

## ENVIRONMENTAL AND TOXIC TORT CLAIMS: ARE YOU COVERED?

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*For the last 20 years, policyholders and insurance carriers have battled over whether coverage exists for environmental and toxic tort claims, sometimes to the point of financial ruin.<sup>1</sup> Large claims, particularly those in excess of \$10 million, have been difficult to resolve without litigation. In fact, litigation expenses comprise almost 90 percent of the money spent on environmental insurance claims. This article covers the basics of insurance coverage law as it relates to environmental and toxic tort claims for corporate counsel, who are increasingly called upon to interpret insurance policies and to take a more active role in risk management. The article also teaches principles and methodologies for promoting settlement and reducing conflict between policyholders and insurance carriers.*

### **Presenting and Managing the Claim**

Suppose a governmental agency demands that your company pay for environmental remediation at a landfill used 30 years ago or several individuals allege that their cancer was caused by exposure to hazardous chemicals manufactured in the 1950s and 1960s. An immediate first step should be to determine whether liability insurance covers the company's legal expenses and the cost of any settlement, judgment, or verdict.

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Tendering and managing an environmental or toxic tort insurance claim can be a difficult and intimidating process. If the company's liability arises from the operations of a predecessor company, several different insurance programs and numerous insurers could be affected by the claim. Even if defense coverage is provided, issues may arise regarding who should represent the policyholder and how much the insurance company should pay in legal fees. There are also questions about how to manage the insurance claim toward settlement if litigation occurs.

Presenting and managing an insurance claim begins with understanding the policyholder's burden. Regardless of the type of coverage or claim, a policyholder's prima facie case for coverage contains four elements: proving the existence and terms of an insurance policy; establishing that the loss is covered under the policy, including satisfying all relevant conditions of coverage; proving that the insurance policy has been breached; and establishing the amount of loss or damages. Determining what coverage should apply to the covered loss (the second element of the policyholder's prima facie case) is the next step.

Corporate counsel should look for commercial general liability (CGL) coverage during the period 1940 to 1986 for environmental claims, and from 1940 to the present for toxic tort claims. CGL insurance

is the most commonly held type of business insurance and it is designed to provide policyholders with coverage for all forms of third-party liability. In particular, CGL insurance provides coverage for liabilities to third parties, who have, through the policyholder's alleged negligence, suffered bodily injury or property damage. CGL insurance became available in the early 1940s when the insurance industry combined several forms of specific hazard liability insurance (elevators, products, premises, and so on) into a single standard form all-risk policy.

Initially, the CGL policy covered liability for bodily injury or property damage caused by an accident. Over time, courts interpreted the policy term accident broadly to mean continuous or repeated exposure to conditions occurring over some period of time. Consequently in 1966, a broader term, "occurrence," was substituted for the term "accident." The revised CGL form defined occurrence as an "accident including injurious exposure to conditions, which results, during the policy period, in bodily injury...neither expected nor intended from the standpoint of the insured." The "occurrence" term was intended to cover pollution-related damages.

In 1973, the CGL policy form underwent two more changes. First, the insurance industry added a standard exclusion that limited coverage for pollution liability to the "sudden and accidental" release of contaminants (in other words, the "qualified pollution exclusion"). Second, the occurrence definition was modified to read: "[A]n accident, including continuous or repeated exposure to conditions [that] results in bodily injury or property damage neither expected nor intended from the standpoint of the insured."

Beginning in the late 1970s, the insurance industry's financial exposure grew because of a rise in latent injury claims, particularly environmental damage, asbestos bodily injury, and other toxic tort claims. Consequently, the 1973 CGL policy was withdrawn from the market in 1984 and replaced with a new policy type, which was offered on a "claims-made" basis in two forms. Under the first claims-made form, coverage depends on whether the claim was made against the policyholder during the policy period. Under the second form, coverage exists when the claim is made and reported during the policy period.

In 1986, the insurance industry changed the CGL form again to broaden the pollution exclusion (referred to as the "absolute" pollution exclusion). The courts are split on whether the "absolute" pollution exclusion applies to toxic tort claims. Courts finding coverage for the policyholder on toxic tort claims rely on the traditional connections between the environment and pollution. Courts finding in favor of the insurance carrier and upholding the exclusion rely on the plain reading of the policy language and give it a literal interpretation.

### **Notice, Duty to Cooperate, and Coverage Reservations**

All insurance policies contain a condition requiring the insured to provide notice of a claim, potential claim, or an occurrence either "immediately" or "as soon as practicable." The condition raises three questions: when do you notify the insurance carrier; which insurance carriers do you notify; and what do you say in the notice letter.

Notice is considered timely if a reasonable businessperson would consider the notice timely. Even if notice is considered late,

most jurisdictions permit a claim to proceed unless the insurance carrier could prove either that late notice increased its financial exposure or impaired the insurance carrier's ability to meet its coverage obligations. The important thing for a policyholder to do is act in a manner consistent with what a reasonable insurance carrier would have done in similar circumstances.

With respect to the scope of notice, the general rule of thumb is to give notice to all potentially applicable coverage, including excess coverage. For an environmental claim, notify all insurance carriers on the risk back to the time when the policyholder first used the landfill or when disposal activity began. Notice should be sent by certified mail, with return receipt requested to establish proof of notice.

Within a reasonable time after receiving notice of a claim, an insurance carrier must make one of three determinations: accept the claim for coverage, accept coverage under reservation of rights, or deny coverage. More often than not, the claim will fall into a gray area, thereby causing the insurance carrier to reserve rights to decline coverage and to investigate the claim.

Generally, insurance policies require a policyholder to cooperate in the investigation, settlement, or defense of a claim. This includes providing the insurance carrier with information (for example, pleadings) and allowing access to records. Note, however, that the duty to cooperate is conditioned upon the insurance carrier's obligation to defend and/or indemnify. Disclosure of underlying claim information should occur under a confidentiality and nonwaiver agreement, which preserves all legal rights and privileges.

Coverage reservations for environmental and toxic tort claims typically involve one or more of the following defenses:

- Trigger-When did damage occur such that a policy must respond to the claim?
- Allocation-What happens if damage occurred during more than one policy period?
- Pollution Exclusion-Does coverage exist for gradually occurring contamination, such as a leaking underground storage tank (LUST)?
- Notice-Did the policyholder provide timely notice? If not, was the insurance carrier prejudiced such that coverage is forfeited?
- Owned Property-Is damage confined to the policyholder's property or does it include third-party property such as groundwater?
- "As Damages"-Are the policyholder's cleanup costs true cleanup costs as opposed to routine environmental compliance or permitting costs?
- "Suit"-Is the cleanup the result of governmental directive as opposed to a voluntary initiative?
- "Expected and Intended"-Was the pollution deliberately and knowingly caused or is it the unexpected result of state-of-the-art disposal practices?

How these issues are resolved will depend on applicable state law.

### **Duty to Defend**

Primary CGL policies contain a duty to defend in the insuring agreement, which is separate and distinct from the duty to indemnify. Courts are split, however, on whether CGL policy language that states that the insurance carrier is required to

defend any "suit" limits the duty to defend to only lawsuits. Most courts have held that an insurance carrier must defend the policyholder when the policyholder receives a governmental agency PRP letter or other administrative threat. A minority of courts has held that the definition of suit does not include PRP letters or other administrative agency threat.

The issue of legal representation under liability policies presents the first opportunity for policyholders and insurance carriers to settle their differences, at least until the underlying claim against the policyholder is resolved. If an insurance carrier accepts coverage but reserves its right to disclaim coverage, the policyholder may be able to control the selection of defense counsel. A policyholder's right to select counsel will depend on the degree to which there is a factual overlap between the underlying claim against the policyholder and the insurance carrier's coverage reservations.

A written agreement between the policyholder and the insurance carrier regarding procedures for the administration, defense, and disposition of the case can lessen suspicion about whether the insurance carrier is truly interested in defending the policyholder or is simply acting to protect its economic interest. For example, the parties can design procedures that allow for joint input and control over selection of defense counsel, strategy, and settlement.

Defense agreements are essential for situations involving repetitive claims or multiple carriers. Often a policyholder will be sued many times for progressive injuries that took place over many policy periods. In these situations, several carriers will have a duty to defend the policyholder. To avoid conflict over how much each carrier should

contribute to the defense and to facilitate prompt reimbursement of defense costs, a written agreement that appoints a lead carrier to act on behalf of the other insurance carriers will minimize confusion and frustration. A lead carrier representative can work with the policyholder on behalf of the carrier group to select counsel, review fee bills and expenses for payment, make decisions regarding settlement, and collect monies owed by other insurance carriers who are obligated to provide a defense. The agreement can also reallocate responsibility in the event that one of the carriers participating in the defense becomes insolvent or exhausts its policy limits.

### **Resolving Claims after Declination of Coverage**

Declination of coverage presents different management challenges. If the policyholder disagrees with the insurance carrier, the declination becomes tantamount to a breach of contract. How should the breach be resolved? Are there alternatives to time-consuming and expensive litigation?

Regardless of the size or complexity of the insurance claim, a good checklist for handling the declination of coverage is set forth in the Prelitigation Protocol for Environmental Insurance Coverage Claims developed by two bipartisan committees of the American Bar Association. The protocol provides a framework and methodology for conducting principled settlement discussions. One aspect of the framework is to create a safe environment in which settlement discussions can occur. Techniques for creating a safe environment include mutual agreements to reserve rights, claims, and defenses; confidentiality agreements; tolling of statute of limitations and other time-based defenses; and

standstills, which prohibit the parties from filing suit.

Once the parties have created a safe environment for settlement discussions, they can turn their attention to exchanging limited but meaningful claim information. In litigation, true information exchange rarely occurs because the adversarial nature of the proceedings leads to excessive and burdensome discovery requests and gamesmanship. The protocol and the companion discovery guidelines prepared by the ABA identify the key information and documents, which can be produced without undue expense or delay. For policyholders, the list includes demands letters or complaints, reports to environmental regulators, estimates of actual and projected investigation, defense, and remediation costs, and relevant corporate history if the claim is being made under policies issued to subsidiary or acquired companies. Similarly, insurance carriers are expected to produce underwriting files, claims files, and specimen policy forms when an actual policy is missing.

Most importantly, the protocol reminds parties of the need for timely communication between decision makers, particularly businesspeople. In fact, for large claims, the protocol recommends that decision makers meet face-to-face within 30 days of completing the initial information exchange. There is no substitute for creating good relations built on mutual trust and respect early on rather than letting the process deteriorate into litigation-oriented interaction. Good relations also give the parties greater flexibility to pick the right technique for alternative dispute resolution, which could range from mediation to minitrials.

One alternative dispute resolution model that deserves greater recognition and use because of its ability to eliminate unnecessary delay and expense is the double-blind mediation model. The double-blind form of mediation is designed to apply to the all-too-frequent situation that arises when no carrier wants to be the first to settle with a policyholder. Under the double-blind model, the policyholder submits a statement of claim facts to the mediator and each carrier. The policyholder then provides the mediator with a coverage chart and a detailed coverage analysis of each policy under which it believes an insurer should pay. The coverage analysis is not shared with the insurance carriers.

Following submission of the policyholder's coverage analysis, the court meets with policyholder's counsel to establish a total settlement demand, which is also not disclosed. Thereafter, each carrier provides the court with its own confidential and detailed coverage analysis. At this point, a second blind is erected, as each carrier's coverage analysis is not disclosed to either the policyholder or to fellow carriers.

After reviewing all submissions, the mediator meets with insurers individually to develop a response to the policyholder's total settlement demand. Again, confidentiality is the key, as only the court knows the amounts offered by the insurers and the policyholder's demand. The point of the exercise is to establish an environment in which each party can evaluate the merits of its position free from worry and concern about what other parties may do.

Settlement discussions or alternative dispute resolution may not always be feasible and there may be no choice but to pursue litigation, particularly when the claim involves a novel issue of policy

interpretation. The lesson to be learned from previous insurance coverage wars, however, is that equal time and attention should be given both to litigation and to settlement. Further, productive settlement discussions require mastery of three important issues: claim valuation, trigger of coverage and allocation, and scope of the settlement.

### **Valuing the Claim**

The complexity of environmental claims makes it difficult for policyholders and insurance carriers to develop a gut feel for the value of the claim. Frequently, it will take years before a policyholder's liability and the cost of site remediation is resolved. Additionally, there may be a threat of either future claims or remedy failure. Accordingly, for meaningful settlement discussions to occur, the parties must construct an analytical framework for valuing the claim.

Through experience, policyholders and insurance carriers have learned to analyze three separate values when dealing with an environmental claim. The first value is past costs, which is a matter of accurately accounting for relevant out-of-pocket and in-kind expenditures. Care must be taken to ensure that all relevant costs are included. Depending on the policy, recoverable costs can include investigation costs, remedy design and implementation costs, consultant costs for technical, analytical, and regulatory assistance, settlement costs, and legal costs.

The second environmental insurance claim value is the value associated with future known cleanup costs. These costs will include the capital and operation and maintenance (O&M) costs. For a typical groundwater pump-and-treat remedy, capital costs are incurred for installing the wells, pumps, piping system, and treatment

equipment. O&M costs include the costs of running the treatment system, monitoring remedial effectiveness, and maintaining and replacing equipment. Since the operating life of a groundwater remediation system is often 20-30 years, O&M costs can represent a substantial portion of future costs.

Depending on the maturity of site characterization and remediation, the level of future known cleanup costs may have varying levels of sophistication. Two examples of calculating future known cleanup costs include "quantity take-off" estimating systems and "module-based" estimating systems. Quantity take-off systems require a detailed design because it is necessary to count every piece of equipment. Module-based estimating systems use basic design information to provide a cost estimate for the entire solution. For example, to estimate the cost of slurry wall installation, the main input variables include the length, width, and depth of the slurry wall.

The third component value for an environmental insurance claim is the estimation of contingent cleanup costs. Contingent cleanup costs are costs that may occur if things go wrong. Possible contingencies include cost overruns, site changes such as the discovery of new hot spots or contaminants, remedy failure, regulatory changes, third-party claims alleging personal injury or property damage, and claims for damage to natural resources such as wetlands and sensitive habitats. The value of a particular contingency is obtained by multiplying the cost to respond to the event by the probability that it will occur. For example, a \$1 million contingency that has a 50 percent probability of occurring has a contingency value of \$500,000.

In the end, the valuation process should accurately reflect the amount the policyholder expects to pay to resolve the underlying claim. Too often, discussions break down because parties are unable to reach agreement on the proper methodology for documenting past costs and developing accurate future cost estimates. Proper methodology, therefore, is key to ensuring that the parties focus on attacking the facts, not each other.

### **Trigger of Coverage and Allocation Methodologies**

CGL policies require that some bodily injury or property damage alleged in the underlying claim occur during the policy period to trigger coverage under the policy. This issue can be complicated to resolve in the case of diseases, which can entail decades-long periods between initial exposure to harmful substances and disease manifestation. Similarly, in environmental cases there are typically long time periods between the initial placement of hazardous substances into landfills and the ultimate release into groundwater or manifestation of harmful effects to the environment.

Courts have developed four different theories for triggering policy coverage:

- "Exposure"-triggers coverage in effect during the period of exposure, beginning from a claimant's first exposure to a harmful substance or first deposit of a contaminant into the environment.
- "Injury-in-Fact"-triggers coverage during the period that injury or damage actually occurs, which in the case of latent injury claims may occur over several decades.

- "Manifestation"-triggers coverage only when damage is actually manifested or discovered.
- "Continuous or Triple Trigger"-triggers coverage under all policies in effect from first exposure through manifestation, including the "injury-in-fact" period.

With the exception of the manifestation theory, which limits coverage to a single year, the theories usually trigger multiple policy periods.

When more than one policy period is triggered, a second issue known as "allocation" arises. Allocation becomes a contentious issue when part of the triggered period includes periods of high deductibles, insolvent coverage, or self-insured retentions. Learning the basics of allocation law, however, can reduce the degree of contention.

Most CGL policies provide coverage for "all sums [that] the insured shall become legally obligated to pay because of bodily injury or property damage to which the insurance applies." Many courts have interpreted this language to mean that a policyholder is entitled to the full extent of coverage provided by a policy that was in effect during any time throughout the continuum from exposure or deposit of pollutants to the manifestation of injury or damages. Under this approach (commonly referred to as the "joint and several" or "all sums" approach), a policyholder may pick any policy in effect during this time period against which to assert the full extent of an insured loss, regardless of the amount of damage occurring during other policy periods.

A second allocation approach spreads damages across some or all policy periods in effect throughout the continuum of exposure

to manifestation. The allocation approaches used by these courts are varied. Some approaches allocate losses according to the relative "time on the risk" of each carrier. Other approaches prorate the loss based on the maximum coverage limits of each policy. A third allocation approach blends the two preceding approaches, by multiplying the "time on the risk" by policy limits for each carrier and then calculating each carrier's proportion of the insured loss. A fourth approach calculates the relative amount of loss or injury that "occurred" in each policy year by reference to some case-specific yardstick, such as the amount of an alleged defective product sold by an insured in each year.

These attempts by courts to allocate insured losses among triggered policies can result in complex formulations for determining the ultimate sums payable by each insurance carrier and, in some cases, by the policyholder itself for a particular loss or series of losses. Choice-of-law determinations can result in different allocation formulas being applied to a single insurance carrier's obligation, as in the case in which a coverage claim is made for environmental liabilities arising from multiple sites in different jurisdictions.

A further complicating factor relates to a requirement in some jurisdictions that policies be exhausted "horizontally," meaning that an excess policy's coverage is not triggered until all policies providing lower layers of coverage, including policies providing coverage for other time periods, have been exhausted. The alternative to this approach, "vertical" exhaustion, would allow any loss or series of losses to exhaust all primary and excess coverage before requiring other triggered policies to respond.

Finally, an issue may be presented as to the number of "occurrences" involved in a particular loss or series of losses. Typical CGL primary policies provide for coverage limits on a "per occurrence" basis (unless an aggregate coverage limit is also in place); further, there are often deductibles or self-insured retentions applied on a per occurrence basis. In the context of environmental liabilities arising from a policyholder's depositing of waste from one facility at many different sites, or a series of toxic tort claims resulting from the sale of a single product, courts have applied a variety of different definitions of "occurrence." Resolution of this issue in any particular coverage claim can have significant implications for exhaustion of primary coverage policies and the number of deductibles or self-insured retentions an insured may have to assume on a covered loss.

### **Negotiation and Settlement Terms**

It is important for both parties to negotiate claims at the highest level possible. For the policyholder, this means having the general counsel or chief financial officer participate in the settlement discussions. For the insurance carrier, it means having the appropriate person from the home office or special coverage unit set up to handle environmental and toxic tort claims. Further, both sides at the negotiation table must have authority to bind an agreement. If authority is lacking, insist on an appropriate superior.

Careful thought should be given to the composition of the negotiating team. Actual settlement negotiations are best handled by corporate counsel who have authority to reach settlements and who can insist on direct contact with the other side's in-house negotiating team. Candidates for the negotiating team include lawyers who can

outline the specific substantive issues and address the legal issues, environmental or toxic tort experts who understand the claims, and financial people responsible for structuring settlements and risk management.

Among the most important tasks for preparing settlement negotiations is determining the type and value of settlement the party desires. Types of settlements include:

- Partial Site Release-release of property damage or bodily injury claims only;
- Full Site Release-release of property damage and bodily injury claims;
- Environmental Carve Out-release of all property damage and bodily injury environmental claims;
- Policy Buy Back-release of all types of claims, including environmental claims.

Each settlement type can be limited to known claims or known policies. The key point, however, is understanding that the broader the type of settlement the larger the settlement values.

Other aspects of the settlement are important. First, if a policyholder wants to retain the right to sue for insurance coverage on behalf of after-acquired companies under the after-acquired company's policies, the settlement agreement should expressly state this objective. Second, it may be important to limit which insurance policies are released. Third, if settling an environmental claim, it is important that the parties arrive at a fair definition that preserves coverage for natural resource damage, toxic tort, and product liability claims. Fourth, specify the timing of the payment of the settlement amount. Ten to fourteen days from

execution of the settlement agreement is reasonable. Fifth, a confidentiality provision in the settlement agreement should allow both the policyholder and the insurance company to disclose the agreement to their respective auditors, lawyers, and consultants. Policyholders may also want to preserve the right to show the settlement agreement to other insurers, while insurance companies will want to preserve the right to show the agreement to their reinsurers.

Finally, the settlement agreement should address whether the policyholder would provide the insurance carrier with either a defense and/or indemnity if the insurance carrier were sued for any claim arising from a released site. Options include:

- No Defense and No Indemnity-The policyholder still protects the insurance carrier by agreeing to obtain a waiver of potential claims against the settling insurance carrier from all other insurance carriers with whom the policyholder subsequently settles.
- Capped Indemnity, No Defense-The policyholder agrees to indemnify the insurance carrier up to a fixed amount (the amount of the settlement), with no agreement to provide a defense.
- Capped Indemnity and Defense (Either Capped or Uncapped)-Some insurance carriers will agree to cap the defense obligation up to the amount of the settlement or will agree to share the defense obligation with the policyholder equally.
- Uncapped Indemnity with or without Defense-This is risky for the policyholder because the policyholder could pay more than it receives in settlement. Under these circumstances, the policyholder

should control the defense and settlement of all indemnified claims.

Ultimately, the settlement terms will depend on the needs and creativity of the parties.

### **Conclusion**

CGL insurance is an important tool in the overall management of toxic tort and environmental claims. To combat the high cost associated with environmental and toxic tort claims, corporate counsel should understand how CGL insurance provides coverage for these types of claims, and should work with the risk management department to ensure that claims are timely noticed.

Once the insurance carrier has identified its coverage defenses, an analysis of the claim's value and the potential scope of insurance should be undertaken. This will permit principled negotiation between the parties, reduce conflict, and ultimately ensure a more timely and fair recovery.

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