

Focus on Washington State:

New Regulations Aid Environmental Insurance Coverage Claims



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New insurance regulations in the State of Washington that took effect in July will change significantly the way insurance companies are required to handle environmental liability insurance coverage claims. The regulations are aimed at eliminating several barriers raised by the insurance industry to environmental claims and making it easier for policyholders in Washington to obtain the benefits of their general liability insurance coverage for environmental cleanups. The new rules could divert millions of dollars currently spent on litigation to environmental cleanup in Washington and elsewhere.

Washington State Insurance Commissioner Deborah Senn explained that one reason for the new rules is that policyholders have been forced to engage in time-consuming, expensive litigation to obtain coverage under their general liability insurance policies. This has hurt smaller policyholders in particular, as they are unable financially to pursue such litigation while also addressing federal and state environmental site cleanup and recovery requirements.

Commissioner Senn explained that one intended effect of the regulations is the elimination of prolonged coverage disputes to ensure that more resources are devoted to remediating environmental damage than to litigation. Commissioner Senn also hopes that the regulations will provide uniform standards for claims settlement practices concerning environmental claims.

Significant New Rules

The new regulations have the following significant features:

Financial Obligations

- Insurance companies must pay, as part of their duty to defend under general liability insurance policies, costs reasonably incurred in an environmental investigation to determine the source, type and extent of contamination. Even after assuming the obligation to defend the policyholder, insurance companies generally resist paying the environmental consultants engaged by the policyholder to perform the initial environmental studies at the site. This new regulation clarifies that duty.
- Insurance companies must pay statutory interest (presently 12 percent) on remediation or investigation expenses paid by the policyholder (for which the insurance company is legally obligated), from the date of the policyholder's payment or the date of the notice to the insurance company of the environmental claim, whichever is later. Insurance companies have engaged in delay tactics to prolong claims resolution to earn the interest on the huge sums involved while the policyholder fights for the benefits of the policy. This regulation would force insurance companies to pay for their stonewalling.
- Insurance companies must pay statutory interest on insurance coverage settlement payments that are over 30 days late. Insurance companies sometimes delay settlement payments for months and earn the interest on those amounts while the policyholder waits.

Standards for Denial of Coverage

- Insurance companies are prohibited from denying that there is damage at a site if the site is listed on the National Priorities List under the Comprehensive Environmental

Response Compensation and Liability Act (CERCLA) or the hazardous site list under the Model Toxics Control Act (MTCA) of Washington, and if the federal or state environmental agency has determined that there is damage at the site. Even though the property at issue is listed as a Superfund site, insurance companies sometimes allege the absence of property damage as a reason for denying coverage or to reserve their rights to disclaim coverage at a later date. This new regulation would prohibit that practice.

- Insurance companies are prohibited from denying a claim on the basis that the policyholder expected and intended the damage unless that position is formed after reasonable inquiry, is well grounded in fact, and is warranted by existing law or a good faith argument for modification of existing law. A knee jerk defense asserted by insurance companies to virtually all environmental liability insurance coverage claims is that the policyholder “expected or intended” the environmental harm. This new regulation would require insurance companies to have a good faith factual basis for alleging that defense.

Lost Policies

- Insurance companies must provide the policyholder with all facts known relating to the issuance or existence of a lost policy, including the identity of any witnesses and all documents establishing facts relating to the lost policies.
- Insurance companies must provide the policyholder with any portion of a located policy.
- Insurance companies must provide the policyholder with all insurance policy forms potentially applicable during the period in question.
- An assumption is established that the minimum limits of coverage offered by an insurance company during the period were purchased absent evidence that higher policy limits were purchased.

Insurance companies frequently take the position that policies are “lost” (and that coverage cannot be provided) after only a minimal search. These new regulations would require insurance companies to provide all known information, all parts of the policies

still existing, and the general standard forms used at the time. The minimum dollar limits would be assumed absent evidence of higher policy limits.

Retaining Policies

- Insurance companies must keep and be able to retrieve for at least 20 years copies of every general liability insurance policy issued for delivery in Washington on or after July 1, 1995. Even though insurance companies know that liability insurance policies can respond to claims many decades after the end of the policy period, insurance companies systematically destroy copies of policies they sell within a few years.

Standards for Investigations

- Insurance companies must commence investigation of environmental claims within 15 working days after receiving notice of the claim.
- Insurance companies and policyholders must cooperate with each other fully in the investigation of environmental claims, including providing the other with facts (including the identity of witnesses) and documents relating to an environmental claim. Privileged material need not be turned over.
- Insurance companies are prohibited from requiring the policyholder to provide answers to numerous questions, interrogatories, or requests for documents concerning matters not relating to the policyholder’s claim for damages. Allegedly to aid their investigation, insurance companies frequently send policyholders demands for thousands of documents and pages of questions not directly relating to the claim submitted by the policyholder. This new regulation would prohibit this “bring me the broomstick of the wicked witch of the west” defense tactic.

Mediation

- Insurance companies must submit to non-binding mediation if requested by the policyholder. Proposed by several insurance organizations, this new regulation would permit policyholders to try nonbinding mediation prior to litigation.

Applicability

These new regulations will apply to all general liability insurance policies issued to Washington residents and to all contaminated sites in Washington. However, the impact of the new regulations may be far broader. If insurance companies are going to have to change their internal systems in Washington—for example, in maintaining and making available retrieval for 20 years worth of records regarding the general liability insurance policies they sell—then may change their internal systems company-wide for all policyholders. If so, these new regulations will have a national impact quickly.

Conclusion

Abuses by the insurance industry in forcing policyholders to litigate almost all environmental liability insurance coverage claims despite court rulings consistently in favor of coverage have had an inevitable effect: reform by regulation. Washington State Insurance Commissioner Deborah Senn has enacted new regulations that should result in more money spent on water treatment plants and less money spent on lawyers. Commissioners across the country may start doing the same. ■

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