

TAB 5



The Six-Minute Environmental Lawyer 2014

Developments in Directors' and Officers' Liability for Environmental Contamination

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Agenda

- Recent Environmental Liability Case
- Potential Exposure for Companies including their D&Os
- What Coverage is currently available:
 - CGL (Commercial General Liability)
 - Environmental Insurance
 - Primary D&O
 - Excess Side A DIC (Difference in Conditions)
- Recommendations for Client Discussions

Directors and Officers and Environmental Liability

- D&Os potential liability for environmental remediation under various legislative statutes is not new
- Environmental regulators are becoming more aggressive/creative in their efforts to find parties to pay for pollution remediation costs
- They are willing to go after individual D&Os for these costs if the company itself is not willing/able to pay (eg in bankruptcy)
- Companies, including their D&Os, need to be more diligent than ever by making sure they understand:
 - Their known and potential environmental liabilities
 - How these liabilities are being managed
 - How current and potentially available insurance can help transfer some of the risk

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Recent Events

Northstar Canada, Cambridge, Ontario

- Discovered degreasing solvent and chromium in groundwater below and emanating from their aerospace parts manufacturing facility
- Carried out a voluntary investigation and remediation program until their precarious financial position caused the Ontario MOE to issue a remediation order in early 2012
- Company filed for CCAA and ceased remediation activities
- CCAA court held that MOE orders were stayed by CCAA proceedings leaving the MOE to pay ongoing remediation costs
- MOE issued a cleanup order naming certain current/former Northstar D&Os
- D&Os continued to responsible for ongoing remediation costs during an appeal and so they eventually settled for \$4.75 million plus approximately \$800K in costs incurred since order was filed

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Insurance Protection Generally Available
General Liability Insurance

- Most General Liability (GL) policies have some form of exclusion for claims related to pollution conditions
- Many insurers offer exceptions to this exclusion that range from limited (eg hostile fire) to fairly broad (eg so-called "sudden & accidental")
- Only respond to 3rd party claims and generally do not cover remediation of the insured's site/property
- Claims related to waste management activities and/or government mandated cleanups are generally not covered
- Older occurrence based GL policies that were written before insurers began excluding pollution in/around the mid 1980s may be a source of payment for historical pollution claims

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Insurance Protection Generally Available (cont.)
Environmental Impairment Liability (EIL) Insurance

- Coverage for historical and new pollution conditions
- Coverage for remediation costs, 3rd party Bodily Injury(BI) or Property Damage(PD), and related defence
- Definition of Insured includes former/current D&Os
- Challenge is known pollution conditions which are generally excluded but some insurers are willing to give back certain coverage on a case by case basis
- Currently working with a couple of insurers to craft an environmental policy that would pay out to D&Os where the company is not able to indemnify them
- Some insurers are willing to go excess/difference in conditions to fill in gaps left by other policies (eg CGL and/or D&O)

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Directors and Officers Insurance

- Although there may be some coverage for remediation under a D&O liability policy, **it is not intended to be a substitute for coverage provided under a GL or EIL policy.**
- **Primary D&O** - While some Primary D&O policies no longer contain a pollution exclusion, there are other provisions under the "conventional" policies that may preclude coverage for a variety of pollution scenarios. Most importantly there is an exclusion for;
 - **bodily injury or property damage and**
 - **clean-up costs**
- **Carriers responding to Northstar Case scenario;**
 - Endorsement that amends Definition of Loss to include Clean Up Costs where Insured Org is Financially Impaired (SIDE A Loss).
 - Some suggest they will also clarify within base wording, no endorsement as of yet.

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Directors and Officers Liability Coverage

- **Side A Difference in Conditions (DIC) wordings** - may allow for some pollution coverage by virtue of the absence of a pollution or BI/PD exclusion and silence in respect of clean-up costs. However, to date this has not been tested.
 - Confirmed no Clean- Up Costs exclusion within SIDE A/DIC Wording.
 - Those that may have a Clean-Up Costs Exclusion within SIDE A since their wording is a follow-form wording (follows any primary exclusion language)
- Check your broker on SIDE A/DIC wording currently on tower if unsure.**

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Environmental Liabilities and Insurance Coverage – a Recap

Risk vs Insurance	CGL Policy (incl. Excess and Umbrella)	EIL Policy	Corporate D&O Policy
Known Historical Pollution Conditions	Generally Excluded	Generally Excluded but coverage can be reinstated on case by case basis	Excluded but may offer defence
Unknown Historical Pollution Conditions	Generally Excluded	Generally Insurable (subject to availability of historical information)	Excluded but may offer defence
New Pollution Conditions	Generally Excluded with exception for S&A events and no onsite cleanup coverage	Generally Insurable for both gradual and S&A, both on and offsite.	Excluded but may offer defence
Regulatory Cleanup Orders	Generally Excluded	Generally Insurable (incl. Fines & Penalties where allowable)	Excluded but may offer defence

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Recommendations Discussions with Companies and their D&Os

- D&Os serving companies that can potentially produce and/or be exposed to environmental contamination related liabilities need to be duly diligent
- What this means depends on the company in question but generally D&Os should:
 - Identify and understand significant corporate environmental liabilities
 - Identify and understand potential personal environmental liabilities
 - Establish processes to ensure liabilities are addressed and monitored
 - Understand how environmental liabilities will be funded, reserved, financially assured, etc
 - Keep diligent records of board of directors oversight
 - Understand the insurance programs of the organizations they serve
 - Obtain appropriate legal advice

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Questions

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