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# COVERAGE LIMITS EASED FOR VOLUNTARY CLEANUPS

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Both the U.S. Supreme Court and the Illinois Supreme Court recently issued opinions that will affect the decision to conduct environmental remediation -- as well as the ability to determine potential insurance coverage -- where no lawsuit has been filed against the insured party conducting the remediation.

For the last 10 years, many Illinois practitioners have operated under the belief that there is no liability insurance coverage for voluntary environmental cleanups. See Lapham-Hickey Steel Corp v. Protection Mutual Insurance Co., 166 Ill.2d 520, 531 (1995).

In the Lapham-Hickey case, the Illinois Supreme Court had before it a primary insurance policy containing typical language that required the insurer to "defend any suit against the insured." The court accordingly concluded that if no suit had been filed against the insured, neither the duty to defend nor the duty to indemnify the insured could exist.

Therefore, if the insured was cleaning up a site for such reasons as the threat of governmental or third-party action that had not yet matured into a lawsuit, to ready the site for a subsequent property transaction, or to come in compliance with environmental regulations, there was no insurance coverage available to reimburse the insured for such remedial activities. Moreover, the duty to "defend" would not be expanded to extend to such activities as negotiating with an environmental agency for a voluntary resolution such as obtaining a "No Further Remediation" letter from the Illinois Environmental Protection Agency.

But then in Central Illinois Light Co. v. The Home Insurance Co., 2004 WL 2743593 (2004), the court limited Lapham-Hickey to insurance policies that contain a duty to defend "suits" in the insuring agreement. By contrast, the policies before the court in CILCO were excess liability policies that, as they did not contain a duty to defend, lacked any "suit" terminology. Instead, the insuring agreement of these policies required indemnification once the insureds became "liable to pay ... as damages," or, in other policy language before the court, became obligated to pay damages "imposed by law."

The court held under this indemnification language, no "suit" against the insured was necessary to trigger the insurance carrier's duty of indemnification. The court cited with approval the holding of an unreported U.S. District Court

decision, Vogue Tyre & Rubber Co. v. CIGNA, No. 96 C 4864 (N.D. Ill. Feb. 11, 1999), but ignored a contrary decision from the same court, American Motorists Insurance Co. v. Stewart Warner Corp., No. 01 C 2078 (June 28, 2004, slip op. on reconsideration at p. 2).

The court also relied on out-of-state authority but rejected the Illinois appellate decisions Northern Illinois Gas Co. v. Home Insurance Co., 334 Ill.App.3d 38, 49-50 (2002), and Zurich Insurance Co. v. Carus Corp., 293 Ill.App.3d 906, 910 (1997).

The CILCO court stated as follows:

"[M]andatory environmental regulations that impose strict liability on any owner or operator who cannot prove that another entity is 'solely' responsible for the contamination (415 ILCS 5/22/2(j)) impose a legal obligation of compliance. However, we also agree with [Home and London Market insurers] that insureds ought not be able to act entirely unilaterally to undertake environmental cleanup and then to obtain indemnification on the basis that they were legally obligated to do so. If no third party asserts a right to damages, the payment is merely gratuitous.

"We conclude, therefore, that the mere existence of such regulations and the insured's decision to voluntarily undertake environmental cleanup is not sufficient to invoke the insurer's duty to indemnify. At a minimum, the insured must be acting in response to a claim. That is, if a lawsuit or administrative action has not been initiated, there must have been at least the assertion of a claim. ... Such a claim need not necessarily be in the form of a demand letter, particularly when the legal obligation being asserted is based on a strict liability statue."

The key, then, to obtaining indemnification from insurance polices that do not contain a duty to defend, is the characterization of agency or third-party action as a "claim."

The CILCO court found that the attestation of oral statements by Illinois Environmental Protection Agency officials that the IEPA intended to enforce the strict liability provisions of the Environmental Protection Act against the insured, and that the IEPA "tacitly threatened litigation," was sufficient to constitute a "claim."

It should be noted that although the CILCO opinion did not discuss any definition of "claim" that may have appeared in the policies at issue, many policies do define the term, and thus, given the centrality of the assertion of a claim to the CILCO analysis, practitioners should note the presence of a "claim" definition in any policies under review.

In addition, it should be pointed out that the CILCO opinion did not discuss the relationship between the excess policies at issue and any underlying coverage or self-insured retention (S.I.R.) that may have been involved. Thus, the requirement that such underlying coverage or S.I.R. must be exhausted before excess coverage is triggered was not analyzed. Since primary policies typically contain a duty to defend suits and thus appear to be unaffected by the CILCO holding, it is possible that as a practical matter CILCO will be applicable only to situations where the

insured has no primary coverage.

In Cooper Industries Inc. v. Aviall Services Inc., 125 U.S. 577 (2004), the U.S. Supreme Court held that one of the options potentially available to a party that voluntarily undertakes a cleanup, the contribution remedy of section 113(f) of the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. [sec]9613(f)(1), is not available to a private party that has not first been sued by the U.S. EPA under sections 106 or 107 of the CERCLA. Instead, the section 113(f) contribution remedy is available only after the U.S. EPA has sued the party.

While not foreclosing the possibility of another statutory cost recovery remedy potentially available to a private party under CERCLA, section 107(a)(4(B), the court has cast a giant shadow over the ability to seek recovery from third parties, once a voluntary cleanup has been undertaken, in the absence of U.S. EPA action against the party performing the remediation.

Thus, the decisions taken together present mixed signals to a party contemplating a voluntary cleanup. On the one hand, the possibility of an insurance recovery under Illinois law, from excess liability policies not containing a duty to defend, has been made available by the Illinois Supreme Court. On the other hand, obtaining contribution from a third party (or from that third-party's insurers) will be more difficult under the U.S. Supreme Court's Cooper ruling.

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