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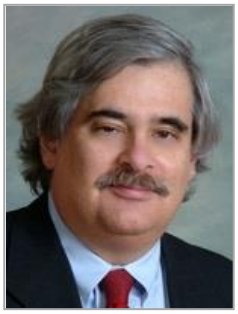
Proving Coverage For Natural Resource Damage Claims In NJ

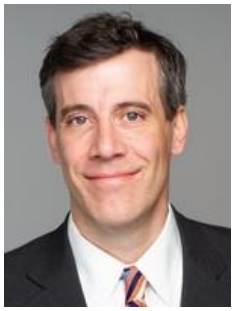
By **Robert Chesler and Nicholas Insua** (March 25, 2019, 3:37 PM EDT)



Robert Chesler

The natural resource damage shoe has now dropped in New Jersey. For eight years under the Gov. Chris Christie administration, the New Jersey Department of Environmental Protection did not file a new natural resource damage lawsuit.

That has now rapidly changed — 2018 was an active year for NRD claims in the state. In February, the Appellate Division rejected challenges to the DEP's $250,000,000 NRD settlement with ExxonMobil. DEP commenced four new NRD actions in 2018 after a decade's hiatus, the most recent in December 2018. Moreover, DEP continued to press its NRD claim with respect to the Passaic River cleanup.



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The NRD actions seek damages for the loss and use of natural resources, including wetlands, sediments and groundwater. The damages sought are in addition to the cost of remediation. NRD claims arise from the state's parens patriae interest in the state's natural resources. This provides the state with the right to seek recovery for damage to those natural resources.

The first question to ask is what insurance policies might apply to a NRD claim. In 1973, the insurance industry introduced the "sudden and accidental" pollution exclusion to general liability policies. New Jersey does not enforce this exclusion, pursuant to Morton International v. General Accident Insurance Co.[1] In 1986, the insurance industry introduced an absolute pollution exclusion, which New Jersey courts do enforce as to traditional environmental pollution.[2]

Thus, insurance coverage for NRD claims only exists under pre-1986 general liability policies. This poses two hurdles for policyholders. First, they must demonstrate that the pollution commenced prior to 1986. Second, they must locate evidence of their pre-1986 insurance policies.

When Contamination Commenced

Sometimes, proving when pollution occurred is straightforward. For example, pollution may arise from a storage tank that was removed in 1969, so that the pollution must have commenced prior to that date. A company may know when certain practices took place.

Otherwise, a policyholder may need to rely upon an expert witness. Such witnesses can testify as to fate and transport, essentially how much time it would take a plume to travel. If a plume travels 20 feet a year and has moved 1000 feet, then the expert can testify that the contamination is 50 years old. Quincy Mutual Fire Insurance Co. v. Borough of Bellmawr[3] concerned contamination of groundwater resulting from dumping of hazardous waste at a landfill. An insurance company used fate and transport to establish that the pollutants could not have reached the groundwater during its policy period.

An expert can also testify as to breakdown chemicals. Many chemicals break down over time into other chemicals. An expert witness can testify as to when contamination commenced by calculating the amount of breakdown chemicals present and how long that breakdown process would have taken.

Where the Insurance Policies Are

Locating pre-1986 insurance policies can be a major burden for a policyholder. Many companies simply do not keep records of their past insurance policies. The standard of proof for insurance policies is preponderance of the evidence.[4]

Often, the policyholder will need very little evidence to avoid summary judgment on "missing policies." In E.M. Sergeant Pulp & Chemical Co. v. Travelers Indemnity Co.,[5] the policyholder had little more than ledger entities containing policy numbers. E.M. Sergeant used an insurance expert to explain how insurance companies used standardized forms that establish the terms and conditions that the policies would have contained. E.M. Sergeant avoided summary judgment against it, and then settled the case.

Policyholders have sources to search for old policies. Insurance brokers often have records. A company's annual report or financial documents may contain evidence. If such avenues prove unsuccessful, the policyholder can turn to an insurance archaeologist, who has expertise in locating old insurance policies. As Sheila Mulrennan, president of the Insurance Archaeology Group Ltd., says: "It is a strategic imperative for companies facing NRD claims to research missing general liability policies prior to 1986. Documenting as many historic assets as possible will enable policyholders to maximize insurance recoveries."

Damages Because of Property Damage

Now, let us assume that a policyholder has proven pre-1986 pollution and discovered some or all of its pre-1986 policies. What legal hurdles must the policyholder next face?

The policyholder has the burden of demonstrating damages because of property damage. Groundwater contamination is covered by insurance in New Jersey, as is soil removal connected to groundwater contamination. Pure soil removal is not covered because it is within the owned property exclusion. Query whether this will change if the DEP seeks damages under the parens patriae doctrine for damage to the state's natural resources.

"Damages" are defined broadly by the New Jersey Supreme Court as, essentially, any payment of money.[6] However NRD claims can involve unusual remedies, such as the purchase of wetlands or the erection of a park on a contaminated site. Insurance companies may contend that such relief does not constitute damages.

Allocation Calculus

Allocation is the most complex legal issue, and the likeliest to produce disputes between a policyholder and its insurance companies. New Jersey has adopted the continuous trigger, pursuant to which each insurance company that provided coverage from the first date of contamination though 1986 are severally liable by both time on the risk and limits.[7] For example, let us assume that a policyholder has a primary insurance policy of $100,000 in year one, and a primary insurance policy of $100,000 and an excess policy of $800,000 in year two. The loss is $500,000. The first policy year is assigned $50,000, and the second year $450,000.

The cutoff date of 1986 is because of the unavailability rule. In Continental Insurance Co. v. Honeywell International,[8] the New Jersey Supreme Court held that a policyholder is not liable in allocation for those years in which insurance coverage is not available in the marketplace. Because of the 1986 absolute pollution exclusion, insurance coverage for environmental liability was no longer available.

In this calculus, the policyholder is responsible for any years in which it does not have coverage (when coverage was available), whether because it cannot locate the policies or because the insurance company is in liquidation.[9] Policyholders should note that they normally bought successively larger policy limits over time. A policyholder may have had a policy limit of $5,000 in 1960 and $20,000,000 in 1986. Thus, even if a policyholder has contamination commencing in the 1950s and can only find its policies from the 1980s, it may still gain the lion's share of coverage.

The Duty to Defend

In addition to the duty to indemnify, general liabilities provide for an unlimited duty to defend against a "suit," which is undefined in pre-1986 policies. In Cooper Industries v. Employers Insurance of Wausau,[10] the court held that a Superfund "potentially responsible party" letter was a "suit" that the insurance company had to defend. The parameters of the duty to defend against governmental actions that fall short of filing a complaint remain unclear in New Jersey. Policyholders should forward any request or demand from the government with respect to NRD to their insurance companies and demand a defense.

Conclusion

Natural resource damage claims are here in New Jersey, and companies can expect liability. The most important question may be who shall pay for the liability — the company or its insurance companies.

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[1] Morton Int'l v. General Accident Insurance Co., 134 N.J. 1 (1993)

[2] Nav-Its Inc. v. Selective Ins. Co., 183 N.J. 110 (2005).

[3] Quincy Mutual Fire Ins. Co. v. Borough of Bellmawr, 172 N.J. 409 (2002)

[4] Borough of Sayreville v. Bellefonte Ins. Co., 320 N.J. Super. 598 (App. Div. 1998).

[5] E.M. Sergeant Pulp & Chemical Co. v. Travelers Indem. Co., No. 12-1741 (D.N.J. 2017).

[6] Morton Int'l Inc. v. General Accident Ins. Co., 134 N.J. 1 (1993).

[7] Owens-Illinois, Inc. v. United Ins. Co., 138 N.J. 437 (1994); Carter-Wallace v. Admiral Ins. Co., 154 N.J. 312 (1998).

[8] Continental Ins. Co. v. Honeywell Int'l, 2018 WL 3130638 (2018)

[9] Ward Sand & Materials Co. v. Transamerica Ins. Co., 2016 N.J. Super. Unpub. LEXIS 59 (App. Div. 2016).

[10] Cooper Indus. v. Employers Ins. of Wausau, 2016 N.J. Super. Unpub. LEXIS 2003 (Law Dive 2016)