
CGL Coverage For Gulf Oil Spill Claims

By Linda D. Kornfeld, John E. Heintz, and Marla H.
Kanemitsu
2010

This article first appeared in the August 9, 2010 edition
of *Insurance Law360*, *Energy Law360*, *Product Liability
Law360*, and *Environmental Law360*

The Deepwater Horizon oil spill has already resulted in hundreds of lawsuits, with more certainly on the way. A significant number of these suits have been filed by Gulf Coast residents and businesses allegedly affected by the spill. For example, fishermen and shrimpers have sued BP PLC and other defendants claiming their businesses have suffered losses as a result of oil contamination in the Gulf waters and adjacent areas.

In other suits, Gulf Coast fishermen hired to help contain and clean up the spill are alleging they have suffered or will suffer negative health effects from their exposure to burning oil, gasses and other chemicals. A host of additional legal theories have been, and will continue to be, advanced.

For many companies facing Gulf oil spill-related liabilities, commercial general liability insurance may offer a critical line of defense. General liability insurers, however, may seek to avoid coverage for these claims. In the context of similar types of large-scale losses, insurers have often responded with a bevy of defenses to coverage. It is not uncommon for an insurer to raise upwards of 40 individual coverage defenses for some mass tort claims.

Analyzing all of the coverage issues that may arise in connection with these suits is virtually impossible. As a result, here we focus on certain popular carrier defenses and some of the arguments policyholders may seek to advance in response. Whether policyholders will prevail on these arguments, of course, will depend on the particular facts involved in each of the claims and the insurance policy language at issue. However, policyholders never should presume that an insurer's efforts to avoid coverage have merit.

Instead, depending on the circumstances, the policyholder may have strong grounds to argue in favor of insurance carrier participation in what otherwise will be expensive litigation. In other words, insurance dollars may be available to defray the financial burden of oil spill-related litigation.

Coverage for “Economic Loss”

In a number of the lawsuits filed thus far, the plaintiffs allege that the Gulf oil spill has resulted in “catastrophic environmental destruction,” which has caused the plaintiffs “economic loss.” For example, in *Barisich v. BP PLC*, Case No. 10-cv-01324 (E.D. La.), the plaintiffs allege:

“the natural resources, water, wetlands, commercial fisheries and wildlife of coastal Louisiana and the Gulf of Mexico ... have been ... damaged by the intrusion of oil into Louisiana’s Coastal Zone and the Gulf of Mexico.”

As a result, the *Barisich* plaintiffs claim among other things that they have “suffered a loss of their right to ... derive economic ... benefits from the natural resources ...” *Id.* at 14-15.

Insurers often argue that such allegations of claimed “economic loss” do not trigger “property damage” or “bodily injury” coverage under commercial general liability policies. According to the insurers, the damages sought in the underlying case are not in direct compensation for bodily injuries or property damage but, rather, are compensation for economic loss that is not covered. However, nowhere in the typical general liability policy does it state that such losses are not covered.

Commercial general liability policies typically cover “those sums that the insured becomes legally obligated to pay as damages because of ‘bodily injury’ or ‘property damage’ to which this insurance applies ...” See, e.g., Commercial General Liability Insurance policy Form § I, Coverage A.1.a. (Insurance Services Office Inc. 2010).

A number of courts across the country that have addressed whether a policyholder that has been sued because the plaintiff suffered “indirect” loss due to “property damage” or “bodily injury” caused by the policyholder have concluded that such “consequential” losses in fact are covered.

The courts tend to focus on the “because of” language and question whether the damages sought are “because of” bodily injury or property damage. For example, in *Reinsurance Ass’n of Minnesota v. Timmer*, 641 N.W.2d 302 (Minn. Ct. App. 2002), the court held that, although lost profits or other consequential damages do not constitute property damage, the insurance company in question was obligated to defend and indemnify its policyholder against claims for lost profits based on physical injuries to the cows belonging to the underlying plaintiff farmer:

“[The insurance company] argues that the district court erred [in finding coverage] because the [underlying plaintiffs] seek damages for economic losses, including lost profits, which are not ‘property damage’ under the policy.

...

“It is true that the term ‘property damage’ does not include economic losses.

...

“As noted by the district court, however, it appears that the specific language of the RAM policy enlarges coverage to include damages in addition to ‘property damage.’ Coverage ‘L’ states: ‘We pay * * * all sums for which an insured is liable by law because of * * * property damage * * *.’” *Id.* at 313-14.

The district court concluded that coverage is not limited to property damage, but includes other damages that flow from property damage.

See also *Spirco Env’tl. Inc. v. Am. Int’l Specialty Lines Ins. Co.*, 555 F.3d 637, 645-46 (8th Cir. 2009) (“there is no language in the policy excluding economic loss or economic harm from the definition of ‘Loss’”; “the indemnification award for the surety’s fees was ‘reasonably apparent’ and a ‘natural and reasonable incident or consequence’ of the underlying property damage

claim.”); *Wausau Underwriters Ins. Co. v. United Plastics Group Inc.*, 512 F.3d 953, 958 (7th Cir. 2008) (“Tort liability for ... consequential damages is limited by the principles of tort causation, but whatever liability the court imposed in a tort suit would, as consequential damages from tortiously inflicted property damage, be within the ‘because of property damage’ coverage of the Comprehensive General Liability policy.”).

In the context of Gulf oil spill litigation, the fact that the plaintiffs in certain instances are not claiming damage to their own property, but, instead, claim economic loss resulting from damage to other property, such as wetlands, should not necessarily impact coverage. Indeed, as long as the claimed losses bear some causal connection to (are “because of”) damaged property, in general, policyholders should have bases to overcome insurer economic loss defenses.

Coverage for Nuisance Claims

Many of the suits arising from the Deepwater Horizon oil spill include “nuisance” claims. These claims, which are a type of common law tort claim, have emerged as a favorite weapon in plaintiffs’ legal arsenals. Part of the allure is the vague, amorphous nature of the tort, and the ability to avoid some of the limitations on other tort theories.

There are two types of nuisance claims, private and public, both of which have been employed in the Gulf oil spill litigation. A private nuisance is the intentional or unreasonable invasion of another person’s use and enjoyment of his or her land. In contrast, a public nuisance is an unreasonable interference with a right common to the general public, such as an obstruction to a public road or a factory that produces bad odors that affect a general area.

The typical remedy sought for a nuisance claim is not compensatory damages, but the “abatement” of the nuisance. In the past, some insurers have argued that suits seeking abatement are not covered by their policies. These insurers rely on the language in commercial general

liability policies requiring the insurers to pay “those sums that the insured becomes legally obligated to pay as damages ...” See Commercial General Liability Insurance Policy Form § I, Coverage A.1.a. According to the insurers, the term “damages” is limited to “legal” monetary damages, and because abatement is an equitable remedy, the nuisance claims are not covered.

If defendants in Gulf oil spill-related suits seek coverage for nuisance claims, the insurers may raise a similar argument. However, to prevail, the insurers would face substantial hurdles.

First, in the environmental context, courts generally have rejected attempts by insurers to draw a distinction between legal and equitable relief. These courts recognize that regardless whether the relief is styled as damages, abatement, or other injunctive relief, it still requires the policyholder to pay money because of harm caused to third parties.

As one court explained, policyholders should be able to rely on the “common sense expectation” that the term “damages” covers any claim that requires them to pay money, regardless how the relief is categorized. See *Stychno v. Ohio Edison Co.*, 806 F. Supp. 663, 675 (N.D. Ohio 1992).

In addition, many of the Gulf oil suits seek compensatory damages in addition to abatement, or do not seek abatement at all. For example, in *Barisich v. BP PLC*, the plaintiffs’ public nuisance claim expressly seeks compensatory damages in addition to injunctive relief. And in *Hopper v. Cameron International Corp.*, Case No. 1:10-cv-00173 (S.D. Miss.), the complaint includes a public nuisance count, but seeks only monetary damages.

If the defendants seek coverage for these nuisance claims under commercial general liability policies, the argument that the claims do not implicate covered “damages” would almost certainly fail.

Coverage for Pollution Claims

“Pollution exclusions” have become a standard fixture in today’s commercial general liability policies. Many insurers see these exclusions as their trump cards for escaping coverage for oil spill litigation. Despite the ubiquity of pollution exclusions, however, coverage may still be available.

For example, many companies in the oil and gas industry (or even other industries) may have purchased general liability or other coverage that (1) expressly covers pollution claims, or (2) at least covers pollution cleanup costs on a legal liability or voluntarily incurred basis for sudden and accidental pollution incidents.

Companies facing Gulf oil spill claims may have one or more of these types of policies, which should provide a first layer of coverage. For companies that did not obtain express pollution coverage, or that may be facing liabilities that could exhaust the limits of their pollution policies, commercial general liability policies may provide additional coverage.

Although most commercial general liability policies include pollution exclusions, these exclusions do not bar coverage for all pollution-related claims. The exclusions have exceptions. One exception recognized by many courts that may be relevant to oil spill litigation is the exception for product liability claims.

For example, some of the oil spill suits allege that the blowout preventers at the rig were defective, which contributed to the damage the plaintiffs allegedly sustained as a result of the spill. Because these claims are premised on an allegedly defective “product,” coverage may be available even if the policies at issue have pollution exclusions.

To provide another example, some plaintiffs allege they have been injured by the use of allegedly harmful oil dispersants used in the cleanup efforts. Companies that manufactured or

sold these dispersants may have a valid argument that any claims against them are products liability claims that fall outside the scope of the pollution exclusion.

There are many other types of pollution-related claims in addition to the examples above that may qualify for coverage. Accordingly, policyholders should not assume that suits involving allegations of pollution-related damage will not be covered. The existence of coverage will depend on the type of policy at issue, the specific policy language used, the nature of the underlying claims against the policyholder, and the state law that governs the policy.

Conclusion

Companies facing potential liabilities from the Gulf oil spill should carefully examine their entire insurance portfolios to evaluate the extent of their insurance coverage. Although the suits may percolate through the courts for years before any liability is imposed, given the vast number and complexity of the suits, the defense costs alone will be substantial.

Insurance may be available to cover these defense costs, and any resulting liability, but the availability of coverage must be evaluated on a policy-by-policy and claim-by-claim basis. Experienced coverage counsel can assist in these efforts and are often instrumental in obtaining and maximizing a company's insurance recovery.

All Content © 2003-2010, Portfolio Media, Inc.

About the Firm

Dickstein Shapiro LLP, founded in 1953, is a multiservice law firm with attorneys nationwide. The firm's clients include more than 75 of the *Fortune 500* companies, start-up ventures and entrepreneurs, multinational corporations, major motion picture studios, charitable organizations, and government officials. Dickstein Shapiro's core practice groups—Antitrust & Dispute Resolution, Business & Securities Law, Corporate & Finance, Energy, Government Law & Strategy, Insurance Coverage, and Intellectual Property—involve the firm in virtually every major form of counseling, litigation, and advocacy. For additional information, please visit dicksteinshapiro.com.

About the Insurance Coverage Practice

Dickstein Shapiro is one of the United States' leading law firms representing policyholders around the world in disputes with their insurers. With more than 70 insurance coverage attorneys—and ranked as one of the largest practices in the United States by *Business Insurance*—Dickstein Shapiro has the deep experience in a broad range of issues that is necessary to provide clients with superior representation in all insurance coverage matters. The firm's insurance coverage attorneys provide advice and strategies that identify coverage opportunities, protect against unnecessary losses, and secure revenue from insurance policies through litigation and alternative means. This work is conducted with one primary focus—maximizing each client's bottom line. Since the beginning of 2007, firm attorneys have recovered more than \$4 billion on behalf of policyholders in matters involving a wide range of coverage types, claims, and industries.

About the Authors

Linda Kornfeld is the Managing Partner of Dickstein Shapiro's Los Angeles office and a partner in the Insurance Coverage Practice. Ms. Kornfeld conducts an active trial and appellate practice, representing insureds in complex litigation matters. She also provides insurance risk management advice to her clients with respect to policy procurement and renewals. Ms. Kornfeld may be reached at KornfeldL@dicksteinshapiro.com.

John Heintz is a partner in Dickstein Shapiro's Insurance Coverage Practice and is a veteran in the fields of corporate insurance coverage and complex litigation with more than 30 years of experience. Mr. Heintz has won numerous landmark appellate cases in state and federal courts, and he has recovered billions of dollars in coverage for his clients. Mr. Heintz may be reached at HeintzJ@dicksteinshapiro.com.

Marla Kanemitsu is a partner in the firm's Insurance Coverage Practice. In addition to her insurance work, Ms. Kanemitsu has extensive experience representing clients in class action and other complex litigation involving consumer products and services. Ms. Kanemitsu may be reached at KanemitsuM@dicksteinshapiro.com.

The opinions expressed are those of the authors and do not necessarily reflect the views of the firm, its clients, or Portfolio Media, publisher of Law360.