

## **CHAPTER 6**

# **Environmental Insurance Coverage, Policy Interpretations, and Litigation: Why You Can't Get There From Here**

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**§ 6.01. Introduction.**

It is a safe assumption that most students do not enter law school intending to practice insurance law. It is also fair to assume that most mineral, natural resources, and environmental lawyers view insurance law as, at best, a tangential part of their practice. Indeed, the only experience most lawyers have with insurance law is in pursuit of a personal injury claim.

As the icon of my generation, Bob Dylan, once sang, "The times, they are a'changing." Today, insurance law is becoming one of the fastest growing areas of environmental litigation, with tremendous implications for all who practice mineral, natural resources, environmental, and toxic tort law. There is a tremendous amount of litigation today over the extent of insurance coverage for both personal and property damage claims in the environmental context, as through exposure to a toxic substance, or with respect to CERCLA cleanup costs. Insurance coverage and availability has become one of the threshold issues in toxic tort and environmental cleanup matters. After a decade of litigation, hundreds of cases, and scores of law review articles, there is no clear consensus on how to resolve the issues. To the contrary, especially with the critical "pollution exclusion clause," a crazy-quilt pattern of diametrically divergent decisions has emerged. What is clear is that hundreds of billions of dollars are ultimately at stake in these disputes.

By way of example, the General Accounting Office recently surveyed twenty of the largest U.S. insurance companies, representing 67% of the general liability insurance market in 1989. Thirteen responded. Nine of

these had 50,000 unresolved claims and about 2,000 pending lawsuits on insurance coverage for pollution liability. They had disbursed about \$106 million on 2,393 claims in 1989. Ten insurers had spent about \$158 million in 1989 alone on lawsuits involving pollution coverage or claims filed by third parties against insured bodies.<sup>(1)</sup>

The purpose of this Chapter is to lay out a course through the perilous mine field of environmental liability insurance. We will start with general observations, comments, and questions by which to approach the issues, and then discuss the developing legal concepts.

### **[1]--Complexity of Litigation.**

These cases are often "The Big Case" with hundreds of millions, if not billions, of dollars at stake in a single dispute. The complexity of the case, both legal and factual, will often match the stakes. To illustrate, the applicable insurance policies may go back fifty years, with different clauses and different policy limits in different years. There also may be periods when the claimant was self-insured, under-insured, or uninsured. The case may involve over 100 policies, fifty different insurers, scores of parties, and many sites, while the underlying pollution problems may extend back 75 to 100 years. Finally, every phrase in each policy is a potential thicket of liability.

### **[2]--Standard Approaches.**

In analyzing a case, the very first step is to acquire or to attempt to acquire copies of all potentially applicable policies. Once you have acquired, to the best of your ability, all relevant policies, you need to read them and ask several questions.

1. What triggers coverage?
2. Has coverage been triggered?
3. When does the duty to defend arise?
4. Has the duty to defend come into existence?
5. Are there applicable exclusions?
6. What sort of notice must be given the insurer?
7. When must notice be given to the insurer?
8. How has your state, or the otherwise appropriate jurisdiction, construed the critical clauses of the policy?
9. Is there, after everything else has been considered, a duty to indemnify the insured?

### **[3]--Standard Defenses.**

There are several defenses of a procedural or a substantive nature that may arise in every claim. Some of the "procedural" defenses may appear overly technical, if not "Mickey Mouse" in nature. However, with the substantial sums of money at stake, all defenses should be approached with equal care and diligence.

### **[a]--Threshold Issues and Defenses.**

*Notice of Occurrence.* You will find that most, if not all policies, require the claimant to provide reasonable