ENVIRONMENTAL IMPAIRMENT LIABILITY INSURANCE COVERAGE

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Superfund and numerous state "little-Superfund" statutes/1/ enacted in the past decade have saddled businesses with enormous new environmental liabilities./2/ These laws impose joint and several strict liability for past and present present chemical spills and hazardous waste disposal activities on companies that sent waste to disposal sites, transporters of hazardous waste, and owners and operators of sites where hazardous substances have been disposed of./3/ These "responsible parties"/4/ are liable for cleanup costs even if they can prove that their conduct was lawful, in good faith, non-negligent and consistent with the state of technology and governmental standards at the time.

Environmental liability is a serious threat to the financial health of many companies. Companies faced with such liability have turned to their insurance policies for protection. Most of the environmental insurance coverage litigation in the first decade following Superfund involved coverage under Comprehensive General Liability ("CGL") policies.

The scope of coverage provided by CGL policies is still hotly contested. However, by 1986 most standard form CGL policies included an "absolute pollution exclusion" which excludes coverage for all pollution-related occurrences./5/ At the same time as pollution coverage was being phased out of

the CGL policy the insurance industry introduced environmental impairment liability impairment liability policies./6/ Environmental Impairment Liability ("EIL") policies are "claims-made" in contrast to CGL policies which are "occurrence-based." That is, they provide coverage only for pollution claims brought against the insured during the policy period./7/ The "claims-made" approach to pollution coverage was designed by insurance companies to limit their environmental exposure in two ways. The EIL policy limits the number of claims that an insurer may be obligated to pay by restricting the period of time after the policy period ends during which the insurer is potentially obligated to provide coverage. By confining their risk exposure in this way, insurers presumably could calculate premiums that accurately reflected, not only the risks they were insuring, but also the costs associated with those risks. See Chas. T. Main, Inc. v. Fireman's Fund Ins. Co., _____ Mass. ___, 1990 WL 25391 (Mass. 1990).

A. Coverage Provided by EIL Policies

EIL policies provide three types of coverage: (1) indemnification for "compensatory damages" resulting from bodily injury or property damage; (2) reimbursement for "cleanup costs" incurred by the insured pursuant to a governmentally imposed legal obligation; and (3) reimbursement of costs incurred in certain voluntary cleanup actions.

1. Coverage for Compensatory Damages

EIL policies state that the insurer will pay, on behalf of the insured, all sums which the insured shall become legally obligated to pay as compensatory damages because of bodily injury or property damage, provided that:

(1) Such bodily injury or property damage is caused by a "pollution incident"/8/ which commences after the retroactive date shown on the declarations page of the policy;

(2) A claim for the damage is first made against the insured during the policy period; and

(3) The claim is reported to the insurance company during the policy period or within 15 days after termination of the policy.

The insurer also has a duty to defend its insured against suits brought against the insured, and may, at its discretion, settle any claim or suit./9/

Thus, while a claim must be brought against the insured and reported to the insurer during the policy period to trigger coverage, the pollution incident that gives rise to the claim need not have occurred during the policy period. However, many EIL policies do limit coverage to incidents that begin after a "retroactive date" chosen by the insurer. The retroactive date is typically the beginning date of the first EIL policy issued to the insured by that insurer. Thus, EIL coverage is generally limited to pollution incidents which take place between the insured's retroactive date and the end of the policy period that result in a claim against the insured during the policy period.

2. Legal Obligations Imposed by Governmental Action

EIL policies obligate the insurer to reimburse the insured for reasonable and necessary cleanup costs incurred by the insured in the discharge of a legal obligation validly imposed through governmental action initiated during the policy period. Covered cleanup costs must be incurred because of environmental damage caused by a pollution incident which commences after the retroactive date of the policy.

As noted above, the portion of the policy pertaining to claims for compensatory damages provides that such claims must be reported to the insurance company during the policy period. The section of the ISO model EIL policy pertaining to liability for cleanup costs does not contain a specific requirement that the initiation of governmental action be reported to the insurance company during the policy period.[10] Thus, the insurer's obligation to reimburse cleanup costs is governed by the policy's general notice provision, discussed below, which requires the insured to give written notice "as soon as practicable" of any action or proceeding for cleanup costs, but does not specifically require that notice be given during the policy period.

Unlike the insurer's obligations with respect to compensatory damage claims, the insurer's obligation to reimburse cleanup costs incurred in response to the initiation of governmental actions does not explicitly include a duty to defend the insured.[11] The insurer reserves the right,

however, to participate in any proceeding for the purpose of imposing legal obligations because of environmental damage.

3. Voluntary Cleanups

Many EIL policies also provide for the insurer to reimburse the insured for voluntary cleanups where no government action has been initiated, if cleanup costs are reasonable and necessary, and the insurer grants the insured prior written consent during the policy period to undertake the cleanup. However, under most EIL policies the insurer will give its consent only where it determines that a pollution incident presents an imminent and substantial danger of bodily injury, property damage, or environmental damage.

4. The Extended Reporting Period Option

As stated above, claims-made policies generally provide coverage for claims brought against an insured during the policy period. However, nearly all EIL policies also permit the insured to purchase an "extended reporting period" option. The extended reporting period, which is typically twelve months, originally was added to the policy so that if the insured reported a pollution incident to its insurer near the end of its policy period, the insurer could not refuse to renew the policy and leave the insured unprotected from claims that were almost certain to follow.[/12/] The extended reporting period extends coverage:

> (1) For bodily injury or property damage which occurs subsequent to the retroactive date and before the end of the policy period;

(2) Where a claim is first brought against the insured within the extended reporting period after the end of the basic policy period; and

(3) Is reported to the insurer during the extended reporting period.

In other words, under the "extended reporting period" option option, an insurer is obligated to cover claims brought against the insured and reported to the insurer during the extended reporting period which are based on property damage that begins subsequent to the retroactive date and before the end of the actual policy period.

5. Policy Exclusions

EIL policies contain a number of important exclusions from coverage. Insureds should be particularly aware of exclusions for:

(a) Damage which was expected or intended by the insured;/13/

(b) Damage to property owned, rented, used by the insured, or in care, custody, or control of the insured;/14/

(c) Damage from a pollution incident emanating from property the insured has sold or conveyed;

(d) Liability assumed by the insured (unless the insured was liable even without the assumption);

(e) Bodily injury to any employee of the insured arising out of and in the course of his employment; and

(f) Damage resulting from a pollution incident that is attributable to the insured's willful non-compliance with the law.

Exclusions commonly appearing in other EIL policies include:

(a) Damage resulting from pollution incidents known but not revealed on the insured's application for insurance; and

(b) Damage or personal injury resulting from a pollution incident disclosed in the insured's application.

B. Judicial Interpretation of EIL Policies

Judicial treatment of EIL policies thus far has been limited. Cases that have addressed the scope of coverage provided by EIL policies have focused on issues of notice, the definition of a "claim," and the completeness of the insured's insurance application. These decisions are discussed below.

1. What Constitutes a "Claim" or "Governmental Action" Triggering Coverage

a. "Claim"

The ISO model does not define "claim" although the word is used throughout the policy to describe and limit coverage. The word as used in the title of the policy appears to describe private party actions and governmental actions against the insured. The word is used in some policy provisions in a way that appears to relate only to coverage for compensatory damages. Other provisions use the word "claim" in a way that could apply to both compensatory damage claims and claims for cleanup costs brought by a governmental authority. These include: the provision stating that all claims by a single claimant are deemed to have been made when the first claim is

made; the provision giving the insurer the right to investigate and settle the claims; and the extended reporting period option. Moreover, there is no standardized use of the term "claim" among EIL policies. See e.g., Pacific Ins. Co. v. Cordova Chemical Co. of Mich., Aerojet Gen. Corp. and Cranford Ins. Co., No. 87-23270-CK, slip op. (Mich. Cir. Ct. Oct. 13, 1988) (published without exhibits at 3 Mealey's Lit. Rpts. Insurance, no. 1, Appx. D), (defining claim to be one or more claims brought by government or private party arising out of single environmental impairment).

The definition of a "claim" can be critical to determining the parties' rights and obligations under the policy because the extended reporting period option extends coverage only for "claims for damages because of bodily injury or property damage." As noted, the extended reporting period does not refer specifically to either "compensatory damages" or "cleanup costs." A number of insurers have nonetheless begun to take the position that the extended reporting period does not cover cleanup costs because these are not "claims" within the meaning of an EIL policy./15/

The meaning of the word "claim" in a policy varying significantly from the ISO model was examined in Pacific Ins. Co. v. Cordova Chemical Co. of Mich., Aerojet General Corp. and Cranford Ins. Co., No. 87-23270-CK, slip op. (Mich. Cir. Ct. Oct. 13, 1988) (published without exhibits at 3 Mealey's Lit. Rpts. Insurance, no. 1, Appx. D). In that case, the policy did

not distinguish between actions for compensatory damages and governmental actions to compel the insured to incur cleanup costs. Id. at 9. The policy defined a "claim" as "compris[ing] any single claim or any series of claims from one or multiple claimants resulting from the same isolated, repeated, or continuing environmental impairment." Id. at 10./16/

In Cordova the insured was notified of potential liability under the Clean Water Act ("CWA") in September, 1980. In 1982, following the passage of CERCLA, EPA sent the insured another PRP letter, this time directing the insured to perform work necessary to abate the release of hazardous substances. Id. at 4-5. Cordova notified both of its EIL insurers during their respective policy periods. Id.

In granting summary judgment to the insured against both insurers, the court stated that "a claim may arise upon the insured being notified either by a written or oral notice of an intention only that the third party wishes to hold the insured responsible," and held that both PRP letters constituted "claims." Id. at 13 and 24. The court then looked to the definition in the policy and determined that the second claim, which was based on the same impairment as the first claim, was a "latter claim in a series of claims" and would be deemed to have been part of the first CWA claim. Id. at 13-14. The court held that under the terms of the policy, as long as the insured notified its insurer as to the first claim, liability

coverage would extend to any subsequent claim made, notwithstanding expiration of the policy period. Id. at 15. Significantly, the court interpreted the phrase "claims first made during the policy period" as a requirement that a claim be brought against the insured first during the policy period rather than as a bar to coverage of a later claim by a second insurer. Id. at 30-31.

In Wolf Bros. Oil Co. v. Int'l Surplus Lines Ins., 718 F. Supp. 839 (W.D. Wash. 1989), a federal district court interpreted a policy containing the ISO language and held that the extended reporting period which extended coverage for "claims" did not extend coverage for a cleanup mandated by the state's environmental agency. The court found that the extended reporting period clause did not provide a general extension of coverage, because of its express references to bodily injury and property damage and the absence of mention of cleanup costs. Id.[/17/] The court stated that, even if the policy were ambiguous on its face, this ambiguity was resolved by extrinsic evidence including the purpose of a "claims made" policy, the sophistication of the insured, and the reduced policy price.[/18/]

The Wolf Bros. reasoning with respect to extrinsic evidence might not be followed by other courts. Courts have traditionally resolved policy ambiguities against an insurer without resort to extrinsic evidence. See, e.g., Quincy Mutual Fire Ins. Co. v. Abernathy, 393 Mass. 81 (1984); Palmer v.

Pawtucket Mut. Ins. Co., 352 Mass. 304 (1967). Moreover, effective use of extrinsic evidence would likely favor the insured. EIL policies and the extended reporting period are widely marketed as extending overall policy protection. Neither the insureds, nor the brokers that advise them, typically are informed of the insurers' position that the extended reporting period option does not extend coverage for cleanups mandated by the government. Extrinsic evidence of the insured's expectation in purchasing an extended reporting period may therefore become important in the interpretation of the scope of coverage provided by the extended reporting period.

b. "Governmental Action"

The issue of what constitutes a "governmental action," as that term is used in the ISO model, initiated during the policy period so as to trigger the insured's obligation to reimburse its insured for cleanup costs has not yet been addressed by courts. For instance, it is not clear whether a statutorily mandated obligation, without more, would trigger an insurer's obligation to reimburse its insured for cleanup costs./19/ Under the terms of an EIL policy an insured is prohibited from making any payment, assuming any obligation, or incurring any expense except at its own cost. The policy also states that the insured must comply with all governmental regulations or directives or risk forfeiture of coverage. Accordingly, in order to avoid placing the insured in an impossible bind, it would appear that an insurer would be obligated to provide

coverage for any self-executing statutory cleanup obligations incurred within the policy period, as long as the insured notifies its insurer "as soon as practicable" of its legal obligation.

A statute which does not expressly require an insured to take action but which imposes statutory liability on an insured that discovers a release at its site during its policy period could arguably be the initiation of a validly imposed legal obligation to finance or perform a cleanup. Public policy considerations of protecting public health and the environment and general rules of insurance policy interpretation which require ambiguities to be construed in favor of an insured weigh in favor of such an interpretation.

2. Notice Requirements Under EILs

Unlike CGL policies, most EIL policies make reporting of a claim, at least a claim for compensatory damages, a threshold coverage requirement. The ISO model policy provides that a claim for compensatory damages must be reported to the company during the policy period or within fifteen days after its termination. However, the ISO model does not impose a threshold coverage requirement of notice to the insurer during the policy period for recovery of cleanup costs. The insurer's obligation to provide reimbursement for cleanup costs incurred as a result of governmental action is governed by a general notice provision that is very similar to the provision found in CGL policies. This provision states that the insured must give

written notice to the company "as soon as practicable" of any "claim made against the insured [or] any action or proceeding to impose an obligation on the insured for cleanup costs." The notice must contain all "reasonably obtainable information with respect to the time, place, circumstance, and nature of the incident, injury, or damage, including the names and addresses of any persons or organizations sustaining injury or damage and of available witnesses." The notice also requires that the insured send the company "every demand, notice, summons, or other process" received by the insured.

Courts have not yet interpreted EIL notice requirements, although this is expected to be an area of intense litigation. In the context of "claims-made" professional liability policies, a number of courts, including Massachusetts, have held that if an insured fails to notify its insurer within the policy period of a claim, the insurer need not show it was prejudiced by the late notice to avoid coverage. See e.g., Chas. T. Main, Inc. v. Fireman's Fund Ins. Co., ____ Mass. ___, 1990 WL 25391 (Mass. 1990) (declaring that "a requirement that an insurer on a claims-made policy must show prejudice by its insured's failure to report a claim within the policy period would defeat the fundamental concept on which claims-made policies are premised"). See also, Gulf Ins. Co. v. Dolan, Fertig and Curtis, 433 So. 2d 512 (Fla. 1983); Esmailzadeh v. Johnson and Speakman, 869 F.2d 422 (8th Cir. 1989); Zuckerman v. Nat. Union Fire Ins. Co., 495 A.2d 385 (N.J. 1985). Other

courts have held that an insurer cannot avoid coverage on the basis of late notice unless it has been prejudiced by the delay. See, e.g., St. Paul Fire & Marine Ins. v. House, 315 Md. 328, 554 A.2d 404 (1989) (holding that coverage was required where the policy was ambiguous as to whether it required notice to insurer or notice of claim to insured during policy period; three of seven judges dissenting); Sherlock v. Perry, 605 F. Supp. 1001 (E.D. Mich. 1985) (insurer failed to show it had been prejudiced by late notice as required by state statute); Village Escrow Co., Inc. v. Nat'l Union Fire Ins. Co., 248 Cal. Rptr. 687 (ordered not published) (Cal. App. 1988), decertified by Cal. Supreme Ct.; Brown-Spaulding & Assoc., Inc. v. Int'l Surplus Lines Ins. Co., 254 Cal. Rptr. 192 (ordered not published) (Cal. App. 1988), decertified by Cal. Supreme Ct.; Sparks v. St. Paul Ins. Co., 100 N.J. 325, 495 A.2d 406 (1985) (claims made policy reporting requirements unenforceable where policy provided no retroactive coverage for claims made during policy period based on damage taking place previous to policy period).

Based on the language of the ISO model and courts' interpretations of similar language in other types of claims-made policies, it would appear that courts would find that one of the threshold requirements for coverage of an action for compensatory damages is that the insured notify its insurers of the claim or suit during the policy period or extended reporting period. However, the ISO EIL policy does

not contain a requirement that the insured notify its insurer within the policy period with respect to reimbursement for cleanup costs. Accordingly, the prejudice rule that has traditionally been applied to CGL notice provisions should be applied where the insured is seeking reimbursement for costs incurred pursuant to government action initiated during the policy period./20/

4. Alleged Omissions and Misrepresentations by the Insured

To obtain EIL coverage, a potential insured usually must submit a detailed application form that requires disclosure of information about the applicant's business operations and claims history. Most EIL applications contain specific questions about past pollution-related incidents and any circumstances known to the applicant which could give rise to a claim for environmental impairment.

The EIL insurer may rely on the responses to the applicant's questions in deciding whether to insure a business or to issue special coverages, or in setting premiums. If the application is arguably incomplete or inaccurate, the insurer is likely to disclaim coverage or seek to rescind the policy in the event of a loss. Many EIL policies contain explicit exclusions for damage resulting from pollution incidents known but not revealed on the insured's application or damage or personal injury resulting from a pollution incident disclosed in the insured's application. (See list of exclusions above at A.5.) Even where a policyholder's failure to provide

information was not done with an intent to misrepresent, the insurers may be entitled to return the premium and avoid any coverage obligations./21/

In several EIL coverage actions insurers have successfully argued that an insured's failure to disclose information about past pollution incidents and the exclusions in their policies for incidents known but not revealed in their applications, relieved the insurers of their coverage obligations.

In Redwing Carriers, Inc. v. American Empire Surplus Lines, No. CV 85-P-0718-S, slip op. (N.D. Ala. April 15, 1988) (published at 2 Mealey's Litigation Reports, No. 17, Appx. D), the insurer was able to rescind its policy because the insured had failed to disclose certain past claims relating to the insured property which were material to the insurer's risk assessment. These omissions included a neighbor's lawsuit against the insured alleging trespass and nuisance for an unrelated discharge of chemicals on his land,/22/ and an Alabama Water Commission order to "immediately cease discharge of [wastewater]" following a finding that the wastewater treatment system was inadequate.

In Advanced Micro Devices v. Great American Surplus Lines, 245 Cal. Rptr. 44 (Cal. App. 1988), a California appellate court held that an exclusion for pre-existing conditions at premises owned or controlled by the insured barred coverage where, prior to obtaining insurance, officials in the company had been informed that contaminants were being discharged into

soil and groundwater in concentrations far above regulatory limits and this information was not disclosed by the insured in its insurance application.

In Creighton v. Petroleum Marketers Mut. Ins. Co., Inc., No. L-89-0852, slip op. (Super. Ct. N.J., Dec. 7, 1989) (published at 1990 Haz. Waste Litig. Rep. 18569), the insurer relied on the "known impairment" exclusion/23/ to avoid coverage. In that case, before the inception date of the policy, the insured had observed a tank removal on his property and had seen spillage in the tank area. The New Jersey Department of Environmental Protection directed him to pile the dirt on a plastic base, not to dispose of the dirt until it was tested, and to report the incident to the proper authorities. In light of these directives, the court found that the insured knew of the environmental impairment before inception of the policy and would not be covered for associated costs under his EIL policy. The court rejected the insured's argument that the policy language required him to know of the liability as well as an incident before inception of the policy for coverage to be excluded.

Conclusion

EIL policies offer many companies an opportunity to transfer certain pollution-related risks which are no longer insured against under comprehensive general liability policies. However, EIL policies are based on different insuring principles than conventional liability policies and

the policyholder and its counsel must be alert to the limitations and policy requirements in order to ensure that the policyholder receives the maximum protection possible. Policyholders can maximize their potential coverage by taking the following steps:

° Review a number of policies before choosing which EIL policy to purchase. Restrictions on coverage vary substantially among EIL policies. For instance, some policies define "claim" broadly to include a series of claims from multiple claimants. Some policies state more clearly than others that the extended reporting period applies to cleanup costs. Exclusions also vary from policy to policy. It is better to learn whether a policy suits your needs before you purchase it than when you need to seek coverage because of environmental damage. In some cases endorsements can be written to add or clarify coverage to meet an insured's individual needs. For example, if the insured is purchasing a policy to meet its underground storage tank financial responsibility requirements, it is important that the policy, or an endorsement, state that the policy meets the EPA regulatory requirements.

° Confirm in writing with the broker and insurer the scope of the extended reporting period prior to purchase. As noted above, some EIL policies do not clearly state whether the extended reporting period is applicable to cleanup costs. This issue may prove to be critical, however, if governmental action

is initiated against an insured during the extended reporting period.

° Complete the insurance application carefully. A policyholder that fails to provide accurate and complete answers in its application faces a denial of coverage even where the insured had no intent to mislead its insurer. The company's insurance broker may assist in the preparation of an application, but the company's risk manager or other employee responsible for insurance matters should review the application and confirm that responses to the application questions are complete and accurate. Where the risk manager lacks complete knowledge of the company's operations and claims history, the risk manager should contact the employees that could be expected to have the most complete knowledge of the information requested in the application.

Claims-made insurance applications often contain particularly broad requests for information about prior claims brought against the company. Although information on past unsubstantiated claims or minor incidents may seem irrelevant to the policy applicant's analysis of its risk, the company risk manager should not assume that such information can be eliminated from the application. Application questions that seem ambiguous, overbroad, or which the insurance risk manager does not understand, should be discussed with the broker. The broker may then contact the underwriter or the insurer's national agent for guidance. The risk manager should make a

note in the file of the advice given to him by the broker and, if there is any danger of confusion, confirm the company's understanding in writing with the broker. Such a note can be invaluable if the insurer later contends that the application was incomplete.

° Verify that the policy issued is the one you purchased. Once the policy is issued, the risk manager should review the policy to ensure that it conforms with the coverage the company believes it is purchasing. Special attention should be paid to the declarations page, covered property schedules, and any special endorsements. Any questions should be immediately directed to the broker.

° Make sure that the policyholder's risk manager is aware of all three potential threshold coverage requirements. As discussed above, most EIL policies require that three threshold conditions be met to obtain some or all of the protection provided by the policy. These are: (1) a pollution incident must occur after the retroactive date and before the end of the policy period; (2) a claim must be made against the insured during the policy period; and (3) the claim must be reported to the insurance company during the policy period or ERP. A risk manager should be aware of these conditions so that, in the event of a loss, coverage is not inadvertently forfeited by a failure to meet one of the criteria.

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FOOTNOTES

/1/ See, e.g., Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §9601, et seq. ("CERCLA"). See also, e.g., the Massachusetts Oil and Hazardous Material Release Prevention and Response Act, Mass. Gen. L. ch. 21E (Law. Co-op. 1988 and Supp. 1990); California Hazardous Substance Account Act, Calif. Health & Safety Code, § 25300, et seq.; Connecticut Hazardous Waste Law, Conn. Gen. Stat. Ann. § 22a-133a, et seq. (West Supp. 1990); N.H. Rev. Stat. Ann. § 147-B, et seq. (Equity Supp. 1989); New Jersey Spill Compensation and Control Act, N.J. Stat. Ann. § 58:10-23.1, et seq.

/2/ The number and size of awards in "toxic tort" cases alleging bodily injuries, fear of disease and/or a diminution in property value due to pollution under or on real property have also increased dramatically in the past two decades.

/3/ 42 U.S.C. § 9607(a) (1)-(4) (1982).

/4/ 42 U.S.C. § 9607.

/5/ CGL policies provide coverage on an "occurrence-basis." That is, they provide coverage for accidents that result in bodily injury or property damage during the policy period, regardless of when a claim for the damage or injury is brought against the insured. This means that an insured may seek coverage under old policies for bodily injury or property damage that may have occurred during those periods even if the insured does not receive a claim against it until years later. The comprehensive general liability insurer's obligation to provide coverage after policy period has expired is sometimes referred to as a policy's "tail."

/6/ For the purposes of this discussion, unless otherwise indicated, the provisions of the Insurance Services Office ("ISO") Model "Pollution Liability Insurance" Policy, Form No. GL 00 29 (Jan. 1983 ed.) are analyzed. Environmental Impairment Liability policies may vary significantly from this form, however, and the authors of this article strongly emphasize that each policy should be read very carefully in the determination of applicable coverage and exclusions. EIL policies are also commonly referred to as "claims-made," "claims-based," and "pollution liability" policies.

/7/ See PPG Industries v. Evanston Ins. Co., No. 85-1387, slip op. (W.D. Penn. Dec 20, 1988) (published at 3 Mealey's Lit. Rpts. Insurance, no. 1, D-1) (comparing factual inquiries necessary for determining whether coverage exists under "occurrence-based" and "claims-made" policies and granting motion for separate trials on applicability of such policies).

/8/ "Pollution incident" is defined as an "emission, discharge, release, or escape of: (1) any solid, liquid, gaseous, or thermal contaminants, irritants, or pollutants directly from the insured site; or (2) any waste materials [sent elsewhere] that . . . results in environmental damage." The entire discharge, release, or escape of a pollutant is deemed to be one "pollution incident."

/9/ Insurers must exercise their discretion to settle a case in good faith and reasonableness. Chemical Applications Co. v. Home Indemnity Co., 425 F.Supp. 777, 779 (D. Mass. 1977) (an insurer who unreasonably refuses to settle a claim to the prejudice of the insured's interest in the excess is liable in full, even beyond the policy limits, for the consequences of its unreasonable conduct). See also, Mass. Gen. L. ch. 176D §(3)(9)(f) (Law. Co-op. 1987) (declaring it an unfair practice for an insurer to fail to settle a claim where the insured's liability is reasonably clear).

/10/ Some EIL policies do explicitly require that the insured must notify the insurance company during the policy period of governmental action.

/11/ As previously noted, the insured's and insurer's obligations may be different under other EIL policy forms. See, e.g., National Grange Ins. v. Continental Cas. Ins., 650 F. Supp. 1404, 1412-13 (S.D.N.Y. 1986) (insurer had no obligation to defend, even against suits).

/12/ See Wolf Bros. Oil Co., Inc. v. Int'l. Surplus Lines Ins. Co., 718 F. Supp. 839, 844 n.6 (W.D. Wash. 1989).

/13/ See Masonite Corp. et al v. Great American Surplus Line Ins. Co. (1st App. Dist. Cal., No. A041180) (1989) appeal pending (discussed at 3 Mealey's Litig. Rpts. Insurance, April 24, 1990).

/14/ In many jurisdictions, this provision will not exclude coverage where the insured undertakes cleanup on its own property to prevent damage to others. See Allstate v. Quinn Construction Co., 713 F. Supp. 35 (D. Mass. 1989) vacated due to settlement (construing similar provision in CGL policy and finding exclusion inapplicable); C.K. Smith v. American Empire Surplus Lines, No. 85-3290 (Mass. Super. Ct. Sept. 27, 1989) (same).

/15/ This argument is the exact opposite position that many CGL insurers take in order to try to avoid a duty to defend. In CGL coverage actions, insurers typically argue that a notice of responsibility, a "PRP" letter, or other governmental directive is a "claim" and the CGL policy requires only that they defend "suits."

/16/ The ISO form provides that "claims for damages because of bodily injury or property damage sustained by any one person or organization as a result of any pollution incident shall be deemed to have been made at the time the first of those claims is made." A potentially significant difference between the Cordova and ISO provisions is that the Cordova provision refers to "one or multiple claimants" whereas the ISO model refers to "any one person or organization."

/17/ However, the court failed to recognize that the definition of property damage contained in the ISO model policy is broadly defined to include any physical injury to, destruction of, or contamination of tangible property and would have included the contaminated property which was the subject of the state cleanup action.

/18/ The court failed to recognize that the purpose of a "claims made" policy would not be defeated by extended coverage of cleanup costs so long as the pollution incident giving rise to such costs took place during the basic policy period. Likewise, with respect to price, the court failed to consider that the reduced price would be attributable to the exclusion of property damage that did not begin during the basic policy period. See supra A.

/19/ See e.g., Mass. Oil and Hazardous Material Release Prevention and Response Act, Mass. Gen. L. ch. 21E, §§5 and 7 (providing that certain parties are liable for damage and cleanup and must notify the Department of Environmental Protection of release or threat of release of oil and hazardous materials) and 40 C.F.R. §§280.50 and 280.61-66 (requiring owners and operators of underground storage tanks to report releases and take corrective actions).

/20/ See Mass. Gen. L. ch. 175, §112 (Law. Co-op. 1987).

/21/ By state law, an omission or misrepresentation in the application may relieve an insurer of its coverage obligation in the absence of a specific policy exclusion to that effect. See, e.g., Mass. Gen. L. ch. 175, §186 (Law. Co-op. 1987) (providing that misrepresentations will release an insurer from a policy if made with actual intent to deceive or if it increased the risk of loss) and Ala. Code §27-14-7 (1975) (providing that misrepresentations and omissions may prevent recovery if fraudulent, material to acceptance of the risk or hazard assumed by insurer, or if it would have affected the insurer's decision as to cost or extent of coverage had the true facts been known).

/22/ The insured alleged that the previous lawsuit related to a brush fire that had been ignited by a blow torch and that the lawsuit had settled for $4,000. The court responded that "whether or not the actual damage prompting suit was chemical related, the complaint still alleged trespass and nuisance with respect to the continuous discharge of unknown chemicals," and found that the incident should have been disclosed.

/23/ Where the insured's policy contains a "known impairment" exclusion such as those described in section A.5 above, a loss arising out of a pre-existing condition may not be covered even if it is disclosed on the application.

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