Taken to the Cleaners: The Importance of Insuring Environmental Pollution Cleanup and How Some Insurers Try to Avoid Coverage

Accidental environmental pollution is virtually unavoidable in our industrialized society, and insurance coverage for liabilities and cleanup plays a critical role in the economic and environmental health of the country. Small, medium, and large businesses throughout the United States rely on their insurers to help pay for the costs of monitoring and cleaning up pollution as well as damages the businesses may owe to third parties on account of such pollution. These damages can include money paid to injured neighbors as well as fines and cleanup ordered by regulatory agencies tasked with enforcing environmental protection laws. Through indemnification, insurance helps keep otherwise productive companies in business despite potentially large environmental liabilities. And the funds made available by insurance are used to pay for the actual environmental remediation and monitoring, which may be delayed or not take place at all in the absence of coverage.

Unsurprisingly, the question of when a third party claim against an insured "triggers" coverage under a general liability policy is often the subject of dispute. General liability policies are written to provide coverage for third party claims that allege property damage or bodily injury unless the type of damage or injury at issue is specifically excluded. This is in contrast to "named peril" insurance policies which only cover categories of risk that are explicitly enumerated (e.g., insurance that only applies to fire or wind). As a consequence of the "all risk" nature of general liability insurance – and with the discovery and subsequent increasing recognition of the damage caused by environmental pollution in the 1960s, 70s, and 80s – insurance companies became responsible for a wide range of environmental liabilities. This is a good thing from a public policy perspective: *general liability* insurance is designed to absorb and spread the cost of previously unforeseen or not fully understood risks.

But as a result, in the 1970s and 80s, the insurance industry began introducing a variety of exclusions that sought to limit coverage related to pollution. These exclusions and their specific wording gave rise to

many disputes and a wide body of case law interpreting the meaning of terms such as “sudden and accidental” as well as the scope of the so-called “absolute pollution exclusion,” which does not in fact exclude all liabilities related to pollution (particularly when insurance companies seek to expand the definition of “pollution” beyond its commonly understood meaning).[1]

Today, typical commercial general liability policies often limit coverage for certain pollution occurrences through exclusions. Insurance companies then sell endorsements for some insureds to re-provide the previously excluded pollution coverage. Unfortunately, this convoluted way of doing business often leads to abuse by insurance companies and undermines coverage for environmental liabilities.

For example, imagine a dry cleaner that purchased a special “dry-cleaners” pollution endorsement, for an additional premium, to counteract a standard pollution exclusion in the base form of their policy. The dry cleaner would likely and understandably believe that they had purchased similar coverage they would have had in the absence of the exclusion. In other words, coverage for lawsuits brought against the dry cleaner that allege pollution occurrences during the policy period. Imagine then the business owner’s surprise when the insurance company denies coverage on the grounds that a formal environmental pollution report was not completed until after the policy period ended (and therefore the contamination had not technically “manifested” during the policy period) even though the underlying lawsuit alleged that the hazardous contaminants were known to have been released during the time when the policy was in effect.

These sorts of slippery and technical arguments that undermine the reasonable expectations of the insured are unfortunately all too often thrown up as roadblocks to coverage. Indeed, United Policyholders is aware of two lawsuits against Sentry Insurance Company similar to the above hypothetical. *See*, *Morrow Corp. v. Harleysville Mut. Ins. Co.*, 110 F. Supp. 2d 441 (E.D. Va. 2000); *Casa Nido Partnership v. Kwon et al.*, 20-cv-07923-EMC (N.D. Cal. Jan. 20, 2022). In each case, different courts denied the insurance company’s motion to dismiss, finding that the allegations against the insured in the underlying lawsuit were sufficient for a plausible claim for coverage. The court in *Morrow* additionally held that the insurance company was responsible for defense costs in the underlying lawsuit.

While the correct result has been reached in each case so far, an individual insured should not be forced to sue its insurer to receive the benefits of coverage. This is particularly true when, as in *Morrow* and *Casa Nido*, a reasonable investigation by the insurer would have quickly shown that the allegations in the underlying lawsuit provided a potential basis for coverage and therefore clearly triggered the important

duty to defend.

Moreover, who knows how many similar claims were denied by the insurance company during the twenty years between the decisions in *Morrow* and *Casa Nido*. Many insureds do not have the wherewithal to pursue costly litigation against their insured. It is unfortunately sometimes lucrative for an insurance company have deny coverage for many similar claims and then play the numbers, confident that that costs of losing a few lawsuits is outweighed by benefit of escaping liability in each case where the insured is unable to sue or settles for a lowball offer.

While the plain meaning of the words of the insurance policy largely determines what is covered, it is important that adjusters and insurance industry lawyers construe endorsements broadly and evaluate coverage from the perspective of what a reasonable insured would understand the words to mean. While many insurance adjusters do uphold the principles of good faith and fair dealing in their work, it is an unfortunate reality that certain insurance companies appear to have a business model of peremptorily denying entire categories of claims without first conducting a reasonable investigation to determine whether there may be coverage. This behavior is particularly problematic when it relates to special endorsements sold to small-business policyholders that don't have the resources to employ risk managers to help them avoid coverage gaps but have a known need for pollution coverage.

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[1] United Policyholders has submitted over 30 "friend of the court' briefs on legal issues related to pollution coverage and exclusions.

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