

Small Land based Oil Spills: Coverage under CGL Policies and the exclusions

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Commercial General Liability (“CGL”) Policy Basics:

Most widely used in the business community and designed to address the needs of most businesses

- * CGL covers **THIRD PARTY LIABILITY**
- * Does **NOT** cover harm to policyholder’s property
- * Damage caused to policyholder’s property is covered by a separate **PROPERTY POLICY**

CGL Policy : Environmental Claims

IMPORTANT FOR 2 REASONS:

- 1 - DUTY TO DEFEND CLAIMS BY THIRD PARTIES
- 2 - DUTY TO INDEMNIFY FOR LIABILITY

Commercial General Liability Policies

Valid Policy - Duty of good faith to disclose material risks

Claims Made or Occurrence - Did the event/claim occur during the term of coverage?

Insured risk - Was it an insured risk?

Endorsements - Are there any endorsements which apply?

Exclusions - Is the coverage excluded by the policy?

Exceptions - Are there any exceptions to the exclusions?

Intpretation - Is the policy ambiguous?

Commercial General Liability Policy

The standard CGL Policy provides indemnification to an Insured for third party claims for property damage and personal injury arising from unexpected or unintended events

However, the broad coverage provided under a CGL policy is limited by conditions, endorsements, and exclusions which serve to remove certain peril from the scope of coverage.

A common "Pollution" exclusion clause states that the insurance does not cover claims arising of the discharge of contaminants in certain circumstances

Common exclusions: "Care, Custody and Control" or "Owned Property" Exclusion provides that the Policy does not apply where the Insured owns, occupies, or uses the property; "Automobile Exclusion" - does not cover leaks from tanker truck or automobiles; "Worked Performed" - oil companies working on tank or delivering oil

CGL Policy - Pollution Exclusion

Qualified Pollution Exclusion (mid-1970's)

Intent to remove from the coverage of the CGL policy pollution events or incidents that were not “sudden and accidental”

Considered frequently by U.S., and Canadian courts - resulted sometimes in:

“sudden and accidental” = “unexpected and unintended”

Rarely seen today - sparked the construction of the Absolute Pollution Exclusion

Absolute Pollution Exclusion

Introduced 1986: precluded coverage for “clean up costs” and removed “sudden and accidental”

Lack of Canadian case law considering and interpreting Intent being to exclude coverage for pollution incidents except in very limited exceptions

Two recent and significant cases from the Ontario Court of Appeal

Zurich Insurance Company v. 686234 Ontario Limited November 27, 2002

R.W. Hope Ltd. v. Dominion of Canada General Insurance Co. (2000) (Ont.S.C.J.), reversed on appeal *Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.*, [2001] O.J. No. 4936 (Ont.C.A).

Absolute Pollution Exclusion

Zurich Insurance Company v. 686234 Ontario Limited

* Carbon Monoxide * Exclusion Ambiguous

Trafalgar Insurance Co. of Canada v. Imperial Oil Ltd.

* Oil spill * Remediation * Contractor

Damage alleged to have been cause did not arise out of escape, discharge or release of pollutant - exclusion did not apply

Absolute Pollution Exclusion

Ontario Court of Appeal

Absolute Pollution Exclusion is overly broad and ambiguous in its wording - Thus, should be interpreted narrowly

Will preclude coverage for traditional incidents of industrial or commercial pollution, being those cases where there has been a significant discharge or release of a contaminant to the natural outdoor environment

EXCLUSION does not apply to the indoor release of carbon monoxide from a faulty or defective furnace in an apartment building

Limited Pollution Endorsement

Similar to the Absolute Pollution Endorsement

- * Indicates that exclusion does not apply to liability for bodily injury or property damage arising out of a sudden, unintended and unexpected happening
- * Typically there is an added premium for this endorsement

Limited Pollution Liability Coverage

- Commercial General Liability Policy endorsement

- * Most of the independent contractors who are doing environmental work would have a form of this coverage

- * Underlying intent is to generally exclude coverage for pollution incidents, subject to limited exceptions

- * “120 hour” detection and reporting cover

- * Picks up the truly accidental incident in an industrial setting

- * Very few cases interpreting Limited Pollution Liability Coverage

Limited Liability Endorsement Case Law:

- * Quebec and Ontario Courts have considered similar endorsements

- * Pilot Insurance Co. V. Tyre King Tyre Recycling Ltd. [1992] I.L.R.1-2851 (Ont. Ct. (Gen Div)) -considered the words “structure” and “container”. Tire was deemed to be “structure” in context of this endorsement

- * Groupe Petrolier Nirom Inc. v. Cie d'Assurance du Quebec (1999), 88 A.C.W.S. (3d) 663 (Que C.A.) -considered the “120 hour detection and reporting requirement. Court of Appeal held that the time limit “would only begin to run when the insured had knoweldge, or should have had knowledge, that there was a leak or failure in the underground fuel storage system.”

- * Query Relief from Forfeiture pursuant to Insurance Contracts Act

Pollution Liability Coverage Endorsement

Gives significant coverage for environmental claims

Clause clearly contemplates there will be third party claims and environmental damage

Interpreting the Insurance Contracts

1- Does your loss fall within the policy?

2- Is it excluded from coverage?

3- Is there an exception to the exclusion ?

Interpreting Insurance Contracts

General Principles

- Should be interpreted broadly in favour of the insured and that exclusion clauses should be strictly and narrowly interpreted against the insurer.
- A literal meaning should not be applied where it would bring it an unrealistic result or result that would not be contemplated in the commercial atmosphere in which the insurance was contracted.
- An interpretation of an ambiguous contractual provision that would render the insured's efforts to obtain insurance protection null and void should be avoided.
- An exclusion clause should not be interpreted in a way that is repugnant to or inconsistent with the main purpose of the insurance coverage, but so as to give effect to that purpose and the reasonable expectations of the ordinary person as to the coverage purchased.

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