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No. 69569-0-I

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

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GULL INDUSTRIES, INC.,

*Plaintiff/Appellant,*

vs.

ALLIANZ UNDERWRITERS INSURANCE COMPANY; AMERICAN  
ECONOMY INSURANCE COMPANY; AMERICAN STATES  
INSURANCE CO. (successor to WESTERN CASUALTY and SURETY  
COMPANY); CHICAGO INSURANCE COMPANY; COLUMBIA  
CASUALTY COMPANY; FEDERAL INSURANCE COMPANY;  
FIREMAN'S FUND INSURANCE COMPANY; GENERAL  
INSURANCE COMPANY OF AMERICA; GRANITE STATE  
INSURANCE COMPANY; INDIANA INSURANCE COMPANY;  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH, PA; NORTH PACIFIC INSURANCE COMPANY;  
OHIO CASUALTY INSURANCE COMPANY; PACIFIC INDEMNITY  
COMPANY; SAFECO INSURANCE COMPANY OF AMERICA;  
STATE FARM FIRE AND CASUALTY COMPANY; TIG  
INSURANCE COMPANY; UNITED STATES FIDELITY &  
GUARANTY COMPANY; WESTPORT INSURANCE  
CORPORATION; and ZURICH-AMERICAN INSURANCE COMPANY

*Defendants/Respondents.*

**APPELLANT'S OPENING BRIEF**

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## I. ASSIGNMENTS OF ERROR

The Superior Court erred in granting, in part, Defendants' and Respondents' Motion for Partial Summary Judgment to Establish Insurance Policies and Declare No Duty to Defend. Specifically, the Superior Court erred in holding that State Farm Fire & Casualty Company ("State Farm") and Transamerica Insurance Group ("TIG") had no duty to defend plaintiff Gull Industries, Inc. ("Gull") under liability policies issued to Gull, notwithstanding the following facts:

- Under Washington's Model Toxics Control Act, RCW 70.105D.040(1)(a) ("MTCA"), Gull is strictly liable for the costs of investigating and remediating environmental property damage at the site of a former gas station operated by Gull's tenants. Gull's liability under MTCA attaches irrespective of whether the Washington Department of Ecology ("DOE") has commenced active enforcement efforts.
- In *Weyerhaeuser Co. v. Aetna Cas. and Sur. Co.*, 123 Wn.2d 891, 896 (1994), the Washington Supreme Court held that an insurer is required to pay its insured's costs of remediation imposed by MTCA under the indemnity coverage provided by functionally identical policies,

whether or not DOE has “made an overt threat of formal legal action.”

- The Superior Court’s adoption of a technical, lawyerly reading of the language contained in both State Farm’s and TIG’s policies, under which only a specific act of enforcement by DOE triggers the insurer’s duty to defend Gull, violates Washington’s rules governing insurance-policy interpretation, undermines the public policy that is the foundation of the *Weyerhaeuser* decision, discourages voluntary environmental cleanups, and provides a strong incentive for liable parties to instigate wasteful litigation with DOE.

## **II. STATEMENT OF THE CASE**

### **A. Gull Industries**

Gull is a family-owned business founded in Seattle in 1959. During all times relevant to this litigation, Gull owned and operated a number of gasoline service stations and related facilities throughout the Pacific Northwest. In most cases, Gull owned the gas station and associated real property and leased the property to individual station operators. CP 818.

### **B. The Sedro-Woolley Service Station**

This appeal arises out of the investigation and remediation of contamination at one such gas station. Gull owned a station located in Sedro-Woolley, Washington (“Sedro-Woolley Site”) and leased the station to a series of lessees for more than 30 years. Those lessees included Hayes and Mary Johnson, who operated the Sedro-Woolley Site under a lease agreement with Gull that ran from September 1972 to September 1982. The Johnsons’ lease with Gull required them to obtain liability insurance naming Gull as an additional insured. CP 185.

### **C. The Johnsons’ State Farm Policies**

Between 1977 and 1981, the Johnsons purchased liability policies from State Farm. The Johnsons’ first State Farm policy incepted in July 1977 and expired one year later in July 1978. The Johnsons renewed their State Farm coverage in 1978 via a three-year policy covering the period from July 1978 to July 1981. The 1978 Policy was cancelled soon after its issuance. Gull contends that State Farm issued a new policy to the Johnsons later in 1978. That policy is the subject of State Farm’s cross-appeal, and Gull will address State Farm’s contentions with respect to that policy in connection with the cross-appeal.

It is undisputed that Gull is an additional insured under the State Farm policies. CP 106. It is likewise undisputed that the policies obligate

State Farm to both defend and indemnify the insureds (both the Johnsons and Gull) against covered third-party liability, and that defense costs are paid in addition to the indemnity coverage limits. CP 119, 120.

**D. The TIG Policies**

TIG issued five liability insurance policies to Gull, providing Gull's primary-layer insurance from 1981 to 1986. CP 154. Unlike the State Farm policies, Gull purchased the TIG policies directly and Gull is the named insured under them. CP 148. Like the State Farm policies, the TIG policies impose a duty to defend on TIG, and costs of defense are paid in addition to the applicable indemnity coverage limits. CP 161.

**E. Gull's Obligation Under MTCA to Investigate and Clean Up Contamination at the Sedro-Woolley Site**

As a result of releases of gasoline into the soil and groundwater over the years, the Sedro-Woolley Site has been contaminated by significant amounts of petroleum hydrocarbons. A January 2005 investigation by Gull's technical consultants identified levels of soil and groundwater contamination exceeding MTCA cleanup levels established under regulations promulgated by DOE. CP 279-80. Gull reported its consultants' findings to DOE on February 15, 2005. CP 142-43.

It is undisputed that Gull is strictly liable under MTCA for the costs of investigating and remediating the contamination at the Site. *See* RCW 70.105D.040(1)(a).

**F. The Typical Process of Investigation and Cleanup of Contaminated Property Under MTCA**

To provide a context for Gull's work at the Sedro-Woolley Site, the Court may find useful a brief description of the normal process of investigating and cleaning up a contaminated site under MTCA. The steps undertaken and the considerations that govern those actions in the typical scenario are as follows:

- Contamination is detected at a property, or suspected due to the nature of historical operations at the property. The property owner hires an environmental consultant to investigate the property. This is usually done via sampling and analyzing the soil and groundwater. This investigation frequently includes drilling monitoring wells into the groundwater. Via this process, the existence, nature, and the extent of the contamination is determined.
- Once the investigation has been completed, the property owner evaluates how best to clean up the site and discharge its legal liability under MTCA. In some cases, adversarial proceedings, which may include both administrative enforcement action by DOE or litigation in court, may be inevitable. For example, a neighboring landowner may file a lawsuit, or DOE may commence

administrative or court proceedings to compel the owner to clean up the site. In such adversarial situations, the owner will retain defense counsel, who in turn will hire and work with environmental consultants for the purpose of eliminating or minimizing the owner's liability. Actions to minimize liability may involve asserting a complete defense to liability ("the contamination is not coming from my property; we should both sue the owner of the actual source of the contamination") or may take the form of arguing for a less costly remedy than the one recommended by DOE.

- In the overwhelming majority of cases,<sup>1</sup> and particularly in the context of relatively small sites such as the former service station at Sedro-Woolley, no such adversarial proceedings are commenced. Instead, the property owner chooses to discharge his or her legal liability under MTCA by undertaking a "voluntary" or "independent" cleanup. As used in this context, "voluntary" is a term of art under MTCA's implementing regulations, WAC Chapter 173-340. The property-owner's cleanup is not

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<sup>1</sup> DOE, *Washington State Brownfield Policy Recommendations: Redeveloping Brownfields, Revitalizing Our Communities*, at XVII, XX (Sept. 2011) (hereinafter "*DOE Brownfield Report*") (150 more contaminated sites are reported each year than are cleaned up, 90 percent of new cleanup projects are led by private parties) (the *DOE Brownfield Report* appears at CP 564-673).

“voluntary” as that term is used in common parlance, but is “voluntary” and “independent” only insofar as it is undertaken without DOE bringing a formal enforcement action against the property owner. Rather than waiting for an enforcement action, based on the strict liability imposed under MTCA, the property owner will perform the necessary investigation and cleanup at sites where it has no meaningful defense to liability and there is little doubt as to the type of cleanup that will be required.

- In such cases, the property owner has a strong incentive to complete the investigation and cleanup itself, thereby managing the work and controlling the costs. The unattractive alternative is to wait for DOE to conduct the investigation and remediation and then pursue recovery of its costs from the property owner in litigation, which is provided for under MTCA. RCW 70.105D.030(1)(a) – (c); 70.105D.040(2). According to DOE’s records, 90 percent of site cleanups are handled in this fashion, *i.e.*, as “voluntary” cleanups led by private property owners.<sup>2</sup>

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<sup>2</sup> See *DOE Brownfield Report* at XVII, XX (CP 582, 585).

**G. Gull's Investigation and Remediation of the Sedro-Wolley Site**

Based on its status as a strictly-liable property owner and operator of the Sedro-Woolley Site, Gull elected to undertake a voluntary investigation and cleanup of that the Site. Before selecting and designing a remediation strategy to address the contamination, Gull's technical consultants undertook further investigation to determine both the extent of the contamination plume and the direction of the groundwater flow at the Site. CP 279-80. Following that investigation, the consultants prepared a list of remediation options that would meet three goals: (1) controlling costs; (2) containing the spread of the groundwater contamination ; and (3) complying with MTCA cleanup levels. CP 399.

Based on the consultants' recommendations, Gull chose a system that entailed both pumping and treating contaminated groundwater and extracting petroleum vapors from the soil. The system was constructed and installed in 2006 and continues to operate, with some modification, today. CP 400.

**H. Gull's Tender of the Sedro-Woolley Liability and the Insurers' Response**

In February 2010, Gull wrote to State Farm and requested a defense against its MTCA liability at the Sedro-Woolley Site. That letter informed State Farm that Gull had incurred costs of over \$365,000 in

investigating and remediating the contamination. CP 27. State Farm denied Gull's claim, citing a variety of grounds including the issue that forms the basis for this appeal. CP 107.

Gull also tendered the Sedro-Woolley Site liability to another of its primary insurers, TIG. At the same time as it tendered the defense of the Sedro-Woolley Site, Gull also tendered claims to TIG for defense at a number of other sites where Gull had undertaken investigation and remediation of contaminated property. CP 180.<sup>3</sup> Although TIG accepted Gull's tender and agreed to defend Gull in connection with six other sites that are functionally identical to the Sedro-Woolley Site, *see* pages 32-33, *infra*, TIG never definitively responded to Gull's tender. CP 180. TIG ultimately denied coverage for the Sedro-Woolley Site by joining the State Farm motion that forms the basis of this appeal. CP 147.

**I. The Litigation Over Gull's Coverage Claims and the Proceedings Below**

In 2010, Gull sued its insurers, including State Farm and TIG, in Skagit County Superior Court. The Skagit County litigation involved only the Sedro-Woolley Site. In December 2011, while the Skagit County case was still pending, Gull filed a second action in King County Superior Court. In the King County case, Gull named as defendants all of its

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<sup>3</sup> *See also* Declaration of Steven G. Jones of June 8, 2012 (Dkt. 58 below) Exs. 19-23 and 26, in Plaintiff's Supplemental Designation of Clerk's Papers (filed March 11, 2013).

known liability insurers, 12 in all, including TIG and State Farm, and sought damages and a declaratory judgment in connection with over 200 additional contaminated sites. In February 2012, the Skagit County Superior Court granted the insurers' motion to transfer that case to King County Superior Court, and Superior Court Judge Michael Trickey, in turn, consolidated the two actions.

This appeal arises out of State Farm's Motion for Partial Summary Judgment to Establish Insurance Policies and Declare No Duty to Defend. As relevant to this appeal, State Farm's motion sought a ruling that, because Gull had investigated and remediated the Sedro-Woolley Site on a "voluntary" basis, discharging its strict liability under MTCA without waiting for active enforcement efforts by DOE, State Farm's duty to defend Gull was not triggered. CP 25. TIG joined State Farm's motion. CP 147. On September 28, 2012, Judge Trickey granted State Farm's and TIG's motion in part, and held that the insurers have no duty to defend Gull in connection with its MTCA liability for the Sedro-Woolley Site. CP 793, 796. On November 13, 2012, Judge Trickey granted Gull's motion for certification and entry of a final judgment pursuant to CR 54(b), and Gull in turn perfected this appeal. CP 961-67; 948-67.

### III. ARGUMENT

#### A. **The Superior Court's Interpretation of the Respondents' Policy Language is Subject to *De Novo* Review.**

State Farm's motion required the Superior Court to interpret the policy language establishing the insurers' duty to defend. As interpretation of insurance policies is a question of law, it is subject to *de novo* review. *Quadrant Corp. v. Am. States Ins. Co.*, 154 Wn.2d 165, 171 (2005).

#### B. **Interpreting the Word "Suit" So as to Eliminate the Insurers' Duty to Defend in the Absence of Formal Enforcement Action by DOE is Contrary to the Washington Supreme Court's Ruling and the Public Policy Rationale in *Weyerhaeuser*.**

##### 1. **The Insurers' Duties to Defend and Indemnify**

The sole issue on this appeal is whether State Farm and TIG have a duty to defend Gull against the strict liability imposed under MTCA for the costs of investigating and remediating contamination at the Sedro-Woolley Site. The appeal addresses only the insurers' duty to defend Gull, not their separate duty to indemnify, *i.e.*, the duty to pay judgment or settlement liability arising out of the cleanup of the Site. Further, as discussed in greater detail at pages 20-22, below, this appeal does *not* address the characterization, as between defense or indemnity, of the work performed in connection with the Site.

The policy language establishing State Farm's duty to defend is as follows:

This Company will pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, arising out of service station operations; and this Company shall have the right and duty to defend any suit against the Insured seeking damages payable under the terms of this policy, even if any of the allegations of the suit are groundless, false or fraudulent; but this Company may make such investigation and settlement of any claim or suit as it deems expedient.

CP 119.

The language establishing TIG's duty to defend is functionally identical:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence. The company shall have the right and duty to defend any suit against the insured seeking damages on the account of such bodily injury or property damage, even if the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient.

CP 161.

The Superior Court held that the term "suit" as used in the above policy language required that DOE institute formal enforcement action against, *i.e.*, "sue," Gull before State Farm and TIG's duty to defend would arise. Gull contends that holding constituted error. When applied

in the context of MTCA's strict liability scheme and in light of the Washington Supreme Court's holding and rationale in *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891 (1994), the term "suit" is ambiguous and obligates the insurers to defend Gull in advance of and without the necessity of active enforcement action by DOE.

**2. *Weyerhaeuser's Core Principle: MTCA's Strict Liability and "Voluntary" Cleanups Require Insurers to Fulfill Their Coverage Obligations Even Without Formal Enforcement By DOE.***

As is outlined above, the system developed by DOE for administering and enforcing environmental cleanup liability under MTCA is substantially different from the litigation-centered system that prevails in other areas of the law such as personal injury and business torts. Two differences are particularly relevant to the insurer's duty to defend. First, by and large, DOE does not enforce MTCA liability by civil actions in court or even coercive administrative proceedings. Instead, MTCA and its implementing regulations are designed to incentivize liable landowners to "voluntarily" investigate and clean up contaminated property, without the active involvement of DOE. CP 676-77; *see* WAC 173-340-300—173-340-390 (DOE's regulations governing voluntary assessment and cleanup under MTCA). Indeed, according to DOE, more than 90 percent of environmental cleanups in Washington are completed on a "voluntary"

basis: a landowner completes the investigation and remediation, documents the work and its results, presents the results to DOE, and seeks DOE's approval and undertaking not to seek further remediation. *See* n.3, *supra*. DOE created this system because the agency simply does not have sufficient resources to actively compel cleanup of the thousands of contaminated sites in the State of Washington. CP 676-78.

Second, under MTCA, a property owner that fails to discharge its legal liability via a voluntary investigation and remediation risks greatly increases its exposure for remedial costs. This increased exposure results from the fact that, when DOE conducts the investigation and undertakes remediation of the property and then seeks to recover its costs from the liable party, the investigation and remediation costs are very likely to be higher than would have resulted from a voluntary cleanup and the various efficiencies and incentives inherent in that setting. *See Weyerhaeuser Co. v. Aetna Cas. and Sur. Co.*, 123 Wn.2d 891, 908 n.23 (1994) ("lack of cooperation may expose the insured, and potentially its insurers, to much greater liability, including the [agency's] litigation costs") (citing *Aetna Cas. & Sur. Co. v. Pintlar Corp.*, 948 F.2d 1507, 1517 (9th Cir. 1991); and *A.Y. McDonald Indus. v. Insurance Co. of N. Am.*, 475 N.W.2d 607, 628-29 (Iowa 1991). Further, litigating with DOE entails substantial additional transactional costs to both the property owner and the State in the form of

attorneys' fees and expert fees. Because MTCA provides that the prevailing party is entitled to recovery of both attorney's fees and "other reasonably necessary expenses of litigation," *Louisiana-Pacific Corp. v. ASARCO, Inc.*, 131 Wn.2d 587, 604 (1997), litigating with DOE presents the property owner with the prospect of not only having to pay investigative and cleanup costs, but DOE's attorney's fees and expert and consultants' fees as well.

Washington's appellate courts have had several opportunities to consider the effects of these aspects of MTCA's liability system in the context of an insurer's obligations to cover environmental liability under policies issued in the 1960s, 1970s, and early 1980s, before the passage of MTCA in 1989. The teaching of those decisions is that policy language is not to be interpreted in a technical, lawyerly manner that fails to recognize the procedural and formal—but not substantive—differences between the administrative liability system and the traditional tort liability context.

The most important of these decisions to this appeal is *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891 (1994). The relevant facts of the *Weyerhaeuser* case are identical to those of the instant case: the insured, Weyerhaeuser, was legally liable under MTCA for the investigation and remediation of environmental contamination at various sites it which it had conducted operations.

Just as Gull has done here, Weyerhaeuser chose not to wait for active enforcement actions by DOE, but instead conducted voluntary investigations and cleanups. *Weyerhaeuser*, 123 Wn.2d at 900, 910-11. Weyerhaeuser then sought coverage from its insurers for the costs of its voluntary investigation and remediation. Just as State Farm and TIG have done, Weyerhaeuser's insurers denied coverage, arguing that, in order for coverage to apply:

there must be a "third party" who acted in an "adversarial" manner to the insured . . . [t]he argument is based on the absence of a "claim" or third party demand or threat. It is the insurers' position that there needs to be some "coerciveness", some "adversarial" conduct by a government agency, or no coverage can exist.

*Id.* at 899.

The Washington Supreme Court rejected the insurers' argument, holding that the superficially "voluntary" nature of the investigation and remediation work was irrelevant to the insurers' coverage obligations. The *Weyerhaeuser* court's analysis pragmatically took account of the special nature of environmental liability, and the process by which liable parties discharge that liability. *Id.* at 909. On that basis, the court disposed of the insurers' argument that the insured's voluntary cleanups had been undertaken in response to "liability imposed by law," as required by the specific policy language at issue in that case. *Id.* at 913. ("The

insurance contracts provide coverage when the policy holder becomes obligated to pay by reason of the liability ‘imposed by law.’ The Policy language does not specify whether this liability must be imposed by formal legal action (or threat of such) or by a statute which imposes liability.”).

The court further recognized that the reading proposed by the insurers would create a disincentive for any property owner to initiate voluntary remediations: liable parties wishing to have the benefit of their insurance—a group including every economically rational actor—would have every incentive to wait until the DOE threatened or brought a formal enforcement action. *Id.* at 907-09. Not only did Weyerhaeuser make this point, but *DOE* emphasized this same argument, and its public-policy implications, in an amicus brief filed in the *Weyerhaeuser* appeal:

Amicus, DOE, represents to this court that independent [or “voluntary”] remedial actions form an integral part of the Model Toxics Control Act program in Washington and that the trial court’s ruling, if upheld, is likely to encourage parties who would have commenced or continued independent remedial actions to await formal enforcement by the State in order to avoid losing any potential for insurance coverage. Because the trial court’s ruling creates a disincentive to engage in independent cleanups, the DOE maintains that the effect of the ruling will be to dramatically slow the progress of hazardous waste cleanup in Washington.

*Id.* at 907-08. The court likewise cited with approval commentators who

observed that the rule urged by the insurers would “severely impede the ability of the federal and state governments to accomplish cleanup of the thousands of contaminated sites extant.” *Id.* at 910; *see also Governmental Interinsurance Exch. v. City of Angola, Ind.*, 8 F. Supp. 2d 1120, 1131 (N.D. Ind. 1998) (“suit” should be construed to include “voluntary cleanup of a site by the policyholder in nominal cooperation with a governmental entity, but under explicit or implicit threat of a formal enforcement action,” because “[t]o decide otherwise would encourage insureds to not cooperate with governmental agencies, thus running the risk of huge fines, punitive damages, and delay in remediating environmental pollution”).

Finally, the *Weyerhaeuser* court held that conditioning insurance coverage on formal enforcement action would conflict with the insured’s duty to mitigate the damages they would claim against their insurers in coverage litigation. *Weyerhaeuser* and another group of *amici*, led by The Boeing Company, noted that “insurers typically argue that coverage is forfeited for harm that could have been avoided or mitigated,” and observed that the insurers’ proposed rule thus placed the insured in a “Catch 22” situation: “[F]orcing a policyholder to both promptly act to mitigate further environmental damage, *and* to await formal threat of legal action creates an unresolvable conflict and results in destroying the

contractual right to liability coverage in many cases involving environmental pollution damages.” *Id.* at 913 (italics in original).

For all of these reasons, the *Weyerhaeuser* court rejected the insurers’ proposed reading of the policy language, holding, instead, that MTCA liability constitutes, for insurance purposes, a covered “liability imposed by law,” without regard to whether DOE or other third-party claimant has yet undertaken formal enforcement efforts. *Id.* at 913-14.

**3. The Reasoning of *Weyerhaeuser* Applies With Equal Force to the Insurers’ Duty to Defend Gull.**

**a. Gull Faces the Same MTCA Liability as Did *Weyerhaeuser*.**

The reasoning behind the *Weyerhaeuser* decision applies with equal force to State Farm’s and TIG’s arguments in this case. First, it is undisputed that both *Weyerhaeuser* and Gull faced precisely the same type of MTCA liability. Both *Weyerhaeuser* and Gull opted for the voluntary approach for the same reason: where a party facing liability under MTCA is able to directly and actively manage the environmental investigation and remediation process, it has every incentive to complete the cleanup as efficiently and inexpensively as possible. *Weyerhaeuser*, 123 Wn.2d at 900.

**b. The Duty-to-Defend Rule Urged by the Insurers Creates the Same Perverse Incentives as Did the Rule Rejected in *Weyerhaeuser*.**

The *Weyerhaeuser* court rejected a proposed reading of policy language that would have created a disincentive to voluntarily and promptly investigating and remediating contamination. This same disincentive would be created by the reading urged by State Farm and TIG. That is no less true even though this appeal concerns not the insurers' duty to indemnify, which was the subject of the *Weyerhaeuser* decision, but rather State Farm's and TIG's duty to defend Gull.

As the *Weyerhaeuser* decision notes, the two duties are distinct. *Weyerhaeuser*, 123 Wn.2d at 902. However, *Weyerhaeuser*, and particularly its disapproval of the perverse incentives created by the rule urged by the insurers here, applies equally to both the insurer's duty to defend and their duty to indemnify. In the case below, the insurers argued that activities constituting "defense" were not limited to traditional defense costs such as paying an attorney to advocate with DOE for a less expensive cleanup. Instead, the insurers argued that costs falling within the duty to defend included all fees for technical consultants necessary to determine the "source, type, and extent" of the contamination at the site. See WAC 284-30-930(3) (defining as an unfair claims handling practice

an insurer's "[f]ailure to make payments, under its duty to defend, for costs reasonably incurred in an investigation to determine the source of contamination, the type of contamination, and the extent of the contamination."').<sup>4</sup>

Given the insurers' expansive definition of "defense costs" in the context of voluntary cleanups, the interpretation of the "suit" language they urge here would have the same chilling effect as did the argument of Weyerhaeuser's insurers in the indemnity context. The Court should reject this interpretation, just as the Supreme Court rejected it in *Weyerhaeuser*. Costs of investigation of the source, type, and extent of contamination are a necessary first step toward cleaning up the contamination. Many policyholders lack the means to fund those investigation costs. What this means is that, without the benefit of insurance proceeds, contaminated sites will languish, because property

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<sup>4</sup> Gull disputes that position in the context of independent or "voluntary" cleanups, in which there is no question of liability and the only question is how to accomplish the cleanup. In such cases, insureds incur few true costs of defense, for there is little to defend. Professional engineering and consultant's fees incurred in order to learn the extent of the contamination, instead, are analogous to an x-ray or MRI before surgery; they are investigative in nature but are part and parcel of the remedy itself. It bears emphasis that neither the motions below nor this appeal address the nature of work and costs that fall on one side or the other of the line between defense and indemnity. However, the likelihood that State Farm and TIG will argue for an expansive definition of "defense costs" in this case supports Gull's position regarding the perverse incentives, and chilling effect on voluntary cleanups, that will result if the Superior Court's ruling is allowed to stand.

owners will not be able to afford to investigate the nature and extent of the contamination. In addition, policyholders will be incentivized to antagonize neighboring landowners, DOE, or both, in an effort to prompt litigation triggering the insurers' duty to defend. The result will be more adversarial proceedings, greater delay in remediation of contaminated sites, and higher costs for all involved, solely to satisfy the form-over-substance interpretation of the word "suit" being advocated by State Farm and TIG. None of these results can be reconciled with the public policy-based reasoning articulated by the Supreme Court in *Weyerhaeuser*.

DOE has forcefully and publicly argued against the adoption of legal rules that incentivize liable parties to wait for adversarial enforcement before acting to investigate and remediate contamination. DOE authored an *amicus* brief on behalf of 38 states in the United States Supreme Court case of *U.S. v. Atlantic Research Corp.*, 551 U.S. 128 (2007). That case concerned the right of contribution among parties that are jointly and severally liable for environmental contamination under CERCLA, 42 U.S.C. § 9601 *et seq.*, the federal equivalent of MTCA.<sup>5</sup> Atlantic Research had voluntarily cleaned up a facility it owned in

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<sup>5</sup> DOE's position in *Atlantic Research* was grounded on CERCLA rather than MTCA. However, because MTCA was heavily patterned after CERCLA, the Washington Supreme Court has held that case law interpreting similar language in CERCLA is persuasive, although not controlling, when interpreting MTCA. See *Bird-Johnson v. Dana Corp.*, 119 Wn.2d 423, 427 (1992); *Hoffer v. State*, 113 Wn.2d 148, 151 (1989).

Arkansas and then sued the United States in contribution. The United States argued that it could not be compelled to contribute toward a cleanup, because Atlantic Research had performed the work voluntarily. In response, 38 states (led by Washington) argued, in support of Atlantic Research, that requiring a company to be sued before it could seek contribution from another party would chill voluntary cleanups and, furthermore, would lead to states having to spend their limited resources on suing parties that were already willing to clean up contamination they were liable to clean up under the law without the formality of waiting to be sued. CP 554; 2007 WL 1074688, \*6 (U.S. Appellate Brief, April 5, 2007).

DOE confirmed, via a declaration filed in the proceedings below, that the policy concerns it expressed in the *Atlantic Research amicus* brief remain in force. That declaration set forth the sworn testimony of James Pendowski, the Program Manager of DOE's Toxics Cleanup Program. CP 676. Mr. Pendowski testified in substance as follows:

2. The Toxics Cleanup Program continues to support the arguments raised by the State in its amicus curiae brief in *United States v. Atlantic Research Corporation*, No. 06-562 (U.S. Supreme Court, April 5, 2007) (attached as Exhibit A). Although the arguments raised in the brief focused on the federal Comprehensive Environmental Response, Compensation, and Liability Act

(CERCLA), the argument that denying recovery of response costs will frustrate voluntary cleanups and defeat the core purpose of the Act also generally applies to state's Model Toxics Control Act (MTCA).

3. Ecology conducts a site hazard ranking, evaluating the amount of contamination, the types of contaminants, the risk the contamination will spread, and primary exposure routes. The Washington assessment and Ranking Method evaluates risks and assigns the site a score ranging from 1 to 5. A score of 1 denotes the highest level of concern, and a score of 5 denotes the lowest priority
4. Within MTCA itself, the legislature has recognized that "the state does not have adequate resources to participate in all property transactions involving contaminated property." RCW 70.105D.040(5)(b). The state also lacks adequate resources to engage in formal oversight of each and every hazardous waste site, through its enforcement authority under MTCA. Ecology's Toxics Cleanup Program generally focuses its resources on those hazardous waste sites presenting the greatest danger to human health and the environment. For lower ranked sites, the Program encourages independent cleanups, as defined in WAC 173-340-515. The majority of persons responsible for lower-ranked contaminated sites chose to conduct site cleanup projects independent of Ecology's direct oversight. The fact that Ecology is not engaged in direct oversight of the cleanup does not mean that cleanup of the site is unwarranted or unnecessary.

5. As noted in Ecology's report, *Washington State Brownfield Policy Recommendations: Developing Brownfields, Revitalizing Our Communities* (September 2011), over 11,400 contaminated properties have been reported to Ecology. Over 2,000 of those properties have not yet begun the cleanup process.
6. Ecology's Toxics Cleanup Program relies upon independent cleanups as a vital component of its strategy to address hazardous waste sites in Washington.

CP 676-77.

The same rationale set forth in Mr. Pendowski's declaration applies here. If insureds such as Gull are not entitled to a defense from their insurers, then parties who otherwise would voluntarily clean up contaminated sites—because they had insurance proceeds to help pay for the necessary first step of investigation—will either fail to conduct such cleanups or will provoke the relevant state or federal agencies to sue in court, solely as a means of triggering the duty of defense under their insurance. The former course would result in far fewer cleanups, and the latter would result in a massive waste of scarce public resources in the form of DOE's or the Attorney General's Office involvement as a litigant.

There are more than 2,000 known and unremediated cleanup sites in the State of Washington, and 300 more are identified every year. Meanwhile, only 150 sites per year receive formal cleanup approval. DOE, which is constantly playing catch-up, does not have the resources to

take every small-scale gas station cleanup through its formal cleanup process. Fortunately, 90 percent of new cleanups in Washington are now conducted voluntarily, allowing DOE to focus its formal enforcement process on large-scale, multijurisdictional cleanups. *Washington State Brownfield Report, supra* n.3, at p. XX; CP 585. If incentives to conduct voluntary cleanups are removed, which would be the result if State Farm's and TIG's arguments are accepted, small-scale sites such as Gull's gas stations may remain contaminated indefinitely.

**c. The Duty-to-Defend Rule Urged by Gull's Insurers Would Place Insureds in the Same Catch 22 as Did the Rule Rejected in *Weyerhaeuser*.**

State Farm's and TIG's motion, and the resulting ruling below, place Gull in the same untenable position in which *Weyerhaeuser* found itself. The *Weyerhaeuser* court described the dilemma concisely:

If pollution has damaged other property, and an environmental agency has told the landowners they are statutorily responsible to remedy the situation, but has not yet threatened suit, the policyholders have two options: (1) clean up and forgo any possibility of recovering from their liability insurance because of lack of overt threat or (2) refuse to negotiate with the agency and refuse to clean up and wait to be sued or to be threatened with suit. If the second option is taken the policyholder also may not have any insurance coverage (at least for damage that occurred after knowledge) because it has failed to mitigate its damage or because the pollution was expected or intended. Such an anomalous result would undercut our core holding in *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869,

784 P.2d 507, 87 A.L.R.4th 405 (1990) and result in fundamental unfairness to policyholders who reasonably believed they had insurance coverage for certain kinds of property damage caused by pollution.

*Weyerhaeuser*, 123 Wn.2d at 912.

State Farm and TIG have both raised the same defense of failure to mitigate damages. CP 13 (“Gull’s First Amended Complaint and/or causes of action are barred to the extent Gull failed to mitigate, minimize or avoid any loss allegedly sustained”). For the same reasons as articulated by the court in *Weyerhaeuser*, this Court should decline to place Gull, and all future similarly situated Washington policyholders, in this Catch 22 situation.

**C. The Term “Suit” is Ambiguous in the Context of MTCA’s Administrative Liability Regime.**

**1. The Ruling Below is Contrary to Well-Established Rules of Insurance Policy Interpretation.**

The only difference between the instant appeal and the *Weyerhaeuser* decision concerns the particular insurance duty at issue: *Weyerhaeuser* involved the insurers’ duty to indemnify; the instant case involves State Farm’s and TIG’s duty to defend. Gull has demonstrated above that the reasoning of the *Weyerhaeuser* decision, including its foundation in Washington’s public policy favoring prompt cleanup of environmental contamination, is dispositive and requires a reversal of the

decision below. However, Gull’s position, that the policies do not require insureds to sit by and wait to be sued in order to preserve their insurance coverage, is also supported by the plain text of the State Farm and TIG policies, as informed by Washington’s body of appellate authority governing the interpretation of policy language.

The Washington Supreme Court has previously rejected technical and lawyerly distinctions of the type advanced by State Farm, recognizing the evolving practical realities of environmental regulation and enforcing the common-sense expectations of the parties facing those realities. The most important example is *Boeing Co. v. Aetna Cas. & Sur. Co.*, 113 Wn.2d 869 (1990). In that case, the insurer argued that it need not indemnify Boeing for costs it incurred as a result of being forced to remediate pollution under CERCLA, because Boeing’s insurance policies covered its liability for “damages” and the remediation costs imposed on Boeing were in the nature of “equitable” or “injunctive” relief—that is, DOE and the U.S. Environmental Protection Agency frequently do not perform the cleanup and seek the costs as damages, but instead compel the liable party to perform the cleanup itself by hiring contractors and paying them directly. *See* RCW 70.105D.030.

The court rejected the insurers’ argument, observing that “[i]n this state, legal technical meanings have never trumped the common

perception of the common man” and “[t]he language of insurance policies is to be interpreted in accordance with the way it would be understood by the average man, rather than in a technical sense.” *Id.* at 881. The average policyholder, the court observed, would expect to be covered for any costs it incurred as a result of actual or threatened use of legal process to “coerce payment or conduct.” *Id.* at 878. It would *not* expect that coverage would depend on a mere fortuity, such as whether the costs were incurred directly as a result of being compelled to remediate the pollution, or indirectly as a result of being found liable (in the form of damages) to reimburse the government for the costs it incurred in performing that remediation. *Id.*

Similarly here, State Farm and TIG seek to exclude from coverage an entire category of costs that Gull incurred as a result of its exposure to MTCA’s regulatory scheme, merely because the regulatory agency has not yet commenced an active, coercive legal or regulatory action. But the average policyholder does not distinguish between being forced to pay legal and other “defense” costs as a result of actual coercive action from a government agency, as opposed to the implicit threat of such action. *Boeing*, 113 Wn.2d at 878 (to the average policyholder, coverage depends “on an actual *or threatened* use of legal process to coerce payment or conduct by a policyholder”) (emphasis added). From the standpoint of a

policyholder such as Gull, being on the receiving end of MTCA's strict, joint-and-several liability scheme feels every bit like being sued in court: Gull has been forced to hire lawyers and consultants, strategize and develop a plan to minimize its liability, navigate the administrative process established by DOE, and write large checks at each step of the way. CP 142; 273-330; 333-94.

In the specific context of MTCA liability, then, the term "suit" as used in the State Farm and TIG policies is reasonably susceptible to at least two meanings: it could mean, as the insurers urge, formal, coercive action taken by DOE, such as a demand letter, administrative order, or civil action in court. For all the foregoing reasons, however, to the average lay purchaser of insurance the word could just as easily encompass any situation in which the insured is being held liable under MTCA to remediate environmental contamination, and any time the insured must take steps to defend itself by hiring counsel and others in an effort to minimize that liability. When a word in an insurance policy is reasonably susceptible to two interpretations, as it is here, the court must adopt the interpretation that results in coverage. *E.g., American Star Ins. Co. v. Grice*, 121 Wn.2d 869, 874 (1993).

State Farm and TIG argue that the policies make a distinction between a "claim" and a "suit" asserted against the insured, and that the

distinction is relevant to the insurers' duty to defend in the MTCA liability context. The policy terms at issue provide that the insurers "shall have the right and duty to defend any suit against the insured[,]" and that insurer "may make such investigation and settlement of any claim or suit as it deems expedient." CP 119, 171.

This language does not support the insurers' argument. The reference to defense of a "suit" and investigation and settlement of any "claim or suit" reflects the reality that many liability claims asserted against an insured will not rise to the level of a civil action in court and will not, therefore, require a traditional, formal "defense" using outside counsel and the like. Rather, the language contemplates that the insurer may settle non-litigated claims asserted against the policyholder simply via the process of insurance adjustment, that is, an employee of the insurer taking steps to evaluate, minimize, and pay the liability while it is still at the pre-litigation or "claim" stage. The language does not affect the interpretation of the term "suit" in the context of the administrative environmental liability regime under MTCA that could not have been contemplated in the early 1980s when the policies were issued.

**2. TIG Conceded this Ambiguity by Accepting Gull's Tender of Functionally Identical Sites.**

The ambiguity of the "suit" requirement in the context of environmental liability in Washington is further demonstrated by TIG's conduct with respect to contaminated stations that are functionally identical to the Sedro-Woolley Site. Gull tendered to TIG its liability in connection with six sites of former service stations: Station No. 299 in Stanwood; Station No. 605 in Spokane; Station No. 263 on Pacific Highway South in Seattle; Station No. 264 in Bellingham; a station known as "Turner's Corner Gull" in Woodinville; and Station No. 240 in Tukwila.<sup>6</sup> In each case, TIG accepted Gull's tender and agreed to defend Gull against those liabilities, including paying investigation costs of precisely the type at issue at the Sedro-Woolley Site, as well as any attorneys' fees incurred by Gull.

Each of those six sites where TIG has accepted defense are identical to Sedro-Woolley from an insurance standpoint: at none of those sites Gull has TIG been sued in court or received a demand letter or similar document that commences a formal, coercive legal proceeding.<sup>7</sup>

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<sup>6</sup> See also Declaration of Steven G. Jones of June 8, 2012 (Dkt. 58), Exs. 19-23 and 26, in Plaintiff's Supplemental Designation of Clerk's Papers (filed March 11, 2013).

<sup>7</sup> *Id.* at ¶ 7.

TIG is a sophisticated commercial liability insurer, represented by able counsel. *E.g.*, CP 404-07; n.7, *supra*. Its acceptance of Gull's tender of these six sites demonstrates that the "suit" requirement is ambiguous in this context: clearly the term is reasonably susceptible to alternative meanings—the legal definition of ambiguity. *Grice*, 121 Wn.2d at 874. As such, the term must be interpreted in favor of coverage. *Id.* at 874-75. The Court should reject the insurers' technical and restrictive reading of the term "suit," just as TIG itself did when it accepted defense at these six sites, and just as the Supreme Court did in analogous circumstances in *Boeing* and *Weyerhaeuser*.

#### IV. CONCLUSION

The rule urged by the insurers, and adopted by the Superior Court, would deprive Gull, and indeed the thousands of identically situated Washington insureds, of any defense-cost coverage absent active enforcement efforts by DOE or other third-party claimant. Such a rule is contrary to the reasoning behind the Washington Supreme Court's decision in *Weyerhaeuser*, because it discourages voluntary environmental cleanups, slows the process of remediating contamination throughout our state, and would unfairly place insureds in a Catch 22 formed by the duty to mitigate damages. As used in the subject insurance policies, and against the backdrop of the particular system used to administer and

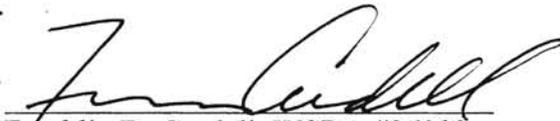
enforce MTCA liability in Washington, the term “suit” is ambiguous and should be interpreted to include all defense tasks reasonably necessary and attendant to the process of discharging the insured’s MTCA liability. For these reasons, this Court should reverse the Superior Court’s partial grant of the motion below, and remand for further proceedings.

RESPECTFULLY SUBMITTED this 11th day of March, 2013.

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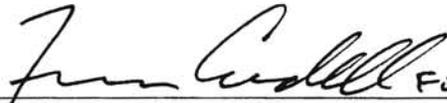
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