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Insurance Coverage Alert!

News Concerning Recent Insurance Coverage Issues

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ENVIRONMENTAL COVERAGE AND COST RECOVERY: 12 SIGNIFICANT CASES OF 2004

By: Thomas M. Jones, Helen A. Boyer & Thomas J. Braun
Cozen O'Connor, 1201 Third Avenue • Washington Mutual Tower, Suite 5200 • Seattle, WA 98101
tjones@cozen.com • hboyer@cozen.com • tbraun@cozen.com

A. ENVIRONMENTAL COVERAGE

Deductible Must be Satisfied For Each Policy Period for Claim Under Consecutive Policies

In *Benjamin Moore & Co. v. Aetna Cas. & Sur. Co.*, 843 A.2d 1094 (N.J. 2004), the New Jersey Supreme Court dealt with the question of how deductible and self-insured retentions should be handled for long-tail claims. The insured claimed that it should only be obligated to pay a single deductible for a claim under a series of consecutive policies. Rejecting a "joint and several approach" to allocation for long-tail claims, the New Jersey Supreme Court reiterated its prior ruling that it would apply a pro rata allocation by years and limits. The Court held that the theoretical basis of such an allocation approach is the concept of multiple occurrences. *Id*. at 1101. Thus, the Court held that in cases of progressive injury there is a separate occurrence in each consecutive policy period, and the conditions of trigger, including payment of a deductible, must be independently satisfied for each period before an insurer's obligations for that period are triggered. *Id*. at 1106.

Diminution in Value Not Property Damage

In *Block v. Golden Eagle Ins. Co*., 17 Cal.Rptr.3d 13 (Cal. App. 2004), the California Second District Court of Appeal held that the reduced value paid to the policyholder in an eminent domain taking by the City of Long Beach because of environmental concerns at the site was not a claim for "damages." The policyholder argued that the diminished value of his land should be treated as a constructive expenditure. The court declined to adopt this argument, reasoning that the reduction in value of the land was essentially a first-party loss and that the eminent domain action

was not a suit claiming damages because the policyholder was not being asked to pay the city or to expend funds to clean up the site. *Id*. at 19.

Clean-Up Costs Are Damages

In *Helena Chemical Co. v. Allianz Underwriters Ins. Co*., 594 S.E.2d 455 (S.C. 2004), the Supreme Court of South Carolina joined the majority of states in holding that environmental cleanup costs incurred in response to an EPA letter identifying the insured as a PRP and requesting it to enter into a voluntary cleanup of the site was a claim for damages. The Court held that the "plain, ordinary meaning of damages" was broad enough to include such costs. *Id*. at 458. However, the Court also held that the claim was barred by the "sudden and accidental" pollution exclusion, because contamination from "routine business operations" was not unexpected or accidental, and therefore the claims did not fall within the exception to the pollution exclusion. *Id*. at 461.

"Accidental" Exception to Pollution Exclusion Met by Intentional Disposal Into Licensed Waste Containment Structure

In *Emerson Elec. Co. v. Aetna Cas. & Sur. Co*., 815 N.E.2d 924 (Ill. App. 2004), the Illinois appellate court was asked to interpret, under Missouri law, the meaning of the term "accidental" in a pollution exclusion with an "accidental" exception and the related concept of a loss being "unintended and unexpected from the standpoint of the insured" in the definition of occurrence. The court concluded that the term "accidental" and the occurrence definition were functionally equivalent. *Id*. at 948. The Court went on to conclude that the test for both terms was whether the insured, at the time of the act, subjectively intended or expected *resulting* harm to the environment. *Id*. The Court held that intentional disposal into a licensed waste containment structure could result in accidental pollution, and therefore the exception for "accidental" releases was met. *Id*. With respect to the "known loss" rule, the Court held that substantial certainty of harm or of pending government action at the policy's inception could render the loss known and therefore barred from coverage due to public policy considerations and the concept of fortuity. *Id*. at 952.

"Sudden and Accidental" Exception to Pollution Exclusion Focuses on Discharge; Exception Applied To Intentional Discharge Relying on Pollution Filtration System

In C*otter Corp. v. American Empire Surplus Lines Ins. Co*., 90 P.3d 814 (Colo. 2004), the Colorado Supreme Court considered the application of the sudden and accidental pollution exclusion to a uranium mining operation that had intentionally discharged its wastes into tailing ponds with the stated expectation that the soils under the ponds would filter contamination as the pond seeped. The Court affirmed the court of appeals, which held that the "sudden and accidental" language of the pollution exclusion focused on the discharge and not the damage. However, the Colorado Supreme Court held that where a policyholder expected a filtration system to prevent migration of contaminants off-site, the policyholder did not expect a "discharge" even if the policyholder expected seepage into its own soil. *Id*. at 830. On that basis the Supreme Court reversed the grant of summary judgment to insurers, finding a genuine issue of material fact with regard to Cotter's expectations. *Id*. at 835.

Smoke Not a Pollutant Under Pollution Exclusion

In *Allstate Ins. Co. v. Barron*, 848 A.2d 1165 (Conn. 2004), the Supreme Court of Connecticut considered a claim stemming from a fire at a home resulting in smoke inhalation deaths. The insurers moved for summary judgment arguing, in part, that the absolute pollution exclusion barred coverage. The Court addressed the status of smoke as a pollutant under the absolute pollution exclusion. The court noted that smoke was listed elsewhere in the policy as a covered cause of personal injury, and that smoke was not listed in the definition of a pollutant in the policy. *Id*. at 420. The Court went on to state that it was unable to find any case law in any jurisdiction that supported the contention that smoke in a house fire was excluded by a pollution exclusion with a "sudden and accidental" exception, noting that this was unsurprising given that house fires are typically either sudden and accidental or such claims are otherwise barred on the grounds of no occurrence or the application of a criminal act exclusion. *Id*. at 421-22. The Court held that because smoke was specifically listed in a grant of coverage and not specifically mentioned in the exclusion, smoke was not a pollutant for this policy. *Id*. at 422-23. It went on to hold that even if the deaths were caused by carbon monoxide, the exclusion would still not apply because otherwise the policy would only cover smoke that did not contain carbon monoxide and a policyholder would not have understood "smoke" to be so defined. *Id*. at 423.

Dust is a Pollutant

In *Allen v. Scottsdale Ins. Co*., 307 F.Supp.2d 1170 (Fed. Cir. 2004), the U.S. District Court for Hawaii held that "fugitive dust" from a concrete recycling plant was a "pollutant." The policyholder claimed that the dust in question was chemically neutral and that such "dust" cannot constitute a "pollutant" under a reasonable definition of the term. In a case of first impression, the Court examined Hawaii's pollution statutes and codes concerning "fugitive dust" and concluded that dust could be a pollutant. *Id*. at 1179.

Absolute Pollution Exclusion Applies to Lead Claim

In *Heringer v. American Family Mutual Ins. Co*., 140 S.W.3d 100 (Mo. App. 2004), the Missouri Court of Appeals analyzed whether injuries stemming from inhalation of toxic quantities of lead in paint were barred by the absolute pollution exclusion. The definition of "pollutant" in the policy included lead, but the policyholder urged the court to follow the example of other jurisdictions that had limited the exclusion to traditional, industrial pollution situations. The Missouri Court of Appeals declined to do so, finding that such a conclusion would require it to ignore the explicit language of the policy and read the word "environment" into the policy's language where it did not appear.

Injury in Fact Trigger Rule Applied to Migrating Contamination; All Policies During Exposure Period Triggered

In *EnergyNorth Natural Gas, Inc. v. Underwriters at Lloyd's*, 848 A.2d 715 (N.H. 2004), the Supreme Court of New Hampshire addressed the appropriate trigger for pollution claims under occurrence-based and accident-based liability policies issued from 1958 to 1985. Two early policies provided coverage for accidents; the later policies

covered occurrences. The insured asserted that damage resulted from inadvertent leaks and spills during the entire history of the plants' operation, from releases from unlined tar pits, and from the continuous migration of toxic wastes through soil and groundwater. *Id*. at 717. The Court determined that as a general principle, injury-in-fact was the proper trigger for occurrence-based policies. *Id*. at 719. However, the Court also concluded that the "occurrence" or "accident" in cases of alleged migration of toxic waste to third-party property was not, as insurers had argued, the discrete causative event, such as an individual leak, but more properly the continuous or repeated injurious exposure to the condition of migrating contamination. *Id*. at 720-22. Therefore, in the case of continuous migration of waste there would be multiple "injuries-in-fact" and all relevant policies during the exposure period would be triggered. *Id*. at 720.

Pollution Monitoring Costs Not Covered Damages

In *Mid-Continent Casualty Co. v. Third Coast Packing Co*., 342 F.Supp.2d 626 (S.D. Texas 2004), the Federal District Court, applying Texas law, considered insurer liability for voluntary pollution monitoring costs. The Court held that absent a lawsuit, costs incurred in monitoring pollution were not damages and took direct issue with other jurisdictions coming to other conclusions, holding the term unambiguously was not intended to cover such costs. *Id*. at 633.

B. ENVIRONMENTAL COST RECOVERY

The following cost recovery cases have the potential to impact coverage and claims handling.

Lawsuit Against PRP Required to Bring Contribution Claims Under CERCLA

In *Cooper Industries, Inc. v. Aviall Services, Inc*., 125 S.Ct. 577 (2004), the United States Supreme Court held that a private PRP cannot bring contribution claims under CERCLA § 113(f)(1), 42 U.S.C. § 9613(f)(1), unless the private party is first sued in a civil action or is the subject of an administratively or judicially approved settlement. Private parties that incur response costs voluntarily and are not themselves subject to suit do not have a cause of action for contribution under CERCLA § 113(f)(1). *Id*. at 584. The Court declined to decide whether a PRP could bring an action for contribution under CERCLA § 107, 42 U.S.C. § 9607, noting that a number of courts have held that a private party, even if it is an identified PRP, could not pursue a Section 107(a) action against other PRPs. *Id*. at 585. The Court remanded the case to the Fifth Circuit for further proceedings to determine whether Aviall had a right to contribution under § 107. *Id*. at 586.

CERCLA contribution actions following voluntary cleanups have been an increasingly common aspect of cost recovery litigation. Limiting the right to file contribution suits early in the process may discourage voluntary cleanups by owners or other PRPs, who may not have a right to seek contribution against other PRPs if they expend costs before they are sued in a civil action. This is the case even though they may receive a notice letter, various governmental directives, and even though they may be the subject of an administrative order requiring participation in a cleanup.

Delaying cleanup until suit is filed may increase litigation and remediation costs. On the other hand, under circumstances at certain sites, delayed cleanup can result in lowered costs.

As a result, under *Aviall*, an insured PRP who is targeted by the EPA may have a greater share of defense and remediation costs initially. Conversely, an insured who would otherwise face contribution may find that its exposure is decreased.

CERCLA Liability Indemnification Contract Upheld Against Federal Government

In *E.I. DuPont De Nemours & Company, Inc. v. United States*, 365 F.3d 1367 (Fed. Cir. 2004), the court determined that the federal government must reimburse DuPont the cleanup costs it incurred under CERCLA to remediate contamination left behind at the Morgantown Ordnance Works plant that it had built and operated for the government during World War II. The government and DuPont entered into a contract that included an indemnification clause in favor of DuPont for bodily injury and property damage arising out of the performance of work at the plant. *Id*. at 1369-70. The EPA notified DuPont in 1984 that it was proposing to place the plant on the National Priorities List for cleanup pursuant to CERCLA. Subsequently, DuPont filed an action against the United States seeking reimbursement under the indemnity contract for a portion of the attorney and consulting fees associated with its investigation. *Id*. at 1371. The court ordered the United States to reimburse DuPont for a portion of the costs incurred. The court held that the indemnification clause was "clearly sufficiently broad on its face to include DuPont's CERCLA-related liability." *Id*. at 1372.

If you have questions about any of the topics discussed within this Alert!, please contact any of the following:

Ann Thornton Field, Chair
National Insurance Litigation Department
Philadelphia PA,
afield@cozen.com or 215.665.2752

William P. Shelley, Vice Chair
National Insurance Litigation Department
Philadelphia, PA
wshelley@cozen.com or 215.665.4142

Thomas M. Jones, Co-Chair
National Insurance Coverage Practice Group
Seattle, WA
tjones@cozen.com or 206.224.1242

Jay M. Levin, Co-Chair
National Insurance Coverage Practice Group
Philadelphia, PA
jlevin@cozen.com or 215.665.2782