DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

MANAGING ENVIRONMENTAL AND TRANSACTIONAL RISK THROUGH INSURANCE: A PRIMER ON THE COVERAGE ISSUES

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I. A Background on CGL Policies

A. Evolution of CGL Policies

1. Pre-1940: Liability Policies designed to provide narrow, specifically-delineated coverage for traditional types of risk/exposure of businesses to the claims of third parties, e.g., premises and products liability, nuisance, negligence of employees.
2. 1940: Introduction of "Comprehensive" policies- single standard "All Risk" policy, intent to broaden coverage to include any type of liability to third parties to which insured might be exposed, unless that type of risk is specifically excluded under policy terms.
3. 1950's — 70's: Per Occurrence Limits of Policies generally increased, in recognition of many new evolving types of liability claims that might be covered.
4. 1966: Substitution of "Occurrence" for "Accident" as defining event for which coverage triggered: specifically broadened coverage to include damage/injury resulting from "exposure to conditions" over time. Drafting history clearly established this change was intended to clarify coverage for gradual property damage occurring from waste disposal and other pollution-causing activities
5. 1973: Further broadening of "Occurrence" definition- to include liability resulting from "continuous or repeated" exposure to conditions.

   -But also addition of standard exclusion which limited coverage for pollution liability to the "sudden and accidental release" of contaminants [the "Qualified Pollution Exclusion"]

6. 1984: Introduction of "Claims-Made" Coverage.
7. 1986: Substitution of "Absolute Pollution Exclusion"

Summary: Most available coverage for environmental liabilities will be found in CGL policies issued from 1940 to 1986. Although the relative value of the Per Occurrence limits of these policies tended to increase over time, beginning in 1973 amendments to the standard form CGL policy rendered coverage for environmental liabilities more problematic.

A. How to Read a Liability Insurance Policy

1. Policy Declarations- contained in a cover sheet, constitute a series of summary statements regarding the identity of the insured and insurer, the policy period, the policy limits, and the coverages purchased. Some important datapoints to review:

    a. Identity of the Insured: may be limited to specifically identified corporate entities, or could include past and/or future affiliates, subsidiaries.
    b. Identity of the Insurer: Many insurance companies which wrote policies prior to 1986 have been purchased, merged into other insurers. Some have gone into insolvency but their policy obligations may be partially covered by state Insurance Guaranty Funds. Some archeology may be necessary to identify sources of solvent coverage under these early policies.
    c. Policy Periods: Typically written in one-year increments- but don't assume that a policy written long after a landfill has closed won't provide coverage for pollution liability resulting from that site [see "Trigger"]
    d. Policy Limits: Two types- Occurrence and Aggregate. Also important are Deductibles, Self-Insured Retentions, Stop-Losses, Excess and Umbrella Coverages.

1. Insuring Clauses- these describe who and what the policy covers. These provisions (as well as Exclusions and Conditions) are typically standard, form language used during various time periods in CGL policies written by all insurers.

    Note: if you're unable to locate a complete version of the policy, copies of the various forms used by the insurance industry can be obtained from the Insurance Services Office. Courts have generally accepted ISO forms as proof of these terms in CGL policies if the insured is unable to produce the actual policy issued.

2. Exclusions- these describe specific types of risk, damages or conduct of the insured which the policy doesn't cover.

    Note: Although policyholders generally bear the burden of proof to show the existence of coverage (via the Insuring Clauses), the insurance company normally bears the burden of proof of showing that an exclusion applies.

3. Conditions- these specify certain duties of both the policyholder and the insurance company in the event of a covered loss. Although failure to comply with duties assigned to the policyholder can result in forfeiture of coverage, a strict burden of proof is normally placed upon the insurance company to show breach of Condition sufficient to void coverage.

    Two important types of conditions:

    a. Notice of Loss- All policies contain a provision requiring the insured to provide written notice of a claim, potential claim or occurrence "immediately" or "as soon as practicable". Compliance with this condition is normally judged under a "commercial reasonableness" standard. In some jurisdictions, even where a policyholder's notice to the insurer is found untimely courts have still imposed a burden on the insurer to show that it was actually prejudiced in handling the claim by this late notice.
    b. Duty to Cooperate- The insured has a duty to cooperate with its insurer in the investigation, settlement or defense of a claim; this will include providing the insurer with detailed information concerning the claim (e.g., copy of the Complaint, EPA Notice letter, demand letters from other PRP's), and allowing access to the policyholder's own records (e.g., waste disposal and environmental audit records, other possibly applicable insurance policies, invoices and other evidence of expenses incurred).

        Note: Although timely and full compliance with this Condition is crucial, care should be taken by the policyholder to review its

Note: Although timely and full compliance with this Condition is crucial, care should be taken by the policyholder to review its records before production to its insurers, for identification of documents which might be privileged in the context of a coverage issue. If an insurer has refused to unqualifiedly agree that coverage exists for a claim, the duty of the policyholder to provide such information informally is arguably extinguished or diminished.

1. Other Evidence of Policy Terms: Although generally the policies themselves are considered self-contained statements and the best evidence of the coverage agreement between the parties, courts have often allowed parol evidence to help discern the parties' intent or interpret policy terms if any such terms are found to be "ambiguous". Some other sources of such parol evidence include:

   -Policy Applications

   -Broker and Underwriting Files

   -Loss Runs compiled by the Insurer

   -Insurance Industry Documents (ISO files)

   2. Contra Preferendum: As policies written prior to 1986 were for the most part standardized forms developed by the insurance industry (as opposed to "manuscript" policies co-written by the insured and its broker and the insurer), a majority of courts have ruled that any ambiguity in a policy's terms should be construed against the author of the language, i.e. the insurance company.

I. Common Coverage Issues in Environmental Claims

A. What Policies should Respond to a Claim?

1. Trigger: pre-1984 CGL policies required that some damage or injury for which the insured is alleged liable take place during the policy period, in order to "trigger" coverage for the loss under that policy. This can be a complex issue to resolve in environmental liability claims, which can involve long time periods between initial placement of hazardous substances into landfills and the ultimate release of those substances into groundwater, or the discovery or manifestation of harmful effects to the environment. Courts have devised several theories to identify triggered policies for such long-tail claims:

   -Initial Deposit of Waste or Release of Harmful Substances by Policyholder

   -Injury-in-Fact

   -Manifestation or Discovery of Harm

   -Continuous Trigger- under this theory (which a majority of courts currently follow), all policies issued during any time between initial deposit/release and manifestation/ discovery of harm are triggered.

   Note: Although commonly it is to an insured's benefit to trigger as many policies as possible to respond to a particular claim (providing as much per occurrence limits as possible), triggering of multiple policies can sometimes increase the policyholder's own costs, by imposing multiple per occurrence deductibles and SIR's, as well as implicating policies issued by insurers which are now insolvent [see "Allocation"]

2. Duty to Defend and Duty to Indemnify: Most CGL policies provide coverage for "defense" of claims (typically costs of legal representation and investigation), and coverage for "indemnity" (the reimbursement of settlements or judgments). The duty to defend is construed as broader than the duty to indemnify; most courts hold that an insurer has the duty initially to defend a claim if the allegations against the policyholder raise even a remote possibility of indemnity coverage. Thus, although whether indemnity obligations under particular policy are "triggered" for a claim may be questionable, often the insurer will be required to provide a "defense" until further facts are developed which completely exclude the possibility of coverage.

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Note: Given the murky categorization of many costs incurred in environmental claims as "defense" vs. "indemnity", an insured can typically implicate many more triggered policy years under the insurers' duty to defend, and realize the benefit of additional policy coverages and limits.

3. Defense of "Suits": One state high court has held that defense obligations under a CGL policy are only triggered by the filing of formal litigation against a policyholder- not merely by receipt by the insured of a PRP Notice letter from the EPA.

A. What Should Each Triggered Policy Pay?

1. "Damages" in Environmental Claims: Often an insurer will seek to characterize part of a policyholder's costs in a pollution claim as routine environmental compliance or permitting expenses, and therefore not compensable as "damages" for which a CGL policy provides coverage. However, most courts that have addressed this issue ruled that such costs are covered so long as the policyholder has been compelled to incur the costs (whether under a court or administrative order, a Consent Order, or simply the communicated threat of enforcement action).
2. Number of Occurrences: Important for several reasons- Number of Deductibles to apply to each claim; calculating Per Occurrence policy limits; and determining exhaustion of underlying limits and triggering of excess liability policies. Courts have devised a number of methods for determining the number of Occurrences:

-Each Environmental Site as a separate Occurrence

-Each Deposit or Shipment of Waste as a separate Occurrence

-Each Type of Waste Stream as a separate Occurrence

-Each Type of "Release" into Environment as a separate Occurrence

-Each Type of Damage or Claim of Harm as a separate Occurrence

-Policyholder's Decision to Dispose of Waste in a Particular Manner as a single Occurrence (e.g., the selection and use of a particular waste hauler)

3. Allocation: When multiple policy periods are triggered, how much of a particular claim is each triggered policy responsible to pay?

A. Application of Policy Exclusions

1. Qualified Pollution Exclusion (1973-86): Courts have split on the applicability of the "Sudden and Accidental" exclusion to a typical environmental claim. Some have focused on whether the language imparts a purely temporal limitation on coverage, i.e. that in order to be covered the claimed damage must have occurred "abruptly" in time as opposed to gradually. Other courts have focused on the state of mind of the insured, and have found coverage so long as the harm or release to the environment was "unexpected or unintended" by the insured, without any temporal limitation on how the harm or damage occurred.

Note: Determination of the effect of this exclusion is extremely jurisdiction-sensitive. Because there can be in a typical environmental claim numerous appropriate forums and choices of substantive law under Conflicts of Laws principles, when coverage is disputed a "race to the courthouse" to file a declaratory judgement action in one party's or another's favored jurisdiction can often determine the outcome of the dispute.

2. "Expected and Intended": All CGL policies exclude coverage for losses or claims which were "expected and intended" , or knowingly or deliberately caused by the insured. However, in an environmental claim context the issue commonly becomes whether the insured, at the time of waste disposal (typically decades ago) knew specifically that release of hazardous substances from its waste into the environment was likely to occur, exactly how that process would take place in the distant future, and what types of damage were likely to result from such releases. Policyholders typically point to the absence of detailed environmental regulations at the time of disposal and lack of common knowledge of the hydrogeological mechanics of hazardous waste leaching from unlined landfills.

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3. "Owned Property": CGL policies exclude losses or damages to an insured's own property. In instances where an policyholder incurs liability for clean-up hazardous substances migrating from waste disposed or released on its own premises insurers will often rely on this exclusion to deny coverage for such costs. However, a majority of courts have found that the Owned Property exclusion does not bar coverage for cleanup costs incurred to remediate or prevent damage to third parties' property, particularly when hazardous substances leaching from an insured's property have contaminated underlying, common groundwater tables.

   Note: Even for cleanup costs limited strictly to an insured's property, often a policyholder can call upon a first party property damage policy for coverage.

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