1989, and the courts struggled to deal with the categorization of costs by site
- The Wisconsin Supreme Court, on July 11, issued its decision overruling Edgerton, and holding in a 75 page opinion that:
  - CERCLA response costs constitute "damages," and
  - "a PRP letter seeking remediation or remediation costs" is sufficient to be the "functional equivalent" of a "suit"
- The Court noted the practical problems in applying the Edgerton decision, the random nature of how assiduous the government is in enforcing the environmental laws, and the odd disincentive that had existed to discourage policyholders from engaging in voluntary cleanups
- The Johnson Controls decision puts Wisconsin law back in line with the vast majority of States

So What Good Is This Now?

- Wisconsin environmental coverage law is now generally favorable
  - Qualified pollution exclusion (usually in 1973-1985 liability coverage) has been held to only preclude coverage for companies intending to harm the environment
  - So coverage will generally be available for pre-1986 policies
- Claims can be made for historic operations (pre-1986) that have now led to environmental concerns
  - Policies from start of operations to 1986 can be triggered
  - Claims generally are not time barred if no denial of coverage has been issued – reservation of rights not enough
- Even prior denials of coverage can be revisited if not more than 6 years ago
  - Future costs might be pursued even if past costs are barred
- Failure to provide notice due to Edgerton should be excused
  - But late notice will remain an issue, and Wisconsin courts have tended to put burden on policyholder to show no prejudice

What's Changed In 10 Years?

- Environmental claims can be settled without litigation
  - Coverage negotiations as a business transaction, taking into account different site cost estimates, legal discounts, and allocation scenarios
  - Alternative fee arrangements with coverage counsel are possible
  - Insurance archeologists have gotten better at finding old policies

Bottom Line – If you face significant environmental exposures, it is worthwhile to evaluate your options

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