

Environmental Liabilities - Gaps in Cover An Irish Perspective

The extent of pollution coverage under traditional Property Damage ('PD') and Public Liability ('PL') policies is a source of significant uncertainty and debate, particularly when an incident occurs.

Public Liability Policies

Since the early 1990s, PL policies have tended to limit pollution coverage to sudden, identified, unintended and unexpected incidents, so called sudden and accidental ('S&A') pollution.

Disputes have therefore centred on whether the pollution has a sudden and accidental cause or has in fact occurred *gradually*. There are no hard and fast rules here, with individual cases often settled through litigation, where coverage is disputed. So, it appears to be fairly common knowledge that PL policies will not respond to claims for third-party property damage, bodily injury, nuisance, trespass and obstruction arising out of *gradual* pollution incidents. However, this focus on *gradual* liability, fails to acknowledge the other significant gap in coverage – **the costs incurred by the insured where they are forced to clean-up pollution on their own property.**

Such first-party clean-up costs may be imposed by regulatory authorities following a pollution incident, whether it is sudden and accidental or gradual. PL policies will exclude damage to own property, so would not respond to this.

Recent Insurance Court Case

Even where the pollution cause *is* sudden and accidental, the picture may not be clear following a recent UK court case.

In 2003 Bartoline Ltd, a company involved in the manufacture and packing of solvents and adhesives, suffered a fire at their UK site. In putting out the blaze a significant volume of contaminated fire-fighting foam washed into adjacent watercourses. The Environment Agency (EA) responded, undertaking immediate remedial works on the rivers. They issued an invoice to Bartoline for the costs of these works in addition to a remediation notice requiring clean up of their own site.

Bartoline made a claim under their PL policy, written by Royal & Sun Alliance (RSA) expecting that the damage to adjacent property would be covered. However, RSA disputed the claim, arguing that the PL policy was intended to cover 'liability for

damages' and this relates to tort liabilities pursued through the civil courts by individuals, who must be in some way compensated for their loss. This is in contrast to statutory liabilities, where the insured is indebted to a regulatory authority or required to act following receipt of a formal notice. This is still a legal liability, but under a set of laws for which PL insurance is allegedly not intended to respond.

The court agreed with the argument presented by RSA's legal counsel, so Bartoline were uninsured for their loss. The case was sent to appeal and has recently (October 2007) been settled out of court. Details of the settlement remain confidential.

It is unfortunate in a way that there has been no final judgement in court that would establish a legal precedent in UK law.

Without this, it still means that there is significant uncertainty surrounding similar claims in future, as no binding precedent has been set.

Property Damage Policies

As first-party clean-up costs are a key consideration, many clients would also assume their Property Damage ('PD') policies would provide a good level of pollution coverage. However, in reality, they are equally limited in scope.

Indeed, for a PD policy to respond:

1. Any pollution conditions covered, must result from an insured peril (fire, flood etc);
2. The pollution must be sudden and accidental in nature;
3. Debris removal coverage may exclude contaminated soil;
4. Business Interruption coverage is also only triggered following an insured peril.

Unfortunately, most pollution conditions, which result in a regulatory action by the Local Authority or Environment Agency, are simply discovered on the insured's property or adjacent land, or in nearby watercourses. They have therefore not resulted from an insured peril. A significant proportion would have occurred gradually and own site clean-up will usually involve removal of contaminated soil often at considerable (uninsured) expense.

Environmental Law

Changing environmental legislation also raises questions over the effectiveness of traditional property and liability policies.

The introduction of the EU Environmental Liability Directive (ELD), introduces additional risks, which may not be covered. Of particular concern would be the

concept of biodiversity. If PL policies do not respond to damage to adjacent public property, which results in an action by regulators, they will not pick up liabilities for damage to biodiversity. Even where an insurer takes a different stance to that adopted by RSA in the Bartoline case, i.e. they do respond to such a statutory clean-up incident, the policy would fall some way short of satisfying the ELD. Indeed, if a river was impacted for example, the PL policy may pay to remove the contaminant, but would not meet the costs of regenerating the habitat to a baseline condition or any complementary or compensatory charges that may be levied.

So, what is the answer?

Recognition of these coverage limitations has driven the development of specialist environmental insurance products, which are specifically designed to respond. Such policies:

- Cover sudden and accidental and gradual pollution, i.e. does not matter which;
- Will sit primary, avoiding any disputes over PL or PD policies responding or not;
- Cover third-party liability, including nuisance;
- Include clean-up imposed by regulators - onsite and offsite - i.e. would be intended to respond to a Bartoline-type claim;
- Can include first party business interruption;
- Are based on the discovery of pollution which leads to third-party or regulatory claim, so no need for property peril;
- Expressly include the definitions from the ELD with the policy intended to cover exposures thereto.

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