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The New Environmental Insurance Products: When Does it Make Sense to Buy Them?

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(Part One of a Two-Part Article)

I. INTRODUCTION

Real estate transactions with environmental problems often founder on attempts to shift the liabilities from one party to the other. In transactions with other types of problems, insurance is a popular risk transfer mechanism, and is regularly used for that purpose, but it is used far less often when there are environmental risks. This so-called "environmental insurance gap" in real estate transactions has often, and correctly, been attributed to the inadequacy of the old environmental insurance products that failed to provide adequate coverage for the risks. Beginning about three years ago, however, the insurance industry began to offer, and is now aggressively promoting, some new products, which it says have risen to the occasion and can be used to save such environmentally-troubled deals. What are these new products, and how do they differ from, or improve upon, the old? When is it a good idea to buy them, and when to avoid them? Part I of this article will answer the first two questions; Part II will address the second.

II. WHAT WERE THE OLD PRODUCTS?

Up until very recently, the environmental insurance market was dominated by three companies, (1) AIG, (2) Zurich and (3) Reliance (ECS), which issued essentially three products: (a) a site-specific pollution liability policy, referred to as the "pollution legal liability policy" (PLL) or, alternatively, the "environmental impairment liability policy" (EIL); and two policies designed for the environmental services industry, (b) a contractor's pollution liability policy (CPL) and (c) an

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agreement, according to the Commission. While the report notes the tremendous gains in water quality, it emphasizes the importance of virtually eliminating the input of toxic substances into the Great Lakes system. The report includes 19 recommendations, including: remediating contaminated sediment, reducing sources of toxic air pollutants, reducing pollution from agricultural lands, funding research about endocrine disruptors, adopting a strategy for dioxins and furans, identifying and eliminating specific uses of mercury, developing a program for the systematic destruction of PCBs, and monitoring toxic chemicals used at nuclear facilities and the effects of certain radioactive elements. International Joint Commission Press Release (July 22, 1998).

EPA Cites Long Island Dry Cleaners for Clean Water Act Violation

EPA has issued a citation to a dry cleaner in Malverne for discharging fluids into a floor drain without a permit. EPA has ordered Bon Bon Cleaners to cease discharges to the drain, properly close the drain, and pay a $14,600 penalty. A Nassau County Department of Health inspector discovered that the company was using its drain for unpermitted discharges. EPA then required the company to either apply for a permit or submit a closure plan for the drain. The company submitted a closure plan to EPA in February 1997. EPA approved the plan and required the company to close the drain and submit proof of closure by May 1997. EPA has not received any information on the progress of the drain closure. EPA Region II Press Release (Aug. 13, 1998).

UPCOMING EVENTS

November 17, 1998

"The Invisible Construction Conference," New York City. Sponsored by the Institute of Civil Infrastructure Studies, New York University. Information: Brian Jaffee or Jael Humphrey (212) 598-9010.

WORTH READING

Paul F. Clark, "Into the Wild: A Review of the Recreational Use Statute," *New York State Bar Journal*, July/Aug. 1998, at 22.

Bart Eklund, Eric P. Anderson, Barry L. Walker & Don B. Burrows, "Characterization of Landfill Gas Composition at the Fresh Kills Municipal Solid-Waste Landfill," *Environmental Science & Technology*, Vol. 32, No. 15, 1998, at 2233.

Michael B. Gerrard, "Protecting State Environmental Sovereignty Through New Statutory and Constitutional Tools," *National Environmental Enforcement Journal*, May 1998, at 3.

Michael B. Gerrard, "Regulation of Orbital Space Derby," New York Law Journal, Sep. 25, 1998, at 3.

Howard Goldman, "Using the Land Use Laws to Protect and Enhance Property Value," *New York Law Journal*, Aug. 5, 1998, at 1:1.

Catherine Henshaw Knott, *Living With the Adirondack Forest: Local Perspectives on Land Use Conflicts* (Cornell University Press).

Janet Pelley, "The Challenge of Watershed Cleanup," *Environmental Science & Technology*, Aug. 1, 1998, at 364.

Rebecca Renner, " 'Natural' Remediation of DDT, PCBs Debated," *Environmental Science and Technology*, Aug. 1, 1998, at 360.

David H. Sculnick & Jon D. Lichtenstein, "Obtaining Academic Records of Non-Parties in Lead Paint Cases," *New York Law Journal* Aug. 18, 1998, at 1:1.

C.W. Spicer et al., "Unexpectedly High Concentrations of Molecular Chlorine in Coastal Air," *Nature*, Vol. 394, July 23, 1998, at 353.

Amy Terdiman, "Power Shortage: Critics Charge the State's Development of Renewable Resources is at a Standstill; Officials Are Hardly Arguing," *Empire State Report*, Aug. 1998, at 47.

John L. Turner, "Tropical Long Island: Fantastic Fish Ride on Gulf Stream," *New York State Conservationist*, Aug. 1998, at 2.

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environmental consultant's errors and omissions policy (E&O). These three original products warrant a brief review, with their deficiencies set forth below, before they can be contrasted with those that have replaced them.

A. The Pollution Legal Liability (PLL) Policy

1. Coverage

The PLL policy was essentially designed to address third-party liability arising out of a pollution condition (a release, discharge or escape of pollutants into the land, water or atmosphere) at a specified site. The basic insuring agreement of the PLL policy resembled Coverage A of the commercial general liability (CGL) policy.[1] Coverage A agreed to pay for damages because of bodily injury or property damage caused by an occurrence (an accident, including continuous or repeated exposure to substantially the same general harmful conditions[2]). The PLL policy agreed to pay for "loss"—bodily injury, property damage and cleanup costs—because of a "pollution condition." This definition was virtually identical to the CGL policy's pollution exclusion, minus the exception for sudden and accidental releases.

A basic difference between the PLL and CGL insuring

agreements lay in the trigger of coverage, that is, in what determined that a particular policy would be invoked. The CGL policy had a single trigger. It was the occurrence of bodily injury or property damage during the policy period. The PLL insuring agreement contained a "double trigger:" during the policy period, a claim must be both (1) made upon the insured and (2) reported in writing by the insured to the insurance company. This double trigger ensured that coverage for environmental risk, a long tail risk *par excellence*,[3] would have no tail beyond the one-year period of coverage except for that provided under the limited "optional extended reporting period" endorsement. And, if the policy was renewed, the double trigger made stacking, or coverage under more than one successive policy for the same claim, virtually impossible.[4]

Another difference between the insuring agreements of the CGL and PLL policies involved the defense provisions. The CGL policy had a duty to defend, and defense costs were outside the limit of liability. The PLL policy had the right but not the duty to defend, and defense costs were included within the limits of liability.

Restrictive definitions and multiple exclusions seriously limited the scope of the basic terms, the pollution condition and elements of "loss." The pollution condition, unlike coverage under the exception to the CGL pollution exclusion, could be both sudden and gradual. It could also be pre-existing or current, occurring during the policy period. However, it could not be on-site. It had to originate, or be released, on-site, but the resulting environmental damage and cleanup costs had to occur off-site. This refusal to cover on-site pollution conditions and cleanup costs derived from the CGL policy's owned property exclusion and the idea that the policy was for third, not first-party, damages. Yet on-site conditions can be as much of a worry in contaminated property transactions as off-site ones.

Another serious limitation on the pollution condition was that, if pre-existing, the pollution condition could not be known. The most prominent and troubling exclusion in the policy was for a pollution condition existing prior to the policy effective date "if any named insured or employee responsible for environmental affairs reasonably could have expected that such pollution condition would give rise to a claim." Perhaps because of the difficulty in determining what is known, particularly for older industrial facilities, this exclusion was the subject of many heated coverage disputes. And, obviously, in contaminated property transactions, known contamination is the very thing that needs to be covered.

The pollution condition was further curtailed by limitations on (1) the types of pollutants that could fall within its ambit, such as acid rain and radioactive matter; (2) the types of objects from which pollutants could be released, such as underground storage tanks, vehicles in loading or unloading or wells if oil were involved; and (3) the types of sites or locations from which the release could emanate. Other excluded properties included Superfund sites, non-owned facilities, "off-shore facilities" as defined by the Deep Water Port Act or Clean Water Act and alienated properties. Such exclusions eliminate many of those areas which are precisely in need of coverage today, for example potential Superfund sites in brownfields redevelopment projects.

The definitions of "cleanup costs" and the requirement of a "claim" in the insuring agreement meant that voluntary cleanup costs were not covered, a serious impediment in current brownfields or voluntary cleanup programs. The definition of property damage did not encompass diminution in value (third or first party) or collateral value loss for banks, thus precluding secured creditor or lender liability coverage. Some typical CGL policy exclusions limited coverage for products liability or completed operations pollution. Finally, damages did not include non-pecuniary relief, business interruption or consequential damages. There was a full contractual liability exclusion, obviously an impediment in transactions with environmental indemnification provisions.

The exclusion for intentional or willful violation of a statute seemed reasonable since liability insurance is supposed to apply to fortuitous events. But many of the rest of the exclusions, especially in the aggregate, gave the impression that what the right hand gave the left hand took away and that the policy covered everything except what needed to be covered.

Along with providing very narrow coverage, these policies were extremely expensive. In 1990, an average premium for an one-year policy for an one site industrial facility with a $50,000 deductible and a $5 million limit was $100,000 or above.

2. Explanation for Narrow Coverage and High Prices

This narrow coverage and high pricing was not just another nefarious plot by the insurance industry (c.f., "The Rainmaker"). It was typical of a new and evolving insurance market. When 50-odd carriers entered into the environmental insurance market after the adoption of the Resource Conservation and Recovery Act (RCRA) regulations in 1980, they attempted to use traditional practices for underwriting and pricing CGL policies. This attempt had disastrous consequences, and, by 1984, all but one (AIG) were out of the market (although some are still paying claims). The lack of history upon which to base underwriting decisions, in addition to faulty underwriting techniques, helped lead to this disaster. A PLL policy cannot be underwritten or rated in the formulaic way of CGL policies. PLL policies are individually risk rated by comparing specific Phase I's with what is known about other, similar sites. In the early 1980s, nothing was known about other similar sites. In addition, the environmental engineering upon which underwriting was based was unsophisticated. There was not much of an environmental engineering/remediation industry in the early 1980s. Most important, the underwriters had no history or experience with these types of policies. Experience is what a company hangs its hat on. When there is little or no experience, high prices and restrictive forms serve as a crutch. The environmental insurance industry now has almost 20 years of experience, and, as shown below, has largely been able to throw the crutch away.

B. Policies for the Environmental Services Industry

In addition to the site-specific PLL policy, the environmental insurance marketplace has for many years offered two types of coverages for the environmental services industry contractor and consultant coverage. The primary providers of these policies were, again, AIG, Zurich and Reliance (ECS), in addition to several "niche" insurers, some of which no longer exist, including United Coastal Insurance Company, United Capitol Insurance Company, the Home Insurance Company, ERIC, ECI, Freberg Environmental (Denver), Credit General, American Safety, Commercial Casualty, Gotham Insurance Company and American Empire.

1. Contractor Coverage

The following types of coverage have been used for several years to protect contractors against claims by third parties resulting from operations such as remediation, abatement, and construction for third parties.

a. Contractors Pollution Liability (CPL) Policy

The Contractors Pollution Liability (CPL) Policy has protected environmental contractors against claims for third party bodily injury, property damage, and cleanup costs arising from pollution conditions, sudden or gradual, caused by insured remedial action operations. (Early policies only covered sudden and accidental pollution.) The insuring agreement resembled that of the PLL policy (originally, contractor coverage was an endorsement to the PLL policy). It agreed to pay for bodily injury, property damage and cleanup costs caused by a pollution condition and the result of claims first made and reported during the policy period, with this difference: the pollution condition had to be caused by specified operations. There was no contractual liability exclusion (or a limited exclsuion), and, except for a few companies, no completed operations exclusion (or a limited exclusion). Unlike the PLL policy, these usually had retroactive dates. There were, in addition, Superfund, radioactive matter, waste disposal site, asbestos and underground storage tank exclusions.

b. Lead-Based Paint and Asbestos Abatement Liability Policies

The Lead-Based Paint and Asbestos Abatement Liability Policies protected the insured against claims for bodily injury or property damage by third parties arising, respectively, from asbestos or lead based paint incidents at scheduled projects. Both policies could be written on an occurrence as well as claims-made and reported basis. The lead or asbestos incident had to result from the insured abatement operations performed during the policy period. The incident and the operations were defined very narrowly in order to ensure all of these connections. There was usually some completed operations coverage. Air monitoring and analytical tests in the area of such operations and reporting and documentation of such tests were usually required before, during and after such operations as a means of documenting incidents. Some policies provided coverage for incidents during transportation of the material while others did not. Bodily injury to employees, sub-contractors or relatives was usually strictly excluded.

2. Consultant Coverage

The second type of policy for the environmental services industry was the consultants' errors and omissions or professional liability policy (E&O). It was specifically directed at environmental consultants, engineers and laboratories. Its insuring agreement was patterned on that of the architects and engineers errors and omissions liability policy. The policy therefore paid damages caused by negligent acts, errors or omission in the performance of professional services rendered or that should have been rendered by the insured. The professional services were specified in the Declarations. The basic difference between this and other E&O policies was that it had no pollution exclusion; professional liability in connection with pollution was covered. This coverage was usually written on a claims made and clains reported basis, with both a retroactive date and an exclusion for claims arising out of pollution pre-existing and known prior to the policy effective date. A difference between this policy and the CPL policy was that, like most E&O policies, it did not specify the type of injury or damage being compensated, whereas the CPL policy specified bodily injury, property damage and cleanup costs.

This policy had most of the typical exclusions found in other, non-environmental E&O policies, such as for ERISA, businesses owned by the insured, personal injury (false arrest, libel, and so forth), Securities Act, and dishonest or fraudulent acts.

3. Combined Form

Several carriers offered a form combining the CPL and E&O policies into one, typically with an insuring agreement for the professional liability coverage and another insuring agreement for the CPL coverage. The exclusions section combined those of the CPL policy with those of the E&O policy into one massive section.

4. Scope of Coverage and Pricing

Unlike the PLL policy, these policies insuring contractors and consultants generally covered what they were supposed to cover. They were not, perhaps with the exception of those that had no completed operations coverage, notably restrictive contrasted with CGL policies issued to ordinary contractors or E&O policies issued to architects and engineers.

However, these policies were very expensive. For a typical carrier with an extensive contractors' book of business, the average premium in 1990 for a combined CPL and CGL occurrence policy was $100,000. This was for a one-year policy, with $1 million limits and a $5,000 deductible. The early CPL insurers had some of the same problem as the PLL insurers.

While the underwriting technique for CPL policies was the same as for CGL policies covering non-environmental contractors—pricing was based on size of the company, sales or receipts—the CPL underwriters also suffered from lack of experience or history. What history they had was non-environmental or based on claims under the CGL policy which covered sudden and accidental pollution. (This is why the first forms only applied to sudden and accidental pollution, and then, as experience accumulated, were expanded to apply to gradual pollution.) This lack of experience explains why prices were so high.

III. How Do The New Products Differ?

A. Site-Specific Coverages

The old PLL policy was clearly much too restrictive for current contaminated property transactions. Two new site specific policies, (1) the cleanup cost cap policy and (2) the new, multi-part PLL policy, have been developed in the last few years in order to rectify this situation. They were written with brownfields or other contaminated property transactions very much in mind. The two policies, currently offered by (1) AIG, (2) Zurich, (3) ECS, (4) Kemper and (5) United Capitol, are targeted at the following parties and situations: (a) site owners/developers; (b) potentially responsible parties (PRPs); (c) contractors/consultants;(d) brownfields redevelopment projects; (e) mergers/acquisitions/divestitures; and (f) real estate transactions.

Both of these policies can be issued with coverage periods of as long as ten years. Policy limits available in the market range from $15 to $100 million at any one company. With facultative reinsurance, these limits can climb as high as $200 million. The minimum premium is generally $5,000 and the minimum deductible $10,000. The discussion below of each specific policy will attempt to give a range for what an average policy might cost.

1. The Cleanup Cost Cap Policy

The cleanup cost cap policy, an entirely new and highly innovative form, goes a long way towards solving a central deficiency of the PLL policy: lack of coverage for known pollution. It is not a liability coverage. Rather, it is a stop loss or finite risk policy, which addresses the situation in which the known pollution has already resulted in a claim and a cleanup has already been ordered. It essentially covers cost overruns above an estimated or guaranteed cost.

More specifically, the policy indemnifies the insured for cleanup costs that exceed the anticipated cost of cleanup at a covered location and pursuant to a remedial action plan. Coverage is provided for remedial activities that are at, from, or adjacent to the location defined in the remedial study, or are discovered in the course of conducting the cleanup. Such insurance usually covers remediation cost overruns for (1) actual contamination greater than estimated; (2) on-site cleanup costs pursuant to the remedial action plan; (3) off-site cleanup costs if the pollutants originated from those in the on-site cleanup; (4) new-found contamination, provided it is discovered within the area of the remedial action plan; and (5) change orders required by governmental authorities that are incurred during the policy term.

Most of the policies have a single trigger of coverage—reporting and/or discovery (one has a claims-made and reported trigger). Maximum coverage periods are ten years.

Generally, these policies are drafted similarly, but there are certain terms to look out for. Most define cleanup costs to include only actual remediation. However, some carriers are willing to define "cleanup costs" to include monitoring and investigation. The policies all have language dealing with change orders. Some are more restrictive than others in this regard. Most, but not all, policies appear to require that costs be incurred during the policy period. That might only be a problem if the term "cleanup costs" has the more expansive definition such that actual cleanup might not commence until late in the policy period. Some policies have, or had in the past, exclusions for professional liability exposure, which can be very problematic.

The cleanup cost cap policy will be assigned a retention level that is equal to the total cost of cleanup plus an adequate buffer or additional retention level. For instance, a $1 million cleanup may require a $100,000 retention. This means that coverage under the policy attaches after $1.1 million has been spent on the covered remediation project. Pricing credits are granted to insureds who elect to co-insure above the retention level. Coverage periods can be for as long as ten years.

This policy has proven to be of enormous value in contaminated property transactions, brownfields redevelopment projects and even in the settlement of Superfund litigation. First, it addresses the problem of known pollution; second, it is a way of capping and controlling cleanup costs; third, the cost estimates required for underwriting these policies can be used in making the property valuations; and fourth, the policy enhances the property value itself. This policy has become very useful in contaminated property transactions.

a. What Does It Cost?

The premium is based on a percentage of the guaranteed cleanup costs, in combination with the limits, i.e., assuming the limits are almost equal to the cost of cleanup. The range is generally 4.5% to 7% for a cleanup of up to $10 million. For a recent policy, involving $1 million limits, a $100,000 retention, and a very small cleanup, the premium was $35,000.

It cannot be stressed enough, however, that each risk is unique, and this formula and these generalizations may not apply to a specific situation. There can be great variation in the prices quoted for the same risk by different carriers (as well as some difference in the scope of coverage), which is why brokers should market each risk to several companies at the same time.

2. Site-Specific Pollution Liability Policy

All five of the main environmental carriers have designed a new pollution liability form to substitute for the old PLL policy.

This policy differs from the old PLL policy both in form and scope of coverage.

a. Form

The PLL policy had one insuring agreement that covered third party bodily injury, property damage and off-site cleanup costs arising out of a pollution condition. The new PLL policies all have more than one coverage part, ranging from as few as two to as many as twelve parts. These coverage parts break the basic elements of the old PLL insuring agreement pollution condition down in various ways, some more minutely than others. Two policies have merely two coverage parts, one for on-site cleanup costs and another for third party bodily injury, property damage and off-site cleanup costs. Another two carriers issue a series of separate stand alone policies with a menu of insuring agreements for any two or more of the following: (1) bodily injury and property damage; (2) contract damages; (3) cleanup costs; (4) legal defense expense; (5) business interruption and extra expense; (6) cleanup cost cap; and (7) collateral value loss reimbursement.

The final policy breaks the elements of the old PLL insuring agreement down even more, distinguishing not only between on-site and off-site cleanup costs but also between pre-existing and current cleanup costs and between on-site and off-site bodily injury and property damage. It has separate insuring agreements for: (1) on-site cleanup of pre-existing conditions; (2) on-site cleanup of new conditions; (3) off-site cleanup of pre-existing conditions; (4) off-site cleanup of new conditions; (5) third party claims for on-site bodily injury and property damage; and (6) third party claims for off-site bodily injury and property damage. In addition, this policy has coverage parts for claims arising from non-owned locations, business interruption, transported cargo and remediation cost cap.

The three policies with the more extensive menus affirmatively cover, in their menus, all or most those liabilities that may require coverage in contaminated property transactions. These liabilities include (1) bodily injury and property damage, (2) cleanup costs, (3) legal defense expense, (4) contractual liability, (5) business interruption and (6) collateral value loss. The two policies with only two coverage parts will address the additional liabilities by means of endorsements or separate stand alone policies.

The reason for the break-downs and menus of coverages was to make the policies useful in the context of transactions, where tailoring the insurance to the specific terms of environmental provisions in purchase and sale agreements is often required. Breaking the coverages down makes that easier, because the insured can pick and choose what is really needed—(1) coverage only for pre-existing conditions or for current conditions, (2) coverage only for on-site cleanup costs or for off-site cleanup costs as well; or (3) coverage only for cleanup costs or for bodily injury or property damage. These breakdowns and menus, however, are not usually sufficient to do all the tailoring required. It is usually necessary to draft manuscript endorsements to further refine the coverage, and many of the carriers are amenable to such manuscripting. Another problem with the menus is that they can become overly complicated with resulting difficulty in understanding just what the insured has paid for.

3. Scope of Coverage

By and large, these policies do not undermine their basic coverage grants by a series of exclusions and definitions. The holes noted above in the PLL policy are largely, although not entirely, filled in.

All of the five carriers have largely filled in the holes in the original pollution condition. We have already seen that the cleanup cost cap policy affirmatively covers known pollution when it is already subject to a claim or cleanup order. The new liability policy expands coverage for known pollution when it is not already subject to a claim by adding discovery language to the pre-existing condition exclusion, which now typically reads:

> This Policy does not apply to "environmental incidents:" based upon or arising from "pollution conditions" existing prior to the inception of this Policy, and reported to or known by any officer, director, partner or other employee responsible for environmental affairs of the "insured," unless all of the material facts relating to the "pollution conditions" were disclosed to the Company in the application and other supplemental materials and information prior to the inception of this Policy.

The intent of this language is to cover known conditions disclosed in the site documents unless specifically excluded by endorsement. This amendment to the old exclusion, adding the disclosure language, also has the virtue of clearly defining what is known by what was in the Phase I and other supporting documents.

Another way of covering such known conditions is the "government reopener endorsement." This endorsement covers known pollution in situations where response costs are either not likely to be required, or they have been required in the past but are not likely to be revisited, usually where some kind of no further action letter, liability release or covenant not to sue has been issued. Whichever of these methods is used, coverage for liability for known pollution is appropriate under the pollution liability policy when the risk is that of a claim being made. If there is an ongoing claim or loss of some kind, then the cleanup cost cap policy is more appropriate. Otherwise, the argument can be made that the liability policy is attempting to insure a known loss.

Many of the exclusions for types of pollutants or sources of their release have been scuttled or curtailed. For example, the acid rain exclusion is gone, the radioactive matter exclusion has been limited, and the broad form nuclear endorsement is usually eliminated. The new policies often have exclusions for asbestos and lead; however, if a particular transaction necessitates coverage for these pollutants, some underwriters are generally open to modifying or eliminating the exclusions.

Most of the exclusions for various objects or locations from

which pollutants may be released have been eliminated. For example, the Deep Water Port Act exclusion is gone, including the part of it which excludes releases of oil from wells. The underground storage tank exclusion is either gone, or will be eliminated in certain situations. (Certainly, these policies are now designed to be used by gas stations and the oil and gas industry.) Most of the policies still contain some kind of vehicle or loading and unloading exclusion; however, one policy provides transported cargo coverage. The Superfund exclusion is gone; the non-owned waste disposal facility exclusion is largely gone. The alienated or divested property exclusion is absent from some policies and has been modified in others.

Most of the policies have retained the same broad definition of "pollution conditions" as in the old PLL policy or the old CGL pollution exclusion. However, one carrier made that definition narrower by requiring that the pollutants be "hazardous substances." Since the government may require cleanup of pollutants that are not hazardous, either because they fail to reach certain levels or because they are not listed under CERCLA as hazardous, this definition is one to watch out for.

All of the policies have a duty to defend, at least with respect to third party bodily injury, property damage, and off-site cleanup costs. Defense costs, however, are still universally included within the limits of liability.

The coverage period is no longer limited to a year; carriers will issue policies of as long as ten years. With the longer coverage period, the claims-made and reported trigger is less of a problem, particularly for bodily injury and property damage. Some carriers have found various ways of providing a tail, first through using a single trigger and secondly through a provision that allows for reporting of potential claims. The industry is clearly moving in the direction of an occurrence policy and may arrive there within a couple of years. One carrier has already used an occurrence form in special situations.

There is broader coverage for types of property damage including cleanup costs. Some of the policies explicitly cover voluntary cleanup costs by stating that costs incurred not only under governmental authority but also pursuant to the American Society of Testing and Materials Standard Guide for Risk Based Corrective Actions, or other similar standards, will be covered. Some policies have changed the definition of "property damage" to include diminution of value, or underwriters say that they treat the definition as including it. (Needless to say, it is far preferable to have the term specifically included in the definition.) Contractual liability is now affirmatively covered by some policies, and the old contractual liability exclusion modified in others.

It should be stressed that many of the carriers are now vastly more flexible about revising their pre-printed forms through manuscript endorsements than they used to be. This is another way in which they have responded to the need for policies which will be useful in transactions. Some carriers have made their basic policy forms much broader than others but are less flexible about changes; other carriers whose pre-printed forms are narrower than others may be more open to on-the-spot revisions. It is a buyer's market, a soft market. However, while the carriers are more flexible and while there are fewer traps in the basic policies than in the old days, there are still traps, and informed negotiation with the underwriters will go a long way towards ensuring that the ultimate policy has adequate coverage.

a. What Does It Cost?

The caveats about pricing generalizations apply even more to the liability policies than to the cleanup cost cap policies. These liability policies are rated on the basis of individual risk, not according to a formula. Premiums can vary greatly depending on the nature and extent of contamination, and they can vary greatly for a specific risk from one carrier to the other. However, underwriters from several different companies agree that for the average policy these days—one location with some existing contamination, $5 million limits, a five-year term and a $50,000 deductible—the premium would tend to run between $35,000 and $45,000.

This, of course, is less than half of what a one-year policy would have cost in 1990. It should not be surprising that the prices have gone down. They will probably continue to go down as the industry gathers more experience. Every month or year is a significant addition to the statistics base. Environmental insurance is an evolving market; as it evolves, it will take on more and more of the characteristics of a traditional insurance market.

4. Policies for the Environmental Services Industry

Policies for the environmental services industry are still being written by the same companies listed earlier (St. Paul has been added to the list), except for those now defunct (The Home Insurance Company and ECI). These policies still consist basically of the E&O and contractor coverages (CPL, lead-based paint abatement and asbestos abatement liability policies). These policies are being sold to a broader range of types of contractors and consultants, probably because the environmental services industry has further specialized. Available limits are the same as for the site-specific coverages: ranging from $15 million to $100 million, and $200 million with reinsurance. Minimum premiums are $1,500, and even less, and minimum deductibles are $1,000.

There have not been many changes in form or scope of coverage in the original policies, because they generally had fewer holes in coverage than the old PLL policies. It is more common now to combine the CPL and E&O forms in one policy, frequently with an additional CGL coverage part. One important change and improvement in CPL coverage is that an occurrence as well as claims-made form is offered by most of the carriers; however, it is not yet being offered to tank contractors. Most of the E&O policies, at least those of the five major carriers, are still both claims-made and reported and still have both a retroactive date and pre-existing known conditions exclusion. However, the E&O policy of one carrier at least has only a single trigger, reporting of a claim, and only a retroactive date to limit coverage for pre-existing conditions.

a. What Does It Cost?

As the industry has gathered more experience concerning the CPL and E&O policies, the prices, like those of the PLL policy, have gone down precipitously. A typical policy for a relatively big contractor, e.g., $10 million in sales, comparable to the one discussed above—one-year, $1 million limits, $5,000 deductible, with combined CGL occurrence, CPL and E&O coverage parts—would be about $15,000 to $20,000 (in contrast to $700,000 in 1990). The same caveats about pricing generalizations apply here as to the site-specific coverages.

IV. SUMMARY OF PART I

The coverage forms and prices for the site-specific policies have greatly improved. The policies generally cover the items that need to be covered. Glaring holes have been filled in: known pollution, cleanup costs of all kinds and in all locations, property damage including diminution of value, the duty to defend, the duration of the coverage period. Some of the policies have tails; and, although none available at present has an occurrence trigger, that is clearly coming. Prices have gone down precipitously and will continue to decline as the market evolves (and remains soft). However, each risk is different, each policy is different and some carriers are in the midst of changing their policies. It is therefore important to market individual risks to several carriers to get the most complete coverage and the best price.

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[1] The CGL policy developed by the Insurance Services Office (ISO) provides premises and operations coverage for third bodily injury and property damage liability (Coverage A), personal injury and advertising injury liability (Coverage B), and medical expenses (Coverage C).

[2] *See* M. Lathrop, "Insurance Coverage for Environmental Claims," § 3.05[1], (Matthew Bender).

[3] The potentially long delay between (1) the date of the occurrence or accident and the date of the injury or damage, and/or (2) between the date of the occurrence or of the injury and the date that a claim is made or reported.

[4] With a single trigger it is often easy to argue that two successive policies apply to the same claim or pollution condition. With a double trigger, it is much more certain that one and only one policy will be invoked, because both of these things, not only one, have to happen during the same period of time.

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