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Insurance Recovery for Environmental Liability: Occurrences, Triggers, Exclusions, and Covered Damages

WEDNESDAY, DECEMBER 9, 2020

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Strafford Webinar

INSURANCE RECOVERY FOR ENVIRONMENTAL LIABILITY: OCCURRENCES, TRIGGERS, EXCLUSIONS, AND COVERED DAMAGES

Wednesday, December 9, 2020

1:00pm-2:30pm EST, 10:00am-11:30am PST

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Considerations for Companies and Counsel

A. Whether Cleanup Costs Are Covered Damages?

Under a standard CGL policy, an insurer is obligated to pay for "all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence."

Most policies define "property damage," but they do not define "damages" leading to litigation over conflicting interpretations of the term.

Whether Cleanup Costs Are Covered Damages?

Insurers' Perspective

- Policies cover only "damages" to claimants, not the cost of cleaning up environmental damage.
- Governmentally mandated cleanup costs are equitable in nature, not legal, and thus not recoverable.

Whether Cleanup Costs Are Covered Damages?

Courts consider several important issues when confronted with property damage issues:

1. Whether environmental cleanup costs incurred in response to a government order are “damages” under a CGL policy.
2. Whether environmental cleanup costs, incurred when the insured undertakes cleanup voluntarily in advance of a government order, are “damages” within the meaning of the CGL policy.
3. Whether costs incurred to prevent environmental contamination constitute “damages” for which the insurer must indemnify the insured.

Cleanup as Ordered by the Government

The current trend is that an insured who has been ordered by the government to reimburse response costs associated with environmental cleanup can claim those costs as damages.

- A few courts have held that response costs are merely an economic loss and not “property damage.”

Voluntary Cleanup Measures

Most courts hold that the insurer is required to indemnify the insured for the costs of voluntary cleanup measures.

- Unfavorable public policy implications of a rule that would discourage insureds from initiating voluntary cleanup efforts.
- Minority of courts hold that there is no duty to indemnify for voluntary cleanup because the costs are not sums which the insured is legally obligated to pay as damages under the policy.

Preventative Measures

Most often, courts do not consider preventative measures to be costs incurred because of property damage.

Whether Cleanup Costs Are Covered Damages?

Court's Reasoning

- Ambiguities in insurance policy language should be resolved in favor of the policyholder.
- The ordinary policyholder would not ascribe a highly technical meaning to the term "damages."

Minority

- Cleanup costs are not damages under a CGL policy.
- Adopted a narrow, technical interpretation of the term "damages."
- "Damages" allowed only if monetary damages are awarded against the policyholder in a lawsuit in court.

B. What Exclusions Apply?

- Expected or Intended Injury
- Contractual Liability
- Pollution Exclusion
  - Absolute
  - Sudden and Accidental
- Own Property
- Known Loss
- Notice

C. What is property under the case, custody or control of the policyholder?

- Either an ownership interest in, or "exclusive control" of the property at the time it is damaged - an insured's physical possession of the property is sufficient
- Applies only to personal property?
- First-Party v. Third-Party?
- Groundwater?

D. What is a foreseeable occurrence?

- **Accident Policies**
  - Insurers argue that damages are "caused by accident" only if the injury-causing event (1) was caused by an unintentional act and (2) occurred suddenly, in the sense that it occurred at a specific time.
  - An accident is the distinctive event or determinable, unexpected happening... the date of which can be fixed with certainty.
  - Many courts have rejected the claim that accident policies cover only damages caused by unintentional acts. Reasoning that "caused by accident" is an ambiguous phrase, courts ask whether the insured intended to cause harm, not whether the insured intended to act.

D. What is a foreseeable occurrence? (cont.)

- Occurrence Policies
  - Expected or intended
  - Legally foreseeable results of insured's intentional acts
  - There is no uniform standard for determining whether an insured expected or intended to cause harm.

D. What is a foreseeable occurrence? (cont.)

- Insurers tend to argue that a result is expected or intended for purposes of insurance coverage if it is "foreseeable" under tort law.
- Insureds argue that a result is intended if and only if the insured specifically intended to cause harm.
- Most courts have rejected both extremes.
- Standard and the emphasis on either "intent" or "expectations" varies from case to case

E. When does insurance coverage begin and end (trigger issues)?

- Insurance coverage is triggered if an event or condition happens during the policy period.
  - Trigger is not defined in policies.
  - Critical elements include timing, express conditions and exclusions, available defenses and case-specific facts.

General Trigger Theories

- Manifestation theory
- Injury in Fact Theory
- Exposure Theory
- Continuous Trigger Theory

Manifestation Theory

- Liability triggered when the effects of the personal injury or property damage first become apparent, even if the cause of the damage was not yet reasonably ascertainable.

Injury-in-Fact Theory

- Property damage or bodily injury actually takes place during the policy period.
- Seminal case, *American Home Products Corp. v. Liberty Mutual Ins. Co.*
  - Claim for bodily injury related to ingestion of drugs.
  - Policy holder argued for continuous trigger coverage.
  - Insurer argued coverage was triggered only when damage was manifested.

Exposure Theory

- Rooted in property damage and bodily injury claims.
- Coverage applies if the contamination develops during the dates of coverage.
- All insurance contracts in effect when the property was exposed to the damage are triggered.

Continuous-Trigger Theory

- Applied in environmental cases.
- Property damage or bodily injury occurs over a long period of time.
- Damages span a number of insurance policy periods.
- Result is that every insurance policy in force during the entire period of property damage or bodily injury is activated and provides coverage for the policyholder's liabilities.

Continuous-Trigger Theory (cont.)

Example

- If damage from waste disposal occurred and continued after the disposal, losses result in multiple policy periods.
- Each year of the damage implicates a different policy.

Courts' Application of Continuous-Trigger Theory

- Rulings on the issue vary widely.
- The courts rejecting the theory applied triggers based on time when the pollution damage was discovered.
- Other courts applied triggers based on the time when the act causing the pollution damage took place.
- The majority of courts have concluded that some variation of the continuous-trigger theory applies.
- Allocation of damages?

II. Strategies for Recovery

A. CGL Policies

What is defense and what is indemnity?

- Why do we care?
  - Generally in primary policies, indemnity costs erode limits, but defense costs do not
  - Insurers generally do not need to defend until there is a “suit,” but they “may” defend and are required to indemnify damages from “claims”

What is defense and what is indemnity?

- What is a "suit"?
  - Minimally, lawsuit
  - Governmental Unilateral Cleanup Order
    - Yes--majority
    - But not California: *Foster-Gardner v. National Union*, 18 Cal.4th 857 (1998)
  - PRP letter, Voluntary Cleanup Agreement
    - Yes—majority
    - No—require suit in "court of law" or "formal complaint"
  - CERCLA 104(e) information request
    - Yes—*Anderson Bros., Inc. v. St. Paul Fire & Marine Ins. Co.*, 729 F.3d 923 (9th Cir. 2013); *Ash Grove Cement Co. v. Liberty Mutual Insurance Co., D.C. No. 3:09-cv-00239-HZ (May 11, 2016) (not for publication)*

What is defense and what is indemnity? (cont'd)

- Where is the line between "defense" and "indemnity"
  - Line is grey in environmental cases, but, when at best, is driven by nature of activity. E.g.,
    - *Aerojet-General Corp. v. Transport Indem. Co.*, 948 P.2d 909, 922-25 (Cal. 1997) (defense includes site investigation expenses)
    - *Am. Bumper & Mfg. v. Hartford Fire Ins. Co.,* 550 N.W.2d 475 (Mich. 1996)(remediation activities are indemnification; activities to disprove or limit scope of, or liability for, clean up are defense)
    - *Fireman's Fund Ins. Co. v. Ex-Cell-O Corp.,* 790 F. Supp. 1318, at 1337-38 (S.D. Mich. 1991) ("defense costs include not only those reasonable and necessary costs to defeat or limit liability, but also those costs, including consulting fees, that are reasonable and necessary to limiting the scope and/or costs of remediation, even if similar or identical studies have been ordered by the government")

What is defense and what is indemnity? (cont'd)

- *Oregon Revised Statute 465.480(7)*
  - (a) There is a **rebuttable presumption** that the costs of **preliminary assessments, remedial investigations, risk assessments or other necessary investigation**, as those terms are defined by rule by the Department of Environmental Quality, **are defense costs** payable by the insurer, subject to the provisions of the applicable general liability insurance policy or policies.
  - (b)There is a **rebuttable presumption** that payment of the costs of **removal actions or feasibility studies**, as those terms are defined by rule by the Department of Environmental Quality, **are indemnity costs** and reduce the insurers applicable limit of liability on the insurers indemnity obligations, subject to the provisions of the applicable general liability insurance policy or policies.

What is defense and what is indemnity? (cont'd)

- What rebuts the presumption? Legis. History:
- "For instance, portions of the feasibility study involving the remedial design and the remedial action work plans definitely are designed to implement the ultimate technology that's chosen for the site. And in that case I would agree with you that that's more properly characterized as indemnity. On the other hand, when you have 18 different technologies that the DEQ wants you to investigate, some of which will bankrupt your company and others of which are potentially implementable and then when you have to [weigh] the efficacy of that technology versus the cost, those activities which are also very time consuming and very expensive, I think **are more properly defense costs because those are all designed, at least by the company, to attempt to limit the company's ultimate exposure for the overall project.** And they have the same characteristics than as the remedial investigation had. So, I would say, yes, sometimes portions of the feasibility study are properly classifiable as indemnity, sometimes they are defense, and my suggestion is this is an area in which you should allow the court to parse out which portions are attributable to which." (Testimony before Oregon House Judiciary Committee, July 7. 2003).

What is defense and what is indemnity? (cont'd)

- When is indemnity obligation owed in environmental cases?
  - "No action shall lie . . . until the amount of the insured's obligation to pay shall have been finally determined either by final judgment against the insured. . .or by written agreement of the insured, the claimant and the company." (*see also* "Loss Payable" clause.)
    - What is "final judgment" in ongoing environmental cleanup case?
    - What is insurer's good faith obligation to reach "agreement" with insured and claimant (often government agency)?

What is defense and what is indemnity? (cont'd)

- When is indemnity obligation owed in environmental cases? (cont'd)
  - Implications
    - Insurers holding out to leverage settlement with insured by demanding that insured accept less than policy limits
    - Insureds concerned that indemnity payment by insurer will allow insurers to cease to pay defenses
      - An "insurer cannot extinguish its defense obligation simply by tendering its indemnity limits to the insured and walking away from the fray — a tempting maneuver when it appears that defense costs will exceed indemnity limits." *County of Santa Clara v. U.S. Fidelity & Guarantee Company, 868 F.Supp. 274, 277 (N.D. Cal. 1994).*
      - However, "if [the primary insurer] pays its limits by judgment or settlement — *i.e.*, if the underlying action is gone — then [the primary insurer's] duties have ended." *Pacific Employers Insurance Company v. Servco Pacific, Inc., 273 F.Supp.2d 1149, 1154 (D. Haw. 2003).*
      - "The common thread running throughout these cases is that an insurer may not exhaust its indemnity limits until a settlement or judgment of some kind imposes a legal obligation on the insured to a third party. In Weyerhaeuser, the insured incurred indemnity costs by complying with a consent decree." *Siltronic Corp. v. Employers Ins. Co. of Wausau, 921 F.Supp.2d 1099, 1108-09 (D. Or. 2013)* .

Dealing with multiple insurance companies

- Not task of insured to shepherd **defense roles** of multiple insurers
  - Insured should demand that carriers provide one coordinating point of contact
    - Insured should require one insurer to defend and make it the responsibility of that insurer to obtain contribution from other carriers for defense costs
    - Insured should (and has duty) to cooperate with defending insurer, including to support making contribution case against other insurers, but generally not to accept any portion of defense costs
      - Majority view: duty to defend is joint and several between all insurers providing coverage
      - Minority: pro rata allocation of defense costs can include allocation to insured for uninsured or self-insured periods

Dealing with multiple insurance companies (cont'd)

- **Indemnity** obligations of multiple insurers
  - "All sums" jurisdictions—can require one insurer to pay up to policy limits, not that insurer's "share" as compared to other insurers
    - Insurers rarely start at this position
    - Insureds need to be clear this is what they are demanding
  - Pro rata jurisdictions
    - Insurers have stronger position that only need to pay their "share"
    - Insured's leverage
      - Bad faith claim (where available) for failure to make reasonable settlement
      - All insurers generally have joint and several obligation to defend; so, if insurers cannot agree on allocation to fully pay for settlement, then all insurers will need to continue to defend.

Practical advice to maximize likelihood of recovery of costs from insurers-with respect to Defense

- Easiest: make certain insurer pays all—counsel, consultant, experts, costs
- However, when insured retains counsel/consultant and requests reimbursement
  - Prompt submittal of detailed invoices (demand for payment of ascertainable sums)
  - Demand payment of interest where allowed on contractual claim
  - Provide consolidated updates on amounts owed
  - Answer reasonable inquiries from insurer

Practical advice to maximize likelihood of recovery of costs from insurers-with respect to Defense (cont'd)

- When insured retains counsel/consultant and requests reimbursement (con.)
  - Fulfill duty to cooperate:
    - Status reports to insurers and, when requested, budgets
    - Provide opportunity for input on major strategic decisions (but decision made by insured with advice of counsel)
      - Retaining experts/consultants
      - Dispositive motions or positions with agencies
      - Settlement opportunities

Practical advice to maximize likelihood of recovery of costs from insurers-with respect to Defense (cont'd)

- In any case, Document, document, document
  - Your insurer and its retained counsel have the obligation to provide a defense that fully protects your interests and to pay all reasonable and necessary defense costs to do so.
  - Demand that they do it, IN WRITING
  - Assume a jury will read everything you send.

Legal implications of a reservation of rights as to defense provided by insurance company

- Almost always the case, and usually creates some conflict of interest
  - Insurer defending but does not agree to pay the judgment imposed as a consequence of the defense it is providing
  - E.g., Insurers will play "reservation of rights" card to get insured to contribute to settlement/resolution of case
- More jurisdictions are recognizing this
  - California "Cumis" counsel: Calif Civil Code § 2860 (entitled to independent counsel chosen by insured when insurer reserves its rights on a coverage issue and the outcome of that coverage issue can be controlled by defense counsel retained by the insurer)
  - Oregon statutory "independent counsel," ORS 465.483
  - Case law supports "independent counsel" in AK, AR, CA, DE, DC, FL, IL, IN, KS, LA, MD, MA, MN, MI, MO, NJ, NM, NY, OH, OK, PA, TX, WA, WI

Legal implications of a reservation of rights as to defense provided by insurance company (cont'd)

- What to do in other jurisdictions
  - Insist that counsel and consultants/experts retained by insurer are competent to handle the type and complexity of case
  - If you are working with insurer-retained counsel, ask how they handle this inherent conflict
    - Request that counsel retained by insurer agree it is representing only you and not the insurance company
    - Presumption in some jurisdictions that "dual client"
      - May not need to be so; presumption may be negated by agreement to contrary
      - Even in "duel client" jurisdictions, lawyer has "primary client." ABA Informal Ethics Op No 1476 (1981).
    - Request that retained counsel agree to honor attorney-client privilege that does not include the insurance company and establish chain of communication with your counsel that does not include insurer
    - But balance communications so as to satisfy duty to cooperate

Legal implications of a reservation of rights as to defense provided by insurance company (cont'd)

- What to do in other jurisdictions
  - Ask questions, IN WRITING, throughout the representation to confirm insurer and their retained counsel and consultants/experts are protecting your interests
  - Be particularly mindful in settlement discussions—are there covered and non-covered aspects of the claim being settled? Do facts known to your counsel affect that?
  - Be prepared to retain your own counsel and consultants/experts and insist that insurer reimburse

Practical advice to maximize likelihood of recovery of costs from insurers—with respect to Indemnity

- Make certain you have best copy of the policy
  - Make very specific request to insurer and follow up
  - Use insurance archeologist as necessary
- Make certain you understand actual policy limits on each policy, including applicability of aggregates and possible application of multiple occurrences
- Understand whether, given law to be applied to the coverage claim, horizontal or vertical exhaustion will be applied and any nuances with respect to how exhaustion applies

Multiple occurrences and applicability, or not, of "aggregate" limit

- Insurers will say they have an aggregate limit when they do not
  - Look at "Limits of Liability" in policy.
    - Typical CGL policy for an "operations" risk applies the stated aggregate only for a risk rated on a "remuneration" (payroll) basis. If the risk was rated on any other basis (e.g. sales, square footage), then the policy will pay multiple occurrence limits if the facts justify a finding of multiple occurrences
    - A substantial number of 1970s excess policies applied the aggregate only "in respect of Products Liability and . . . Personal Injury . . .by Occupational Disease."
    - In multi-year policies, are either sets of limits (aggregate or occurrence limits) annualized? (also look for "Annual Limits" or "Annual Period" clause).

Multiple occurrences and applicability, or not, of "aggregate" limit (cont'd)

- Test for separate occurrence is jurisdiction specific:
  - Cause theory, e.g. *Wright v. Turner,* 354 Or 815 (2014) (two collisions caused injury).
  - Effects theory, e.g. *Anchor Casualty Co. v. McCaleb*, 178 F2d 322 (5th Cir 1949) (separate "occurrence" for each person whose property was damaged by oil well explosion).
  - Event theory, e.g. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F3d 1178, 1213 (2nd Cir 1995) (each installation of asbestos-containing product constitutes separate "occurrence").

Multiple occurrences and applicability, or not, of "aggregate" limit (cont'd)

- Modifying Language:
  - " 'Occurrence' means an accident, including continuous or repeated exposure to substantially the same general conditions"

Traps to Avoid

- Side agreements that limit coverage ("non-waiver agreements")
- Reservation of rights letters that purport to create new terms of coverage (e.g. "right of reimbursement")
  - Unilateral, so argument that not binding
    - *But see Buss v. Superior Ct., 16 Cal.4th 35 (1997)* (purporting to reserve right to reimbursement on costs allocable to "solely" non-covered claims)
  - But can be interpreted as agreed condition if accept defense subject to the reservation of rights
  - Best practice: respond to reject any statement in reservation of rights letter that detracts from coverage required under the insurance contract

Traps to Avoid (cont'd)

- Insurance counsel guidelines that prevent defense counsel from providing reasonable and necessary defense

OREGON FORMAL ETHICS OPINION NO. 2005-166

Competence and Diligence:

Compliance with Insurance Defense Guidelines

Facts:

Insurer has an ongoing professional relationship with Lawyer to defend claims asserted against its insureds. As a part of that relationship,

Insurer requires Lawyer to agree to comply with its Litigation Billing/Management Guidelines (the "Guidelines"). ***

Question:

May Lawyer agree to comply with the Guidelines without regard to their effect on Lawyer's clients?

Conclusion:

No.

Discussion:

Lawyer may sign and return the acknowledgment letter to indicate that Lawyer has accepted the *assignment* of the matter, but must advise

Insurer that he or she cannot agree to comply with Guidelines that might compromise Lawyer's ethical obligations as discussed below. ***

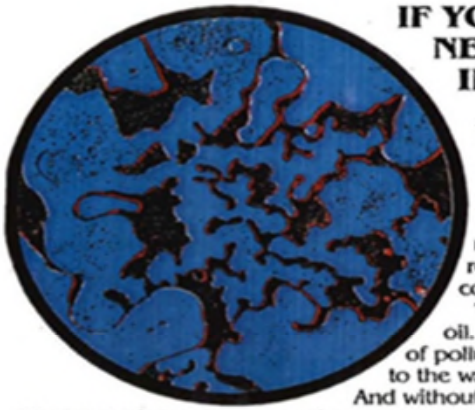
- "Policy buyback" settlements

B. Specialized Policies


Robert Horkovich
POLLUTION LIABILITY COVERAGE

The Genesis of Environmental Impairment Liability (EIL) Insurance

- In the Beginning…
  - Early CGL Policies did not exclude pollution;
  - Mid-70s, a limited (qualified) polluter's exclusion was added;
  - Interpretation was controversial;
  - EIL Policies emerged to fill the potential gap in coverage.



IF YOU DON'T THINK YOU NEED POLLUTION INSURANCE,

TAKE A CLOSER LOOK

What you're looking at is water pollution. Magnified 250 times. It's not visible to the naked eye. Even the trained naked eye. Nevertheless, the polluter is responsible for the costly and time consuming process of cleaning it up.

This particular pollution was caused by oil. But it's only one of hundreds of forms of pollution, any of which you can be causing to the water, the air, or the soil. Unintentionally. And without realizing it.

The cost of cleaning up environmental pollution can put a firm out of business. Especially a small firm. And that's why The Travelers Environmental Hazard (EH) Policy was created.

The Travelers EH Policy provides much broader coverage than other policies. For example:

- Automatic, Comprehensive pollution liability coverage. Many other policies require each business site to be added to the policy; if the site is not described, there is no coverage.
- A separate limit of liability for Products and Completed Operations exposures. Most other policies share the pollution liability limit with the normal Products and Completed Operations losses. As a result, if normal losses exhaust your limits, there is no coverage for pollution losses.
- Retroactive liability. Since the EH policy normally has no retroactive date, full coverage is available for prior acts which result in claims made during the EH policy period.
- Difference in Conditions Coverage. Those deliberate discharges (such as carefully treated waste waters) which were not expected or intended to cause damages and which were nevertheless excluded in the past are now covered under the EH policy.

For details on The Travelers Environmental Hazard Policy, contact your independent Travelers agent or broker.

Pollution is everybody's problem. At The Travelers, we're as concerned with protecting future generations as we are with protecting this one.

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THE TRAVELERS

The Travelers Indemnity Company and Its Affiliated Companies, Hartford, CT 06115

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It's been quite awhile since a single source could insure the world from environmental risks.

We don't pretend to be in Noah's league. But when it comes to protecting you from environmental risks, we come awfully close.

At Commerce & Industry Insurance Company, we can now provide specialized environmental coverages to businesses worldwide.

That means we can still offer you everything from our traditional casualty coverages and property insurance for preferred and standard risks to the latest in environmental insurance protection. All with local service through an unparalleled network of offices across the country.

And like Noah, we're up on the latest changes in the climate so we're able to develop new products to make sure you stay covered.

For more information, contact your local representative. After all, an offer like this doesn't come along every day.

AIG World leaders in insurance and financial services.

Commerce & Industry Insurance Company, a member company of American International Group, Inc.

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Robert Horkovich

BUSINESS INSURANCE
December 18, 1995
at 7

Remember When Environmental Accidents Were Fun For The Whole Family?

What you may not remember is that when others viewed environmental risk management as science fiction, our specialists were pioneering the field. And because we continue to evolve with the industry's ever-changing needs, we understand that progressive risk management can only come from a willingness to take intelligent, informed risks ourselves.

By forming an active partnership with our agents, brokers and customers, the Zurich-American Environmental Group forges a bond of shared expertise that stretches the boundaries when it comes to creative risk management products and solutions.

We're willing to take risks other companies won't. And we'll service our policies in a way other companies can't. Because we're backed by the financial strength, stability and The Power of Partnership only The Worldwide Zurich Insurance Group can provide. For more information, contact your agent or broker, or call 1-800-382-2150.

ZURICH-AMERICAN INSURANCE GROUP

The Power of Partnership℠ in Environmental Insurance

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The Genesis of Environmental Impairment Liability (EIL) Insurance

- Modern Day EILs…
  - Site-specific and risk-specific coverage;
  - Longer periods of coverage;
  - More exotic instruments and marketing.

Pollution Legal Liability (PLL) Insurance

1990s to Present

- Increasingly specialized.
- Detailed underwriting/tight targeting of specific types of policyholders.
- Coverage depends on definition of “Pollution Conditions”/ “Pollution Event”

CAUTION: Be Careful of:

- "Known Conditions" Exclusions - who needs to know what?
- "Related Site Development" Exclusion
- Reporting requirements/give notice as soon as possible.

Claims Made Policies

- Coverage may arise only for a period of time that expressly is set out.
- Notice requirements may be construed strictly – so give notice early and often.

Loss Mitigation

- A policyholder may be reimbursed for costs of mitigating losses.
- An insurance company may be required to pay the necessary costs a policyholder spends to mitigate losses to avoid damage to property to others where there is a potential for imminent environmental harm.
- This makes sense to encourage the policyholder to act to prevent pollution and contamination.

Emerging Trends In EIL and PLL Underwriting

- Emerging Trends:
- M & A coverage
  - How to cover Target's exposure?
  - Does Target's coverage apply to Acquirer? If not, is there a policy that would provide coverage?
- Fall out from natural disasters
- Marketing towards specific industries
  - Construction contractors & consultants
  - Transactional environmental insurance
  - Owners & operators of retail, institutional, manufacturing and distribution facilities

M&A Coverage

- Pollution Legal Liability (PLL) Insurance
- Representation and Warranty Insurance
  - Obtaining Phase I due diligence reports (site assessments);
  - Environmental documentation providing disclosure of environmental issues and known conditions;
  - Policies may cover losses due to unknown pollution conditions.

Rep & Warranty Insurance

- SIR typically 1.5% to 2% of transaction value.
- Covers unknown preexisting conditions.
- One to six years.
- Limits may be shared with other risks.
- Defense but not duty to defend.

Recent Products to Cover Pollution Legal Liability

1. Ironshore (Liberty): “Contractors Environmental Legal Liability” (2019);
2. Ironshore: “Real Estate Site Pollution Incident Legal Liability” (2019);
3. Ironshore: “Site Pollution Incident Legal Liability” (2019);
4. AXA XL: “Pollution and Remediation Legal Liability”;
5. AXA XL: “Contractor’s Pollution Legal Liability Insurance”;
6. AXON Underwriting: Pollution Legal Liability (2016).

Construction Pollution Insurance

Owner's Perspective:

- Require that General Contractor obtain pollution coverage.
- Coverage should be clearly defined.
  - NOT, *e.g.*, "general liability, including pollution"
  - Owner should be an "additional insured"
  - With separate limits
- "Additional insured" coverage should be primary and noncontributory.
- To protect the limits and deductibles under the owner's insurance program.

General Contractor's Perspective:

- Insurance requirements.
- CIP Programs
- Potential problems
  - Shared limits
  - OCIP
    - Owner controls insurance, But
    - Contractor bears the liability risk

Clearly define pollution coverage requirements.

- There are many options

The CGL "Occurrence" issue.

- May warrant requiring a separate pollution policy

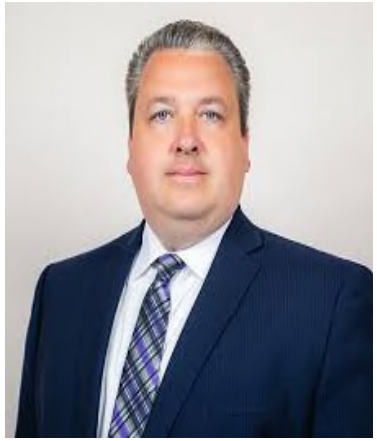
Contractors' Pollution Liability Insurance Coverage

Scope of CPL Coverage

- Intended to “fill in the gap” in coverage in a CGL policy potentially created by the polluter’s exclusion and “owned property” exclusion.
- Includes coverage for bodily injury and property damage caused by a pollution event that results from the policyholders’ operations.
- Also includes coverage for remediation expense, which may be a separate coverage or a subset of property damage.
- Often times packaged with other lines of coverage, such as CGL or E&O.

Questions?

Thank You.



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