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New Issues in Environmental Risk Insurance

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Acknowledgments

For twenty years, William H. Howard has advised and represented insurers with respect to insurance coverage matters—for the past fifteen years with an emphasis on insurance coverage for environmental claims. Mr. Howard is a Member of Cozen O'Connor, resident in that firm's Philadelphia office. Mr. Howard received his Bachelor of Arts degree, magna cum laude, with Honors in English and as a member of Phi Beta

Kappa, from Case Western Reserve University. Mr. Howard also received his Juris Doctor 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.

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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 Dave Lenckus, *Spotlight: Environmental Risk Management, Pollution Risk Transfer Continuing to Evolve*; *Market for Cleanup Coverage Growing*, Vol. 36, No. 23 *Business Insurance*, at 10 (June 10, 2002), available at 2002 WL 9517754 (citing estimates that the market for conventional environmental coverages “has grown in recent years at a twenty percent annual rate to more than \$2 billion of premium,” as compared with a decade ago “when premium volume was less than one-tenth the current level”).

³“Brownfields refers to efforts sanctioned by the EPA to restore seriously polluted land to use, generally limited use.” George B. Flanigan, *A Perspective on General liability Insurance and the Pollution Hazard: Exposures and Contracts*, Vol. 20, Issue 3, *Journal of Insurance Regulation* (4/1/02), available at 2002 WL 24376166.

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 Frazer Exton Dev't LP v. Kemper Environmental, Ltd., No. 03 Civ. 0637 (HB), 2004 WL 1752580, at *1, n.5 (S.D.N.Y. Jul. 29, 2004) (citation omitted).

⁹George B. Flanigan, Insurance Coverage for Environmental Claims” Vol. 51, Issue 1 Risk Management, at 28 (Jan. 1, 2004), available at 2004 WL 66261873 (hereinafter “Flanigan, Jan. 1, 2004 Risk Management”).

¹¹Waeger, *supra*, at 402.

¹²Zuckerman, *supra*, § 7:9.

¹³2004 WL 1752580 (S.D.N.Y. July 29, 2004).

¹⁴ Id. at *2.

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 554 (emphasis in original).

²⁹ See *Camalloy Wire, Inc. v. Nat. Union Fire Ins. Co.*, 695 N.Y.S.2d 562 (N.Y. App. Div. 1999).

³⁰ No. 94 Civ. 8939 (KMW), 1996 WL 197705 (S.D.N.Y. Apr. 24, 1996).

³¹ 50 Fed. Appx. 248, 2002 WL 31472440 (6th Cir. 2002) (unpublished decision).

³² Id. at *1.

³³ 154 F.3d 1049 (9th Cir. 1998).

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 CGL insurer's duties to the insured under the CGL policy. See *id.* at 490. Furthermore, the court noted that "contractual choice of law provisions [are] generally enforceable." *Id.* (citing *Hansen v. GAB Business Services, Inc.*, 876 P. 2d 112 (Colo. App. 1994)). For a discussion of choice of law provisions in pollution liability insurance policies, see *infra*, Subsection J.

⁴⁸Id.

⁴⁹1996 WL 563188 (S.D.N.Y. Oct. 2, 1996).

⁵⁰Id. at *2.

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 *3.

⁶⁷Zuckerman, supra, § 7:8 at 7-71.

⁶⁸1997 WL 462010 (S.D.N.Y. Aug. 12, 1997).

⁶⁹ Id. at *2 (citations omitted).

⁷⁰1997 WL 89163 (Mass. Super. Feb. 18, 1997).

⁷¹ Id. at *9 (emphasis added).

⁷² Id.

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

⁷⁴See id. at 453.

⁷⁵ Id.

⁷⁶ Id.

⁷⁷ Id. 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).

⁸¹ Id. 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 So.2d 1245 (Fla. App. 1998).

⁸⁷See id. at 1246.

⁸⁸ Id. at 1248.

⁸⁹See *Mission Nat'l Ins. Co. v. Hartford Fire Ins. Co.*, 702 F. Supp. 543, 545 (E.D. Pa. 1989) (applying Ohio law and citing *Reliance Ins. Co. v. Allstate Indem. Co.*, 514 Supp. 486, 487 (E.D. Pa. 1981) (applying Pennsylvania law)); *Mutual Benefit Ins. Co. v. Goshenhoppen Mut. Ins. Co.*, 572 A. 2d 1275, 1277 (1990); *COUCH ON INSURANCE* 3D § 218.3 (1999 & Supp. 2004).

⁹⁰E.g., *Cargill, Inc. v. Evanston Ins. Co.*, 642 N.W. 2d 80, 88 (Minn. Ct. App. 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.* at *13.

¹⁰⁵No. 03-10754 (D. Mass.) (Complaint filed April 22, 2003), reported in 2 No. 15 Mealey's Ins. Pleadings, at 8 (May 13, 2003).

¹⁰⁶See also 17 No. 27 Mealey's Litig. Rep. Ins., at 12 (May 20, 2003).

¹⁰⁷No. 323658 (Cal. Super. San. Francisco), reported in 17 No. 9 Mealey's Litig. Rep. Ins., at 7 (Jan. 7, 2003).

¹⁰⁸Id.

¹⁰⁹See also *LaFarge Corp. v. Travelers Indem. Co.*, No. 00-16996, 32 Fed. Appx. 851, 2002 WL 463298 (9th Cir. 2002) (unpublished opinion) (upholding the federal 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.* at 838, citing Minn. State. § 115B.444, subd. 2(b).

¹²⁰770 A.2d 403 (R.I. 2001).

¹²¹*Id.* at 412.

¹²²*Id.* at 413-14.

¹²³297 F. Supp.2d 995 (N.D. Ohio 2003).

¹²⁴See *id.* at 1007.

¹²⁵Zuckerman, *supra*, § 7:8 at 7-75 (quoting “Pollution Legal Liability Select Policy” form).

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. (emphasis added).

¹³³ Id. at 1232.

¹³⁴ See State of Minnesota v. American Hardware Mut. Ins. Co., No. CT02-16741 (Minn. Dist. Apr. 9, 2004), reported in 18 No. 23 Mealey's Lit. Rep. Ins., at 2 (Apr. 20, 2004).

¹³⁵ See also 17 No. 8 Mealey's Poll. Liab. Rep., at 17 (May 2004).

¹³⁶ 33 U.S.C. § 1251.

¹³⁷ See Allstate Ins. Co. v. City of Chicago, No. 02 C 5456, 2003 WL 1877670 (N.D. Ill. Apr. 14, 2003).

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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