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Oregon Supreme Court Ruling Creates Potential Uninsured Employer Liability for Employee Occupational Disease Claims

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Employers have long assumed that their workers' compensation insurance coverage provides complete protection against claims by employees for on-the-job injuries. In the past, employees have been allowed to sue employers for on-the-job injuries only if the employer failed to obtain workers' compensation coverage or if the employer intentionally injured the employee. A new Oregon Supreme Court case creates the potential for employees to sue their employers for occupational disease claims. Such claims are not covered by workers' compensation coverage and may also not be covered by general liability coverage.

The plaintiff in *Smothers v. Gresham Transfer* was a lube technician for a trucking company. In the course of his work, he was exposed to chemical mists and fumes. The plaintiff suffered from a lung condition for which he filed a workers' compensation claim. The administrative law judge denied plaintiff workers' compensation benefits because he failed to prove that his exposure at work was the "major contributing cause" of his lung condition. This is the causation standard required for compensation of occupational diseases under Oregon's workers' compensation law.

Plaintiff then filed a negligence action against his employer, alleging failure to provide a safe workplace, failure to warn, and failure to provide proper instructions or protections. The trial court and the Court of Appeals dismissed the employee's complaint on the grounds that the workers' compensation exclusive remedy clause barred the claim. This statute makes the workers' compensation law the "exclusive remedy" for work-related injuries, "whether or not they are determined to be compensable... ."

On May 10, 2001, the Oregon Supreme Court reversed and held that the "major contributing cause" standard, combined with the exclusive remedy of the workers' compensation law, violated the Oregon Constitution's "remedy clause," which provides that there must be a remedy for every harm recognized by the law. The court's decision is lengthy and scholarly. It traces the development of the remedy clause from the Magna Carta through adoption of the Oregon Constitution in 1859 to the present. The court found that the "major contributing cause" standard applied in workers' compensation occupational disease cases is higher than the causation standard applied in common law tort theories. This standard, coupled with the exclusive remedy provision, created a situation where plaintiff was left without any remedy for injury to a constitutionally protected right. The court deemed this lack of redress to be unconstitutional. It, therefore, allowed the employee to proceed with his claim against his employer in court.

Smothers has important implications for employers:

1. Ordinarily the employer tenders a workers' compensation claim to its insurer, the insurer retains defense counsel, and the insurer and the employer have a common interest in defeating or limiting the claim. Under *Smothers*, the insurer's successful defense of an occupational disease claim, on the grounds that the employment exposure was not the major contributing cause of the disease, will relieve the insurer from paying on the claim, but will expose the employer to liability in a lawsuit by the employee on the same claim.
2. Unlike a workers' compensation claim, the occupational disease claim can expose the employer to whatever economic and non-economic damages, including pain and suffering and loss of lifestyle damages, the plaintiff can convince the jury to award. The employer may be exposed to punitive damage claims in some cases.
3. Occupational disease claims by employees may not be covered by the employer's general liability policy (CGL policy). Many CGL policies exclude all employee injury and disease claims from coverage. In the past, workers' compensation coverage covered this exclusion, but the *Smothers* ruling creates a possible gap in coverage.
4. Where *Smothers* allows an employee to sue his or her employer, the employer is also now exposed to contribution and indemnity claims by third parties. In the past, the "exclusive remedy bar" prohibited not only employee claims against the employer, but also claims by third parties who may be liable for the

plaintiff's occupational disease. Municipalities, which have enjoyed immunity against any person's claim covered by workers' compensation, could lose that immunity in occupational disease cases.

The Smothers case will affect employers in a variety of cases. Chemical exposure cases, such as Smothers, are the most obvious. Occupational disease claims can take many forms, including a wide variety of repetitive stress claims that can arise in many manufacturing, construction and office environments. Companies need to be aware that these claims can create a conflict of interest with their workers' compensation insurers and that these claims create the potential for uninsured liability that falls in a newly created gap between workers' compensation and general liability insurance.

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