

Edgerton and Johnson Controls

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Practice Area: Environmental Law and Litigation

On July 11, 2003, the Wisconsin Supreme Court re-opened a window to insurance coverage that it had slammed shut just nine years ago. In its recent decision of *Johnson Controls, Inc. v. Employers Insurance of Wausau*, the court overruled its 1994 opinion in *City of Edgerton v. General Casualty Co.*, which held that comprehensive general liability policies do not cover Superfund cleanup costs, and that an insured's receipt of a responsible party letter from the government does not trigger an insurer's duty to defend.

Johnson Controls may impact insureds' rights to reimbursement for settlement payments and defense costs incurred in environmental cleanup matters, where claims were previously denied based on the *Edgerton* ruling. Companies should revisit their insurance policies and coverage claims relating to any such sites.

The Edgerton Ruling

As a result of the *Edgerton* ruling in 1994, Wisconsin was one of the few states that denied coverage under CGL policies for environmental cleanup costs. The key policy language at issue involved the insurer's obligation to cover amounts that an insured was "legally obligated to pay as damages." The Wisconsin Supreme Court took a very restrictive view of what constituted "legal damages," as opposed to "equitable" injunctive relief. *Edgerton* held that the typical cleanup costs are more in the nature of equitable relief. *Edgerton* allowed that claims for harm to the environment ("natural resource damages") were more in the nature of "legal damages," which could be covered by a CGL policy.

The other key issue in *Edgerton* related to CGL language that triggered an insurer's duty to defend on the commencement of a "suit." *Edgerton* ruled that the term meant an actual court action, and that an insured had no right to a defense when all it had received was a notice from the government that the insured was a potentially responsible party at the site.

The Hills Decision

The Wisconsin Supreme Court appeared to retreat from the *Edgerton* case in 1997, when it issued its decision in *General Casualty Co. of Wisconsin v. Hills*. In *Hills* the Supreme Court distinguished between cases where the government was directing an insured to conduct (or pay for) a cleanup, and cases where a non-governmental party was performing the cleanup and was suing the insured to contribute to that cleanup. *Hills* stated that no coverage was available in the former situation, under *Edgerton* small, but that the latter situation did involve a claim for "damages" under CGL policies.

This distinction has led to significant criticism of the Wisconsin Supreme Court. In particular, the net result of the *Edgerton* and *Hills* decisions was to discourage companies from participating in site cleanups, since the only way to get coverage was to be sued by another party that was conducting the cleanup. In addition, as a result of these cases, the availability of insurance coverage turned in part on whether or not the company received a notice letter from the government.

Johnson Controls

In *Johnson Controls*, the Supreme Court directly overturned the *Edgerton* decision both on the question of “damages” and on the question of a PRP letter as a “suit.” On the first issue, the Supreme Court concluded that “damages” include CERCLA response costs in any form. These response costs are covered “damages” under a CGL policy, subject to other policy defenses that might be available. On the second issue, the Supreme Court concluded that a responsible party letter is analogous to a complaint filed in court, given the serious consequences that may result from an insured’s failure to cooperate with the government following receipt of such a letter.

Time to Pull Out those Old Policies?

With *Edgerton* overruled, it is appropriate to reassess the right to coverage under comprehensive general liability policies for environmental cleanup costs. For companies potentially affected by the *Johnson Controls* decision, the following questions now arise:

- *Has the company incurred cleanup costs for which coverage was denied based on the Edgerton decision?* If so, companies need to reconsider their rights to coverage in light of the specific policy periods and policy language at issue.
- *Did the company’s disposal activities take place after 1985?* At that time, CGL policies began to incorporate an “absolute” pollution exclusion that foreclosed coverage for environmental liabilities. For about 15 years prior to that, CGL policies incorporated a pollution exclusion that denied coverage except for pollution that was “sudden and accidental.” The Wisconsin Supreme Court has generally interpreted that phrase to mean “unexpected and unintended” from the standpoint of the insured. While the earlier exclusion is unlikely to defeat coverage in most circumstances, the absolute pollution exclusion presents a greater hurdle.
- *Has the insurance company asserted policy defenses in addition to those based on the definitions of “damages” and “suit”?* There are other exclusions to coverage that may apply. For example, most CGL policies include an “owned property” exclusion, denying coverage where an insured’s conduct contaminates the insured’s own property as opposed to property of another.
- *Is it too late to assert a claim?* Many companies decided not to pursue coverage after *Edgerton* was issued in 1994, and some claims may now be barred by the statute of limitations. In *Johnson Controls*, the Supreme Court acknowledged that many companies made decisions about settling (or not pursuing) coverage claims based on *Edgerton*, and recognized the potential unfairness to those who may have lost the opportunity to get coverage. One unanswered question is whether the courts might fashion a remedy for insureds in this situation, effectively suspending the operation of the statute of limitations while the *Edgerton* decision was in effect. While *Johnson Controls* may have reopened a coverage window, the statute of limitations may be closing that window again with each passing day.

The next order of business for most companies with unreimbursed cleanup costs is to pull those old policies, and consider tendering those costs to their carriers if the criteria at the beginning of this article have been met.

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