

# A WORD TO THE WISE:

## Carefully Examine Exclusions in Your Business Insurance Policies

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### The Scene

*During a heavy windstorm, dust and other particles from a chemical facility were blown onto a nearby residential area, damaging homes and vehicles.*

*In a tragic rail car accident that caused a significant spill of its chemical cargo, several people suffered multiple injuries.*

*An emission accidentally occurred from a tank dedicated to store chemical materials sent on consignment by a chemical distributor; the release happened before the distributor took possession of the materials.*

*In a class action lawsuit, employees at a manufacturing facility alleged long-term exposure to a chemical used in the operations process. The lawsuit also named the chemical distributor that was the sole supplier of the chemical to the facility for the past five years.*

### Claims Exposure

In the chemical industry, incidents similar to these scenarios have happened. During these situations, many distributors of chemical products have learned the hard way that their

insurance policies contained significantly restrictive exclusions related to pollution-liability, leaving them exposed to potentially catastrophic claims. In the past several years, there has been a growing trend for insurance carriers to add standard and non-standard exclusions to Commercial General Liability, business automobile and site specific pollution liability policies that can have ominous impacts on a company's pollution-related protection.

To safeguard their firms' financial and operations viability, chemical distributors need to become familiar with challenges presented by these exclusions along with pollution liability insurance products that are available.

### Commercial General Liability Standard Exclusion

For a majority of businesses, a Commercial General Liability (CGL) insurance policy serves as the standard coverage for claims of bodily injury or property damage to protect against incidents occurring on their premises or other covered locations where they typically conduct business as well as products liability claims. While a CGL policy often can be extended to provide additional coverages for other

liabilities such as personal and advertising injury, employee practices and medical expenses, the standard exclusion in CGL insurance – commonly referred to as standard exclusion (f) – explicitly limits protection against pollution-related claims. This includes clean-up and damage to natural resources arising from specific activities or liabilities associated with the ownership, leasing or use of a premises.

Under the standard exclusion, it does not matter if the pollution incident results from a sudden event or a gradual condition. The standard exclusion is comprehensive, excluding pollution at or from any premises, site or location that a chemical distributor owns, occupies, rents or loans – now and in the past. Other aspects of the exclusion are equally discouraging for a company. For instance, liabilities arising from handling, storing or processing waste are disallowed.

Certain exceptions are contained in the standard exclusion to protect chemical distributors against pollution resulting from:

1. Heat, smoke or fumes from a hostile fire
2. Heating, cooling and dehumidifying equipment that are part of the policy holder's building
3. Operating fluids from mobile equipment
4. Material which is required to be brought into a building.

It is highly recommended that companies confirm that their policies do not delete these types of coverages.

### Modifications to the Standard Exclusion

Another major potentially ruinous issue for many chemical distributors can result from standard and non-standard modifications to the standard exclusion. However, many insurance companies seek to remove some or all of these exceptions, further limiting or even completely removing these pollution coverages. For example, while the CGL policy does not exclude products liability or completed operations, the standard

exclusion (f) is "silent" on these areas, so any modification can create problems for a company. If the insurance underwriter modifies the standard exclusion in some way, there can be intended or unintended consequences that limit or remove this basic coverage for products liability or completed operations. This tampering and revising of the standard exclusion can remove all pollution protection, including coverage normally expected for chemical companies' products. Other endorsements can be incorporated into the exclusion to omit pollution coverage except for specific hazards such as hostile fire or heating, cooling or dehumidifying equipment in a building. Still other endorsements, often called absolute pollution exclusions, remove all elements of insurance as it is provided for pollution or products events. Any endorsement that rewrites or removes exclusion (f) needs to be very carefully reviewed.

## Time-based Restrictions

Over the past several years, it has become common practice for insurance carriers to combine these exclusion endorsements, as mentioned above, with forms that add back very narrow coverage grants for pollution. While these forms provide protection for pollution emanating from certain events, the discovery and reporting requirements of these events are generally limited to a specified timeframe. The generic terminology for this type of coverage is "time element," reflecting its time-based restrictions. To qualify for coverage under this coverage, the incident must be directly linked to a specific and sudden event. Typically, this coverage will require that the incident must be discovered within 7 to 30 days of the event's commencement. Although the reporting deadline usually is 21 to 90 days, it is critical to understand the timeline generally starts at the date of the incident's commencement – not at the date of discovery. Since this type of coverage is so restrictive and limiting to the product liability exposure, it is practically irrelevant and ineffective for the chemical industry.

## Business Automobile Coverage

In addition to CGL coverage, companies should closely review their business automobile coverage, which covers all types of vehicles including trucks and trailers, for exclusions related to pollution liabilities. A business auto policy generally will cover pollution related to lubricants, fuels, fluids and exhaust gases along with other substances needed for or

resulting from normal electrical, hydraulic or mechanical functions of the covered vehicle. Any pollution emission or release, however, must be issued from a part of the vehicle that was intended to hold, receive or dispose of the substance.

Standard pollution-related exclusions in a business auto policy typically do not cover bodily injury or property damage caused by a pollutant release during the course of transit of cargo or material stored or processed in the covered vehicle. Also ineligible for coverage are substances before they are accepted by or after they are delivered by the policy holder.

On a positive note, a chemical distributor can expand coverage to address pollution that arises from cargo exposure by requesting its insurance carrier add the "Broadened Pollution Liability" endorsement, known as CA9948. However, the company should be aware that some carriers will not add this endorsement since they cannot charge a premium for it. In some instances, carriers will broaden coverage on a site pollution or a combined CGL/site pollution package under the transportation pollution coverage extension.

## Site Specific Pollution Liability

A site specific pollution policy is designed primarily to provide coverage for bodily injury, property damage or clean up cost resulting from a covered pollution condition on an insured location. It is important to recognize that this type of policy is not intended to cover products liability.

For a chemical distributor, the site specific pollution coverage typically is handled as a third party liability. The policy can address first party coverage to provide for clean up of pollution conditions found on owned premises included in the policy. However, companies need to ensure that the policy is written properly to provide first party coverage.

In addition, coverage under the site specific pollution policy can be extended to provide coverage for pollution conditions from transportation, including owned and non-owned automobiles, rail and barge. Contractual liability for specific environmental indemnities can also be covered by endorsement.

While coverage for non-owned sites can be obtained, special care needs to be taken in understanding limitations associated with this coverage. For example, non-owned disposal sites can be covered on a listed basis or on a blanket or general form. However, the blanket form can be severely restrictive if not carefully reviewed. Likewise, non-owned sites for short- or long-term storage of materials

can be covered, but there are potential limitations. The policy should be thoroughly examined for issues such as retroactive dates, new or pre-existing conditions, and clean up for onsite and offsite incidents. There are several combinations of coverages that can be triggered to address different conditions. A company should be aware that these coverages are considered as non-standard approaches in insurance policies and require careful review and understanding.

## Combined CGL and Site Specific Pollution Coverage

During the past several years, a family of insurance policies has emerged which combines the Commercial General Liability policy with the site specific pollution coverage. Chemical distributors can realize cost savings when purchasing these combined policies by sharing limits between the coverages. These policies consolidate and address all aspects of standard CGL insurance along with non-standard pollution coverage.

But, similar to the stand-alone pollution coverage, there is an important caveat for chemical distributors: Pitfalls are associated with these non-standard forms and require careful analysis of potential impacts to their businesses. Without a competent insurance agent or broker, it is difficult to be sure exactly what your business is being offered...as well as which exclusions, restrictions or omissions are included in the proposed policy.

Simply stated, not all insurance is created equally. A word to the wise: do not venture into this jungle without an experienced, trustworthy guide. ■



### ABOUT THE AUTHOR

**Bruce Bricarell**, Managing Director, joined Wortham in 1984 and specializes in the placement

and management of the firms' environmental risks. Bruce has been involved with a number of large risk placements involving the use of captives and other financial plans. He has been actively involved in the development of the pollution / environmental markets. Prior to joining the firm, Bruce was an underwriter and supervisor with two major insurance carriers.