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New Issues in Environmental Risk Insurance


William H. Howard †

Pages 153-192 | Published online: 11 Feb 2011

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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

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¹Anthony W. Gentile, *Using Insurance to Manage Your Environmental Liabilities*, *Environmental Insurance: Past, Present and Future*, Fourth Annual Advanced ALI-ABA Course of Study, at 369, 371 (June 12-13, 2003).

²See Matt Scroggins, *Use of Cover Grows for EIL Exposures*; REBEX 2004, Vol. 38, No. 42 *Business Insurance*, at 4 (Oct. 18, 2004), available at 2004 WL 62677641. See also

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⁴See 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.

⁵See 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:

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

⁷Anthony W. Gentile, Using Insurance to Manage Your Environment Liabilities, Environmental Insurance, Emerging Issues and Latest Developments on the New Coverage and Insurance Cost Recovery, at 471, 476 (June 17-18, 2004).

⁸ Id. § 7:7, at 7-62.

¹⁰ Frazier, Robert J., Environmental Insurance, Practice Forms, § 7:10 (2004) (hereinafter “Frazier”), 2004 WL 1752580.

⁹George, Robert J., Environmental Insurance, Practice Forms, § 7:9 (2004) (hereinafter “George”), Issue 1, Risk Management, at 100 (PLI 2004).



¹¹Waeger, 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, at 389, 396 (June 17-18, 2004) (hereinafter “Waeger”).

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

¹³2004 WL 1752580.

¹⁴ Id. at 7-62.

¹⁵ Id. at *5.

¹⁶ 858 A.2d 39 (2004).

¹⁷ See id. at 45.

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

¹⁹ Waeger, *supra*, at 408.

²⁰ Id. at 397.

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

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

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

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

²⁵ 718 F. Supp. 839 (W.D. Wash. 1989) (unpublished decision).

²⁶ Id. at 841. (citation omitted).

²⁷ 709 N.Y.S.2d 553 (N.Y. App. Div. 2000)

²⁸ Id. at

²⁹ See *Case*, 1999 WL 10000 (N.Y. App. Div. 1999).

³⁰ No 

³¹ 50 Fed. Appx. 248 (6th Cir. 2002) (unpublished decision).

³² Id. at

³³ 154 F.3d 1052 (6th Cir. 2000)

³⁴ Id. at 1052.

³⁵22 F.3d 339 (1st Cir. 1994).

³⁶Id. at 340.

³⁷718 F. Supp. 839 (W.D. Wash. 1989).

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

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

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

⁴¹See *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).

⁴²See *id.*

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

⁴⁴939 P.2d 483 (Colo. App. 1997).

⁴⁵Id. at 490.

⁴⁶Id.

⁴⁷The court noted that, unlike the pollution liability policy at issue, the CGL policy did not contain a choice of law clause. Therefore, the court applied Colorado law to determine the applicable law. *Id.* at 490.

Further, the court noted that the CGL policy generally enforces the law of the state of Colorado. 2 (Colo. App. 1997). The court also noted that the insurance policies, generally, enforce the law of the state of Colorado.

⁴⁸Id.

⁴⁹1996 W

⁵⁰Id. at

⁵¹Id.



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

⁵³695 N.Y.S.2d 562 (N.Y. App. Div. 1999).

⁵⁴718 F. Supp. 839 (W.D. Wash. 1989).

⁵⁵ Id. at 845.

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

⁵⁷939 P.2d 483 (Colo. App. 1997).

⁵⁸ Id. at 491.

⁵⁹ Id.

⁶⁰718 F.Supp. 839 (W.D. Wash. 1989).

⁶¹ Id. at 845 n. 8.

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

⁶³2001 WL 872944 (E.D. Pa. May 15, 2001).

⁶⁴ Id. at *1.

⁶⁵ Id. at *2.

⁶⁶ Id. at

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⁶⁸1997 V

⁶⁹ Id.

⁷⁰1997 V

⁷¹ Id. at

⁷² Id.

⁷³943 F. Supp. 441 (D.N.J. 1996), aff'd, 127 F. 3d 1095 (3d Cir. 1997).



⁷⁴See id. at 453.

⁷⁵Id.

⁷⁶Id.

⁷⁷Id. at 458 (emphasis in original).

⁷⁸See, 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).

⁷⁹See, 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).

⁸¹Id. at *1.

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

⁸²148 S.W.3d 109 (Tex. 2004).

⁸³See id. at 113-14.

⁸⁴Zuckerman, *supra*, § 7:8 at 7-76.

⁸⁵147 Wash. 2d 148, 52 P.3d 494 (2002) (en banc).

⁸⁶712 S.C.

⁸⁷See id.

⁸⁸Id. at

⁸⁹See

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(2002).

⁹¹642 N.W.2d 80 (Minn. Ct. App. 2002).

⁹²Id. at 87 (emphasis in original).

⁹³Id. at 88 (citations omitted).

⁹⁴600 N.E. 2d 176 (Mass. App. 1992).

⁹⁶Id., 600 N.E. at 180-81 (citations omitted).

⁹⁵Id. at 180 (citations omitted).

⁹⁷No. 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).

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

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

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

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

¹⁰²1996 WL 328011 (N.D. Ill. June 11, 1996).

¹⁰³Id. at *1.

¹⁰⁴See id.

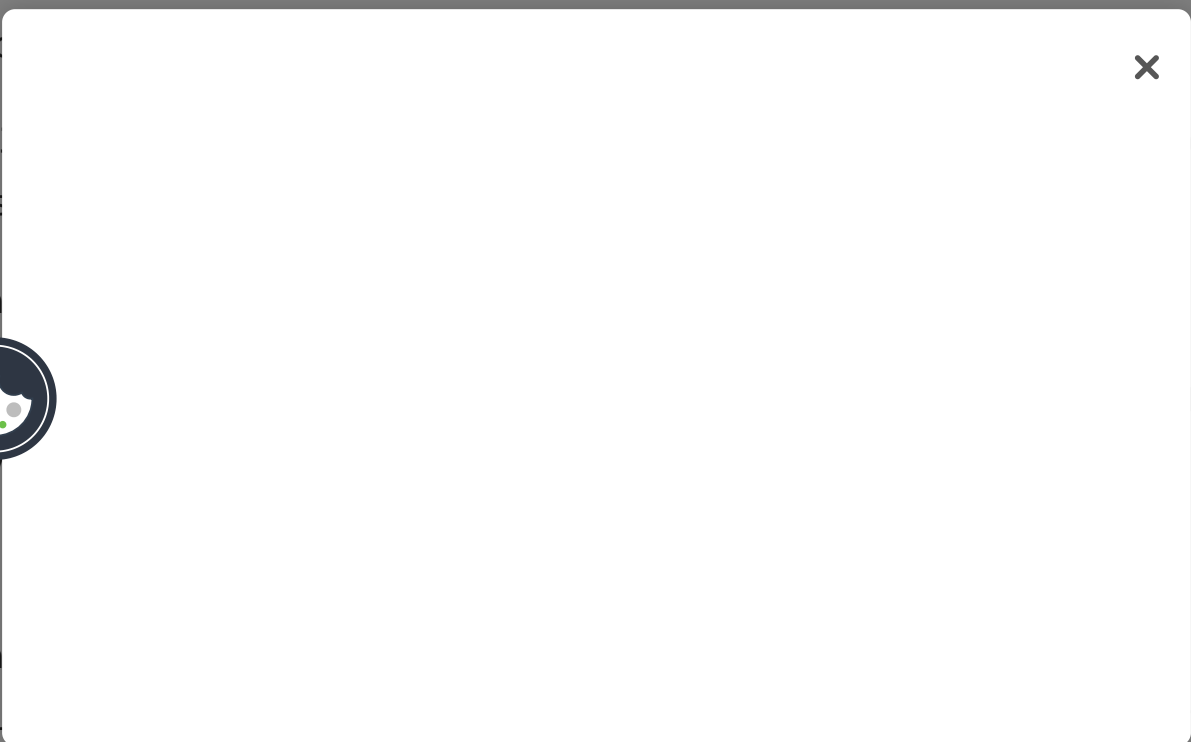
¹⁰⁵No. 0... p. 15
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¹⁰⁶See a

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Ins., at 7

¹⁰⁸Id.

¹⁰⁹See a... p. 851,
2002 WL... al district



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).

¹¹⁰For 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).

¹¹¹See *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”).

¹¹²110 F.Supp. 2d 441 (E.D. Va. 2000).

¹¹³*Id.* at 445.

¹¹⁴No. 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).

¹¹⁵*Id.*

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

¹¹⁷*Id.* at *1.

¹¹⁸644 N.W. 2d 820 (Minn. App. 2002).

¹¹⁹See *id.*

¹²⁰770 A

¹²¹*Id.* at

¹²²*Id.*

¹²³297

¹²⁴See *id.*

¹²⁵Zucke

form).

Policy”



¹²⁶ Id. § 7:9 (quoting "Cleanup Cost Cap Insurance Policy" form).

¹²⁷ 125 S. Ct. 577, 1606 Ed.2d 548 (2004).

¹²⁸ 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).

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

¹³⁰ Id., 125 S. Ct. at 584-86, 160 L. Ed.2d at 560-62.

¹³¹ 297 F. Supp. 2d 1227 (E.D. Cal. 2004).

¹³² Id. (e

¹³³ Id. at

¹³⁴ See S. Ct. 1323, 1324, 1325 (2004); 2004 WL 2741 (Minn. 10, 2004).

¹³⁵ S. Ct. 1323, 1324, 1325 (2004).

¹³⁶ 33 U.S.C. § 1323, 1324, 1325 (2004).

¹³⁷ See A. Ct. 1323, 1324, 1325 (N.D. Ill. 10, 2004).

¹³⁸ See id.



¹³⁹See id.

¹⁴⁰476 S.E.2d 481 (1996).

¹⁴¹Id. at 483-84.

¹⁴²Id. at 490 (citations omitted).

¹⁴³943 F. Supp. 441 (D.N.J. 1996), aff'd, 127 F.3d 1095 (3d Cir. 1997).

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