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# New Issues in Environmental Risk Insurance

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degree from Case. He has authored other articles and frequently speaks on insurance coverage. He is admitted to the Pennsylvania and Ohio bars, as well as federal courts in those states. Mr. Howard is a member of a number of professional associations, including the American Bar Association, in which he is an active member of the Section of Litigation's Insurance Coverage Litigation Committee, co-chairing its Environmental Coverage Subcommittee.

The author acknowledges, with thanks, the substantial contribution to this article of Margaret A. Mackowsky, a former associate at Cozen O'Connor.

## Notes

†Comments expressed herein are those of the author and do not necessarily represent the views or opinions of any current or former clients of Cozen O'Connor. This article is intended to educate readers generally on certain issues and is not intended to provide legal or professional advice. Readers should not act or rely on information provided in this article without seeking specific legal advice on matters that concern them.

<sup>1</sup>Anthony W. Gentile, Using Insurance to Manage Your Environmental Liabilities, *Environmental Insurance: Past, Present and Future*, Fourth Annual Advanced ALI-ABA Course c

<sup>2</sup>See Ma... bl. 38, No. 42 Busin... L. See also Dave Le... ansfer Continui... Business Insuranc... mates that the m... years at a twen... ed with a decade... el").

<sup>3</sup>"Brown... lluted land to use, g... liability Insuranc... 3, Journal of Insuranc...



<sup>4</sup>See Michael Ha, Growing Demand, Rate Hikes Seen in Environmental Risk Market, National Underwriter Property & Casualty—Risk & Benefits Management Edition (3/17/03), available at 2003 WL 69821936; Environment—Getting Your Hands Dirty?, Post Magazine, at 211 (Feb. 27, 2003), available at 2003 WL 8530571; Paula L. Green, Insurers See Green in Brownfield Risk, Vol. 15, Issue 8 Global Finance, at 37 (Aug. 1, 2001), available at 2001 WL 11673408.

<sup>5</sup>See Ann M. Waeger, Current Insurance Policies for Insuring Against Environmental Risks, Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Fifth Annual Advanced ALI-ABA Course of Study, at 389, 396 (June 17-18, 2004) (hereinafter “Waeger”); Roberta G. Gordon, The Emerging Environmental Insurance Market, New Solutions to Environmental Problems in Business & Real Estate Deals 2003, at 698-99 (PLI 2003). Some of the newer, specialized environmental risk insurance coverages available include, but are not limited to, the following:

<sup>6</sup>Zuckerman, Tod I. & Raskoff, Mark C., Environmental Insurance Litigation, Practice Forms, § 7:8 (2004) (hereinafter “Zuckerman”) (quoting “Pollution Legal Liability Select Policy” form).

<sup>7</sup>Anthony W. Gentile, Using Insurance to Manage Your Environment Liabilities, Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Fifth Annual Advanced ALI-ABA Course of Study, at 389, 396 (June 17-18, 2004) (hereinafter “Gentile”).

<sup>8</sup>Id. § 7:8.

<sup>10</sup>Frazier, Robert J., Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Fifth Annual Advanced ALI-ABA Course of Study, at 389, 396 (June 17-18, 2004) (hereinafter “Frazier”), 2004 WL 1752580.

<sup>9</sup>George, Robert J., Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Fifth Annual Advanced ALI-ABA Course of Study, at 389, 396 (June 17-18, 2004) (hereinafter “George”), Issue 1, at 389, 396 (June 17-18, 2004) (hereinafter “George”).

<sup>11</sup>Waeger, Ann M., Current Insurance Policies for Insuring Against Environmental Risks, Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, Fifth Annual Advanced ALI-ABA Course of Study, at 389, 396 (June 17-18, 2004) (hereinafter “Waeger”).

<sup>12</sup>Zuckerman, Tod I. & Raskoff, Mark C., Environmental Insurance Litigation, Practice Forms, § 7:8 (2004) (hereinafter “Zuckerman”).

<sup>13</sup>2004 WL 1752580.

<sup>14</sup>Id. at 389, 396.

<sup>15</sup> Id. at \*5.

<sup>16</sup> 858 A.2d 39 (2004).

<sup>17</sup> See id. at 45.

<sup>18</sup> Flanigan, Jan. 1, 2004 Risk Management, *supra* (“More Options, Contractor's Liability Coverage”).

<sup>19</sup> Waeger, *supra*, at 408.

<sup>20</sup> Id. at 397.

<sup>21</sup> Zuckerman, *supra*, § 7:8 at 7-69 (quoting “Pollution Legal Liability Select Policy” form).

<sup>22</sup> Zuckerman, *supra*, § 7:8 at 7-69 (“Pollution Legal Liability Select Policy” form, “Insuring Agreements”) (emphasis added).

<sup>23</sup> Id. § 7:8 at 7-79 (quoting “Pollution Legal Liability Select Policy” form).

<sup>24</sup> See, e.g., *Boerman v. American Empire Surplus Lines Ins. Co.*, 50 Fed. Appx. 248, 2002 WL 31472440 (6th Cir. 2002).

<sup>25</sup> 718 F.

<sup>26</sup> Id. at

<sup>27</sup> 709 N.

<sup>28</sup> Id. at

<sup>29</sup> See *Ca*

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<sup>30</sup> No. 94

<sup>31</sup> 50 Fed

<sup>32</sup> Id. at

<sup>33</sup> 154 F.3

<sup>34</sup> Id. at 1052.



<sup>35</sup>22 F.3d 339 (1st Cir. 1994).

<sup>36</sup>Id. at 340.

<sup>37</sup>718 F. Supp. 839 (W.D. Wash. 1989).

<sup>38</sup>No. 04-10047 (D. Mass.) (Complaint filed June 15, 2004), reported in 3 No. 20 Mealey's Ins. Pleadings, at 12 (Jul. 27, 2004).

<sup>39</sup>See also 18 No. 35 Mealey's Litig. Rep. Ins., at 10 (Jul. 20, 2004).

<sup>40</sup>Zuckerman, *supra*, § 7:8 at 7-80 ("Pollution Legal Liability Select Policy" form).

<sup>41</sup>See *Gulf Underwriters Ins. Co. v. Gordian Environmental LLC*, No. M-04-402 (S.D. Tex.) (Complaint filed Nov. 18, 2004), reported in 4 No. 5 Mealey's Ins. Pleadings, at 15 (Dec. 7, 2004).

<sup>42</sup>See *id.*

<sup>43</sup>No. Civ. A. 02-3009, 2003 WL 715755 (E.D.La. Feb. 26, 2003).

<sup>44</sup>939 P.2d 483 (Colo. App. 1997).

<sup>45</sup>Id. at 490.

<sup>46</sup>Id.

<sup>47</sup>The contract policy did not contain any exclusion determining whether the policy generally enforces the insurance App. 2 (Colo. insurance

<sup>48</sup>Id.

<sup>49</sup>1996 W

<sup>50</sup>Id. at

<sup>51</sup>Id.



<sup>52</sup>Zuckerman, supra, § 7:8 at 7-80 to 7-81 (quoting “Pollution Legal Liability Select Insurance Policy” form).

<sup>53</sup>695 N.Y.S.2d 562 (N.Y. App. Div. 1999).

<sup>54</sup>718 F. Supp. 839 (W.D. Wash. 1989).

<sup>55</sup> Id. at 845.

<sup>56</sup>Zuckerman, supra, § 7:8 at 7-71 to 72 (quoting “Pollution Legal Liability Select Policy” form).

<sup>57</sup>939 P.2d 483 (Colo. App. 1997).

<sup>58</sup> Id. at 491.

<sup>59</sup> Id.

<sup>60</sup>718 F.Supp. 839 (W.D. Wash. 1989).

<sup>61</sup> Id. at 845 n. 8.

<sup>62</sup> Id. § 7:8 at 7-72 (quoting “Pollution Legal Liability Select Policy” form).

<sup>63</sup>2001 W. 070044 (E.D. Pa. 11-15-2001)

<sup>64</sup> Id. at

<sup>65</sup> Id. at

<sup>66</sup> Id. at

<sup>67</sup>Zucker

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<sup>69</sup> Id. at

<sup>70</sup>1997 W

<sup>71</sup> Id. at

<sup>72</sup> Id.

<sup>73</sup>943 F. Supp. 441 (D.N.J. 1996), aff'd, 127 F. 3d 1095 (3d Cir. 1997).



<sup>74</sup>See id. at 453.

<sup>75</sup> Id.

<sup>76</sup> Id.

<sup>77</sup> Id. at 458 (emphasis in original).

<sup>78</sup>See, e.g., *Yankee Caithness Joint Venture, L.P. v. Planet Ins. Co.*, 1996 WL 426359 at \*1 (S.D.N.Y. July 30, 1996)(noting differences between Nevada and New York law regarding the availability of punitive damages).

<sup>79</sup>See, e.g., *TerraMatrix, Inc. v. U.S. Fire Ins. Co.*, 939 P.2d 483, 490 (Colo. App. 1997) (applying New York law to decide obligations under a pollution liability insurance policy pursuant to that policy's choice of law provision, but Colorado law to determine obligations under CGL insurance policy).

<sup>81</sup> Id. at \*1.

<sup>80</sup>No. 94 Civ. 8939 (KMW), No. 1996 WL 426359 (S.D.N.Y. July 30, 1996).

<sup>82</sup>148 S.W.3d 109 (Tex. 2004).

<sup>83</sup>See id. at 113-14.

<sup>84</sup>Zucker

<sup>85</sup>147 W

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<sup>87</sup>See id

<sup>88</sup> Id.

<sup>89</sup>See *M*

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<sup>90</sup>E.g., *C*



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(2002).

<sup>91</sup>642 N.W.2d 80 (Minn. Ct. App. 2002).

<sup>92</sup>Id. at 87 (emphasis in original).

<sup>93</sup>Id. at 88 (citations omitted).

<sup>94</sup>600 N.E. 2d 176 (Mass. App. 1992).

<sup>96</sup>Id., 600 N.E. at 180-81 (citations omitted).

<sup>95</sup>Id. at 180 (citations omitted).

<sup>97</sup>No. L-97311-88 (N.J. Super., Union County, May 25, 1993), reported in 7 No. 34 Mealey's Litig. Rep. Ins., at 6 (Jul. 13, 1993).

<sup>98</sup>Zuckerman, supra, § 7:1 at 7-10 to 7-11 (quoting "Commercial General Liability Coverage Form").

<sup>99</sup>Id. § 7:8 at 7-76 (quoting "Pollution Legal Liability Select Policy" form).

<sup>100</sup>Id. § 7:9 at 7-86 to 7-87 (quoting "Cleanup Cost Cap Insurance Policy" form).

<sup>101</sup>Commerce and Industry Insurance Company "Contractors Pollution Liability Policy," Form 68089 (6/97), at p. 10 of 13 (American International Group, Inc. 1997).

<sup>102</sup>1996

<sup>103</sup>Id. at

<sup>104</sup>See id

<sup>105</sup>No. 0

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<sup>106</sup>S

<sup>107</sup>No. 3

Ins., at 7

<sup>108</sup>Id.

<sup>109</sup>See a

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court's ruling, in a case seeking coverage for pollution damage, that California law requires horizontal exhaustion before an excess insurer is required to defend or indemnify its insured).

<sup>110</sup>For a discussion and detailed analysis of insurance allocation issues, see William Shelley, Richard C. Mason and Nancy C. Thome, *Fundamentals of Insurance Coverage Allocation*, 14 No. 9 *Mealey's Litig. Rep. Ins.*, at 13 (Jan. 5, 2000).

<sup>111</sup>See *Sharon Steel Corp. v. Aetna Cas. & Sur. Co.*, 931 P.2d 127, 140 n. 19 (“Methods used by other jurisdictions include apportionment based on equal shares; apportionment based upon the premiums paid; or apportionment using a ‘maximum loss’ method”).

<sup>112</sup>110 F.Supp. 2d 441 (E.D. Va. 2000).

<sup>113</sup>*Id.* at 445.

<sup>114</sup>No. C-108-92 (N.J. Super. Middlesex Co.) (Order, Findings of Fact and Conclusions of Law), reported in 14 No. 23 *Mealey's Litig. Rep. Ins.*, at 4 (Apr. 18, 2000).

<sup>115</sup>*Id.*

<sup>116</sup>No. 86 Civ. 9671 (SWK), 1990 WL 9275 (S.D.N.Y. 1990).

<sup>117</sup>*Id.* at

<sup>118</sup>644 N

<sup>119</sup>See *id.*

<sup>120</sup>770 A

<sup>121</sup>*Id.*

<sup>122</sup>*Id.* at

<sup>123</sup>297 F

<sup>124</sup>See *id.*

<sup>125</sup>Zucke

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Policy”



<sup>126</sup> Id. § 7:9 (quoting “Cleanup Cost Cap Insurance Policy” form).

<sup>127</sup> 125 S. Ct. 577, 1606 Ed.2d 548 (2004).

<sup>128</sup> Id. at \*4. Section 113(f)(1) provides: § 9613. Civil Proceedings

(f) Contribution. (1) Any person may seek contribution from any other person who is liable or potentially liable under section 107(a) [42 U.S. C. § 9607(a)] during or following any civil action under section 106 [42 U.S.C. § 9606] or under section 107(a) [42 U.S.C. § 9607(a)]. Such claims shall be brought in accordance with this section and the Federal Rules of Civil Procedure, and shall be governed by Federal law. In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate. Nothing in this subsection shall diminish the right of any person to bring an action for contribution in the absence of a civil action under section 106 [42 U.S.C. § 9606] or section 107 [42 U.S.C. § 9607].

42 U.S.C. § 9613(f)(1).

<sup>129</sup> Cooper Indus., Inc. v Aviall Services, Inc., supra, 125 S. Ct. at 583-84, 160 L. Ed.2d at 559-60.

<sup>130</sup> Id., 1

<sup>131</sup> 297 F

<sup>132</sup> Id. (e

<sup>133</sup> Id. at

<sup>134</sup> See

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<sup>135</sup> See a

<sup>136</sup> 33 U.

<sup>137</sup> See A

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<sup>138</sup> See id.



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0, 2004).

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<sup>139</sup>See id.

<sup>140</sup>476 S.E.2d 481 (1996).

<sup>141</sup>Id. at 483-84.

<sup>142</sup>Id. at 490 (citations omitted).

<sup>143</sup>943 F. Supp. 441 (D.N.J. 1996), aff'd, 127 F.3d 1095 (3d Cir. 1997).

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