The Tale of Two Cases
Clean-up Coverage the Best and Worst of Times

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Two decisions involving clean-up of environmental conditions and the use of environmental insurance demonstrate many of the pros, cons and pitfalls potential policyholders need to consider.

The first decision comes from Texas and involved the duty to defend and the insurance policy definition of "clean-up costs." The duty to defend when someone sues you is one of the primary benefits of liability insurance. The duty is triggered almost universally based on an "any-possibility-of-coverage" standard when one compares the complaint(s) or threatened legal action to the language of the insurance policy. In this case, the plain language of the policy was held to address the insurance company's affirmative responsibility to indemnify against off-site clean-up costs caused by "pollution conditions" on or under the insured property. It was not disputed that the underlying lawsuits asked the court to create a schedule for complying with certain environmental laws that drove the clean-up issues.

This request and alleged off-site migration as well as alleged violations of the Clean Water Act and the Resource Conservation and Recovery Act (RCRA), both of which statutes could give rise to clean-up costs, were held sufficient to give rise to a duty to defend.

In the environmental context, the duty to defend can be particularly important because defense costs incurred generally do not reduce the limits of coverage available for eventual indemnity. In addition, investigating environmental allegations can be the most costly element of any environmental dispute and is generally considered to fall within the ambit of defending in addition to more traditional defense costs, such as attorney fees.

The second case out of Connecticut did not turn out as well for the policyholder. First, it involved a private purchase arrangement and a promise to remediate certain conditions on the land to a third party (not the government). Second, while the clean-up ultimately was – unsurprisingly – more expensive than anticipated, it did not involve Hazardous Waste under RCRA, but rather "Waste Materials" such as household and construction debris. Third, the fact that the clean-up was conducted with state oversight, but under a Voluntary Remediation Program was insufficient, in the Court's view, to give rise to coverage.

On summary judgment, the insurance company successfully argued that: 1) there was no "Claim" and no "Clean-Up Costs" were incurred under the policy; 2) the "Waste Materials" were not a "Pollution Condition"; and 3) the liability at issue was a contractual one between two private parties and was not driven by the requirements of existing environmental laws – local prohibitions on future dumping notwithstanding. This policyholder's burden was substantially greater because the case involved the narrower duty to indemnify, rather than the duty to defend. Nonetheless, the environmental insurance policy was purchased expressly to cover the risk of greater clean-up costs at the same time as the land was purchased and the policyholder clearly intended that the coverage apply.

Properly tailoring environmental coverage to the various risks anticipated or to be managed is crucial. Unfortunately, not all future contingencies can be identified beforehand. This is part of the reason that today's "pollution liability" insurance products are so tightly underwritten. Insurance companies generally have little appetite for risks involving exceedance of predicted clean-up costs because the existence of such insurance alone may contribute to the inflation of costs. Nonetheless, environmental insurance can be a crucial element of a comprehensive environmental risk management strategy and is especially valuable in reassuring reluctant stakeholders. However, when it comes to today's environmental insurance products, buyers need to be aware of the pros, cons and pitfalls in order to avoid getting their pockets picked as the result of an unanticipated environmental twist.

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