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Insurance Coverage for RCRA Corrective Action Costs

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Federal and state environmental agencies have an array of weapons available to compel companies to investigate and clean up contamination. While the specific law chosen as legal authority generally will not alter the agency's ability to enforce its goal of cleaning up property damage, the choice may have a significant impact on the company's ability to recover insurance for the enforcement action and resulting liabilities. Policyholders need to be aware of the insurance issues relating to the different laws imposing environmental liabilities, especially when the policyholder has input in determining the legal authority that will govern its investigation and remediation.

This article addresses how the policyholder's right to insurance coverage may be affected by the different environmental laws at issue, with particular emphasis on the coverage available for enforcement actions pursuant to the Resource Conservation and Recovery Act ("RCRA"), and analyses of the limited case law pertaining to insurance coverage for RCRA liability.

Background

In general, the most egregious hazardous waste sites already have been discovered and addressed. To address the remaining contamination problems, federal and state environmental agencies are being encouraged to move away from imposing liability under traditional federal and state Superfund laws toward a more cooperative or "voluntary" approach. As a result, many companies now face liability for addressing historic releases of hazardous waste from their operations under the Corrective Action provisions of RCRA.

Most of these companies have general liability insurance that they purchased to protect themselves against the costs associated with suits seeking damages because of property damage. A release of hazardous waste giving rise to a suit on the part of the government triggers coverage under most general liability insurance policies in many states. Thus, insurance companies should have a duty to defend and indemnify their policyholder under these circumstances. Insurance companies, however, may attempt to avoid coverage for environmental liability arising out of an administrative action by arguing that an administrative action does not constitute a "suit"triggering their duty to defend. The term "suit" is undefined in most standard-form liability insurance policies.

Most states that have addressed the issue recognize that administrative environmental actions similar to the Corrective Action requirements of RCRA, whether imposed by a permit or an administrative order, sufficiently are coercive so as to constitute a "suit" for purposes of general liability insurance coverage. This particularly is true because the policyholder is strictly liable for releases of hazardous substances.

As one state appellate court has held in rejecting a formalistic approach to interpreting the term "suit" in general liability insurance policies:

> Under the statutes governing cleanup of environmental damage, [the policyholder] was going to have to pay. The fact that [the policyholder] chose to try to gain a more favorable resolution by cooperation instead of litigation does not mean that the agency

> was not making a claim that [the policyholder] was responsible for damages.

St. Paul Fire & Marine Ins. Co., Inc. v. McCormick & Baxter Creosoting Co. (Or. App. 1994).

Moreover, insurance companies may also attempt to avoid coverage by asserting that costs to investigate and clean up contamination are not "damages" under their insurance policies. Numerous courts, however, have held that investigation and cleanup costs mandated by strict liability environmental statutes, such as federal and state Superfund laws, constitute "damages" within the meaning of general liability insurance policy language. These rulings should extend to costs incurred under RCRA Corrective Action. Indeed, in In re Texas E. Transmission Corp. (E.D. Pa. 1992), the court rejected the argument that RCRA, as opposed to CERCLA, cleanup costs are not recoverable as "damages", finding that the policyholder's cost of complying with either a demand or an injunction to remediate property damage is the same whether issued under CERCLA, TSCA or RCRA.

RCRA

RCRA, enacted in 1980, regulates the generation, management, treatment, storage and disposal of hazardous waste from "cradle-to-grave." Subsequent to RCRA's enactment,Congress recognized that such regulation of waste management did not address existing contamination/property damage associated with hazardous waste generation and that a multitude of RCRA facilities were becoming Superfund sites. In 1984, RCRA was amended to add statutory "Corrective Action" provisions for conducting cleanup of contamination. Corrective Action only applies to those RCRA facilities where releases of hazardous wastes threaten human health or the environment. It is not a violation of RCRA to have a release and Corrective Action is not related to compliance with existing RCRA hazardous waste management regulations. To date, EPA has proposed, but never finalized or promulgated regulations to implement RCRA Corrective Action.

RCRA requires the EPA, or a duly authorized state environmental agency, to incorporate Corrective Action requirements into a RCRA facility's operating permit (the "Part B" permit). RCRA explicitly requires corrective action for any continuing environmental property damage "regardless of the time at which waste was placed [where it caused the damage]." For those RCRA facilities where a permit no longer is required, EPA or an authorized state agency may impose Corrective Action under an administrative order. Generally, such orders are entered into on consent; however, EPA or the state agency have the authority to issue such orders unilaterally.

The Corrective Action requirements incorporated into certain RCRA Part B permits are, for purposes of enforcement, requirements of federal and state RCRA statutes. Failure to comply with a Part B permit or administrative order requirement can lead to fines of up to $25,000 per day as well as permit revocation and the resultant inability to continue operations. Therefore, any violation of a permit or order requirement is a violation of state and federal law and would subject policyholders regulated pursuant to RCRA to the full array of existing environmental enforcement authority.

RCRA and CERCLA

RCRA Corrective Action "was designed to be the analogue to the CERCLA program's National Oil and Hazardous Substances Pollution Contingency Plan" (known as the NCP). The legislative history of RCRA Corrective Action is clear:

> Unless all hazardous constituents released from solid waste management units at permitted facilities are addressed and cleaned up the [Congressional] committee is deeply concerned that many more sites will be added to the future burdens of the Superfund program . . . . The responsibility to control such releases lies with the Facility owner . . . .

RCRA Corrective Action directly is analogous to CERCLA remedial requirements. Both statutes require an assessment followed by an investigation, a review of potential remedial alternatives, and selection of a remedy.

Insurance Coverage for RCRA Liability

Several courts have held that investigation and cleanup costs incurred pursuant to RCRA Corrective Action are covered as "damages" under standard-form comprehensive general liability policies. In *Lindsay Manufacturing Co. v. Hartford*

Accident & Indemnity Co. (8th Cir. 1997), the Court predicted that the Nebraska Supreme Court would interpret the term "damages" in accordance with its ordinary meaning and to encompass environmental response costs. In *Brown Group, Inc. v. George F. Brown & Sons, Inc.*, (Mo. Ct. App. 1997), the Court held that RCRA-imposed response and remediation costs are "damages".

In *In re Texas Eastern Transmission Corp.* (E.D. Pa. 1992), the Court predicted that the Texas courts would conclude that the term "damages" was ambiguous and could be fairly construed to include environmental cleanup costs. However, *Texas Eastern* includes a caution to policyholders attempting to prove coverage associated with compliance with RCRA hazardous waste, management, safety, notice and other record keeping regulations.

In *A.Y. McDonald Industries, Inc. v. Insurance Co. of North America* (Iowa 1991), the Court held that CERCLA response costs were damages, but also held that a civil penalty for failure to comply with RCRA notification, permit, and groundwater monitoring regulations was not covered within the meaning of the term damages. However, the Court did find that the EPA's complaint alleging violation of RCRA regulations and subsequent administrative proceedings culminating in a consent order with the policyholder constituted a "suit" triggering the duty to defend.

In sum, policyholders face substantial governmental coercion under the RCRA Corrective Action provisions and have no choice but to comply. The coercive nature of such provisions is essentially no different than the coercive nature of CERCLA provisions that generally have been found to trigger the duty to defend. Moreover, a policyholder subject to RCRA Corrective Action requirements must pay to investigate and, if necessary, cleanup contamination. Policyholders have a strong argument that RCRA Corrective Action requirements are tantamount to a "suit" seeking damages. ■

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