

An aerial photograph of a rugged, rocky coastline. A river flows through the center, surrounded by dark grey, cracked rock formations. Patches of vibrant green vegetation are scattered across the rocks and along the riverbanks. The water in the river is a deep, dark green. In the top right corner, the text 'CLYDE & CO' is written in a white, serif font.

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# Silent Environmental Risk

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# What is silent environmental risk?

Claims for pollution, contamination and resulting damage which are not made against the primary polluter but rather the manufacturer of an allegedly defective product.

Recent examples:

- MTBE
- PFAS
- PCB
- Petroleum

# Manufacturer claims: MTBE

- Gasoline additive used to oxygenate fuel; polluted groundwater when spilled at petrol stations
- Identified as a carcinogen; now widely banned
- Clean up cost estimated at up to USD30bn
- First case involving Exxon petrol station; then against manufacturers generally
- Public nuisance among the identified torts
- Liability awards based on theories of collective liability

# Manufacturer claims: PFAS

- Industrial surfactants used in applications including AFFF firefighting foams, carpeting, upholstery, apparel, floor wax, textiles, sealants and cookware
- Identified as a carcinogen; now widely banned
- Initial focus on DuPont's Washington Works plant
- Now multiple actions against manufacturers arising from use at airports and airbases
- Public nuisance among the identified torts
- Liability awards based on theories of collective liability

# Manufacturer claims: PCBs

- Chemicals widely used as insulators, paper, caulking and paint
- Linked to cancer and immune system difficulties
- Widely banned in 1979
- Multiple actions seeking redress for decontaminating water supplies
- Public nuisance among the identified torts
- Liability awards based on theories of collective liability

# Manufacturer claims: Petroleum

- 14 cases across United States
- Claimants: states, counties, cities and one fishermen's association
- Allegations: that oil majors, since 1965:
  - extracted a substantial percentage of raw fossil fuel
  - caused a quantifiable percentage of global fossil fuel related CO2 emissions
  - wrongfully promoted their fossil fuel products
  - concealed known hazards associated with the use of those products
  - championed anti-regulation and anti-science campaigns
  - failed to pursue less hazardous alternatives available to them

# Manufacturer claims: Common trends

- Public entity plaintiffs: states, counties, cities
- Manufacturer defendants
- Expanding scope of public nuisance doctrine
- Collective liability theories bypass conventional causation rules:
  - Concert of Action
  - Alternative Liability
  - Enterprise Liability
  - Market Share Liability
  - Commingled Market Share Liability

# Manufacturer claims: EIL coverage

- Has there been a Pollution Condition?

*‘Pollution Condition means the discharge dispersal release escape migration or seepage of any solid liquid gaseous or thermal irritant pollutant or contaminant including smoke soot vapours fumes acids alkalis chemicals fungi hazardous substances hazardous materials and waste materials into or upon land structures thereon the atmosphere surface water or groundwater.’*

- Most policies contain an absolute product liability exclusion
- Most policies contain a retroactive date



# Manufacturer claims: GL coverage

- Claims are characterised as product liability claims
- Difficult to pinpoint occurrence and date of damage
- Public nuisance a new and dangerous allegation
- Application of retroactive dates
- Application of financial loss exclusions
- Application of pollution exclusions

# Typical GL pollution exclusions: UK

‘This policy does not cover liability arising from POLLUTION other than caused directly or indirectly by a sudden, identifiable, unintended and unexpected incident which takes place in its entirety at a specific time and place during the PERIOD OF INSURANCE.’

*ABI Pollution Exclusion*

# Typical GL pollution exclusions: USA

## **‘Standard’ pollution exclusion (1973):**

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

# Typical GL pollution exclusions: USA

## **‘Absolute’ pollution exclusion (1986):**

Exclusion for pollution which:

- originates on the insured’s premises.
- originates from a waste disposal or treatment site
- arises from the handling or treatment of waste
- originates from a site where the insured is undertaking operations



# Typical GL pollution exclusions: USA

## **'Total' pollution exclusion (2001):**

'This insurance does not apply to:

(1) Bodily injury or property damage which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants at any time.

(2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants; or

(b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, pollutants.'

# Typical GL pollution exclusions: Bermuda Form

## **Pollution exclusion:**

Liability for personal injury, property damage ... arising out of the discharge of pollutants ...

## **Write-back for Product Pollution Liability:**

Liability for personal injury or property damage arising out of the end use of the insured's products provided that such use (1) occurs after possession of the goods has been relinquished to others by the insured and (2) occurs away from premises controlled by the insured.

# Conclusions

- Environmental claims against products manufacturers are an increasing phenomenon
- Beware environmental product liability risk in:
  - High-risk sectors
  - High-risk jurisdictions
- Time to review pollution coverages?

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50+

Offices

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415

Partners

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3,800

Total staff

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2,200

Legal professionals

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1,800

Lawyers

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