SOLVING THE AIG PROBLEM: BROWNFIELDS INSURANCE LANGUAGE SHOULD BE NEGOTIATED BY COVERAGE EXPERTS

BY Susan Neuman

The world of brownfield insurance (BI) was recently shocked to learn that AIG was non-renewing its site pollution liability (SPL) book of business. AIG's Pollution Legal Liability Select (PLLS) policy, issued in 1995, was environmental insurers' first response to the Brownfields Movement. It allowed them to modify previously restrictive and inflexible policies so that they could be used to facilitate transactions. The idea of the policy was that the insured would be able to "select" specific coverages out of a number of modules based on distinctions of time, location, and types of damage, for instance On Site Cleanup Costs due to Pre-Existing Pollution Conditions. However, in addition to this selection process, specific policies also need to be manuscripted or tailored to fit specific risks. They are negotiable contracts, and, as illustrated by most of the cases involving such policies over the last 10 or 15 years, need to be negotiated by coverage experts.

Many of the cases involve the issue of whether known conditions are covered:

For example, in *D.C. Operating Co. v. Indian Harbor Ins. Co. and XL America, Inc.* a developer had purchased a policy to protect itself from the risk that excavation and construction at an urban renewal site would reveal additional contamination. The policy form had the typical known and non-disclosed pollution exclusion which made an exception for conditions listed in a Disclosed Document Endorsement. The policy, effective from 2006 to 2007, included such an endorsement which listed Phase I's and a Closure Letter issued prior to the policy period that identified five USTs as the source of contamination that had been remediated. It also had a Site Development Exclusion which applied to "known" conditions defined as either conditions described in the

reports listed in the Disclosed Document Endorsement or as "specified below," i.e., as petroleum hydrocarbons. When 18 USTs were discovered with contamination clearly not related to the 5 USTs, XL denied based on the conditions being known. The court denied XL's motion to dismiss based on standard rules of contract interpretation, construing ambiguous language in plaintiff's favor.

This was a case where there was no meeting of the minds. To satisfy the insured, the policy would have excluded contamination from the 5 USTs, and would not have had a site development exclusion, the purpose of which is usually to exclude unknown conditions revealed by redevelopment. XL had made it clear that that was precisely what it did not want to cover. There may have been no way around this problem but any coverage lawyer worth his or her salt would recognize that excluding known conditions is no way to exclude unknown conditions and is an invitation to a coverage action.

City of Cleveland v. Chartis Specialty Insurance Co. involved an AIG policy and a specific known contamination exclusion that was "negotiated between the parties." Chartis issued a PLLS policy to the City of Cleveland for ten years, 2009 to 2019, at a premium of $235,045. Coverage A, discovery of on-site cleanup costs from pre-existing conditions, was at issue. The policy also had an exclusion for cleanup costs:

Arising from Pollution Conditions due to or associated with Volatile organic compounds (VOCs, Barium, Cadmium, Chromium, Cyanide, and Mercury or any additives to or degradations by-products thereof on, under or migrating from the Insured Property (ies).

Seven years before the policy was issued, the City obtained a grant for remediation and, according to its consultant, a geologist, PAH's were discovered at that time. In 2010 "black gray oily" contaminated materials were discovered and removed but not analyzed for PAH's. The City submitted a claim and Chartis denied partly on the basis of

statements made by the insured's consultant in preparing the claim and at deposition. In its motion for summary judgment Chartis claimed that the pollution was not discovered during the policy period but rather as early as 2006 and that the black gray oily material was the same pollution remediated prior to the insurance taking effect. The court denied the summary judgment motions of both parties because there were multiple issues of material fact remaining for trial.

This case illustrates the importance of 1) drafting known conditions exclusions narrowly, with limitations to area and without break-down products language, and 2) presenting a claim correctly to the carrier; it should not be left to an environmental consultant who may not understand how the policy works.

The losses involved in these and many other cases could have been avoided if the exclusions and provisions at issue had been negotiated and drafted by experts in environmental insurance coverage. Policies like the one in *City of Cleveland* which are still in force with the same ambiguous language can now be rewritten or renewed with another carrier and preferable language.

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