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A Reminder To Consider The Availability Of Historical Liability Insurance Policies When Facing Environmental Contamination Problems

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In recent years there has been considerable focus on the availability of new insurance products to address the risks posed by environmentally impaired properties. As a general matter, there are two types of products, those that cover third-party liability claims and those that are triggered when the cost to clean up environmental contamination exceeds a specified trigger. These are very useful products, and it is always worthwhile to consider these products when dealing with property that may be contaminated.

However, before purchasing one of these products, it is important to first determine whether your client has historical liability coverage that addresses the environmental risks. Historical coverage, of course, has received considerable attention over the years, and many companies have been involved in large, complex negotiations and litigations regarding the applicability of historical liability policies to environmental releases. However, because of the focus on new products, the availability of historical coverage is sometimes overlooked. This article is a quick reminder that when you learn of a new environmental contamination problem, it is a good idea to determine whether historical coverage is available. If it is, it could cover the costs to investigate and clean up the environmental problem.

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Most commercial general liability (CGL) policies issued over the past sixty-plus years provide coverage for property damage, which generally includes damage to the environment, such as damage to neighboring properties or to groundwater caused by releases of hazardous substances. Unfortunately, since about 1986, most CGL policies included what is often called an "absolute pollution exclusion" clause, which bars coverage for most environmental claims.[1]

However, depending on the state in which you are located, any insurance policy that was in existence when the initial release of hazardous substances occurred or that was issued after the release occurred, may provide coverage. Thus, for example, a release of a hazardous substance that occurred in 1970 has the potential to trigger coverage in any policy that was in existence in 1970 or that was issued subsequent to that date. Most policies issued prior to about 1972 did not contain pollution exclusions at all. Therefore, they are likely to provide coverage, and the carrier is likely required to pay for site investigation and cleanup.

In the early 1970s, insurance carriers started to include what is often referred to as a "sudden and accidental" pollution exclusion clause in CGL policies. This exclusion barred coverage for releases of hazardous substances unless the releases were "sudden and accidental." There has been considerable litigation regarding the meaning of the phrase "sudden and accidental," and it will not be addressed in detail here. Insureds have generally argued that the phrase only excludes damages that were expected or intended by the insured. Carriers, on the other hand, have generally argued that the term "sudden" has a temporal component so that only a release that was immediate in

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nature is covered. Courts throughout the country are split on this issue. However, the bottom line is that if there were any "sudden and accidental" releases, whatever that term means, prior to or during the policy period, then the carrier will likely be required to pay for investigation and cleanup.

Moreover, as long as there is a possibility that there was a "sudden and accidental" release, the carrier will likely be required to provide the insured with a defense. This is very important because, in California, and possibly in your state, the costs of investigation are considered costs of defense. Therefore, even if a "sudden and accidental" release cannot be documented, the carrier may well be required to pay for the site investigation if that investigation is also necessary for defense. Such investigations can be very expensive, and as a general matter, there is no limit to the amount a carrier is required pay to defend its insured. Therefore, a carrier that is required to defend must pay the full cost of the investigation, even if the cost of the investigation exceeds the policy limits. Thus, if the client purchased insurance coverage at any time prior to about 1986, it is likely to have insurance coverage that could cover the investigation or cleanup.

Indeed, even if your current client did not purchase its own coverage, or has exhausted its own coverage, it may be able to access insurance coverage purchased by others. A corporation should always consider, for example, whether a subsidiary, affiliated entity or newly acquired entity had coverage applicable to the environmental problem it is now facing. For example, your company may have exhausted its historical coverage. However, it may have merged, at some point in time, with another entity that had applicable historical coverage. A careful analysis of corporate history and insurance coverage may uncover policies that will cover the risks.

If the client was a landlord, it may have been an additional insured on policies that were issued to its tenants. Or, if a tenant had insurance and agreed to indemnify the landlord, the tenant's insurer may be required to indemnify the landlord under the "insured contract" provision of the policy. Even if your client was not an insured, other parties, including tenants, former tenants, neighboring property owners or others who caused releases of hazardous substances may have coverage that will cover their costs of the investigation and cleanup. In such a case, your client should consider how it might obtain the benefits of those policies.

The following example may be helpful. A client owned a shopping center and leased a unit to a dry cleaner. During a routine Phase II investigation performed to satisfy a potential lender, perchloroethylene was found in the soil. The landlord had its own general liability policies, dating back several years, which provided coverage. In addition, the current tenant had its own policies, which named the landlord as an additional insured. Therefore, the landlord had coverage under the tenant's policies and the tenant, which caused some of the releases, had coverage as well. In addition, prior tenants also had insurance coverage dating back to the 1970s naming the owner as an additional insured. Therefore, the landlord and those tenants had coverage under those policies as well. Because of the time span involved, some of the policies had absolute pollution exclusion clauses, some had sudden and accidental pollution exclusion clauses, and some did not have any pollution exclusions. In the end, however, the carriers paid millions of dollars in investigation and cleanup costs, and the client was fully reimbursed for all of its costs and expenses.

However, determining whether there is coverage and obtaining that coverage requires careful assessment and planning. The policies first have to be located. In many cases, the policies were thrown away some years prior to the event. When this happens, the client may need to locate other evidence of the policies, such as receipts, checks used to pay premiums or other records. Once located, the policies need to be carefully evaluated to determine the nature and extent of coverage and the potential impact of exclusions. We have already discussed the potential impact of pollution exclusion clauses. We also note that liability policies are generally designed to protect the insured against claims by third parties and do not cover damages to the insured or the insured's own property. Thus, most liability policies contain an "owned property" exclusion. At first glance, this might appear to bar coverage for releases that occurred on the insured's property. However, if the releases threaten or affect groundwater, which, in California, is not considered property owned by the insured, or threaten or affect neighboring properties, the carrier should be required to provide coverage.

As a general matter, policies do not cover purely voluntary undertakings. The client must, therefore, be careful if it elects to proceed on its own or if the agency asks it to sign a voluntary cleanup agreement. Some policies require the carrier to defend both "suits" and "claims" against the insured. If so, the carrier is required to defend a claim by a third party, including a demand by a regulatory agency, even if no suit has been filed against the insured. However, most policies only require the carrier to defend if a suit is brought against the insured. If the regulatory agency demands cleanup, but does not sue, the defense obligation probably won't be triggered. However, there are steps that the insured may be able to take to trigger coverage. If the client who receives the demand sues a third party, such as a former tenant that caused the release, that party's insurance may be triggered. Moreover, if that party then counterclaims against the client, the counterclaim may also trigger the client's insurance coverage. Thus, obtaining coverage requires careful planning and consideration of the risks associated with any resulting litigation.

The bottom line is that many environmental investigation and cleanup costs may be covered by insurance, particularly if policies dated prior to about 1986 can be located. Therefore, when you learn that your client faces an environmental cleanup or investigation, you may want to advise your client to:

1. Search for all insurance policies and records that may evidence those policies;

2. Have located policies carefully evaluated to determine whether there is potential coverage;

3. Work with a person with the requisite expertise to structure the proceedings in a way that maximizes coverage; and

4. Avoid undertaking any actions that could jeopardize coverage.

If the client is able to locate policies and obtain coverage, many of the costs of investigation and cleanup may be covered by its historical insurance policies, thereby greatly reducing your environmental exposure.

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[1] *I say that most post-1986 policies have absolute pollution exclusions because I have seen only a few post-1986 policies without this exclusion. Every policy must be carefully reviewed to evaluate the potential for coverage.*