Corporate Exposure: "Sudden and Accidental"

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"Sudden" and "accidental" stipulations have been written into most comprehensive general liability insurance policies issued since 1970. What these terms mean has probably never been so heatedly debated in the courts as now. It appear the definitions of these terms are simply a matter of your risk position. Insurance carriers have tried to use "sudden" and "accidental" to deny billions of dollars in environmental liability claims. Their position is clear: Unless the loss was a result of a sudden or an accidental occurrence, there is no coverage.

Thus, pollutants gradually seeping into the soil are not covered since the seepage was not sudden and, arguably, not accidental. An accident is an unexpected event. It *can* be expected that anything held in a tank might leak into the environment. In the meantime, policy holders consistently state the terms "sudden" and "unintended" are synonymous; since no one *intended* for the chemicals to leak, the contamination should be covered.

The courts are attempting to clarify this discrepancy, but the issue remains a source of controversy and confusion. Some of the court cases have viewed these terms strictly—their dictionary definitions. These reviews clearly lead one to expect coverage, since the common language use of the word as defined in the dictionary supports the insured's position.

In addition, many policy holders have successfully demonstrated to the courts the carrier's intent when using these terms in the policy. As noted above, carriers began inserting the terms in 1970. They then specifically issued endorsements excluding coverage for deliberate polluters. This would indicate that unless the action was deliberate, the carriers had intended to cover such losses. This interpretation has been supported on numerous occasions as documents consistently conveying this impression have been introduced into the courts. Such evidence, in fact, has sometimes been so persuasive that many carriers have openly admitted their intent was to cover this type of loss and then dropped their argument. What this means is many carriers *will* consider claims that were gradual in nature, provided it can be demonstrated there was no intent to cause injury or damage. But the controversy only begins at that point.

General liability policies have another clause that has now come under scrutiny and attack in the environmental liability arena. These policies have a "duty to defend" provision in the contract. Carriers are responsible for defending the insured's interest in any lawsuit covered under the policy. Several courts have issued mandates requiring the carrier to defend the insured's interest while it determines whether there is coverage under the policy. Insurers argue they have no duty to defend until an exposure to their contract can be determined. Nonetheless, a California decision stipulated insurers must pay environmental liability legal defense costs within 30 days of receipt and reimburse past costs with interest. This decision was effective immediately, without regard for whether coverage existed. The court also ruled that environmental contamination claims are considered "continuous injuries" and thus may transcend several policy periods. In such cases, all policies in effect during these periods will share in the environmental clean-up costs.

While the courts try to settle the disputes between insured and carriers, the Securities and Exchange Commission is now pushing companies to disclose potential environmental liability expenditures. The question is, how can a company predict its costs without knowing whether past policies will respond? In addition, often several companies will be required to respond to a polluted site. Arguably, the percentages to be shared between various companies will ultimately present another hurdle for the courts to resolve. It almost appears that for every one decision established, the court renders two consequential issues.

Lending institutions should feel relieved by the court's decision that they cannot be held responsible for clean-up expenses on properties in which they have an interest. There had been a number of occasions in which a financial institution or bank had foreclosed on a property that turned out to be polluted; clean-up costs would be brought against the bank. Although this court decision may have brought a sigh of relief to many banks, the decision contained a clause that is still cause for concern: The ruling left open the possibility that trustees of the banks could be held personally liable for the clean-up costs.

In short, environmental liability has developed into a specialty niche, with only a few carriers offering a competent product and still fewer brokers knowledgeable and experienced enough to help design and protect the insured's interest. Review your coverage carefully, and never destroy an insurance policy. Definitions and descriptive terms can assume different meanings and interpretations—and possibly provide protection where none existed in the past.

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