Introduction: Historical Note on Environmental Insurance Coverage Litigation

As environmental insurance coverage litigation enters its fourth decade, and as this practice manual enters its third decade, I thought it appropriate to sketch where we have been, where we are, and where we might be headed.

The Story of Environmental Insurance Coverage Litigation Begins With Modern Federal Environmental Statutes (Principally, CERCLA), But the Prototype Was Asbestos Coverage Litigation

Environmental insurance coverage litigation (aka "pollution coverage litigation") is a type of "long-tail" or "progressive" insurance coverage litigation—it concerns disputes where bodily injury or property damage "takes time to become known and a claim may be separated from the circumstances that caused it by as many as [25] years *or more*."[1] Thus, it should not be surprising that "long-tail" insurance coverage litigation is frequently complex, time consuming, and costly. As Peter Kalis—one of the country's pioneer long-tail claims coverage attorneys (for policyholders)—has explained: "Long-tail claims often require that policyholders and insurers reconstruct decades of history, often through painstaking factual and expert inquiries. Hundreds of millions of dollars may turn on the outcome. Thus, the parties tend to be careful and the courts tend to be methodical in their handling of such cases."[2]

As we detail in Chapter 26, the story of long-tail claims litigation begins with asbestos personal injury litigation. In 1975, in the case of *Borel v. Fiberboard Paper Prods. Corp.*,[3] asbestos litigation changed forever: What were workers' compensation cases became product liability cases, where employees could sue the manufacturers of the products that were used during the course of their employment. As Prof. Lester Brickman states: "This was huge, as we had serious injuries: hundreds of thousands of cancer deaths and asbestosis deaths, from the very heavy exposures in the 1940s, 1950s, and 1960s."[4] And here is how Eugene Anderson (since the late 1970s, one of the country's top policyholder attorneys) described *Borel*'s impact on asbestos manufacturers (several of which he represented in coverage actions):

> Most asbestos workers inhaled asbestos produced by a number of different manufacturers. The question of which asbestos manufacturers would be legally liable for which asbestos-related injuries was answered in 1973. The *Borel* case placed the entire asbestos industry on the hook for any and all injuries to people who breathed asbestos, regardless of which manufacturer's asbestos caused the injury. The *Borel* court applied the theory of joint and several liability and ruled that each manufacturer-tortfeasor who contributed to the injury was responsible for the entire injury. We now know that *Borel* was the beginning of economic demise for virtually every company that had ever produced asbestos.[5]

---

[1] Harvey R. Rubin, *Dictionary of Insurance Terms* 291 (4th Ed.) (emphasis added). In some environmental coverage actions, policyholders have sought coverage under policies issued decades before World War II.

[2] Jan. 14, 2004 interview with the *U.S. Insurance Law Report*. We might add that, in some cases, billions of dollars (not just hundreds of millions of dollars) are at stake in environmental coverage litigation.

[3] *Borel v. Fiberboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973).

[4] See interview with Professor Lester Brickman in Chapter 26.

[5] Eugene R. Anderson, A *"Keene" Story*, 2 Nev. L.J. 489, 489 (2002).

Additionally, asbestos manufacturers had to deal with successor liability: many companies involved in asbestos litigation were parent corporations, which had bought subsidiaries—or merged with companies—which had asbestos liabilities. In many cases, these were very small subsidiaries and the insureds had very small percentages of relative fault for the asbestos products. In any event, under successor liability, the parents become liable for all the subsidiaries' liabilities. This was a windfall for the plaintiffs (and their counsel).

The Keene Company was a perfect example. Keene bought a company called Baldwin-Ehret-Hill for $7 million (this small subsidiary's asbestos sales was just 1% of Keene's total sales). Additionally, the subsidiary stopped its asbestos production in the early 1970s. If Keene had not bought this subsidiary, Keene would not have had any asbestos liability and, as a result, would not have deemed it imperative to sue its insurers. However, that's not the way it happened.

As indicated, Keene became liable for all the subsidiary's liabilities. Then, in 1978, Keene brought a coverage action—one of the very first major long-tail claims coverage cases, *Keene v. INA*[6] —before the D.C. federal district court. Ultimately, the D.C. Circuit Court of Appeals accepted Keene's "triple" trigger theory, under which every general liability insurance policy issued to Keene—starting with policies that incepted in the 1930s and '40s, and continuing through every subsequent policy, until the time that Keene brought the coverage action—was "triggered." Also, some of the older policies were written without policy limits. Therefore, there were now potentially billions of dollars in assets made available to asbestos personal injury attorneys. These attorneys were opportunistic and entrepreneurial—they quickly understood that there was a mountain of insurance money available.

Keene's pro-policyholder allocation approach grabbed the attention not just of personal injury attorneys, but also, of course, insurers and insurance coverage attorneys (for both policyholders and insurers). Suddenly, the role or position of insurance law among the nation's top law firms was significantly elevated. For example, consider the career of Eugene Anderson, one of the country's most famous policyholder attorneys.

Keene was Anderson's first major insurance coverage case—at the time, he was a commercial tax litigator. Years later, Anderson recounted *Keene*'s dramatic impact on his career:

> I had always imagined that when I made my mark on the law, it would be in the area of taxation. I wanted to be a tax lawyer and earned an L.L.M. in Taxation from New York University School of Law. It never occurred to me that my most recognized achievement in the law would lead me to become, as one periodical put it, one of the twenty persons who "have left their mark on risk management and property/casualty insurance." I was the only lawyer on the list. Pretty heady stuff! The case that made the difference was *Keene*.[7]

An Old Specialty (Insurance Coverage) Becomes Hot and a New Sub-Specialty (Environmental Insurance Coverage Litigation) is Created

Anderson's experience was shared by many other lawyers, in just about every metropolitan area throughout the country. Suddenly, beginning in the early 1980s, insurance coverage became a hot, even glamorous specialty, as the monetary stakes for both sides were so high—in many cases, the future of the corporate policyholder hung in the balance. Experienced lawyers, practicing in other, disparate areas of the law, just as Eugene Anderson, made mid-career changes and devoted themselves entirely to "insurance recovery" i.e. insurance coverage analysis and litigation for

[6] *Keene Corp. v. Insurance Co. of North America*, 667 F.2d 1034 (D.C. Cir. 1981), cert. denied, 455 U.S. 1007 (1982).

[7] Eugene R. Anderson, "A 'Keene' Story," 2 Nev. L.J. 489, 489 (2002). (Mr. Anderson's article provides an interesting history on long-tail claims from a policyholder attorney's perspective).

policyholders.

With the advent of CERCLA, enacted in 1980, pollution coverage disputes became commonplace, and began to overtake asbestos coverage disputes as the marque insurance coverage litigation: most of these actions involved millions—in some cases, billions—of dollars. Environmental insurance coverage litigation—even more than asbestos coverage litigation (as it included more corporate policyholders)—forever changed the relationship between the insurance industry and corporate America. Here is how Robert Chesler, one of the country's top policyholder attorneys, describes what happened: "[P]olicyholders only began to impose ridiculous liabilities on insurers because society first imposed those ridiculous liabilities on the policyholders. This led to the wasteful coverage wars, the death of comprehensive insurance coverage, and the inability to externalize certain risks. These are all negatives for society."[8] Also, as Chesler pointed out, the typical policyholder in insurance coverage litigation changed: "[T]he pre-1980 coverage cases dealt almost entirely with insurers who abused or cheated individuals and small companies. . .[B]efore 1980, there were very few large corporate claims."[9]

Environmental insurance coverage litigation and analysis, as a discrete insurance coverage sub-specialty, accelerated as almost no other legal specialty had before or since. It became the preeminent insurance law specialty from the early 1980s all the way through the late 1990s, and one of the top specialties among all fields of business law. In this regard, the aforementioned Peter Kalis explained how, in the 1980s, environmental law caused insurance coverage to, suddenly, become a popular field for young corporate attorneys:

> This perception [that insurance coverage was not a "hot" or "prestigious" area of law for a young lawyer] began to change in the mid-1980's. As part of the shareholder revolution at that time, it became very important that managements do what they could to protect and secure shareholder value. It was no longer acceptable just to sit on claims against insurance companies. At the same time, the common law system of adjudication began recognizing more and more causes of action against corporate clients, and Congress and the states were enacting more liability schemes that burden corporate clients as well. CERCLA and the SARA amendments are good examples. The convergence of these trend lines—a greater management sensitivity to protection of shareholder value and more and more external liability threats to the corporation—caused insurance coverage to rise in prominence and prestige in executive suites and within the profession at large.[10]

Robert Chesler's transition to a career in insurance coverage was fairly typical. In 1983, he joined New Jersey's Lowenstein Sandler as an associate in the firm's environmental department. As New Jersey was (a) the strongest state environmental enforcer, and (b) had many polluted sites, Chesler's practice group had plenty of cases. Chesler and his colleagues soon realized that the need for insurance recovery was a common denominator among almost all of these cases. Here is how Chesler, many years later, recounted his days as an environmental coverage pioneer:

> Michael Rodburg headed the environmental department, and he had a vision for developing an insurance practice. He set me to work writing articles and networking, while he advised our environmental clients to pursue insurance coverage. These efforts led us to have a highly visible presence as one of the few firms with environmental insurance expertise, and the only environmental practice to specialize in insurance—the other pioneers in this area all began with asbestos insurance. By 1986, we had a substantial

[8] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

[9] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

[10] Jan. 14, 2004 interview with the *U.S. Insurance Law Report*.

> environmental insurance practice [that included many of the country's largest corporations].[11]

To reiterate, Chesler's path to environmental insurance coverage as a specialty was not unusual. In the 1980s, for the first time, (a) law firms were established that were entirely devoted to insurance coverage litigation (generally, these were insurer oriented firms, but several policyholder coverage boutiques and larger firms were also created), and (b) large corporate law firms, such as Chesler's, created insurance coverage practice groups. Additionally, many relatively small or medium sized law firms that traditionally represented insurers in coverage disputes, experienced tremendous growth.

Finally, law firms that both represented insurers and policyholders in coverage disputes had to select sides—even if there were no true conflicts of interest, there were always "business conflicts," as the coverage issues involved were "big casino" legal questions that impacted the future of policyholders and the entire insurance industry. For this reason, neither policyholders nor insurers wanted their law firms to argue conflicting positions, even if this occurred in litigation in which they were uninvolved.

The Impact of Environmental Insurance Coverage Litigation on the Teaching of Insurance Law

In 1992, when this text was first published, most attorneys knew next to nothing about insurance law. This probably was because they were never taught insurance law during law school. In 1987, one of this country's top insurance law professors, Robert H. Jerry, II (presently, Dean, University of Florida, Levin College of Law, and, then, a professor at the University of Missouri School of Law) complained that "[f]ew subjects as important as insurance law are so neglected by American law schools and law students." So, again, if only a relatively tiny percentage of law students were being taught insurance law, this meant only a small percentage of lawyers knew what they needed to know about insurance law.

This, too, has changed dramatically since this book was first published. As environmental insurance litigation (to include asbestos coverage litigation) has involved so many cases of such great magnitude, this had an undeniable impact on law school curriculums. Law schools could no longer treat insurance law as a "step-child" course—an elective (usually, irregularly offered) that would either be foisted on the newest faculty rookie (fresh out of law school) or, perhaps, farmed out to an adjunct instructor (typically, a practitioner in the same metropolitan area in which the law school is located).[12] In 2007, Dean Jerry commented on the sea change concerning the teaching of insurance law:

> Twenty years later. . .much has changed. Teaching materials, casebooks and scholarly articles on insurance law in monographs and periodicals are much more abundant. The Association of American Law Schools' section on insurance law, which did not even exist. . .in 1987, is very active, facilitating interaction among academics with teaching and research interests in insurance law. . .[I]t appears that student and legal education have come to understand what practitioners have known for many years—insurance law is an extremely important subject; indeed, it is difficult even to imagine a legal transaction or event that does not implicate insurance in some way.[13]

---

[11] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

[12] This is not meant as a swipe at either adjuncts (the author is an adjunct insurance law instructor), or rookie full-time law school faculty members. In fact, rookies often become the top experts in their fields. For example, perhaps, the leading insurance law academic, Dean Robert Jerry II, got his start in insurance law as a law school faculty rookie, with no previous insurance law background.

[13] Jerry and Richmond, *Understanding Insurance Law* (4th Ed.), Introduction.

The Stabilization/Maturation of Environmental Insurance Coverage Litigation

In the late 1990s, pollution coverage litigation began to stabilize or mature, and by 2000, it became much more subdued.[14] There were basically five reasons for this.

First, most large corporations brought their massive pollution coverage actions in the '80s and '90s. Second, in the mid- and late 1990s, there was much less environmental enforcement than there was in the 1980s. Third, it became increasingly hard to find contamination that commenced before 1985, when the insurers' absolute pollution exclusion (later called the total pollution exclusion) controlled the outcome of most environmental insurance coverage disputes. Fourth, most states developed a body of controlling law on several key environmental insurance coverage issues—thus, there was no longer a need to litigate so many issues. Fifth, both insurers and corporate policyholders became more interested in settling disputes, rather than spending so much on legal fees.[15]

Concerning this fifth and final factor, Los Angeles policyholder attorney, David Steuber, who, from the very start of environmental and asbestos coverage litigation, has represented some of the country's biggest corporations, explained it as follows:

> [M]y philosophy is that we should try to settle insurance recovery problems, because litigation is so demanding and expensive. It is not in anybody's best interests to litigate for years, and spend tens of millions of dollars—unless you have to. Obviously, there are circumstances where you have to do that, but I try first to see if we can achieve a fair settlement. If we can—great! If not, then we litigate.
>
> That is what happened in California's Asbestos Coordinated Proceeding, where we filed an action on behalf of our client on May 31st, 1979, and that litigation lasted until August, 1996—17 years later. I have had other cases that lasted almost as long. Some cases, you just have to do that, where it gets to the point where the parties are unable to work out a settlement, no matter how hard they try. Maybe the dollars are too substantial, the issues are too unique or of first impression, so they cannot be settled, as too much is riding on them. But again, I have always got an eye open for settlement possibilities, even after litigation has been filed.

The Cycles of Long-Tail Insurance Coverage Litigation

As we are about to enter the second decade of the new millennium, we are in what many observers describe as the third basic cycle of long-tail insurance cover-

---

[14] A Westlaw search will prove this. For example, a search for "pollution exclusion" (the most litigated issue in environmental insurance coverage litigation is the interpretation of the various pollution exclusions in CGL policies) in the federal insurance case database (FIN-CS) and multi-state insurance database (MIN-CS) peaked at 158 documents in 1995. In 2008, it resulted in only 73 documents, even though over the years Westlaw has continually included more and more non-published cases in its insurance law databases. By the way, the first year the term "pollution exclusion" resulted in more than 10 documents was 1985, when it resulted in 12 documents. Also, as respects the word "pollution," in 1973 it resulted in only three documents, in 1995 it peaked at 259documents, and in 2008 resulted in 157 documents.

[15] David Steuber (a Los Angeles coverage attorney who has represented policyholders for three decades in some of the country's largest long-tail coverage disputes) put it this way: "It is true that many of the bigger claims, for the bigger sites, have already been litigated. To a certain extent, the height of the pollution coverage litigation was back in the 90s. There is also, perhaps, less aggressiveness in the enforcement of environmental statutes than 10-15 years ago. In addition, there are also many issues in the environmental/pollution area that are no longer of first impression, so parties are able to formulate their litigation decisions better today than they were 15 years ago, when we were dealing with unique questions of first impression at every single turn. The insurance companies said the law was one thing, and the policyholders were saying that the law was another. To a certain extent, the pioneers had to litigate those issues, and resolve them. You are seeing more surgical kinds of cases, rather than what I call the 'shotgun cases,' of the late 80s and 90s, where you needed to cover the whole waterfront. Today, it is more surgical, because more issues have already been decided." Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

age litigation.[16] The first lasted from the end of the 1970s to the 1980s—it consisted, primarily, of asbestos bodily injury coverage cases, and, to a much lesser extent, asbestos property damage coverage litigation. Although asbestos coverage action never ceased, the second cycle started with the filing of massive pollution coverage cases in the mid-1980s—perhaps the two most emblematic of this phase were the *Shell* case, filed in May 1986 (in California), and the *Westinghouse* case, filed in May, 1987 (in New Jersey).[17] This cycle lasted for about a decade, and was, as indicated, mainly comprised of pollution coverage cases. The third cycle began in the late 1990s, and, again, consists primarily of asbestos coverage actions, though there are a number of pollution coverage cases that are still being litigated. However, in this second wave of asbestos coverage litigation, the issues are much narrower—they are, typically, allocation issues/allocation related issues ("all sums" versus "pro-rata," exhaustion, "spiking," "stacking," number of occurrences, etc.).

The Future of Environmental Insurance Coverage Litigation

As for what will happen in the future, this depends on two factors: First, the state of tort litigation. As Peter Kalis explained: "[C]overage litigation tends to be derivative of the main liability drivers of the era. If you keep your eye on the American Trial Lawyers Association and the state and federal governments, you can pretty much predict where the coverage wars are going to be fought."[18] Similarly, David Steuber has stated: "I always follow the various seminars that the plaintiffs' counsel put on, because whatever types of cases they are touting, will likely be the next big underlying tort area. In turn, in all likelihood, that will also become the next big insurance battleground."[19]

Second, the future of long-tail claims also depends on the nature of liability insurance policies available. Everybody—policyholder and insurer advocates alike—would agree that, in response to the massive long-tail claims with which they had to wrestle, insurers dramatically limited their liability coverage. (Those of you with even a passing knowledge of environmental insurance coverage are familiar with the absolute pollution exclusion introduced in 1986—now called the total pollution exclusion). For example, here is how Robert Chesler described it:

> Decades ago, before the liability explosion, insurers used ambiguous and broad language, as a means of marketing policies, and insurers would also use ambiguity against less sophisticated insureds. You have to remember that before 1980, there were very few large corporate claims. In the new specialty policies, insurers use precise language. They have learned the perils of ambiguity in a world of unlimited liability.[20]

So, will there be another phase of "super-hot" environmental insurance coverage litigation? Robert Chesler does not think so: "Environmental insurance litigation resulted from a constellation of forces that will be difficult to replicate. Insurers are quick to add exclusions now, and most new specialty policies are claims made."[21] David Steuber is not so sure:

> I would never say "never." Many people said there would never be another "asbestos." People are now saying that there will never be another "pollution." But, asbestos is still

---

[16] *See* Peter Kalis' Jan. 14, 2004 interview with the *U.S. Insurance Law Report*.

[17] Of course, coverage attorneys in many other parts of the country would argue that the cases *they* worked on were the pioneer cases of environmental coverage litigation. In particular, the Seattle insurance coverage bar would have a strong argument in this regard, as they fought major environmental insurance coverage battles well before either the *Shell* or *Westinghouse* cases.

[18] Jan. 14, 2004 interview with the *U.S. Insurance Law Report*.

[19] Jan. 14, 2004 interview with the *U.S. Insurance Law Report*.

[20] Jan. 2, 2004 interview with the *U.S. Insurance Law Report*.

[21] Jan. 2, 2004 interview with the *U.S. Insurance Law Report*.

> here, and we are seeing other types of cases that are evolving. . ..They are not quite as big, perhaps, as some of the pollution cases, but there are chemical treated products cases, various fire-retardant plywood cases. Also, mold and EMF issues have never quite hit, but might in the future. And we have manganese welding, silica, medical devices and products, and various kinds of toxic tort cases.[22]

What do insurer counsel predict? Michael Aylward, a Boston coverage specialist who has represented insurers throughout the history of environmental insurance coverage litigation, agrees with Robert Chesler that the wild days of the field are a thing of the past. In a 2004 interview, Aylward stated that "nothing is likely to approach the pollution coverage wars of between the 80s and mid-90s." Aylward explained:

> The Superfund coverage wars were unique. There was a new statute that imposed joint and several, and retroactive liability. There were new wordings in insurance policies that had barely been tested when Superfund was enacted in 1980, and there were staggering potential financial liabilities to policyholders and insurers alike. There was so much at stake. I do not think we will see [to use Bob Chesler's phrase] that kind of constellation of factors again. People feared Y2K might have presented that type of situation, but it did not. It seems unlikely that we will, again, have something that new in terms of both liability and coverage, coming together at the same time again any time in the near future.[23]

As for the modern pollution liability policies that have been issued in recent years (which we discuss in Chapter 29), Aylward noted that the "stakes are not as high." He summarized the very few lawsuits concerning such policies as follows:

> Most of these involve single site cleanup, where there has been a spill on the insured's property, such as a tank leak or an explosion. The very sort of thing that probably would have been viewed as an "accidental" release under the old CGL policies. For the most part, these are not the kind of losses we had in the past that involved either intentional, industrial disposal activity or a stream of shipments by a waste generator to a landfill or some reconditioning or disposal facility.
>
> These modern pollution liability claims are not the classic Superfund cleanup situations that we had in the past. Most of the new pollution claims are either accidental releases on the insured's own property or involve claims by private property owners, who have either bought the property and are suing previous owners or operators, or who own property nearby and are upset because the value of their property has decreased because of pollutants from the insured's operations.[24]

Lastly, as for my prediction, I agree with Chesler and Aylward—environmental insurance litigation will continue for decades, but, almost certainly, will not be the "legal specialty on speed" that it once was.

---

[22] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

[23] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.

[24] Jan. 21, 2004 interview with the *U.S. Insurance Law Report*.