SECURING AND MAINTAINING ENVIRONMENTAL INSURANCE LOSS AND LIABILITY PROTECTION: THE RISK MANAGER'S ROLE*

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INTRODUCTION

The explosion of environmental liability throughout the 1980's has dramatically increased the liability exposure of businesses that use, handle, store, or discard chemicals, products containing chemicals, hazardous waste or petroleum products. The federal Comprehensive Environmental Response, Compensation Liability Act (popularly known as "Superfund" or "CERCLA"), the Resource Conservation Recovery Act ("RCRA"), and most state "little Superfund" statutes impose liability for releases and threats of releases of hazardous substances and petroleum products upon a broad range of "responsible persons".

Under these environmental statutes, a company may be liable for the costs of cleanup even where the environmental damage was not the company's fault or the company had no knowledge of the spill, leak or ensuing environmental damage. A "responsible" person can be held liable for discharges of hazardous substances that took place many years ago even if the discharges were a result of activities that were permissible, licensed, or directed by governmental authorities when undertaken. As everyone who has been involved in an environmental cleanup is undoubtedly aware, assessment and remediation of environmental damage is extraordinarily expensive. Simple underground storage tank leak cleanups frequently cost several hundred thousand dollars and Superfund hazardous waste site cleanups may run into the millions or billions of dollars. As companies have become increasingly concerned that environmental liability could threaten or seriously destabilize their businesses, insurance protection has become extremely important, if not critical, to their business security.

Most companies traditionally have relied upon comprehensive general liability insurance to protect them against all types of third party liability. However, in the environmental liability area insurers are aggressively seeking to limit their own exposure, and frequently assert numerous reasons why they believe they need not defend or indemnify their insureds against environmental liability. It is no longer sufficient for a company to rely upon receiving adequate protection by instructing office employees or risk managers to contact the current insurance brokers upon receipt of a lawsuit complaint. Negotiating with a company's insurer or insurers for environmental insurance coverage is often as difficult and complicated as negotiating settlement of the environmental liability itself. There are, however, a number of steps that a company can take to maximize the risk protection it has already purchased, identify the risks for which it is currently unprotected and obtain additional protection or, where possible, minimize its risk activities. These steps can generally be classified as follows:

I. identification and evaluation of environmental exposures and risk transfer opportunities;

II. informed participation in the insurance procurement process;

III. identification of incidents that could give rise to liability, and discharging the company's contractual notice and cooperation obligations; and,

IV. coordination of the company's response to alleged environmental liabilities and to its insurers.

I. EVALUATING THE COMPANY'S RISKS AND PROTECTION

A. Identify the Company's Loss and Liability Exposures

Regardless of the size or sophistication of the company, a company with environmental liability exposure needs to designate an employee to be responsible for managing the company's environmental liability risk, referred to here as the "risk manager". The position of the actual person in a given company will, of course, depend upon the size and nature of the business. The risk manager must be knowledgeable in state and federal environmental compliance requirements or have regular access to people who are, and must be well-informed of the company's purchase, storage, transportation, disposal and manufacturing practices, both historically and presently. The risk manager also needs to be able to assess the impact of various risks on the company's financial stability, and be able to evaluate the company's insurance plan.

To evaluate the risk protection provided by the company's insurance program, the company's risk manager will need to examine and assess:

- losses or liabilities that could arise from past operations;
- losses or liabilities that could arise in connection with current operations;
- any applicable regulatory environmental financial responsibility obligations;
- insurance policies which may protect the company against liability for injury or that may have already occurred; and
- insurance options that can meet the company's current risk transfer needs and any regulatory financial responsibility obligations.

The first task of the risk manager is to identify all of the past and present potential environmental exposures of the company, its officers and directors, and employees[1] who are directly involved in activities involving the handling, use, storage, or disposal of hazardous substances or petroleum products. Environmental liabilities may arise from the company's past and present impacts on air, water, soil, groundwater and the interior of the workplace. To identify the company's environmental liability risk, the risk manager should consider the risks of: employee error or negligence; equipment inadequacies or malfunctions; negligence by non-employees involved in handling hazardous substances on behalf of the company; aboveground and underground storage tanks; and past and present storage, treatment, and disposal practices on the property. In evaluating the risks associated with past and present storage, treatment, and disposal practices, the risk manager should identify any areas where chemicals or wastes have been placed, such as dry wells or lagoons; areas in which containerized wastes may have been disposed; and areas in which barrels or equipment parts were rinsed, washed or buried. It is important that all activities which may have or have had environmental consequences be identified, even where the company's activities or conduct was legal, customary in the trade or industry, or approved by governmental authorities at the time such activities were performed.

The risk manager should next identify any landfills, disposal facilities, treatment plants, or recycling centers to whom the company's waste has been sent, and any transporters and haulers with whom the company has dealt. If the company has purchased other companies or the liabilities of other companies, the facilities and transporters used by the predecessor companies should be identified wherever possible.

Finally, the risk manager should identify the current and past uses of all of the company's commercial and industrial property. The use and activities of prior owners should be identified to the extent that such information can be obtained.

B. Identify Applicable Financial Responsibility Requirements

Federal environmental statutes require companies engaged in certain activities that are believed to present environmental risks to provide a financial guarantee or assurance that the company will be able to respond to an environmental accident. Companies often rely on insurance to meet such regulatory financial assurance requirements. For instance, owners and operators of underground storage tanks containing petroleum products must demonstrate that

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[1] A stockholder who participates in management of the corporation, the corporation's officers and directors, and employees responsible for decision making or implementation of a company's policies relating to hazardous substances may be subject to liability under CERCLA as an "owner" or "operator". See, e.g., New York v. Shore Realty Corp., 759 F.2d 1032, 1052 (2d Cir. 1985) (individual stockholder liable as operator); United States v. Northeastern Pharmaceutical & Chemical Co., 810 F.2d 726, 744 (8th Cir. 1986) (same). State environmental cleanup statutes are often modeled on the federal statute and may present similar risks of liability. Some state environmental cleanup laws explicitly impose liability upon officers or directors. See, e.g., Mass. Gen. Laws ch. 21E, § 2.

they have the financial ability to take "corrective action", i.e., clean up, and to pay third party bodily injury or property damage of at least $500,000.00 to $1,000,000.00 per spill or leak.

Owners and operators of hazardous waste treatment, storage, or disposal facilities (TSDFs) must demonstrate the financial ability to respond to claims for at least $1,000,000.00 per occurrence. TSDFs must also demonstrate they have the financial ability to meet their closure and post-applicable to specific industries.

C. Organize Loss and Liability Information

Potential loss information should be referenced chronologically according to the dates of shipment, use or disposal so that potential exposures can be correlated with applicable insurance policies. Any applicable financial responsibility obligations should be included among the current year's exposures. If environmental damage is known to have occurred the date or dates on which hazardous materials entered the environment (if known) and the date on which the damage was discovered should be identified. The dates of any notices of responsibility, claim letters, or requests for information that have been received by the company should also be noted.

Organization of environmental risk data enables a company to evaluate its risk transfer needs, select an insurance package that best meets the company's purposes, and identify any areas in which the company chooses to or must bear the risk of loss. Well-organized environmental risk data also enables the company to assess the impact that environmental insurance coverage issues will have on the company's overall risk.

Because the investigation and evaluation process, described above, may result in the collection and creation of sensitive data and evaluative statements, the company should consider involving counsel in the loss and liability exposure identification and evaluation process. Legal representation can serve two purposes. First, a lawyer knowledgeable in environmental matters may be able to identify risk activities or exposures of which the company is unaware. Second, communications between a lawyer and a client are protected as confidential and, except under extraordinary circumstances, need not be revealed to third parties. If one of the risks that the company has identified should materialize into a loss or liability, the company may want to keep confidential its pre-claim evaluation of its potential exposure.

D. Collect All Past and Present Insurance Policies

One of the most important tasks of the risk manager is to compile and maintain evidence of the company's insurance protection against potential liability arising in connection with past events or activities. Comprehensive general liability (CGL) policies, property damage policies, commercial automobile policies, and excess indemnity policies provide coverage for "accidents" or "occurrences" that result in injury or property damage during the

policy period. In other words, these policies provide coverage for damage that occurs during the policy period even though a claim may not be brought against the policyholder until long after the policy period ends.[2] Because environmental liabilities may be based on accidents or occurrences that took place over many years or many years ago, all of the company's insurance policies for previous periods should, if possible, be collected and maintained as valuable records. If the company has not maintained complete copies of all policies, it should attempt to obtain copies of its policies from its broker or agent for missing policy years.

E. Collect Secondary Evidence of Coverage if Policy is not Available

If neither the company nor the company's broker can locate original copies of policies purchased in prior years, other evidence of a policy's terms and conditions may permit the company to obtain the protection provided in a missing policy.[3] Information regarding the type of policy, name of the insurer, policy period, coverage limits, designated insureds, and locations covered by the policy, whether the policy was a standard form policy, and any special endorsements that would affect the application of standard policy provisions are particularly important.[4]

Such policy information may be obtained from:

- policies for the period immediately following the missing policy period;
- correspondence and claims files maintained by the company's broker or agent;
- broker accounting records or customer cards that may reveal dates, amounts, and policy numbers;
- copies of invoices submitted by the broker to the policyholder or insurer;

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[2] In contrast, claims-made policies provide coverage for claims that are brought against the policyholder and reported to the insurer during the policy period. Usually, the damage need not have occurred during the policy period for a claims-made insurer to be obligated to provide coverage.

[3] In order for a court to find coverage where the policy is no longer available, the policyholder must be able to show that a policy was issued and explain its terms and conditions. Emons Indus. v. Liberty Mutual Fire Ins. Co., 545 F. Supp. 185, 188 (S.D.N.Y. 1982); Burroughs Welcome Co., 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986). An insurer seeking to defeat coverage on the basis on an exclusion must prove the existence of the exclusionary term in a missing policy. Id. at 1223; Emons Indus. Inc. v. Liberty Mutual Fire Ins. Co., 545 F. Supp. 185 at 189; Royal Insurance Co. v. Cohen, 125 S.E.2d 709 (Ga. 1962).

[4] See, e.g., Burroughs Welcome Co., 632 F. Supp. 1213 and 642 F.Supp. 1020, 1023 (S.D.N.Y. 1986) (letters discussing coverage, endorsements, and excess policies referring to missing policy sufficient evidence of coverage for summary judgment); Keene Corp. v. Ins. Co. of North America, 1981 WL 1753 (D.D.C. 1981) (summary judgment granted in support of insurer where underlying action involved products liability claim and policyholder could not produce evidence of products liability endorsement).

- originals or copies of excess indemnity policies which provide information concerning underlying primary policies on the "schedule of underlying insurance";

- agents, brokers, company risk managers, and other company employees who dealt with insurance or were involved in other claims and might be able to identify the insurance company or companies with whom the company dealt and the type or types of coverage purchased;

- insurance certificates issued to vendors, lessors, contracting parties or other persons with whom the company dealt or for whom it was obligated to obtain evidence of insurance; and

- correspondence, internal memoranda, and minutes of meetings that may contain information about the company's insurance program.[5]

F. Compile Insurance Policies and Secondary Evidence of Insurance

After all of the information on the company's coverage history has been located, the risk manager should prepare an insurance summary that identifies the names of insurers and types of policies issued to the policyholder; policy numbers; policy periods; coverage limits; deductibles; and what, if any, portion of the coverage limit has been exhausted by previous claims. The summary should be maintained by company personnel who are involved in environmental risk management, the procurement of insurance, or handling environmental claims against the company.

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[5] See Burroughs Welcome Co. v. Commercial Union Insurance Co. 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986) (as proof of insurance, policyholder introduced policies for two out of twelve periods, certificate of insurance letters referring to claims for product liabilities during the relevant years, endorsements, excess policies referring to primary coverage, and minutes of board of directors meetings recording company's decision to purchase products liability coverage); Zurich Insurance Co. v. Northbrook Excess and Surplus Insurance Co., 145 Ill. App.3d 175, 494 N.E.2d 634, 652 (1986), aff'd sub nom. Zurich Insurance Co. v. Raymark Industries, Inc., 118 Ill.2d 23, 514 N.E.2d 150 (1987) (to show insurance coverage, policyholder introduced "specimen" copy of policy and insurance ledger containing notation of premium payment); Emons Industries v. Liberty Mutual Fire Ins. Co., 545 F. Supp. 185 (S.D.N.Y. 1982) (policyholder's introduction of its statistical data card showing per accident and yearly aggregate limits, risk survey prepared by insurer's claims inspector, and affidavit of insured's president sufficient evidence of products liability insurance to defend insurer's motion for summary judgment). But see also United States Fidelity and Guaranty Co. v. Thomas Solvent Co., 683 F.Supp. 1139 (W.D. Mich. 1988) (generic forms and billing forms retained by insured's agent marked "Continental" introduced by one insurer seeking contribution from another insufficient to show coverage where other unrelated companies also are identified as "Continental", and where there was no information available on dates of coverage, policy amount, locations of insured premises and identity of named insured.)

II. PURCHASING INSURANCE TO TRANSFER ENVIRONMENTAL RISK: EVALUATING THE OPTIONS

A. Policy Selection

Once the company has identified its environmental exposure and financial responsibility obligations, the risk manager and the company's insurance broker should work together to identify risks that will be transferred in whole, risks that will be partially transferred, and exposures that the company is likely to continue to bear. In evaluating insurance and other risk transfer options, the risk manager should consider:

- the nature and extent of the risk to be insured;
- the purposes that the insurance is to serve;
- the types of policies, scope of coverage, coverage limit options, deductibles, and prices available to serve the required purposes;
- the extent to which other means of risk transfer or financial assurance mechanisms, such as trust funds or contractual indemnifications may be used to serve the company's risk transfer needs; and
- the extent to which self-insurance may be preferable to available coverage.

Once the company and broker have agreed upon an insurance program, the company should memorialize in writing its understanding of the risks that will be transferred. If a claim should later arise and the broker failed to purchase the requested coverage, the company may be able to recover its loss from the broker.[6] However, the company should not set forth its understanding of coverage exclusions in the letter, because if its understanding is imprecisely stated, or incorrect, the letter could be used by the insurance company to support a denial of coverage.[7]

B. Preparation of Policy Applications

Prior to purchasing insurance, companies are often required to prepare an insurance application. Insurance applications contain a variety of questions about an applicant's business

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[6] See, e.g., Duty and Liability of Real Estate Agent or Broker to Purchaser with Respect to Procurement or Transfer of Insurance Policy, 88 ALR 3d 1077 (1978); Goger, Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability Insurance Coverage Procured, 72 ALR 3rd 704 (1976); Trenkner, Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance, 64 ALR 3rd 398 (1975).

[7] See, e.g., Diamond Shamrock Chemicals Co. v. Aetna Casualty & Surety Co., 1988 HWLR 12,072 (N.J. Super. Ct. Ch. Div. Dec. 11, 1987) (finding risk manager's expectation that pollution would be excluded determinative, despite contrary ruling by other New Jersey courts).

operations and claims history. An insurance company may rely on the responses to application questions in deciding whether to insure a business or to issue special coverages, or in setting premiums.[8] A policyholder that has not submitted complete and accurate answers in its applications may find that when it files a claim with its insurer, the insurer declares that the policy is invalid.[9] Even where a policyholder's failure to provide information was not done with an intent to misrepresent, the insurer may be entitled to return the premium and avoid any coverage obligations.[10]

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.

C. Verification of Policy Terms

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[8] R. Keeton, and A Widiss, Insurance Law at 567 (1988).

[9] See, e.g., J.A.M. Associates of Baltimore v. Western World Insurance Co., 95 Md. 695, 622 A.2d 818 (1993), Nyasco Sports, Inc. v. Director, Federal Emergency Management Agency, 561 F. Supp. 864 (1983) (____); Inland Mutual Ins. Co. v. Davenport, 247 F.Supp. 387, 393 (1965) (____).

[10] See, e.g., M.G.L. ch. 175, §186 (non-disclosures on insurance applications that increase an insurer's risk of loss may relieve insurer of obligations under policy issued to insured). Although a few states will not rescind a policy unless the insurer proves that the policyholder intended to misrepresent material facts requested on the application, the majority of courts have permitted an insurer to rescind its policy where: (1) the policyholder provided incorrect information on an insurance application; and (2) the insurer relied on the incorrect information in its decision to insure or in its decision to issue the specific type of insurance contract to the policyholder. See, e.g., State Farm Mutual Automobile Insurance Co. v. Price, 181 Ind. App.258, 396 N.E.2d 134, 136 (1979); Crawford v. Standard Insurance Co., 49 Or. App. 731, 621 P.2d 583 (1980); see also Keeton R. and Widiss, A. Insurance Law at 570 (1988).

Once an insurance policy is issued, the risk manager should review the policy to ensure that it conforms to the coverage the company believed it was purchasing. The risk manager should pay special attention to the declarations page, covered property schedules, and any special endorsements. The "declarations" page is attached to the front of the policy and identifies types of coverage purchased, coverage limits, and the standard forms and endorsements that combine to form the policy package. The covered property schedules identify the locations that the insurer is insuring so it is important to verify that each location the policyholder wishes to insure is properly listed on the appropriate schedules. The company should immediately direct any questions to the broker.

Once the risk manager has verified that the policy issued is consistent with the coverage the company wished to purchase, the policy should be maintained in a secure location along with previous policies. It is often a good idea to ask the broker to maintain a complete copy as well in case the company suffers a casualty which destroys evidence of its insurance coverage.

III. THE POLICYHOLDER'S DUTIES IN THE EVENT OF AN OCCURRENCE, LOSS OR CLAIM

One of the critical responsibilities of the risk manager is to make sure that the company complies with the notice and cooperation obligations set forth in its insurance policies. An insurer that does not receive timely notice of an occurrence, loss or claim may be relieved of its obligation to defend and indemnify its policyholder.[11]

General liability policies require a policyholder to provide written notice to its insurer of occurrences and claims asserted against it. Property damage policies contain a similar provision requiring the policyholder to give immediate written notice of loss. Environmental impairment liability policies also contain similar notice requirements. In addition to these notice requirements, the company is required to cooperate and assist its insurers in investigating and settling third-party claims brought against the company.

A. Providing Notice of Occurrences

The standard form liability notice provision provides:

> In the event of an occurrence, written notice containing particulars sufficient to identify the policyholder and also a reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses, shall be given by or for the

[11] Sohm v. United States Fidelity & Guaranty Co., 352 F.2d 65 (6th Cir. 1965); McPherson v. St. Paul Fire and Marine Ins. Co., 350 F.2d 563 (5th Cir. 1965)

insured to the company or any of its authorized agents as soon as practicable. (emphasis added).

"Occurrence" is defined in general liability policies as an "accident including . . . exposure to conditions that results in property damage neither expected nor intended by the insured." Thus, the insured has a contractual duty to notify its insurers "as soon as practicable" after the company becomes aware that an accident or property damage has occurred, even if no claim has yet been brought against the company.

Courts have interpreted the phrase "as soon as practicable" to mean "within a reasonable time" after a policyholder becomes aware or should have become aware of an occurrence, in view of all the facts and circumstances of each particular case.[12] Accordingly, a company must ensure that all of its employees notify the company's risk manager or person responsible for filing claims with the company's insurers of any accidents or discoveries of environmental injury or property damage.[13]

Upon discovery of an accident, damage, or injury, the risk manager should collect the available information regarding the date of discovery of the accident or occurrence, potential cause(s) of the loss, actual or potential claimants, and the names and addresses of other parties who may also be responsible or have information about the accident.

Notice of the environmental occurrence, including a description of the incident or damage, the policyholder's connection to the occurrence, how the occurrence came to the policyholder's attention, and whether other parties have brought claims against the policyholder should be sent by the policyholder to all of its insurers who could conceivably be obligated to provide coverage. It is not always sufficient to simply notify the company's broker because the broker might fail to notify all of the relevant insurers due to negligence, ignorance, or because he does not feel that the claim will be covered. Moreover, brokers often use standard claim notification forms which may not be suitable for notifying an insurer of an environmental occurrence.

B. Inform Insurers of Significant Factual Developments

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[12] [Add late notice cases in lead paint filed.] State of New York v. Amro Realty Corp., 697 F. Supp. 99, 103 (N.D.N.Y. 1988); National Semi-conductor Corp. v. Allendale Mutual Insurance Co., 549 F. Supp. 1195 (D.Conn. 1982); American Records Pressing Company v. United States Fidelity & Guaranty Co., 466 F. Supp. 1373 (S.D.N.Y. 1979); Commercial Union Insurance Co. v. International Flavors and Fragrances, Inc., 822 F.2d 267, 272 (2d Cir. 1987).

[13] See e.g., [add lead paint cases] Security Mutual Ins. Co. v. Acker-Fitzsimmons Corp., 31 N.Y.2d 436, 293 N.E.2d 76, 78, 340 N.Y.S.2d 902 (1972) (a policyholder must "exercise reasonable care and diligence to keep himself informed of accidents out of which claims for damage may arise".)

Following its initial notice submissions identifying an occurrence or loss, the company should inform its insurers of any significant developments that could impact the company's potential liability. For instance, if a governmental agency prepares a preliminary site assessment or remedial investigative study, or issues a request for information to the company, the insurers should be informed and sent copies of documents that have been sent to the company. Informing the insurers of significant developments provides them with the opportunity to engage in early settlement negotiations. Insurers are often more willing to participate in a settlement agreement if they believe such participation will significantly resolve the insured's liability and avoid expensive coverage litigation.

Liability insurance policies prohibit a policyholder from making any payment, assuming any obligation, or incurring any expense other than for emergency first aid, without the approval of its insurers. Therefore, insurers must be informed of legal and significant factual developments and provided with an opportunity to initiate settlement or response actions. If an insurer has been informed of defense or settlement opportunities and refuses to defend or settle on behalf of the company, the company will not be penalized for acting on its own behalf.

C. Providing Notice of Claim or Suit

The standard form CGL policy, and most other standardized insurance forms require a policyholder to notify its insurer immediately upon receipt of a claim or suit.[14] In interpreting the policyholder's obligation to provide notice, courts typically construe the notice provision to require a policyholder to notify its insurer within a reasonable period of time in view of the facts and circumstances of the case.[15] However, because the policyholder usually has

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[14] The standard form CGL policy provides:

> If claim is made or suit is brought against the policyholder, the policyholder shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

Similarly, the standard form multi-peril policy provides:

> . . . "In case of loss the named insured shall: (a) give immediate notice of such loss to the Company . . . ."

[15] See, e.g., Gerrard Realty Corp. v. American States Insurance Co., 89 Wis.2d 130, 143, 277 N.W.2d 863 (1979) ("the words 'immediately,' 'forthwith,' 'promptly' and 'as soon as practicable' all require notice in a 'reasonable time'"); Compagnie dec Bauxites de Guinu v. Insurance Co. of North America, 724 F.2d 369, 374 (3rd Cir. 1983) (insurer must be given notice within a reasonable time under the circumstances regardless of the word "immediate" or similar language in the notice provision of a policy); Ziebar v. Middlesex Mutual Assurance Company, 549 F.Supp. 1318, 1320 (D.Conn. 1982) (terms such as "immediate" notice as used in insurance policies are "construed to damage or bodily injury occurred, the company should notify each of its insurers who could potentially be obligated to defend or indemnify it mean and require that reasonable notice be given under the

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unambiguous notice of a claim or suit against it upon receipt of a summons, complaint, or demand letter, the majority of courts have concluded that the failure of a policyholder to promptly notify its insurer of a claim or suit against it is unreasonable and will only be excused under extenuating circumstances.

The company's risk manager should promptly forward to its insurers copies of complaints, demand letters, governmental agency requests for information, notifications of potential or alleged liability, and similar correspondence from governmental agencies and/or private parties. If the company does not receive sufficient information from the claim letter to determine the date or dates on which the alleged property damage or bodily injury occurred, the company should notify each of its insurers, including excess indemnity insurers, that provided coverage during the time that injury or property damage could have occurred.

D. Demand that Insurers Defend or Settle Claims Brought Against the Company

As soon as a governmental agency alleges that the company is liable, and suggests that it participate in settlement negotiations with other potentially responsible parties, or orders it to undertake investigative or remedial action, the company should demand in writing that its insurer or insurers defend it against the alleged liability and settle on its behalf. The demand should outline in broad terms why the company believes that the insurer is obligated to defend and indemnify it. The demand letter should include the relevant coverage language in the insurance policy and sufficient facts about the occurrence to show that there is, at least, a possibility that the claim against the company falls within policy coverage. If there is applicable environmental caselaw on point, cases may also be sent.

E. A Policyholder's Duty to Cooperate with its Insurers

Following receipt of notice of an occurrence or claim or a demand for defense, insurers often demand that their policyholders answer extensive questions regarding the loss or potential liability. The answers to these questions will almost certainly be used by the insurer in making its coverage determination and, often, to support the insurer's intention to deny coverage or reserve its ability to deny coverage later. Accordingly, the policyholder can forward to its insurers existing documents that its insurer needs to conduct its investigation, but should be extremely cautious in making representations to its insurers without advice from counsel. While insurance policies require a policyholder to provide its insurer with reasonably obtainable information and to assist and cooperate in investigating the alleged liability, the policyholder should not be required to spend hundreds of hours answering dozens of questions

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circumstances"); National Semi-Conductor Corp. v. Allendale Mutual Insurance Co., 549 F.Supp. 1195, 1199 (D.C. Conn. 1982) (courts have construed insurance policy phrases such as "immediate notice" as meaning and requiring that notice be given within a reasonable time under the circumstances).

when its insurer has suggested that its legal interpretation of the policy will result in a refusal to defend or indemnify.[16]

After the company has made a good faith attempt to supply the information necessary for the insurer to make an initial determination of its duty to defend,[17] the policyholder should update the insurer from time to time regarding developments in the case. The policyholder may also wish to invite the insurer to review site or settlement related documents in the policyholder's offices, or its counsel's office. A policyholder is not obligated to xerox the thousands of documents that typically are generated in an environmental case where its insurer is not providing a defense.

IV. COORDINATING ENVIRONMENTAL LIABILITY AND COVERAGE ACTIONS

Once the company has forwarded to its insurers notice of a loss, claim, or suit against it, and its insurers have not responded by acknowledging coverage or agreeing to defend, the company should consider engaging counsel unless liability is almost certain to be extremely minimal. Early coordination of environmental and coverage issues can be critical to successful resolution of a coverage dispute. Key coverage issues are factually dependent upon, but legally distinct from, a policyholder's environmental liability. Protection of the defendant-policyholder requires a litigation or claim settlement strategy that addresses both environmental liability and insurance coverage issues.

CONCLUSION

In order to effectively manage its environmental liability risks, a company must be more actively involved in its insurance program than may have been necessary in other areas. A company-wide examination and assessment of environmental risks and risk transfer opportunities will provide the basis for implementing an effective risk management strategy and for identifying those risks which the company continues to bear. Such information enables the company to maximize the insurance opportunities available to it, provides on-going information on the risk exposures associated with various business activities, and helps to prevent unpleasant and expensive surprises.

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[16] Statements by an insurer that the policy does not cover abatement costs or non-instantaneous events are examples of legal positions that a policyholder is unlikely to change by an elaborate presentation of conditions at the site.

[17] Information relevant to the insurers determination of its obligation to defend could include complaints, Notices of Responsibility, claim letters, correspondence between the company and third party claimants and information to show that property damage could have taken place during the insurers policy period.