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INSURING YOUR BUSINESS

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INSURANCE COVERAGE RELATED TO OIL AND NATURAL GAS FRACKING

By Richard H. Friedman

So, if a homeowner claims that her water supply was contaminated by "fracking", a technique used to obtain shale gas from deep bedrock by horizontal drilling and injecting fluids, primarily water and sand, creating vein-like fractures that allow for enhanced gas extraction), do the oil and natural gas companies responsible for the drilling have insurance coverage for such claims?

The McNees Insurance Recovery and Counseling group is not aware of any reported cases as yet on this issue, but at least one company, Nationwide Insurance, has preemptively advised its oil and gas industry clients that they will not provide coverage for such claims. Nationwide's position was recently reported in the Environmental Reporter and was offered, according to Nationwide, to counter social media claims that Nationwide had covered such claims in the past, but were now disclaiming them.

Nationwide did not discuss the legal basis for its preemptive position, but it is most likely based upon the total pollution exclusion that is included in virtually all standard commercial liability policies. This exclusion applies to any claim arising from "contaminants," which is defined broadly in the exclusion. Depending on the nature of any claim asserted, insurers could also deny coverage based upon the earth movement/earthquake exclusions found in most policies.

In reality, we suspect that raising the matter implicates a broader political issue at play outside the scope of this article. Shale gas development has been a catalyst for activism, much of which arises in the absence of scientific evidence or factual confirmation. Such is the case for the trigger-word fracking in this instance. We observe that consequences attributed connotatively to fracking may be rather, in fact, merely the result of drilling and cementing (or the failure to do so properly), activities not unique to fracking. Thus, the Nationwide notice may be a reaction to the "chatter" that attempts to subsume fracking into the shale gas political fray.

The practical take-away from this news is that, unsurprisingly, insurance companies are reluctant to operate in realms of poorly understood or articulated risk. Thus, for property owners and oil and gas companies alike, you need to assess and understand which activities constitute uninsured liability risk with regard to shale gas development and protect yourself accordingly.

The good news is that insurance coverage for pollution and for earth movement/earthquakes is readily available in the marketplace. Property owners and gas companies just have to pay additional premiums to get it.

Additionally, understanding this state of insurance coverage, you should consider the importance of a strong indemnification provision in any oil and gas lease documents. McNees Wallace and Nurick's Insurance Recovery group is able to assist with both risk analysis and drafting contract language. ■

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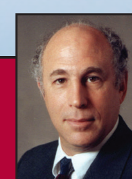

FINDING COVERAGE FOR FIDUCIARY LIABILITY CLAIMS *By Michael R. Kelley*

Let's say that you are an owner of a company with a 401k plan, or the administrator of the 401k, and you get sued for allegedly violating your fiduciary duties under ERISA. Let's assume further that you have general liability, employment practices liability, directors and officers liability, and workmen's compensation insurance coverages. You also have the Fidelity Bond coverage specifically required by ERISA.

Are you covered for defense costs and any money damages that you are found liable to pay?

Unfortunately, the answer in most cases is no.

Traditional insurance policies usually exclude coverage for fiduciary liability arising from the handling of employee benefit plans, and the Fidelity Bond required by ERISA protects only the plan – not the owners or administrators - from claims arising from employee fraud or dishonesty.

The solution to this coverage gap is to purchase, either separately or as part of another policy or management liability program, fiduciary liability coverage. The purpose of such coverage is to protect owners and fiduciaries from claims of breach of their fiduciary duties in relation to employee benefit plans. ■

WHAT'S THE DIFFERENCE BETWEEN AN INSURANCE CERTIFICATE AND AN ADDITIONAL INSURED?

By Michael R. Kelley

Business owners are often required to obtain documentation of either an insurance certificate or proof of an additional insured. What situations might require an insurance certificate and not an additional insured, or vice versa, and what is the difference between them?

An insurance certificate is proof of insurance. It is usually issued by an agent or broker to a policy holder so that the policy holder can prove to others that it has insurance coverage. The certificate of insurance is used to prove insurance in a wide variety of circumstances, including real estate closings, construction contracts, and vendor agreements. It is important to note that the certificate of insurance is not the insurance policy itself, and any language contained on the certificate that is contrary to the actual policy will not be effective.

One type of insurance certificate is an "additional insured" certificate. This is proof that one party has been added to another party's insurance policy as an additional insured. A common situation would be, for instance, if a business uses an outside vendor to perform some work at its facility. The business may want to be added as an additional insured to the vendor's general liability policy in case an accident occurs while the vendor is working on the business's property. As an additional insured, the business could simply submit any claims arising from such an accident to the vendor's insurance carrier and that carrier would have to defend any lawsuit and pay any claim.

In addition to the additional insured certificate, which is just proof of insurance, an insurance company issues an "additional insured endorsement," which is the actual policy language that explains what is covered and what is not covered as an additional insured. Being "endorsed on the policy" means that one has been added to another's insurance coverage and an endorsement has been issued on their behalf.

An additional insured endorsement may cover all additional insureds generally, or be issued for each specific additional insured. In either case, we recommend that an additional insured obtain both the additional insured certificate and the additional insured endorsement. That way, it has the full range of coverage offered by the policy. Also, if the relationship is ongoing from year to year, an additional insured should require that it receive the additional insured certificate and endorsement on a yearly basis. For instance, if a business has a five year contract with a vendor, and obtains the certificate and endorsement at the outset of the relationship, the business should require the vendor to supply this information each year. The vendor could have changed insurers, or even allowed the policy to lapse. By requiring yearly proof, the business can make sure that coverage is still in place. ■

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