A Reminder About Pollution Legal Liability Coverage

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A recent decision from the federal district court in Pittsburgh highlights the importance of carrying environmental insurance, especially in connection with properties or facilities with an increased potential for environmental legacy liabilities. Many property owners believe that comprehensive general liability (CGL) policies adequately protect against environmental liabilities. However, standard CGL policies will typically only cover certain, very limited environmental liabilities and are by no means an effective tool for comprehensive environmental protection. Pollution legal liability (PLL) policies, designed to respond to contamination found on properties, are a far more useful and comprehensive mechanism to mitigate potential liability stemming from current or past ownership of environmentally sensitive properties.


The CERCLA claims against Wiseman arose out of environmental contamination at property formerly owned by Wiseman. TIG asserted that it owed no such defense or coverage-related duties to Wiseman. Among other arguments, TIG asserted that the CGL policy contained an exclusion for bodily injury or property damage claims arising out of the release of hazardous materials "into or upon land." However, the exclusion contained an exception to releases that were considered "sudden and accidental." "Sudden and accidental" was not defined under the policy. TIG asserted that the CERCLA claims brought against Wiseman did not allege any sudden or accidental event and thus it had no duty to defend or otherwise provide coverage.

The case was assigned to Chief Magistrate Judge Lisa Pupo Lenihan for a report and recommendation. She clarified that TIG's duty to defend did not hinge on whether the underlying complaint "expressly alleges specific factual predicates clearly within the applicable policy terms." Rather, the duty to defend arose when a fair reading of the underlying complaint did not "expressly rule out the possibility of insurance coverage under the applicable policy terms." Pupo Lenihan stated further that TIG could not reasonably conclude from the face of the underlying complaint that the allegations "precluded or negated any potential..."
applicability" of the "sudden and accidental" qualifiers.

Based on the foregoing, Pupo Lenihan held that the language of the underlying complaint was a sufficient basis to deny TIG's asserted grounds for summary judgment and to grant Wiseman's motion for partial summary judgment on the question of TIG's duty to defend.


Although in this case Wiseman succeeded in thwarting its insurer's summary judgment motion on the duty to defend, in order for Wiseman ultimately to obtain coverage for its claim it will face a significant burden in demonstrating that the "sudden and accidental" exception to the policy exclusion applies. Given that the property was likely contaminated over a long period of time rather than in a single abrupt, catastrophic event, actually obtaining coverage under the policy will require a factually intensive showing that the gradual contamination was sufficiently like the abrupt event to qualify as "sudden and accidental." In short, the case highlights the difficulty of obtaining coverage for environmental liabilities under a CGL policy.

That controversy could have been avoided if the plaintiffs had considered other insurance products that are better suited to cover this type of pollution-related risk. This is especially true of properties on which manufacturing or other environmentally sensitive operations may have occurred.

Generally speaking, PLL insurance policies can help landowners mitigate known and unknown risks associated with the acquisition and divesture of real property, and offer more robust protections for environmental risks than the CGL policy that the plaintiffs sought to rely on in the Wiseman case. In situations comparable to the facts at issue in Wiseman, a PLL policy would have been a more appropriate coverage and likely would have negated the need to bring a lawsuit to enforce the policy.

PLL coverage is the most common type of insurance to address potential environmental liabilities associated with real property.

It is generally used to address cleanup costs for environmental contamination, third-party claims for bodily injury or property damage arising from environmental contamination (both pre-existing or first occurring during the policy term), and business interruption losses resulting from a covered environmental condition or claim.

Among other things, PLL policies can also provide for protection against natural resource damages, risk stemming from non-owned disposal sites, and legal defense costs associated with all of the foregoing. PLL policies cover unknown pre-existing contamination discovered after the policy inception, as well as new conditions that occur after the inception date.

Known conditions are included under most PLL policies unless they are specifically scheduled and excluded from coverage under the policy. Capital improvement exclusions are quite common and would exclude costs of remediating known conditions, such as urban fill material, in connection with redevelopment of a property.

However, costs arising in connection with government claims stemming from known conditions can still be covered under a typical PLL policy. CGL policies will typically exclude coverage for underground storage tanks, fuel or chemical storage, waste storage and business interruption, which can be included under a PLL policy. It is also important to note that off-site disposal sites or landfills (often called "non-owned disposal sites" in PLL policies) can be scheduled onto policies. If liability arises at the disposal facility and liability attaches to your client as a generator, the PLL policy would kick in.

PLL policies also can cover re-opener type situations. In many states, parties that have received no-further-action determinations after cleaning up a contaminated property may be audited, and the cleanup decision re-opened to require further investigation or remediation. This is likely to occur in situations where the
remediation standards governing a particular contaminant are revised, or where new data become available at a later date suggesting that remediation was not properly completed. With a PLL policy in place, costs associated with a re-opener become less of an uncertainty. PLL policies also entitle the policyholder to legal defense of any of the above situations.

PLL policies are claims-made-and-reported policies, meaning that claims must be made during the term of the policy. So, for example, Wiseman would have had to have an existing PLL policy covering the property to avail itself of that policy’s protections when the underlying CERCLA claim arose. It would not have been enough to have had the policy during ownership of the property.

Underwriting on PLL policies is typically conducted using readily available environmental documents, including Phase I and Phase II environmental site assessments, as well as other environmental reports, and agreement documents.

Wiseman offers an important lesson, especially to those that own or operate properties that have current or former facilities with environmentally sensitive operations: CGL policies are not an effective tool to manage environmental liability risks. Although not perfect, PLL policies are a more appropriate type of coverage to mitigate unknown risks associated with present and legacy property ownership. PLL policies can offer particular value to address the residual risk after a cleanup.

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