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Lifting the Fog from Environmental Liability Insurance Coverage Disputes: A Book Review

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Feature

*For this issue's Feature, the **Reporter** presents a Book Review By John S. Vishneski, III*, reviewing Environmental Liability Insurance Law: An Analysis of Toxic Tort and Hazardous Waste Insurance Coverage Issues. By Kenneth S. Abraham. Prentice Hall Law & Business, 1991. Pp. xiv, 410.*

Lifting The Fog From Environmental Liability Insurance Coverage Disputes: A Book Review

Fog everywhere. Fog up the river, where it flows among the green aits and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city.... And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Charles Dickens, BLEAK HOUSE[1]

I. Introduction

Today, a fog very much like that described by Charles Dickens in BLEAK HOUSE has descended upon the American judiciary. This fog is generated by intense courtroom battles fought over the question of who will pay to clean up the environmental damage caused by industrialization. The issues are so numerous and complex, the disagreement between the parties so profound, and the results so diverse, that the only constant to be found in such cases is the haze of confusion.

II. Background

These disputes arise primarily between insurance companies and the biggest consumers of insurance, the manufacturing industry. These disputes arise because, under modern environmental statutes, manufacturers can be held absolutely liable for pollution caused or threatened by their waste products. Such liability is imposed without regard to fault or proximate causation, and it applies retroactively, making companies liable today for their own acts and acts of third parties that were legal at the time they were performed.[2] Companies facing this unexpected type of liability have turned to their liability insurers for coverage. Insurance companies, however, claim that their policies do not cover such liability.

These insurance coverage disputes are pervasive because of the manner in which modern environmental statutes are enforced. Under the Comprehensive Environmental Response, Compensation, Liability Act, ("CERCLA"),[3] for example, the United States Environmental Protection Agency ("EPA") selects for cleanup certain contaminated sites which it places onto its National Priorities List ("NPL"). At each site, the EPA designates as many liable parties as it can identify (called "Responsible Parties" under the statute) and orders those parties to clean the site. If the Responsible Parties refuse to perform the required remedial actions, each can be held jointly and severally liable for the EPA's cost to perform the remediation itself.[4] At many sites there are more than one hundred Responsible Parties, and currently, there are 1,200 sites on the NPL.[5] Thus, since each Responsible Party at each site potentially has an insurance claim, the number of such claims, and coverage suits, is quite large.

The amounts involved are also very large. The EPA estimates that the 1,200 sites on the NPL will cost an average of $29 million each to clean up.[6] Also, some companies are designated as Responsible Parties at numerous sites; thus they have several coverage suits or large suits involving many sites. In addition, the EPA predicts that the total number of sites on the NPL will rise to 2,100 by the year 2000, and estimates of the total costs associated with the CERCLA legislation range from $150 to $700 billion.[7]

Hence, the fog develops. Faced with the prospect of paying for the enormous costs associated with environmental remediation, insurance companies are challenging environmental liability claims with extreme fervor. Most environmental liability coverage suits begin with procedural battles. Because courts of different states disagree as to the proper resolution of many substantive issues, there is often a scrap over whether the forum in which the suit was filed is the correct forum. Once that question is resolved, the parties fight about which state's law the forum court should apply.

Then discovery battles rage. This happens because, typically, the parties do not know what the law will be with respect to substantive coverage defenses until the court declares it. The parties are thus forced to attempt to gather several sets of facts to support their positions with respect to each of the several possible interpretations

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of the law.

When a court finally gets to the point of deciding how the relevant insurance policy provisions should be interpreted, it faces complex and often novel arguments with respect to each of numerous defenses to coverage. In one case that the author is personally involved with, a policyholder's complaint against several of its insurers was answered with a combined total of one-hundred forty-nine affirmative defenses. The insurers were attempting to find a defense in just about every provision of their contracts.

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These novel and complex arguments arise because of the large sums of money at stake. Industry and insurance companies are fighting these cases hard. As a result, our judiciary is faced with an ever-thickening morass of substantive and procedural legal issues that pervade environmental liability insurance coverage disputes like a Dickensian fog.

III. Clearing The Fog

Into the midst of this fog, like a stiff breeze preceding a change in the weather, comes Professor Kenneth Abraham's new book, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES,[8] a book which goes a long way toward clearing the judicial air.

The first thing one notices about Environmental Liability Insurance Law is that its author's perspective is unique. Much of recent scholarship concerned with environmental insurance coverage is written by advocates whose efforts are directed primarily at providing support for the litigation positions they take on behalf of their clients.[9] As a professor of law at the University of Virginia who teaches and writes extensively about insurance law, Professor Abraham has no such client constraints. Therefore, as an academic, Abraham provides a much more evenhanded analysis than previous authors.

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This evenhanded approach to the subject is an important first step toward lifting the fog. Environmental Liability Insurance Law does not attempt to state, authoritatively, what the law is; it is not a comprehensive collection and analysis of cases, and it is not a piece of advocacy. Rather, it is an attempt to identify the problems of insurance policy interpretation the courts currently face and to evaluate the strengths and weaknesses of the arguments on either side of the numerous questions.

IV. Getting To The Heart Of The Matter

The value of ENVIRONMENTAL LIABILITY INSURANCE LAW lies in the extent to which it is successful in getting to the heart of the complex issues and exposing the illogic or limitations of the competing arguments.

The book is most successful in exposing the limitations of often-repeated arguments. For example, one central issue involves the interpretation of the phrase "as damages" found in the widely-used standard-form coverage clause of commercial liability insurance policies, which are usually at issue in these cases. The standard-form policy covers "all sums which the insured shall become legally obligated to pay *as damages* because of bodily injury or property damage to which this insurance applies caused by an occurrence."[10]

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Insurance companies often argue that CERCLA liability does not constitute "sums which the insured shall become legally obligated to pay *as damages*."[11] This argument is based on the maxim that every word in a contract should be given independent meaning and should not be interpreted such that words or phrases are superfluous.

The first step in this argument is to point out that the word "damages" has two possible interpretations, one making the phrase "as damages" superfluous and the other not. Under a broad interpretation, "damages" can refer to any costs imposed on a defendant through litigation whereas under a narrower interpretation it refers only to monetary awards, as opposed to injunctive or other non-monetary relief.

Next, insurers argue that the broader interpretation should be rejected because if "damages" is taken to mean any costs imposed on a defendant through litigation, then the phrase "all sums which the insured shall become legally obligated to pay as damages" becomes equivalent to "all sums which the insured shall become legally obligated to pay." Such a result, insurers claim, reads the phrase "as damages" out of the policy. Thus, "damages" must be interpreted narrowly as including only monetary awards.

According to insurance companies, CERCLA liability typically imposes only non-monetary costs on policyholders because the EPA usually orders Responsible Parties to clean up a site rather than ordering them to pay money to reimburse someone else for cleaning the site. This form of liability, insurance companies argue, would be covered if the term "damages" were interpreted in its broader sense, but is not covered if "damages" is interpreted in its narrower sense.

This issue often becomes very complex in court battles because the parties argue, for example,

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about whether the "independent meaning" rule takes precedence over other rules of interpretation that yield different results, or whether a CERCLA order to clean a site is equivalent to an order to reimburse someone else for cleaning the site. Both arguments generate a dense fog.

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Abraham, however, cuts right through the fog to the heart of the matter by exposing a fatal limitation of the "independent meaning" argument, stating as follows:

> If the only form of legal obligation that could possibly be precluded from coverage by the "as damages" clause were the obligation to pay cleanup costs, then the fact that the clause does contain words of limitation ["as damages"] would strongly suggest that liability for such costs does not constitute liability payable "as damages." There are a number of different kinds of legal obligations, however, that would fall within the terms of the Insuring Agreement in the absence of the "as damages" clause. On occasion taxes or subdivision exactions may be levied on a distinct class of citizens or property owners in order to raise funds to make repairs of property that has suffered damage (a private road in a subdivision damaged by flooding, for example). Similarly, civil penalties for violation of statutes or ordinances are sometimes assessed on a strict liability basis. Because insurance against liability for such penalties probably would not violate public policy, the "as damages" language functions to preclude coverage of such liabilities.[12]

Hence, Abraham concludes, since the "as damages" phrase functions to preclude coverage for such taxes and penalties, "as damages" is not read out of the policy if the phrase is interpreted in its broader sense as including any costs imposed on a defendant through litigation. Abraham's approach disposes of the "independent meaning" argument by showing that it does not really help resolve the "as damages" issue one way or the other. This analysis makes the usual complex arguments unnecessary. As he does with the "as damages" issue, Abraham cuts to the heart of many of the central issues in these environmental insurance coverage suits and exposes the weaknesses and limitations of the arguments made by both sides. It is this approach to analyzing environmental insurance coverage issues and Abraham's success in applying it that makes ENVIRONMENTAL LIABILITY INSURANCE LAW valuable.

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V. Scope Of Issues

The value of ENVIRONMENTAL LIABILITY INSURANCE LAW is enhanced by its comprehensive scope. Abraham analyzes issues relating to the 1966, 1973 and 1986 versions of the standard-form comprehensive general liability ("CGL") policy. He discusses issues that arise with respect to "umbrella" or "excess" insurance (i.e., policies that provide coverage for losses exceeding the limits of relevant CGL policies). He analyzes liability policies produced in the late 1970s and early 1980s which the insurance industry specifically designed to cover environmental losses, called Environmental Impairment Liability and Pollution Liability Insurance policies,[13] and Abraham even discusses the potential coverage for environmental liability under first-party property insurance.[14]

In addition to these topics, ENVIRONMENTAL LIABILITY INSURANCE LAW addresses procedural issues such as forum selection and choice of law questions. The book also touches briefly on the areas of reinsurance law (a reinsurance policy provides insurance for insurance companies) and consolidation of large multi-party or multi-site coverage litigation. In short, ENVIRONMENTAL LIABILITY INSURANCE LAW has something useful to say about most topics one is likely to encounter in environmental insurance coverage litigation.

Since the book does not attempt to discuss every authority and every argument on every subject, it is able to accomplish its limited purpose with a large number of topics.

VI. One Caveat

In general, Abraham's approach to analyzing the issues, getting to the heart of the matter, fits well with the comprehensive scope of issues treated. Since the book does not attempt to discuss every authority and every argument on every subject, it is able to accomplish its limited purpose with a large number of topics.

With respect to some subjects, however, Abraham's limited approach to analysis leaves much unsaid. For example, the book's discussion of the 1970 standard-form pollution exclusion clause is little more than a primer on the subject. The 1970 pollution exclusion states:

> This insurance does not apply... to bodily injury or property damage arising out of the discharge, dispersal, release or escape of [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.[15]

The judicial debate concerning this exclusion centers on the question of whether it allows for coverage of

all occurrences of unexpected and unintended discharges of pollutants or only for those unexpected and unintended discharges of pollutants that also take place in a short or instantaneous period of time.

In discussing the 1970 pollution exclusion clause, Abraham makes several important points. He notes that this standard-form language was centrally drafted by insurance industry trade organizations and then promulgated to state insurance commissioners for approval. Because that process is similar to the drafting of legislation, the drafting and approval history of such insurance policy language is relevant to its interpretation in the same way legislative history is relevant to the interpretation of a statute.[16]

Abraham then analyzes the short standard explanation sent by the insurance industry to all state insurance commissioners in 1970 and the representations made by insurance industry representatives to the West Virginia Insurance Commissioner in a July 1970 hearing held concerning the meaning and effect of the then-proposed exclusion. From his analysis of this limited information, Abraham concludes that the insurance industry represented to state officials that the pollution exclusion was meant to allow coverage for unintended and unexpected pollution, but that no representations were made concerning the supposed additional requirement that discharges of pollutants take place in a short or instantaneous period of time.[17]

As far as it goes, this analysis appears to be sound. There is, however, a great deal more to be said about the drafting and promulgation history of the 1970 pollution exclusion. For example, the minutes of meetings of the industry trade organization principally responsible for drafting the exclusion and correspondence among its members and by it members with third parties shed light on the real intentions of those who drafted the exclusion. These documents tell an interesting story, but that story has not been allowed to come to light because the insurance industry zealously protects these records from public scrutiny.

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In addition, whatever the more complete drafting history reveals, such information must be interpreted in view of the fact that the 1970 pollution exclusion was drafted long before CERCLA liability was created in 1980. In 1970, there was no such thing as retroactive, absolute, joint and several liability for the actions of third-party waste haulers over whom the policyholder had no control. The 1970 pollution exclusion could not possibly have been consciously intended by the insurance industry to exclude a type of liability that did not exist, yet courts are called upon to decide whether the language of the exclusion, as a matter of coincidence, happens to exclude such liability.

These considerations concerning the 1970 pollution exclusion are necessary for a complete analysis, but are not discussed in ENVIRONMENTAL LIABILITY INSURANCE LAW. This limitation, however, does not detract from the value of Abraham's analysis. If Abraham attempted to include a complete discussion in his treatment of each topic, the resulting book would have been much longer and would not have accomplished its purpose of getting to the heart of the various issues. Nevertheless, the reader should not expect that ENVIRONMENTAL LIABILITY INSURANCE LAW is the ending point of research, rather it is the beginning, and a very good one at that.

VII. Conclusion

ENVIRONMENTAL LIABILITY INSURANCE LAW is an excellent and evenhanded introduction to the myriad issues in environmental insurance coverage disputes. Lawyers new to this field, whether they represent insurance companies or insured consumers, should use the book to become familiar with the numerous complex issues of environmental liability insurance. More experienced lawyers and judges should use the book to focus on meritorious positions, and consequently, to begin clearing away the Dickensian fog currently permeating American courts.

ENDNOTES

1 Charles Dickens, *Bleak House* 1-2 (Oxford Press 1987) (1853).
2 *See e.g.*, THE COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, LIABILITY ACT, ("CERCLA") 42 U.S.C. §§ 9601-9675 (1988).
3 *Id.*
4 *E.g., United States v. Chem-Dyne*, 572 F. Supp. 802, 811 (S.D. Ohio 1983). *See* 42 U.S.C. § 9601 (32) (1988).
5 Thomas Reiter et al., *The Pollution Exclusion Under Ohio Law: Staying The Course*, 59 U. CIN. L. REV. 1165, 1170-71 (1991).
6 *Id.*
7 *Id.*
8 Kenneth S. Abraham, ENVIRONMENTAL LIABILITY INSURANCE LAW: AN ANALYSIS OF TOXIC TORT AND HAZARDOUS WASTE INSURANCE COVERAGE ISSUES (1991) [hereinafter ENVIRONMENTAL LIABILITY INSURANCE LAW].
9 *See e.g.*, David B. Goodwin, *Disputing Insurance Coverage Disputes*, 43 STAN.L.REV. 779 (1991) (Reviewing Barry R. Ostrager & Thomas R. Newman, *Handbook On Insurance Coverage Disputes* (3d ed. 1990), demonstrating that the book has a decidedly pro-insurer point of view. Ostrager and Newman, of course, typically represent insurance companies in environmental insurance coverage disputes).
10 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 291.
11 *See, e.g., Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co.*, 842 F.2d 977, 985 (8th Cir. 1988).
12 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 62.
13 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 195-215.
14 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 215-222.
15 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 291.
16 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 36-39.
17 ENVIRONMENTAL LIABILITY INSURANCE LAW, *supra* note 9, at 155-160.