

April 2014

## **Insurance Claims for Recovery of Environmental Cleanup Costs**

### **Introduction**

#### Environmental Damage Claims

The release of hazardous substances to the environment can result in contamination of soil and/or groundwater. Such releases occur from underground storage tanks (USTs), spills at drum storage areas, spills during chemical loading/unloading, general process operations, on-site hazardous waste disposal practices (e.g. dry wells), wastewater treatment systems, clarifiers and sewer laterals, and other business practices. Liability for the resulting contamination arises under the array of federal and state statutes, such as the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and California Hazardous Substances Account Act (HSAA), as well as by common law principles.

The contamination can be costly to cleanup at a facility, can also result in damage to neighboring properties, and may require extensive off-site remediation. In many instances, the potentially responsible parties (PRPs) for the release and resulting damage owned primary and excess liability insurance policies during a period when the release likely occurred or damage was incurred. Therefore, a claim can be tendered to the insurer for the costs incurred addressing the contamination and even damage to neighboring properties. These claims need not be limited to catastrophic events, need not be sudden and accidental, and need not be abatable.

#### Cleanup Liability

As stated, once a release (an event) has occurred that results in, or has the potential to result in, environmental harm or damage to property, there are many bases for the imposition of liability on businesses. The principal bases of liability are found in federal and state statutes, as well as in common law. The PRP may then be faced with costly remediation programs, on-site and possibly off-site, as well as claims from third parties damaged by the release.

#### Liability Insurance Policies

Aside from seeking contribution from prior owners, prior or current operators, neighbors or public sources (that have contributed to or exacerbated the contamination), a PRP should thoroughly review the potential of recovery from its insurers, or other parties insurers.



In general, the focus will normally be on primary and excess liability policies as opposed to other policy types where recovery is less likely. For example, first party property insurance differs from liability insurance in that it covers only claims for damage to a policyholder's own specifically covered property; whereas, liability insurance covers claims for damage to the property of third parties. For environmental clean-up cost claims under policies, other than liability policies, most courts have yet to decide a number of key coverage issues. In contrast, a number of courts have decided key coverage issues in claims for environmental cleanup costs under liability policies favorable to policyholders.

### **Preparing the Environmental Insurance Claim**

Pursuit of insurance claims is often a long, arduous, time-consuming and costly process, from identifying existing policies, through the initial claim process and the multi-tiered process of producing documents for the insurers, answering information requests from insurers, attending meetings and negotiations, and, where necessary, commencing and prosecuting lawsuits against the insurance companies.

The most formidable threshold problem is that of locating crucial policy information. Many businesses purge records from time to time, and relevant documentation may now be missing or has been maintained (perhaps unknowingly to the facility management) in the back of the bottom filing cabinet in the shed by the trash enclosure! However, the following sources are particularly useful in the search for critical policy information.

#### Client's Internal Records

1. Insurance Records: Copies of insurance policies or portions of insurance policies; certificates of insurance; prior insurance claim files (including automobile accidents); names, addresses and phone numbers of prior and current insurance agents and brokers; and memoranda and correspondence regarding past and present insurance coverage.
2. Accounting and Financial Records: Invoices from insurance agents, brokers, and insurance carriers; canceled checks evidencing payment of premiums; ledger sheets itemizing insurance coverage; and insurance schedules prepared by brokers or agents.
3. Legal Records: Loan records, lawsuit records, lease records, and contract records.
4. Quality Assurance/Safety Records: Information maintained by the client's personnel in charge of quality assurance or safety concerning insurance policies, insurance company surveys, and prior claims to insurance carriers.
5. Corporate Records: Corporate minutes which document approval for purchase of insurance or adoption of a self-insurance program.
6. Property leases: Leases for buildings where insurance coverage was required.



7. Permits: City business license requirements, occupancy or other permits requiring “proof of insurance”, and correspondence with permitting agencies (e.g. City fire departments) regarding insurance coverage.
8. Client/Project Files: Contracts with clients that require “proof of insurance”, and proposals that required proof of insurance as part of the bid package.

#### Outside Sources

1. Insurance Brokers and Agents: Schedules of insurance, invoices, copies of policies or portions of policies, and personal records of brokers or agents concerning policy information.
2. Outside Accountants and Auditors: Financial statements, schedules of insurance, and records such as ledger sheets.
3. Lending Institutions: Loan files which may contain copies of insurance certificates or which may reference specific insurance policies.
4. Governmental Authorities: Evidence of insurance coverage provided to governmental authorities or agencies pursuant to contract requirements or statutory requirements.
5. Permitting Agencies: City records showing proof of insurance (e.g. fire departments).
6. Landlords: Leases showing insurance coverage.
7. Clients: Contracts with clients, or proposals to clients, showing proof of insurance.
8. Business and Industry Associations: Many business and industry associations have been involved in facilitating insurance packages for its members and may have helpful information as to the identity of insurance carriers.

#### Preparing For Potential Future Claims

1. Compile all existing insurance policies or portions of insurance policies, past and present.
2. Search accounting, financial, and legal records for policy information; compile all such information past and present; and note the source of the information.
3. Search for and compile prior claim information.
4. Update compilations annually, or as often as coverage is renewed or altered.
5. Maintain duplicate copies of all policies and related information with legal representative.
6. Maintain complete and accurate records of expenditures in connection with potential claims, such as environmental cleanup costs, consulting fees, legal fees, and contractor cost.

#### Initiating a Claim

1. Retain legal counsel familiar with environmental cleanups and insurance coverage.
2. Retain consultants with experience implementing environmental activities that may be subject to cost recovery (e.g. work in compliance with the National Contingency Plan [NCP]).
3. Clearly define investigation, removal, and remediation costs.

4. Identify third parties that (i) may have contributed to the contamination, or (ii) may be impacted by the contamination.
5. Put the insurer on notice as soon as possible.

### **Hurdles to Coverage: Interpreting Policy Provisions to Obtain Coverage**

#### Occurrence

1. Policy Language: "Occurrence" means an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured.
2. Policyholder's Position: The damage was neither intended nor expected. The standard of review should be subjective; that is, the actual intentions and expectations of the particular policyholder should be considered.
3. Insurer's Position: The discharge was expected or intended. The standard of review should be objective; that is, whether a reasonable policyholder would have expected or intended the damage.

#### Owned Property Exclusion

1. Policy Language: *This insurance does not apply: (k) to property damage to (1) property owned or occupied by or rented to the insured, (2) property used by the insured, or (3) property in the care, custody or control of the insured or as to which the insured is for any purpose exercising physical control; but parts (2) and (3) of this exclusion do not apply with respect to liability under a written sidetrack agreement and part (3) of this exclusion does not apply with respect to property damage (other than to elevators) arising out of the use of an elevator at premises owned by, rented to or controlled by the named insured.*
2. Policyholder's Position: The owned property exclusion should not bar coverage for investigation and cleanup costs incurred by the policyholder if there has been damage to, or the threat of damage to, property of third parties.
3. Insurer's Position: The owned property exclusion excludes coverage for costs incurred to investigate or clean up contamination on the policyholder's own property, or for cleanup activities conducted on the policyholder's own property.

#### Pollution Exclusion and Absolute Pollution Exclusion

1. First Generation Policy Language: *This insurance does not apply: (f) to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

2. Policyholder's Position: Pollution exclusion is a restatement of the definition of occurrence and does not bar coverage for damage which is unexpected and unintended by the policyholder. The term "sudden and accidental" contained in the exclusion means unexpected and unintended.
3. Insurer's Position: Pollution exclusion bars coverage for environmental contamination and is not simply a restatement of the occurrence definition. The exception for "sudden and accidental" discharges has a temporal meaning - identifiable event that transpires quickly.

#### Notice Requirements

1. Policy Language: *Insured's duties in the event of occurrence, claim or suit: (a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses, shall be given by or for the insured to the company or any of its authorized agents as soon as practicable.*
2. Policyholder's Position: Late notice should not preclude coverage under the policies unless the insurer has been materially prejudiced.
3. Insurer's Position: Policyholder's failure to provide timely notice bars coverage.

#### Duty to Defend

1. Policy Language: *...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, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.*
2. Policyholder's Position: A suit is not required in order to trigger the duty to defend. Government mandated actions are sufficient to trigger the duty to defend.
3. Insurer's Position: A suit is required in order to trigger the duty to defend. Government mandated actions do not trigger the duty to defend. The duty to defend extends only to claims covered by the policy.

#### Defining Covered Damages: The "As Damages" Issue

1. Policy Language: *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 insurance applies, caused by an occurrence...*

2. Policyholder's Position: The term "as damages" includes all costs incurred by the policyholder in undertaking government mandated cleanup actions.
3. Insurer's Position: Costs incurred by the policyholder to respond to governmental cleanup demands are equitable in nature, not legal, and therefore, not damages covered under the policy.

#### Trigger of Coverage

1. Policy Language: *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 insurance applies, caused by an occurrence...*
2. Policyholder's Position: Coverage is afforded under all policies issued to the policyholder from the date of release until full manifestation of the damage.
3. Insurer's Position: Usually, the only policy triggered is the one in effect at the time of the manifestation of the damage. However, a number of insurers apply the "exposure theory" asserting that only the policy in effect at the time of initial exposure to the injury is triggered.

For further information, contact:

Anthony Brown

Telephone: +1.714.770.8040 ext. 101

Mobile: +1.949.939.7160

Email: [anthony.brown@aquilogic.com](mailto:anthony.brown@aquilogic.com)