KNOWING WHEN TO HOLD 'EM AND WHEN TO FOLD 'EM ENVIRONMENTAL INSURANCE SETTLEMENT CONSIDERATIONS

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I. Introduction

Thousands of policyholders are currently engaged in disputes with their insurers involving environmental claims. Many of these cases involve substantial liabilities at sites in multiple states. Environmental insurance coverage cases can lumber along for years, consuming significant resources of both policyholders and insurers. Thus, it is not surprising that many companies are searching for ways to avoid these exceedingly expensive and often protracted cases. Although there are tremendous uncertainties associated with environmental insurance litigation, policyholders and their counsel that are willing to tackle the tasks of assessing their environmental exposures, analyzing applicable caselaw, and designing a well□thought□out settlement strategy can often resolve even complex multi□site insurance disputes relatively quickly, inexpensively, and on terms that are quite satisfactory. This article identifies some of the reasons that influence a company to seek settlement of its environmental insurance coverage disputes; describes a variety of the settlement models that are currently being used to settle cases; and summarizes a number of the issues which must be considered when negotiating settlements within a multiple year insurance program. Finally, the article summarizes Title VIII of the proposed Superfund Reauthorization Act which would provide responsible parties with the option of resolving their environmental insurance disputes through a national fund.

II. The Pros and Cons of Settlement Versus Litigation

Although it may seem obvious that settlement is preferable to protracted insurance coverage litigation, insureds and insurers settle all or part of their coverage disputes for many different reasons. Some of these include:

(1) The amount of the underlying dispute is not sufficiently large to warrant full□scale environmental coverage litigation;

(2) The insured and its insurer have a long, mutually beneficial business

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[1] I am grateful to Attorney Nina R. Mishkin for her generous assistance with this article.

relationship which will be threatened by vigorous coverage litigation;

(3) The insured has potential environmental liability at multiple sites and coverage litigation is expected to be protracted and factually intensive;

(4) The insured is the subject of pending environmental actions which could be adversely affected by issues that could be litigated in a coverage action;

(5) Settlement of the coverage dispute will permit the insured to devote its attention and resources to underlying environmental claims or get on with other business;

(6) The insured's alleged environmental liability exceeds its ability to pay and □

a) the insured's liability is likely to increase if its insurer does not participate or settle on its behalf because the insured cannot afford to settle; or

b) the insured may be forced to file for bankruptcy if the insurer does not settle on its behalf and the insurer does not want to litigate in bankruptcy court;

(7) The state's law which is likely to govern the interpretation of the insurance contract is much more favorable for one party than the other; or

(8) The specific facts in a case heavily favor either the insured or the insurer.[2]

There are also circumstances in which an insured or its insurer may choose to litigate rather than to consider an early settlement. Such circumstances could arise where the policyholder believes it has a very strong bad faith claim; the insured or its site is located in a state with favorable law and the insured wishes to obtain a judicial coverage determination because it anticipates future claims; or the policyholder faces an unending stream of private party claims and has policies with no aggregate limits (so almost no settlement amount would be satisfactory).

Due to variations in state law, many policyholders that would rather settle than litigate feel they have to initiate a lawsuit to preserve a favorable forum. However, the filing of a lawsuit does not necessarily preclude early settlement negotiations. A

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[2] For example, an insurer may wish to settle because its claims file contains documents or statements that the insurer does not want used in litigation or does not want to influence other coverage disputes. Or, an insured may accept a deeply discounted settlement because there is evidence of known or intentional pollution.

growing number of courts have formally or informally stayed cases before discovery begins, so that parties that wish to settle can negotiate resolution of their disputes before coverage litigation proceeds. *See, e.g.,* CBS Inc. v. Crum & Forster, *et al.*, No. L□42□96□92 (N.J. Superior Ct., Bergen

Cty.); Farmland Industries, Inc. v. Republic Insurance Company, *et al.*, No. CV193□3572CC Div. 2 (Mo. Superior Ct., Clay Cty.); Bristol□Myers Squibb Co., et al. v. AIU Insurance Co., *et al.*, No. A□0145672 (Texas Dist. Ct., Jefferson Co.).

III. Types of Settlements

Environmental insurance coverage cases frequently involve liabilities for environmental obligations that extend far into the future, and are difficult to assess. Counsel for an insured must be prepared to look for creative resolutions that serve their client's business needs, and meet insurer reinsurance parameters and the insurer's desire for finality, or at least, peace. While there are limitless possibilities for creative settlement arrangements, environmental insurance coverage settlements generally follow one of six different models: an agreement to defend with reservation of rights; a claim or site release; a policy buyback (with or without carve□outs); percentage settlements; pay□as□you□go arrangements; and claims funds. Each of these is briefly described below.

A. The Interim Agreement to Defend

An interim agreement to defend is often negotiated before a coverage action is filed in order to defer resolution of the indemnification issue until after the underlying cases are concluded. In the event that the insured is successful in the underlying cases, there would be no need to engage in coverage litigation.

An insurer is most likely to agree to defend where its insured's liability is not established, *i.e.*, the insured is a defendant in one or more private party law suits or the insured's connection to a Superfund site is questionable. In such cases, both the insurer and its insured have an interest in defeating or minimizing the insured's alleged liability. An insurer is also more likely to defend or pay its insured's defense costs if the insurer has defended the insured or other insureds in similar cases, or feels it may face bad faith exposure if it refused to defend.

An insured seeking defense should examine the relevant state's law on an insurer's duty to defend. In addition to noting favorable caselaw, the insured should describe to its insurer specific defense activities which need to be undertaken to protect the insured's (and the insurer's) interests, and what favorable outcome may be achieved by a prompt and vigorous defense. Except under extraordinary circumstances, an insured should never agree to reimburse its insurer for costs paid under an interim defense agreement in the event that the law changes or the insurer ultimately proves it has no indemnification obligation.

B. The Claim or Site Release

Most insurance settlements involving non□environmental claims involve payment of a lump sum to the insured in exchange for release of the insurer's alleged coverage obligations on a particular claim. While these types of settlements are not infrequent in the environmental context, insurers often demand broader releases, especially where more than one claim may arise at a single site.

One of the more common types of environmental insurance settlements is one in which an insurer agrees to pay a lump sum in exchange for release of further liability at one or more specified sites. To assess a site release settlement proposal, an insured must evaluate all the environmental exposures or claims it could face at that site. An insured should be cautious about the formulas or principles it agrees to accept in deriving the settlement amount and conditions upon which it agrees. Its insurer is likely to view the first settlement as a guideline for any subsequent settlements.

Amounts paid in settlement may or may not be treated as reducing available policy limits. Where the insured and insurer agree that amounts paid in settlement will "count" towards the insured's "per accident" or "per occurrence" limits, an insured may have to negotiate whether multiple claims are to be treated as a single or multiple occurrence(s). The insured must consider whether its other insurers will take a different view of the number of occurrences involved.

The insured must also consider whether it will agree to provide a settling insurer with "contribution protection" against other insurers. "Contribution protection" usually takes the form of a hold harmless or indemnification clause. The insured agrees to hold harmless or indemnify the settling insurer against claims brought against the settling insurer by third-parties. "Contribution protection" may include several components: (1) indemnification judgment in a future contribution action; (2) indemnification for the insurer's defense costs and/or "loss" in a future contribution action; or (3) an agreement to defend the insurer in subsequent contribution actions. Insurers in environmental insurance coverage cases frequently make "contribution protection" a condition of settlement. Insurers are usually most concerned about "contribution protection" where more than one insurer can be obligated to pay on a claim. The scope of "contribution protection" is an issue to be negotiated. The insurer desires to maintain control over future actions involving interpretations of its policies and the insured needs the right to control the costs of defending that insurer so that the contribution agreement does not significantly impair the settlement amount.

C. Full or Partial Policy Buybacks

In a partial or full policy buyback, the insured agrees to release its insurer from all liability for defense, indemnity, or unfair claims handling practices arising from various known and unknown claims. Buybacks can include all claims or can be limited in various ways, such as to "environmental" or "pollution" claims; pollution property

damage claims; policies covering certain years or policies issued below a certain layer or dollar amount; or all claims with the exception of certain identified claims. Policy buybacks must be considered very carefully. A policyholder's interest in a policy buyback is likely to depend upon: (1) its ability to accurately assess the scope of its potential future environmental liabilities; (2) what other long□tail exposures the insured may face; (3) the level of coverage provided by the insurer; and (4) whether the insurer is able to offer any necessary "carve□outs." If a policy buyback is to be limited to "environmental" or "pollution" claims, those terms should be carefully defined to avoid unnecessary future disputes. For instance, some insurers treat indoor air pollution as a products liability issue, others consider it a "pollution issue." An insured might assume that coverage for natural occurring radon would not be removed in a pollution coverage "buy□out" while its insurer might believe it would be removed. An insured and its insurer should clarify whether work place exposures, asbestos, etc. would be bought back in an environmental coverage buyback.

A policy buyback potentially shifts much greater future risk to an insured than a site or claim release. However, there are several situations in which the benefits of settlement can make a policy buyback feasible. For instance, an insured's probable liability at one site may be so high that the insured cannot sustain the loss and will require protracted litigation the insured cannot afford. Some form of policy buyback may also be economical if the insured has evaluated its company□wide historical and current environmental exposure and the proposed settlement amount compares favorably with the insured's environmental risk of being self□insured for those policy periods, multiplied by the probability of success in coverage litigation, plus litigation costs. This can be represented schematically as follows:

Total current and future $ likely to be allocated to settling insurer	X	Odds of recovery in coverage litigation	+	Litigation cost	≤	Buyback

Where multiple sites are involved, the calculation must be done separately for each site since the probability of success and marginal cost of coverage litigation is likely to be different at each site.

Business considerations, as well as litigation risk, frequently play a major role in whether a policyholder is willing to negotiate a buyback. For instance, many insureds would prefer to strike their best deal with their insurers in comprehensive settlements and focus on their cleanup obligations or business goals rather than face suing their insurers on a recurring basis. On the other hand, some policyholders derive comfort from knowing that their policies are in place, even if the liability protection they may ultimately provide is extremely limited.

D. Percentage Settlements

In a percentage settlement arrangement, the insurer agrees to pay a percentage of its insured's defense and/or liability before the full extent of the insured's exposure is known. This arrangement is most often proposed where multiple insurers are involved; the insured faces multiple claims, some of which are likely to be covered and some not; or the insurer(s) is defending under a reservation of rights and early settlement of the underlying claim(s) may be possible.

Where two or more insurers are potentially obligated to cover a claim, an agreement to pay a percentage of defense costs is often used to divide the defense obligation. Where multiple insurers are dividing an obligation by percentage, there are several ways a percentage can be calculated.

These include: (a) dividing the number of months or years the insurer covered the insured by the number of months or years of all available policies potentially on the risk ("the trigger period"); or (b) dividing the number of months or years the insurer covered the insured by the number of months or years in the "trigger period." The "trigger period" can be calculated in a variety of ways using an exposure, injury□in□fact, or continuous trigger theory.[3] Under the formula described in (a), the insured receives 100% of its defense costs or indemnity from the known solvent insurers. Periods covered by an insolvent insurer, periods in which coverage has been exhausted, periods when the company was self□insured, periods during which the insured's policies contain the absolute pollution exclusion and/or periods for which policies cannot be found do not decrease the insured's recovery.[4] Caselaw supporting

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[3] Comprehensive general liability policies cover property damage during the policy period. However, environmental claims frequently involve progressive property damage that takes place or continues through multiple policy periods. In response to such claims (and to latent bodily injury claims arising in asbestos and pharmaceutical products cases), courts have developed several major approaches for determining when the damage "occurs" for purposes of triggering insurance coverage. Under the approach called the "exposure trigger," the property damage is deemed to have occurred during each policy period in which the environment was exposed to contamination. *See, e.g.*, Fireman's Fund Ins. Cos. v. Ex□Cell□O Corp., 662 F. Supp. 71 (E.D. Mich. 1987), *motion for immediate appeal denied*, 682 F. Supp. 34 (E.D. Mich. 1987). Under the "actual injury" or "injury□in□fact" trigger theory, the policy or policies on the risk during the time that the property was being damaged must respond. *See, e.g.*, Industrial Steel Container Co. v. Fireman's Fund Ins. Co., 399 N.W.2d 156 (Minn. App. 1987), *rev. denied*, March 18, 1987. Under the "continuous trigger" or "triple trigger" theory, all insurance policies in effect from the date of first exposure of the environment to hazardous substances through the date when the insured becomes aware of the damage must provide coverage. *See, e.g.*, New Castle Cty. v. Continental Cas. Co., 725 F. Supp. 800 (D. Del. 1989). A fourth approach, the "manifestation trigger" theory, applied by a few courts, limits insurance coverage to the policy on the risk at the time that property damage is discovered or becomes "manifest." *See, e.g.*, Mraz v. Canadian Universal Ins. Co., Ltd., 804 F.2d 1325 (4th Cir. 1986).

[4] Although insurers and insureds often begin calculating the length of the trigger period with the first date that the insured shipped or transported material to a site or the insured purchased property on which a release of hazardous substances occurred, an insurer may be liable for releases of pollutants that preceded its insured's involvement at a site. *See, e.g.*, Gulf Chemical & Metallurgical Corp. v. Associated

a calculation that does not shift loss to the insured for years in which coverage is not available includes: J.H. France Refractories Co. v. Allstate Ins. Co., 626 A.2d 502 (Pa. 1993) (asbestos); Owens□Illinois Inc. v. United Ins. Co., 625 A.2d 1 (N.J. App. 1993) (asbestos); Hatco v. W.R. Grace and Co., 801 F. Supp. 1334 (D.N.J. 1992); Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co., 1993 U.S. Dist. Lexis 3237 (D. N.J. March 12, 1993); Keene Corp. v. Insurance Co. of North America, 667 F.2d 1034 (D.C. Cir. 1981) *cert. denied* 455 U.S. 1007 (1982) (asbestos); In Re Asbestos Proceedings, No. 1072, tentative decision concerning Phase IV pp. 21□32 (Cty. San Fran. Sup. Ct. Cal. Aug. 29, 1988). Not surprisingly, insurers usually propose that the percentage be calculated by dividing the number of policy months or years of coverage they provided by the total trigger period, including years in which coverage is not available. Under this formula, the insured bears the difference between the solvent insurers' percentage and its total loss or liability.

Percentage settlements can also be negotiated based on the size of future liabilities. This arrangement can be particularly attractive when the parties can not estimate the size or number of future claims an insured is likely to face at specified sites. For instance, an insured may agree to pay a specified percentage, such as 25% of future defense costs or a specified percentage of any settlements or judgments, such as 50% of the first $5 million and 25% thereafter. The insurer or insurers pay the difference. Percentages can also be varied according to the year in which claims arise or any other factors the parties find relevant to their situation.

E. Pay□As□You□Go Settlements

In a pay□as□you□go settlement, an insurer makes an agreed□upon amount available to the insured for indemnity and pays the insured's defense costs until the agreed□upon amount is exhausted. Usually this is accomplished by substituting a fairly specific settlement document for the policy or environmental coverage in the policy. The settlement document will specify claims or categories of claims that will be paid by the insurer. If the insurer is going to retain the settlement amount until the insured's obligations arise, and the insurer plans to seek reimbursement from its reinsurers, the insurer may seek to specify a trigger approach for determining the policy period or periods in which a claim is to be placed. If the insured has other primary or excess insurers this designation may affect the insured's ability to pursue other coverage. The policyholder may have an interest in following a "trigger" approach in the settlement agreement that is consistent with its approach to triggering its other insurance policies. Confidentiality provisions and disclaiming language can provide some protection for the interests of the insured and the settling insurer. However, the settlement document

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Metals & Minerals Corp., No. 92□7499 (5th Cir. Sept. 3, 1993) (holding that pre□shipment insurers had a duty to defend suits alleging bodily injuries resulting from exposure to the insured's product). *See also* Hazen Paper Co. v. United States Fidelity & Guaranty Co., 409 Mass. 689 (1990) (stating that the relevant issue for determining indemnification is "whether releases of discharges at the ... Site, *for which [the Insured] may be responsible* were sudden and accidental") (emphasis added).

should also note that the settlement is being entered for compromise purposes and is not an admission by either the insured or the insurer of coverage or lack of coverage under any particular policy.

The pay□as□you□go agreement is most useful where: (a) the insured faces relatively large defense costs; or (b) liability is potentially large but very uncertain and an insurer wants to keep its money in return for offering its insured a higher potential settlement amount than it presently would in a lump sum settlement offer; or (c) the insured has a single primary insurer or all relevant primary insurers are settling and the insured and its insurer(s) can agree upon a trigger approach and the number of covered occurrences (the insured can then assess its potential exposure and protection from excess insurers); or (d) for tax reasons, the insured wants the receipt of settlement proceeds to take place in the same tax year as the corresponding cleanup costs are incurred.

A variation on the pay□as□you□go theme is a settlement in which the insurer makes available agreed□upon amounts to be used for both defense and indemnity but is not obligated for additional defense costs. This arrangement is not likely to be attractive to an insured unless the insured has the ability to control defense costs in underlying claims, *i.e.*, most of its liability is likely to be uncomplicated cleanups in which allocation of liability is not a significant issue or its Superfund claims can be handled in-house. A combined defense and indemnity pay□as□you□go agreement is also generally not advantageous to an insured unless the amount that the insurer agrees to make available is significantly larger than the amount the insurer would provide in a lump sum settlement, or the adverse tax consequences of a lump sum settlement are significant to the insured.

F. Claims Fund Settlement

In a claims fund settlement, the insurer pays a lump sum into an escrow account to be paid out as required for environmental claims. The insured (in the case of settlements) or the insured's vendors (in the case of cleanup obligations) submit invoices to the escrow agent. The settlement agreement must specifically set forth guidelines for the release of funds from the escrow account so that payment is automatic. Settlement dollars should not be diminished by escrow charges. Many banks will appoint an escrow agent for little or no fee.

Claims funds can be more advantageous than pay□as□you□go agreements to an insurer who does not want to continue its involvement in an insured's claims. Claims funds may also have reinsurance advantages. However, the claims funds can present adverse tax consequences to an insured if they are not carefully structured. If the insured has an absolute right to the full amount of funds in a claims fund, it may have to take the amount of the settlement into income in the current tax year although it cannot draw upon the funds until cleanup costs are incurred or there are settlements or judgments in underlying tort cases.

G. The Advantages and Drawbacks of Creative Settlements

Environmental claims often involve factors that do not play a major role in other types of claims such as: (1) piecemeal settlements staggered over a number of years; (2) on□going cleanup obligations which can be only roughly estimated; (3) liabilities for events and damage of which the insured had no knowledge and over which it had no control; (4) opportunities for settlement with EPA prior to litigation; and (5) extremely expensive defense costs associated with private tort claims. Consequently, an alternative environmental claim settlement package may serve the insured's timing needs, defense requirements, or desire to pursue other primary or excess insurers more effectively than conventional lump sum site release settlements.

However, creative settlements often take longer to be evaluated and negotiated by an insurer. Frequently the insurer must check the impact of a creative settlement on its reinsurance, accounting, and auditing practices. Creative solutions must also be written with great care and specificity. The parties are not likely to have had the long term experience with the ability of creative settlement to address issues that arise in connection with future claims or the operation of the settlement agreement.

IV. Settlements Involving Multiple Insurers: Allocation of Liability among Insurers

When multiple policies are triggered and/or the insured's alleged liability exceeds the "per accident" or "per occurrence" limits of a primary policy, any settlement must take into account the impact of the settlement on the insured's ability to pursue other insurers. Insurers typically try to eliminate their risk by seeking contribution protection so that the insured, not the insurer, will bear the risk in the event that the insurer's allocated risk is greater than estimated by the insured and the settling insurer. In designing a settlement strategy that involves multiple primary and excess, and may involve first party property and claims-made insurers as well, the insured and its counsel must consider a variety of issues bearing on the insurer's relative obligations. These may include, among others: the number of occurrences at each site; the number of policies on the risk for each occurrence; how liability is to be allocated among layers; and the possible effect of "noncumulation" and "other insurance" provisions.

A. Allocation Among Primary Insurers

As previously mentioned, an insurer's obligation is likely to depend on the number of "occurrences" that are deemed to take place at a given site. Liability policies define "occurrence" as:

> an accident, including continuous or repeated exposure to conditions which results in bodily injury or property damage

neither expected nor intended from the standpoint of the insured. (emphasis added)

Although the definition of "occurrence" includes on-going or repeated events, CGL policies do not provide guidance for distinguishing when one occurrence ends and another begins.

Courts have attempted to determine the number of occurrences by applying a "cause" or "effect" analysis. Under the "effect" approach, courts consider the number of injuries to determine the number of occurrences. *See, e.g.*, Lombard v. Sewerage & Water Board, 284 So.2d 905, 915□16 (La. 1973). Most courts have adopted the "cause" approach. Under the "cause" approach, courts examine the number of proximate causes of an injury or damage to determine the number of occurrences. *See, e.g.*, American Red Cross v. Travelers Indem. of Rhode Island, No. 91□2175 SSH, 7 Mealey's Litig. Rep: Insurance (1993); Associated Indemnity Corp. v. Dow Chemical Co., 814 F. Supp. 613 (E.D. Mich. 1993); Appalachian Ins. Co. v. Liberty Mutual Ins. Co., 676 F.2d 56, 61 (3rd Cir. 1982). However, courts have reached inconsistent results in applying the "cause" approach. What one court views as an on-going phenomenon or single causative event, another court may view as multiple causative events. *Compare, e.g.*, Jackson Township Municipal Utilities Authority v. American Home Assoc. Co., reprinted at 1984 Haz. Waste Litig. Rep. 6220 (Aug. 31, 1984) (seepage of toxic waste into wells over 6 year period leading to contamination of drinking water and injuring numerous families, constituted separate occurrences) with Morton Thiokol v. Aetna Casualty & Surety Co., No. A□8603799 (Ohio Ct. Common Pleas, Hamilton Cty. March 1, 1990) (all claims relating to disposal at one site arose out of same condition and constituted one occurrence per policy year). Moreover, where property damage claims are based on the migration of chemicals onto third parties' property, at least one court has found that the policy in effect at the time that the abutting property was damaged must provide coverage, rather than the policy in effect at the time the insured's property was injured. United States v. Conservation Chemical Co., 653 F. Supp. 152, 177 (W.D. Mo. 1986).

A single occurrence can trigger multiple primary policies. Even where an insurer and an insured agree on what constitutes a single occurrence, they may disagree on the number of policies that are triggered by a single occurrence. Under an "exposure", "injury□in□fact", and "continuous trigger" theory, more than one policy may be triggered. On the other hand, some courts have interpreted the "exposure" or "injury□in□fact" to trigger only the first policy in effect at the time that property or groundwater was contaminated.

Where multiple policies are triggered many courts have permitted the insured to select the triggered policy under which it is to be indemnified. The designated insurer may then seek contribution from other insurance companies or can avoid liability if it proves no alleged bodily injury or property damage took place during its period. *See, e.g.*, Keene Corp. v. Insurance Corp. of North America, 667 F.2d at 1049□1053;

Broderick Investment Co. v. The Hartford Accident and Indemnity Co., 742 F. Supp. 581 (D. Colo. 1989). However, a few courts have adopted a "pro□rata" approach and required each primary insurance policy triggered to contribute equally up to the policy limits of its policy to settlements or judgments in underlying claims. Under this scheme the insured bears the allocated portion of loss for years in which it was self□insured or cannot identify the insurer. *See* Insurance Co. of North America v. Forty□Eight Insulations, Inc., 633 F.2d 1212 (6th Cir. 1980) *modified* 657 F.2d 814 (6th Cir.) *cert. denied* 454 U.S. 1109 (1981). Still others have allowed policyholders to draw upon multiple policies in the same layer and "stack" limits. *See, e.g.*, Stonewall Insurance Co. v. City of Palos Verdes Estate, 7 Cal. App. 4th 309, 9 Cal. Rptr. 2d 663 (Cal. App. 1992).

Under either a joint and several approach or a *pro rata* approach, the insured must consider the consequences of settling with some but not all of its insurers if contribution protection is to be included in the settlement.

B. Excess Insurance Allocation and Settlement

An excess insurer's defense obligation where the underlying policy has been exhausted depends upon whether excess policy language includes a duty to defend. Where a claim involves insurers in multiple policy periods, some courts have required an excess insurer to defend or contribute to defense once the underlying primary policy limit in its policy period has been exhausted. *See, e.g.*, Dayton Indep. School Dist. v. National Gypsum Co., 682 F. Supp. 1403, 1411 n.23 (E.D. Tex. 1988), *vacated on jurisdictional grounds sub nom.*, W.R. Grace & Co. v. Continental Casualty Co., 896 F.2d 865 (5th Cir. 1990), *reh'g denied.*

An excess insurer has an obligation to pay indemnity once the underlying policy has been exhausted. Where other primary policies are available to pay the claim, then some courts have required the excess insurer to drop into the underlying exhausted primary insurer's spot. *See, e.g.*, Associated International Insurance Co. v. St. Paul Fire & Marine Ins. Co., 220 Cal. App. 3d 692, 269 Cal. Rptr. 485 (Cal. App. 1990). If an insured settles with its primary insurer for less than its policy limits and releases its primary insurer from further coverage obligations, courts have generally required the excess insurer to pay amounts in excess of the primary limit. *See, e.g.*, Stargatt v. Fidelity Casualty Co. of New York, 67 F.R.D. 689, 691 (1975), *aff'd*, 578 F.2d 1375 (3rd Cir. 1978); Allstate v. Riverside Insurance Co. of America, 509 F. Supp. 43, 47 (E.D. Mich. 1981); Amatex Corp. v. Aetna Casualty & Surety Co., 107 Bankr. 586 (Bankr. E.D. Pa. 1989) *aff'd.* 908 F.2d 961 (3rd Cir. 1990).

Policies issued by excess insurers typically contain "other insurance" and/or "non□cumulation of liability" provisions that attempt to limit or eliminate coverage in the event that the insured has other insurance which applies to the same risk. There are three types of "other insurance" clauses. The first type provides that where other insurance is available, the insurer will pay only its proportionate share of the loss.

Alternatively, the provision may state that the insurance is excess to any other available insurance. A third type of clause restricts the availability of the insurance to situations where no other insurance is available. Most decisions construing "other insurance" clauses involve policies covering the same policy period. Where injury or property damage spans multiple policy periods, the few courts to consider the issue have declined to apply "other insurance" clauses so as to limit the policyholder's rights of recovery.[5]

Some excess policies also contain a "non□cumulation of liability" clause which provides that if the loss in question is covered in whole or in part under any other excess policy issued prior to the inception date of the policy, the limits of liability shall be reduced by any amounts recoverable under the prior insurance. Case law on the enforceability of "non□cumulation of liability" provisions in the context of progressive property damage has not yet been developed.[6]

Where an underlying insurer has been declared insolvent, some courts have required an excess insurer to "drop down" into the insolvent insurer's position. *See, e.g.*, Gulezian v. Lincoln Insurance Co., 399 Mass. 606, 611 (1987); Massachusetts Insolvency Fund v. Continental Casualty Co., 399 Mass. 598 (1987).

VI. The Proposed Environmental Insurance Resolution and Equity Act of 1994

A. Settlement Features

On February 3, 1993, the Clinton Administration released its proposed Superfund Reform bill. Title VIII of the bill titled, the Environmental Insurance Resolution and Equity Act of 1994, would establish an Environmental Insurance Resolution Fund ("EIRF") to provide responsible parties with an alternative to seeking coverage for certain environmental claims from their insurers.[7]

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[5] *E.g.*, In re Asbestos Insurance Coverage Cases, No. 753885, Phase IV, Statement of Reasons for Decision at 211 (Calif. Super. Ct. Jan. 24, 1990) (in case involving coverage for hundreds of claims for asbestos disease, "other insurance" clauses shall not be given literal effect; contribution among insurers shall be based on equitable principles); Crown Center Redevelopment Corp. v. Occidental Ins. Co., 716 S.W.2d 348 (Mo. App. 1986) (in case involving 100 deaths, 500 injuries, two lines of primary insurance and five layers of excess insurance, court will not attempt to apportion coverage under "other insurance" clauses).

[6] *But cf.* J.T. Baker, Inc. v. Aetna Cas. & Sur. Co., et al., C.A. No. 86□4794, Report of Special Master (D.N.J. Sept. 23, 1993), *reprinted in* 7 Mealey's Litig. Rep.: Insurance No. 48 at A□1, A□12 (construing clause requiring insured to elect coverage under any one policy if two or more policies provide coverage not applicable as matter of law to injuries which are "cumulative and progressive" and occur over period of time in which multiple policies are successively triggered).

[7] Money in the EIRF would come from fees and assessments imposed on insurance companies. Thus, it appears there would not be a direct policyholder tax on insurance premiums. However, it is likely that insurance companies would raise their premiums to cover assessments they would be required to pay to the Internal Revenue Service to fund the EIRF.