WOODEN & McLAUGHLIN LLP

Attorneys At Law

WHO'S ON DECK AND WHAT'S ON FIRST

Potential Issues for Excess Insurers in Long Term Environmental Contamination Cases [1]

By James M. Boyers and Matthew J. Trainor

Declaratory judgment actions in which policyholders seek insurance coverage for historical environmental contamination under comprehensive general liability policies, umbrella insurance policies, and/or excess insurance policies present complex legal, factual, and scientific issues to defense practitioners. Often, the alleged contamination at issue took place over decades. These cases usually involve layers of policies offering potential coverage and significant uncertainty regarding the potential scope of remediation costs.

The authors lack the space here to discuss all the potential defenses to coverage that may be available in a given environmental coverage case, although many exist. Instead, we identify several issues for umbrella or excess carriers that may affect potential coverage allocation, including the trigger of coverage and related issues such as horizontal versus vertical exhaustion of coverage, and potential contribution claims. We consider certain issues in the context of published Indiana cases. Finally, we consider how Indiana courts may address other issues in the future based on decisions from other jurisdictions.

The policy language always serves as the starting point of any coverage analysis. Of course, practitioners must evaluate this policy language within the context of Indiana common law. Often, policyholders seek to use the Indiana Supreme Court's opinion in *Allstate Insurance Co. v. Dana Corp.* ("*Dana*"), 759 N.E.2d 1049 (Ind. 2001), to create concerns for excess and umbrella insurers where the potentially covered remediation costs might involve millions of dollars. They suggest that where there may be a "continuous occurrence" of "property damage" over many policy years, the policyholder may pick any one policy year and pursue recovery of all sums connected with that occurrence from the primary, umbrella, and/or excess policies in that chosen year. Where the alleged environmental contamination took place over many decades, many questions exist regarding the potential trigger of coverage and the extent of any triggered coverage. For example, practitioners must first determine whether *Dana*'s concept of joint and several liability can even apply to the policy. *See Irving Materials, Inc. v. Ohio Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 18692 (S.D. 2008) (distinguishing the policy language at issue in that case from the policy language at issue in *Dana*).

As an initial question, practitioners must consider whether the insured can prove that an occurrence of property damage actually took place within the policy period. To do so, counsel must determine whether the insured must prove, among other things, an unforeseen release of contaminants within the policy period or simply a migration of existing contamination. In *PSI Energy, Inc. v. Home Ins. Co.*, 801 N.E.2d 705 (Ind. Ct. App. 2004), the court of appeals

[1] This article was first published in the Defense Trial Counsel of Indiana's section of the *Indiana Lawyer* (Mar. 31-Apr. 13, 2010). Reprinted with permission of the Defense Trial Counsel of Indiana.

concluded that under certain policy language, an insured need not "specifically prove that new releases of contaminants caused property damage during the relevant policy periods" where the definition of occurrence is designed to be "a restriction limiting the insured's ability to file multiple claims against the insurer for property damage caused by one continuous occurrence." *Id.*, 801 N.E.2d 734. The court in *PSI Energy* found that the following definition of *occurrence* fell into that category: "[a]n event or a continuous or repeated exposure to conditions which unexpectedly results in personal injury, property damage or advertising injury during the policy period, all said exposure to substantially the same general conditions existing or emanating from the one premises shall be deemed one occurrence." *Id.*, 801 N.E.2d at 733. The court of appeals held that under such a definition, the insured "must prove [only] that subjectively unexpected and unintended contamination *continued to cause damage* during the relevant policy period to trigger coverage under these policies." *Id.* 801 N.E.2d at 734 (citing *Dana*, 759 N.E.2d at 1060) (emphasis added).

In *PSI Energy*, the court of appeals also considered a group of policies with the following different definition of *occurrence*: "one happening, or a series of happenings arising out of one event, taking place *during the term of this policy.*" 801 N.E.2d at 733 (emphasis added). Under such a definition, if an insured proves "that subjectively *unexpected and unintended leaks were occurring* from subsurface containment structures and causing contamination of the groundwater during the relevant policy periods, such leaks would constitute an event within the meaning of the policy language." *Id.* at 736 (emphasis added). Under such a standard, an insured faces a much greater burden to establish a covered occurrence of property damage within the policy period. The standard also arguably rules out any coverage for property damage arising from events that took place before or after the policy period.

In *Dana*, Allstate, an excess insurer, argued that it was responsible for only those property damages incurred by the insured, Dana, during the particular policy period itself. The court disagreed and held that under the policy terms, "once an accident or event resulting in Dana's liability--an occurrence--takes place within the policy period, Allstate must indemnify Dana for 'all sums' Dana must pay as a result of that occurrence, subject to the policy limits." *Dana*, 759 N.E.2d at 1058. Therefore, "whether or not the damage effects of an occurrence continue beyond the end of the policy period, if coverage is triggered by an occurrence, it is triggered for 'all sums' related to that occurrence." *Id.* Thus, assuming exhaustion of underlying coverage, an excess insurer under a policy including such language may be liable for damages related to the occurrence that took place after the policy period, depending on other terms within the policy.

The Indiana Supreme Court in *Dana* based its opinion on the policy terms and definitions at issue in the policies and the arguments presented by the parties in that case. Therefore, where a policy contains terms and definitions different from those found in the *Dana* policies and limits its coverage to only property damages that actually occurred during the policy period, the insurer should not be liable for damages that occurred either before or after the policy period. *See Irving Materials, Inc. v. Ohio Cas. Ins. Co.*, 2008 U.S. Dist. LEXIS 18692 (S.D. 2008). In contrast to the policies in *Dana*, the *Irving* case dealt with a policy where the excess insurer agreed to pay "those sums" in excess of the primary insurer's policy limits for property damage "that takes place during the policy period …." 2008 U.S. Dist. LEXIS 18692 at 16. The *Irving* court held that a policy containing the qualification language "that occurs during the policy period" in the coverage grant distinguished the *Irving* policies and required a holding different from the holding in *Dana*. *Id.* at 18. *Irving* limited the holding in *Dana* to those policies that do not expressly

limit liability coverage to property damage occurring within a specified policy period. *Id.* Therefore, a practitioner must always determine whether *Dana* can actually apply to the case.

Whether the potential coverage arises only with respect to property damage that actually took place within the policy period, or from an event that took place within the policy period, or that took place continuously over several policy periods, practitioners representing excess or umbrella carriers must consider at what point coverage may be triggered by the exhaustion of underlying coverage. Key language for evaluating this issue usually falls under the "Limits of Liability" section of the policy. For example, some excess insurance policies use the following language in their Limit of Liability Section: "The Company shall only be liable for the Ultimate Net Loss in excess of … the limits of the underlying insurances as set out in the attached SCHEDULE OF UNDERLYING POLICIES in respect of each Occurrence covered by said underlying insurances." *See Dana*, 759 N.E.2d at 1062. Such language arguably limits the exhaustion analysis to those policies specifically identified in the schedule of underlying policies attached to said policy. However, many excess and umbrella policies use much more expansive language.

For example, the Northern District of California recently discussed the following language from a Limit of Liability section in an excess policy: "[the insurer] will be liable only for that portion of damages in excess of the Insured's Retained Limit which is defined as the greater of either: … the total of the applicable limits of the underlying policies listed in the Schedule of Underlying Insurance and *the applicable limits of any other underlying insurance providing coverage to the Insured … .*" *Pacific Coast Bldg. Prods., Inc. v. AIU Ins. Co.*, 2006 U.S. Dist. LEXIS 82028 at *12 (N.D. Cal. 2006), *aff'd, Pacific Coast Bldg. Prods., Inc. v. AIU Ins. Co.*, 300 Fed. Appx. 546 (9th Cir. 2008) 2008 U.S. App. LEXIS 26717 (9th Cir. 2008) (not for publication) (emphasis added). The Ninth Circuit affirmed the district court's holding that "the clear and explicit language of the [excess policy] requires that 'any other underlying insurance' first be exhausted before … an excess carrier would drop down to provide coverage to the insured. This language compels application of the horizontal exhaustion rule." 300 Fed. Appx. at 548, 2008 U.S. App. LEXIS 26717 at **2.

More recently, Judge Barker addressed the issue of exhaustion of underlying coverage in *Trinity Homes LLC v. Ohio Casualty Insurance Co.*, 2009 U.S. Dist. LEXIS 88697 (S.D. Ind. 2009) involving similar language in an umbrella policy and reached the same conclusion. In *Trinity*, the policy language at issue defined underlying insurance as "the policies of insurance listed in the Schedule of Underlying Policies and the insurance available to the insured under all other insurance policies applicable to the 'occurrence.' 'Underlying insurance' also includes any type of self-insurance or alternative method by which the insured arranged for funding of legal liabilities that affords coverage that this policy covers." *Trinity*, at *36. In considering the exhaustion issue, Judge Barker cited *Dana* and held as follows: "Where the insured has both primary and excess insurance, the excess insurer's liability only arises once all 'underlying insurance,' as that term is defined in the insurance contract, is unavailable. * * * Because the … Policy clearly defines this term to include 'all other insurance policies,' all of the relevant policies must be unavailable before Cincinnati's liability will be triggered." *Id.* at *37-*38. Therefore, Judge Barker concluded that the policy required horizontal exhaustion.

Judge Barker next considered what constituted exhaustion of an underlying policy. In *Trinity*, the plaintiffs settled with many of their primary insurers for less than policy limits and entered into settlement agreements that "stated that payment by the underlying insures of the agreed amount(s) 'exhausted' the policies." *Id.* at *38. The insured then argued that the underlying policies had been exhausted based on that language in the settlement agreements.

Judge Barker forcefully rejected the insured's argument. "Plaintiffs cannot circumvent that clear intention embodied in the contract simply by branding each settlement with an underlying insurer an 'exhaustion' of the policy, when, in fact, it patently is nothing more than a reduction of the coverage under that policy." *Id.* at 40. Judge Barker concluded that the plaintiffs had failed to meet their burden of proving exhaustion of underlying coverage in order to trigger coverage under the umbrella policy.

Assuming an excess policy may ultimately be triggered, excess coverage may be limited based on other portions of the policy. For example, certain excess policies include a condition to coverage entitled "Prior Insurance and Non-Cumulation of Liability." This condition usually states something similar to "that if any losses also covered in whole or part under any other excess policy issued to the insured prior to the inception date hereof, the company's limited liability as stated in the declaration shall be reduced by any amounts due to the insured on account of such loss under such prior insurance." The authors have found no Indiana authority on this provision. However, the United States District Court for the District of Oregon has held that this provision is enforceable. *See California Ins. Co. v. Stimson Lumber Co.*, 2004 Dist. LEXIS 10098 at 32 (D. Or. 2004) (applying prior insurance and non-cumulation of liability condition to reduce coverage limits for an excess insurer), *aff'd in part, rev'd and remanded in part on other grounds*; *California Ins. Co. v. Stimson Lumber Co.*, 325 Fed. Appx. 496 (9th Cir. 2009) 2009 U.S. App. LEXIS 8031 (9th Cir. 2009) (unpublished). Thus, under *Stimson Lumber,* even if an insured proved the existence of a continuing occurrence of property damage and a legal basis for an all-sums allocation, an excess insurer in a later year could apply such a condition to reduce its potential exposure from an attempted "spike" of coverage.

Assuming an excess policy gets triggered under its terms, a contribution action may be the next logical step. *See Federated Rural Elec. Ins. Exch. v. National Farmers Union Prop. & Cas. Co.*, 805 N.E.2d 456 (Ind. Ct. App. 2004), *vacated and dismissed*, 816 N.E.2d 1157 (Ind. 2004).

These are just a few of the arguments available to excess insurers dealing with cases involving long term environmental contamination with significant remediation costs. Attorneys representing excess insurers should carefully scrutinize all applicable policy language to determine whether these arguments may apply.

Mr. Boyers is a partner and Mr. Trainor is an associate in the Indianapolis firm of Wooden & McLaughlin. Mr. Boyers is a member of the DTCI. The opinions expressed in this article are those of the authors.