

SIDLEY & AUSTIN'S CALIFORNIA ENVIRONMENTAL LAW ALERT

T
R
E
L
A

CALIFORNIA SUPREME COURT RULES CGL INSURERS NEED NOT DEFEND AGAINST AGENCY ORDERS

Earlier this month the California Supreme Court held that commercial general liability ("CGL") insurers have no duty to indemnify insureds for the expense of complying with formal administrative agency orders. *Certain Underwriters at Lloyd's, London v. Superior Court*, 24 Cal. 4th 945 (2001). In that case, Powerine Oil Company, Inc. sought a declaratory judgment on coverage respecting orders issued by the Los Angeles Regional Water Quality Control Board and the San Diego Regional Water Quality Control Board.

The Court based its ruling in large part on its 1998 ruling that CGL insurers have no duty to defend administrative agency orders. *Foster-Gardner, Inc. v. National Union Fire Insurance Co.*, 18 Cal. 4th 857, *as mod.*, 19 Cal. 4th 253 (1998). The standard CGL policy generally states that the insurer has a duty to defend the insured "in any suit seeking damages" for harm alleged within the scope of the policy. The Court held that the word "suit" was unambiguous and based on its literal meaning could only refer to "actual court proceedings initiated by the filing of a complaint."

Because it is well-settled that the duty to defend is broader than the duty to indemnify, the Court ruled that "where there is no duty to defend, there *cannot be* a duty to indemnify." (emphasis in original). The Court also found that the language of the policy was clear. The term "damages" is used in both the duty to defend and indemnity provisions. The Court reasoned that since the duty to defend is triggered only by lawsuits, then the "damages" which the "suits" seek are necessarily moneys ordered to be paid by a court.

The Court recognized that other courts (and more numerous courts) have held that the duty to indemnify is not so limited, but the Supreme Court reasoned that those courts erroneously took a "functional" or "hybrid" approach to reading the policy language instead of a "literal" one. The Court also recognized the adverse public policy implications of its ruling. Even so, the Court refused to "rewrite" the duty to indemnify provisions: "We will not do so for the insured itself, in order to shift to the insurer some or all of the substantial costs that might be imposed on the insured as the outcome of a proceeding conducted before an administrative agency pursuant to an environmental statute. Neither will we do so for considerations of public policy in order, perhaps, to promote the outcome itself through such a shifting of costs . . . Our reason is that we do not rewrite any provision of any contract, including the standard policy underlying any individual policy, for any purpose."

In light of this ruling, insureds may attempt to protect themselves by increasing their compliance training and monitoring, thus forestalling orders by administrative agencies. However, if an administrative agency gets involved, insureds (and the agencies) may be left with few alternatives other than mutually agreeing upon a date and time for service of a complaint.

If you have any questions, please contact Judith M. Praitis at 213.896.6637 or via e-mail at jpraitis@sidley.com, or contact Amy Lally at 213.896.6642 or via e-mail at alally@sidley.com.