1 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE

4-42 New Appleman Insurance Law Practice Guide 42.syn

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

§ 42.syn Synopsis to Chapter 42: UNDERSTANDING ENVIRONMENTAL INSURANCE

by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan n*

FOOTNOTES:
(n12)Footnote *. Updates by publisher's editorial staff.

2 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
I. OVERVIEW.

4-42 New Appleman Insurance Law Practice Guide 42.01

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.01 Scope.

This chapter identifies the different types of insurance that may respond to environmental liabilities and exposures, and it outlines the commonly disputed coverage issues that can arise under this insurance. First, the chapter examines environmental claims asserted against historical comprehensive general liability (later named "commercial" general liability) ("CGL") policies. Despite decades of coverage litigation, the legal framework for analyzing claims under these policies remains nuanced and complicated. Careful consideration must be given not only to the various exclusions for pollution claims, which were introduced after the early 1970s, but also to other insurance provisions of general application, which can impact coverage for environmental liabilities. Next, the chapter briefly highlights the potential coverage for environmental claims under first-party property policies or automobile policies, even though such policies are commonly overlooked and dismissed by policyholders. The chapter then turns to environmental impairment liability insurance ("EIL") policies and various current environmental insurance products or arrangements. These policies can be tailored to fund environmental cleanup or otherwise provide needed security in the context of financing real estate transfers and transactions. Understanding the salient terms and their nuances is key to procuring a policy that will meet the expectations of both the insured and the insurer. Although this chapter focuses specifically on the practical and legal issues impacting environmental insurance claims, practitioners also should consider the above chapters on Coverage Analysis (Chapters 1-13) and Coverage Litigation (Chapters 14-28).

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

3 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
I. OVERVIEW.

4-42 New Appleman Insurance Law Practice Guide 42.02

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.02 Key Practice Insights.

When an insured is faced with a potential or actual environmental liability, it should first determine the universe of insurance potentially available to help cover the liability. Similarly, insurers receiving notice of environmental insurance claims from their policyholders should determine whether there is other insurance that may also respond to the same risk. These policies may include historic CGL policies, property policies or even commercial automobile policies. Consideration should be given to a company's historic insurance portfolio and the portfolio of any predecessor or affiliated companies involved in the operations or transactions giving rise to liability. Policy archaeology may be necessary to identify or locate any missing policy evidence. A number of companies, consultants and counsel specialize in archaeology to help locate old and missing policies. The insured's coverage portfolio may also include EIL policies or other current products that would respond to the exposure, and the insured should consider how the various policies interrelate.

Once the relevant old policies are identified and organized, consideration should be given to choice of law principles to determine which state law may govern any insurance dispute. Although some fundamental principles of contract interpretation and insurance law may vary little from jurisdiction to jurisdiction, many environmental disputes turn on coverage issues that vary greatly from jurisdiction to jurisdiction. Thus, the practitioner should understand the dispositive law--or lack thereof--on key issues such as owned property exclusions, pollution exclusions, the known loss doctrine, late notice, trigger, allocation, treatment of environmental costs as defense versus indemnity, the "occurrence" definition, and more, as discussed below. Depending on the facts of the underlying environmental claim and the legal framework under which the case will be analyzed, the parties may want to consider early settlement negotiations to avoid, or otherwise minimize, costly coverage litigation. That being said, the parties should also understand timing and forum

considerations when deciding if, when and where to file coverage litigation.

Beyond evaluating and pursuing coverage under the policies in place, a party may consider whether obtaining additional or new environmental insurance could assist in handling environmental liability. If remediation is necessary, a "cost-cap" environmental insurance policy may be a useful tool in limiting the insured's exposure from cost overruns. In addition, a pollution legal liability insurance policy can provide protection to an insured for unknown future liabilities associated with environmental damage. Some entities may wish to obtain a combination of the two, a blended finite risk policy, in order to establish remediation and liability costs up front and protect the insured from future liability from pollution claims and remediation overruns. Given the variety of policies available, an insured must carefully consider its environmental liability and the needed protection before seeking coverage. In addition, because the current environmental insurance policies are individually negotiated, negotiation of a policy will likely be time consuming and require careful attention to detail by the insured and insurer. The terms of any policy must be developed to address the specific conditions of a given site, and the needs of the insured.

There are an unusually great number of complex and interrelated strategic considerations involved in presenting and litigating coverage claims for environmental matters. Successful representation of a client with an environmental coverage problem requires a thorough grasp of the legal sources of environmental liability, the history of waste disposal practices, the science of environmental investigation and remediation, the insurance industry's response to environmental risk over the years, the different constructions applied to identical policy wording in different states, and the applicable rules on choice of law in each candidate forum. Insurance considerations may affect how the underlying claim of environmental liability should be defended or settled.

In coverage litigation, defining either side's complicated scientific factual contentions about how and when contamination was caused, how long and where the contamination moved, when the contamination was or might have been discovered, and how the responsible party responded or might have responded, all can fundamentally affect how much coverage is available and what part of the liability, if any, the policyholder must absorb. Contentions that improve claims against primary insurers may diminish claims against excess insurers. Issues concerning deductible, self-insured retentions and retrospective premium calculations must be considered. No "one-size-fits-all" approach will succeed consistently.

Environmental litigation uniquely involves questions of good faith and fair dealing. Facing an expanded universe of environmental claims and seeing the collapse of key reinsurance entities, several major domestic insurers formed special home office environmental claim-handling units in the mid-1980s. These units generally adopted a harder stance on environmental claims than before, and the progress of claim resolution appears to have slowed. It is not unusual to find a coverage claim asserted in the 1980s that remains unresolved two or even three decades later. Environmental coverage litigation addresses claim handling issues as often as it addresses questions of environmental science and engineering.

Current environmental insurance products may be very useful in resolving environmental liabilities permanently. The Comprehensive Environmental Response,

Compensation and Liability Act may impose liabilities that are strict, retroactive, joint and several, unlimited and perpetual. Coverage that has only recently become available may assist responsible parties in closing the books on old liabilities once and for all, and provide financial assurance that future dollars are available when they are needed for operation, maintenance and monitoring of environmental remedial systems.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

4 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
I. OVERVIEW.

4-42 New Appleman Insurance Law Practice Guide 42.03

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.03 Master Checklist.

☐ Identify the scope of the environmental exposure and all potentially applicable policies.

Discussion:
§ 42.04[1]

☐ Organize your coverage portfolio based on (1) relevant insured; (2) type of coverage; (3) years of coverage and; (4) layers of coverage.

Discussion:
§ 42.04[2]

☐ Determine which state laws may govern the environmental insurance claim.

Discussion:
§ 42.04[3]

☐ Examine the insurer's duty to defend as contrasted with the duty

to indemnify, and understand what environmental costs are categorized as "defense" as rather than indemnity payments.

Discussion:
§§ 42.04[5], [6], [7]; *see also* § 42.05[6]

☐ Determine whether the environmental claim establishes a covered bodily injury, property damage or personal injury, if applicable.

Discussion:
§§ 42.05[1], [2], [3]

☐ Understand the differing "accident" and "occurrence" definitions and their potential impact on the scope of coverage.

Discussion:
§§ 42.05[4], [5]

☐ Determine which policies are triggered and how to allocate a continuous loss among the triggered policies.

Discussion:
§ 42.06

☐ Determine whether coverage may be precluded based on the insured's knowledge, expectation or intent.

Discussion:
§§ 42.07[1], [6]

☐ Consider whether groundwater remediation or off-site property damage renders the "owned property" exclusion inapplicable.

Discussion:
§ 42.07[2]

☐ Understand the scope of the various pollution exclusions and how the courts have applied them to various environmental liabilities.

Discussion:
§§ 42.07[3], [4]

☐ Evaluate whether current environmental insurance products could help limit future environmental exposure.

Discussion:
§§ 42.11, 42.12

- Consider whether pollution legal liability insurance would help limit risk of third-party claims for property damage and bodily injury.

Discussion:
§§ 42.11, 42.12

- Consider whether cost-cap insurance is necessary to address potential overruns in necessary future remediation.

Discussion:
§§ 42.11, 42.12

- Evaluate the insured's plans for the property and the potential benefit of blended finite risk programs.

Discussion:
§§ 42.11, 42.12

☐ Determine if contractor's pollution liability or professional liability insurance is necessary to protect the insured from environmental risk.

Discussion:
§§ 42.11, 42.12

☐ Evaluate the need for secured creditor coverage before loaning funds and obtaining a security interest in a property with potential environmental liability.

Discussion:
§§ 42.11, 42.12

☐ Where environmental insurance is appropriate, carefully negotiate the best terms for the policy.

Discussion:
§ 42.13

☐ Determine the appropriate time period for coverage, taking into account the insurer's time limits and the impact on premium of extended policy terms.

Discussion:

§ 42.13

☐ Where a policy will cover certain damages outside the typical definition of property damage or bodily injury, make sure that inclusion is specifically noted in policy language.

Discussion:
§ 42.13

☐ The insured should negotiate the narrowest terms possible for any exclusion to coverage.

Discussion:
§ 42.13

☐ Exclusions to coverage should be explicitly defined.

Discussion:
§ 42.13

☐ If any known conditions are intended to be covered, this must be negotiated during development of a policy and these should be specifically noted in the policy.

Discussion:
§ 42.13

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

5 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
II. EVALUATING ENVIRONMENTAL CLAIMS UNDER OLD COMMERCIAL GENERAL LIABILITY ("CGL") POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.04

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.04 Begin with Basic Coverage Considerations.

42.04[1] Identify All Potentially Applicable CGL Policies. Environmental claims typically involve actual or alleged injurious exposure or damage over a long period of time. The insured facing liability should identify all policies in effect during the entire time of alleged or actual contamination, and up through the date of notice, which generally may mirror the time of historic operations.

Also, the insured should consider whether its liability arises as an owner, operator, transporter, landlord, tenant, *etc.* Consideration should be given to the historic policies of all relevant entities through which the company's liability may be established.

Strategic Point:

Do not assume that "no assignment" or "cooperation" clauses in CGL policies preclude coverage for successor companies. Most courts find that, when a successor entity may be held liable for the pre-transaction operations of its predecessor, the predecessor's insurance coverage rights transfer to the successor by operation of law [*see, e.g.*, Pilkington North Am., Inc. v. Travelers Cas. & Sur. Co., 861 N.E.2d 121 (Ohio 2006) (predecessor corporation may transfer its right to indemnification for tortuous activity to successor corporation by contract, despite anti-assignment clause, when covered loss had already occurred)].

Cross Reference:

See Ch. 7 above for information on researching insurance coverage.

Cross Reference:

For broad discussions of CGL policies, *see* Business Insurance Law and Practice Guide § 2.01; California Insurance Law and Practice Ch. 49; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.01; Environmental Law Practice Guide § 8.03.

Cross Reference:

For a discussion of owner, landlord & tenant liability coverage, *see* Business Insurance Law and Practice Guide § 2.03[9].

42.04[2] Locate All Potentially Applicable CGL Policies. An insured with potential environmental liability or brownfields development should endeavor to locate all of the old CGL policies that may respond to the claim. Secondary evidence of old policies may help prove the existence of otherwise missing coverage. A number of companies, consultants and counsel specialize in policy archaeology.

Checklist:

When searching for old policy records, review the following sources:

1. Known liability or workers' compensation policies, which often refer to underlying policies, prior policies that have been renewed, or concurrent policies;

2. Legal files and court records that involve prior liability claims and, likely, insurance claims correspondence or records;

3. Accounting records, corporate ledgers, *etc.* evidencing premium payments;

4. Insurance records of affiliated, predecessor or acquired companies (check due diligence records and insurance reporting obligations from corporate transactions);

5. Records of other companies or entities that would have received Certificates of Insurance before engaging in particular transactions with the company;

6. Records of prior or current insurance agents or brokers, including London market brokers holding the old records of their "legacy" brokers;

7. Insurers' policy records, whether in warehouses, computer systems, indices, underwriting files, loss-run tracking systems, *etc*.

8. After policies are identified, organize them based on (a) coverage

type; (b) chronological order and (c) whether they are primary, excess or umbrella policies. Keep separate policies for predecessor or affiliated organizations separate, and in similar organizational order. It can be especially helpful to depict policies on a color-coded bar chart with attachment points and occurrence limits on the vertical axis and policy periods on the horizontal axis.

Cross Reference:

For a discussion of umbrella and excess policies, *see* Business Insurance Law and Practice Guide Ch. 4; for a discussion of excess insurance *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 8.04(1).

Cross Reference:

For a discussion of how insurance policies sold in the past can finance brownfields cleanups, *see* Brownfields Law and Practice § 28.01.

Consider:

The location of old insurance policies and secondary evidence of coverage has become an art. There are a few insurance archaeology firms that have developed unique and substantial expertise in knowing where to look. Where the client has substantial underlying environmental exposure and its records are limited or incomplete, the expense of retaining an insurance archaeologist is often justified.

Strategic Point:

It is important to remember that one policy may constitute secondary evidence of another policy. For example, if you look at the declaration page of a policy, check to see if it indicates whether the coverage is "new" or a "renewal" of a prior policy. If a renewal, this policy provides secondary evidence of the prior policy, even if the prior policy is missing. Similarly, the declaration page may list underlying or concurrent coverage, thus providing leads to, and secondary evidence of, other policies.

Strategic Point:

Interrogatory answers in old court files from unrelated matters may identify a policy's issuing insurer, insured and limits of liability, and perhaps even the policy period. If the insurer also is unable to produce the policy based on the information developed, the policyholder may call a highly qualified and experienced insurance archaeologist to provide policy reconstruction testimony. Most courts hold that secondary evidence plus expert testimony can be sufficient evidence to meet the policyholder's burden of proof as to the existence and material terms of an insurance policy.

Cross Reference:

For a discussion on the effective use of expert testimony, *see* Ch. 21 above.

42.04[3] Ascertain Which State Law Applies. After the old CGL policies are identified, check to confirm whether the policies contain a choice of law provision. The standard CGL policy does not. Because the substantive law governing coverage disputes varies by jurisdiction, the insured and the insurer will want to determine which state law most likely applies. For an in-depth discussion of choice of law analysis under insurance policies, *see* §§ 4.08, 14.06 above. In the case of environmental insurance claims, the governing law may be determined by the location of the site, where the policy was issued, or some other location dependent upon the following factors:

1. The place of contracting;

2. The place of negotiating the contract;

3. The place of performance;

4. The location of the subject matter of the contract; and

5. The domicile, residence, nationality, place of incorporation, and place of business of the parties.

Example:

An insured operates in a multi-state region but is currently headquartered in Kansas and faces liability for environmental cleanup at a site formerly operated in Missouri. The insured seeks coverage under a 1970s policy that was issued by an Illinois insurer, negotiated through an Iowa broker and delivered to the insured at its 1970s' residence in Kentucky. Courts following a *lex loci contractus* approach likely will apply Kentucky law to the insurance claim because the policy was delivered to the insured in Kentucky. Courts applying the Restatement (Second) of Conflict of Laws "Most Significant Relationship" test might apply the law of Missouri, where the insured risk is located, but the location of the risk is afforded less significance in this case because the policy insures multiple risks in more than one state [*see* Restatement (Second) of Conflict of Laws § 193 comment B].

Strategic Point:

When analyzing the merits of an environmental coverage claim, consider all potentially relevant state law because the ultimate choice of law is difficult to predict. Until a lawsuit is filed, the practitioner will not know which forum state's choice of law analysis will be invoked, and the different approaches can lead to differing results. Even under the *lex loci contractus* approach, the parties may dispute where the contract was "made." Under the Restatement approach, it is difficult to predict which state law will be deemed to have the most

significant contacts when environmental coverage actions involve multiple-state risks, multiple insurers, multiple residencies, *etc*. as they often do.

Strategic Point:

Federal courts apply the conflicts rules of the forum state. Filing a case in either a federal or state court in a state which applies the *lex loci contractus* rule can result in application of the law of a different and potentially more favorable state than if the suit is filed in a state whose conflicts rules apply the law of the state with the most significant relationship. In substantial coverage matters, this often leads to forum fights in competing jurisdictions. While the first-filed case may determine the ultimate forum in many cases, a later filed case may receive precedence if (1) third-party practice in the underlying liability case is used to make the coverage fight part of an earlier initiated lawsuit, (2) the second coverage case is more comprehensive than the first, or (3) the first case was filed by the insurer in the middle of coverage negotiations to seize procedural advantage.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and "choice of law" and "conflict of law" /p insur!

Cross Reference:

Cross Reference:

For a discussion of choice of law provisions in insurance contracts, *see* California Insurance Law and Practice § 41.06; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 26.04.

42.04[4] Consider Which Party Bears the Burden of Proof. As with any insurance-coverage issue, the insured with an environmental claim generally bears the burden of proving that the liability falls within the scope of coverage, while the insurer generally bears the burden of proving any exclusion or policy limitation takes the claim outside the scope of coverage. Some ambiguity in burden of proof may exist when the limiting language is embodied in an insuring provision rather than in a policy exclusion.

Example:
When a policy defines "occurrence" or "property damage" based on damage "neither expected nor intended from the standpoint of the insured," some courts require the insured to prove a negative in its prima facie case for coverage, *i.e.*, that the injury or damage was neither expected nor intended [*see, e.g., Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976 (3d Cir. 1995)] . Other courts require the insurers to show the damage was expected or

intended [*see, e.g., Carter-Wallace, Inc. v. Admiral Ins. Co.*, 712 A.2d 1116 (N.J. 1998)].

Strategic Point:

The burden of proof may be split even within a single issue. For example, while an insurer has the burden to prove that a pollution exclusion applies to bar coverage, a number of states which treat "sudden" as meaning "abrupt" also hold that a policyholder has the burden to establish an exception to the exclusion. In those states, under 1970 to 1985 policies with standard pollution exclusions, the policyholder would have the burden to prove that an abrupt, unexpected event caused a material part of the damage.

Cross References:

Cross References:

For a discussion of policyholder notice and proof of loss, *see* Business Insurance Law and Practice Guide §§ 2.04, 15.03(2)(d); for notice in insurance litigation, *see* Business Insurance Law and Practice Guide § 40.01; for a discussion of proof of loss, *see* Mitchell L. Lathrop Insurance Coverage for Environmental Claims § 4.07[3].

42.04[5] Appreciate That The Insurers' Duty to Defend Is Broader Than the Duty to Indemnify. The duty to defend is broader than the duty to indemnify, in that the insurer must defend its insured even in connection with merely potentially covered claims [*see* § 30.14[1][c] above]. This concept is significant in the context of environmental claims, where coverage may be called into doubt but not denied outright.

Strategic Point:

A policyholder seeking coverage may find it advantageous to litigate the duty to defend first, and seek to postpone litigation of the duty to indemnify until the underlying liability has been established by judgment or settlement. Even when the underlying claim has been settled, the policyholder's counsel should consider moving for summary judgment on the duty to defend, since showing a breach of that duty may simplify the establishment of a duty to indemnify. In many states, if the insurer breaches its duty to defend, the policyholder may settle the insured claim and enforce the settlement against its insurer without having to prove its own liability.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and duty /s defend /s

indemnify /s insur!

Cross Reference:

For a discussion of the duty to defend in environmental insurance disputes, *see* Business Insurance Law and Practice Guide § 15.02; for a discussion of the promise to defend and the promise to indemnify, *see* California Insurance Law and Practice §§ 41.30 -41.31; for a discussion of duties of the insurer to the insured generally, *see* Mitchell L. Lathrop Insurance Coverage for Environmental Claims § 8.03.

42.04[6] Determine When the Duty to Defend Is Triggered in the Context of Environmental Remediation. Even though the duty to defend is broader than the duty to indemnify, the insured and its insurers do not always agree when the duty to defend is triggered in cases involving environmental remediation. A typical CGL policy requires an insurer to defend any "suit" seeking "damages" on account of covered property damage or bodily injury, but the policies do not always define the terms "suit" or "damages."

Insured's Perspective:

A potentially responsible party ("PRP") letter from the U.S. EPA or similar state order generally triggers the duty to defend. A majority of courts reach this conclusion under one or more of the following theories:

1. A reasonable insured does not understand "suit" to mean only court proceedings; proceedings [*see, e.g.*, Aetna Cas. & Sur. Co. v. Pintlar Corp., 948 F.2d 1507, 1517 (9th Cir. 1991) (applying Idaho law) ("as a result, an 'ordinary person' would believe that the receipt of a PRP notice is the effective commencement of a "suit" necessitating a legal defense)];

2. PRP letters are "suits" because they seek to "gain an end by legal process" [*see, e.g.*, A.Y. McDonald Indus. v. Ins. Co. of N. Am., 475 N.W.2d 607, 628 (Iowa 1991) ("We hold that a "suit" under the policies here includes any attempt to gain an end by legal process)];

3. Given the coercive nature of PRP letters and similar state orders, they are the "functional equivalent" of a suit [*see, e.g.*, Mich. Millers Mut. Ins. Co. v. Bronson Plating Co., 519 N.W.2d 864, 870 (Mich. 1994)] ;

Exception:

Mere notification letters with no threat of enforcement may not be considered sufficiently coercive to constitute a "suit" [*see, e.g.*, Carpentier v. Hanover Ins. Co., 248 A.D.2d 579, 581 (N.Y. App. Div. 1998)] .

4. The word "suit" is ambiguous and because insurance policies are contracts of adhesion, coverage must be construed in favor of the policyholder [*see, e.g.*, C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133 (1990)] .

Insurer's Perspective:

PRP letters or other environmental orders are not "suits" triggering a duty to defend. The minority of courts follow this approach because:

1. "Suit" clearly and unambiguously refers to some type of legal proceeding in a court of law [*see, e.g.*, Lapham-Hickey Steel Corp. v. Protection Mut. Ins. Co., 655 N.E.2d 842, 847 (Ill. 1995)] ;

2. PRP letters are more analogous to "claims" than to "suits," and each word has its own meaning under a CGL policy; policy [*see, e.g.*, Foster-Gardner, Inc. v. Nat'l Union Fire Ins. Co., 959 P.2d 265, 280 (Cal. 1998)] .

3. A "voluntary" cleanup requested by EPA or state authorities is not a "suit" [*see, e.g.*, Professional Rental, Inc. v. Shelby Ins. Co., 599 N.E.2d 423, 430 (Ohio Ct. App. 1991)] .

In addition to the foregoing, other courts apply a four-factor test to determine whether a PRP letter or similar order constitutes a "suit" triggering the duty to defend. Those four factors, enunciated in *Ryan v. Royal Insurance Company of America* [916 F.2d 731, 741 (1st Cir. 1990)] , include the "coerciveness, adversariness, the seriousness of effort with which government hounds an insured, and the gravity of imminent consequences."

Strategic Point--Insured:

In coverage litigation, it may be useful to give voice to a PRP letter by calling a state environmental official to authenticate the demand itself and to explain the enforcement options available to the state and federal governments in the event an invitation to participate in a "voluntary" cleanup is not accepted.

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: "duty to defend" /p trigger! and remediation.

Cross Reference:

For a discussion of remediation generally, *see* Mitchell L. Lathrop Insurance Coverage for Environmental Claims § 35.06.

42.04[7] Determine Proper Categorization of Environmental Costs: Defense vs. Indemnity. After the defense obligation is triggered, the parties still may dispute whether incurred cleanup costs constitute defense expenses or indemnity payments.

Strategic Point--Insured:

The policyholder receiving a defense subject to a reservation of rights with respect to coverage may desire to categorize as many costs as possible as the agreed-upon defense expenses. Similarly, the policyholder (and its excess insurers) may want to categorize the incurred expenditures as defense costs to ultimately preserve the primary policy limits for final judgment or settlement, because defense costs are typically provided "outside of," or in addition to, the limit of liability.

Strategic Point--Insurer:

When providing a defense subject to a reservation of rights, the insurer should try to limit the scope of defense payments to costs associated with remedial investigations, while reserving payment of costs associated with feasibility studies and actual remediation.

Example:

For cases involving large expenditures that are neither clearly investigative nor clearly remedial, a court may create a rebuttable presumption that remedial investigation costs are indemnity [*see, e.g.*, Gen. Accident Ins. Co. v. State Dep't of Envt'l Prot., 143 N.J. 462, 477 (1997)] .

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: "environmental cost!" and indemn!

Cross Reference:

New Appleman on Insurance Law Library Edition § 27.01[4][b].

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

6 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
II. EVALUATING ENVIRONMENTAL CLAIMS UNDER OLD COMMERCIAL GENERAL LIABILITY ("CGL") POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.05

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.05 Determine the Scope of Potential Environmental Insurance Claims Under General Liability Policies.

42.05[1] Meeting the Requirements for Covered "Bodily Injury." Most CGL policies define "bodily injury" to include "sickness," "disease," and "disability," including "death at any time resulting therefrom." If a third party alleges injurious exposure to contamination during the policy period, coverage may be triggered even if the injury did not manifest itself until years later [*see, e.g.*, Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980)] .

Strategic Point:

In mass tort cases, some insurers, especially in the London Market, demand that policyholders demonstrate that every claimant in fact sustained injury during its policy period. This position imposes a very difficult burden on the policyholder.

Cross Reference:

New Appleman Law of Liability Insurance § 14.04.

Cross Reference:

For a discussion of bodily injury coverage, *see* California Insurance

Law and Practice § 49.14; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.02[1].

42.05[2] Meeting the Requirements for Covered "Property Damage." Some CGL policies define "property damage" as "physical injury to or destruction of tangible property, which occurs during the policy period, including loss of use therefrom at any time resulting therefrom ... ." Other policies may not specifically require that the injury or destruction occur "during the policy period."

Strategic Point:

There was very little groundwater monitoring in the United States prior to the late 1970s. Proving the occurrence of gradual property damage in the form of groundwater contamination generally requires expert testimony, and may involve calculation of contaminant transport times in specific subsurface media at particular gradients. A simpler method for proving property damage during a historic policy period, in the case of a sanitary landfill, may be to model the production and migration of landfill gas, into which volatile organic chemicals may partition from landfill leachate, and from which those chemicals may then partition to offsite groundwater.

Cross Reference:

New Appleman Law of Liability Insurance § 14.04.

Cross Reference:

For a discussion of property damage, *see* California Insurance Law and Practice § 49.15; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.02[2].

42.05[3] Meeting the Requirements for Covered "Personal Injury." Coverage for "personal injury" may extend to "wrongful entry or eviction or other invasion of the right of private occupancy" or, in later policies, to "wrongful entry into, or eviction of a person from a room, dwelling or premises that the person occupies." At least some courts have found that contamination of underground water constitutes an invasion of the right of private occupancy, or that soil contamination is caused by a "wrongful entry" of chemicals [*see, e.g.*, Millers Mut. Ins. Ass'n v. Graham Oil Co ., 668 N.E.2d 223 (Ill. App. Ct. 1996)] . Also, nuisance claims based on foul odors or gases may also trigger "personal injury" coverage. Pollution exclusions applicable only to "bodily injury" or "property damage" claims should not preclude such coverage [*see, e.g.*, Pipefitters Welfare Educational Fund v. Westchester Fire Ins. Co., 976 F.2d 1037 (7th Cir. 1992)] .

Strategic Point:

Check to see whether old CGL policies have a broad form endorsement

for personal injury coverage, or whether the coverage was issued as part of the standard-form policy in more recent years. Also, if a pollution exclusion is present, check to see whether it specifically applies to "personal injury" claims.

Cross Reference:

For a discussion of occurrence based policies, *see* Business Insurance Law and Practice Guide § 15.03; for a discussion of the concept of occurrence, *see* California Insurance Law and Practice § 49.12; for a discussion of the historical development of accident and occurrence based policies, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.05[2][b].

42.05[4] Appreciate the Differences Between "Accident" and "Occurrence" Based Policies. Up until 1966, the standard-form CGL policy provided coverage on an "accident" basis, usually without defining "accident." Some courts analyzing pollution claims under accident policies have found coverage even for gradual releases [*see, e.g.,* Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993)] . After 1966, the standard policy became "occurrence" based. The definition has changed over time, but it often includes continued or repeated exposure to conditions that results in bodily injury or property damage. Some courts interpret the "occurrence" policies to provide broader coverage than the former "accident" policies [*see, e.g.,* United States Fid. & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437, 443 (D. Kan. 1990)] .

42.05[5] Understand the Subtle Distinctions and Potentially Large Consequences of the Policy's "Occurrence" Definition.

42.05[5][a] "Neither Expected Nor Intended." CGL policies often define "occurrence" to include "property damage" or "bodily injury" "neither expected nor intended from the standpoint of the insured." Most courts will look at the subjective intent of the insured to cause damage, not merely at the underlying act [*see, e.g.,* State Mut. Life Assurance Co. of Am. v. Lumberman's Mut. Cas. Co., 874 F. Supp. 451, 456 (D. Mass. 1995)] . Others may ask whether a "reasonable" insured should have expected the injury even if the particular insured denies subjective intent or expectation [*see, e.g.,* Cessna Aircraft Co. v. Hartford Accident & Indem. Co., 900 F. Supp. 1489 (D. Kan. 1995)] .

Strategic Point:

Waste disposal methods in the United States have improved drastically since the 1970s, primarily in response to federal and state legislation, notably, the Resource Conservation and Recovery Act of 1976 and its implementing regulations. Even in 1970, when the Environmental Protection Agency was created, most of the nation's waste was disposed in open, burning dumps, with little segregation of industrial chemical process wastes. For cases involving waste disposal in the 1970s and earlier, the jury in a coverage case may not know this history. A few highly qualified environmental consultants have a comprehensive understanding of this history and the body of literature which describes it.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and occurrence /p defin! and subjective /s intent.

Cross Reference:

For a discussion of expected or intended property damage, *see* Business Insurance Law and Practice Guide § 15.03(2).

42.05[5][b] "During the Policy Period." Another frequently analyzed requirement of the "occurrence" definition is what, if any, injury, damage, occurrence or event must specifically take place during the policy period [see, *e.g.*, *Public Serv. Elec. and Gas Co. v. Certain Underwriters*, No. 88-4811(JCL), 1994 U.S. Dist. LEXIS 21072, at *16 (D.N.J. Sept. 30, 1994)] .

Strategic Point:

Look to see whether the policy's definitions for "occurrence," "bodily injury," or "property damage" incorporate a temporal requirement of an "event," "injury," "occurrence," or "damage" during the policy period. When the "occurrence" definition specifically requires an "event" during the policy period, the insured may have to show a specific release or isolated event during the policy period before environmental coverage is triggered.

42.05[6] Consider Whether Remediation and Response Costs Are Excluded Equitable Relief or Covered "Damages."

Insured's Perspective:
Remedial cleanup costs are "damages" insured by the CGL policy. Most courts agree because either:

1. Remedial costs are coercive in nature, like damages [*see, e.g.*, C. D. Spangler Constr. Co. v. Industrial Crankshaft & Engineering Co., 326 N.C. 133, 147 (1990)] .

2. A reasonable insured would expect coverage for environmental cleanup unless it was expressly excluded by the policy [*see, e.g.*, Farmland Indus., Inc. v. Republic Ins. Co., 941 S.W.2d 505, 508-512 (Mo. 1997) ; Johnson Controls, Inc. v. Employers Ins. of Wausau, 665 N.W.2d 257, 278 (Wis. 2003)] ;

3. Remedial costs are "damages" because they seek reimbursement for injury to property; [*see*, *e.g.*, U.S. Aviex v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. Ct. App. 1983)]; or

4. Remedial costs are based on regulatory findings of "property damage" and are therefore covered [*see, e.g.*, Continental Ins. Cos. v. Northeastern Pharm. & Chem. Co., 842 F.2d 977, 983 (8th Cir. 1988)] .

Insurer's Perspective:

Remedial costs are distinct and separate from "damages," thus negating a defense or indemnity obligation under the policy [*see, e.g.*, Cincinnati Ins. Co. v. Milliken & Co., 857 F.2d 979 (4th Cir. 1988)].

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: remedia! /s cost! and "equitable relief" and damages.

Cross References:

For a discussion of remedial and cleanup costs "as damages," *see* Business Insurance Law and Practice Guide § 15.05; for a discussion of remediation generally, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 35.06.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

7 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
II. EVALUATING ENVIRONMENTAL CLAIMS UNDER OLD COMMERCIAL GENERAL LIABILITY ("CGL") POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.06

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.06 Understand Which Policies Are Potentially Triggered by the Environmental Claim and How the Claim May Be Allocated.

42.06[1] Consider Which Trigger Theory Applies.

42.06[1][a] But Keep in Mind That Trigger Theories Are Not Mutually Exclusive. Courts use the term "trigger" as a label for what event or events must occur for an insurer to be obligated to respond to an insured's liability under a particular insurance policy. These functional "trigger" theories are not mutually exclusive, and their application may depend on the specific language of the policies at issue, as well as the nature of the claim. The trigger theories that are discussed immediately below may apply to an environmental insurance claim.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: "environmental claim" and trigger.

Cross References:

For a discussion of trigger theories generally, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims §§ 6.05 -6.06; Business Insurance and Practice Guide Ch. 15.

42.06[1][b] Exposure Trigger. Coverage is triggered during the period of exposure to harmful conditions [*see, e.g.*, Ins. Co. of N. Am. v. Forty-Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980)] . This theory may be applied

when it is impossible to determine at which point an injury actually occurs.

42.06[1][c] Continuous Trigger. Coverage is triggered from the time of initial exposure to the time of an injury's manifestation [*see, e.g.*, Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034, 1045 (D.C. Cir. 1981) ; State of California v. Continental Ins. Co., 55 Cal. 4th 186, 197 (Cal. 2012) ; Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 2009 WI 13, P53 (Wis. 2009)] .

Cross Reference:

For a discussion of continuous trigger theories, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 6.04[3].

42.06[1][d] Injury-in-Fact Trigger. Coverage is triggered at the first point of discernable injury. This trigger may overlap with the manifestation and exposure triggers [*see, e.g.*, American Home Prods. Corp. v. Liberty Mut. Ins. Co., 748 F.2d 760, 764-65, (2d Cir. 1984)].

42.06[1][e] Manifestation Trigger. Coverage is triggered only when injury or damage first becomes discoverable [*see, e.g.*, Eagle-Picher Indus., Inc. v. Liberty Mut. Ins. Co., 682 F.2d 12, 19 (1st Cir. 1982)]. Manifestation does not necessarily require actual discovery, but merely discoverable injury or damage.

42.06[1][f] Triple Trigger. Under Rhode Island law, in particular, triggered policies include those in effect when property damage either: (1) manifests itself; (2) is discovered; or (3) in the exercise of reasonable diligence, is discoverable, and then subsequent policies where there is progressive property damage [*see, e.g.*, Textron, Inc. v. Aetna Cas. Indem. Co., 754 A.2d 742 (R.I. 2000)] .

Strategic Point--Insured:

Under this approach, an insured can rely on expert testimony and back date the trigger period to the time:

1. That the insured would have been able to discover the contamination in the exercise of reasonable diligence (provable by expert testimony); and

2. That the insured had "some reason" to test for the contamination during the policy period (*e.g.*, evidence of work practices, accidental releases, etc.).

Cross Reference:

For a discussion of triple trigger theory, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 6.04(3).

42.06[2] Understand the Impact of Basic Allocation Theories.

42.06[2][a] Consider That There Are Three Basic Approaches to Allocation.

When more than one policy period of coverage is triggered, a court must decide how to allocate coverage liability among the triggered policies. There are at least three primary approaches, which can greatly impact the value of a claim against any particular policy.

Strategic Point:

The number of occurrences involved in an environmental coverage case can be especially significant, and the strategic considerations may be counter-intuitive. Where a primary policy has a limit of liability per occurrence and no applicable aggregate limit, it may be advantageous for the policyholder to argue that there are multiple occurrences, in order to establish more coverage under that policy. On the other hand, if the policy has a deductible, self-insured retention or retrospective premium provision, the policyholder may retain more of the ultimate exposure by asserting multiple occurrences. Also, if the primary insurer is insolvent or has settled early, the policyholder may prefer to argue that there is but a single occurrence in order to reach the attachment point of excess or umbrella coverage sooner. In all cases, the policy wording is critical. A large number of policies define all damage relating to exposure to a single injurious condition as but one occurrence.

Strategic Point:

Insurers in coverage litigation will usually want to commit the policyholder early to a specific contention on the number and nature of the occurrences alleged. On the other hand, policyholders may prefer the flexibility to state the number of alleged occurrences at the end of discovery, in order to take into account the results of early settlement. These timing issues frequently become the subject of case management order negotiations at the outset of litigation.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: trigger and allocat! /s theor!

42.06[2][b] Policyholders Often Advocate "All Sums" Allocation. Numerous decisions support the use of the "all sums" or "vertical" approach to allocation [*see, e.g.*, Keene Corp. v. Ins. Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981) ; Plastics Eng'g Co. v. Liberty Mut. Ins. Co., 2009 WI 13 (Wis. 2009) ; *see also* State of California v. Continental Ins. Co., 55 Cal. 4th 186, 199 (2012) (noting that court was constrained to "all sums" allocation by policy language)]. Under this approach, each policy is liable for the entire environmental liability, subject to each policy's limit of liability.

Strategic Point--Insured:

The all sums approach may benefit the insured because (1) the insured can pick and choose which triggered coverage it wants to pursue; (2) the insured is typically only responsible for one deductible or self-insured retention and (3) the paying insurers cannot seek contribution from the insured for "uninsured" or "self-insured" periods.

Strategic Point--Insurer:

If found liable for "all sums" despite the insured's prior settlement with other carriers, or if determining the settlement value of a claim under an "all sums" jurisdiction, seek a credit or offset based on either (1) the settled policy limits (without regard to the actual settlement amount) or (2) the pro rata limits of the settled policies, without regard to the settlement amount or the actual policy limits.

Cross References:

For a discussion of allocation of losses generally, *see* Mitchell L. Lathrop, Insurance Coverage in Environmental Claims § 6.07. For a discussion of the "all sums" approach specifically, *see* Mitchell L. Lathrop, Insurance Coverage in Environmental Claims § 6.08.

42.06[2][c] Insurers Tend to Seek "Pro Rata" Allocation. In contrast to the "all sums" approach, a pro rata allocation tends to favor insurers because the environmental liability is spread across the entire triggered period and each policy is only responsible for its pro rata share, while the insured remains responsible for pro rata shares during periods of self-insurance or no insurance. Courts employ different methods to determine the pro rata share of liability for each policy. Some courts simply allocate damages based on the relative time each policy was in effect throughout the triggered coverage period, without regard to the limits of each policy [*see, e.g.*, Mayor & City Council of Baltimore v. Utica Mut. Ins. Co., 802 A.2d 1070 (Md. Ct. App. 2002)]. Other courts vary the "time on the risk" analysis by multiplying the number of years of coverage by the limits of that insurer's policies, then assigning liability corresponding to the ratio of the total coverage provided by that insurer to the total coverage provided by all the triggered policies [*see, e.g.*, Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994)] . Yet another line of authority supports an "equal share" allocation among the triggered insurers without respect to their specific time on the risk or the degree of the risk they assumed, premised upon the "other insurance" provisions of the policies [*see, e.g.*, IMCERA Group v. Liberty Mut. Ins. Co., No. B079031, 44 Cal. App. 4th 1344A (1996)] .

Insured's Perspective:

Pro rata allocation is typically less favorable because it may impose upon the insured (1) increased transactional costs in negotiating and/or litigating coverage against multiple carriers; (2) the burden of satisfying multiple self-insured retentions during the entire period of triggered coverage, which makes it less likely that excess policies will be reached; and (3) the burden of absorbing pro rata shares for periods in which insurance was commercially available but

the insured was either self-insured or inadequately insured.

42.06[2][d] Some Courts Use a Hybrid Approach to Allocation. A third alternative allows for a horizontal allocation among insurers based on their time on the risk, but does not require the insured to absorb pro rata shares during uninsured periods. Instead, the allocation period is limited to years where insurance is available [*see, e.g.*, Aerojet-General Corp. v. Transport Indem. Ins. Co., 948 P.2d 909 (Cal. 1997)] .

Strategic Point--Insured:

If in a pro rata jurisdiction, attempt to limit the allocation period to years where insurance is available under the modified pro rata approach.

Consider:

In recent years, a substantial issue in coverage litigation has been determining the specific years in which insurance was available, as that affects potential allocation. Generally speaking, in a horizontal allocation jurisdiction, the "spread period" may run from the policyholder's first involvement with a site until a potential liability is known, or until coverage becomes unavailable. In 1985, broad-form pollution exclusions were added to most comprehensive general liability insurance policies. At about the same time, the market for environmental impairment liability coverage virtually collapsed (also that market bounced back to some degree in the 1990s). Litigation of availability issues may involve many sub-issues (1) known loss considerations; (2) availability of policies on an occurrence as opposed to claims-made basis; and (3) whether insurance must have been available to the particular insured or merely to participants in that industry generally. There are a relatively few experienced and highly qualified experts available to provide testimony bearing on those issues.

Drawback:

Allocating the damages on an environmental claim over a longer period of time (1) decreases the potential to attach umbrella and excess policies, (2) may increase the policyholder's exposure under deductibles, self-insured retentions and retrospective premium provisions, and (3) expose the policyholder to more years in which primary policy issuers are insolvent or defunct.

Cross Reference:

For discussions of allocation, *see* §§ 8.13, 30.30 above; Business Insurance and Practice Guide § 15.12; California Insurance Law and Practice § 49.17.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party

Claims

8 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
II. EVALUATING ENVIRONMENTAL CLAIMS UNDER OLD COMMERCIAL GENERAL LIABILITY ("CGL") POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.07

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.07 Evaluate Policy Limitations, Exclusions and Common Coverage Defenses.

42.07[1] Consider Whether the Injury or Damage Was "Expected or Intended."

Insurers routinely question whether insureds facing current environmental liabilities expected or intended, or should have expected or intended, the damage or injury based on their knowledge of potential hazards at the time of contamination.

Strategic Point--Insured:

1. Avoid the potential bias of hindsight. Provide testimony or other evidence that historic operations were consistent with the prevailing practices, scientific knowledge and regulatory environment of that time.

2. Examine applicable state laws to determine who bears the burden of proof, whether the inquiry is subjective or objective, and whether the inquiry extends not only to the conduct but also to the resulting harm.

3. Refer to the policy language. If the policy wording does not specifically require a showing that damage was "neither expected nor intended from the standpoint," highlight this omission to the insurer.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: environmental and damage /p "expected or intended".

Cross Reference:

For a discussion of "expected or intended" damage, *see* Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.05[4].

42.07[2] Determine Whether the Claim Falls Outside the Scope of the "Owned Property" Exclusion. CGL policies typically exclude coverage for "property damage" to property that is owned, rented or occupied by the insured, or to property in the insured's care, custody or control.

Insurer's Perspective:
When there is actual or potential groundwater or off-site contamination, the owned-property exclusion should not preclude coverage for the insured, even if remediation of the insured's own property is also involved [*see, e.g.*, Conrail v. Certain Underwriters at Lloyds, No. 84-2609, 1986 U.S. Dist. LEXIS 24579 (E.D. Pa. June 5, 1986) , *aff'd*, 853 F.2d 917 (3d Cir. 1988) ; Fed. Ins. Co. v. Purex Indus., 972 F. Supp. 872, 883-884 (D.N.J. 1997)] .

Warning:

Although proof of imminent off-site contamination may bolster an insurance claim, the information should be treated confidentially by the parties to avoid the inadvertent augmentation of the insured's exposure to third parties.

Insurer's Perspective:
Groundwater is owned by the insured or, alternatively, coverage is precluded except to the extent of actual (not merely threatened or imminent) damage to adjacent properties [*see, e.g.*, Boardman Petroleum v. Federated Mut. Ins. Co., 498 S.E.2d 492, 494-495 (Ga. 1998)] .

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and "owned property" /s exclus!

Cross Reference:

For discussions of the owned property exclusion, *see* Business Insurance Law and Practice Guide § 15.10; California Insurance Law and Practice Guide § 36.19[2][j]; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.08[1].

42.07[3] Know Whether Coverage May Exist Despite a "Partial" Pollution Exclusion in the Policy. The "sudden and accidental" or "sudden, unintended and unexpected" pollution exclusions appeared in most CGL policies from approximately 1972 through 1985.

Insurer's Perspective:
The "sudden and accidental" pollution does not bar coverage for gradual releases as long as the contamination was without notice, unexpected and unintended [*see, e.g.*, Textron, Inc. v. Aetna Cas. and Sur. Co., 754 A.2d 742, 749-754 (R.I. 2000)] .

Insurer's Perspective:
Gradual releases are not "sudden" and, therefore, the pollution exclusion bars coverage [*see, e.g.*, Aetna v. General Dynamics Corp., 968 F.2d 707, 710 (8th Cir. 1992)] .

Strategic Point:

An abrupt event often causes some but not all of the environmental property damage from a site. In that instance, in a jurisdiction in which "sudden" is construed to have a temporal meaning, a key legal issue is whether the policyholder may recover all of its damages, or only an allocated part of its damages, based on the ratio between the damages caused by the abrupt event and the damages that would have come to exist without the abrupt event. A majority of courts have held that there is no allocation in such cases, and the policyholder may recover all of its damages if the abrupt event caused any material part of them. Other courts, however, have ruled that the policyholder has the burden to prove an allocation between "sudden" and "non-sudden" property damage, and that may be an insurmountable burden given current limitations on scientific expert testimony.

Lexis.com Search:
After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: pollution and "sudden and accidental" or "sudden /2 unexpected".

Cross Reference:

For discussion of admissibility of expert testimony, *see* §§ 21.04, 21.05 above.

42.07[4] Consider Whether the Claim Falls Outside the Scope of Any "Absolute" Pollution Exclusion. After 1985, the standard-form CGL policy usually included a broader pollution exclusion that purported to disallow coverage for all pollution claims, regardless of whether they were caused by sudden, unexpected, unintended, accidental or abrupt events.

Insurer's Perspective:
The post-1985 exclusion is not "absolute" because it applies only to traditional industrial pollution [*see, e.g.*, Doerr v. Mobil Oil Corp., 774 So. 2d 119, 135 (La. 2000)] .

Insurer's Perspective:
The post-1985 exclusion applies to any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste, even if constituting "non-traditional" environmental pollution [Owners Ins. Co. v.

Farmer, 173 F. Supp. 2d 1330, 1333-34 (N.D. Ga. 2001) ("the unambiguous language of the policy excludes all pollutants and does not exclude pollutants based on their source or location")].

Consider:

Courts are split on whether excluded pollutants include asbestos, E.coli, carbon monoxide, carpet glue, floor sealant fumes, gasoline, lead paint, mold, radioactive material, sewage or smoke.

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: "absolute pollution exclusion."

Cross Reference:

For discussions of the absolute pollution exclusion, *see* Business Insurance Law and Practice Guide § 15.09; California Insurance Law and Practice § 49.33; Mitchell L. Lathrop, Insurance Coverage for Environmental Claims § 3.07[3].

Insured's Perspective:

Despite the existence of a pollution exclusion, an insurer had to defend a restaurant against claims that the restaurant's odors saturated a neighboring apartment because the insurer failed to demonstrate the odors coming from the restaurant's kitchen constituted "pollutants" [*see* Barney Greengrass Inc. v. Lumbermens Mut. Cas. Co., 2011 U.S. App. LEXIS 22442 (2d Cir. Nov. 4, 2011)]. The court noted that the term "odors" was not listed in the policy's description of an excluded pollutant and that said restaurant odors are not the type of traditional environmental pollution, to which a pollution exclusion is usually applied.

42.07[5] Understand the Requirements for a "Late Notice" Defense to Coverage. Because the typical CGL policy imposes certain reporting requirements on the insured, an insurer may raise the issue of late notice. Whether in the context of environmental claims or otherwise, the vast majority of jurisdictions prohibit the insurer from denying a claim based on late notice under an occurrence-based CGL policy unless there is a showing of actual prejudice [*see, e.g.*, Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978)] . a handful of other jurisdictions remain notable exceptions to the general rule [*see, e.g.*, Dreaded, Inc. v. St. Paul Guardian Ins. Co., 904 N.E.2d 1267, 1272-1273 (Ind. 2009) (discussing variations of notice prejudice rule across jurisdictions); *but see* N.Y. Ins. Law § 3420 (changing prejudice rule for cases arising after January 17, 2009)].

Strategic Point:

Even in the few jurisdictions in which there is no requirement for an insurer to show prejudice to defeat a claim based on late notice, there can be exceptions or "reasonable excuse" for late notice where (1) the policyholder reasonably believed it was not liable for the underlying claim, (2) the policyholder reasonably did not know the

occurrence had taken place, or (3) giving notice would be futile because the insurer is known to the policyholder or its counsel to reject all claims of that type. Also, an insurer may waive the defense of late notice, in some of the same jurisdictions, by reserving the right to deny coverage for the claim only on other grounds.

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and "late notice"

Cross Reference:

For a discussion of time for furnishing notice, *see* Business Insurance Law and Practice Guide § 2.04(2). For a discussion of what constitutes late notice, *see* § 30.26[3] above.

42.07[6] Appreciate the Scope of the "Known Loss" Doctrine and How It May Affect Insurability of an Environmental Claim. The "known loss" doctrine bars coverage when a loss is certain--or in some jurisdictions a "probable certainty" or where there is a "substantial probability" of a loss--at the time coverage is placed [*see, e.g.*, Ins. Co. of North America v. Kayser-Roth Corp., 770 A.2d 403, 415 (R.I. 2001) ; Outboard Marine Corp. v. Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1210 (Ill. 1992)] . The greater the "extent of unknown liabilities," the less likely the "known loss" doctrine will preclude coverage.

Strategic Point:

A policyholder often seeks to prove an occurrence, especially where a qualified pollution exclusion under applicable law requires an abrupt event, through witness testimony and scientific evidence. A witness may, for example, remember a prominent past chemical spill. Insurer counsel then seek to use the policyholder's own contention as the basis to say that notice of that occurrence was not timely given, or that the property damage from the occurrence was a "known loss" at the inception of any later policies. Expert testimony may be needed by the policyholder to support a response that the event was not generally understood at the time to be a source of either substantial environmental harm or legal liability. Today, groundwater contamination is an obvious source of potential legal liability. Not so in the 1970s and earlier, before the prevalent use of groundwater monitoring and analysis for volatile organic chemicals and before the 1980 enactment of the Comprehensive Environmental Response, Compensation and Liability Act.

Example:

Insured receives EPA demand letter before policy begins. The "known loss" doctrine may not bar coverage because the extent of the insured's liability was still unknown when the policy began.

Example:

Insured faces judgment for environmental cleanup before policy incepts. The "known loss" doctrine bars coverage because the loss was a certainty when the policy incepted.

Lexis.com Search:

After choosing the appropriate jurisdiction or treatise, the following terms and connectors may be of assistance: CGL and "known loss".

Cross References:

For discussions of known loss and loss in progress, see New Appleman on Insurance Law Library Edition § 16.07[2][b]; Business Insurance Law and Practice Guide § 15.04.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

9 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
II. EVALUATING ENVIRONMENTAL CLAIMS UNDER OLD COMMERCIAL GENERAL LIABILITY ("CGL") POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.08

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.08 Determine Whether Settlement of the Environmental Insurance Claim Is in the Parties' Best Interests.

42.08[1] Coverage Litigation Is Costly and Time-Consuming. Given all of the coverage variables outlined above, coverage litigation is predictably expensive and time-consuming, but often unpredictable in outcome. The policyholder and its insurers should consider discussing a commercially reasonable settlement of the environmental claim early and often, even if litigation is pursued.

Cross Reference:

See Ch. 23 above, Settling Insurance Coverage Disputes.

42.08[2] Consider a Confidentiality, Standstill and Tolling Agreement to Deter a Lawsuit and Facilitate Settlement Negotiations. Even if both parties are willing to entertain settlement talks, they may hesitate to forego the filing of a lawsuit for fear that the other side will be the first to file in an unfavorable jurisdiction. To ease this tension, the parties should consider executing a Confidentiality, Standstill and Tolling Agreement. Such an agreement:

1. Allows the insured to produce internal or consultant estimates of potential future liability without fear of the information falling into the hands of unintended outside parties, particularly when the insurer is not defending the insured so as to clearly invoke any state law privileges;

2. Precludes either party from filing a lawsuit without first

terminating the agreement pursuant to the agreement's notice provisions; and

3. Assures the parties that all of their coverage rights and defenses (including statute of limitations) are preserved and tolled throughout the period of the agreement, without respect to any coverage positions discussed during settlement negotiations.

Warning:

If a party refuses to execute a Confidentiality, Standstill and Tolling Agreement after requested by the other party, the requesting party should consult with its counsel to determine whether a coverage action should be filed based on concerns about statute of limitations or forum selection.

Cross Reference:

For a discussion of insurance litigation generally, *see* Business Insurance Practice Guide Ch. 40. For a discussion of Alternative Dispute Resolution in environmental insurance disputes, *see* Mitchell L. Lathrop, Insurance Coverage and Environmental Claims § 27.06.

42.08[3] Understand Timing Constraints If Coverage Litigation Is Pursued. If litigation is deemed to be the most effective method to resolve coverage or induce settlement of the claim, keep in mind the procedural limits on the timing of a coverage lawsuit or declaratory judgment action.

Timing--Insured's Perspective:

An insured's cause of action for breach of the insurance contract accrues when an insurer denies indemnity for a covered claim or refuses to defend a potentially covered claim. Once a denial occurs, the insured and its counsel should calendar the limitations period for breach of contract actions, generally, under each state law that may ultimately apply, and consult the insurance policy for any contractual limitations and "Notice of Suit" provisions.

Timing--Insurer's Perspective:

An insurer may choose to file a declaratory judgment action to determine the scope of its coverage obligation while defending subject to a reservation of rights. The insurer must consider whether the facts known at the time of the action present a controversy ripe for adjudication. Generally, courts consider the question of an insurer's duty to defend a pending lawsuit to be ripe. Establishing the ripeness of a determination as to whether there is a duty to indemnify, however, is more difficult. A court may be reluctant to find there is a ripe controversy regarding the duty to indemnify if no legal claim has been filed against the insured, but there are exceptions [*see, e.g.*, Icarom, PLC v. Howard County, Md., 904 F. Supp. 454, 458 (D. Md. 1995)] . In all cases, the key question is whether the controversy

is based on known facts rather than a hypothetical, anticipatory scenario.

Strategic Point:

Environmental insurance coverage litigation can be lengthy and expensive. It often involves underlying environmental cleanup or toxic tort claims in excess of the limits of at least some policies at issue. A policyholder seeking coverage should carefully coordinate the defense of the underlying claim with the assertion of the coverage claim. Litigation of the coverage claim may disadvantage the policyholder in the underlying matter by developing evidence of intentional or reckless conduct. There also frequently are opportunities to use the insurer's duty to settle covered claims to expose the insurer beyond its stated policy limits.

Cross Reference:

For a discussion on managing the relationship between the coverage case and underlying litigation, *see* Ch. 16 above.

Cross Reference:

For a discussion of timing of declaratory judgment actions, *see* Mitchell L. Lathrop, Insurance Coverage and Environmental Claims § 8.03[1][e]. For a discussion of timing issues relating to homeowner's insurance, *see* California Insurance Law and Practice Guide § 36.02[2][b].

42.08[4] Consider Negotiating the Scope of a Settlement Before Discussing Financial Terms. The insurer's cost of settlement is easily computed by the payment amount, but the insured's cost of settlement is determined by the scope of the release and any proposed indemnity provision. The release may be as limited as the policyholder's site-specific release for remediation costs only. Alternatively, it could be as broad as a full policy buy-back, terminating the rights of all insureds or potential insureds for all known or unknown claims, or providing unlimited defense and indemnity in favor of the insurer should any third parties (including other insurers) assert a claim against the settling insurer relating to the released claims. Until the practitioner knows the scope of the release, the discussion of financial terms is virtually meaningless.

Strategic Point--Insured's Perspective:

Know the scope of your current or potential claims--and the identity of potential third-party claimants--to understand the breadth of release and/or indemnity provisions you would be willing to negotiate. Absent compelling circumstances, avoid "uncapped" indemnity obligations that could cost more than the settlement amount, effectively turning the policyholder into the insurer of the risk.

Strategic Point--Insurer's Perspective:

If coverage for a disputed claim is unlikely, consider the settlement value of a policy buy-back or broader release to bring finality and remove long-tail exposures from the company's books. Some insurers categorically insist upon full site releases as a condition of any settlement.

Bad Faith:

Some insurers even demand that the policyholder sell back its policies and agree to defend and indemnify the insurer against any future claims on the policies, even contribution claims by other insurers or direct actions by tort claimants in states where those are allowed, in order to receive payment of a covered claim. These positions may in some cases lead to litigation of a "bad faith" issue.

42.08[5] Understand the Nuances of Insurance Recovery and Settlement Within the London Market. Many companies obtained historical CGL coverage through the London insurance market. Although insureds may loosely refer to their insurer as "Lloyds," or to the policies as "London policies," in reality multiple insurers subscribe to each policy, and these multiple insurers are individually liable only to the extent of their own percentage of the total policy limit. This fragmented market structure adds additional nuances to the insurance recovery and settlement process.

Strategic Point--Insured's Perspective:

An insured with notable London involvement in its coverage program may want to consult with experienced coverage counsel to navigate its pursuit of environmental insurance claims, which should take into consideration the following tasks:

Checklist:

1. Review policy records and complete archaeology as needed to identify the subscribing companies and their respective participation levels on all potentially applicable London market CGL policies.

Consider:

Policy "slips" showing the stamped, signed lines of individual insurers are the best evidence, but policy subscription may also be evidenced by policy endorsements, Certificates of Insurance or other policy evidence. Note that the company subscriptions and their respective limits may change from year to year under a multi-year policy.

2. Determine the "lead" company or companies insuring the primary risk under the policies. The "lead" company or companies and their counsel likely will analyze the claims and make recommendations to the rest of the solvent market insurers regarding potential settlement or litigation.

3. Determine, and continuously monitor, the financial status of the subscribing London market companies. Many are now in run-off, or in "insolvent" or even "solvent" Schemes of Arrangement, under which claim submissions may be restricted or claim payments may be limited.

Warning:

Unlike insurance receiverships or liquidations in the United States, the United Kingdom allows financially solvent insurers to form Solvent Schemes of Arrangement, which often establish absolute claim bar dates within months of the Scheme's formation.

4. Pursue claims against Scheme or insolvent companies on an individualized basis, to the extent the potential recovery warrants the administrative costs.

5. Become familiar with the unique structure and terms necessitated by a settlement with the solvent London market.

Cross Reference:

For a discussion of the London market generally, *see* Mitchell L. Lathrop, Insurance Coverage and Environmental Claims § 1.06.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

10 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
III. CONSIDERING ENVIRONMENTAL INSURANCE CLAIMS UNDER OTHER TYPES OF OLD POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.09

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.09 Consider Historic First-Party Property Coverage.

Unlike third-party CGL coverage, first-party property insurance protects the insured against damage to its own property. Environmental litigation under these policies is less common, but common factors to consider include:

1. Are consecutive property policies triggered by ongoing damage?

2. Is damage to soil or groundwater damage to insured "real property," or does the policy specifically exclude damage to land and groundwater?

3. Do remediation costs constitute covered "direct physical loss"?

4. Does "debris removal" coverage extend to contamination cleanup?

5. Is there a "contamination" exclusion and, if so, are concurrent causes nonetheless insured?

6. Does the "ordinance or law" exclusion bar coverage?

Timing:

Notice provisions under first-party property policies may be quite strict, requiring a sworn proof of loss within a period of 30 to 90 days. Some state laws and regulations may invalidate such limitations, or require insurers to disclose them to policyholders.

Strategic Point:

The wording of an "all-risk" first-party policy's exclusion of perils including "contamination" may end with an ensuing loss clause such as "... unless resulting from a peril not otherwise excluded." Counsel for both the insurer and the policyholder must carefully examine the impact of such a clause, and creatively examine the possible ways to posture the coverage claim. Gradual leakage from underground storage tank piping, as an example, would generally not itself be an excluded peril in such policies. Soil contamination of covered property resulting from a leaking underground storage tank pipe joint, then, would result "from a peril not otherwise excluded." Thoughtful description of cause and effect may assist in broadening the apparent coverage of property policies.

Insurer's Perspective:

As a result of defective and corrosive drywall sold in the mid-2000s, property owners may have virtually uninhabitable structures which will require extensive renovation or even demolition. An article by Wayne D. Taylor and Ruth M. Pawlak, *Defective and Corrosive Drywall: Analyzing First-Party Coverage Issues* [46 Tort Trial & Ins. Prac. L.J. 63, 92 (2010)] argues that first-party property insurance policies will likely not provide coverage because the policy exclusions for pollutants and defective construction will bar any first-party claims to recover for the damages caused by the corrosive drywall. The article further reviews the recent judicial precedents that have shaped this area.--Aviva Abramovsky

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

11 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
III. CONSIDERING ENVIRONMENTAL INSURANCE CLAIMS UNDER OTHER TYPES OF OLD POLICIES.

4-42 New Appleman Insurance Law Practice Guide 42.10

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.10 Determine If Old Automobile Liability Policies May Be Relevant.

When motor vehicles are used to transport waste to landfills, a policyholder might successfully argue that environmental liabilities arising out of the ownership, maintenance or use of the vehicle are covered by the typical automobile liability policy [*see, e.g.*, United States Fid. & Guar. Co. v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988)] .

Strategic Points:

Motor vehicle coverage often insures against liability arising from the "use" and "unloading" of a covered vehicle. Transporter liability under the Comprehensive Environmental Response, Compensation and Liability Act depends on both the "use" and "unloading" of a motor vehicle (in addition to site selection by the transporter). Also, the term "use" in motor vehicle policies may be construed exceptionally broadly, in part to implement the mandatory coverage goal of a state's financial responsibility law. Motor vehicle policies may be conformed to higher minimum limits when operated in other states. Evidence of motor vehicle coverage may be uniquely available through administrative agency records.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

12 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
IV. EXAMINING CURRENT ENVIRONMENTAL INSURANCE PRODUCTS.

4-42 New Appleman Insurance Law Practice Guide 42.11

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.11 Understand the Numerous Types of Environmental Insurance Products in the Current Market.

42.11[1] Overview of Current Environmental Policies. Environmental insurance is an evolving and expanding field. The type and availability of environmental insurance has increased dramatically since the products began becoming more available in the mid-1990s. In response to environmental demands, environmental insurance has developed as a detailed and sophisticated option. However, due to the wide variety of conditions insured against there is no one standard policy. Instead each environmental insurance policy is extremely specialized developed on a site-specific basis during the underwriting stage. The process allows creation of a policy to address individual needs, but requires careful attention to a wide range of issues. The first step is to determine what protection is necessary based upon current property conditions and expectations for the future activities on a property.

42.11[2] Pollution Legal Liability. Pollution Legal Liability (PLL) insurance is also sometimes known as Pollution and Remediation Legal Liability, Premises Pollution Liability, Pollution Legal Liability, Pollution Liability Limited, Environmental Site Liability, and Environmental Cleanup and Liability insurance. This insurance is the modern descendent of the early Environmental Impairment Liability coverage. Specific coverage terms vary widely among PLL policies. However, in general, PLL insurance consists of some combination of three basic coverage components:

1. Third-party coverage for bodily injury, cleanup costs, and property damage arising out of pollution conditions "on, at, under or migrating from" an insured site;

2. Defense cost reimbursement for covered third-party claims;

3. First-party claims for government-mandated cleanup related to pre-existing environmental conditions first discovered during the coverage period.

It is important to note that individual PLL policies will vary greatly in the scope of coverage. A PLL policy may explicitly exclude coverage for injunctive relief, thus limiting or precluding potential coverage for cleanup costs in many situations [*see* Gilbert, *Environmental Impact Insurance: Practical Considerations*, Environmental Aspects of Real Estate Transactions (Witkin ed. 1995); *see also* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 11, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf.

The general term for pollution legal liability insurance is one to five years. A longer term is preferred by most policyholders--but longer coverage can lead to a significantly higher premium. Insurance policies extending 10 years are fairly common, and policies covering 15 and even 20 years have been issued by insurers. But a term longer than 10 years will come only at a significantly increased premium, if even available. Premiums for PLL insurance are determined on a per year basis, with all premium costs due up-front.

There is also a wide range of options for policy limits on PLL policies. Coverage generally begins at $1 million. Coverage can increase to $5 million or $10 million for an increased premium. Coverage may even be available up to $50 million or $100 million in certain instances, however the increased limit will certainly increase the policy premium.

Consider:

It may be possible to negotiate reduced policy premiums where available information demonstrates that a property has a low environmental risk. Some environmental investigation will be required by the insurer in order to issue the PLL policy. Beyond that required investigation, the insured should evaluate whether additional environmental investigation has the potential to benefit the insured in the form of a reduced premium, or the risk of exposing additional risks that could raise the premium or potentially result in coverage exclusions.

42.11[3] Remediation "Cost Cap" Insurance. Remediation "cost cap" insurance is a tool to minimize the risk associated with ongoing remediation and the potential of cost overruns. Cost cap insurance policies allow an insured to guarantee that actual cleanup costs will not exceed estimates by more than an agreed amount, subject to the total limits of coverage purchased. Securing a cost cap policy will require an approved remediation plan with cost estimates from a reputable environmental consulting firm. The insurance company may also engage their own environmental engineering professionals to evaluate the plan and potential risks--in fact many insurance companies now have in-house experts to assist in underwriting these policies.

The actual limits, retentions, premium and coverage terms for cost cap insurance will vary based upon the site conditions. While most insurers do not offer coverage beyond a 10-year period, extended coverage can be negotiated in certain instances. In general, the policy will terminate at the issuance of a regulatory

approval--or "No Further Action" letter for the cleanup, or at the end of the term--whichever is earlier.

The insured will be responsible for payment of the premium at the start of the policy. In addition, the insured will have all responsibility for cleanup costs up to the estimated cost and generally for overruns up to an agreed upon amount, normally some percentage of the estimated cleanup costs. Only after costs have exceeded the estimate, plus agreed overrun, will the insurer be responsible for payment of remediation costs. Once that responsibility has been triggered, the policy will provide for coverage for all costs, up to the policy limit.

Insured's Perspective:

Due to the limited coverage term and need for an approved cleanup plan with firm cost estimates, Cost Cap coverage is not a viable option at the early stages of most sites. In addition, because Cost Cap policies are based on approved remediation plans, they may exclude coverage for remediation activities and costs outside the approved plan--arising from changed conditions, changed regulatory standards, or lack of effectiveness of a chosen remediation method. The insured must be aware of what limit the policy has in place for coverage of additional remedial costs.

Warning:

Insurers are more willing to offer Cost Cap policies in jurisdictions with risk-based corrective action standards. However, in many risk-based programs, regulatory closure, sometimes in the form of a "No Further Action" letter, may be issued dependent on certain future monitoring or controls. If the Cost Cap coverage terminates at issuance of regulatory closure, any additional costs of post-closure monitoring, such as that required by some Institutional Controls or Environmental Use Covenants, would be outside the scope of coverage. Insured parties should consider the handling of these costs.

42.11[4] Secured Creditor Coverage. Secured Creditor Coverage is intended to address the risk to creditors posed by the loss of collateral value due to environmental contamination, and the risk for environmental liability resulting from foreclosure of a contaminated property.

Example:

One form of Secured Creditor Coverage pays the lender the principal balance due on a mortgage loan when (i) contamination is present at the insured property; (ii) the loan is in default; and (iii) the lender's interest in the collateral is transferred to the insurance company.

In general, most Secured Creditor Coverage policies are structured to pay the insured the lesser of the default amount, the cleanup costs, or third-party claims for bodily-injury, property damage and legal defense costs.

42.11[5] Contractor's Insurance. A contractor's pollution liability policy helps protect contractors against claims of third parties for bodily injury or property damage. While in the past most environmental contractors elected to self-insure their exposure to environmental liabilities, contractor's insurance

policies are becoming more common as they become more available and as more property owners require proof of such insurance from their contractors. Property owners are not generally covered by the contractor's policy, but some may require the contractor to name the owner as an additional insured for the duration of the work.

In addition to third-party claims, contractor's pollution liability policies may cover legal defense costs and costs of remediating on- and off-site contamination. Contractor's pollution liability coverage is available for a variety of operations--including mobile waste treatment units; emergency spill response; site restoration; storage tank cleaning, removal and installation; transformer removal; and asbestos abatement.

Another form of contractor's insurance is professional liability coverage. This coverage is available for consultants, risk assessment firms, laboratories, architects, and engineers and provides coverage for pollution damages resulting from negligent acts, errors, or omissions committed in rendering professional environmental services. An errors and omissions policy will typically pay for third-party personal injury and property damage including cleanup and loss of use. However, the professional services covered must be itemized in the policy.

Strategic Point--Insured:

When the same firm performing the design work for a project also handles the remediation, then combined coverage for contractor's pollution liability and errors and omissions may be available. This may avoid coverage issues resulting from disputes about the cause of contractor's liability and better protect the insured.

42.11[6] Blended Finite Risk. A blended finite risk insurance program combines the elements of PLL and cost cap insurance. The goal of the finite risk policy is to support resolution of environmental liabilities and cleanup costs for known and unknown contamination at a particular site. However, unlike the cost cap policy, the finite risk policy requires that the insured pay both the premium and the estimated future remediation costs up front to the insurer. The net present value of the anticipated remediation is deposited into an interest bearing commutation trust account managed by the insurer. The insurer assumes responsibility for managing and paying the bills of the remediation contractor and provides "cost cap" and PLL coverage to the contractor and primary insured if needed. When remediation work is completed, the insurer is entitled to any remaining funds from the trust account. If there is a cost overrun, the insurance will pay for the cost overruns, up to the policy limit.

A blended finite risk policy is often utilized to facilitate real estate transactions involving contaminated properties, or significant brownfields redevelopment projects.

Insured's Perspective:

Negotiation of the estimated future remediation costs is of critical importance as the insured has the up front responsibility for future costs and the premium. Any funds left following the cleanup are the property of the insurer.

As is the case in both PLL and Cost Cap coverage, the perceived environmental risk and policy time will significantly impact the premiums for coverage under a finite risk program. Finite risk programs can be used to address longer-running cleanups--with policy terms running 20 or even 30 years. However, the available length of coverage will depend upon the insurer's assessment of timing of the work and the benefit the insurer expects to realize from investment or management of the up-front payment.

Consider:

When the majority of the remediation costs will likely be incurred soon after development of the finite risk policy, the insurer obtains less benefit from the up-front payment and may in return require a greater premium in order to protect itself from risks of cost overruns.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

13 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
IV. EXAMINING CURRENT ENVIRONMENTAL INSURANCE PRODUCTS.

4-42 New Appleman Insurance Law Practice Guide 42.12

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.12 Know When and Why Current Environmental Insurance Products Are Needed Most.

The wide variety of environmental insurance products allows for development of an insurance policy to meet the specific needs posed by environmental contamination, or potential environmental contamination, at a property. However, this variation can also lead to traps for the unwary. Because environmental insurance is still a costly investment, it is often only worthwhile for significant projects or, increasingly, portfolios of properties.

Consider:
A finite risk program will require a significantly higher up-front payment by the insured, but may be more beneficial than traditional cost-cap where the party responsible for remediation does not have the ability or desire to manage a long-term cleanup.

Consider:
An individual contractor's pollution liability policy would likely be cost prohibitive for small projects, given the payment expected by the contractor. To answer this concern and address insurance requirements of clients, many contractors have general pollution liability coverage, coupled with higher deductibles reflecting the amount that the contractor is able to self-insure.

Consider:
Pollution Legal Liability insurance may be used as a tool to encourage sale or redevelopment of a property following remediation. The protection of buyers and developers from potential unknowns may accelerate the sale of a property following completion of remediation.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

14 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
IV. EXAMINING CURRENT ENVIRONMENTAL INSURANCE PRODUCTS.

4-42 New Appleman Insurance Law Practice Guide 42.13

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.13 Negotiate the Best Coverage Terms and Beware of Common Pitfalls.

42.13[1] Incorporating a Favorable and Enforceable Choice of Law Provision. While a choice of law provision is not generally included in an insurance policy, it is frequently required by insurers issuing environmental impairment liability coverage. If possible, an insured should seek to have the choice of law provision removed entirely. However, insurers have been insistent on inclusion of a choice of law provision in current environmental insurance policies, and utilize the provision to select the state most favorable to the insurer's position. Similarly, the insurer may seek to control forum and venue, in a location most convenient to it. The insured must carefully consider the impacts of these provisions. Beyond just the cost and time burdens of an inconvenient forum, an unfavorable choice of law can have significant implications for coverage [*see* Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, in Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 378 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008)].

42.13[2] Establishing the Appropriate Coverage Time.

42.13[2][a] Policy Coverage Period. Most of the environmental specialty products currently available require that claims must be both made and reported within the policy period to qualify for coverage [*see, e.g.*, Michael B. Gerrard, Environmental Law Practice Guide: State and Federal Law § 8.14 (Greenwich Insurance Company Specimen Policy)]. As discussed above, environmental liability coverage is frequently available for longer terms than typical insurance, with environmental coverage extending 10 or more years in many cases. However, even a 10-year policy period may be shorter than the entire remediation and monitoring for a site, given the challenges presented by environmental contamination.

Negotiating an appropriate policy period is essential to the value and effectiveness of the insurance product. While extended periods will result in increased premium costs upon the insured, the timing of environmental liability and risk must be carefully considered when negotiating the appropriate coverage time.

42.13[2][b] Extension of Coverage or Reporting Period. In some cases policyholders may have the option, under certain limited circumstances, of extending the reporting period beyond the policy term. This option does require an additional premium payment by the policyholder [*see, e.g.*, Michael B. Gerrard, Environmental Law Practice Guide: State and Federal Law § 8.14 (Greenwich Insurance Company Specimen Policy, § V)]. The available time period may be set in the original policy, along with the cost for extension. When available, the extension must be requested by the policyholder prior to expiration of the policy.

In some cases the policyholder may be able to negotiate for extension of coverage. However, obtaining an additional term of coverage will require negotiation with the insurer at a similar level to negotiation of the original policy. Should the insured be interested in pursuing any extension, early initiation of negotiation is advisable in order to avoid any lapse in coverage that could lead to coverage disputes.

42.13[3] Defining "Known Conditions."

42.13[3][a] Defining Insured's Knowledge. When negotiating the scope of any Known Condition exclusion, it will be important to define the insured's knowledge. Insured and its counsel will be seeking to define it narrowly, while the insurer and its counsel will be seeking to define it broadly.

Consider:
What individuals within the insured have the ability to impute knowledge to the insured. In addition to the typical officer/ director representatives, the insurer will likely also seek to include those individuals with responsibility to environmental management or compliance. Some policies include a schedule specifically identifying the representatives by name.

Consider:
What constitutes knowledge? Is knowledge subjective--dependent upon the named individual actually knowing or receiving some notice, written or verbal? Or is knowledge objective--encompassing anything the insured knew or should have known at the time the policy was issued?

42.13[3][b] Coverage for Known Conditions. While in general Known Conditions are commonly excluded from coverage, parties seeking to ensure environmental risk may need to obtain coverage for known conditions. This is available as an option in some environmental insurance policies, but coverage of Known Conditions will depend upon what is disclosed to the insurer at the time of policy issuance and coverage for known conditions should be specifically noted in the policy [*see, e.g.*, Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 14-15, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf]. Known conditions that are not explicitly referenced as covered within the policy

may result in future coverage disputes based upon proper disclosure. To avoid the potential for dispute over whether a pre-existing condition was disclosed to the insurer prior to policy inception, many PLL policies require that all such disclosures be listed specifically on a policy schedule [*see, e.g.*, Susan Neuman & Robert D. Chesler, *Environmental Insurance Coverage*, *in* Environmental Law Practice Guide: State and Federal Law § 8.04[1] (Michael B. Gerrard ed.)].

Insured's Perspective:
An article provides a concise background about the role of the "known condition" exclusion in environmental insurance policies and the details from the litigation that has emerged over the exclusion. [*See* Caroline Vazquez, *Into the Unknown: The Reach of Environmental Insurance in Cases*, 16 Conn. Ins. L.J. 467, 501 (2010)]. Vazquez argues that courts should construe "known conditions" under the doctrine of *contra proferentem* and that the burden should lie on the insurer to identify "known conditions."--Aviva Abramovsky

42.13[4] Dealing with Named Insureds, Additional Insureds and Insured vs. Insured Exclusions. Environmental insurance frequently involves multiple parties seeking protection from future liability. Where the insured owes environmental indemnity to another party, it will be important to consider whether that party should be named as an additional insured. If that party is not an additional insured, the insured must consider the impact of any Contractual Exclusions, as discussed below in § 42.13[9].

Most policies do require an exclusion of coverage for claims by one insured against another insured under a policy, termed an "insured vs. insured exclusion." This is a common exclusion, but has the potential to create future disputes between parties involved with a property and/or a remediation project. This exclusion is especially problematic where a policy includes a "suit" or "government mandate" trigger for first-party property remediation liability.

Example:
Seller sells a property to Buyer under an agreement in which Contractor assumes all environmental liability and the environmental remediation, backed by environmental insurance. After encountering unknown conditions, the Contractor defaults and becomes insolvent. Buyer sues Seller claiming it was damaged by Seller's failure to disclose the unknown conditions. If Seller was not a named insured, Seller may not be able to seek any available funds under Contractor's insurance. However, if Seller, Buyer and Contractor are all insured, the claim could be barred by an insured vs. insured exclusion.

Insured's Perspective:
In some situations it may be best to maximize the parties covered under an insurance policy--in fact inclusion of all parties may be mandated in a sale or remediation agreement. However, if future disputes may arise between parties, the insured should carefully consider the impact of an insured vs. insured exclusion and whether future risk warrants an increased premium for removal of the exclusion.

42.13[5] Consider Scope of "Bodily Injury." The scope of covered Bodily Injury will depend upon the specific policy language--which can vary greatly. Third-party "bodily injury" may be defined to include some combination of the

following: physical injury, sickness, or disease; mental or emotional distress; shock; building-related illnesses; and death. Some policies have a more circular definition of "bodily injury" that includes the term "bodily injury" in the definition itself. Under certain circumstances, insurers may be willing to include fear of disease and medical monitoring in the scope of "bodily injury" coverage, although such claims present greater challenges from an underwriting standpoint.

42.13[6] Consider Scope of "Property Damage."

42.13[6][a] On-Site and Off-Site Damage. Different types of environmental insurance will vary in their coverage for on-site and off-site damage. Historically Environmental Impairment Liability and PLL excluded on-site remediation, and even now PLL policies may have an exclusion for on-site physical damage, though it is less common. However, the exclusion of on-site damages limited the usefulness of PLL policies for certain redevelopment projects, and while cost-cap insurance covered on-site remediation, it was not always appropriate for a given site. In response to increased brownfields redevelopment initiatives, insurers began offering both "on-site" and "off-site" remediation coverage. Initially this coverage was limited to the extent that cleanup was mandated by government action [*see, e.g.*, Susan Newman & Robert D. Chesler, *Environmental Insurance Coverage, in* Environmental Law Practice Guide: State and Federal Law § 8.01[2][a] (Michael B. Gerrard ed); Susan Neuman, *A Willing Self-Insurer? The Availability of Environmental Impairment Liability Insurance After 1985*, 5 J. Ins. Coverage 32, 39-40 (Autumn 2002)].

Current PLL policies offer even more flexibility for on-site coverage, with some even eliminating the requirement for a government mandate. Some policies now include a discovery trigger for coverage of "on-site," first-party cleanup costs. Under the discovery trigger, coverage may be available even in the absence of any government demand if the conditions requiring remediation on the insured's property are first discovered and reported to the insurer during the policy period [*see* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 15-16, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf]. The insurer may require pre-approval of a voluntary cleanup plan for on-site remediation in order for PLL coverage to apply [*see* Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities*, The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][iii]].

Notably, the scope of property damage covered will depend in large part upon the other riders or exclusions of the policy, including any exclusion or coverage of Known Conditions, as discussed in § 42.13[3][b] above.

42.13[6][b] Loss of Use. Property damage coverage will typically include loss of use resulting from that property damage. The "resulting loss of use" language in the "property damage" definition used in several PLL policies may also provide coverage for business interruption losses. Coverage may also be available for loss of use without property damage, though such coverage should be specifically noted if outside the general coverage description, including policies which describe loss as "damage resulting from ..." [*see* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf].

First-party business interruption coverage is available from a few insurers, though this is usually by special endorsement [*see, e.g.*, Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf]. This type of coverage may be a tool for facilitating property transactions during the continuation of remediation.

42.13[6][c] Third-Party Property Damage and Stigma. There generally is no PLL coverage available for diminution in the value of the insured's own property. Coverage for diminution of a third-party's property value might be provided, depending on the insurer and policy language used. Most of the available PLL policies that do cover diminished value require that the third-party's property be physically damaged, thus avoiding coverage for perceived, or "stigma," damages resulting from potential or threatened contamination [*see* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf]. However, it is possible to obtain coverage for stigma or diminished value without property damage, though the cost may be prohibitive.

Insured's Perspective:

Damages such as diminution of value and stigma should be specifically addressed within the scope of coverage due to the variability of policies and lack of consistent coverage status.

42.13[7] Consider Potential Other Loss / Damages.

42.13[7][a] Defense Costs. Defense costs related to covered damages are generally covered by an environmental insurance policy. However, these costs typically apply towards the policy limit [*see, e.g.*, United States Dep't of the Treasury, *Hazardous Substance Liability Insurance*, Mar. 1982, at 72; Susan M. Cooke, *Insurance Coverage for Environmental Losses and Liabilities*, The Law of Hazardous Waste: Management, Cleanup, Liability, and Litigation § 19.07[2][a][i]; Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, in Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 339, 349 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008)]. This is unlike many CGL policies, where defense costs are outside the policy limits. Before securing environmental insurance coverage, the possibility of complicated or long-running litigation should be considered in the assessment of the appropriate policy limit.

42.13[7][b] Exclusion of Punitive Damages. Most policies exclude punitive damages. Some policies state an express exclusion of punitive damages, other simply use definitions of loss that could arguably exclude such damages. Furthermore, there is no consistent holding in the courts as to whether punitive damages are even insurable [*see generally* Linda L. Schlueter, Punitive Damages §§ 17.0-17.2(D) (5th ed. 2005); Robert Jerry & Douglas Richmond, Understanding Insurance Law § 65[e] (4th ed. 2007)].

42.13[7][c] Exclusion of Civil Penalties. Civil penalties are not generally considered to be covered by environmental insurance. Some policies include an express exclusion of civil penalties. Other policies define the covered "loss" as some award, settlement or judgment of "compensatory damages." This use of

"compensatory damages" may limit coverage for civil penalties or fines [*see* Peter J. Kalis, *et al.*, Policyholder's Guide to the Law of Insurance § 12.03[B][1] (2005)].

42.13[7][d] Coverage for Natural Resource Damages. Parties are increasingly seeking coverage for natural resource damages. In fact some parties seek environmental insurance solely to protect from such damages. Some policies do include coverage for natural resource damages, including physical injury to wildlife, flora, air, land, and groundwater or surface water on properties held or controlled by a public natural resource trustee [*see* Northern Kentucky University, *Environmental Insurance Products Available for Brownfields Redevelopment, 2005*, Feb. 2006, at 13, available at http://www.epa.gov/brownfields/pubs/enviro_insurance_2006.pdf]. A party seeking coverage for natural resource damages should ensure that such coverage is explicitly listed in the policy.

Consider:

Consider: For purposes of natural resource damages under Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") [42 U.S.C. § 9601 *et seq.*], courts have defined "damages" as "the monetary quantification stemming from an injury," as opposed to the "injury to natural resources" [*see, e.g.*, Coeur D'Alene Tribe v. Asarco Inc., 280 F. Supp. 2d 1094, 1114 (D. Idaho 2003) .

42.13[8] Dealing with "Intentional Act" Exclusions. Like the "Intentional Act" exclusion in most CGL policies, the exclusion of coverage for intentional acts in environmental policies can present significant problems for the insured. In general this provision excludes coverage for "intentional," "dishonest," "willful," or "deliberate" acts or omissions committed by or at the direction of the insured. This can include intentional non-compliance or violations of laws or other requirements. While deletion of this exclusion in its entirety would be ideal from the insured's perspective, it is often not possible. At a minimum, the insured needs to closely consider the impacts on environmental liability coverage. In policies covering known conditions, those conditions should not be subject to exclusion from coverage based on this provision. Similarly, Intentional Act exclusions should not apply to the remediation covered by a Cost-Cap or Finite Risk policy [Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, in Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 376 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008)]. Finally, as with the handling of Known Condition Exclusions, see above at § 42.13[3], the insured should seek to limit and clearly define the individuals whose actions can trigger loss of coverage under this provision.

42.13[9] Dealing with Contractual Liability Exclusions. Contractual Liability Exclusions warrant careful attention when assessing the role of environmental insurance in a transaction or redevelopment. Generally, policies will exclude from coverage any contractual liability of the insured, unless the insured is required by law to undertake it, or unless the insurer agrees to include the contract as an "insured contract." Where appropriate, the insured should include a schedule of "insured contracts" in the policy to ensure that the liabilities under the contract or indemnity can be covered by the insurance policy, to the extent available.

Example:

Contractor agrees to undertake a remediation, obtain environmental insurance and indemnify the Property Owner. Unless Contractor is required by law to indemnify Property Owner, Contractor should include the indemnity agreement as an Insured Contract.

42.13[10] Procuring Mold Coverage. Property and health damage resulting from mold and fungi is an emerging issue in environmental liability, and, consequently, environmental insurance. Most policies will require an exclusion of mold and fungus as a default condition.

Insureds can add back in coverage for mold and fungus related damages, but such an addition will result in an increased premium. In some cases, insurers require higher deductibles and lower coverage limits for added mold coverage [*see* Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, *in* Environmental Insurance: Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 380 (ALI-ABA Course of Study Materials No. CN050, May 8-9, 2008)].

Strategic Point:

Strategic Point: A court may draw a distinction between mold damage and loss caused by mold. An illustration of this was given in *Liristis v. American Family Mut. Ins. Co.* [204 Ariz. 140, 144 (2002)] . The insureds' house was damaged by a fire, then later rebuilt. As a result of water used to put out the fire, mold grew throughout the house. Insureds sought to claim on their policy, but the policy included an exclusion for mold: "We do not cover loss to the property ... resulting directly or indirectly from or caused by [mold]. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss" [*id.* at 144]. Because the mold resulted from the fire and damage caused by the fire was covered under the policy, the damage from the mold was also covered. The court noted that the insurer could have avoided this situation had it added the words "either consisting of, or ..." to the policy exclusion [*id.* at 144]. However, another court has not drawn a distinction between mold damage and loss caused by mold. [*See* DeVore v. American Family Mut. Ins. Co., 383 Ill. App. 3d 266 (2008) (rejecting the Arizona Court of Appeals interpretation of the same exact clause)].

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims

15 of 15 DOCUMENTS

New Appleman Insurance Law Practice Guide

Volume 4: Separate Lines of Insurance
PART I New Appleman Insurance Law Practice Guide
Chapter 42 UNDERSTANDING ENVIRONMENTAL INSURANCE
IV. EXAMINING CURRENT ENVIRONMENTAL INSURANCE PRODUCTS.

4-42 New Appleman Insurance Law Practice Guide 42.14

AUTHOR: by Robyn L. Anderson, William G. Beck and Jessica E. Merrigan

42.14 Final Thoughts on Strategy.

Procuring environmental insurance coverage under the currently available policies requires policy-specific negotiation of almost all key terms and a careful attention to detail. Even after binders have issued, the insured must pay close attention to the final terms of the final policy as issued. It is not unheard of for new changes to appear prior to issuance of the final document.

The wide variety of currently available environmental insurance coverage can offer valuable tools for redevelopment and management of environmental liability and risk. However, environmental insurance is full of traps for the unwary and policy terms must be given careful consideration in order to ensure that they will provide the intended benefit to the insured.

Legal Topics:

For related research and practice materials, see the following legal topics: Insurance LawBad Faith & Extracontractual LiabilityGeneral OverviewInsurance LawBad Faith & Extracontractual LiabilitySettlement ObligationsThird Party Claims