

NAVIGATING POLLUTED WATERS: HOW SENATE BILL 814 IMPACTS OREGON ENVIRONMENTAL LAW

With two Superfund Sites – Portland Harbor and North Ridge Estates Asbestos Site – as well as numerous other cleanup sites identified by the Environmental Protection Agency (“EPA”), Oregon is, and will remain, heavily entrenched in environmental litigation for the foreseeable future.¹ Oregon’s Portland Harbor Superfund Site is one of the largest in the nation, spanning over 11 miles of the Lower Willamette River and involving over 140 Potentially Responsible Parties.² As a result, attorneys practicing in this area must be aware of recent developments and changes to Oregon environmental statutes.

Senate Bill 814

On June 10, 2013, Governor John Kitzhaber signed Senate Bill 814 into law. The law modifies Oregon’s Environmental Cleanup Assistance Act (“OECAA”) by making it easier for Potentially Responsible Parties to recover costs from their insurers and resolve underlying environmental claims.³ The OECAA was originally enacted in 1999 in response to complaints that insurers were not assisting with payment of claims related to environmental liability. It was modified in 2003 when the legislature added provisions regarding lost policy issues, allocation, and contribution among insurers, as well as certain claims-handling procedures.

SB 814 was enacted, in part, as a response to the ongoing Portland Harbor litigation. “SB 814 will give shipbuilders and riverside industries in my district the tools they need to proceed with cleaning up pollution of the lower Willamette River,” Senator Chip Shields (D-Portland) stated in April 2013. “Holding insurance companies accountable to their policyholders by giving businesses a private right of action will ensure that these companies can be environmentally conscious while continuing to put thousands of Oregonians to work.”⁴ According to Senator Betsy Johnson (D-Scappoose), “Industries, businesses, and manufacturers need certainty that their insurance claims will be paid in order to comply with orders to clean up the Portland Harbor. This bill [SB 814] gives affected companies the tools to navigate environmental insurance claims and get the resources they need to be good stewards of both the economy and the environment.”⁵

The notable changes made to the OECAA by SB 814 are set forth below.

¹ United States Environmental Protection Agency, *EPA in Oregon*, available at <http://www2.epa.gov/aboutepa/epa-oregon> (last visited Jan. 2, 2014).

² United States Environmental Protection Agency, *Portland Harbor Superfund Site, Site Summary*, available at <http://yosemite.epa.gov/r10/cleanup.nsf/sites/ptldharbor> (last visited Jan. 3, 2014).

³ Oregon Senate Majority, *Insurance claims bill to support economy and environment passes Senate* (April 10, 2013), available at <http://www.orsenatemajority.org/tag/sb-814> (last visited January 2, 2014).

⁴ *Id.*

⁵ *Id.*

Assignment of Rights

Section 2 of SB 814 adds language regarding the assignment of rights to collect under an insurance policy. It states that even if the general liability policy requires the insurer's consent prior to assignment of rights under the policy, the insurer's consent is not required for losses existing prior to the assignment (existing environmental claims).⁶

Non-Cumulation Clauses

The law makes non-cumulation clauses unenforceable. It states, in part:

A general liability insurance policy that provides that any loss covered under the policy must be reduced by any amounts due to the insured on account of such loss under prior insurance may not be construed to reduce the policy limits available to an insured that has filed a long-tail environmental claim,⁷ or to reduce those policies from which an insurer that has paid an environmental claim may seek contribution.⁸

The section adds that non-cumulation clauses may be a factor considered in the allocation of contribution claims among insurers.⁹

Property Damage

SB 814 provides that the release of hazardous substances into the water or onto property owned by a non-insured constitutes, "damage, destruction or injury to property."¹⁰ It adds that even if some of the damage occurs on the insured's property, all remedial action costs incurred by the insured to protect another's property from the contamination constitute damages that the insured is legally obligated to pay.¹¹

Insurer's Duty to Pay

SB 814 amends ORS 465.480 to clearly identify the duty of insurers to pay their insureds' defense costs. Section 4(3)(b) states that if an insured files suit against fewer than all of its insurers, the insured may choose which policies are required to satisfy the insured's claim. Although an insurer may have a right to contribution from other insurers, an insurer cannot avoid payment on the basis that another insurer has not yet paid. This rule does not apply, however, if the selected insurer has no obligation to pay until limits of the underlying policies have been met.

⁶ 2013 OR SB 814, Section 2.

⁷ "Long-tail environmental claim" is defined as an "environmental claim covered by multiple general liability insurance policies." 2013 OR SB 814, Section 4(1)(a).

⁸ 2013 OR SB 814, Section 4(2)(d).

⁹ *Id.*

¹⁰ 2013 OR SB 814, Section 4(2)(e).

¹¹ *Id.*

Contribution

The law makes numerous amendments to the contribution portion of ORS 465.480, including:

- (1) An insurer may not seek contribution from another insurer who has “entered into a good faith settlement agreement with the insured regarding the environmental claim.”¹²
- (2) A rebuttable presumption exists “that all binding settlement agreements entered into between an insured and an insurer are good faith settlements.” Settlements approved by a court after a 30-day notice has been provided to all insurers constitute good-faith settlements.¹³
- (3) Insurers may not seek to avoid payment of defense costs by asserting that another insurer has fully satisfied the insured’s environmental claim.¹⁴
- (4) The contribution rights set forth under the law preempt all common law contribution rights.¹⁵
- (5) A court shall consider the “terms of the policies that related to the equitable allocation between insurers” as a factor when apportioning contribution amounts among insurers.¹⁶

Unfair Claims Settlement Practices

SB 814 sets forth a list of “unfair environmental claims settlement practices” such as: (a) failure to commence an investigation of an environmental claim within 15 days of notice; (b) failure to make timely payment of reasonable defense or indemnity costs; (c) improper denial of a claim; (d) requiring an insured to provide answers to repetitive questions and requests for information; and (e) failure to pay interest as required by Oregon law.¹⁷ The law provides a civil remedy in which insureds may recover actual damages, attorney fees, and costs, and provides courts with the authority to award treble damages if they find that the insurers acted unreasonably.¹⁸

¹² 2013 OR SB 814, Section 4(4)(a).

¹³ 2013 OR SB 814, Section 4(4)(b).

¹⁴ 2013 OR SB 814, Section 4(4)(c).

¹⁵ 2013 OR SB 814, Section 4(4)(d).

¹⁶ 2013 OR SB 814, Section 4(5)(d).

¹⁷ 2013 OR SB 814, Section 6(1).

¹⁸ 2013 OR SB 814, Section 6(4)(a) and (e).

Mediation

SB 814 requires insurers to participate in non-binding mediation at the insured's request to address lost policy and coverage related issues.¹⁹ The Oregon attorney general is responsible for appointing a "mediation service provider" to operate a program specifically related to environmental claims; for providing requirements related to qualification and training for all mediators participating in the program; and establishing a schedule of fees related to the program.²⁰

Conclusion

It remains to be seen how SB 814 will impact environmental cases moving forward and retroactively.²¹ Nevertheless, coverage attorneys should advise their insurers to strictly comply with the provisions set forth in the bill. And insurers should be prepared to issue payments promptly, regardless of whether other insurers have defense and/or indemnity obligations to the insured.

¹⁹ 2013 OR SB 814, Section 6(2)(a) and (b).

²⁰ 2013 OR SB 814, Section 6(2)(e).

²¹ S.B. 814 is retroactive. It applies to all environmental claims arising before, on, or after the effective date of the law, but does not apply to claims for which a final judgment has been entered. See 2013 OR SB 814, Section 8.