MARKETERS URGED TO REVIEW INSURANCE POLICIES FOR LEAK COVERAGE

Insurance coverage for pollution damage varies widely. Marketers need to examine and understand their policies to ensure that their coverage meets their needs.

By Gregory P. Crinion

A release of product from an underground storage tank can cause economic ruin to a petroleum marketer.

At least one estimate holds that the *average* cost to remediate a release of gasoline from an underground storage tank is $80,000. That estimate is only an average and does not include the business lost while the station is closed during tank removal and the installation of remediation equipment.

That estimate also does not include any penalties that might be imposed by the federal Environmental Protection Agency or the Texas Natural Resource Conservation Commission, nor the potential liability to third persons caused by the release and the legal fees incurred in defending lawsuits arising from the release.

In the April May June 1996 issue of the *Texas Petroleum and C-Store Journal*, I wrote of some of the liabilities petroleum marketers could face in the event of a release from an underground storage tank. Given these potential costs, losses and liabilities, marketers have increasingly looked to their comprehensive general liability (CGL) insurance policies for relief.

While some marketers have also acquired special environmental coverage or even umbrella policies, this article discusses only the coverage of standard CGL policies.

THE EARLY CGL POLICIES

In the 1960s, insurance companies were issuing CGL policies that covered damages caused by an "occurrence." "Occurrence" was usually defined as:

An accident, including continuous or repeated exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured.

Consequently, an early CGL policy could provide coverage for gradual contamination damage.

THE LIMITED POLLUTION EXCLUSION CLAUSE

The flood of environmental legislation and resulting lawsuits for property damages caused a corresponding flood of claims for insurance coverage for clean-up costs and lawsuit damages.

Beginning in the early 1970s, in an effort to stem this flood, insurance companies included a limited pollution exclusion clause in their CGL insurance policies to exclude coverage for damages resulting from the deliberate disposal and discharge practices of industry. A typical limited pollution exclusion clause read as follows:

This insurance does not apply to bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.

Under this limited pollution exclusion, coverage was excluded for damages arising from the discharge of contaminants into the environment, excepting damage

from sudden and accidental releases of those contaminants. The phrase "sudden and accidental" is an exception to the general exclusion of all releases of contaminants from policy coverage.

This revision did not stem the flood of coverage claims for environmental damages. In fact, claims for environmental coverage by CGL policies have become the source of a great many lawsuits nationwide. The lawsuits generally center on (1) whether the contamination results from a covered "occurrence", (2) whether the expenses for which coverage is sought are "property damage" that are covered by the policy, and (3) whether the particular release was "sudden and accidental" for which coverage would be provided.

In Texas, the question of whether contamination is the result of a covered "occurrence" is determined by whether the contamination was expected or intended by the insured. Coverage is provided for accidental damages, including accidental damages that result from deliberate conduct. Coverage is *not* provided for damages that are the natural and probable consequence of intentional conduct.

In one instance, contamination that occurred as a result of an oil company's failure to protect the groundwater while drilling an oil well was not a covered damage since the company knew the groundwater would become contaminated if not protected during the drilling. In another instance, coverage was available to pay for remediation of contamination that resulted from intentional dumping of waste in a disposal site. While the insured deliberately disposed of the waste at the site, the insured did not expect that the waste would escape from the landfill and cause damages to the surrounding environment.

The Texas appellate courts have not ruled on whether contamination caused by an underground storage tank release is a covered "occurrence." However, following these two decisions, a release from an underground storage tank should be a covered "occurrence" unless, for example, the tank owner had continued to use a known leaking tank.

Even if a release is a covered "occurrence," an insured must also prove the release caused "property damages." Besides claims of diminution in the value of impacted property, a common claim asserted against tank owners is a government order requiring remediation or seeking reimbursement of investigative and remedial costs. There is no agreement by the courts around the country on whether investigation and remediation expenses are "property damages."

The courts applying Texas law have generally ruled that costs incurred by an insured in responding to government agency orders to remediate property are covered "property damages." One court also held that certain fines and penalties imposed by a government agency might be recoverable under a CGL policy. The Texas Supreme Court has not ruled on that question.

The most common topic of debate over CGL policies containing limited pollution exclusion clauses involves the precise meaning of the "sudden and accidental" language of the limited pollution exclusion clause — whether "sudden" has a time, or temporal, aspect or whether it simply refers to an unexpected event. The insurance carriers argue that the phrase "sudden and accidental" contains a temporal aspect such that the exclusion bars coverage unless the release of contaminants was both quick and unintended.

Thus, damages resulting from a gradual or repeated discharge of contaminants will not be covered. The insureds argue that "sudden" is ambiguous, and can mean unexpected, without warning, and unforeseen, such that any unexpected and unintended release would be covered notwithstanding the limited pollution exclusion.

Again, the courts around the country have not reached any consensus in deciding that issue. Only one Texas state appellate court has ruled on the question, and held that "sudden and accidental" did not contain a temporal requirement. That ruling was withdrawn, however, and the case settled.

The federal court of appeals covering Texas has recently ruled that the term "sudden" includes a temporal aspect. Since the contamination in that case occurred over an extended period of time, and not abruptly, the claim was not covered. Another federal court applying Texas law ruled that coverage was not available for the cost to remediate PCB contamination caused by long-term, intentional disposal practices.

In Texas, the question of whether contamination is the result of a covered "occurrence" is determined by whether the contamination was expected or intended by the insured.

THE ABSOLUTE POLLUTION EXCLUSION

Beginning in the mid-1980s, the insurance carriers included an absolute pollution exclusion in their CGL policies to except any coverage for damages resulting from any release of pollutants. The typical absolute pollution exclusion clause provides:

This policy does not apply to ... any Personal Injury or Property Damage arising out of the actual or threatened discharge, dispersal, release or escape of pollutants, anywhere in the world. ... "Pollutants" means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste material.

The Texas Supreme Court has ruled that the absolute pollution exclusion is, in fact, absolute. No coverage will exist under a CGL policy with an absolute pollution exclusion for damages resulting from a release of contaminants, including a release from an underground storage tank.

CONCLUSION

A release of product from an underground storage tank can be financially ruinous to a marketer. The scheduled termination of the Texas Petroleum Storage Tank Remediation Fund will eliminate

one source of funds used to pay for the investigation and remediation costs in responding to a release. Because of the significant costs, losses and liabilities involved, marketers have looked to their comprehensive general liability insurance policies to recover some of those expenses and losses.

The coverage provided under a CGL policy depends upon the exact policy purchased, and the terms of those policies have changed significantly over the years. Marketers need to examine and understand their CGL policies to ensure the coverage purchased meets their needs. Marketers also need to retain all old CGL policies in their permanent files.

The insured has the burden of proving the existence and terms of a policy, and an insured may have to seek coverage under an old CGL policy for a release that occurred some years previously but was only recently detected. An insured's inability to produce an insurance policy may preclude the insured from obtaining coverage to which it is legally entitled. ■

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