



This article was originally published on Insurance Law360 on June 28, 2010

Coverage Issues After The Oil Stops Flowing

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Thousands of gallons of crude oil continue to gush daily from the sea floor 40 miles offshore in the Gulf of Mexico, and more oil will be hitting more beaches and tidal habitats soon. It seems like every day there is more bad news.

Even with no immediate end in sight, however, it makes sense to consider what the future legal and insurance coverage landscape will look like after the oil stops flowing. What can be anticipated from one of the largest ecological and environmental disasters of our time?

The cleanup effort will be huge. Thousands of people will be employed defouling beaches, trying to head off more oil reaching land, and monitoring impacts on ecology, the environment and human health. The full impact of the oil and chemicals used to disperse it or clean it up may not be known for decades. Filtration technology will be tested as never before.

There will be lawsuits — many more than there are already. There will be class and derivative actions, environmental citizen suits, high-profile litigation probably between and among BP PLC, TransOcean Ltd., Cameron, Halliburton, Anadarko Petroleum Corp. and Mitsui Group, etc., and their respective in-house captive, domestic and international insurance companies. Thousands of smaller tort and breach of contract claims will arise as the inevitable but partly

unpredictable impact of the spill ripples across the national and global economies.

One key question for potentially liable parties seeking defense and indemnification from their insurance companies will be whether a naturally occurring substance can properly be considered a "pollutant" for purposes of excluding coverage. In addition, litigation costs incurred in disputes over whether and how other insurance policy exclusionary language can be used to evade the broad duty to defend, and the narrower duty to indemnify, could involve billions of dollars.

Property losses will continue to mount. The fisheries, tourism and shipping industries, including the substantial gaming and hospitality industries in the Gulf, immediately spring to mind when considering losses. How close a business entity must be to the oil itself to suffer compensable harm will also likely be the subject of intense dispute and litigation in numerous jurisdictions. With respect to these losses and the issues of causation, business interruption insurance should be available under many policies.

However, if claims following the Exxon-Valdez, World Trade Center and Hurricane Katrina disasters are any guide, only those with stable and well-developed records of profits will see their claims adjusted with some measure of dispatch. Others will be forced to litigate. A significant issue will be the period of restoration — the theoretical time period (usually less than a year) over which compensable interruption takes place.

But what if you are not a business right on the Gulf? Contingent business interruption coverage may be available. The cost of delays in delivery of supplies caused by port closings, ship decontamination and all manner of other factors should be covered. Other less direct, but nevertheless significant, impacts on one's business may also be covered.

Civil actions by government authorities generally trigger valuable standard-form property coverage to offset resulting losses. Specialty coverage products involving pollution have grown in number and popularity over the past 15 years. This "environmental" coverage will be tested in new ways by the wave of claims and already the insurance industry has responded by instituting modifications in standard-form environmental coverage from major carriers.

There are several practical things policyholders can do. Speak to your broker. Review your coverage. Give notice at every level of coverage, even if you are not sure of your exact losses at this time. Make sure you know the time period within which to bring a claim. Your policy may contain an arbitration clause, but as with arbitration and other policy language and provisions, not everything may be as clear as your friendly neighborhood claims handler would have you believe! Never accept the first "no" when it comes to coverage for large dollar amounts. Claims personnel do not get promoted for paying claims or based upon the number of policyholders they make happy. That's the broker's or the underwriter's job.

Speaking of brokers: when major liabilities trigger a flood of claims, brokers can also sometimes find themselves targets for lawsuits from

policyholders disappointed with the performance of their insurance. It is generally difficult to hold brokers to a professional malpractice standard, but every case is different and it is certain that some plaintiffs will try.

Similarly, directors and officers may see substantially more claims and lawsuits alleging that they did not take appropriate steps to protect their business's interests. Whenever stocks fall, someone considers derivative lawsuits and goes back to look at past public filings to determine just how much a spill like this could or should have been on management's radar screen.

While BP has promised to pay valid claims, it is unlikely that the company will continue to pay long after the oil stops gushing. Filing claims with BP likely will give rise to a cottage industry of professionals adept at assisting people in pursuing claims, and BP is perhaps likely to adopt a more jaded claims-handling philosophy in the longer term. Moreover, if BP is ultimately responsible, how will insurance companies respond to valid claims by their policyholders? Finger-pointing, litigation, and subrogation and contribution actions likely will be the rule, rather than the exception.

The Gulf will be suffering the effects of this disaster for decades — as will the courts and businesses of all stripes. For some, the spill may prove a windfall, but for others a source of regret over insurance coverage that might have been. Policyholders need to take steps now to evaluate and protect their insurance coverage rights. With proper action and planning, obtaining the insurance coverage to which you are entitled does not have to turn into another natural disaster!

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