WORTH THEIR WEIGHT IN GOLD
Five Steps to Digging Up Pollution Coverage Under Older Insurance Policies
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You just discovered that the commercial or industrial property that you own is polluted. This discovery may have occurred during the negotiations for the sale of the property or after you looked into refinancing an existing loan or when you decided to start construction work. Your environmental consultant tells you that the cost of investigation and clean-up can be over $250,000 which just blew a giant hole in your budget. Is there any place you can look to help pay for the costs?

In a typical case, pollution on your property stems from "historic" contamination. Unless the property is currently being used for heavy industry, most of the pollution likely came from past operation which may ceased decades ago. The source might be from a drycleaner, gas station or some other commercial use before you purchased the property. In cases of historic contamination, one of the best sources of funding to pay for environmental clean-up is OLD insurance policies. Those older insurance policies dating back 30 years or more can be a pot of gold. If you can locate those old policies, then, in California, there to access those old policies, you must sue the insured under that insurance policy or if you are the owner, you have to be sued. How do you go about finding the polices? And, what is involved in litigation?

Step 1: Find the Old Policies: Insurance policies issued before 1985 can provide insurance coverage to pay for the investigation and clean-up of pollution which was released before 1985.
To locate the policies, you can look to several sources:

- Review your own business files – insurance, accounting, property;
- Contact your insurance broker to search the broker's files;
- Contact and review records of outside accountants;
- Contact and review your lawyer's records for any claims, such as a property damage or liability claims which might contain insurance information;
- Review check register or other records for evidence of premium payments which will list the payee and may list a policy number;
- Review any other older policies for references to other policies, including excess or umbrella policies;
- Contact your landlord or other businesses that required your company to submit a certificate of insurance before doing business with your company; and

- As a last resort, hire a company that specializes in insurance "archeology" to conduct the search.

Step 2: Does coverage exist? After finding the policy, you will need to review what type of coverage the policy provides. Coverage will depend upon the policy years and the terms of the policy.

- **Pre- 1966 policies**: Covered "accidents" which were generally regarded as any unexpected and unintended events. Insurers have rarely contested insurance coverage on these older policies.
- **1966 – 1970 policies**: Liability for unintended pollution damage was generally covered under the Comprehensive General Liability ("CGL")insurance policies issued between 1966 – 1970. These policies provided coverage for "Occurrence" which was defined as: *"an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured"*
  Since most pollution incidents were unintended, even if there were continuous, these older policies covered most spills and releases of contamination, even those from slow leaks from an underground fuel tank.

- **1970 – 1985 policies**: In 1970, the insurance industry added a "pollution exclusion" to its standard form CGL policies. This exclusion referred to as the "*sudden and accidental exclusion*" became part of the standard form in 1973. The exclusion typically states that the policy does not apply to:

  "bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapor, soot fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is <u>sudden and accidental</u>."

  While many courts have interpreted the phrase "sudden and accidental" as "unexpected and unintended", in California, the courts have adopted a more literal meaning and requires that the polluting incident occur "suddenly" or within a short time frame. Unlike the pre-1970s policies that covered slow leaks, the courts in California generally required that the pollution occur suddenly.

- **1985 to present policies:** After 1985, most CGL policies were modified to expressly exclude any pollution coverage and deleted the "*sudden and accidental*" exception. The post 1985 polices have what is called an "absolute pollution exclusion". A typical post-1985 exclusion states:

This insurance does not apply to "bodily injury" or "property damage" arising out of the actual, alleged, or threatened discharge, dispersal, release, or escape of pollutants at or from premises owned, rented or occupied by the named insured.

Because of the breadth of the exclusion, obtaining insurance coverage under the post-1985 policies is difficult. However, in some cases even post-1985 policies may provide insurance for environmental harm under the products liability coverage provisions if a "product" that you sold caused the environmental damage.

Step 3: The Requirement For A "Suit". In California (but not necessarily in other states), the law requires that there be a "lawsuit" filed against the "insured" before there is any insurance coverage.

- **Regulatory Order**: California courts have held that orders issued by environmental government regulators are not consider "suits". Even an order by the regulator to conduct an environmental clean-up will not trigger an obligation by the insurer to pay. The regulator must file a lawsuit in State or Federal court. But, in most cases, the regulators do not have the resources to prosecute the action in the courts.

- **Lawsuit:** Because the state regulators rarely file legal actions in court, even if they have issued a clean-up order, in order to access the insurance protections, either the property owner or operator will need to file a lawsuit against another party who is also responsible for clean-up for contribution. That other party might be a former tenant or a former owner of the property. Then, that party must counter sue or cross complain against "you" to trigger your insurance coverage. In most environmental cases, there are multiple defendants, each suing and counter-suing. Where the contamination is "historic" and was caused by operations which occurred decades ago, the number of parties involved can number in the dozens.

Step 4: The Legal Games Begin: Having found insurance and filed a "suit", the procedural games begin.

- **Notice To Insurer:** Once you are sued, you must provide notice to the insurer as soon as possible and ask the insurer to defend you against the claim that you are responsible, in part, for the contamination. This is called "tendering defense" of the claim. The policyholder must give notice as soon as is reasonable under the circumstances. Even when a policyholder does not give prompt notice, most states excuse untimely notice UNLESS the insurance company can prove that its ability to defend the underlying action was prejudiced by receiving late notice. But, there is another reason not to delay. Most cases have held that the insurer's obligation to pay defense costs, which is typically the attorneys' fees do not arise until after the notice has been provided.

- **Exclusions:** The insurer may argue that there is no coverage or duty to defend based upon numerous exclusions in the policy. The exclusions might be based upon factual arguments, for example, the polluting incident was not "sudden and accident", but was caused by a pin prick slow leak. Or, the exclusions might be based upon contract terms in the policy. The legal and factual arguments are nuanced and too numerous to list, but when the insurance company is fighting to avoid having to pay hundreds of thousands of dollars in environmental costs, the stakes are high.

- **Duty to Defend:** The insurer's obligation to pay your attorneys' fees and court costs in defending an underlying environmental action is may be the most important benefit of the insurance policy. This is because even if the insurance carrier raises a litany of arguments that coverage is excluded, the law in California and most states, requires insurers to "defend" where there is a "potential" for coverage. That defense obligation can extend beyond legal fees to include the costs of investigating the extent of contamination.

- **Insurers Fight Back:** In some cases the insurers will file a separate lawsuit against you to obtain a declaration and determination from the court that there is no coverage or obligation to defend or indemnify you. based on exclusions in the policy. This adds another layer of expense in addition to the cost of both conducting the environmental clean-up and the lawsuit against the other parties who caused or contributed to the contamination.

Step 5: Settlement and Paying: If you can survive the Legal Games and the insurer is providing a defense and you are seeking payment for the damages, either in settlement or after trial, issues as to which insurance policies covers the damage and how much will each insurer have to pay may arise. Recently in 2012, many of these issues were resolved by the the California Supreme Court in, *The State of California v. Continental Insurance Company.*[1] The decision was favorable to insureds, and as to the older pre-1986 policies, you may be able to access several different policies, spanning the years over which the environmental damage occurred and will also be able to combine the policy limits of those policies to make one large "*uber*" policy.

- **Continuous Trigger:** The California Supreme Court has held that that the "continuous injury trigger of coverage" applied to the insurers' indemnity obligations, "so long as the insurers insured the subject property at some point in time during the loss itself."[2] The

[1] *The State of California v. Continental Insurance Company, 55 Cal.4th 186 (2012)*

[2] Id. at 191 "*We initially address the "`continuous injury' trigger of coverage," as that principle was explained in Montrose Chemical Corp. v. Admiral Ins. Co. (1995) 10 Cal.4th 645, 655 [42 Cal.Rptr.2d 324, 913 P.2d 878] (Montrose) and the "all sums" rule adopted in Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38, 55-57 [70 Cal.Rptr.2d 118, 948 P.2d 909] (Aerojet), and conclude that the principles announced in those cases apply to the insurers' indemnity obligations in this case, so long as the insurers insured the subject property at some point in time during the loss itself."*

Court held, "[t]he fact that all policies were covering the risk at some point during the property loss is enough to trigger the insurers' indemnity obligation."[3]

- **All Sums Allocation:** A legal issue may also arise between different insurers, over differing policy periods and differing policy limits as to how much each insurer is obligated to pay. The California Supreme Court rejected the pro-rata or percentage allocation between insurers and held that the policies obligated the insurers to pay "all sums" for property damage up to their policy limits.

- **Stacking:** As to the older pre-1986 policies, the California Supreme Court also resolved the issue of whether policy limits can be "stacked", added together to provide greater limits. For example, Policy #1 has $100,000 of coverage and Policy #2 has $100,000. Insurers had argued that the limits was only $100,000 and that the insured could not add the two limits together for $200,000 of coverage. Rejecting the anti-stacking principle, absent specific "anti-stacking" language in the policy, the Court concluded that because the policies agreed to pay "all sums" for property damage, the policy limits should be determined with stacking.[4]

Conclusion: Older pre-1986 insurance policies are worth their weight in gold. In most cases, it is worth the cost and effort to search for those policies.

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[3] Id. at 198.

[4] Id. at 201-202 "The all-sums-with-stacking indemnity principle incorporates the *Montrose* continuous injury trigger of coverage and the *Aerojet* all sums rule, and 'effectively stacks the insurance coverage from different policy periods to form one giant 'uber-policy' with a coverage limit equal to the sum of all purchased insurance policies. Instead of treating a long-tail injury as though it occurred in one policy period, this approach treats all the triggered insurance as though it were purchased in one policy period.'" *Id.* at 201 (citation omitted). However, the Court noted that insurers seeking to avoid the "all-sums-with-stacking" application should include express anti-stacking provisions in their policies.