

# INSURANCE COVERAGE FOR ENVIRONMENTAL LIABILITIES IN COMMERCIAL AUTOMOBILE POLICIES

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## INTRODUCTION

*The Comprehensive Environmental Response, Compensation Liability Act (“CERCLA”) imposes liability upon companies that generate, transport, store, or discard hazardous wastes. Specifically, CERCLA applies joint and several liability to current owners and operators of a facility, previous owners and operators of a facility, generators of the hazardous waste, and transporters of the hazardous waste that used the facility for treatment or disposal. CERCLA seeks to have these potentially responsible parties (“PRPs”) pay for the cleanup of the waste sites.*

*Transporters of waste may look to not only their commercial general liability policies, but to their commercial automobile liability policies for coverage in paying for the cleanup of the waste sites.<sup>1</sup> Specifically, transporters should look at their automobile liability policies to determine whether there is coverage for loading and unloading since an argument can be made that the contamination is attributable to releases which occurred after the unloading of the waste from the vehicle into the landfill. Several courts have recognized the applicability of automobile liability coverage to the cleanup of environmental contamination.*

*This article will discuss the policy language and the legal arguments demonstrating the applicability of commercial automobile liability policies to environmental claims.*

## THE POLICY LANGUAGE AND COURT INTERPRETATION

### Arising Out of the Use Provision

Many pre-1970 commercial automobile liability policies contain language in the insuring agreement which reads:

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of Coverage A bodily injury or Coverage B property damage to which this policy applies, caused by an occurrence and *arising out of the ownership, maintenance or use*, including loading and unloading, of any automobile, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage. (Emphasis added.)

Damages sustained by third persons as a result of the unloading of a vehicle comes within the “use” provision of automobile liability insurance under the rationale that the unloading of the vehicle is an essential part of using the vehicle.<sup>2</sup> As the Supreme Court explained in *State Farm Mut. Auto Ins. Co. v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123 (1973), cases have established that the “arising out of the use” language found

in insuring clauses of automobile liability policies “has broad and comprehensive application, and affords coverage for injuries bearing almost any causal relation with the vehicle.”

### **Injury May Occur Long After Unloading**

The causal relation with the vehicle can be found long after the unloading of the vehicle. In *Merit Insurance Company v. Parent Building Materials, Inc.*, 176 Ill. App. 3d 965, 531 N.E. 2d 1015 (1988), the defendant, Parent Building Materials (“Parent”) unloaded and stacked plasterboard at a construction site. Parent left the construction site and the next day, the plasterboard fell over and injured the plaintiff. The plaintiff filed suit against Parent alleging that the negligent stacking of the plasterboard resulted in his injuries. The issue before the court was whether unloading which results in an injury long after the unloading has been completed is afforded coverage under the loading and unloading provision of an automobile liability insurance policy. The *Merit* court held that plaintiff’s injuries were covered under the automobile policy and noted that it is sufficient that the events giving rise to the claim arose out of the vehicle’s use and are related to it. The *Merit* court, relying on *Copes v. Copeland Building Supply, Inc.* 415 So.2d 264 (La. App. 1982), stated that “[the] test for coverage under an ‘unloading’ process is whether, under the particular facts involved, the act causing injury constituted a part of the ‘unloading’ process as that term is commonly understood.” *Id.* at 266. The court then applied a “but for” proximate cause test and held that since the injury allegedly arose out of a negligent unloading, then coverage would exist under the insurance policy. Accordingly, Merit Insurance Company was bound to represent Parent under the “loading and unloading”

clause of the auto liability section of the insurance policy where the unloading was completed but alleged to have been completed negligently. See also *Raffel v. Travelers Indemnity Co.*, 141 Conn. 389, 106 A.2d 716 (1954); *American Automobile Insurance Co. v. Master Building Supply & Lumber Co.*, 179 F. Supp. 699 (D. Md. 1959); *New Deal Lumber & Mill Co. v. American Mutual Liability Insurance Co.*, 359 F. Supp. 738 (E.D. Pa. 1973) aff’d without op. 491 F.2d 750 (3<sup>rd</sup> Cir. 1974); *Dodson v. Key*, 508 S.W.2d 586 (Ky. App. 1974). But see *Liberty Mut. Ins. Co. v. Hartford Accid. & Indem. Co.*, 251 F.2d 761 (7<sup>th</sup> Cir. 1958).

Thus, in determining whether the unloading of a vehicle comes within the “use” provision of auto liability policies, any causal relation with the vehicle is sufficient for there to be coverage.

## **APPLICABILITY TO ENVIRONMENTAL CLAIMS**

### **Expansive Interpretations**

#### *Duty to Defend*

The insuring agreement in many automobile liability policies specifically provide defense and indemnity coverage for claims which arise out of the “ownership, maintenance or use, including loading and unloading, of any automobile.” Numerous CERCLA claims allege liability due to an insured’s alleged transportation and unloading of waste at various sites. This liability, commonly known as “transporter liability,” results from the “use of a covered auto.”

As set forth above, in non-environmental cases, the courts have taken an expansive view, in order to find coverage, when analyzing injuries arising out of the use of

an automobile. Courts involved in environmental cases similarly have taken an expansive view and have favored applicability of auto liability coverage to transporter liability.<sup>3</sup> In *Hutchinson Oil Company v. Federated Service Insurance Company*, 851 F. Supp. 1546 (D. Wyo. 1994), the plaintiff, a collector and transporter of waste oils, was named as a PRP at a recycling facility. The insurer, Federated, denied coverage under its CGL, auto, and umbrella policies. After determining that a PRP notice constituted a “suit” as defined by the policies, the court stated that a determination as to “coverage for indemnity” was premature. However, with respect to the duty to defend, the court held:

Contrary to the contentions of Federated, the Court disagrees that it has been established that there is no potential for coverage under any of the policies at issue in this case. After reviewing the allegation of the PRP notice and the terms of each of the policies, it is apparent that the EPA’s administrative claims against Hutchinson have triggered the insurer’s duty to defend under the policies. *Hutchinson*, 851 F. Supp. at 1556.

Significantly, the *Hutchinson* court did not make any exception in its holding for the auto liability policies at issue.

A similar result was reached in the Second Amended Order in *USF&G v. Thomas Solvent Co.*, 683 F. Supp. 1139 (W.D. Mich 1988). In that case, the defendant, Thomas Solvent, a retailer and transporter of commercial solvents, was subjected to several personal injury and diminution of

property suits as well as actions by the State of Michigan and the United States under CERCLA for groundwater contamination arising from alleged improper handling and containment of industrial solvents. Plaintiff, USF&G, who had provided a defense under a reservation of rights, brought a declaratory judgment action against Thomas Solvent and several CGL, umbrella, and auto insurers that declined coverage. The court, in orders dated January 8, 1988 and March 16, 1988, found a duty to defend under all policies issued to Thomas Solvent, including the automobile policies. Under the automobile policies, the court stated that the terms “accident” and “occurrence” were “functionally equivalent” and analyzed the allegations of the complaints, concluding:

I find that the previously quoted [allegations of negligent handling and transport . . . all arguably fall within the policy provisions of the automobile policies at issue here. Accordingly, all have a duty to defend with respect to those . . . actions. *Thomas Solvent*, 683 F. Supp. at 1171.

Thereafter, the court, after vacating its January 8, 1988 and March 16, 1988 orders, entered an Order dated April 14, 1988, which held:

It Is Further Ordered that plaintiff USF&G and defendant Hartford as automobile insurers have a duty to defend the “Kelley,” “Adkins,” and “Allen” actions as well as the Kelley, et al v. Thomas Solvent, et al CERCLA action [the State of Michigan CERCLA action], but USF&G and defendant

Hartford do not have a duty to defend the USA v. Thomas Solvent, et al CERCLA action [the United States CERCLA action]. . . .<sup>4</sup>

The court further held that USF&G and Hartford had to share in the defense costs under the coverages in the automobile policies. Then, the court certified the following issues to the Sixth Circuit:

2. Whether plaintiff USF&G and defendant Hartford as automobile insurers have a duty to defend the “Kelley,” “Adkins,” and “Allen” actions as well as the Kelley, et al v. Thomas Solvent, et al CERCLA action and whether plaintiff USF&G and defendant Hartford do not have a duty to defend the United States v. Thomas Solvent, et al CERCLA action based upon the automobile policies discussed in the above-mentioned opinions; and

3a. Whether the defense costs incurred by USF&G in the “Kelley,” “Adkins,” and “Allen” action as well as the “Kelley” CERCLA action from February 6, 1984 until the present as well as all future defense costs incurred in these same actions should be shared among USF&G, Canadian, Northbrook, St. Paul, and Hartford in the following manner: USF&G, two-sixths of the defense costs; Canadian, one-sixth of the defense costs;

Northbrook, one-sixth of the defense costs; St. Paul, one-sixth of the defense costs; and Hartford, one-sixth of the defense costs.

The issues were never decided by the Sixth Circuit due to a realignment of the parties which destroyed diversity jurisdiction. Accordingly, the case was dismissed. Nevertheless, it is persuasive that the District Court found there to be coverage under the automobile policies.

### *Duty to Indemnify*

In *Unigard Mutual Insurance Company v. Abbott*, 732 F.2d 1414 (9<sup>th</sup> Cir. 1984) PCBs leaked from a transformer stored at the Pierce Packing Company plant contaminating its animal feed products. Customers that used the feed products were required to destroy the animals and feed products. Unigard Insurance Company (“Unigard”) provided primary commercial general liability coverage and Mission Insurance Company (“Mission”) provided excess general liability coverage. The jury found that the negligent operation of a truck was causally involved in the escape of the PCBs. Accordingly, the district court held that Unigard and Mission were liable for coverage under the general liability policies and also under the automobile coverage provisions in their policies. The insurance companies appealed application of the automobile policies to the claim.

On appeal, the Ninth Circuit Court of Appeals affirmed the District Court decision. In so doing, the Ninth Circuit court stated:

The district court correctly concluded that according to Montana law the insurance

policies provide separate reimbursement for automobile and general liability claims arising from the same accident.

Pierce paid separately computed and itemized premiums for the general liability and automobile liability coverages. The Montana Supreme Court has stated that it is the number of separate coverages, not the number of policies, that dictates the insurer's liability. *Chaffee v. United States Fidelity & Guaranty Co.*, 181 Mont. 1, 591 P.2d 1102 (1979).

Both the district court and the Ninth Circuit agreed that Montana would adopt the reasoning of *State Farm Mutual Automobile Insurance Company v. Partridge*, 10 Cal. 3d 94, 514 P.2d 123 (1973) which held that when injury is caused by both auto-related conduct and non-auto-related conduct, the insurer is not shielded from liability by exclusionary language in the insurance provision covering the non-auto-related conduct, if the non-auto-related conduct is a proximate cause of the injury. In *Partridge*, both the homeowners and automobile policies provided coverage for the accident. Under the *Partridge* analysis, the Ninth Circuit held that the general liability policies as well as the automobile policies provided coverage for the damages caused by the PCB contamination.

Claims submitted for coverage on behalf of insureds typically involve essentially the same set of issues. Claims are made against the insureds for alleged liability due to their transport of waste and unloading of same which causes property damage at the sites involved. The claims involve an "occurrence" as defined by the policies. The occurrence arose out of the insureds' alleged

transportation and unloading of waste materials through covered autos. Accordingly, based upon the policy language and applicable law, there is coverage under automobile liability policies for environmental claims arising out of the transportation and unloading of waste.

## CONCLUSION

The analytical focus for a court in considering applicability of an automobile liability policy to an environmental claim is whether there is any causal relation between the use of the vehicle and the damages sustained by the third party. Courts have taken an expansive view of this issue and found coverage for transporter liability under automobile liability policies. Accordingly, policyholders should look to their automobile liability policies as well as their commercial general liability policies to pay for the cleanup of environmental contamination.

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1. It is important to review the policies and determine whether there are any mutual exclusivity provisions in the policies which would prevent the insured from seeking coverage under both a CGL and an auto policy.

2. Use of a vehicle includes loading and unloading. *International Business Machines v. Truck Ins. Exchange*, 2 Cal. 3d 1026, 474 P.2d 431 (1970). See also *Union Mut. Fire Ins. Co. v. Commercial Union Ins. Co.*, 521 A.2d 308 (Me.1987) (Injury which occurred while an insured was removing shotgun from his automobile on hunting trip was covered under automobile policy as arising out of "ownership, maintenance or use" of automobile, since automobile was being used to transport insured and his companion on hunting trip and, incidental to that use, it was necessary, reasonable and foreseeable that weapons would be placed into and removed from the vehicle at some point).

3. An exception is *Waste Management of Carolinas, Inc. v. Peerless Insurance Company*, 72 N.C.App. 80, 323 S.E.2d 726 (1984), rev'd on other grounds 315 N.C. 688 (1986). There, the court, with little

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analysis, relied on the “arising out of” language in the auto policy and held that there was no causal connection between the use of the Dempsey Dumpsters and the property damage.

4. The United States CERCLA complaint did not assert allegations that the contamination of the soil or groundwater resulted from the use, maintenance, or operation of any motor vehicle. There was no allegation that any material was improperly transferred, shipped, hauled, or even handled. Therefore, the court did not find a duty to defend the United States’ CERCLA complaint under the automobile policies. The State of Michigan’s CERCLA complaint asserted allegations which linked the soil and groundwater contamination to the use, maintenance, or operation of motor vehicles. The court, as a result, found a duty to defend the State of Michigan CERCLA complaint under the automobile policies. It is fair to say, therefore, that had the United States’ CERCLA complaint been drafted to include allegations like those in the State of Michigan’s CERCLA complaint, the court would have found a duty to defend the United States CERCLA action under the automobile policies.