Comprehensive General Liability Insurance: Aggregate Limits May Not Apply to Environmental Actions

by Murray D. Sacks

You are the risk manager of ABC Chemical Company, and the federal government has obtained a judgment against your company for $10 million in costs incurred by the government to clean up a hazardous waste site. The government shows that, in 1976, ten separate shipments of ABC’s waste were transported to the site. You have a 1976 comprehensive general liability (“CGL”) insurance policy with a $1 million per-occurrence limit and a $2 million aggregate limit for property damage. Also, the 1976 CGL policy contains no deductibles, self-insured retentions, or retrospective premium agreements. In response to your demand for coverage, your insurance company offers to pay ABC $2 million—its full aggregate limits—to cover part of the judgment.

Is this a good deal? The surprising answer is probably not. In fact, the two million dollar CGL policy may be worth ten million dollars to ABC. There are two reasons:

• The policy’s aggregate limit probably does not apply to environmental actions, such as the action brought by the government against ABC for cleanup costs.
• Each of the ten shipments of waste could be a separate occurrence.

This article discusses the first reason—why aggregate limits of liability in standard-form CGL and excess liability policies often do not apply to environmental actions, and, thus, can provide almost unlimited coverage.

Only Certain Hazards Are Subject to Aggregate Limits

Most CGL policies limit the liability of the insurance company in two ways: a per-occurrence limit, and an aggregate limit. A per-occurrence limit caps the amount of dollar damages an insurance company is liable to pay for each occurrence. See United States General Accounting Office, Liability Insurance: Changes in Policies Set Limits on Risks to Insurance Companies, at p.17 (Nov. 1986) (“GAO Report”). An aggregate policy limit places a cap on the total amount of damages an insurance company is obligated to pay under a policy. The insurance company’s liability ends once the applicable aggregate limit has been paid, regardless of the number of claims made under the policy.

In most pre-1986 CGL policies, aggregate limits do not apply to every risk. CGL policies provide coverage for various risks or hazards, such as products, completed operations, premises, and operations. The pre-1986 CGL standard-form policy applied aggregate limits of liability to certain risks—those involving bodily injury and property damage arising from products and completed operations. (GAO Report, at p.17.) Aggregate limits also apply to “property damage arising out of premises or operations rated on a remuneration basis.” However, the pre-1986 standard-form CGL policy “did not place aggregate limits on the other types of risks (i.e., those falling within the premises/operations category [and not rated on a remuneration basis]).” (GAO Report, at p.17.)

The phrase “rated on a remuneration basis” refers to the basis on which the policy’s premiums are calculated. Premiums for CGL policies are calculated on various bases, including the policyholder’s receipts, area, sales, or remuneration (i.e.,
payroll). Thus, aggregate limits apply to the premises/operations hazards only if the policy’s premiums were calculated on the basis of the policyholder’s payroll.

Many pre-1986 CGL policies have no aggregate limits that apply to environmental actions because the premises/operations hazard was not rated on a remuneration basis. In fact, the most common rating basis for that hazard probably is the policyholder’s sales. In that case, the CGL policy has no aggregate limit for environmental actions.

**Actions Against Waste Generators Are Within the Premises/Operations Hazard**

Environmental actions against waste generators ordinarily fall within the premises/operations hazard. According to one treatise, “[p]remises liability exposures arise from the legal duties associated with the ownership, use, occupancy and/or possession and control of land.” D. Malecki, R. Horn, E. Wiening, J. Donaldson, *Commercial Liability Risk Management and Insurance*, Vol. 1, at pp.61-62 (2d ed. 1986.)

The same treatise notes: “Operations . . . refers to a kind of miscellaneous or catch-all category that includes all activities of a commercial entity except those for which separate, insurable categories have been reserved . . . .” Therefore, “[a]ctivities at the insureds’ own business premises are operations but the activity-related exposures cannot clearly be distinguished from the premises exposures previously described. As a result, on-premises activity-related exposures are usually lumped together with premises exposures under the more inclusive category, ‘premises and operations.’” *Id.* at p. 78.

For most waste generators, disposal of waste is simply a necessary and incidental element of the policyholder’s manufacturing operations, and, thus, falls within the premises/operations hazard.

Although courts have not directly addressed the issue of whether environmental actions are within the premises/operations hazard, they have held that the other categories subject to aggregate limits clearly are inapplicable. For example, environmental actions do not involve any alleged liability for “products” or “completed operations.” *E.g., Buckeye Union Ins. Co. v. Liberty Solvents & Chems. Co.*, (Ohio Ct. of Appeal, 1984). Thus, because environmental actions do not fall within other specific hazards, courts implicitly have held that environmental actions are within the broad premises/operations hazard. Apparently, some insurance companies agree. For example, in *Detrex Chemical Industries, Inc. v. Employers Insurance of Wausau*, (Federal District Court, Ohio, 1990), Wausau acknowledged that the environmental actions arose out of the policyholder’s premises or operations.

Even if the premium is rated on a remuneration basis, the CGL policy may provide more coverage than is stated in the “aggregate limit.” The standard-form CGL policy provides that the aggregate limit for the premises/operations hazard “shall apply . . . separately with respect to each project away from premises owned by or rented to the named insured.” Thus, if each disposal is a separate “project,” or, in a multiple site scenario, if each landfill is a separate “project,” there would be multiple “aggregate” limits—one for each project.

**Aggregate Limits in Excess Liability Policies Also May Be Inapplicable**

The standard-form language in umbrella and excess liability insurance policies is different from that in CGL policies, but the result is often the same. According to the plain language of a common excess policy, the aggregate limit applies only to products liability and occupational disease. Thus, there is no aggregate limit of liability for property damage arising out of environmental actions. See *Weyerhaeuser Co. v. Aetna Casualty & Sur. Co.* (Washington Superior Ct., June 4, 1993).

**Conclusion**

A careful policy analysis regarding the applicability of aggregate limits is essential for any policyholder seeking coverage under pre-1986 policies for environmental liabilities, whether in litigation or settlement discussions. Without this analysis, you could be walking away from that pot of gold at the end of the rainbow.