CHAPTER 12
Using Old Insurance Policies as Weapons

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INSURANCE ARCHAEOLOGY

What Is It?

Insurance archaeology is the systematic recovery and analysis of insurance policies as far back as records will allow. Environmental liabilities that arise out of past business operations on a site may be offset by insurance coverage purchased at the time the worst pollution was taking place. This is the case because general-liability policies written from 1945 through 1985 often offer a great possibility for coverage. Once overlooked because they had long since expired, old policies are now recognized as vital assets worth millions of dollars that can make or break a real estate deal. Successful business managers are beginning to understand the benefits of taking advantage of brownfields statutory schemes while at the same time pursuing insurance proceeds to assist in funding site cleanup.

How Is It Done?

The first step is to look for insurance policies in the client's own records. The best evidence of coverage is the actual, executed insurance policy. If this type of primary evidence cannot be found, often an insurance archaeologist will locate "secondary evidence" of coverage, such as insurance certificates; partial policies; letters—with policy numbers on them—that are stored in garages, warehouses, and basements; management reports; corporate records; financial ledger entries; umbrella and excess-policy schedules; records maintained at Lloyd's of London; and correspondence, to or from insurance agents, that refers to coverages for particular time periods. Files maintained by brokers, agents, and reinsurer intermediaries are also places to locate coverage; the files often contain premium registers, declarations pages for coverages ceded to reinsurers, and other documents that evidence the existence of coverage. Corporate correspondence often provides valuable leads about the identity of past employees or brokers who have information about the company's insurance history. In addition, corporate lawyers and officers, as well as former risk managers, will provide

a wealth of information. Once the most knowledgeable people are located, the archaeologist will conduct interviews to identify as many leads as possible to piece together the insured's insurance history.

Generally, the burden of proving that insurance coverage exists is on the insured, as the party claiming coverage under the policy.[1] Once the insured can show the existence of a policy and can establish its loss, the contents of a lost or missing policy may be proven indirectly through secondary evidence, such as testimony or other documents tending to support the substance of the policy.[2] Insurance companies often assert they do not have a copy of the policy or know its contents because of document destruction procedures that are part of their normal course of business. However, for reinsurance purposes, many insurance companies keep records of policies they have issued for many decades after the expiration dates of the policies. Requesting that carriers specifically search their underwriting, claims, and reinsurance records should be part of any request for policies and evidence of policies.

MAKING A CLAIM UNDER OLD COMMERCIAL GENERAL-LIABILITY POLICIES

The Legal Basis for Such a Claim

The legal foundation for claims for cleanup costs to remediate a contaminated site is based in contract law. Insurance contracts, like other legal contracts, are construed to give effect to the intent of the parties at the time the parties entered into the contract. In most states, disputes that arise concerning the meaning of certain policy provisions, exclusions, and conditions are resolved in accordance with established contract-interpretation principles. Included in these principles is the well-established rule that the policy language should be construed to protect the reasonable expectations of the insured. Any ambiguity in an insurance policy is to be resolved against the insurance carrier.[3] This basic rule of contract construction is often referred to as the doctrine of *contra proferentem.*

Types of Policies under Which You Can Make the Claim

Claims for damages, including costs associated with the cleanup of property contaminated by pollutants, can be made under a number of different types of insurance policies. Though the earliest claims were tendered to carriers for payment under the comprehensive general liability (CGL) policies, there is a growing body of

law that has interpreted cases in which policyholders seek coverage under other types of policies, such as automobile and garage-liability policies, environmental-impairment liability policies, first-party property policies, and "personal injury" coverages.

Assignability of Insurance Policies

There is ample case law that examines when one corporation can be held the successor-in-interest to another corporation. A corporation that merges with, or purchases assets of, another corporation may become liable for the liabilities of the corporation with which it merged or from which it purchased assets. This raises two issues: (1) whether the successor corporation has the right to claim coverage under the predecessor corporation's policies, and (2) whether the successor corporation can recover under its own policies for liabilities that arose out of activities of the predecessor.

Most insurance policies contain a term providing that any assignment of interest under the policy does not bind the insurance company until the insurance company provides consent. Even with this "no assignment clause," courts have found that the clause does not prevent a successor from recovering under a predecessor's policies in the event of a statutory merger or consolidation.[4] Courts have held that the "no assignment clause" contained in the predecessor's policy will not bar coverage for liability transferred to a successor if the predecessor's policy would have provided coverage had the transaction not taken place.[5] A major rationale in these cases has been that the insurance coverage should follow the underlying liability, in spite of a "no assignment clause," when there is no increase in risk to the insurer.[6]

The issue of whether a successor corporation can claim coverage under its own policies for damage that arose out of a predecessor's activities is also important to understand when faced with the problem of contaminated property. Generally, an insurance company will not be required to provide coverage under the policies issued to the successor corporation that inherits a predecessor's liabilities, unless the policies issued to the successor are independently triggered by an insurable event.[6]

COVERAGE UNDER CGL POLICIES

The CGL form was first written in 1940 and had a very broad scope. The insuring agreement of such policies provided coverage for "bodily injury" and/or "property damage" resulting from an "accident." Most courts that have considered old "accident" policies have found that policies issued from 1940 to 1966 cover pollution damage

resulting from gradual causes.[7] In 1966, the National Bureau of Casualty Underwriters changed the coverage on the standardized form from "accident" to "occurrence." This significant change is discussed later in this chapter. In 1970, the Insurance Rating Board filed a pollution-exclusion endorsement that barred coverage for environmental damage unless the injury resulted from sudden and accidental happenings, commonly referred to as the "sudden and accidental" pollution exclusion. In 1973, the Insurance Services Office included the "sudden and accidental" pollution exclusion in its standardized CGL form. In 1985, the insurance industry adopted what is commonly referred to as the "absolute pollution exclusion." Though policies written after 1970 present additional issues for environmental-insurance recovery efforts, they are often issues that, like the many other defenses insurance companies consistently assert, can be overcome or at least compromised to attain the mutual goal of resolving such liabilities.

COVERAGE UNDER AUTOMOBILE POLICIES

Most commercial automobile-liability policies contain an insuring agreement providing as follows:

> The Company will pay on behalf of the Insured all sums the Insured shall become legally obligated to pay as damages because of
>
> a. bodily injury or
>
> b. property damage
>
> to which this insurance applies, caused by an occurrence and arising out of the ownership, maintenance or use, including loading and unloading of any automobile.

Motor vehicles are often used to transport waste to landfills. Policyholders contend that when a motor vehicle is involved in the discharge of pollutants, the resulting environmental liability may be said to arise out of the ownership, maintenance, or use, including loading and unloading, of a vehicle. Few cases have directly dealt with the applicability of motor-vehicle coverage in the environmental context. However, in at least one case, a court found that allegations that hoses were used to transfer materials between the underground tanks and trucks "arguably fall within the policy provisions of the automobile policies at issue." [8]

COVERAGE UNDER GARAGE-LIABILITY POLICIES

Garage-liability policies generally apply only to injury or damage arising out of the use of, or in connection with, the policyholder's garage operations. Very few courts have interpreted what constitutes a "garage operation" in the environmental context. Nevertheless, garage policies are still a potential avenue to pursue in making a claim.

COVERAGE UNDER ENVIRONMENTAL-IMPAIRMENT LIABILITY POLICIES

Environmental-Impairment Liability (EIL) policies were written in the 1970s and 1980s and were intended to cover situations that were not covered under CGL policies, which generally began to include standard pollution exclusions by 1972. There were several different types of EIL policies written in the 1970s, with most providing coverage for gradual, nonsudden contamination. Unlike occurrence-based CGL policies, which provide coverage for injuries that take place during the policy period regardless of when the loss is reported, EIL policies were almost always written on a "claims-made" basis. Claims-made policies provide coverage only when the claim against the insured is asserted against the insured during the effective policy period. The insuring agreement section of many claims-made policies requires that the insured also must report the claim to the insurer during the same policy period. Policies mandating that (1) a claim be asserted against the insured during the policy period and (2) the claim be reported to the insurance carrier during the policy period often result in more restricted coverage than the name of the coverage implies.

COVERAGE UNDER PERSONAL-INJURY SECTION OF THE CGL

Typical personal-injury coverage contains an insuring agreement that provides as follows:

> The insurer will pay on behalf of the insured all sums the insured shall become legally obligated to pay as damages because of injury (herein called "personal injury") sustained by any person or organization and arising out of one or more of the following offenses committed in the conduct of the named insured's business:
>
> Wrongful entry or eviction, or other invasion of the right of private occupancy . . . if the offense is committed during the policy period.

Environmental actions are often pursued by private parties or governmental agencies on theories of nuisance, trespass, or other theories related to interference with the use and enjoyment of property. In such cases, courts have recognized that trespass and nuisance will be deemed to have taken place as long as the pollutant is on the property or is interfering with the use or enjoyment of the property, from initial contamination through abatement.[9] In addition, personal-injury coverage generally contains its own specific terms, conditions, and exclusions. Significantly, several courts have held that the CGL pollution exclusion does not apply to personal-injury coverage sections contained in the CGL, which can strengthen a recovery strategy in a state with procarrier law on the pollution exclusion.[10]

COVERAGE UNDER FIRST-PARTY PROPERTY INSURANCE

First-party property insurance provides coverage to the insured for damage to property the insured owned or leased at the time the damage took place. The key to recovery is tendering a claim in which there has been direct physical loss to covered property, during the policy period, that is caused by an insured peril. In a "named perils" policy, the specific perils covered are enumerated, while "all risk" policies provide coverage for all perils unless specifically excluded. "All risk" policies ordinarily provide explicitly that the insurer will pay expenses for the removal of debris from covered property caused by a covered cause of loss. As construed by some courts, such debris-removal clauses cover the cost of cleaning up contaminated property.[11]

ACCIDENT VERSUS OCCURRENCE POLICIES

Before 1966, the standard-form CGL policy provided coverage on an "accident" basis. That is, pre-1966 CGL policies provided coverage for personal injury or property damage caused by an "accident," a term that in most cases was not defined. Since 1966, the standard-form CGL policy has provided coverage for all sums the insured becomes legally obligated to pay as damages due to an "occurrence." In the 1966 revision, "occurrence" was generally defined as an accident, including "injurious exposure" to conditions that, during the policy period, results in bodily injury or property damage neither expected nor intended from the standpoint of the insured. Subsequent CGL policies often define "occurrence" to include a continuous or repeated exposure to conditions that results in bodily injury or property damage. The "occurrence" language

is generally understood to provide broader coverage than the former "accident" language.[12]

DEFENSES INSURANCE COMPANIES OFTEN USE TO AVOID LIABILITY UNDER CGLs

Who Qualifies as an Insured?

Determining who qualifies as "the insured" has been the source of much debate and is especially important if the company named as the insured in the old CGL policy is no longer in existence or is bankrupt. The first place to turn is the definitions section of the policy. Many courts have held that a successor corporation may succeed to the benefits of the insurance polices issued to the acquired corporation despite "no assignment" clauses.[13]

Late Notice

CGL policies generally contain a provision that requires the insured to provide written notice to the insurer of an occurrence "as soon as practicable" and to give notice of a claim or suit "immediately." The standards for determining whether notice was given on a timely basis differ from state to state and will depend upon the facts of the particular case. The trend has been to move away from a strict contractual construction of the provision toward a more reasonable rule requiring the insurer to show prejudice by reason of the late notice to bar coverage. States requiring prejudice to the insurer to bar coverage include Alaska, Arizona, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Massachusetts, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, Washington, West Virginia, and Wisconsin.[14]

Cleanup Costs Constitute Equitable Remedies, Not Legal Damages

For several years insurers argued, and many courts agreed, that response costs recoverable under environmental statutes constituted equitable (injunctive) relief and thus were not "legal damages" as required under the insuring agreement of liability policies. However, there has been a swing in favor of policyholders, with the majority

of courts now finding that sums an insured is required to pay for remediation, either directly or as reimbursement to a governmental agency, constitute "damages" as required under the insuring agreement of most policies.[15]

No Property Damage

The definition of property damage is also used by insurance companies to argue that coverage is precluded under CGL policies. CGL policies issued after 1973 often contain the following definition of property damage:

> (1)Physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or
> (2) Loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.

Insurers argue, with limited success, that costs incurred by a policyholder to comply with governmental orders to remediate soil and groundwater contamination do not meet the definition of property damage but rather are claims for economic loss. Several courts have held that costs incurred by a policyholder to modify business operations to prevent future emissions of pollutants do not constitute claims for property damage.[16] Even carriers who concede that response costs constitute legal damages because of property damage generally assert that they may not be liable to indemnify the policyholder because the property damage did not take place during the policy period, as required under the definition of property damage. This "trigger" argument has resulted in courts creating four different theories regarding when bodily injury or property damage takes place, so they can determine which policies are triggered.

1. *Exposure theory:* Most often associated with bodily injury cases, including the first asbestos cases, coverage is said to be triggered in all policies in effect during the time exposure to harmful substances took place.[17]
2. *Manifestation theory:* Coverage under the manifestation theory is triggered by the policy in effect at the time the bodily injury or property damage is discovered.[18] The seminal case that first applied the manifestation theory in an asbestos bodily injury case is *Eagle-Picher Industries, Inc. v. Liberty Mutual Insurance Co.*, 682 F.2d 12 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983). The manifestation theory often ends up being the most restrictive theory in pollution cases because only one policy is ordinarily triggered, as whereas under other theories the loss will

typically trigger several carriers' policies. In addition, the policy triggered is often one that was in effect after 1985, when the so-called "absolute pollution exclusion" was commonly contained in CGL policies.

3. *Injury-in-fact theory:* Under this theory, each policy in effect during the time the bodily injury or property damage is sustained, up until the date of the discovery of such damage or injury, is said to be triggered.[19]
4. *Continuous (*or *triple trigger) theory:* Under this theory, all policies on the risk, beginning at the time of first exposure through the date of manifestation of the injury or damage, are triggered. This theory was also first set out in an asbestos bodily injury case.[20] A California court extended the continuous trigger to include "all policies in effect from the first exposure until date of death or date of claim, whichever occurs first."[21]

Lack of an Occurrence

CGL policies generally obligate the insurers to indemnify the insured for all sums the insured becomes legally obligated to pay as damages because of bodily injury or property damage caused by an occurrence. Most CGLs define an occurrence as

> an accident, including a continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage *neither expected nor intended from the standpoint of the insured.*

Insurance coverage disputes involving CGL policies often turn on the issue of whether the injury or damage for which an insured seeks coverage was expected or intended by the insured. In determining whether bodily injury or property damage was unexpected or unintended, and therefore within the definition of an occurrence, several courts have looked to the resulting damage rather than the act that gave rise to the damage. A number of courts have found an occurrence in cases in which the act that gives rise to the damage was intentional, but the resulting damage was unintentional.[22] However, if an insured knew or should have known that there was a substantial probability that certain injurious results would follow from its acts or omissions, coverage may be barred. In recent years, the issue of whether a subjective or objective standard should be applied has been hotly debated, with no clear trend in the courts.

Application of the Pollution Exclusion

Insurers almost always assert the pollution exclusion as a bar to coverage in policies

that contain a pollution exclusion. The standard pre-1986 pollution exclusion in most CGL policies provides that coverage does not apply to bodily injury or damage arising out of the discharge, dispersal, release, or escape of pollutants or contaminants unless the discharge is sudden and accidental. Drafting-history documents concerning the meaning of the pollution exclusion have been introduced to support the policyholder view that the exclusion is merely a restatement of the definition of occurrence and bars coverage only for environmental impairment that is expected or intended.[23] A growing number of courts have found that the term "sudden" in the exception to the pollution exclusion includes a temporal element.[24] Another frequently litigated issue is whether the sudden-and-accidental exception to the pollution exclusion refers to the discharge in the initial dumping of waste or the discharge of leaching contaminants from the site.[25] Most courts have indicated that it is the initial release or discharge into or upon land that must be sudden and accidental to avoid the application of the pollution exclusion.[26]

After 1986, CGL policies generally contain what is commonly referred to as an "absolute" pollution exclusion. This exclusion eliminates the sudden-and-accidental exception language contained in the pre-1986 pollution exclusion. The majority of courts have held that this exclusion bars coverage for bodily injury and property damage arising out of pollution claims. However, some courts have held that the so-called "absolute" pollution exclusion is not a bar to coverage in all situations.[27]

Application of the Owned-Property Exclusion

CGL policies generally contain an "owned-property" exclusion, also known as the "care, custody, and control" exclusion. This exclusion precludes coverage for damage to property "owned, occupied by, or rented to" the insured, or to property in the "care, custody, or control of the insured, or to premises alienated" by the insured. The exclusion was intended to clarify that policies do not provide coverage for first-party situations that warrant coverage under the first-party property section of the policy. However, some courts have held that if there is groundwater contamination, the exclusion does not apply because contamination to groundwater goes beyond damage to property that is owned by the insured. Similarly, some courts have also held that the owned-property exclusion does not apply in instances where on-site remediation is being performed to prevent off-site contamination.[28]

Application of the Voluntary-Payment Provision

The typical voluntary-payment provision contained in CGL policies before 1986 provides as follows:

> The policyholder shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.

The primary purpose of the voluntary-payment provision in CGL policies is to protect the insurer from the risks of collusive settlements between the policyholder and an injured third party.[29] Several courts have held that insurers must indemnify policyholders for costs incurred by policyholders who remediate a site to avoid litigation with governmental entities. Some courts have also indicated that the insurer must indemnify the policyholder who voluntarily remediates a site to avoid fines or penalties from a governmental entity. This can be a significant issue, because under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA),[30] a person who fails, without sufficient cause, to provide removal or remedial action is potentially liable for up to three times the costs incurred by the government, if the government undertakes the cleanup itself. In at least one case, the court held that even though the policyholder materially breached its obligation to obtain the insurers' consent to pay for cleanup costs at a site, that breach did not allow the insurers to avoid coverage without a showing by the insurers that they had been substantially prejudiced.[31]

HOW MUCH COVERAGE CAN YOU GET?

The answer to how much coverage one can tap depends on several issues, including (1) the number of policies triggered, (2) the number of "occurrences," and (3) whether the applicable policies contain aggregate limits for operations coverage. Once multiple policies are held triggered, either because of multiple "occurrences" or continuing property damage, courts must determine how to apply the limits of the multiple policies to the underlying claim.

In addition to an aggregate (or total) limit of liability, most policies have a "per occurrence" limit of liability. In some cases, policyholders have been successful in increasing the number of occurrences, thereby expanding the amount of coverage available. Determining the number of occurrences causing property damage for which the policyholder may be liable can have a significant impact on the amount of

insurance available to a policyholder. A majority of courts have looked to the cause of the property damage rather than the number of claims that result from the property damage. Under such an analysis, courts have found only one occurrence when there is one proximate, uninterrupted, and continuing cause that results in all the injuries and damage, even though several discrete items of damage resulted.[32] The focus of the analysis is the cause of the accident rather than its effect. A minority of jurisdictions look to the results of the event in calculating how much coverage will apply.

Stacking

In the area of cumulative-injury, toxic-tort cases (including hazardous waste and pollution claims), stacking policy limits means that if more than one policy is triggered by an occurrence, each policy can be called upon to respond to the claim, up to the full limits of the policy. Stacking allows the limits of every triggered policy to be added together to determine the amount of coverage available for a claim.

Allocation issues that deal with the ultimate financial implications of the environmental claim become important only after resolving the issues of which policies are triggered. Several recent decisions addressing allocation issues in the environmental area have applied methodologies that apportion responsibility to the policyholder for those periods with gaps in coverage. Coverage gaps may be the result of various factual scenarios, including periods of time in which a policyholder was self-insured or coverage was not purchased or no longer exists due to previous exhaustion of limits by claim payments or settlements, insolvencies, missing policies, and commutations. The application of the continuous trigger of coverage resolves insurance companies' concerns about being singled out to pay all the costs associated with a cleanup under the policyholders' preferred joint and several liability theory.[33]

Additional allocation issues are raised by the applicability of excess coverages. In *Owens-Illinois, Inc. v. United Insurance Co.,* a case involving the interpretation of when an excess carrier's policies must pay, the court adopted a continuous trigger in determining that the fair method of allocation includes an analysis of both time on the risk and degree of risk assumed.[34] The court also held that when there are different layers of coverage, all available primary coverage must be exhausted before excess coverages can be tapped. The implication seems to be that, as excess carriers assume a smaller degree of risk than primary carriers, the liability of excess carriers should reflect the lesser risk they assumed.

The court's rationale for triggering excess coverage was based on an asbestos property-damage case, *United States Gypsum Co. v. Admiral Insurance Co.*, in which the court cited the "other insurance" provision to determine that all triggered and available primary coverage must be exhausted before tapping into coverages provided by excess policies.[35] The "other insurance" provision typically provides that if other valid and collectible insurance with any other insurer is available to the insured, covering a loss also covered by the policy at issue, the insurance afforded by the policy at issue shall be in excess of such other insurance.

In a case interpreting *Owens-Illinois*, the court in *Carter-Wallace, Inc. v. Admiral Insurance Co.* discussed allocation methods and found that a "proportionate" method of allocation would be consistent with *Owens-Illinois*.[36] Under this method, each policy within a year would be responsible for a portion of the loss based on its policy limits. However, the court remanded the case without deciding the precise allocation method to be applied.

A related issue is the effect of settlements upon nonsettling carriers. In *UMC/Stamford v. Allianz Underwriters*, the New Jersey Superior Court held that an excess carrier is entitled to a settlement credit based on "the amount allocable to the primary under its policies" rather than the actual amount received in settlement.[37] One implication of this ruling is that an insured settling with any of its carriers for less than the full amount of the policy limits cannot obtain recoveries from nonsettling carriers in excess of their proportionate share. Conversely, nonsettling carriers cannot receive any settlement credit from an "excessive" settlement with primary carriers. Of note, the court rejected the claims of nonsettling excess carriers that they were entitled to know the terms of the settlement to ensure that the insured did not receive a windfall, that all underlying coverage had been properly exhausted, and to pursue their contributions claims.[38] The court's rationale ultimately upheld the confidentiality of the settlement terms, invoking New Jersey's public policy interest in promoting the settlement of litigation.

A similar approach was adopted by the Appellate Court of Illinois in *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*[39] In that case, the insured protested the court's allocation of moneys obtained in settlement with its primary insurers. The court upheld an allocation of a settlement credit based upon the primary carriers' per occurrence limit of $250,000 per year, multiplied by the number of policy years the carriers were on the risk. Again, the court did not allocate the actual settlement moneys

received, but applied a settlement credit based on the time-on-the risk allocation model.

GOOD APPROACHES IN NEGOTIATING SETTLEMENTS WITH INSURANCE COMPANIES

Before negotiating with the carrier or carriers who issued policies that may respond to property damage at a site, all the information related to costs that have been incurred to remediate a site, as well as estimates of what will be spent in future cleanup efforts, must be gathered. All the insurance information and history of the site or sites must then be collected. Then, under various allocation methods, the best demand for each carrier with potential exposure should be calculated. Although there are many different ways to allocate the carrier's exposure, some of the most well-established methods include pro rata share by time on the risk, pro rata by limits, pro rata by time multiplied by limits, and per capita (equal shares). There are endless ways to calculate a carrier's exposure, and knowing where to begin will depend largely upon how many sites are involved and how much money is at stake, as well as other factors. For instance, if there is excess coverage available but the amount of the loss does not reach the excess level, allocation methodologies that take into account excess layers of coverage will be of little benefit.

A meeting with the carrier should be arranged to discuss resolving any coverage issues and to present a settlement demand. It may be helpful not to threaten immediate court action by joining forces with an expert in negotiating claims rather than litigating coverage issues. Negotiating directly with carriers without resorting to litigation can be fruitful if a representative that understands insurance issues and environmental issues goes to the negotiating table. However, if litigation must be initiated to get the carriers to the negotiating table, it should be stayed to reduce litigation costs while negotiating with the carriers. Critical terms and conditions of the settlement should be resolved before discussing settlement amounts. Very often, negotiations will fall apart after a number is reached if the parties find there was no meeting of the minds regarding what that number represents.

There are many types of settlements that carriers routinely enter with policyholders in the environmental context, including total policy "buybacks." This is the broadest type of release and should not be entered without careful consideration. The settlement should be limited to a property-damage release related solely to the

site(s) at issue. A settlement agreement that releases the insurance carrier for all bodily injury and property damage that arise out of the site should be avoided, especially without knowing about the possibility of future bodily injury claims related to the site. The scope of any release entered with the carrier must be as narrow as possible.

Structuring the settlement should also be considered. If the amount needed over a certain number of years is known (for example, for the long-term pumping and treating of groundwater at a site, or operation and maintenance costs), then the carrier's purchase of an annuity for future liabilities could be suggested.

Another key to negotiating an environmental claim is to be well informed about all parties to the negotiations. When developing a strategy to settle a claim or seek reimbursement of cleanup costs, one must consider some of the factors that affect the insurance industry as a whole, as well as what may be motivating the particular insurance companies at the negotiations.

Insurers are clearly interested in exchanging uncertainty for certainty when it comes to environmental claims, because they realize that to stay competitive (and / or not get gobbled up by stronger carriers), they must prove to market forces that they have recognized their liabilities and can pay environmental claims. Many insurance companies that issued commercial CGL coverage from the 1940s until the mid-1980s increasingly have been bowing to the growing pressure on the property-casualty industry—from securities regulators, insurance-ratings agencies, accountants, and shareholders—to quantify their environmental liabilities accurately. The property-casualty insurance industry today needs $40 billion to pay off its future environmental liability claims, and current reserving does not come close to this figure, according to a report released by Standard & Poor's.[40]

Though it is important to understand where the property-casualty insurers stand as an industry on environmental issues, it is also important to get as much "intelligence" as possible on the specific carriers at the negotiation table. For instance, if negotiating with Nationwide Mutual Insurance Company and its affiliates, it may be useful to know that Nationwide recently increased its reserves for potential environmental and asbestos-related liabilities by $1.1 billion.[41] This is not to suggest that Nationwide will be paying every environmental claim that is tendered to it, without an exhaustive investigation of each claim, but it is certainly a relevant piece of information to have at the bargaining table.

For the party involved in remediating brownfields, or simply a party with

environmental liabilities, old insurance policies can be part of the solution. In many cases, insurance coverage will provide monies to remediate contaminated property. Therefore, the identification of all insurance policies and pursuit of coverage under those policies should be part of any plan to address contaminated property.

NOTES

1. 21 JOHN A. APPLEMAN, INSURANCE LAW AND PRACTICE §12,094 (1980).
2. 19 COUCH, COUCH ON INSURANCE 2D §79:6 (1983).
3. *See, e.g.*, Liverpool & London & Globe Ins. Co. v. Kearney, 180 U.S. 132, 135–36, 45 L.Ed. 460, 21 S.Ct. 326 (1901); Albany Savings Bank v. Halpin, 117 F.3d 669 (2d Cir. 1997); Arkwright-Boston Mfrs. Mut. Ins. Co. v. Wausau Paper Mill Co., 818 F.2d 591 (7th Cir. 1987); Westchester Resco Co. v. New England Reinsurance Corp., 818 F.2d 2 (2d Cir. 1987); Union Ins. Soc'y of Canton, Ltd. v. William Gluckin & Co., 353 F.2d 946, 951 (2d Cir. 1965); Rhone-Poulenc Basic Chems. Co. v. American Motorists Ins. Co., 616 A.2d 1192 (Del. 1992).
4. Imperial Enters., Inc. v. Fireman's Fund Ins. Co., 535 F.2d 287 (5th Cir. 1976); Brunswick Corp. v. St. Paul Fire & Marine Ins. Co., 509 F. Supp. 750 (E.D. Pa. 1981); Chatham Corp. v. Argonaut Ins. Co., 334 N.Y.S.2d 959 (Sup. Ct. 1972); *see also* Maryland Cas. Co. v. W.R. Grace & Co., 794 F. Supp. 1206 (S.D.N.Y. 1991).
5. *See, e.g.*, Northern Ins. Co. v. Allied Mut. Ins. Co., 955 F.2d 1353, 1358 (9th Cir. 1992); National Am. Ins. Co. v. Jamison Agency, Inc., 501 F.2d 1125, 1128-30 (8th Cir. 1974); B.S.B. Diversified Co. v. American Motorists Ins. Co., 947 F. Supp. 1476, 1480-81 (W.D. Wash. 1996); Gopher Oil Co. v. American Hardware Mut. Ins. Co., No. C1-98-737 (Minn. Ct. App. Feb. 2, 1999).

   But see General Accident Ins. Co. v. Superior Ct., 64 Cal. Rptr. 2d 781 (Ct. App. 1997) (ruling that corporate successor liability for asbestos torts does not entitle it to predecessor's insurance coverage by operation of law); Quemetco, Inc. v. Pacific Auto Ins. Co., 29 Cal. Rptr. 2d 627 (Ct. App. 1994) (holding that company that succeeded to CERCLA liabilities as "mere continuation" of company that generated hazardous wastes at site could not obtain coverage under predecessor's CGL policies because transfer of insurance benefits would result in increased risk to insurers).
6. Idaho v. Bunker Hill Co., 647 F. Supp. 1064 (D. Idaho 1986); Upjohn Co. v. Aetna Cas. & Sur. Co., No. K. 88-124 CA (W.D. Mich. Sept. 9, 1991), 1991 WL 490026; Textron, Inc. v. Aetna Cas. & Sur. Co., No. 92-650 (R.I. Sup. Ct. Mar. 11, 1994); Johnson Controls, Inc. v. Employers Ins. of Wausau, No. 89 CV 016174 (Cir. Ct. Mil. Cty. Wis. Dec. 22, 1993); Aetna Life & Cas. Co. v. United Pac. Reliance Ins. Cos., 580 P.2d 230, 232 (Utah 1978).

7. Coverage under insurance policies sold from 1940 to 1970 includes pollution liability. *See* Morton Int'l, Inc. v. General Accident Ins. Co., 629 A.2d 831 (N.J. 1993), *cert. denied*, 114 S. Ct. 2764, *reh'g denied*, 115 S. Ct. 25 (1994).

Finding coverage: *see, e.g.*, Anchor Cas. Co. v. McCaleb, 178 F.2d 322 (5th Cir. 1949); Aetna Cas. & Sur. Co. v. Martin Bros. Container & Timber Prods. Corp., 256 F. Supp. 145 (D. Or. 1966); City of Myrtle Point v. Pacific Indem. Co., 233 F. Supp. 193 (D. Or. 1963); Moffat v. Metropolitan Cas. Ins. Co., 238 F. Supp. 165 (M.D. Pa. 1964); Employers Ins. Co. v. Rives, 87 So. 2d 653 (Ala. 1955); Moore v. Fidelity & Cas. Co., 295 P.2d 154 (Cal. Ct. App. 1956); The Travelers v. Humming Bird Coal Co., 371 S.W.2d 35 (Ky. Ct. App. 1963); White v. Smith, 44 S.W.2d 497 (Mo. Ct. App. 1969); City of Kimball v. St. Paul Fire & Marine Ins. Co., 206 N.W.2d 632 (Neb. 1973); Cosmopolitan Mut. Ins. Co. v. Packer's Supermarket Inc., 340 N.Y.S.2d 461 (N.Y. Sup. Ct. 1972); Lancaster Area Refuse Auth. v. Transamerica Ins. Co., 263 A.2d 368 (Pa. 1970); Taylor v. Imperial Cas. & Indem. Co., 144 N.W.2d 856 (S.D. 1966); Massachusetts Bonding & Ins. Co. v. Orkin Exterminating Co., 416 S.W.2d 396 (Tex. 1967).

Denying coverage: *see, e.g.*, Leggett v. Home Indem. Co., 461 F.2d 257 (10th Cir. 1972); American Cas. Co. v. Minnesota Farm Bureau Serv. Co., 270 F.2d 686 (8th Cir. 1959); Farmers Elevator Mut. Ins. Co. v. Burch, 187 N.E.2d 12 (Ill. App. Ct. 1962); United States Fidelity & Guar. Co. v. Briscoe, 239 P.2d 754 (Okla. 1951); Town of Tieton v. General Ins. Co., 380 P.2d 127 (Wash. 1963); Clark v. London & Lancashire Indem. Co., 124 N.W.2d 29 (Wis. 1963).

The Wisconsin Supreme Court reversed *City of Milwaukee v. Allied Smelting Corp.*, 344 N.W.2d 523 (Wis. Ct. App. 1983), *State v. Mauthe*, 419 N.W.2d 279 (Wis. Ct. App. 1987), and *Wagner v. Milwaukee Mut. Ins. Co.*, 427 N.W.2d 854 (Wis. Ct. App. 1988) in *Just v. Land Reclamation, Ltd.*, 456 N.W.2d 570 (Wis. 1990).

8. USF & G v. Thomas Solvent Co., 683 F. Supp. 1139 (W.D. Mich. 1988).

9. *See, e.g.*, Kitsap County v. Allstate Ins. Co., 964 P.2d 1173 (Wash. 1998); *see generally* Kirk A. Pasich, *Insurance under Personal Injury Provisions*, 3 ENVTL. CLAIMS J. 449 (1991).

10. *E.g.*, Titan Holdings Syndicate, Inc. v. City of Keene, 898 F.2d 265 (1st Cir. 1990); Titan Corp. v. Aetna Cas. & Sur. Co., 27 Cal. Rptr. 2d 47 (1994); City of Edgerton v. General Cas. Co., 493 N.W.2d 768 (Wis. Ct. App. 1992), *rev'd on other grounds*, 517 N.W.2d 462 (Wis. 1994); *but see* American Universal Ins. Co. v. Whitewood Custom Treaters, Inc., 707 F. Supp. 1140 (D.S.D. 1989).

11. Lexington Ins. Co. v. Ryder Sys., Inc., 234 S.E.2d 839 (Ga. Ct. App. 1977); Daniels v. Aetna Life & Cas. Co., No. IP 81-1413-C, 1983 WL 13684 (S.D. Ind. June 29, 1983).

12. United States Fidelity & Guar. Co. v. Morrison Grain Co., 734 F. Supp. 437, 443 (D. Kan. 1990), *aff'd*, 999 F.2d 489 (10th Cir. 1993) (quoting 11 G. COUCH, COUCH ON INSURANCE 2D, §44:285, at 437 (1982)).

13. Brunswick Corp. v. St. Paul Fire & Marine Ins. Co., 509 F. Supp. 750 (E.D. Pa. 1981); *see also* Imperial

Enters., Inc. v. Fireman's Fund Ins. Co., 535 F.2d 287, 292–93 (5th Cir. 1976); Paxton & Vierling Steel Co. v. Great Am. Ins. Co., 497 F. Supp. 573, 580 (D. Neb. 1980); Chatham Corp. v. Argonaut Ins. Co., 334 N.Y.S.2d 959 (Sup. Ct. Nassau County 1972); Aetna Life & Cas. v. United Pac. Reliance Ins. Co., 580 P.2d 230 (Utah 1978).

14. Irene C. Warshauer et al., *Late Notice in New York: Time for a Change*, 5 ENVTL. CLAIMS J. 199 (Winter 1992/93).

15. Dianne Dailey & Margaret M. VanValkenburg, *Environmental Liability Insurance Claims: Considerations in "Third-Party" Insurance*, 1995 Defense Research Institute 39.

16. *See, e.g.*, AIU Ins. Co. v. Superior Court, 799 P.2d 1253 (Cal. 1990); Hazen Paper v. United States Fidelity & Guar. Co., 555 N.E.2d 576 (Mass. 1990); Boeing Co. v. Aetna Cas. & Sur. Co., 784 P.2d 507 (Wash. 1990).

17. *See* Clemtex, Inc. v. Southeastern Fidelity Ins. Co., 807 F.2d 1271 (5th Cir. 1987); Commercial Union v. Sepco Corp., 765 F.2d 1543 (11th Cir. 1985); Porter v. American Optical Corp., 641 F.2d 1128 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); Insurance Co. of North Am. v. Forty-Eight Insulations, 633 F.2d 1212 (6th Cir. 1980); American Nat'l Fire Ins. v. B & L Trucking and Constr. Co., 951 P.2d 250 (Wash. 1998).

18. Safeco Ins. Co. v. Federated Mut. Ins. Co., 915 F.2d 1565 (4th Cir. 1990); Suburban Constr. Co., Inc. v. Hartford Fire Ins. Co., No. 90-379-D (D.N.H. July 23, 1992); Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995); Transamerica Ins. Co. of Mich. v. Safeco Ins. Co., 472 N.W.2d 5 (Mich. Ct. App. 1991); Home Indem. Co. v. Hoechst Celanese Corp., 494 S.E.2d 764 (N.C. Ct. App. 1998); Board of Educ. of Cleveland v. R.J. Stickle Int'l, 602 N.E.2d 353 (Ohio Ct. App. 1991).

19. *See, e.g.*, In re Prudential Lines, 158 F.3d 65 (2d Cir. 1998); Maryland Cas. Co. v. W.R. Grace & Co., 23 F.3d 617 (2d Cir. 1993); Inland Waters Pollution Control, Inc. v. National Union Fire Ins. Co., 997 F.2d 172 (6th Cir. 1991); Dow Chem. Co. v. Associated Indem. Corp., 724 F. Supp. 474 (E.D. Mich. 1989); Dextrex Chem. Inds. v. Employers Ins. of Wausau, 746 F. Supp. 1310 (N.D. Ohio 1990); Armstrong World Inds. v. Aetna Cas. & Sur. Co., 26 Cal. Rptr. 2d 35 (Cal. Ct. App. 1993); Outboard Marine Corp. v. Liberty Mutual Ins. Co., 670 N.E.2d 740 (Ill. App. Ct. 1996); Harford County v. Harford Mut. Ins. Co., 610 A. 2d 286 (Md. 1992); Gelman Sciences, Inc. v. Fidelity & Cas. Co., No. 105981 (Mich. Jan. 21, 1998); Cortland Pump & Equip. Inc. v. Firemen's Ins. Co. of Newark, 604 N.Y.S.2d 633 (App. Div. 1993).

20. *See* Keene Corp. v. Insurance Co. of N. Am., 667 F.2d 1034 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 1007, *reh'g denied*, 456 U.S. 951 (1982).

21. Montrose Chem. Corp. v. Admiral Ins. Co., 913 P.2d 878 (Cal. 1995); *In re* Asbestos Ins. Coverage Cases, Judicial Coordination Proceeding No. 1072 (Cal. Super. Ct. San Francisco May 29, 1987).

22. *See, e.g.*, Clemmer v. Hartford Ins. Co., 587 P.2d 1098 (Cal. 1978); Farmer in the Dell Enters. v. Farmers Mut. Ins. Co., 514 A.2d 1097 (Del. 1986); McGroarty v. Great Am. Ins. Co., 329 N.E.2d 172 (N.Y. 1975); Seniuk v. United States Fidelity & Guar. Co., 432 N.Y.S.2d 213 (App. Div. 1980); Town of Huntington v. Hartford Ins. Group, 415 N.Y.S.2d 904 (App. Div. 1979); Washington Hous. Auth. v. North Carolina Hous. Auths. Risk Retention Pool, 502 S.E.2d 626 (N.C. Ct. App. 1998).

23. *See* Steven G. Bradbury, *Original Intent, Revisionism and the Meaning of the CGL Policies*, 1 ENVTL. CLAIMS J. 279, 283–84 (1988).

24. *See, e.g.*, Mesa Oil, Inc. v. Insurance Co. of North America, 123 F.2d 1333 (10th Cir. 1997) ("sudden" has a temporal meaning); *see also* Dimmitt Chevrolet Inc. v. Southeastern Fidelity Ins. Corp., 636 So. 2d 700 (Fla. 1993), *reh'g denied*, 19 Fla. Law W. S166 (Mar. 31,1994); Lumbermans Mut. Cas. Co. v. Belleville Indus. Inc., 555 N.E.2d 568 (Mass. 1990); Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392 (Mich. 1991); Waste Management of Carolinas Inc. v. Peerless Ins. Co., 340 S.E.2d 374 (N.C. 1986); Northville Inds. Corp. v. National Union Fire Ins. Co., 679 N.E.2d 1044 (N.Y. 1997); Hybud Equip. Corp. v. Sphere Drake Ins. Co., Ltd., 597 N.E.2d 1096 (Ohio 1992).

25. *See, e.g.*, Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21 (1st Cir. 1997); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992); United States Fidelity & Guar. Ins. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1991), *aff'd*, 999 F.2d 489 (10th Cir. 1993); Standun Inc. v. Fireman's Fund, 73 Cal. Rptr. 2d 116 (Ct. App. 1998); Hinds v. Clean Land Air Water Corp., No. 96-1058 (La. Ct. App. 1997); Nat'l Ins. Co. of Omaha v. City of Woodhaven, 476 N.W.2d 374 (Mich. 1991); *but see* South Macomb Disposal Auth. v. Westchester Fire Ins. Co., No. 84-2686-CZ, at 22–23 (Mich. Cir. Ct. Jan. 31, 1994), *aff'd*, 1994 WL 687230 (Mich. Ct. App. Nov. 18, 1994); Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368 (Minn. Ct. App.), *review denied* (Minn. Mar. 26, 1992).

26. *See, e.g.*, Millipore Corp. v. Travelers Indem. Co., 115 F.3d 21 (1st Cir. 1997) (discussing sudden and accidental clause under recent Massachusetts law); Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir.), *cert. denied*, 113 S. Ct. 189 (1992) (initial discharge into ponds); United States Fidelity & Guar. Ins. Co. v. Morrison Grain Co., 734 F. Supp. 437 (D. Kan. 1991) (abandonment of pesticides and fertilizers in deteriorating building and burying similar materials in drums underground), *aff'd*, 999 F.2d 489 (10th Cir. 1993); Standun Inc. v. Fireman's Fund Ins. Co., 73 Cal. Rptr. 2d 116 (Ct. App. 1998); Hinds v. Clean Land Air Water Corp., No. 96-1058 (La. Ct. App. 1997); Nat'l Ins. Co. of Omaha v. City of Woodhaven, 476 N.W.2d 374 (Mich. 1991) (initial spraying of pesticides); *but see* South Macomb Disposal Auth. v. Westchester Fire Ins. Co., No. 84-2686-CZ, at 22–23 (Mich. Cir. Ct., Jan. 31, 1994) (for purposes of summary judgment motion, court will assume that insured "intended for the subject landfills to act as containers," and, therefore, filling of landfills did not constitute discharge into environment as defined in pollution exclusion), *aff'd*, 1994 WL 687230 (Mich. Ct. App. Nov. 18, 1994); Sylvester Bros. Dev. Co. v. Great Cent. Ins. Co., 480 N.W.2d 368 (Minn. Ct. App.), *review denied* (Minn. Mar. 26, 1992) (question is whether release from landfill, not initial dumping, is sudden and accidental).

27. *See* John A. MacDonald & Eugene R. Anderson, *The Pollution Exclusion: The Industry's Inconsistent Regulatory and Judicial Representations*, FOR THE DEFENSE, May 1995.

28. *See* Lakeside Non-Ferrous Metals, Inc. v. Hanover Ins. Co., No. 97-17034 (9th Cir. April 5, 1999); Intel Corp. v. Hartford Accident & Indem. Co., 952 F.2d 1551, 1565–66 (9th Cir. 1991); Paul Patz v. St. Paul Fire & Marine Ins. Co., 817 F. Supp. 781 (S.D. Wis. 1993), *aff'd*, 15 F.3d 699 (7th Cir. 1994); United States Aviex Co. v. Travelers Ins. Co., 336 N.W.2d 838, 843 (Mich. Ct. App. 1983).

29. *See, e.g.,* Augat, Inc. v. Liberty Mut. Ins. Co., 571 N.E.2d 357 (Mass. 1991); Coil Anodizers, Inc. v. Wolverine Ins. Co., 327 N.W.2d 416, 418 (Mich. Ct. App. 1982); Griggs v. Bertram, 443 A.2d 163 (N.J. 1982); Roberts Oil Co. Inc. v. Transamerica Ins. Co., 833 P.2d 222, 229 (N.M. 1992).
30. 42 U.S.C. §9601 *et seq.* (1988).
31. Roberts Oil Co. v. Transamerica Ins. Co., 833 P.2d 222 (N.M. 1992).
32. BARRY R. OSTRAGER & THOMAS R. NEWMAN, HANDBOOK ON INSURANCE COVERAGE DISPUTES §7.04, 163 (1994).
33. *See, e.g.,* Montrose Chem. Corp. v. Admiral Ins. Co., 42 Cal. Rptr. 2d 324 (Cal. 1995) (applying continuous trigger of coverage, court ruled that allocation would require contribution among all insurers on risk in proportion to their respective policy liability limits or time periods covered under each such policy); Gopher Oil Co. v. American Hardware Mut. Ins. Co., No. C1-98-737 (Minn. Ct. App. 1999); Northern States Power v. Fidelity & Cas. Co. of New York, 523 N.W.2d 657 (Minn. 1994) (court found that when damages resulting from soil and groundwater contamination are continuous, damage should be spread evenly over relevant period of time, with allocation on "pro rata by time on the risk" basis).
34. Owens-Illinois, Inc. v. United Ins. Co., 650 A.2d 974 (N.J. 1994).
35. United States Gypsum Co. v. Admiral Ins. Co., 643 N.E.2d 1226 (Ill. Ct. App. 1994).
36. Carter-Wallace, Inc. v. Admiral Ins. Co., 712 A.2d 1116 (N.J. 1998)(following *Owens-Illinois*).
37. UMC/Stamford v. Allianz Underwriters, 647 A.2d 182 (N.J.Super.L. 1994).
38. *Id.* at 191.
39. Outboard Marine Corp. v. Liberty Mutual Ins. Co., 670 N.E.2d 740 (Ill. App. Ct. 1996).
40. L. H. Otis, *Insurers Need $40 B to Pay Pollution Claims, S & P Says*, NAT'L UNDERWRITER, Oct. 30, 1995, at 1.
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