Understanding the Pollution Exclusion in CGL Policies

Hollywood makes a living dramatizing stories of contaminated water supplies and food sources. In movies such as Erin Brockovich and A Civil Action, viewers learn that defending a pollution case can be a protracted and expensive proposition. This is true whether the alleged polluter is actually responsible for the contamination or not. If the case is successful, damages can be astronomical. So, when placing coverage for a company that might have pollution exposures, it is important to make sure those exposures are covered.

Agents see two fairly common types of claims relating to pollution coverage: failing to recommend and obtain a policy that provides pollution coverage and failing to ensure that the coverage is not taken away by the pollution exclusion. The insurance carrier will often cite the pollution exclusion as a basis for denying a client's claim, saying the substance at issue does not fall within the definition of "pollution," or the pollution was not "sudden and accidental" and thus there is no coverage under the exception to the exclusion, or the pollution was confined to the premises as opposed to escaping into the land, air or water, or the pollution exclusion is modified with a "buy back" endorsement and the conditions for coverage are not met.

These examples all involve interpretation of the insurance contract. For an insurance agent involved in litigation this can be good and bad. Arguably, the dispute is between the parties to the contract—the policyholder and the insurance carrier. However, the parties will often bring the agent into the action. This is particularly true when the agent has taken an early position siding with the policyholder and advocating that the loss should clearly be covered. If coverage is found, there will be no need to sue the agent for failure to procure coverage. However, if the carrier sticks to its position of no coverage, the agent is in a much less advantageous position in the litigation that follows. If the court finds that the policy was unambiguous, it may be argued that it was the policyholder's duty to read. This argument will also be the basis for the claim against the agent for failing to obtain the correct coverage when the policy at issue unambiguously did not provide that coverage.

The "duty to read" defense is an agent's ally and you should not waive your right to use that defense by taking a contradictory position. In some jurisdictions the duty to read defense will prevent the claimant from bringing a case against you and will be the basis for a dismissal. In other jurisdictions, it at least provides a basis to allocate fault against the client.

Coverage issues also can arise from different policy versions. Multiple policy versions can be at issue in a single litigated pollution case. This is true because of the evolution of the pollution exclusion in the CGL policy and the nature of litigation for pollution damages. Most all of the policies in this instance are occurrence policies, and since pollution can be discovered some time later and occur over a period of time with multiple different parties held liable for their part in the claimed damages, several years of policies can apply.

By taking some extra time to deal with clients who may have pollution exposures and following some simple risk management procedures you may be able to avoid contamination by a pollution claim. IA

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Don't Underestimate Client Duty

When it comes to multiple policy forms and corresponding coverage disputes, the best defense is a basic avoidance strategy. Routinely advise clients that there are limitations to coverage in every CGL policy. Document any quotes for coverage that the client rejects. Advise the client, in writing, to review the policy and to contact you if any coverage change is desired. Take the time at renewal to reiterate and document it all over again. While this may seem like very basic advice, it is critical to have documentation if you need to present a viable defense to an error & omissions claim in pollution exclusion litigation. This is true whether the coverage dispute involves a client for whom you never considered there would ever be any pollution liability exposure, and for those clients who clearly have pollution liability exposure. Either way, reinforce the notion that it is your duty to procure what is requested by the client. Do not underestimate the importance of the client's duty to advise you as to what coverage it may need.

—A.P.