



2019 Construction Conference
September 25 – 27, 2019
San Diego, CA

Environmental Claims Arising from Construction and Redevelopment Projects

I. Introduction

a. Presentation Overview

This presentation will be a round-table panel discussion addressing key emerging claims and insurance policy coverage issues arising in the context of environmental claims at construction or redevelopment projects. The discussion will be based on a specific fact pattern, set out below, based on real-world claims experience of the panelists. The presentation will include commentary from industry experts representing various stakeholders including owners, developers, contractors, consultants and insurers. The discussion will focus on challenging issues facing the various stakeholders with respect to resolution of the environmental claim, its impact on the project as a whole and as well as on key insurance policy coverage issues. The insurance policy coverage discussion will focus on which insurance policies may apply and to what extent coverage may be provided, or excluded, in whole or in part, based on the terms and conditions of the policies and/or applicable case law.

Please note the views of the panelists in this presentation are offered solely for educational and professional development purposes and do not represent the official positions of their employers and/or clients.

Hypothetical Fact Pattern for Panel Discussion

Current Site Owner, LLC (“CSO”) wishes to develop a former metal plating facility in Portland, Oregon into a 14-story mixed use (commercial and residential) project. Prior owner, Commercial Chrome Plating Company (“CCPC”), has historic CGL insurance paying for site investigation and remediation of known conditions (solvents and metals in soil and groundwater) from historic plating operations. CSO purchases

environmental coverage, via a site policy, for the redevelopment, and retains Big Builders Inc. (“BBI”) to serve as the general contractor for the project. The site policy excludes known conditions, but covers new conditions not known to the parties. CSO also purchases a Builders Risk Policy as well as an Owner Controlled OCIP Policy for the project. In the course of excavation, the parties run into far greater solvent and metals contamination than previously known and in areas of the site not thought to have been impacted. Also, PCBs are discovered in soils in an area of the site previously thought to be clean. There is some indication the PCB release was from a drum that was punctured by the excavation contractor (Digger Construction Inc. (“DCI”)) in the course of its work. It also appears some of the prior site characterization work and pre-project due diligence done for Owner by Earth Scientists, Inc (“ESI”) may have been inadequate in several respects. The presence of the additional solvent and metals contamination, as well as the PCB release, will cause lengthy delays to project timelines with attendant delay claims and project cost over-runs. The Owner, CSO, is named as an additional insured on all other parties’ policies.

II. Discussion of Fact Pattern

a. Summarize Facts for Discussion

The participants will summarize the pertinent facts, set out above, for the attendees. This is a fairly typically claim scenario and will set up the context for the discussion of the various key issues that follow.

III. Key Underlying Claims Issues

i. Initial Response by Project Participants

The panelists will discuss key steps in the various stakeholders’ initial responses to discovery of an environmental claim at a construction site, including notice to other parties, notice to insurers, possible public and/or neighbor relations issues, notification to the state agency or EPA and related matters, pursuit of responsible parties, and implementation of emergency response actions.

ii. Response by Insurers

Panelists will cover the key steps in acknowledgement of notice of claim, claim investigation, coverage opinion formulation, reserving rights, if appropriate, retention and counsel of experts, being kept apprised of status and significant developments and related action items going forward.

- iii. Long-Term Claim and Project Management Issues and Impact on Project
 - 1. Project Participants
 - 2. Insurers

Panelists will address the key challenges faced by each of the stakeholders as the investigation and resolution of the environmental claim goes forward all while attempting to move forward, to the greatest extent practicable, with the construction and redevelopment work. For the owner, this means moving forward as quickly as possible with as much of the work, and related delay costs, covered by insurance of one kind or another. For the insurers, this involves fulfilling their obligations under the terms of the policies and applicable law, while protecting their right to investigate and to have time give input into key decisions regarding investigation and cleanup, to pursue contribution or subrogation from other parties and being given the opportunity to consent to all remedial action work other than emergency response measures.

IV. Key Insurance Policy Coverage Issues

- i. The Insurance Policies that May Apply

- 1. Comprehensive General Liability (“CGL”)

- Applies to bodily injury or property damage occurring during the policy period. Likely has a broad pollution exclusion that may preclude coverage (discussed below) and various “business risk” exclusions that may apply.

- 2. Builders Risk Policies

- First-party coverage that applies to certain covered causes of loss or damage to the work in the course of construction.

- 3. Environmental Policies

- a. Contractors Pollution Liability (“CPL”)

- Maybe written on a claims-made or occurrence basis. Generally, covers “pollution conditions” arising from the insured’s covered contracting operations. Intended to fill in the gap in coverage in a CGL policy created by the pollution exclusion. Also affords coverage for remediation expense, which can may be a separate coverage or a subset of property damage. Often packaged with other lines of coverage, such as CGL or E&O. May have an excess “other insurance” clause.

b. Site Policies

These policies, typically written on a claims-made basis, cover on-site pollution conditions discovered during the policy period or extended reporting period. Release may need to post-date a Retroactive Date in the policy. Typically exclude pre-existing and/or known conditions. Require insurer consent to other than emergency response measures.

4. Contractors or Consultants Professional Liability Coverage

Typically written on a claims-made basis, these policies cover loss arising from a wrongful act, or a negligent act or omission, by insured in the course of its performance of covered professional services. Does not cover “general liability” claims not “arising” from the “performance of professional services” as that would be covered under a CGL or other policy.

5. Owner or Contractor Controlled Insurance Policies (“OCIP”)

A policy held by a property owner during the construction or renovation of a property, which is typically designed to broadly cover virtually all insurable liability for property damage or bodily injury arising from the construction project (subject to the exclusions set out in the policy).

ii. Key Coverage Issues

1. CGL Policies

a. CGL v. Pollution Policies – Priority of Coverage Issues

The facts of the loss and the wordings of the policies will drive the issue of which policies apply and who “goes first” with respect to the claim or different elements of damages. There is very limited case law in this area.

In *A Mut. Ins. Co. v. Chartis Spec. Ins. Co.*, 861 N.W.2d 533 (Wis. Mar. 17, 2015), a natural gas release resulted in explosion, causing bodily injury and property damage. A CPL policy issued by AIG insured BI and PD caused by “pollution conditions,” defined as “the discharge, dispersal, release or escape of any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, medical waste and waste materials into or upon land, or any structure on land, the atmosphere or any watercourse or body of water, including groundwater, provided such conditions are not naturally present in the environment in the concentration or amounts discovered.”

- GL carrier undertook insured's defense in underlying suits. Chartis argues that to fulfill the policy's causation requirement, it is not enough that a substance capable of acting as a contaminant was the but-for cause of the alleged bodily injury and property damage. Rather, according to Chartis, 'the contaminating nature of the substance at issue' must directly cause the alleged bodily injury and property damage.
- "Chartis explains that the CGL policy issued by Acuity and the CPL policy issued by Chartis "are essentially the flip side" of each other. Chartis asserts that 'the Acuity CGL Policy is intended to cover [the insured's] liability for bodily injury or property damage not caused by pollution, and the Chartis Pollution Policy is intended to cover liability for bodily injury or property damage caused by pollution.'"
- Court disagreed, noting that the policy, on its face, covers any BI or PD resulting from pollution, "nothing more, nothing less" • Distinguished cases from other jurisdictions on the basis that "Wisconsin cases have not interpreted pollution exclusion clauses as dealing solely with broadly dispersed environmental pollution."

Very often both CGL and environmental policies may apply to the loss, in whole or in part, depending on policy wordings, the nature of the claim and alleged damages and case law in the relevant jurisdiction.

b. Application of the Pollution Exclusion

Absolute Pollution Exclusion generally precludes coverage for claims arising from release of Pollutants:

- At or from premises insured owns, rents or occupies;
- At or from any site used by insured or others for handling, storing, or disposing of waste;
- Where Pollutants were transported, handled, stored, or processed as waste by insured or someone for whom insured has liability;
- At or from site on which insured, or its contractors are performing operations, if Pollutants are brought onto site in connection with such operations.

“Pollutants” is defined as “any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. “Waste” includes materials to be recycled, reconditioned or reclaimed.

The “Governmental Action” Exclusion provides there is no coverage for loss, cost or expense arising out of any governmental direction or request to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize Pollutants.

The “Total Pollution Exclusion” provides there is no coverage for Bodily Injury or Property Damage which would not have occurred, in whole or in part, but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of Pollutants at any time.

Selected Absolute Pollution Exclusion Case Law from the Construction Context

Devcon Int’l. Corp. v. Reliance Ins. Co., 609 F.3d 214 (3d Cir. 2010) (Dust and exhaust fumes generated from construction project at an airport was a “pollutant” and claim were excluded by APE).

Cincinnati Specialty Under. Ins. Co. v. Energy Wise Homes, Inc., 2015 VT 52 (2015) (Vermont Supreme Court holds injury from claims arising from release of chemicals allegedly associated with application of spray-foam insulation in a school building were excluded from coverage based on APE in the installer’s policy).

Headwaters Resources Inc. v. Illinois Union Ins. Co., 770 F.3d 885 (10th Cir. 2014) (Underlying claims brought by homeowners who alleged fly ash used in construction of golf course devalued their homes and created health risks. The 10th Circuit affirmed the grant of summary judgment by the District Court, finding the APE clear and unambiguous in this context. APE applied to the insured’s release of fly ash mixture into the environment).

2. Environmental Policies

a. Claims Made and Reported Issues

Claim must be first made against insured and reported to the insurer during the policy period or any extended reporting period. The release must also post-date any “retroactive date in the Policy.

b. Known Incident Exclusions

Policies routinely exclude coverage for releases or claims known by the insured prior to the policy period.

3. Other Policies

The parties will need to evaluate the loss facts, as well as the terms of the various other policies purchased by the stakeholders to determine the extent to which policies such as Builders Risk, OCIP or Professional Liability policies may apply to a particular environmental claim at a construction site.

V. Best Practices for Insurance Professionals and Other Stakeholders

a. Importance of Timely and Regular Communication Between the Parties

i. Respecting all stakeholders’ interests

In our experience, claims proceed efficiently and constructively when all parties respect the other’s interest and timelines to the greatest extent possible.

Regular, timely and open communication between the parties is critical to the efficient handling and resolution of complex environmental claims at construction sites.

b. Insurer Consent Prior to Incurring Cleanup Costs

Policies generally require insurer consent to all remedial action response costs to be submitted for coverage under the policy, other than truly emergency response measures. Remedial action work undertaken without insurer consent may not be covered, per the terms of the policy. So long as reasonable and necessary, truly “emergency” response costs undertaken early on may be covered, if reasonable and necessary, subject to the other terms, conditions and exclusions of the policy.