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CASE SUMMARY

DIRTY PROPERTY FOR DIRT CHEAP:
CGL COVERAGE FOR THE
DIMINISHED VALUE OF
CONTAMINATED SITES UNDER
GOODSTEIN V. CONTINENTAL
CASUALTY CO.

INTRODUCTION

In Goodstein v. Continental Casualty Co.,\(^1\) the United States Court of Appeals for the Ninth Circuit held that the diminution in sale value of property due to pollution does not constitute “property damage” under a comprehensive general liability insurance policy where the sale contract did not require the buyer to remediate as a condition of the sale.\(^2\) In so holding, the court found that diminished property value is not “physical injury to tangible property,” nor is it “damage” that the “insured shall become legally obligated to pay” because of “property damage.”\(^3\) However, without determining whether the mere designation of property as environmentally contaminated by the Washington State Department of Ecology is a “suit,” the Ninth Circuit held that such classification may still trigger the insurer’s duty to defend.\(^4\)

\(^{1}\) Goodstein v. Cont’l Cas. Co., 509 F.3d 1042 (9th Cir. 2007).
\(^{2}\) Id. at 1046.
\(^{3}\) Id. at 1054.
\(^{4}\) See id. at 1055.
I. FACTS AND PROCEDURAL HISTORY

A. THE STERNOFF PROPERTIES

Partnerships comprised of members of the Sternoff family jointly owned two industrial properties in Washington: a three-acre site on Marginal Way ("the Marginal property") in Seattle and a twelve-acre site in Renton ("the Renton property"). For forty-five years, the Sternoffs operated a scrap metal salvage yard at the Marginal property that caused ground pollution. For approximately twenty years, the Sternoffs recycled scrap metal and electrical equipment at the Renton property, resulting in hazardous waste byproducts containing high concentrations of soluble lead. In the late 1980s and early 1990s, the Washington State Department of Ecology ("DOE") identified the two properties as environmentally contaminated, and listed them as hazardous sites under the Model Toxics Control Act of Washington ("MTCA").

Beginning in the mid-1980s, the Sternoff partners had a series of disagreements among themselves, and they were unable to continue operating their various businesses. On March 29, 1990, the King County Superior Court dissolved the partnerships and appointed Robert Goodstein ("Goodstein") as receiver to liquidate the partnership assets. The court allowed Goodstein to proceed with remediation of the contaminated properties as necessary or to sell the properties without remediation. Goodstein presented two options to the receivership court: (1) sell the properties at a discounted sales price "as is" to account for the pollution, or (2) remediate the pollution and then sell the properties. The court approved a plan to sell the two properties "as is."

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5 Id. at 1046; see also Appellant’s Opening Brief at 7, Goodstein v. Cont’l Cas. Co., 509 F.3d 1042 (9th Cir. 2007) (No. 05-35805).
6 Goodstein, 509 F.3d at 1046.
7 Id.
8 The Model Toxics Control Act of Washington imposes strict liability for the remediation of environmental hazards upon any person who owned or operated a facility at which hazardous substances were released. Wash. Rev. Code § 70.105D.040 CHECK BB FORMAT ON THIS); see also Goodstein, 509 F.3d at 1046 n.2 (citing Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923, 927 (Wash. 1996)).
9 Goodstein, 509 F.3d at 1046.
10 Id.; see also Appellant’s Opening Brief at 6, Goodstein v. Cont’l Cas. Co., 509 F.3d 1042 (9th Cir. 2007) (No. 05-35805).
11 Goodstein, 509 F.3d at 1046.
12 Id. at 1047.
13 Id.
In 1996, Goodstein sold the Renton property for $3,001,000, and in 1998, he sold the Marginal property for $500,000. The sales agreements disclosed that both properties were polluted and required the purchasers to assume responsibility for any cleanup that may be required. Both agreements also provided that "[no] amendment, change or modification of [the agreements] shall be valid, unless in writing and signed by the parties hereto." However, the agreements did not commit the purchasers to remediate the properties on their own.

B. THE INDUSTRIAL INSURANCE POLICIES

Industrial Indemnity Company ("Industrial") issued primary and excess insurance policies to the Sternoffs between 1980 and 1986. The initial coverage grants in these Comprehensive General Liability ("CGL") policies state that "[Industrial] will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [property damage]" to which this insurance applies. Under the policies, Industrial assumed "the right and duty to defend any suit against the insured seeking damages on account of such . . . property damage, even if any of the allegations of the suit are groundless, false or fraudulent." Further, "the policies required the Sternoffs to provide written notice of an 'occurrence' to Industrial 'as soon as practicable,' and, in the event a claim or suit is asserted against the Sternoffs, to 'immediately forward' to Industrial all 'demand, notice, summons or other process' received by the Sternoffs." The policies defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in . . . property damage

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14 Id.
15 Id.
16 Id.
17 Goodstein v. Cont'l Cas. Co., 509 F.3d 1042, 1047 (9th Cir. 2007).
18 Id.
19 Comprehensive General Liability policies provide general liability coverage for commercial and business entities. In 1986, the revision of the CGL standard policy eliminated the word "comprehensive" and substituted it with "commercial." Although both use the acronym "CGL" and are called "CGL policies," there are significant coverage differences between the two. NEW APPLEMAN INSURANCE LAW PRACTICE GUIDE 30-24 (Leo Martinez, Marc S. Mayerson & Douglas R. Richmond eds., 2007).
20 Goodstein, 509 F.3d at 1047; see also Appellees' Response Brief at 4, Goodstein v. Cont'l Cas. Co., 509 F.3d 1042 (9th Cir. 2007) (No. 05-35805).
21 Goodstein, 509 F.3d at 1047.
22 Id.
neither expected nor intended from the standpoint of the insured.” The policies did not define “damages,” “claim,” or “suit.”

C. COMMUNICATION BETWEEN GOODSTEIN AND INDUSTRIAL

On September 28, 1990, Goodstein notified Industrial by letter that the Washington DOE had identified the Marginal and Renton properties as contaminated and that a study was underway to assess the damage and cleanup costs. Goodstein requested copies of the relevant policies and stated that “Sternoff may make a claim for cleanup and related costs under the insurance policies.” On October 19, 1990, Industrial acknowledged receipt of the claim and indicated that it was attempting to find the Sternoff policies.

On October 22, 1990, Goodstein acknowledged receipt of Industrial’s October 19, 1990 letter, but stated: “Please note, however, in case there is any confusion, we are not presently making any claims under these policies. At present, we are simply asking to obtain copies of any policies, applications, etc. relating to insurance provided by Industrial Indemnity to Sternoff.” Industrial did not receive any further correspondence regarding the Sternoff policies and in December 1992, closed the file for “lack of activity.” Because no claim was filed, Industrial did not issue a coverage position letter to Goodstein.

On September 25, 1998, eight years after Goodstein indicated to Industrial that he was “not presently making any claims,” Goodstein notified Industrial of the sale of the Renton and Marginal properties. In that letter, Goodstein also stated that the extent of the contamination of the properties had been investigated and that he was now in a position to settle the environmental claims related to those properties. Goodstein then demanded payment of $473,000 for the loss on the Marginal

23 Id.
24 Id.
25 Id.
26 Id. at 1047-1048 (emphasis in original).
27 Internal documents indicated that Industrial understood the September 28, 1990 letter to be asserting a claim for the cleanup and other related costs; see Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1048 (9th Cir. 2007).
28 Id.
29 Id. at 1048 (emphasis in original).
30 Id.
31 Id.
32 Id.
33 Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1048 (9th Cir. 2007).
property and $4.839 million for the loss on the Renton property. These amounts were calculated based on the “appraised value of the sites if uncontaminated less the sales price of the sites in their contaminated condition.” Industrial responded by disclaiming any coverage under the policies for the losses claimed by Goodstein on behalf of the Sternoffs.

D. PROCEDURAL HISTORY

In 2002, Goodstein filed suit seeking a declaratory judgment that “Industrial owed a duty to defend and to indemnify Goodstein under the CGL policies, and . . . for breach of contract based on Industrial’s failure to fulfill those duties.” Industrial moved for summary judgment on the grounds that the claimed losses from the property sales were not covered by the policies and that Goodstein never invoked the duty to defend.

In opposition to the summary judgment motion, Goodstein offered a declaration as evidence that he had entered into an oral cross-assignment agreement with Zelman Renton LLC (“Zelman”), the purchaser of the Renton property. The declaration stated that the cross-assignment agreement had “not yet been finalized.” Goodstein did not submit any evidence of the transfer and cross-transfer of rights in support of his opposition to summary judgment.

The United States District Court for the Western District of Washington granted Industrial’s motion for summary judgment, finding that Industrial did not have a duty to defend or a duty to indemnify Goodstein under the policies. The court did not consider the evidence purporting to establish the cross-assignment of rights.

Goodstein filed a motion for reconsideration along with a written cross-assignment agreement and a new declaration, stating that “all the material terms [of the cross-assignment agreement] had been negotiated

34 Id.
35 Id.
36 Id.
37 Id.
38 Id. at 1048-49.
39 Goodstein and Zelman agreed that all rights that Goodstein had to insurance coverage for environmental contamination would be transferred to Zelman, and Zelman would transfer those rights back to Goodstein; see Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1049 (9th Cir. 2007).
40 Id.
41 Id.
42 Id.
43 Id.
44 Id.
by, agreed to, and known to the parties as of January 27, 2005.\textsuperscript{45} The district court denied the motion for reconsideration, holding that Goodstein failed to comply with the local rules governing such motions.\textsuperscript{46} On appeal, Goodstein challenged the district court’s failure to consider the cross-assignment evidence at the summary judgment and reconsideration stages, as well as the court’s grant of summary judgment for Industrial on Goodstein’s duty to defend and duty to indemnify claims.\textsuperscript{47}

II. NINTH CIRCUIT ANALYSIS

A. CONSIDERATION OF CROSS-ASSIGNMENT EVIDENCE

The Ninth Circuit began its discussion by rejecting Goodstein’s assertion that his declaration properly served as evidence of the cross-assignment of rights between Zelman and Goodstein.\textsuperscript{48} Goldstien purported that the purpose of the agreement, was “to ensure that all rights to insurance coverage for environmental damage at the Renton site [were] consolidated and assigned to the Receiver,”\textsuperscript{49} and to “put to rest any argument that the claim for coverage was an ‘economic loss’ and not covered damages under the policies.”\textsuperscript{50}

While Washington law allows the assignment of insurance rights,\textsuperscript{51} the Ninth Circuit held that the district court did not abuse its discretion by declining to consider evidence of the cross-assignment.\textsuperscript{52} First, contrary to Goodstein’s assertion, the declaration did not state that the parties had reached a definitive agreement.\textsuperscript{53} Second, the agreement

\textsuperscript{45} Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1049 (9th Cir. 2007).
\textsuperscript{46} Id.; see infra notes 58-62 and accompanying text.
\textsuperscript{47} Id.
\textsuperscript{48} See id. at 1050. Because the policies at issue provide coverage for third-party liability and not first-party injury, the insurer is only liable for such damages that “the insured shall become legally obligated to pay” to a third-party; see id. at 1052. Therefore, in order to avail himself of the coverage provided by the policies, Goodstein entered into the cross-assignment agreement with Zelman; see id. at 1049. Third-party insurance covers the insured for liability it incurs to another party, while first-party insurance provides coverage for injury to the insured’s own property; see Olds-Olympic, Inc. v. Commercial Union Ins. Co., 918 P.2d 923, 930 (Wash. 1996) (citing Weyerhaeuser Co. v. Aetna Cas. & Sur. Co., 874 P.2d 142 (Wash. 1994)).
\textsuperscript{49} See Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1049 (9th Cir. 2007).
\textsuperscript{50} Appellant’s Opening Brief at 3, Goodstein v. Cont’l Cas. Co., 509 F.3d 1042 (9th Cir. 2007) (No. 05-35805).
\textsuperscript{51} See Public Utility Dist. No. 1 of Klickitat County v. Int’l Ins. Co., 881 P.2d 1020, 1027 (Wash. 1994) (holding that an assignment of insurance rights is valid “if made after the events giving rise to liability have already occurred when the assignment is made.”).
\textsuperscript{52} Goodstein, 509 F.3d at 1050.
\textsuperscript{53} Id.
executed by Goodstein and Zelman, which the cross-assignment sought to modify, provided that "[no] amendment, change or modification of [the agreements] shall be valid, unless in writing, and signed by the parties hereto."\(^54\) Lastly, the declaration did not disclose the essential terms of the cross-assignment agreement, including the consideration that supported the agreement.\(^55\)

The Ninth Circuit also held that the district court properly declined to reverse its summary judgment ruling upon Goodstein's motion for reconsideration.\(^56\) In support of his motion, Goodstein asserted that although the cross-assignment agreement was not memorialized in writing when he submitted the original declaration in opposition to summary judgment, "all the material terms had been negotiated by, agreed to, and known to the parties as of January 27, 2005."\(^57\) The district court, however, ruled that Goodstein failed to meet the standard laid out in the local rules.\(^58\) Local Rule 7(h) of the Western District of Washington provides that motions for reconsideration will only be granted upon a "showing of new facts... which could not have been brought to [the court's] attention earlier with reasonable diligence."\(^59\) The Ninth Circuit agreed with the district court, finding that Goodstein's motion "fails of its own weight."\(^60\) The panel held that according to Goodstein's motion, the precise terms of the cross-assignment agreement were agreed to and known to the parties, and therefore, could have been brought to the district court's attention in January of 2005.\(^61\) As such, Goodstein failed to meet the standard imposed by Local Rule 7(h).\(^62\)

Because it concluded that the district court properly declined to consider evidence of the cross-assignment, the Ninth Circuit did not consider the possible impact of the cross-assignment agreement on Goodstein's substantive claims for coverage under the CGL policies.\(^63\)

B. **DIMINISHED VALUE OF PROPERTY AS COVERED DAMAGES**

The Ninth Circuit next considered Goodstein's assertion that Industrial had a duty to indemnify Goodstein for the difference between

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\(^54\) *Id.* at 1047 (alteration in original).
\(^55\) *Id.* at 1050.
\(^56\) *Goodstein v. Cont'l Cas. Co.*, 509 F.3d 1042, 1051 (9th Cir. 2007).
\(^57\) *Id.*
\(^58\) *Id.*
\(^59\) W.D. Wash. Local R. 7(h) (cited in *Goodstein*, 509 F.3d at 1051) (alteration in original).
\(^60\) *Goodstein*, 509 F.3d at 1051.
\(^61\) *Id.*
\(^62\) *Id.*
\(^63\) *Id.*
the sale price of the polluted properties and the fair market value of the land had it been remediated prior to the sale.64 Goodstein argued that the diminution in value of the land due to the pollution is the “functional approximation” of the cost to remediate the properties and as such, should be covered under a CGL policy.65 While the Ninth Circuit agreed with the district court’s conclusion that the policy did not provide for indemnity of such costs, it disagreed with the rationale asserted by the district court in reaching that conclusion.66

The district court found that the policy provision that required Industrial to pay all sums “on behalf of the insured,” rather than to the insured, must be read literally.67 Therefore, the policy required Industrial to provide indemnity to the insured only for another’s loss, not for the insured’s own loss.68

The Ninth Circuit declined to follow the district court’s strict adherence to the distinction between first and third-party insurance.69 Relying on Boeing Co. v. Aetna Casualty & Surety Co.,70 the Ninth Circuit found that the Washington Supreme Court “has demonstrated a marked willingness to take a view of policy language in the context of insurance coverage for environmental cleanup claims sufficiently expansive to preclude such literalism.”71 Interpreting a CGL policy identical to the one in Goodstein, the Washington Supreme Court held in Boeing that a third-party liability policy does cover remediation costs, even though the insurer was to pay the insured for costs incurred.72 Therefore, the Ninth Circuit held that “Goodstein’s claim cannot fail simply because it is not a request for a payment made to a harmed third party.”73

However, the Goodstein court found that the diminished sale value of the polluted property was not the “functional approximation” of remediation costs.74 First, the sales contracts for the two properties did not require the buyer to remediate the pollution as a condition of the

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64 Id.
65 Id. at 1052.
66 See Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1051 (9th Cir. 2007).
67 Id. at 1052.
68 See id.
69 Id. at 1051-52.
71 Goodstein, 509 F.3d at 1052.
72 Boeing, 784 P.2d at 516; see also Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1052 (9th Cir. 2007).
73 Goodstein, 509 F.3d at 1052.
74 See id.
sale. On the contrary, records showed that while one of the properties was cleaned up by the buyer, the other remained polluted almost ten years after the sale and over fifteen years after it was first identified as contaminated.

Second, the court concluded that the reduced purchase price represented a calculation based on the probable cost of remediation discounted by the probability that the costs would actually be incurred. "The reduction in price for the cleanup costs was thus almost surely not equivalent in amount to the present cost of prompt cleanup.”

Lastly, diminution in sale value alone, the court stated, cannot constitute “property damage” where the policy language requires “physical injury to tangible property.” While clean up costs incurred in response to environmental agency action can constitute “property damage,” Washington courts “have never extended such interpretation to include diminution in property value as a surrogate for response costs never incurred.” Further, Goodstein did not “constructively” incur costs for remediation when the sale was not conditioned on remediation by the buyer using the money saved from the diminished purchase price.

In support of his position, Goodstein cited two Washington Supreme Court cases that held that response costs could constitute “property damage” under similar CGL policies: 1) Boeing Co. v. Aetna Casualty & Surety Co., noted above, and 2) Weyerhaeuser Co. v. Aetna Casualty & Surety Co. In Boeing, the Washington Supreme Court considered whether environmental response costs paid by the insured as a result of actions by the United States Environmental Protection Agency under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) constituted “damages” within the meaning of the CGL policies issued by the insurers. Applying Washington’s “plain meaning rule,” the Boeing court held that response costs incurred

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75 Id.
76 See id. at 1053.
77 See id.
78 Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1053 (9th Cir. 2007).
79 Id. at 1054.
81 Goodstein, 509 F.3d at 1054.
82 Id.
83 See id. at 1052.
84 42 U.S.C.A § 9601 (West 2008).
86 See id. at 511 (citing Farmers Ins. Co. v. Miller, 549 P.2d 9, 11 (Wash. 1976)) ("Undefined
under CERCLA are "damages" to the extent that those costs were incurred "because of" property damage within the meaning of the CGL policies. 87

In *Weyerhaeuser Co. v. Aetna Casualty & Surety Co.*, 88 the Washington Supreme Court took *Boeing* a step further and held that where the insured incurred response costs based on liability imposed by an environmental statute, those costs are "damages" within the meaning of a CGL policy, even if incurred prior to any adversarial agency action. 89 The *Weyerhaeuser* court found that requiring an insured to wait to be sued before receiving the benefits of its insurance policy would be inconsistent with the insured's contractual duty to mitigate damages, as well as the public policy of encouraging prompt action to protect the public health and environment. 90

The *Goodstein* court distinguished *Boeing* and *Weyerhaeuser* from the instant case in one crucial respect: "[t]he plaintiffs in *Boeing* and *Weyerhaeuser* actually cleaned up the polluted land, thus remedying the harm to the public caused by the contamination. The covered damages were incurred as part of that effort." 91 The sales contract for the Sternoff properties could not be the functional equivalent of the claims in *Boeing* and *Weyerhaeuser* when neither contract required the purchaser to actually remediate the pollution as a condition of the sale. 92 As a result, the Ninth Circuit affirmed the district court's holding that Industrial had no duty to indemnify Goodstein for the loss in sale value of the polluted properties. 93

C. DUTY TO DEFEND POTENTIALLY COVERED CLAIMS

Finally, the Ninth Circuit considered Goodstein's assertion that the DOE's allegations of contamination created a duty to defend since claims for environmental remediation are potentially covered under the Industrial policy. 94 In reversing the district court's grant of summary judgment, the Ninth Circuit held that Goodstein invoked the duty to

87 See *Boeing*, 784 P.2d at 516.
89 See *id.* at 154.
90 See *id.* at 153-154.
91 Goodstein *v.* Cont'l Cas. Co., 509 F.3d 1042, 1052 (9th Cir. 2007).
92 *Id.*
93 See *id.* at 1054.
94 See *id.* at 1055.
defend by filing the lawsuit against Industrial and that duty began at the
time of the DOE action and ended upon the sale of the properties.\textsuperscript{95}

An insurer has a duty to defend when the insurance policy
"conceivably" covers the allegations:\textsuperscript{96} "[a]n insurer’s duty to defend an
action brought against its insured arises when a complaint against the
insured, construed liberally, alleges facts which could, if proven, impose
liability upon the insured within the policy’s coverage."\textsuperscript{97} But Industrial
only assumes the duty to defend a "suit against the insured seeking
damages."\textsuperscript{98} Whether the DOE’s declaration of the Sternoff properties as
polluted constituted a "suit" within the meaning of the policy is an open
and unresolved issue under Washington law.\textsuperscript{99} Since Industrial did not
argue that the DOE action was not a "suit," the Ninth Circuit declined to
resolve the issue,\textsuperscript{100} and instead, the Ninth Circuit assumed that the DOE
designation of the properties was a "suit."\textsuperscript{101} So assuming, the \textit{Goodstein}
court ruled that "environmental response costs \textit{can} constitute covered
‘damages’ under CGL policies" and held that the DOE action implicated
Industrial’s duty to defend.\textsuperscript{102}

The duty to defend and the duty to indemnify are separate
obligations, and courts examine them independently.\textsuperscript{103} Therefore, the
fact that Goodstein did not pay any response costs is irrelevant to
whether a duty to defend existed while those costs were potentially
payable.\textsuperscript{104} The court only looks to whether the claims asserted against
the insured were potentially covered under the policy.\textsuperscript{105} "An insurer’s
duty to defend is a continuing one, and does not end until the underlying
action is resolved or it is shown that there is no potential for
coverage."\textsuperscript{106} As such, the \textit{Goodstein} court found that when Goodstein
sold the properties without performing remediation, he converted the
response costs, which were potentially covered under the policies, into an

\textsuperscript{95} \textit{Id.} at 1060.
\textsuperscript{96} \textit{See id.} at 1055 (citing Woo v. Fireman’s Fund Ins. Co., 164 P.3d 454, 459 (Wash. 2007)
(en banc)).
\textsuperscript{98} Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1047 (9th Cir. 2007).
\textsuperscript{99} \textit{See id.} at 1055.
\textsuperscript{100} \textit{See id.}
\textsuperscript{101} \textit{Id.}
\textsuperscript{102} \textit{Id.} (emphasis added).
\textsuperscript{103} \textit{See id.} (citing Dewitt Constr. Inc. v. Charter Oak Fire Ins. Co., 307 F.3d 1127, 1137 (9th
Cir. 2002)).
\textsuperscript{104} \textit{See Goodstein}, 509 F.3d at 1055.
\textsuperscript{105} \textit{See id.}
\textsuperscript{106} Overton v. Consol. Ins. Co., 38 P.3d 322, 344 (Wash. 2002) (en banc) (quoted in
Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1056 (9th Cir. 2007)).
economic loss that clearly fell outside the scope of coverage. Thus, Industrial’s duty to defend began at the time of the DOE action and terminated when Goodstein sold the properties. The Ninth Circuit held that if Goodstein can establish a breach of the duty to defend, he will be able to recover any pre-transfer costs incurred in defending, including any costs incurred in investigating the environmental contamination, such as the costs of hiring an expert to assess the pollution.

1. Invocation of the Duty to Defend

Goodstein asserted that his September 28, 1990 letter invoked the duty to defend because it gave Industrial notice of the fact that the DOE had declared the properties polluted. However, Washington law requires more than just providing notice to the insurer of a claim: “the insured must affirmatively inform the insurer that its participation is desired.” The Goodstein court found that Goodstein had done the opposite; Goodstein made clear that he was not invoking coverage under the policies. In his October 22, 1990 letter, Goodstein specifically stated that he was “not presently making any claims under the policies.”

Industrial asserted that no showing of prejudice was necessary because Goodstein never invoked the duty to defend in the first place. While the Ninth Circuit found Industrial’s position to be creative, the court was not persuaded. Under Washington’s late notice rule, in order to avoid liability for defense costs, an insurer must prove that the insured’s delay in tendering the defense claim caused the insurer actual and substantial prejudice.

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107 See Goodstein, 509 F.3d at 1055.
108 Id. at 1056.
109 The measure of damages for a breach of the duty to defend is the costs and reasonable attorney’s fees incurred by the insured in defending itself plus any consequential damages as a result of the breach; see id. at 1058 n.20 (quoting Underwriters at Lloyds v. Denali Seafoods, Inc., 927 F.2d 459, 464 (9th Cir. 1991)). The court found that the discounted sales price could not have been caused by Industrial’s failure to defend because Goodstein did not invoke the duty to defend until he filed this lawsuit, which was after he had already sold the properties for the discounted price; see id.
110 See Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1056 (9th Cir. 2007).
111 See id.
112 Id. (quoting Unigard Ins. Co. v. Leven, 983 P.2d 1150, 1160 (Wash. Ct. App. 1999)).
113 See id.
114 See id. at 1048; see also id. at 1056.
115 See Goodstein, 509 F.3d at 1056.
116 See id. at 1056.
117 See Goodstein v. Cont’l Cas. Co., 509 F.3d 1042, 1056-57 (9th Cir. 2007) (citing Mutual
The Ninth Circuit held that the fact that Goodstein may never have tendered a defense claim to Industrial before filing this lawsuit did not relieve Industrial of its obligation to prove prejudice. The court held that "[t]he filing of the lawsuit itself constitutes a request for payment of defense costs under the policy, and at that point, the late notice rule applies." The court found that Goodstein's failure to deman a defense precluded coverage absent a showing of prejudice. "[E]ven if a claim for defense costs is. . .asserted in the form of a coverage suit rather than by a letter to the insurer demanding a defense or submitting defense costs, the insurance company is still liable for the defense costs absent evidence of substantial prejudice." 121

2. Evidence of Substantial Prejudice

The Ninth Circuit held that Industrial could not establish prejudice as a matter of law. To establish prejudice, Industrial had to "demonstrate some concrete detriment, some specific advantage lost or disadvantage created, which ha[d] an identifiable prejudicial effect on [Industrial's] ability to evaluate, prepare or present its defenses to coverage or liability." The court found that there was no evidence to suggest that Industrial could have taken any steps to mitigate or dispute Goodstein's liability for the pollution or that Industrial was in any other way damaged by Goodstein's alleged breach of its obligations under the policy. Accordingly, the Ninth Circuit reversed the district court's grant of summary judgment for Industrial on the duty to defend claim. The Goodstein court, however, emphasized that this decision was not expressing a view on whether Industrial actually owed a duty to defend under the policies. Rather, the decision merely established that Industrial could not prove substantial prejudice as a matter of law to warrant the grant of summary judgment. The Ninth Circuit left it up to

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118 Id. at 1058.
119 Id. at 1057.
120 Id. at 1058.

122 Goodstein v. Cont'l Cas. Co., 509 F.3d 1042, 1058 (9th Cir. 2007).
123 Id. (citing Unigard Ins. Co. v. Leven, 983 P.2d 1150, 1161 (Wash. Ct. App. 1999)).
124 See id. at 1059.
125 Id. at 1060.
126 See id.
127 See id.
the district court, on remand, to determine whether there was a duty to defend based on these facts, and, if so, whether any damages were incurred as a result of the breach.\textsuperscript{128}

III. IMPLICATIONS OF THE DECISION

The Ninth Circuit decision in \textit{Goodstein v. Continental Casualty Co.} stands for the proposition that the diminished sale value of polluted property is not a covered "property damage" under a CGL policy where the sale contract did not require the buyer to remediate as a condition of the sale.\textsuperscript{129} This holding appears to be consistent with Washington law; by selling the property "as is" and without requiring the buyer to clean up the property, Goodstein did not actually pay any sums it was obligated to pay under the MTCA or CERLCA.\textsuperscript{130}

More significant, however, is the Ninth Circuit's treatment of what constitutes a "suit" for purposes of the duty to defend. In finding that Industrial might still have a duty to defend Goodstein, the Ninth Circuit assumed that the DOE action was a "suit" for purposes of defining the insurer's defense obligations under the CGL policy.\textsuperscript{131} In the words of the \textit{Goodstein} court, what constitutes a "suit" for purposes of the duty to defend in environmental cleanup cases is an issue that the Washington Supreme Court has "repeatedly declined to resolve."\textsuperscript{132}

However, by proceeding to find a duty to defend under the assumption that mere designation of property as polluted is a "suit" under a CGL policy, the \textit{Goodstein} court may have opened the door for policyholders who have cleaned up property without putting their insurers on notice to claim retroactive payments for site investigation costs.\textsuperscript{133} In addition, as one commentator stated, "[b]y the court's own logic, that 'suit' would not terminate until the property was fully remediated and removed from the cleanup list. Until [the DOE] does so, the 'suit' would remain active and Goodstein would remain exposed to enforcement by the state and potential contribution actions by subsequent owners."\textsuperscript{134}

\begin{itemize}
\item\textsuperscript{128} See id.
\item\textsuperscript{129} See \textit{Goodstein v. Cont'l Cas. Co.}, 509 F.3d 1042, 1053 (9th Cir. 2007).
\item\textsuperscript{130} See \textit{Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.}, 874 P.2d 142, 151 (Wash. 1994) (en banc).
\item\textsuperscript{131} See \textit{Goodstein}, 509 F.3d at 1055.
\item\textsuperscript{132} See id.
\end{itemize}
The Washington Supreme Court’s en banc decision in *Weyerhaeuser* took a step closer to finding that mere designation of property as polluted without an overt threat of litigation is a “suit” within the meaning of a CGL policy.  

135 *Goodstein* expands on *Weyerhaeuser* in holding that a duty to defend may exist based on the mere designation of property by an environmental agency. 136 Whether Washington courts or other jurisdictions will follow the *Goodstein* court’s assumption that mere designation by an environmental agency constitutes a “suit” remains to be seen.

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