



Texas Environmental Law Roundtable

The Litigation Landscape in 2018

November 7, 2018

The Houston Club
Houston, TX

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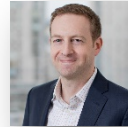


Insurance Coverage for Environmental Losses

Key Trends and Recent Litigation



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Agenda



Environmental Coverage Overview

Recent Caselaw/ Hypothetical Scenarios



Know Your Coverage for Environmental Risks

Historical CGL

- Coverage for bodily injury, property damage, and legal defense costs
- Pre-1970s are the most valuable
 - “Sudden & Accidental” pollution exclusion: 1970s
 - “Absolute” pollution exclusion: mid-1980s

Pollution Legal Liability

- First- and third-party coverages, e.g.:
 - On-site cleanup of unknown conditions and for reopener of known
 - Off-site cleanup
 - NRDs
 - Transportation spills
 - Non-owned disposal sites
 - Illicit abandonment
 - Civil fines and penalties (but not criminal)

Directors & Officers (D&O)

- Coverage for individual D’s & O’s for breach of official duties (including defense)
- Coverage for company’s indemnity obligations to D’s & O’s
- Coverage for company’s own liability for certain claims (e.g., securities)
- Pollution exclusions generally not included for individual D’s & O’s

Recent Caselaw and Hypothetical Scenarios



The Scenario: Historical Contamination

What constitutes a claim or “suit”?

✓ PRP Letters

- *McGinnes Industrial Maintenance Corp. v. Phoenix Insurance Co.*, 477 S.W.3d 786 (Tex. 2015)
- *American Chemical Service, Inc. v. U.S. Fidelity & Guaranty Co.*, 2015 WL 3508125 (N.D. Ind. 2015)
- *Anderson Brothers v. St. Paul Fire & Marine Insurance Co.*, 729 F.3d 923 (9th Cir. 2013)

✓ CERCLA § 104(e) Information Requests

- *Ash Grove Cement Co. v. Liberty Mutual Insurance Co.*, 649 F. App'x 585 (9th Cir. 2016)
- *Northwest Pipe Co. v. RLI Insurance Co.*, 649 F. App'x 643 (9th Cir. 2016)
- *Anderson Brothers*



The Scenario: Historical Contamination

What types of costs are covered?

✓ Defense Costs

- *But see Anadarko Petroleum Corp. v. Houston Casualty Co.*, No. 16-1013 (Tex.) (appeal pending, court of appeals found defense costs were a “liability”)

✓ Remediation Costs

- *Travelers Indemnity v. City of Richland*, 2018 WL 1558469 (E.D. Wash. May 30, 2018) (RI/FS costs covered as damages)
- *Great American E & S Insurance Co. v. Coupled Products, LLC*, 2018 WL 3475398 (N.D. Ind. July 19, 2018) (RCRA remedial measures covered)



The Scenario: Current Contamination

What types of costs are covered?

✓ Remediation Costs – Air Emissions

- *Louisiana Generating, L.L.C. v. Illinois Union Insurance Co.*, 831 F.3d 618 (5th Cir. 2016) (indirect mitigation measures considered remediation costs)
- *Louisiana Generating L.L.C. v. Illinois Union Insurance Co.*, 719 F.3d 328 (5th Cir. 2013) (duty to defend CAA suit seeking remediation of air emissions)

➤ Settlement Payments

- *Rogers Cartage Co. v. Travelers Indemnity Co.*, 103 N.E.3d 504 (Ill. App. Ct. 2018) (settlement without consent of insurer allowed)



The Scenario: Storm Damage

Anti-Concurrent-Causation Clauses

- *JAW the Pointe, L.L.C. v. Lexington Insurance Co.*, 460 S.W.3d 597 (Tex. 2015)
- *Robichaux v. Nationwide Mutual Fire Insurance Co.*, 81 So. 3d 1030 (Miss. 2012)

Business Interruption Insurance

- *Citadel Broadcasting Corp. v. Axis U.S. Insurance Co.*, 162 So.3d 470 (La. Ct. App. 2015)

Questions?

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