

July 2009



KELL, ALTERMAN & RUNSTEIN, LLP

Law Trends Today

UTILIZING HISTORIC LIABILITY INSURANCE FOR ENVIRONMENTAL CLEAN UPS

By Marti Sharp

While frequently overlooked, older policies of liability insurance are an invaluable asset when responding to an environmental clean up directive or a claim advanced by an adjacent property for environmental contamination. Arguably, historic Comprehensive General Liability (“CGL”) policies of insurance provide the broadest spectrum of coverage for property impacted by environmental contamination, such as property where releases of hazardous or toxic materials have occurred or leaking underground storage tanks have impacted the subsurface soil and/or waters. Where coverage is obtained, the typical CGL policy pays for attorney and environmental consultant fees and costs and for the ultimate clean up of the property and/or any settlement.

Standard CGL policies obligate the insurer to defend any “suit” against the insured. Although suit has been interpreted narrowly to mean a lawsuit in many jurisdictions, Oregon courts have defined “suit” to mean either a lawsuit filed in court,

an administrative order or even an agency directive. Thus, where an agency such as the Oregon Department of Environmental Quality (“DEQ”) requires that a site be cleaned up, coverage is triggered under the standard CGL policy of insurance.

Once coverage is triggered, where an environmental loss commences during one policy period and continues through several others, coverage is triggered under all CGL policies of insurance applicable to the property. For instance, where the DEQ directs a landowner to clean up a leaking underground storage tank, absent any exclusions or endorsements to the contrary, all insurance carriers on the risk have an absolute duty to defend the insured for the leaking underground storage tank.

Two types of pollution exclusions affect coverage under the CGL policy of insurance. The first pollution exclusion, which is generally called the qualified pollution exclusion, was introduced in the 1970s and rarely bars claims for

environmental damages in Oregon. This exclusion bars all claims for environmental pollutants unless the discharge, release, dispersal or escape of pollutants is “sudden and accidental.” By 1973, the qualified pollution exclusion was incorporated into most CGL policies of insurance and in many jurisdictions barred claims for gradual, long-term dispersal of pollutants, such as for leaking underground storage tanks.

However, in Oregon, to defeat the qualified pollution exclusion, the insured need only show that the release or dispersal of environmental contamination was not intentional. While in some jurisdictions the insured must prove that the release itself was sudden and accidental, Oregon is a policy holder friendly jurisdiction and as such the qualified pollution exclusion defeats only those dispersals of environmental contamination which are intentional. In short, in Oregon, the qualified pollution exclusion rarely

defeats environmental claims, even those arising out of migrating contamination, such as gradual releases from underground storage tanks.

In 1986, the second pollution exclusion was added to the form CGL policy of insurance. The so-called “absolute pollution exclusion” is uniformly applied in all jurisdictions to bar coverage for any discharge, dispersal, seepage or other release of environmental pollution, period. Thus, any CGL policies of insurance issued after 1986 will likely not cover environmental damage to property.

In the event that you have been directed by an agency to clean up a property or you have any other type of environmental loss, hire a specialist who can determine whether you may have coverage under a CGL policy of insurance. If you

owned or operated on an impacted property prior to 1986 and had CGL policies of insurance, your loss should be covered. Even if you don’t have copies of your policies, a specialist may be able to find enough evidence to obtain coverage. Because CGL policies of insurance will pay for both your defense, which includes your attorneys’ and technical consultants fees and costs, and for the ultimate clean up of the property, it is worth finding evidence of your historic CGL policies of insurance and tendering your claim to your carrier.



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