

Environmental Insurance: Sixteen Ways to Win a Better Settlement



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In recent years, the courts have become home to a growing caseload of environmental insurance coverage disputes. Many participants today are searching for ways to dispose of these large and complex cases without engaging in lengthy trials. A well-thought-out strategy combining many of the suggestions in this article may be the best way to resolve these cases quickly, inexpensively, and on terms favorable to policyholders.

Show Them You Mean Business

Unfortunately, initiating a lawsuit appears to be a precondition to negotiation with many insurance companies. Though time consuming and costly, it is usually the only way to get these companies to the bargaining table. If you choose to negotiate before filing an action, get an agreement that allows you to choose the forum if talks break down. To do this, you may have to present a copy of your complaint and threaten to file it within minutes of your call to counsel.

1. Put Together a Winning Team

Your team should consist of persons familiar with your environmental liabilities (past and future), your insurance coverage (past and present), and the issues common to environmental coverage disputes. Each area of knowledge is critical to achieving a good settlement.

2. Be Prepared (Better than the Other Side)

Find out: What you have already spent on environmental cleanup; what you are likely to be liable for in the future; why you are liable at

each site (product, ownership, negligence); whether the damage was intentional; what exactly it is that your policies say (deductibles, premium agreements, polluters' exclusion, aggregate limits, personal injury language). Your outside counsel and risk manager can assist you in answering these questions and explaining the impact of each of the above factors on negotiation.

3. Calculate Their Exposure

The calculation methods are practically infinite. However, apportioning for each site the loss over the exposure period (or the available coverage period, whichever is shorter) is the most accessible method. Prorating by time on the risk is the easiest method to employ. Once this calculation is made, it can be matched with policy terms and plugged into a PC spreadsheet program to create estimated ranges of liabilities for each primary and umbrella insurance company.

4. Negotiate with One Company at a Time

Negotiations that bring all the insurance companies together at the same time are unlikely to result in prompt settlements. Because the issues in these negotiations are numerous and complex, settlements usually take place separately with each insurance company.

5. Keep the Lawyers Out

The fastest way to bring settlement negotiations to a grinding halt is to allow outside lawyers to handle the negotiations. Lawyers may have a financial interest in delaying settlement, and they often get tangled in long-standing argu-

ments—personal and professional—with opposing counsel.

6. Beware of Open-Ended “Standstill Agreements”

Parties sometimes agree to suspend litigation to allow time for a settlement. Depending on how the litigation is going, a “standstill agreement” may reduce the policyholder’s settlement leverage. If, however, the parties agree to a standstill, its duration must be clearly defined, usually four to eight weeks.

7. Enlist a “Confidential Listener”

Settlement discussions sometimes break down for no apparent reason. A confidential listener can help parties break the lulls, silences, and impasses that fill many settlement discussions. If informal talks break down, formal mediation may help.

8. Avoid Complete Buybacks

In a complete buyback, a policy is treated as though it never existed—an ideal outcome for insurance companies that claim they never meant to provide coverage in the first place. According to one insurance company attorney, the “effect of such a settlement is to effectively end the COL [comprehensive general liability] policy forever.”

9. Keep an Eye on the “Carve-Outs”

So-called carve-outs are a critical part of any deal you make with an insurance company. You should not give up bodily injury, personal injury, product liability, employment liability, or asbestos coverage without very substantial compensation. Put only property damage claims on the table, and make clear to the insurance companies that including any additional types of claims will cost them more.

10. Make Sure All Settlements are “Net of Retro”

If you have a retrospective premium agreement, make sure the insurance company understands that any settlement agreed to is net of the retrospective premium adjustment. Some insurance

companies will raise the settlement amount on paper, subtract the retrospective adjustment and then issue the check for the agreed-upon amount. (Review all their arithmetic.)

11. Beware of Indemnification Provisions

Insurance companies frequently will try to insert an indemnification provision in the settlement agreement—language pledging the policyholder to “defend, indemnify, and hold harmless” the settling insurance companies against claims by third parties and nonsettling insurance companies. Although these provisions rarely come into play, they may have the undesirable effect of turning the policyholder into an insurance company.

12. Examine Allocation Issues

You should review and sign off on the insurance company’s allocation of the settlement amount among the triggered policies. Avoid closing out good policies and try to allocate as much as possible to the bad ones. Issues to consider, among others, are polluters’ exclusions, deductibles, self-insured retentions, retros, and per occurrence and aggregate limits.

13. Do Not Bind Future Acquisitions

With all settlements, watch out for language that would prevent you from asserting claims arising from corporations that you (or the insurance company) acquire in the future. By the same token, carefully review all “release” language to avoid any unintended releases of claims.

14. Try to Accommodate Reinsurance Companies

Insurance companies worry whether their reinsurance companies will cover them for the settlement. Whenever possible, honor requests that will assist your insurance companies in getting reimbursed. Being cooperative puts more money on the table for you.

16. Assume Nothing is Confidential

Individual insurance companies insist on confidentiality provisions. You should assume that such provisions bind you, but not them.

17. Try a Little Tenderness

Insurance company employees are people who do get weary—a fact often forgotten in the heat of battle. The skills you have learned while negotiating in other contexts should be applied even if you believe that your insurance company wrongly denied you coverage. Keeping the discussions businesslike will help to advance the successful outcome of the negotiations.

The Lamb and the Lion

Although many observers thought extremely large disputes could not be settled out of court, Champion International Corporation reached a major settlement with most of its sixty insurance companies in 1991. Allied Signal Corporation and Travelers Indemnity Company settled a coverage dispute involving 250 waste sites. Policyholders can expect more such settlements, and perhaps someday there will be a national solution. But it should be remembered, as Woody Allen once warned in another context: “Someday the lamb will lie down with the lion, but the lamb will not get much sleep.” ■

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