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How to Survive a Late Notice Challenge in an Environmental Insurance Coverage Action

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This article is a follow-up to "Winning Environmental Insurance Claims Trials: Was It an 'Accident' or 'Occurrence?'"

Since the mid-1980's, environmental insurance coverage claims have been the most complex of insurance coverage claims. Insurance companies usually will not voluntarily provide coverage for gradually-occurring environmental claims without a fight, which typically takes the form of insurance coverage litigation that can be costly and time-consuming.

A policyholder must overcome many hurdles to obtain coverage for an environmental claim. This article discusses the threshold issue, whether the policyholder's notice to the insurance company was timely. This is the issue that you must overcome just to get to first base in the dispute.

There are two types of notice required under most liability insurance policies: notice of an "occurrence," and notice of a claim. The time when notice of a claim is required often is clear, and most policyholders know to give their insurance companies notice soon after receiving a claim. Most insurance coverage fights involving notice concern the timeliness of notice of an occurrence, which is the cause of the damage ("an accident... which results in property damage"). When property damage has happened at an environmental site and the policyholder faces cleanup obligations, notice may be due.

In most jurisdictions, an insurance company cannot avoid coverage on late notice grounds unless it demonstrates that it was harmed, or "prejudiced," by the late notice. Since most insurance companies simply will not pay an environmental insurance claim without a fight, the policyholder should argue that the insurance company could not be prejudiced if notice was late, because they would not have provided coverage regardless of when notice was given. If you are fortunate to be in such a jurisdiction, you must aggressively pursue discovery on the insurance company's history of handling environmental claims.

The timeliness of notice dominates fact discovery in an environmental insurance coverage action. It is even more pronounced in a jurisdiction where the insurance company does not have to prove prejudice to avoid coverage. The policyholder will be constantly on the defensive during fact discovery. Nonetheless, there are several approaches that should be taken to maximize the chances of success in a jurisdiction where prejudice need not be shown. The first is to see whether, first within the context of notice law, then under general contract law principles, you can argue that a party to a contract does not have to undertake an obligation if to do so would be futile. If you find such a principle, you should argue to the court that the insurance company's failure to provide coverage for environmental claims demonstrates that timely notice would have been futile, and thus that the insurance

company should not be able to raise it as a defense. This essentially is a prejudice argument in disguise, but it may be useful in a no-prejudice state.

If the futility argument fails, you must be prepared to defend the timeliness of your client's notice. The first thing you must do is to look at the insurance policies. Is the policy a primary policy or an excess policy? The law is more lenient regarding the timeliness of notice when an excess policy is involved. Does the policy require notice merely when there has been an occurrence, or under narrower circumstances, for example when it is known to a select group within the company (e.g. the risk manager)? If it is the latter, ignorance may be bliss. Many excess policies only require notice of an occurrence likely to implicate the policy, which means notice is not due until it appears that the excess policy will be reached. The next thing you must do is to understand all of the facts about notice, including the status and knowledge of environmental conditions at the site at the time notice was given, whether remediation was contemplated, whether cost estimates had been prepared, and the involvement of a governmental agency or other third party. You also need to learn whether there are any troubling internal communications. For example, an e-mail from an environmental engineer to the risk manager stating that the company was being compelled by an environmental regulator to spend millions of dollars remediating a site six months before notice was given is a bad fact.

If you are in a jurisdiction that requires an insurance company to prove it was prejudiced by late notice, and the insurance company moves to dismiss the action on the grounds that notice was late, you need to defend the motion aggressively. You must first argue that notice was timely. In an environmental case, knowledge of site conditions and regulatory involvement tend to evolve over time, and there rarely is an instance when notice clearly was due. You should establish that regulatory involvement mandating a site cleanup was not definitive, at least until notice was given. You must argue that before giving notice there was no magic moment that clearly indicated that the policyholder was being compelled by a regulatory agency (or even a private person) to cleanup a contaminated site. You must set forth why notice was given when it was given, which will enhance the credibility of your argument. Next, you must argue that the insurance company's claims handling practices demonstrate that it cannot prove prejudice.

The insurance company may argue that it was prejudiced because relevant witnesses died or became unavailable, and documents were lost, from the period when notice should have been given until it was given. You must be prepared to argue why this would not have mattered, and other reasons why the insurance company's presentation is inadequate to prove prejudice.

If you are in a state where the insurance company does not have to prove prejudice, they will always move to dismiss the action on late notice grounds because it is a silver bullet for them if they win. You must argue, as above, that notice was timely. You must emphasize as much uncertainty as possible, and argue that the policyholder should not be held to have forfeited its right to coverage under such conditions.

In either case, you also should look to see if the insurance company has argued when notice was due, and if so, why. If the insurance company has not stated when notice was due, you should argue that this demonstrates that there were many uncertainties and that the policyholder should not be deemed to have forfeited coverage when the insurance company cannot say when notice was due. If the insurance company has asserted when notice should have been given, you must explain that they were wrong.

There is another argument that is not made often enough by policyholders fighting late notice claims, but it should always be made. The argument is that the policyholder did not know that damage happened during the policy periods before giving notice, and thus did not know that it should give notice under the policies. Most environmental claims involve damage that began years ago and has

continued, such as ongoing groundwater contamination. Environmental engineers are trained to determine what pollution is present and how to get rid of it. How and when it got there, and when pollution occurred in prior years, are irrelevant to the environmental engineer. Proof that damage or injury occurred during the policy period has to be established to demonstrate that the policy is implicated, or "triggered," but this usually requires expert testimony. Environmental engineers do not know when damage happened in prior years, or the amount of damage that occurred in any year, which matters if there is excess insurance coverage.

Without such information, the policyholder would not know to give notice in a specific year, and notice should not be deemed to be late. To make this argument, you again must explain why notice was given when it was. You also will be helped if the insurance company's answer to the policyholder's complaint contains an affirmative defense that damage did not happen during the policy period. This will demonstrate that even now there is a reasonable debate about whether and when damage occurred during the policy periods, perhaps including conflicting expert testimony, and the policyholder should not have to forfeit its coverage when it would not have known that notice was due before it was given.

Insurance companies routinely respond to notice of environmental claims by "reserving their rights" to subsequently deny coverage, if there is no airtight exclusion precluding coverage. If you engage in coverage litigation with them, their first approach will be to pursue a late notice defense, including using extensive fact discovery designed to help them argue that notice was late. If you are in a majority, "prejudice" state, you should never lose this issue unless you waited years to give notice and important information was lost in the interim. Even in a no-prejudice state, however, this battle can be won if it is fought aggressively and intelligently.

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