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Takeaways From 3 NJ Environmental Insurance Decisions

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In the cyberworld in which we live, the liabilities that seem to concern us most are intangible attacks like hacking, phishing and ransomware. Insurance coverage law is only slowly developing with respect to such risks. However, beginning in 1976, New Jersey has had a robust development of insurance coverage law with respect to that most tangible of risks, environmental contamination. Regardless that it is now over 40 years since environmental insurance litigation began, this area of law continues to develop. 2017 has already witnessed three important decisions in the law of insurance coverage for hazardous waste site cleanup, each of which enhances policyholders' ability to obtain coverage for long-tail claims.

In Mid-Monmouth Realty Associates v. Metallurgical Industries, No. A-0237-14T2 (App. Div. April 21, 2017), the court addressed a depressingly typical scenario. Metallurgical had leased the property from 1967 to 1983 for the recycling and remanufacturing of specialty metals. Metallurgical also had onsite various tanks containing hazardous substances. The site contained wetlands and a brook that emptied into the Shrewsbury River. Site operations resulted in pollution, including groundwater damage.

The first issue the court addressed was whether there was insurance coverage for soil removal. The insurance company argued that the “owned property exclusion” barred coverage for such costs, asserting that “the DEP never required, and plaintiff never proposed, groundwater remediation.” The court noted that the owned property exclusion did not apply to groundwater, and found coverage because there was groundwater damage, and “the DEP required remediation in the form of soil removal.” Thus, even without active groundwater remediation, coverage existed because the soil removal was the groundwater remedy.

The next issue the court addressed was the continuous trigger. The insurance company argued that the policyholder needed a “timing” expert on when each of the three contaminant streams entered the groundwater. The court rejected this argument. The court found that New Jersey was a "continuous trigger" state and that “insurance policies covering the risk are triggered throughout the period of exposure, discovery and remediation.” The court held that “there is no need to determine precisely when the groundwater became contaminated…” It is often impossible precisely to date when groundwater contamination commenced in a case of long-term pollution. The court’s ruling simplifies the policyholder’s burden of proving an occurrence during the policy period.

The court also rejected the insurance company's reliance on the statute of limitations. The insurance company moved for summary judgment because while it denied coverage in 1993, the policyholder did not file suit until 2000, more than six years later. The court denied the insurance company's motion because of the insurance policy's standard "no action" clause, which delayed accrual of the statute until damages became fixed either by final judgment after trial or a written settlement agreement.

Finally, the court addressed the known loss/loss in progress issues. The insurance company argued that the policyholder (the site owner) had been aware of the potential site liability since at least 1981, when DEP investigated the property and found contamination. However, the court found that such knowledge was not sufficient to establish a 'valid claim for insurance' that would trigger the known loss/loss in progress doctrines. In order to have a valid claim, the policyholder would need to have known that the DEP found groundwater contamination that required remediation, an issue that still remained contested at the time of trial. The court required knowledge by the policyholder that it had a valid claim for insurance, and not just knowledge of contamination. As a result, the court held that the known loss and loss in progress doctrines did not apply.

E.M.Sergeant Pulp & Chemical Co. v. The Travelers Indemnity Co., Civ. No. 12-1741(KM) (JBC) (D.N.J. January 19, 2017) addressed another important issue in environmental law, that of lost or missing policies. Environmental claims have long tails. Under New Jersey law, because of the so-called absolute pollution exclusion, coverage generally does not lie under post-1986 policies. In 2017, locating pre-1986 policies can be a heavy burden. In Sergeant, the policyholder had owned a parcel of land since 1942, and sought coverage under policies issued by Travelers from 1948 to 1964. Sergeant's proof of the policies' existence can charitably be called limited, consisting in the main of four ledger entities. However, Sergeant employed an expert witness, Henry Booth, who explained how the policy numbers indicated what type of policies were in issue, and who discussed, inter alia, what type of coverage a company like Sergeant would have had. As a result of the expert testimony, the court denied Travelers' motion for summary judgment. This ruling confirms that a policyholder can establish coverage under old policies on the basis of limited secondary evidence.

The final noteworthy decision that affects environmental insurance law is from the New Jersey Supreme Court. Givaudan Fragrances Corporation v Home Insurance Company. Givaudan addressed decisively the issue of assignment — often contested in the environmental world. In Givaudan, the original company had undergone several corporate transformations in which policy rights were transferred until they were assigned to Givaudan Fragrances, which sued its historical insurance companies for coverage over a hazardous waste site in Clifton. The insurance companies denied coverage, inter alia, on the basis of the standard "no assignment" clause found in most general liability policies, which stipulates that a company cannot assign its insurance policies to a successor without the insurance companies' permission. The court disagreed. It reviewed assignment case law from both New Jersey and other states, and found that it overwhelmingly supported a policyholder's right to receive the proceeds from the policy, as opposed to the policy itself. The court reasoned that once an occurrence took place, the assignment of the right to pursue coverage for that occurrence is in essence a post-loss claim assignment. The court relied in part on Elat v. Aetna Casualty & Surety, Co., 280 N.J. Super. 62 (App. Div. 1995), where the policyholder successfully assigned its rights under the policy to the U.S. Department of Environmental Protection.

Environmental liabilities remain ever-present in New Jersey — river cleanups, Superfund sites and contaminated properties identified under the Industrial Site Remediation Act. These decisions will assist policyholders in gaining the benefit of their policies to address these liabilities.

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