Chapter XI

INSURANCE

There are several different types of insurance that may apply to environmental problems. While many insurance policies do not cover environmental remediation and damages, insurance can be a valuable tool to address environmental issues.

A. General Liability Insurance

Liability insurance covers claims made by third parties, normally including not only lawsuits filed in court, but also claims made by environmental agencies, such as EPA. *Griffith Oil Co., Inc. v. National Union Insurance Co. of Pittsburgh, Pa.*, 15 A.D.3d 982, 789 N.Y.S.2d 352 (4th Dep't 2005); *Avondale Industries, Inc. v. Commercial Union Ins. Co.*, 887 F.2d 1200 (2d Cir. 1989). A typical general liability policy covers damages the insured is legally obligated to pay as the result of an "occurrence" taking place during the policy period that results in bodily injury or property damage. Cleanup costs incurred are normally considered "property damage" covered under a general liability policy. *Don Clark, Inc. v. U.S. Fidelity and Guaranty Co.*, 145 Misc.2d 218, 545 N.Y.S.2d 968 (Sup. Ct. Onondaga Co. 1989); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (Mich. App. 1983).

Most policies provide that an "occurrence" must be accidental, being "neither expected nor indented from the standpoint of the insured." However, if the damage is an unexpected result of intentional act, such as groundwater pollution resulting from operation of a landfill, there may be coverage. *City of Johnstown v. Bankers Standard Insurance Co.*, 877 F.2d 1146 (2d Cir. 1989).

Normally, a liability policy only covers bodily injury or property damage that take place during the term of the policy. An exception is "claims made" policies, which cover claims made

during the term of the policy. In a case involving historic pollution resulting in personal injury or property damage, states differ in their interpretation of whether a policy is triggered by (1) initial manifestation or discovery of the injury or damage; (2) first exposure to the contaminant; (3) actual injury, or "injury-in-fact"; or (4) any of the first three, or a "continuous" trigger. While states like New Jersey have adopted the "continuous" trigger theory, *Owens-Illinois v. United Insurance Co.*, 138 N.J. 437 (1994), New York recognizes the "injury-in-fact" trigger, so that the policy is triggered when injury first occurs, although successive policies in later years may also be triggered if damage is ongoing. *Maryland Casualty Co. v. W.R. Grace & Co.*, 23 F.3d 617 (2d Cir. 1993), *cert den'd* 513 U.S. 1052 (1994). If a spill occurred over many years, and different insurers covered different years, or some years were not insured, the court may allocate liability for indemnity by prorating over the applicable years in which coverage is triggered. *Consolidated Edison Company of New York, Inc. v. Allstate Insurance Co.*, 98 N.Y.2d 208, 746 N.Y.S.2d 622 (2002).

Typically, once an environmental issue is discovered, it makes sense to immediately notify any insurer whose policy might be triggered under any theory.

B. Duty to Defend

A liability policy normally includes two duties. These are the duty to defend – meaning to provide legal counsel to represent the insured to defend them from claims, including claims that may ultimately prove to be either invalid, or outside the scope of the policy, and the duty to indemnify – meaning to pay any costs or damages the insured must pay if the claim is upheld.

It is well-established that "an insurer's duty to defend... is 'exceedingly broad.'" *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966, 969 (1993), *citing Colon v. Aetna Life & Casualty Insurance Co.*, 66 N.Y.2d 6, 8, 494 N.Y.S.2d 688

(1985). "The duty is broader than the insurer's obligation to indemnify: '[t]hough policy coverage is often denominated as 'liability insurance', where the insurer has made promises to defend 'it is clear that [the coverage] is, in fact, 'litigation insurance' as well.'" *Continental Casualty Co. v. Rapid-American Corp.*, 80 N.Y.2d 640, 648, 593 N.Y.S.2d 966, 969 (1993), *citing Seaboard Surety Co. v. Gillette Co.*, 64 N.Y.2d 304, 311-312, 486 N.Y.S.2d 873, 876-877 (1984). Where the "claims arguably arise from a covered occurrence," the policyholder must be defend. *Griffith Oil Co., Inc. v. National Union Insurance Co. of Pittsburgh, Pa.*, 15 A.D.3d 982, 789 N.Y.S.2d 352 (4th Dep't 2005).

C. Pollution Exclusions

While historically many policies covered environmental spills, beginning in the early 1970's, most general liability policies included a pollution exclusion, which excluded coverage for pollution unless it was "sudden and accidental." By the late 1980's, most general liability policies included an "absolute" pollution exclusion, which excluded all or almost all pollution events.

The older policies are still very important, since often historic contamination is discovered that can be traced back to the before the time of the absolute pollution exclusion. In some states, the exclusion for "sudden and accidental" has been construed to mean that both "sudden" events and "accidental" events are covered – so only intentional events are excluded. *See, e.g., Morton International, Inc. v. General Accident Ins. Co.*, 134 N.J. 1 (1993).

However, the New York Court of Appeals has been less favorable to insureds, deciding that there is a "temporal element" to the "sudden and accidental" exception to the pollution exclusion. *Northville Industries Corp. v. National Fire Insurance Co. of Pittsburgh, Pa.*, 89

N.Y.2d 621, 635, 657 N.Y.S.2d 564, 569 (1997); *see also Ziankoski v. Boonville Oil Co., Inc.*, 241 A.D.2d 951, 661 N.Y.S.2d 322 (4th Dep't 1997).

Thus, the "sudden and accidental" exception did not cover a pinhole leak in an underground oil tank where there was no showing of "an abrupt, environmentally significant discharge of pollutants could be inferred," and "the allegations regarding the temporal aspects of the petroleum leakages actually describe them as having occurred continuously over a period of many years." However, in other situations, the "pollution exclusion" does not bar claims arising out of contamination. *See, e.g., Petr-All Petroleum Corp. v. Fireman's Ins. Co. of Newark, N.J.*, 188 A.D.2d 139, 593 N.Y.S.2d 693 (4th Dep't 1993); *Family Service of Rochester, Inc. v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 149 Misc.2d 48, 562 N.Y.S.2d 358 (Sup. Ct. Monroe Co. 1990). Further, if not "pollution" is involved, such as interior contamination from lead paint or asbestos, the pollution exclusion might not be applicable. *Westview Assocs. v. Guar. National Ins. Co.*, 95 N.Y.2d 334, 717 N.Y.S.2d 75 (2000); *Continental Casualty v. Rapid-America Corp.*, 80 N.Y.2d 640, 593 N.Y.S.2d 966 (1993).

Even if a claim may seemingly be encompassed by an exclusion, it often makes sense to make a claim on the policy anyways, since "exclusions are generally construed narrowly in exceptions to exclusions are generally construed broadly to define coverage." *Borg-Warner Corp. v. Insurance Company of North America*, 174 A.D.2d 24, 33, 577 N.Y.S.2d 953 (3d Dep't 1992); *Thomas J. Lipton, Inc. v. Liberty Mutual Insurance Company*, 34 N.Y.2d 356, 357 N.Y.S.2d 705 (1974). Any ambiguity must "be construed against the insurer, particularly when found in an exclusionary clause." *Ace Wire & Cable Co. v. Aetna Casualty & Surety Co.*, 60 N.Y.2d 390, 398, 469 N.Y.S.2d 655, 658 (1983). Furthermore, "where a particular provision is susceptible to more than one reasonable interpretation, all ambiguities must be resolved in favor

of the insured." *Kula v. State Farm Fire and Casualty Co.*, 212 A.D.2d 16, 19, 628 N.Y.S.2d 988, 990 (4th Dep't 1995).

D. Other Defenses

Often, an insurance company raises "late notice" as a defense. An insured normally has a duty to notify their insurer as soon as practicable both with regard to an occurrence that may give rise to a claim, and then to a claim. In some states, like New York, late notice precludes coverage even if there is no prejudice to the insurer, *Olin Corp. v. Insurance Co. of North* America, 743 F. Supp. 1044, 1053 (S.D.N.Y. 1990), *aff'd* 929 F.2d 62 (2d Cir. 1991), while in other states prejudice must be shown. *Solvents Recovery Service of New England, Inc. v. Hartford Ins. Co.*, 218 N.J. Super. 49 (N.J. App. Div. 1987). Thus, once contamination or another environmental problem is discovered, it is critical to give notice to all insurance carriers as soon as possible, even before an actual claim is made or suit is filed.

Also, general liability policies usually do not cover damage to the insured's "own property." Nonetheless, since the groundwater is normally owned by the state, pollution of groundwater on the insured's own property may be covered. *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989); *United States Aviex Co. v. Travelers Insurance Co.*, 125 Mich. App. 579, 336 N.W.2d 838 (Mich. App. 1983).

E. Other Types of Claims and Policies

Some statutes allow a direct claim against a polluter's insurer. For example, under Navigation Law §190 contained in the New York Oil Spill Law, not only the state, *State of N.Y. Central Mutual Fire Ins. Co.*, 147 A.D.2d 77, 542 N.Y.S.2d 402 (3d Dep't 1989), but also an injured party may bring suit directly against a discharger's insurer. *Snyder v. Newcomb Oil Co.*,

Inc., 194 A.D.2d 53, 603 N.Y.S.2d 1010 (4th Dep't 1993). Late notice is not necessarily a defense to this claim. *State v. Taugco, Inc.*, 213 A.D.2d 831, 623 N.Y.S.2d 383 (3d Dep't 1995).

Besides liability coverage for third-party claims, insurance policies may include "first-party" coverage for property damages. While these policies may cover pollution if the damage resulted from a covered peril (like fire or motor vehicle accident), these policies also typically include pollution exclusions.

Since typical generally liability policies no longer cover pollution, it is necessary to obtain special policies to cover environmental risks. At an additional cost, an insured can obtain environmental impairment liability insurance from some insurance carriers that specifically covers risks resulting from pollution.

Pollution legal liability polices typically cover the costs of third-party claims. Cost cap insurance policies pay for costs that exceed the estimated cost of a remedial plan. These policies typically have large "co-insurance" and deductible provisions, so that the insured must still pay a significant portion of the cost overruns. Policies are also available to cover contractors and consultants for environmental liabilities.