

A GUIDE *to*  
INSURANCE COVERAGE  
*for* ENVIRONMENTAL  
LIABILITY CLAIMS



ANDERSON KILL  
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## *About the Firm*

Anderson Kill & Olick, P.C. was founded in 1969 on the principles of integrity, excellence in the practice of law, and straightforward solutions to complex legal issues. The firm's attorneys approach engagements aggressively, and have earned a reputation for combining corporate polish with pugnacity. Anderson Kill provides comprehensive legal advice in the following areas: Anti-Counterfeiting, Bankruptcy & Restructuring, Corporate & Commercial Litigation, Corporate & Securities, Employment & Labor Law, Insurance Recovery, Intellectual Property, Product Liability, Real Estate & Construction, Tax, and Trusts & Estates. Anderson Kill attorneys work together, leveraging creativity and legal and business acumen to deliver cost-effective resolutions to clients' problems. Many of the firm's professionals are recognized experts in their practice areas, leaders and active participants in professional associations, and are frequently invited to speak to business organizations.

## *About Anderson Kill's Insurance Recovery Group*

**Anderson Kill's Insurance Recovery attorneys** represent policyholders in disputes with insurance companies. Anderson Kill has had unparalleled success in obtaining insurance coverage for policyholders in connection with environmental and toxic tort liability, products liability, professional liability and disability, intellectual property claims, directors' and officers' liability, commercial crime insurance, property losses, business interruption losses and many other types of insurance. Our clients include the nation's largest corporate and industrial policyholders as well as utilities, municipalities, state governments, charities, major religious and not-for-profit organizations, small companies and individuals.

Anderson Kill is ranked **No. 1** in *Chambers USA America's Leading Lawyers for Business* 2008 for Insurance Dispute Resolution.

The *Chambers* profile describes Anderson Kill as follows: "This insurance litigation heavyweight is a leading choice for policyholders. Clients hail it as 'one of the best firms out there for policyholders, as the lawyers achieve results without the fuss. They are tenacious and dedicated.' Anderson Kill & Olick's success as a national practice was particularly on display in the past year as it enjoyed leading roles in prominent insurance disputes."

For more information, please contact:

**Robert M. Horkovich**, Chair, Insurance Recovery Group  
(212) 278-1322 — [rhorkovich@andersonkill.com](mailto:rhorkovich@andersonkill.com)

**William G. Passannante**, Co-Chair, Insurance Recovery Group  
(212) 278-1328 — [wpassannante@andersonkill.com](mailto:wpassannante@andersonkill.com)

**John G. Nevius, P.E.**, Shareholder, New York  
(212) 278-1508 — [jnevius@andersonkill.com](mailto:jnevius@andersonkill.com)

**Rhonda D. Orin**, Managing Partner, Washington, D.C.  
(202) 416-6549 — [rarin@andersonkill.com](mailto:rarin@andersonkill.com)

**Michael Conley**, Co-Managing Shareholder, Philadelphia  
(267) 216-2707 — [mconley@andersonkill.com](mailto:mconley@andersonkill.com)



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## *Purpose and Structure of the Guide*

This Guide discusses insurance coverage for environmental liability claims against insurance policyholders nationwide faced with claims for environmental or pollution damage by environmental agencies and others. Insurance companies should be helping policyholders defend environmental claims and should be paying if policyholders are forced to spend money to pay environmental claims. The most important question is how to make insurance companies honor their obligations.

One of the primary purposes of the Guide is to alert policyholders to the fact that liability insurance policies purchased in years past may very well cover today's environmental claims. Old insurance policies may be worth much more than their weight in gold.

The Guide starts with an Introduction and Sampler to give a "quick start" overview of insurance coverage for environmental claims. An important feature of the Introduction is a description of the organization of the Guide which gives a summary of each section. This will enable the reader to find, pick and choose sections of particular interest.

Environmental damage eventually will cost the United States hundreds of billions of dollars. This huge cost of cleaning up "pollution" will affect everyone. Today industries, charities and governmental institutions across the country are paying a particularly high price. Banks, schools, churches, municipalities, port authorities, electrical equipment manufacturers, and even scrap recyclers are just some of the groups paying large pollution-related costs.

No policyholder could have foreseen this situation 20 or more years ago. Because of concerns about the potential costs of unforeseen liabilities, businesses, governments and other institutions counted on their standard form Comprehensive General Liability ("CGL") insurance, their property insurance, and other insurance coverage to protect against future legal liability claims. After all, paying for unexpected losses is what insurance was and

## *Introduction and Sampler*

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*A.Old Insurance  
Policies Cover  
Today's Problems*

is purchased for. Insurance is to protect a business person or organization from the costs of unforeseen liabilities and damages.

One insurance company has advertised:

WHAT WILL HAPPEN IN 15 YEARS  
IF YOUR COMPANY IS SUED FOR  
A PRODUCT IT MADE TODAY?

Today, some insurance companies have upset their policyholders' expectation that insurance would take care of unforeseen liabilities, particularly in the area of environmental liabilities and damages. Thus, policyholders need to know what they can and should do to obtain the insurance coverage for which they paid premiums in the past. Policyholders must prepare today.

Thorough preparation NOW for present and future environmental claims is essential. Policyholders who do not prepare may face delays later and risk the loss of important evidence. Records of old insurance policies can be lost. Claims and underwriting files maintained by insurance companies can be thrown away. And memories of key witnesses can fade.

*B. Organization  
and Sampler*

This Guide provides information that may help policyholders obtain today the benefits of the insurance coverage they purchased in years gone by. The Guide will help policyholders institute a program to identify and evaluate their insurance policies that may cover environmental liabilities and to monitor their claims against insurance companies.

The organization described below will permit readers to pick and choose the sections of the Guide pertinent to their immediate needs.

The Guide is organized as follows:

- Section One explains the purpose of liability insurance and some fundamental insurance concepts;

- *Section Two* discusses the importance of prompt notice and lays out practical instructions designed to help policyholders rapidly discover what insurance they have purchased, and whether that insurance should cover environmental liability claims;
- *Sections Three and Four* explain, respectively, how the policyholder should respond to information requests from insurance companies and how it should update the insurance companies on developments affecting the policyholder's claim for insurance coverage;
- *Sections Five and Six* provide information to assist the policyholder in deciding whether or not to sue its insurance companies and/or reach a negotiated resolution of the insurance coverage dispute;
- *Section Seven* discusses important steps to be taken at the inception of litigation concerning coverage issues;
- *Section Eight* provides some background information about the Comprehensive General Liability insurance policy and discusses some of the evidence which shows that this policy was intended to provide broad coverage for environmental damage claims;
- *Section Nine* describes some of the key issues that arise in environmental insurance coverage claims. This section will help policyholders understand many of the legal issues that are most common in insurance coverage disputes so that policyholders can discuss those issues with their legal counsel and decide what to do; and
- *Finally*, appendices to the Guide contain a number of sample letters which a policyholder and its legal counsel can adapt to communicate with insurance companies and others.

## **Section 1**

### **An Insurance Primer** .....

#### **A. THE PURPOSE OF INSURANCE IS TO INSURE**

The first and fundamental rule is that the purpose of insurance is to insure. Standard form liability insurance is “litigation insurance.” Liability insurance is purchased by virtually every business organization, and most governmental entities in the United States. It covers a broad range of claims resulting from real or imagined bodily injury or property damage. The comprehensive general liability (“CGL”) policy fits environmental damage claims to a “T.” This liability policy has long been advertised as “One of the most potent weapons for protection every afforded.” That is the promise; the delivery is unfortunately considerably short of the mark.

#### **B. THE FIVE SERVICES**

A liability insurance policy promises to deliver five services to the policyholder:

1. Loss Prevention and Safety Engineering Services
2. Investigation
3. Defense
4. Indemnity
5. Loss Mitigation

1. Loss Prevention and Safety Engineering Services—Frequently, the insurance company inspects the policyholder’s facilities to ensure that the policyholder is employing adequate safety and loss control practices;

2. Investigation – the insurance companies agrees to investigate claims made against the policyholder;

3. Defense—the insurance company agrees to defend the policyholder whenever there is an attempt to impose legal liability upon the policyholder because of bodily injury or property damage;

4. Indemnity—The insurance company agrees to indemnify the policyholder for any damages which the policyholder may face because of bodily injury or property damage;

5. Loss Mitigation—After there has been an accident or other incident, the insurance company agrees to institute loss control measures for the benefit of the policyholder in order to prevent or minimize claims.

C.  
OCCURRENCE  
AND  
TRIGGER—  
CAUSE AND  
EFFECT

There are two fundamental insurance concepts that sometimes cause confusion.

Liability insurance policies differentiate between cause and effect. The amount a liability insurance policy will pay is determined by the number of causes of the claimed bodily injury or property damage. The causative event or factor is called the “occurrence.” A liability insurance policy is “triggered”—that is, brought into play or made applicable by the effect—when the claimed bodily injury or property damage takes place during the policy period.

The distinction between “occurrence” and the “trigger of coverage” has been explained by the Insurance Company of North America (“INA”) as follows:

[The word] “occurrence” is defined in the policies as the event that causes sickness or disease.... Under the terms of the insurance policies in issue, therefore, coverage exists if and only if sickness or disease “occurs” (that is, happens) during the policy period and is caused by an “occurrence” (that is, by an appropriate causative event). There is no requirement in the policies, however, that the causative event must also have happened during the policy period. For example, if a causative event which happens during Aetna’s policy period causes a disease which happens during Liberty’s policy period, Liberty owes coverage for the claim and Aetna does not.

In the usual case, the distinction between the causative event and the resultant injury is not important because the causative event and the resulting injury happen at the same time. For example, in a car crash, the collision (the occurrence) and the resulting property damage (the trigger of coverage) occur simultaneously. By contrast, in “delayed action” claims—such as in most environmental property damage claims—the injury or damage may be separated from the cause by a long period of time.

The concept of “cause” (occurrence) can be almost metaphysical. For example, in a product liability case, is the “cause” the decision to market the product, the making of the product, the sale of the product, or any one of the multitude of stages between the beginning of time and the appearance of the damage? Depending on the facts of the particular case, courts have held that the “cause” of product liability injuries could be the decision to manufacture or to sell a particular product; the incorporation of a defective product into another product; the failure of the product; or the failure to warn of the product’s deficiencies.

Similarly, the “effect” or trigger presents enough variations to puzzle the most talented linguist. There are at least nine separate triggers that can be found in the reported decisions. These range from “cause” – which makes occurrence and trigger the same event – to “manifestation” or the realization by the damaged party that there has been bodily injury or property damage. There are four principal triggers: namely, (1) continuous injury, which includes the entire injury process from initial exposure through manifestation (manifestation being the diagnosis or discovery of the condition); (2) injury-in-fact, which could include the entire injury process but requires the policyholder to make an affirmative showing that some injury did occur (e.g., in an air pollution case the policyholder might have to show that contaminants entered or migrated through the atmosphere during the applicable policy periods); (3) exposure (exposure being the moment of exposure from which all subsequent damage is deemed an outgrowth); and (4) manifestation. The “trigger of coverage” theory that avoids a single-point trigger and most often maximizes the policyholder’s insurance coverage in delayed-manifestation cases is the continuous injury theory. Under this theory, all insurance policies in effect during the entire course of the alleged environmental damage will be triggered to provide coverage for the policyholder’s claim.

*Remember: Never expect an insurance company*

## **Section 2**

*to help a policyholder file an insurance claim or to help a policyholder collect insurance proceeds for an environmental insurance coverage claim.*

*Insurance companies insist that they be given notice of events that may give rise to liability (such as an automobile accident) and that they be given immediate notice of claims and potential claims (such as a letter threatening legal action or a complaint initiating a legal proceeding against the policyholder) immediately. Thus, there are two separate and distinct notice requirements. The first is notice of an event or happening (an “occurrence”) that may lead to a claim. The second is notice of an actual or potential claim against the policyholder. In either case, the policyholder promptly should provide notice to each and every insurance company that sold a liability insurance policy for any point in time during the alleged bodily injury or property damage. For instance, if the insurance pertains to a demand for cleanup of environmental damages, give notice to every insurance company that sold a liability policy from the date the environmental damage first happened through the date of the “occurrence” or of the actual or threatened demand for cleanup.*

### **How to Pursue Insurance Coverage**

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#### **A. GIVE NOTICE—NOW**

**Notice of Problems.** The invariable rule is that a policyholder should give notice to its insurance company as soon as the policyholder senses that an event or happening might result in a claim against the policyholder.

*1. Notice of problems.*

**Notice of Claims.** When a claim is made against the policyholder or threatened against the policyholder, the policyholder immediately should give notice to all of the above-described insurance companies.

*2. Notice of claims.*

**Notice Generally.** A policyholder should provide notice to each and every insurance company that sold an insurance policy at any point in time that

*3. Notice generally.*

might possibly be involved in the claim. One of the most common reasons advanced by insurance companies for denying a claim is that the policyholder gave "late notice." In some states, delays in notifying an insurance company for periods as short as 10 days can harm the prospects for successfully obtaining insurance coverage. In these states, no consideration is given as to whether or not the delay caused any harm to the insurance company.

"Plain vanilla" notice usually is best. Notice usually is given through agents or brokers. Policyholders should notify their agents or brokers who then give the notice to the insurance company. Policyholders are well-advised to verify that the agent or broker has fulfilled its function promptly and precisely. A sample letter asking the agent or broker to give notice is set out in Appendix A.

The insurance industry has developed a standardized form for giving notice. An insurance agent or broker usually will send notice to all insurance companies on this standard "ACORD: General Liability Loss Notice" form (the "ACORD Form"). A copy of the ACORD Form is set forth in Appendix B. The ACORD Form is used for both notices of problems, happenings, events (occurrences) and notices of claims or potential claims.

With the help of the policyholder, the agent or broker should answer as many of the questions on the ACORD Form as possible, keeping in mind that "not applicable" and "unknown" frequently may be the correct answers in the early stages of a potential problem or an insurance claim. Even though the agent or broker is responsible for giving the notice, the policyholder should ask for and receive copies of all notices. The policyholder carefully should determine that notice has been sent to *all* potentially involved insurance companies and that the answers on the ACORD form are accurate and appropriate. Attention to detail sometimes is lacking in the agent's or broker's claims processing staff.

Sometimes it is appropriate for the policyholder to give notice directly to the insurance companies,

for example, when the agent or broker is no longer in business. In such situations, the ACORD form provides a good checklist. A sample of a notice letter sent directly from a policyholder to an insurance company is set forth in Appendix C.

A policyholder should provide notice to each and every insurance company that sold an insurance policy at any point in time that might possibly be involved in the claim. For example, if the United States Environmental Protection Agency (EPA) has sent a letter to the policyholder alleging that the policyholder potentially may be responsible for the clean-up of a municipal waste disposal facility that opened in 1950, the policyholder should put all insurance companies that sold the policyholder insurance policies from 1950 to the present on notice. This is true even if the policyholder did not send material to the site until 1960.

When the policyholder first gives notice of an event or happening that may result in the possibility of a claim to its insurance companies, it is not necessary to supply overly detailed information. In fact, spending too much time at this point on gathering detailed information about the event can take time and energy away from the search for insurance coverage and may unnecessarily delay notice. This is not to suggest that insurance companies should not be given complete information—only that the first wave of information should go out even though it may be incomplete and subject to later correction.

When insurance companies are given first notice of a claim or potential claim, a copy of the document received by the policyholder that alleges liability or responsibility for the environmental damage is all that need be provided. Additional information that could be included in the notification, if readily available, might be a general description of the product or event; what happened, when and where; why the policyholder is involved; and what insurance policies are believed to have been purchased from the insurance company.

The initial notification should state clearly that additional insurance policies may have been purchased and should ask the insurance company to provide a list of all policies that it sold to the policyholder. The notice also should request that the insurance company provide a defense, or agree to pay the defense costs, in the action against the policyholder; that the insurance company reimburse the policyholder for all of the policyholder's past, present and future liabilities; and that the insurance company advise the policyholder of all possible legal and factual bases that would support a finding of insurance coverage.

Some insurance policies contain special notification provisions. If the insurance policy contains any special notice requirements, of course, these should be followed carefully. For example, first-party property damage insurance policies (that is, your fire insurance policy which now probably has a fancier name) often contain a "proof of loss" filing requirement. The insurance policy will state what is required. Proof of loss filings often must be sworn to before a notary public and are separate from and in addition to the other notice requirements. Proof of loss provisions should be followed strictly to avoid a later argument by the insurance company that the policyholder forfeited its insurance coverage by failing to follow the specific requirements of the policy.

The necessity of giving notice is a major reason for locating and compiling insurance documents BEFORE a problem develops. Without records, it may take days, weeks, or even months to discover those insurance policies which were purchased in the past. It is easier to comply with an insurance policy's notification requirements if all insurance policy information already has been collected and readily is available.

There are many different insurance policies which may provide coverage for pollution-related claims, including:

- Comprehensive General Liability (“CGL”) insurance policies (sold from 1940 until the present)—these are “all risk” policies that are described in detail in this Guide;
- Umbrella Liability insurance policies provide insurance protection both above *and in addition* to basic comprehensive general liability insurance.
- Excess Liability insurance policies provide insurance protection above basic comprehensive general liability insurance.
- Environmental Impairment Liability insurance policies (sold from 1981 until the present)—additional insurance specifically for damages incurred due to environmental impairment;
- Ship Scrapping or WQIS policies—additional insurance specifically for damages incurred due to water pollution resulting from ship scrapping or other maritime activities;
- First-Party Property insurance policies—these policies insure the policyholder against physical loss or damage to its own real and personal property;
- Personal Injury Liability insurance policies—these policies insure the policyholder against liability for personal injuries such as libel, trespass, nuisance, and unfair competition;
- Product Liability insurance policies—these policies insure the policyholder against liabilities that may be incurred as the result of some problem caused by a product manufactured or sold by the policyholder; and
- Automobile insurance policies.

A policyholder also may have other, more specialized policies which should be reviewed because a number of different insurance policies may provide coverage for the same environmental liability.

In the early 1980s, insurance companies added an Environmental Impairment Liability (EIL) insurance

B. THE  
INSURANCE  
COVERAGE &  
INSURANCE  
POLICIES  
POSSIBLY  
INVOLVED

*1. Types of  
Insurance  
Policies.*

policy to the insurance package offered to policyholders. It is important to understand that an EIL policy DOES NOT REPLACE OTHER INSURANCE POLICIES THAT ALSO PROVIDE INSURANCE COVERAGE FOR ENVIRONMENTAL LOSSES. In other words, the purchase of an EIL insurance policy does not mean that environmental insurance coverage provided in other policies is nullified. In many instances, EIL coverage is simply “belt and suspenders” insurance like buying flight insurance in addition to your whole or term life insurance policy.

## *2. Insurance Policy Analysis.*

It is crucial for policyholders to prepare now for future environmental claims. Proper records and files will be essential if it becomes necessary to file a claim. A policyholder should develop a plan now to locate and preserve what could become important evidence in the future. Insurance policies should be read, analyzed, and depicted on an insurance coverage chart showing for each year (with primary insurance at the bottom, umbrella insurance just above and excess insurance on top of the umbrella layer) the name of the insurance company, the amount of coverage and any deviations from the standard form language. The resulting chart will look like a layer cake with different layers each year. All pertinent exclusions should be noted in the chart. The time line or period of development for each occurrence can then be compared to the chart of insurance to make rough estimates of available insurance coverage. This analysis usually requires some expert assistance.

A policyholder cannot know if an insurance policy will provide coverage and thus be valuable until the policy is analyzed. In addition, and as explained below, a primary reason for analyzing *all* insurance policies is that information in one, seemingly irrelevant policy, may lead to the discovery of other policies that may provide coverage for environmental claims.

## *3. Loss Control.*

Included within the premium dollars paid for their insurance policies, many policyholders purchased loss control services from their insurance companies

that the insurance companies advertised were tailor-made for their policyholders. In particular, insurance companies advertised that they provided expert loss control services to advise their policyholders on how to avoid exposures, losses, and potentially dangerous business operations and activities. These services typically included loss control seminars and regular inspections conducted by insurance company field experts of the policyholders' business premises. As long ago as 1942, Travelers Insurance Company vividly described its loss control services as follows:

[W]e've invested more than \$50,000,000 in accident prevention and maintain a staff of several hundred trained experts, the largest group of its kind in the world, whose job it is to safeguard life and property against needless destruction. They've had the satisfaction of watching accident ratios drop in plants operating in accordance with their recommendations. They are particularly proud of their war record, the steady, successful fight they are waging to keep down accidents in vital industries.

In effect, insurance companies often act as "surrogate regulators," that is, they police their policyholders. A lawsuit against the policyholder very well may have resulted from the failure of the insurance company's loss control experts to properly advise and monitor the policyholder. Where an insurance company professes a special relationship with a policyholder, or its industry, the provision of loss control services particularly is important. When claims materialize, should such insurance companies be allowed to disclaim insurance coverage on the ground that they did not know of the risks? The answer is no.

THE INSURANCE POLICYHOLDER SHOULD COLLECT ALL PRIOR INSURANCE POLICIES, INCLUDING THE POLICIES THAT WERE PURCHASED BY ITS PREDECESSORS AND AFFILIATES.

## C. FINDING OLD INSURANCE POLICIES

### 1. *Discovering Insurance Policies.*

Without evidence of past insurance policies, the policyholder may lose millions of dollars in insurance coverage that was paid for with precious premium dollars! While old insurance policies may seem like history; they can be very important because insurance policies generally provide coverage for any damage or injury that took place during the policy period—*no matter when the damage or injury is discovered*. For example, a 1951 insurance policy may provide coverage today if the claimants alleged that some environmental-related damage began during 1951.

Accordingly, the policyholder must try to locate all potentially applicable insurance policies, regardless of type or age. As pollution damage usually is alleged to have taken place over many years, the policyholder must try to locate all insurance policies purchased by the company and by any of its predecessors or affiliates. These policies may cover environmental problems that are coming to the forefront today and may lead to the discovery of other potentially applicable insurance. For instance, even though a policyholder may have purchased Environmental Impairment Liability (“EIL”) insurance from an insurance company in the mid-1980s, the policyholder may be able to find information in the EIL policy or in the application for the EIL policy regarding other relevant liability insurance policies. By way of example, the policy may refer to an expiring policy or to other insurance policies that provided specialized types of coverage. Also, umbrella or excess insurance policies often contain specific references to underlying policies and renewal insurance policies frequently identify expiring policies.

In addition to examining company files, the policyholder should contact current and past brokers or insurance company agents and request that they review their historical records. While brokers and agents should be able to help locate old insurance policies, they sometimes err in their suggestions about insurance coverage matters. Do not rely on their advice concerning what is or is not covered by

insurance. Instead, consult with counsel expert on insurance issues.

There are several companies in the business of locating old insurance policies. The use of such an "insurance archaeologist" usually is cost effective.

Make certain that the search for all insurance policies includes:

*2. The Scope of the Search.*

- Reviewing your own insurance files and your broker's and agent's files;
- Interviewing present and former employees of your company's insurance department, brokers, and agents;
- Reviewing records of outside accountants;
- Reviewing accounting records for evidence of premium payments;
- Reviewing your lawyer's records, especially claims files;
- Reviewing known policies for references to other policies;
- Reviewing records of affiliated and predecessor companies;
- Reviewing the available insurance policies of other businesses or parties that also face potential liability at the same site;
- Reviewing workers' compensation files for documents which may disclose that an insurance company defended workers' compensation cases since workers compensation insurance and liability insurance frequently are purchased from the same insurance company;
- Reviewing records, if possible, of any companies that required your company to submit a certificate of insurance before doing business with your company;
- Reviewing railroad records if the company ever operated a facility with a sidetrack (in that case, there might be a sidetrack agreement with the railroad, which would have required evidence of insurance);

- Reviewing records of federal and state governments, if business has been conducted with them (for example, a government contract with the U.S. Navy may mean that there is a copy of the actual insurance policies in the U.S. Naval Archives in Suitland, Maryland); and
- Searching the London insurance market for London brokers' records.

Never forget that insurance companies should—but frequently claim that they do not—have copies of the insurance policies they sold to you.

### *3. How to Identify and Collect from Insolvent Insurance Companies*

A number of insurance companies in recent years have become insolvent or bankrupt. In these instances, there usually will be less money to pay claims, and certainly there will be additional complications in filing claims.

To recover as much as possible from your insurance, you should identify those policies sold by insurance companies that now are insolvent. In most cases, the broker or insurance company agent that sold the insurance policy will inform policyholders that the insurance company has declared insolvency or, at least, will have information about the insolvency.

State appointed liquidators of insolvent insurance companies and state guaranty funds (comparable in some ways to the Federal Deposit Insurance Corporation) should be notified promptly if a policyholder has a claim or possible claim against an insolvent insurance company. The state insurance department in the state where the insolvent insurance company was headquartered or where the claim arose should inform the policyholder about the manner and place to file claims.

U.S. policyholders that purchased insurance from Lloyds or the London insurance market may need to complete special applications to be certain that a claim is properly filed to be considered in any insolvency proceedings in London. In some rare instances, an insolvent insurance company's

reinsurers may be a source of payment for claims. In other situations, the policyholder's umbrella and excess insurance policies may "drop down" to cover liabilities when a primary or lower level insurance company is insolvent.

It is crucial that a policyholder continue to communicate with the liquidators or the parties handling an insurance company insolvency. Furthermore, the agent or broker should be asked to keep the policyholder informed of all possible ways to receive payment.

All states have insurance guaranty funds designed, with limitations, to pay claims by policyholders against insolvent insurance companies. Thus, there are at least two sources for recovery from insolvent insurance companies: the state guaranty funds and any proceeds from the liquidation process.

Review company procedures for retaining and storing documents and inform appropriate company personnel to keep files relating to insurance and environmental matters. It is important that information about potential environmental claims be retained. Such information would include any communications to and from any other potentially responsible parties such as suppliers of equipment parts or outside consultants. A sample memorandum to employees is attached as Appendix D.

In addition, all agents and brokers should be asked to preserve documents that may be related in any way to environmental matters or insurance matters of any kind. A sample letter to all insurance agents and brokers requesting that they maintain all of their records concerning the policyholder is set forth in Appendix E. A sample letter to the policyholder's outside accountants requesting that they maintain all of their records concerning the policyholder is set forth in Appendix F.

#### *4. Protect Evidence*

## **Section 3**

### **How to Respond to Insurance Company Inquiries**

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#### **A.RESERVATION OF RIGHTS LETTERS**

There are three usual responses by an insurance company to an environmental insurance coverage problem or claim. First, with respect to claims, the insurance company immediately may agree to defend and pay the claim. Unfortunately, this is highly unlikely.

The second possible response is that the insurance company immediately will deny the claim. This, too, is unlikely. Unless there has been a clear violation by the policyholder of the insurance policy terms, such as late notice or non-payment of premiums, insurance companies generally do not deny a claim without first conducting some type of investigation.

The third and most likely response by an insurance company is for the insurance company to send to the policyholder a "reservation of rights" letter. This letter informs the policyholder that the insurance company will investigate the claim, but that it may deny insurance coverage in the future.

The reservation of rights letter will set forth an exhaustive list of reasons that the insurance company thinks may justify a denial of coverage.

In the past, the insurance company commonly would agree to pay the policyholder's defense costs during the period of the insurance company's investigation of the claim. This practice now has changed—at least insofar as large claims are concerned—and insurance companies will rarely, if ever, agree to pay for the policyholder's defense.

Sometimes an insurance company will ask a policyholder to sign a "non-waiver" agreement to be in force while the insurance company investigates. Policyholders should be aware that such an agreement could be a "trojan horse" because some of the forms used permit the insurance company to recoup all defense expenditures if a court ultimately determines that there is no coverage for the policyholder's claim. Under the laws of most states, the insurance company usually would be required to pay for the policyholder's defense until it could show that there is no possibility that the claim is covered under any of its insurance policies.

Most often, the insurance company will send the policyholder a questionnaire containing a large number of detailed questions about the claim. How these questions are answered, and the amount and type of information that should be given to the insurance company, depends on the policyholder's overall strategy for pursuing the claim. Certain ground rules should apply to most situations:

1. Unless an insurance company agrees to provide insurance coverage with no strings attached, it is wise to treat the insurance company as an adversary—decidedly unfriendly. The policyholder's goal is to cooperate with the insurance company as fully as possible in order to get the insurance coverage paid for, WITHOUT giving up any rights.
2. Any information or documents that are subject to the attorney-client privilege (this includes discussions and correspondence between a policyholder and its attorney) or which were prepared in anticipation of litigation should not be given to the insurance company. If these materials are provided to the insurance company, the policyholder may be compromising important rights, such as its right to maintain the confidentiality of privileged communications with its attorneys.
3. The policyholder must cooperate with the insurance company and should try to find a way to answer the insurance company's questions that is not overly burdensome. For example, if the insurance company asks to review a large number of documents, offer to have the review conducted at the policyholder's office rather than incur the expense of copying all of the documents and sending them to the insurance company.
4. Keep records of when information is provided to an insurance company.
5. Keep records of the money spent in providing information to the insurance company. Under many insurance policies, the insurance company is obligated to reimburse the policyholder for

the costs of “cooperating” with the insurance company.

A sample response to an insurance company’s request for information is set forth in Appendix G.

## **Section 4**

### *Keep in Contact with the Insurance Company*

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Whether you have just put your insurance company on notice or are in the middle of a lawsuit over insurance coverage, it is important to keep in contact with the insurance company. Each insurance company should receive a periodic update on the status of each claim. These updates need not be extensive. A sample update letter is set forth in Appendix H.

In particular, it is essential to forward proposed settlements or consent orders to the insurance company before agreeing to them. A sample letter regarding a proposed settlement is set forth in Appendix I.

It often is advisable to remind the insurance company that it has a duty to act fairly and in good faith with its policyholder. Such a letter can be sent at any time after the policyholder has notified the insurance company of its claim for insurance coverage. A sample letter to the insurance company regarding the insurance company’s continuing duty of good faith and fair dealing is set forth in Appendix J.

## Section 5

### Deciding Whether to Sue an Insurance Company Over an Environmental Insurance Coverage Dispute

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There are two things a policyholder can count on when it sues an insurance company for insurance coverage: first, environmental insurance coverage cases can be expensive and, second, the litigation will disrupt the policyholder's business operations.

These cases can go on for years. Expect that the insurance company will fight, expect that it has been through these fights before, and expect that the insurance company knows how to make the challenge as difficult and expensive for the policyholder as possible. For an insurance company, the longer it can prolong the lawsuit, and thereby drain and demoralize the policyholder, the lower any eventual settlement might be. This phenomenon is known as "insurance nullification by litigation" or "stonewalling."

That is the bad news. The good news is that hundreds of millions of dollars are being recovered by policyholders in settlements and judgments. For cases that do not settle but go to trial, policyholders win 85 to 90% of the time. A recent *Business Insurance* article notes that 17 of the last 22 environmental coverage cases have resulted in jury verdicts for the policyholder.

To avoid unpleasant surprises after the battle has begun, policyholders should discuss the potential insurance coverage litigation with an attorney to obtain a realistic understanding of what the fight for insurance coverage will entail. It also is important to determine the kind of experience the prospective attorney has in representing policyholders in environmental insurance coverage disputes. A policyholder should ask for general information about anticipated legal fees, realistic recovery prospects, and the time it may take to reach a decision or settlement. Little of this information is available with precision. Estimates, however, enhance decision-making ability.

A.THE BAD  
NEWS

B.THE GOOD  
NEWS

C. PRE-  
LITIGATION  
EDUCATION

#### D. ALTERNATIVES TO LITIGATION

Policyholders should inquire concerning alternatives to litigation. In some circumstances, policyholders and insurance companies may decide to use arbitrators to determine the obligation of the insurance companies to provide coverage. The cautious policyholder should be aware of the problems with arbitration. Experienced practitioners know that arbitration is often policyholder unfriendly. In most instances, the organizations that appoint arbitrators designate individuals as arbitrators who are currently or formerly employed by insurance companies or their law firms.

Non-binding mediation has been quite successful when used as an adjunct to litigation. Mediators can keep dialogue proceeding even though they have no power to dictate settlements. Over 97% of all cases are settled, so the sooner a policyholder can reach this result the better.

#### E. THE BAD, BAD NEWS

Importantly, a policyholder must understand that there is always the possibility that its case against the insurance company may be lost.

#### F. THE GOOD, GOOD NEWS

Remember, the purpose of insurance is to insure. Policyholders usually recover far more in settlements than they spend in litigation costs or attorneys fees. Stephen B. Brown, the Vice President and Senior Counsel of Champion International Corporation, detailed in a 1992 article in the *Toxics Law Reporter* how Champion recovered \$45,000,000 in settlements from its insurance companies after only 18 months of litigation.

## **Section 6**

Settlement discussions with insurance companies regarding environmental insurance coverage claims should be held early and often. Contrary to popular thinking, talking settlement does not show weakness. The process is frustrating and takes time. Early settlement talks can, in many cases, save a great deal of time, money and headaches. Frequently persistence is rewarded.

Should you sue first or talk first? For large dollar claims, there are serious risks in talking settlement before filing a lawsuit against an insurance company. The insurance company may decide to file a "preemptive" insurance coverage lawsuit in a state or court that is policyholder unfriendly. Insurance companies know which states or courts are advantageous for them, that is, which states or courts are anti-policyholder. Remember, an insurance company can file a lawsuit against a policyholder while settlement negotiations are proceeding; and they frequently do. Sometimes a policyholder can negotiate a "standstill" agreement with the insurance company specifically stating that neither party will file a lawsuit until after settlement negotiations break down. When in doubt, sue first and talk settlement later.

The policyholder should consider using the agent or broker to facilitate settlement discussions. Some lawyers do not favor this approach, but the overall results indicate that in many cases having someone in the middle can expedite the settlement process.

Overwhelmingly environmental insurance coverage disputes settle. One of the policyholder's efforts should be to reach that goal. Settlement discussions and litigation, however, should proceed on two separate tracks. The most effective settlement tool is an aggressive and knowledgeable litigation push. Hard driving courtroom efforts often lead to substantial settlements and speed up the settlement process.

### ***When and How to Talk Settlement With the Insurance Company***

## *Section 7*

### *Litigation*

If your insurance companies sue you or if you sue your insurance companies, you should notify your agents, brokers, accountants, environmental lawyers, relevant company employees and relevant former company employees of the lawsuit.

A sample letter to current employees is set forth in Appendix K.

A sample letter to former employees is set forth in Appendix L.

## *Section 8*

Understanding Comprehensive General Liability insurance—what it covers and what it does not cover—will help a policyholder collect insurance for pollution damage claims. Other insurance policies may provide insurance coverage for part or all of a policyholder’s environmental liabilities, but Comprehensive General Liability insurance policies historically have been one of the broadest and most commonly used insurance policies for covering all of the risks faced by businesses, including the risk of pollution liability. Despite the Comprehensive General Liability insurance policy’s broad scope of coverage, however, in recent years insurance companies consistently have disputed coverage when policyholders have submitted claims under this policy for their environmental liabilities.

An understanding of the scope of coverage provided by the Comprehensive General Liability insurance policy will better highlight the importance of the steps suggested in this Guide. Many, although far from all, court cases have supported policyholders and show that policyholders are entitled to insurance coverage for liabilities resulting from pollution damage.

### A.

#### *BACKGROUND*

Liability insurance first was sold in the United States a little more than 100 years ago to New York City building owners. Before 1940, a separate insurance policy was needed for each individual problem that might arise. For example, a business owner would buy separate insurance for automobiles (originally

“teamsters insurance”), a separate policy for buildings, for elevators, products liability, and so forth. Often more than 18 separate insurance policies would be purchased by a single business.

This situation changed in 1940, when comprehensive or multiple risk general liability policies first were sold to the public. Between 1940 and 1966, standard form Comprehensive General Liability policies covered all of the risks that were formerly covered separately by single risk policies—and more. The insurance policies sold from 1940 to 1966 generally covered any liabilities that were caused by an “accident.”

In 1966, the standard form insurance policy was changed and broadened to provide coverage for liability caused by an “occurrence,” as opposed to an “accident.” An “occurrence” is a happening. Think of the occurrence as the cause of damage. Conversely, damage is the result of an occurrence or happening.

What did the change from “accident” to “occurrence” mean for policyholders? The short answer, according to most courts, is: “not much.” As insurance industry comments provided below will show, even insurance companies have agreed that the two words—“accident” and “occurrence”—are interchangeable.

One concept that has remained constant since 1940 is that “comprehensive” insurance is meant to cover almost any liability for bodily injury or property damage a policyholder might face unless the insurance policy contains a specific exclusion. In other words, the insurance company covers everything absent an explicit exclusion.

B. 1966:  
POLLUTION  
LIABILITY IS  
COVERED IN  
THE REVISED  
COMPREHENSIVE  
GENERAL  
LIABILITY  
STANDARD FORM  
INSURANCE  
POLICY

It is important to remember that pollution is not a new issue to the insurance industry. A look at how insurance companies sold and marketed their Comprehensive General Liability policies will show that in the past the insurance industry often discussed insurance coverage for pollution damage.

When the first Comprehensive General Liability insurance policy was introduced in 1940 (the "accident" policy), it was advertised to "cover everything." Approximately 90% of the court cases involving "accident" policies hold that "everything" includes liability for environmental property damage arising from gradual pollution.

When the insurance industry rewrote the standard form Comprehensive General Liability insurance policy in 1966, the industry made it clear that it would continue to cover pollution damage. One of the drafters of the 1966 standard form, G.L. Bean of the Liberty Mutual Insurance Company, proclaimed at an insurance industry conference that, "it is in the waste disposal area that a manufacturer's basic premises-operations coverage is liberalized most substantially" under the 1966 standard form Comprehensive General Liability insurance policy. Mr. Bean also stated that gradual pollution damage resulting from such causes as "contamination of the water supply or vegetation" were covered.

Henry G. Mildrum, an executive with The Hartford Insurance Company, similarly noted that "slow ingestion of foreign substances or inhalation of noxious fumes" were perfect examples of events that would be covered under the 1966 revised form. This insurance executive added that the new insurance policy would provide insurance coverage for property damage resulting from the emission of "noxious fumes" from a chemical manufacturing plant.

A 1966 Liberty Mutual Insurance Company sales directive instructed its sales persons to sell the new policy on the basis of its broadened coverage for pollution. The directive stated, "with the current emphasis on air and water pollution, many risks

have a hidden exposure too often not recognized.” The point of this statement was, of course, that the new Comprehensive General Liability insurance policy would cover these “hidden exposures.”

In 1966, the insurance industry was in agreement. Liability for unintended pollution damage was covered under the new Comprehensive General Liability insurance policy. Insurance buyers were told in insurance company sales promotions that the new insurance product definitely covered all manner, shape, and form of liability, subject to only a few limited exclusions.

In 1970, the insurance industry began to add a partial “polluter’s exclusion” (sometimes called the “pollution exclusion”) to its standard form Comprehensive General Liability insurance policies. This exclusion became part of the standard form in 1973. The exclusion 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 sudden and accidental.

There are three important things for all policyholders to know about the partial polluter’s exclusion. First the insurance industry promoted this exclusion to state insurance regulators and others in 1970 as a “mere clarification” of the existing coverage which, as discussed above, included insurance coverage for pollution damage. Second, the insurance industry represented at the time that the exclusion was meant to exclude only knowing and deliberate pollution damage by the policyholder. Third, there is evidence from statements made by insurance company executives that the partial “polluter’s

C. 1970:  
THE PARTIAL  
“POLLUTER’S  
EXCLUSION”  
IS CALLED A  
“MERE  
CLARIFICATION”  
OF EXISTING  
COVERAGE

exclusion" was added to the Comprehensive General Liability insurance policy largely for public relations purposes. In other words, it was an exclusion that did not exclude.

Today, the insurance industry argues that the partial "polluter's exclusion" eliminates coverage for most pollution incidents. But that is not what the industry said in 1970 when the exclusion was added to the policy form.

In 1970, the insurance industry explained to state insurance commissioners and insurance departments that the partial "polluter's exclusion" simply was a clarification of the "neither expected nor intended" language used in the "occurrence" definition. The highest courts of several states, including New Jersey, Georgia, Wisconsin, Illinois and West Virginia, have ruled that insurance companies are bound by their 1970 statements concerning the intended scope of the exclusion.

The meaning of the "sudden and accidental" phrase in the exclusion clause has been at the heart of the dispute between insurance companies and their policyholders over the insurance industry's attempt to disclaim coverage for pollution liability. This phrase is a term of art that had a specific meaning for the insurance industry in 1970 when it was incorporated into the insurance policy form. It was understood by insurance companies to mean "unintended or unforeseen" and thus to exclude coverage only for persons who had intentionally caused pollution damage.

Today, some insurance companies argue that the phrase "sudden and accidental" means "abrupt" or occurring over a brief period of time, such as an explosion. They further argue that, in determining the scope of insurance coverage, a court should not look beyond the insurance policy when trying to define its terms. In other words, insurance companies are now asking the courts to ignore their solemn representations to insurance regulatory authorities, and their own sales literature, custom, usage, and history.

When the 1970 partial “polluter’s exclusion” was drafted, the words “sudden and accidental” were not understood by insurance companies or regulators to refer to any time period, brief or not. The phrase earlier had been used in boiler and machinery policies, in which the insurance industry defined the word “accident” to mean a “sudden and accidental breakdown” or a “sudden and accidental tearing asunder.” In court cases and legal commentary concerning boiler and machinery insurance coverage, the phrase was interpreted by the courts to mean “UNEXPECTED AND UNINTENDED.”

The insurance industry certainly had to know that the phrase “sudden and accidental,” as used in the partial “polluter’s exclusion,” would continue to be interpreted as “unexpected and unintended.” In fact, in 1982, Thomas Jackson of Travelers Insurance Company publicly stated that the “sudden and accidental” phrase was equivalent to “unexpected and unintended.” Travelers viewed any other interpretation as illogical. This is what policyholders are saying today.

There is also compelling evidence that the partial “polluter’s exclusion” was added to the Comprehensive General Liability insurance form for public relations purposes. A letter from the Mutual Insurance Rating Bureau (MIRB)—an agency representing the insurance industry—to the Insurance Commissioner of West Virginia stated that the MIRB hoped that the partial “polluter’s exclusion” would dispel any perception that the insurance industry was “aiding and abetting” willful polluters—a perception that would place “the insurance industry in public disfavor.”

The partial “polluter’s exclusion” was designed to publicize the insurance industry’s refusal to insure INTENTIONAL polluters. The insurance companies feared that, absent a specific policy exclusion, the public might not understand the industry’s position on intentional pollution.

So, even after the partial “polluter’s exclusion” was added, public and private statements from the

insurance industry and policyholders indicated broad agreement that the Comprehensive General Liability insurance policy covered liability for unintentional damage caused by waste disposal, smoke, fumes, air or stream pollution, and the contamination of water supplies and vegetation. Even though some insurance companies have reversed their interpretation, this insurance coverage should still be available for policyholders who purchased Comprehensive General Liability policies with valuable premium dollars.

## **Section 9**

### **Current Legal Issues**

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There are a number of basic legal issues that commonly arise in environmental insurance coverage cases. A policyholder should become familiar with these issues before making any decision to litigate against, or negotiate with, its insurance company.

It is important to note that court decisions discussing these legal issues differ from state to state—sometimes significantly. Thus, the decision of which state's law should apply to the policy interpretation issues is often of crucial importance.

#### A. THE DUTY TO DEFEND

The duty to defend—in other words, the insurance companies' obligation to pay the policyholder's attorneys' fees and court costs in defending an underlying environmental action brought by the United States Environmental Protection Agency or others—is an important benefit for policyholders. *Sometimes this is the most important benefit of the insurance policy.* Note that, in many cases, the cost of defending the policyholder will be far greater than the actual amount of any judgment or settlement. Liability insurance policies require insurance companies to defend the policyholder or to pay the policyholder's defense costs in any action that alleges the possibility of liability for property damage or bodily injury that potentially is covered by the policy.

The standard form, post-1966 Comprehensive

General Liability insurance policy typically states:

[The insurance company] shall have the right and duty to defend any suit against the insured seeking damages on account of ... bodily injury or property damage even if any of the allegations of the suit are groundless, false or fraudulent.

The duty to defend means that:

1. An insurance company must hire and pay for a lawyer to defend a policyholder if there is any possibility of insurance coverage, based on the allegations against the policyholder;
2. The insurance company's duty to defend is independent of, and broader than, its ultimate duty to pay any final judgment; and
3. If some, but not all, of the allegations against the policyholder possibly fall within the insurance policy coverage, then the insurance company has a duty to defend the entire action.

Liability insurance policies generally state that a policyholder must notify the insurance company "as soon as practicable" after an occurrence (the happening or event that may give rise to the claim) or, in the event of a claim or lawsuit against the policyholder, must forward "immediately" to the insurance company the complaint or other notice of liability. As explained above, there are two separate notice requirements: notice of happening and notice of claim. The notice provisions usually have been interpreted to require the policyholder to give notice as soon as is reasonable under the circumstances.

#### B. THE ISSUE OF NOTICE

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 has been impaired by the delay, *i.e.*, most courts recognize that the insurance company should be required to demonstrate that it was prejudiced by receiving late notice. Moreover, an

insurance company waives the defense of untimely notice if it does not assert this defense and deny coverage promptly and specifically on that ground.

Some states excuse late notice if the policyholder can prove that the insurance company was not prejudiced by the delayed notification. This requirement can still constitute a significant hurdle for policyholders because it places upon the policyholder the considerable burden of proving a negative proposition—that the insurance company was not prejudiced by the delayed notice.

In some states, courts have held that timely notice is a precondition to coverage and, therefore, that it is not necessary for the insurance company to prove that its ability to defend the case was hampered by the delay in providing notice. Policyholders who give late notice in these states forfeit their insurance coverage.

### C. WHAT IS A “SUIT?”

The standard form Comprehensive General Liability insurance policy states that the insurance company will defend any “suit” against the policyholder. For the purpose of activating the insurance company’s obligation to defend its policyholder, no one disputes that the term “suit” includes lawsuits filed in a court by governmental agencies or by third parties such as neighboring landowners. However, in environmental insurance coverage cases, insurance companies often contend that they do not have a duty to defend because no “suit” has been brought against the policyholder. Under the environmental laws of many states and the federal government, governmental agencies may make claims against policyholders in administrative proceedings instead of traditional lawsuits filed in court. Insurance companies often argue that these administrative proceedings are not “suits,” even though policyholders’ liabilities are determined in these proceedings quite as conclusively as they would be in a court of law.

It is a matter of common experience that insurance companies uniformly take over a policyholder’s

defense as soon as the policyholder receives a nasty letter from the claimant or a lawyer. This is standard practice, for example, in automobile accident cases. In environmental matters, however, insurance companies contend that this time honored custom does not apply.

Most courts that have considered the “suit” issue agree that a formal legal action is not necessary to trigger the insurance company’s duty to defend. Consequently, if the policyholder receives a demand or communication from the Environmental Protection Agency or a state regulatory agency which states that the policyholder is or may be responsible for an environmental problem, that is considered sufficient to trigger the duty to defend.

Some courts have adopted a slightly more limited rule which states that administrative actions must be adversarial and coercive to trigger the duty to defend. Thus, a voluntary plan to eliminate environmentally hazardous conditions might be considered insufficiently coercive to trigger an insurance company’s duty to defend.

A small number of courts have concluded that a formal legal action must be filed in court before the duty to defend is triggered.

The standard form Comprehensive General Liability insurance policy states that the insurance company is required to pay “all sums that [the policyholder] is legally obligated to pay as damages because of bodily injury or property damage” (emphasis added). In recent years, insurance companies have advanced the novel argument that their insurance policies only cover “damages” to third-party claimants and do not cover the costs of cleaning up environmental damage in accordance with a governmental order or directive. In legal jargon, many insurance companies claim that governmentally mandated cleanup costs are “equitable” in nature, and thus nonrecoverable, because these costs are not awarded in the context of a lawsuit filed in a court of law.

D. ARE  
CLEANUP  
COSTS  
COVERED  
DAMAGES?

In almost all cases, however, the courts have concluded that cleanup costs are "damages" covered under Comprehensive General Liability insurance policies. In particular, the courts have found that all monies that the policyholder is legally required to pay as a result of property damage, including monies for the cleanup of environmental contamination, are recoverable from insurance companies. These courts have relied on a number of considerations, including the tenet that ambiguities in insurance policy language should be resolved in favor of the policyholder. Finding the "as damages" language of the policy to be ambiguous, courts have reasoned that, since the ordinary policyholder would not ascribe a highly technical meaning to the term "damages," this term should be interpreted in favor of coverage.

A few courts have disagreed with the overwhelming majority on this issue. They have held that cleanup costs are not covered "damages" under Comprehensive General Liability insurance policies and have adopted a narrow, technical interpretation of the term "damages." In these cases, "damages" have been allowed only if monetary damages are awarded against the policyholder in a lawsuit in court.

#### E. DOES THE 1970 PARTIAL "POLLUTER'S EXCLUSION"

APPLY?

The 1970 partial "polluter's exclusion" bars insurance coverage for liability resulting from property damage arising out of the "discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants," unless the "discharge, dispersal, release or escape" is "sudden and accidental." As discussed above, many court battles have been fought over the meaning of the phrase "sudden and accidental" in the partial polluter's exclusion.

*The key issue is whether the phrase "sudden and accidental" necessarily means "abrupt," and only "abrupt," thus eliminating insurance coverage for gradual*

*pollution damage.*

Many courts have ruled that this phase is either ambiguous or is simply a restatement of the requirement that the resulting damage be “neither expected nor intended” from the standpoint of the policyholder. When a court rules that policy language is ambiguous, the policyholder is given the benefit of the doubt in other words, insurance coverage is granted.

Wording in an insurance policy is ambiguous if there is more than one reasonable interpretation. When deciding whether “sudden and accidental” is ambiguous, courts have considered various dictionary definitions and interpretations of the word “sudden,” which is frequently defined as “unexpected.” The very fact that the courts cannot agree on the meaning of the term shows that it is ambiguous, according to several decisions.

Policyholders argue that the partial polluter’s exclusion should not apply in environmental cases because insurance companies themselves did not mean to exclude gradual pollution damage when they drafted the exclusion and submitted it for approval to state insurance regulatory authorities. Several courts have considered the historical evidence that the exclusion was intended merely to clarify the “neither expected nor intended” language of the Comprehensive General Liability insurance policy. In particular, these courts have noted that premiums were not reduced when the exclusion was added to the policy. Obviously, premiums *should have been* reduced if the coverage itself was.

In cases where insurance companies have themselves sought insurance coverage in one form or another, the insurance companies have argued that the partial “polluter’s exclusion” only bars coverage for intentional and expected pollution damage. For example, Centennial Insurance Company told a federal court in Pennsylvania that the exclusion does not bar coverage if the policyholder did not know, expect or intend” that its “discharge of wastes at any site ... would result in any type of environmental

damage." Keep in mind that many insurance companies and their affiliates have pollution problems, and that they have, sought *and obtained* insurance coverage for their own environmental problems.

As already noted, many courts have denied coverage for gradual pollution because of their interpretation of the partial "polluter's exclusion." These courts either have found that the phrase "sudden and accidental" is not synonymous with "neither expected nor intended" or have held that "sudden" refers to a brief, abrupt time period.

Before pursuing environmental insurance coverage litigation, policyholders should consider carefully what the various state courts have said about the partial "polluter's exclusion."

F. DOES  
THE 1985  
"POLLUTER'S  
EXCLUSION"  
APPLY?

In the mid-1980s, a revised "polluter's exclusion" was added to standard form insurance policies. A typical post-1985 exclusion states:

This insurance does not apply to:

1. "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. (Emphasis added).
2. Any loss, cost or expense arising out of any governmental direction or requirement that the named insured test for, monitor, dean up, remove, contain, treat, detoxify or neutralize pollutants.

Pollutants means solid, liquid, gaseous or thermal irritants or contaminants, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

While most courts have applied exclusions worded like this (sometimes erroneously), there still

are many circumstances in which the 1985 exclusion should not bar coverage for environmental liability.

There is a considerable amount of testimony and documentary evidence that in 1985 the insurance industry did not intend the exclusion to encompass all pollution damage, regardless of how the damage was caused or by whom. Specifically, insurance industry representatives testified that the exclusion was overdrafted and would not be applied to deny coverage where common understanding suggested that coverage would be available. Equally or more important, insurance industry filings by trade associations showed that the endorsement was not applicable to claims involving "products, completed operations and certain off premises discharges."

Insurance industry representatives have contended that the 1985 exclusion was designed to decrease pollution claims by providing an incentive to industry to improve manufacturing and disposal techniques. For instance, the Aetna Casualty and Surety Company recently informed a Louisiana court. "Pollution insurance does not provide a license to pollute any more than auto liability provides a license to drive carelessly." Even if the wholly illogical assumption were true that insurance causes accidents, the post-1985 "polluter's exclusion" should not deny coverage to innocent policyholders who were not engaged in any "polluting" activity. Yet, many insurance companies today argue that the exclusion bars insurance coverage for clearly innocent policyholders.

In addition, the 1985 exclusion only denies insurance coverage for contamination from pollutants, and some courts have held that policyholders who did not understand the substances in issue to be pollutants may be covered. For example, lead paint may not be a pollutant, even though it may result in groundwater contamination, because it is paint, not a pollutant. In fact, a few courts have ruled that the 1985 exclusion does not bar insurance coverage unless the insurance company can prove that the substance discharged

was a known “irritant, contaminant or pollutant” within the meaning of the exclusion. “Pollution,” as it is defined in the 1985 exclusion, is the result of the disposal of industrial wastes. Consequently, the exclusion should not apply unless the substances in question are recognized “wastes” generated in the course of the policyholder’s business operations.

Policyholders should also know that product liability and completed operations are not excluded by the 1985 “polluter’s exclusion.” Thus, if a valve manufacturer sells a defective valve which causes an oil spill, the claim against the valve manufacturer is a products liability claim, *not* a pollution claim. If a building contractor installs defective plumbing that leaks spilling oil, the claim against the contractor is a completed operation claim and not a pollution claim.

#### G. PROPERTY UNDER THE CARE, CUSTODY OR CONTROL OF THE POLICY- HOLDER

Many Comprehensive General Liability insurance policies have an exclusion for “owned property” or property under the “care, custody and control” of the policyholder. This means that a policyholder may not be entitled to insurance coverage for damage to property that it owns or controls.

Many on-site pollution incidents, however, cause injury to off-site property or persons, for instance, neighboring landowners or underlying groundwaters. Policyholders argue that these exclusions should not apply when the policyholder pays for the cleanup of its own property in order to remedy, prevent, or limit injury or damage to third parties. For the most part, the courts have ruled in favor of policyholders in cases which involve any type of third-party property damage.

In many states, groundwater is considered public property or property of the state and, consequently, contamination of the groundwater beneath a policyholder’s land is considered damage to third-party property. This is also true of the atmosphere, which, in virtually all states, is considered to be “owned” by the public as whole. Most courts have

ruled that the “owned property” or “care, custody or control” exclusions do not apply to claims against policyholders for damage to groundwater, local waterways, or the atmosphere, since this “property” does not belong to individual policyholders.

Insurance companies frequently attempt to deny coverage on the ground that their policyholder is seeking to recover for a “known risk,” that is, that at or before the date of purchase of the relevant insurance policies, the policyholder allegedly knew of the risk that its business operations could give rise to legal liability. For instance, an insurance company might argue that information, threats, or warnings about potential environmental hazards given to policyholders before the purchase of insurance coverage turned otherwise insurable risks into uninsurable certainties. In fact, the insurance companies accepted this allegedly “known risk.” If the insurance companies did not want to accept this risk, they had two options: The first was to refuse to sell the insurance; and the second was to include a specific exclusion for the risk in question.

The insurance companies, not their policyholders, are in the business of measuring and assuming risk. As the D.C. Circuit Court of Appeals stated:

An insurance contract represents an exchange of uncertain loss for a certain loss. In a comprehensive general liability insurance policy, the uncertain loss is the possibility of incurring legal liability and the certain loss is one premium payment. By issuing the policy, the insurer agrees to assume the risk of the insured’s liability in exchange for a fixed sum of money.

Insurance companies should not have the option of touting their “risk management” expertise and writing broad coverage knowing that they will deny that insurance coverage exists when claims are made. Lord Mansfield, the father of insurance law,

## H. KNOWN RISK

held that “every underwriter is presumed to know the business of his insured.”

Although no “known risk” exclusion exists in standard-form Comprehensive General Liability policies, insurance companies advocating the adoption of this phantom exclusion urge courts to adopt the following standard: “Whether the insured knew or reasonably should have known there was a substantial probability of loss before the policy period began.”

Most courts have refused to recognize a phantom “known risk” exclusion, and have reaffirmed the principle that it is the responsibility of the insurance companies to exclude risks that are not covered by their policies. Courts have recognized that insurance companies conduct thorough investigations of the risks they assume and are, therefore, at least as knowledgeable concerning those risks as their policyholders.

## I. THE FORSEEABLE OCCURRENCE

Another anti-policyholder tack under which insurance companies seek to avoid insurance coverage is based upon the argument that their policyholders “expected or intended” the bodily injury or property damage in issue. The standard Comprehensive General Liability policy typically requires the insurance company to pay “all sums” or the “ultimate net loss.., which the insured shall be obligated to pay as damages because of bodily injury or property damage... caused by an occurrence.” An “occurrence” is typically 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.* [emphasis added]

The insurance companies argue that, if an accident happens that the policyholder could or should have known was possible, the accident was “expected or intended.” Therefore, they say that

the accident does not fall within the definition of “occurrence” as defined above and, consequently, there is no coverage. For instance, one insurance company lawyer wrote: “[I]n analyzing the occurrence issue, insurers must examine the information that should have been known by the insured as well as what actually was known.” Liability insurance is sold to protect insurance policyholders from tort liability. Obviously, the insurance companies are grasping for a rule that would deny tort insurance for tortious acts.

The phrase “neither expected nor intended”, however, is unqualified. It does not say, for example, “*should have* expected or intended.” Insurance industry records explaining how the standard form Comprehensive General Liability policy was drafted show that the insurance industry considered, but rejected, a “reasonable certainty” test for inclusion in the standard form Comprehensive General Liability policy. When the Comprehensive General Liability policy language was drafted, spokespeople in the insurance industry stated that the industry did not intend for the “occurrence” definition to exclude coverage for bodily injury and property damage due to negligence, but rather to provide coverage for damage that, from the policyholder’s perspective, was the unintended result of an intentional act. For example, Herbert Schoen, Associate General Counsel of The Hartford Accident and Indemnity Company and one of the key drafters of the 1966 Comprehensive General Liability policy language, testified that the drafters of the 1966 form sought to exclude “the intentional results of intentional act[s], such as murder... [t]hat is an intentional act with an intentional result.”

Lyman Baldwin of the Insurance Company of North America, who served on one of the drafting committees that approved the 1966 revisions, also noted that “instances arise when the injury is an unintended result of an intentional act. The two situations, an absence of intent or an unexpected result, would be covered under either the ‘accident’ or ‘occurrence’ definition.”

While the 1966 standard-form Comprehensive General Liability policy was being introduced, a representative of Johnson & Higgins, a large insurance broker, surveyed insurance companies to seek their explanation of various policy provisions, including the “neither expected nor intended” language. In response, Travelers Insurance Company stated:

We do not anticipate any problems with the phrase “neither expected nor intended from the standpoint of the insured.” Certainly, we will never use the language to deny coverage where the foreseeability of the injury was no more than an element of proof of negligence as this would mean that the liability policy would not cover liability for negligence. The language obliges us to judge coverage from the standpoint of the insured claiming coverage.

Employers Mutual of Wausau responded to the Johnson & Higgins survey by noting that the focus was on what the policyholder subjectively expected, rather than on an objective standard of expectation:

You ask whether or not we will use the “reasonable man test” in determining whether the insured should have expected the injury rather than determining whether such injury was in fact expected. The definition of occurrence does not provide for the “reasonable man test.” Thus, the test will be whether such injury was in fact expected.

George Katz of the Aetna Casualty and Surety Company was one of the principal drafters of the 1966 standardized CGL “occurrence” definition. He similarly explained:

In order to deny the corporation coverage on the ground that it expected or intended the injury which gave rise to the claim, we would have to show that the level of management responsible for making policy with regard to the act or omission causing the occurrence

expected or intended that injury would result... We also intend to cover other kinds of injury resulting from intentional acts of employees unless such acts are known to and condoned by or directed by those officials of the corporation responsible for the action of the employee that gave rise to the injury or damage.

Finally, Harold Schaffner of the Hartford Insurance Group assured the Johnson & Higgins researchers that the word "expected" in the definition of "occurrence" meant "expected for a certainty."

Thus, as drafted, the standardized form language "neither expected nor intended" permits insurance companies to deny coverage only if they can show that the policyholder had a preconceived design to inflict the specific bodily injury or property damage that resulted. It is a safe bet that few, if any, policyholders had a preconceived design to injure anyone or damage anything as a result of their business operations.

Insurance coverage is "triggered"—brought in play—if an event or condition happens during the policy period. Liability insurance policies typically provide that insurance policies apply to a claim, or are triggered, when the resulting property damage or bodily injury happens during the policy period.

In most environmental cases, property damage or bodily injury happens over a long period of time and will span a number of insurance policy periods. Some of the better-reasoned court decisions have adopted the "continuous trigger" theory, according to which every insurance policy in force during the entire period of property damage or bodily injury is activated and—if other conditions are met—provides coverage for the policyholder's liabilities.

A continuous trigger approach often will provide the best result for policyholders seeking

J. THE TRIGGER ISSUE:  
WHEN DOES INSURANCE COVERAGE BEGIN AND END?

insurance coverage for liability resulting from environmental damage caused over a period of many years. For example, if leachate from a landfill began contaminating groundwater in 1965 and the policyholder did not learn of the contamination until 1985, every policy year from 1965 to 1985 would be triggered.

There is substantial evidence that the insurance industry intended to adopt a "continuous trigger" approach when it drafted the standard form Comprehensive General Liability insurance policy in 1966. One of the 1966 drafters, Gilbert L. Bean of the Liberty Mutual Insurance Company, stated that "the policy in force when a particular injury or damage takes place is the one which applies, regardless of when the causing accident took place." Mr. Bean added that, if damage from waste disposal continued after the disposal, losses could take place in multiple policy years "with a separate policy applying each year."

Some courts, however, have rejected the continuous damage trigger, and have applied triggers based on the time when the pollution damage was discovered. Insurance companies supporting this position argue that if leachate from a landfill contaminated groundwater from 1965 to 1985, but was not discovered until 1983, only the insurance policy in effect in 1983 would provide coverage.

Other courts have applied triggers based on the time when the act causing pollution damage took place. Under this theory, if an *act* that took place from 1965 to 1969 caused contamination from 1965 to 1985, only the policies in effect from 1965 to 1969 would provide insurance coverage.

Court rulings on this issue have varied from state to state. For example, in cases where a policyholder has been ordered to remove asbestos from buildings and pay damages, courts have said, variously, that the trigger for insurance coverage was (a) when the asbestos was installed in the building, (b) when its presence in the building was discovered, (c) when the building owner was ordered to remove the asbestos,

and (d) all of the foregoing.

The majority of courts have concluded that some variation of the “continuous trigger” applies to claims for liability insurance coverage for environmental damage.

Under most liability insurance policies, an insurance company is required to pay “all sums” for which the policyholder is liable because of property damage or bodily injury. When multiple policies apply to damage or injury taking place over a period of years, the question can arise of how much each insurance policy must pay. Insurance companies often argue that they need pay only a percentage or “pro-rata” share of the liability if there are other insurance policies that are triggered at the same level of coverage. For example, under this theory if there are 10 years of coverage with a different insurance company providing coverage for each year each insurance company should pay only one-tenth of the policyholder’s total loss.

In cases involving environmental damage, where a long time may separate the happening or cause (occurrence) and the discovery of the pollution damage, many courts have denied insurance companies’ efforts to divvy up responsibility. They have ruled that, once triggered, each insurance policy provides full coverage for the policyholder’s liability. Some of these cases have allowed the policyholder to choose which of the triggered insurance policies must pay the claim. Other courts, however, have followed a pro-rata or percentage allocation when deciding how much each of several different insurance companies is liable to pay.

Since many policyholders have been unable to buy insurance in recent years or have large deductibles (self-insured retentions), insurance companies frequently press for an allocation of damages to years in which the policyholder had little or no insurance. Such an allocation scheme obviously

K. ATTEMPTS  
BY INSURANCE  
COMPANIES  
TO ALLOCATE  
DEFENSE AND /  
OR INDEMNITY  
EXPENDITURES  
TO THE  
POLICYHOLDER  
OR TO OTHER  
INSURANCE  
COMPANIES.

will have the effect of diminishing the total amount of available insurance coverage and is contrary to the intent of the drafters of the standard form Comprehensive General Liability insurance policy. The standard form CGL policy contains a provision called the “other insurance” clause which allocates responsibility among insurance companies. This provision enables an insurance company which has paid the policyholder’s claim to seek contribution from the other insurance companies on the risk. The policy, however, is completely silent regarding allocations to *policyholders*. Thus, the policy language provides absolutely no support for insurance companies’ attempts to shift their own obligations onto their policyholders.

## L. HOW TO COUNT THE NUMBER OF OCCURRENCES

It is not always easy to determine how many causative acts (occurrences) there have been at a polluted site.

The number of occurrences can have a major impact on a policyholder’s total recovery. For example, the definition of “occurrence” may determine the number of times the insurance policy limits of a triggered policy will apply to pay for a loss because most policies have per-occurrence limits. If an insurance policy has a limit of \$100,000 per-occurrence, the policyholder may benefit from a finding that there were five difference occurrences supporting a demand for \$500,000—as opposed to \$100,000—in insurance coverage. At the same time, the number of occurrences might also affect how many deductibles or retrospective premiums will apply to a given claim because these, too, may be on a per-occurrence basis. If an insurance policy has a \$100,000 per-occurrence deductible, the policyholder may benefit from a finding that there is only one occurrence since, in that case, it would only have to pay \$100,000 to obtain the insurance coverage above the deductible.

The policyholder should evaluate the single occurrence versus multiple occurrences question

when determining which insurance policy or policies to designate as applicable to the claim or claims.

The issues discussed in this Guide necessarily raise a number of complex legal questions. Court decisions have varied from state to state and even from court to court in the same state. It is important for a policyholder to have a general familiarity with these issues and an understanding of its entitlement to insurance coverage. Each policyholder, however, should review the issues in detail with an attorney experienced in these areas before making a specific determination concerning an appropriate insurance recovery strategy.

M. PURSUING  
AN  
INSURANCE  
RECOVERY  
STRATEGY

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**[LETTERHEAD OF POLICYHOLDER]**

**[Date]**

Insurance Agent or Broker  
Address

Re:

1. [Currently known insurance companies, insurance policies, insurance policy numbers and dates]
2. Environmental Insurance Claims
3. [Name and address of Claimant or Potential Claimant]

**Appendix A**

.....

REQUEST TO  
INSURANCE  
AGENT OR  
BROKER TO  
NOTIFY  
INSURANCE  
COMPANIES  
OF AN  
OCCURRENCE  
OR A CLAIM

Dear [Name of Insurance Agent or Broker]:

We are writing to request that your company take the following actions:

1. Notify each of the liability insurance companies that sold insurance to us with respect to the matters set forth in this letter. (For your convenience, a list of the currently known insurance companies, insurance policies and insurance policy numbers, for which your company acted as an agent or broker, is attached to this letter.);
2. Give notice of the claim to each insurance company identified and give notice for every policy period covered by the liability insurance policies identified above. In addition, please give notice to all other insurance companies with respect to primary, umbrella or excess liability insurance policies which you may have sold to us;
3. Review your files for information concerning our company and the insurance it bought through you. (Let us know what information you develop so that you and we can notify any other insurance companies that might be involved.);
4. Provide us with both a copy and list of all liability insurance policies you sold to us, since there may have been additional policies sold to us by you, of which we are currently unaware;

5. Request that each of our liability insurance companies immediately conduct an investigation of the claim and provide us with any information gathered during such investigation;
6. Ask each liability insurance company to provide us with a list and a copy of all liability policies sold to us;
7. Request that each of the primary insurance companies provide us with a defense, or pay our defense costs, in respect to the claim;
8. Request that all of the insurance companies indemnify us against any liabilities;
9. Ask each insurance company to explain in writing all legal and factual bases that could support insurance coverage for the claim; and
10. Send us copies of the notices you give.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

**[Policyholder Contact Person]  
[Telephone Number]**

Enclosure: **[Claim Letter]  
[List of Insurance Companies,  
Insurance Policy, Insurance Policy  
Numbers and Dates]**

bcc: **[Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]**

## *Appendix B*

.....

ACORD  
GENERAL LOSS  
NOTICE OF  
OCCURRENCE/  
CLAIM

## **Appendix C**

.....  
NOTICE  
LETTER  
ADVISING AN  
INSURANCE  
COMPANY  
OF AN  
OCCURRENCE  
OR A CLAIM

[LETTERHEAD OF POLICYHOLDER]

[Date]

Insurance Company  
Address

Attention: Claims Department

- Re:
1. [Presently known insurance policies,  
insurance policy numbers and dates]
  2. Environmental Insurance Claim
  3. [Name and Address of Claimant or Potential Claimant]

Dear [Claims Person]:

This letter is to advise you that a claim has been made against our company alleging certain environmental-related damages. A copy of the claim more fully describing these alleged damages is enclosed.

This letter is notice of the claim for each and every policy period covered by the liability insurance policies identified above, and by any other policies, whether primary, umbrella or excess, which you may have sold to us.

In addition, we request that you take the following actions:

1. Review your files for information concerning our company and its insurance coverage with your company. Let us know what information you develop;
2. Explain in writing all legal and factual bases that could support insurance coverage for this claim;
3. Provide us with both a copy and list of all liability insurance policies you sold to us or under which we were otherwise insured, since there may have been additional policies sold by your company of which we are currently unaware, or which may provide us with insurance coverage;
4. Review your records so that you and we can identify any other insurance companies that sold policies to us and notify them of this matter; and

5. Investigate this matter and provide a defense and indemnity to us.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

Enclosure: [Claim Letter]

cc: [Insurance Agent or Broker]  
bcc: [Corporate Counsel]  
[Policyholder's Insurance  
Coverage Counsel]

## **Appendix D**

.....  
MEMORANDUM  
TO EMPLOYEES  
TO RETAIN  
RECORDS

*[Tailor a memorandum to specific records retention practices of the policyholder, to specific persons, to specific business units and to specific environmental claims involved.]*

### **[MEMORANDUM HEAD OF POLICYHOLDER]**

**[Date]**

To: **[Records Department  
Finance Department  
Legal Department]**

Re: Environmental Insurance Claim

We are currently attempting to obtain insurance coverage with respect to certain environmental claims that have been made against the company.  
**[Describe in more detail.]**

We want to ensure that all insurance policies that may potentially provide coverage to us, as well as all related records, are preserved and not destroyed. In addition, we want to ensure that all records relating to the product are preserved and not destroyed. Your department may have documents and files relating to our insurance coverage over the years.

Please suspend any records destruction practices or policies regarding insurance records and records relating to the product. Inadvertent destruction of records may prejudice our insurance claim. Please contact me promptly if these requests pose any problems for you or if you are unable to comply.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

**[Policyholder Contact Person]  
[Telephone Number]**

bcc: **[Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]**

**[LETTERHEAD OF POLICYHOLDER]**

**[Date]**

Insurance Agent or Broker  
Address

Dear [Name of Agent or Broker]:

We purchased insurance policies from various insurance companies for which your company acted as an agent or broker. For your convenience, a list of the currently known insurance companies, insurance policies, insurance policy numbers and dates for which your company acted as an agent or broker is attached to this letter.

These policies may provide insurance coverage for damage or injury that took place during their policy periods, even if that damage or injury took place many years ago. We want to ensure that all insurance policies that may potentially provide coverage to us, as well as all related records, are preserved and not destroyed. Consequently, we request that your company take all necessary measures to preserve all copies of all insurance policies sold to us and any related records.

In addition, we request that you take the following actions:

1. Inform us if you are aware of any additional insurance that you sold to us in addition to that shown on the attached list;
2. Send us copies of any agency and commission agreements that your company entered into with any insurance company mentioned in the attached list; and
3. Contact us promptly if these requests pose any problems for you or if you are unable to comply.

If you have any comments or questions, please communicate with the undersigned.

**Appendix E**

.....  
REQUEST TO  
INSURANCE  
AGENT OR  
BROKER TO  
MAINTAIN  
INSURANCE  
RECORDS

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

Enclosures: [List of Insurance Companies,  
Insurance Policies, Insurance  
Policy Numbers and Dates]

bcc: [Corporate Counsel]  
[Policyholder's Insurance Coverage Counsel]

[LETTERHEAD OF POLICYHOLDER]  
[Date]

Name of Certified Public Accountant  
Address

Re: Environmental Insurance Claim

Dear [Name of Certified Public Accountant]:

You have performed accounting services for us. We are currently attempting to obtain insurance coverage with respect to certain environmental claims that have been made against the company. [Describe in more detail.]

Old insurance policies may provide insurance coverage for damage or injury that took place during their policy periods even if that damage or injury took place many years ago. We want to ensure that all insurance policies that may potentially provide coverage to us, as well as all related records, are preserved and not destroyed.

As accountants for us, you may have documents and files relating to our insurance coverage over the years. Please preserve and make available to us for review all documents and records relating to us in your possession, custody or control for as far back as you maintain such records.

If these requests pose any problems for you, if you are unable to comply, or if you have any comments or questions, please communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]

[Telephone Number]

bcc: [Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]

**Appendix F**

.....  
REQUEST TO  
CERTIFIED  
PUBLIC  
ACCOUNTANT  
TO MAINTAIN  
INSURANCE  
RECORDS

## *Appendix G*

.....  
RESPONSE TO  
AN INSURANCE  
COMPANY'S  
REQUEST FOR  
INFORMATION  
REGARDING A  
CLAIM

[LETTERHEAD OF POLICYHOLDER]

[Date]

Insurance Company  
Address

Attention: Claims Department

Re: Environmental Insurance Claim

Dear [Claims Person]:

This is a response to your letter dated [INSERT DATE].

Enclosed are copies of:

1. Claim Letter dated [INSERT DATE];
2. Letter dated [INSERT DATE] from our legal counsel to [Claimant], including attachments;
3. Samples of product literature.
4. Invoices of Sales to [x] Corporation by us.

The information contained in these materials is responsive to many of the questions raised in your letter. As the remaining information that you request is quite extensive, we invite you to send a representative to our office to review the additional documents you consider necessary for your investigation.

The burden of searching for some of the information you have requested, and putting it into the form you have suggested, would be expensive and cause a great inconvenience to our business. We would be pleased to meet with you to discuss this aspect of your request.

Please treat all information being furnished to you as confidential. Certain information has not been furnished to you because we believe it is highly confidential, privileged or proprietary. We would be pleased to discuss these aspects of your request with you as well.

If you have any comments or questions, please

communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

Enclosures:

1. Claim Letter dated [INSERT DATE]
2. Letter dated [INSERT DATE] from our legal counsel to [Claimant], including attachments.
3. Invoices of Sales to [x] Corporation by us.

cc: [Policyholder's Counsel]  
[Insurance Agent or Broker]

bcc: [Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]

## *Appendix H*

.....  
LETTER TO  
INSURANCE  
COMPANY  
UPDATING  
INFORMATION  
WITH RESPECT  
TO ENVIRON-  
MENTAL CLAIM

*[Note: A letter comparable to this should be sent periodically; every three or six months.]*

**[LETTERHEAD OF POLICYHOLDER]**

**[Date]**

Insurance Company  
Address

Attention: Claims Department

Re: Environmental Insurance Claim

Dear [Claims Person]:

This letter updates you on the status of matters. We have retained **the law firm of [ ]**, **[address and telephone no.]**, to represent us. Enclosed for your information is the **[date and description of attachment]**. In a few weeks we expect to receive **[describe]**, which then will be forwarded to you.

To date we have paid nearly **[x dollars]** for the investigation and defense of this claim. We reiterate our request that you provide a defense and indemnity to us.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

**[Policyholder Contact Person]  
[Telephone Number]**

Enclosure: **[date and description of attachments]**

cc:      **[Policyholder's Outside Environmental Counsel]  
[Agent or Broker]  
[Corporate Counsel]**

bcc:     **[Policyholder's Insurance Coverage Counsel]**

[LETTERHEAD OF POLICYHOLDER]  
[DATE]

Insurance Company  
Address

Attention: Claims Department

Re: Environmental Insurance Claim

*Appendix I*

.....  
NOTICE OF  
POTENTIAL  
SETTLEMENT OF  
CLAIM TO GO  
TO EACH  
INSURANCE  
COMPANY

Dear [Claims Person]:

We have reached a potential settlement agreement in the action [Plaintiff] v. [Policyholder Co., et al], Civil Action No. \_\_\_\_\_ (the "Underlying Action"). We enclose a copy of the proposed settlement agreement.

A court hearing has been scheduled for [date] at [time and place] to approve or disapprove the settlement. We believe that the proposed settlement is in our best interests. The proposed agreement will limit our potential liability and the potential liability of our insurance companies. The settlement will terminate this litigation which could be costly, time consuming and ultimately result in greater liability.

Our insurance companies are identified in the attached list.

If you direct us not to enter into the proposed settlement, we will probably follow your direction, but only if you and the other insurance companies agree to defend and indemnify us against all of the present and future claims. The settlement agreement must be signed prior to the hearing. Unless otherwise directed by you, we intend to sign the settlement agreement on [date]. You may contact our counsel in the environmental matter who is **[name, firm, address and phone number of policyholder's environmental counsel in the underlying matter]**.

If you have any questions or comments, please communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

Enclosures:      1. Proposed Settlement Agreement  
                      2. List of Insurance Companies

cc:      [Policyholder's Environmental Counsel]

bcc:      [Corporate Counsel]  
                      [Policyholder's Insurance Coverage  
                      Counsel]

**[LETTERHEAD OF POLICYHOLDER]**  
**[Date]**

Insurance Company  
Address

Attention: Claims Department

Re: Environmental Insurance Claim

Dear [Claims Person]:

This letter is to remind you that your company owes a continuing duty of good faith to its policyholder. If your company, or any of its agents, acts in any manner that results in any damage to our rights, we will hold your company responsible.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

**[Policyholder Contact Person]**  
**[Telephone Number]**

cc:      **[Policyholder's Environmental Counsel]**  
bcc:     **[Corporate Counsel]**  
            **[Policyholder's Insurance Coverage**  
            **Counsel]**

***Appendix J***

.....  
LETTER TO  
EACH  
INSURANCE  
COMPANY  
REGARDING  
ITS CONTINU-  
ING DUTY OF  
GOOD FAITH  
AND FAIR  
DEALING

## **Appendix K**

.....

LETTER TO  
POLICYHOLD-  
ER'S CURRENT  
EMPLOYEES

[LETTERHEAD OF POLICYHOLDER]

[Date]

Employee  
Address

Dear [Name of Employee]:

[Company Name] is seeking insurance coverage for environmental property damage/bodily injury claims made against the company. These insurance claims involve many millions of dollars. [Company Name] had insurance during the period of alleged environmental damage. The company submitted claims to the insurance companies that sold insurance to it. The insurance companies have refused to pay. Accordingly, [Company Name] filed a lawsuit against the insurance companies.

There is a possibility that you, as well as other company employees, might be contacted by the insurance companies, their lawyers, or investigators for an interview. If you are contacted by someone seeking an interview, you should ask for whom the person is employed.

*You are not a party to the lawsuit.* Should you be contacted, you have no obligation to agree to an interview. On the other hand, there is nothing that prevents you from agreeing to be interviewed. Whether or not you agree to an interview, there is a possibility that you might, at some time, be asked to testify. We would appreciate hearing from you if you are contacted.

If you desire, the company will provide a lawyer, at no cost to you, to accompany and advise you during any interview or in the event that you are called upon to testify. If you already have a lawyer, you may certainly have your lawyer present.

You are under no obligation to contact the company if you do not wish to do so. However, we would be grateful if you did. If you wish to do so, please call me or our lawyer at (xxx) xxx-xxxx or collect. We appreciate your attention and cooperation.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

cc: [Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]

## *Appendix L*

.....  
LETTER TO  
POLICYHOLD-  
ER'S FORMER  
EMPLOYEES

[LETTERHEAD OF POLICYHOLDER]

[Date]

Former Employee  
Address

Dear [Name of Former Employee]:

[Company Name] is seeking insurance coverage for environmental property damage/bodily injury claims made against the company. These insurance claims involve many millions of dollars. [Company Name] had insurance during the period of alleged environmental damage. The company submitted claims to the insurance companies that sold insurance to it. The insurance companies have refused to pay. Accordingly, [Company Name] filed a lawsuit against the insurance companies.

There is a possibility that you, as well as other former company employees, may be contacted by the insurance companies, their lawyers, or investigators for an interview. If you are contacted by someone seeking an interview, you should ask for whom the person is employed.

*You are not a party to the lawsuit.* Should you be contacted, you have no obligation to agree to an interview. On the other hand, there is nothing that prevents you from agreeing to be interviewed. Whether or not you agree to an interview, there is a possibility that you might, at some time, be asked to testify. We would appreciate hearing from you if you are contacted.

If you desire, the company will provide a lawyer, at no cost to you, to accompany and advise you during any interview or in the event that you are called upon to testify. If you already have a lawyer, you may certainly have your lawyer present.

You are under no obligation to contact the company if you do not wish to do so. However, we would be grateful if you did. If you wish to do so, please call me or our lawyer at (xxx) xxx-xxxx or collect. We appreciate your attention and cooperation.

If you have any comments or questions, please communicate with the undersigned.

Very truly yours,

[Policyholder Contact Person]  
[Telephone Number]

cc: [Corporate Counsel]  
[Policyholder's Insurance Coverage  
Counsel]



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& OLICK, P.C.**  
Settle for Everything®

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