

# Your Coverage Advisor

## Apples to Apples: Comparing Pollution Legal Liability Policies



By Rob Snyder  
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With the exception of a few bells and whistles, commercial insurance policies are “all the same, just a commodity,” right? “Once you have read one business owners’ policy, you have read them all,” right? Not so when it comes to environmental liability insurance. The coverage grants, terms, and conditions in environmental liability policies can vary widely, and careful review is required to find the policy that best meets the specific needs of the policyholder and property. Indeed, environmental insurance policies can be constructed uniquely for the situation at hand, whether for a real estate transaction, a brownfield re-development project, or a corporate “M&A” transaction. When looking for environmental insurance, find a broker with demonstrated experience with environmental risk solutions and keep the following points in mind.

Environmental liability insurance has been on the market since at least the early 1980s. Early policies were written specifically to cover contingent RCRA closure obligations, or were intended to fill the gap in coverage created by the qualified pollution exclusion. Today, many insurance companies offer some form of environmental insurance to cover a wide variety of specific risks. For purposes of this article, however, we have analyzed several comparable policy forms offered by Great American Insurance Group, The Chubb Group, and Zurich, for insuring against environmental risk arising out of real estate, or premises, owned by the insured.

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## Apples to Apples: Comparing Pollution Legal Liability Policies (Continued)

Premises environmental liability insurance, also known as pollution legal liability insurance, is almost always written on a claims-made and reported basis, as opposed to an occurrence basis. This generally means that the “pollution condition” must have been discovered during the policy period, or the claim made against the policyholder during the policy period, and the claim must be reported to the insurer during the policy period. Some companies do offer coverage for certain risks on an occurrence basis, however. For example, the Great American policy includes occurrence-based coverage for pollution conditions arising out of contracting services performed by the insured and for pollution conditions arising out of the transportation of products or wastes by a carrier to or from

a job site or covered location. These occurrence-based coverage grants offer extended protection to policyholders that can be particularly valuable depending on the nature of the policyholder’s operations.

Premises environmental liability insurance policies typically contain a “menu” of coverage grants which the policyholder selects. At a minimum, these include third-party liability and first-party coverage for newly discovered pollution conditions “on, at, under or emanating from” the policyholder’s scheduled premises. There, the obvious similarities end. Some policies, but not all, include specific coverage for transportation of materials, business interruption, non-owned disposal sites, and crisis management expense.

Premises environmental liability policies generally exclude coverage for environmental conditions “known” to a “responsible insured” prior to the inception date of the policy. Each policy spells out in detail what is meant by “known” and who is included within the terms “responsible insured” or “responsible person.”

Other significant differences in these policies are found in the definitions sections as well. In particular, the definition of “Pollution Condition” is constantly being updated to address topical environmental themes such as illicit abandonment and mold. Great American now includes methamphetamines or associated chemicals within the general definition and

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### **Rob Snyder – The Fedeli Group, Vice President, Property & Casualty – Environmental Risk Management**

Rob Snyder serves as Vice President of Environmental Risk Management with responsibility for new business production in the Property and Casualty Division of The Fedeli Group. Rob designs, implements and executes plans that include technical support of corporate accounts, and furthers the development of environmental risk management clients. Rob provides consultative problem solving in the application of environmental insurance for mergers and acquisitions,

real estate development, manufacturing, transportation, contracting, brownfield re-development and any business that poses an environmental financial risk to clients’ balance sheets.

With a Bachelor of Science degree in mechanical engineering, Rob is both a Certified Insurance Counselor and Chartered Property and Casualty Underwriter. He started with The Fedeli Group in 2002. Rob is president of a six-county business network organization and a seventh grade parish religion teacher.



adds biological hazards as the direct result of suicide, homicide or other violent crime for Coverage F. And, definitions of “Loss” can significantly alter the scope of coverage, particularly when it comes to covering fines and penalties. “Emergency Response Cost” may mean “first party remediation costs incurred within seven days following the discovery” (Chubb), “costs . . . incurred by the insured on an emergency basis” (Great American), or “costs . . . incurred to avoid an actual imminent and substantial endangerment to the public health or environment” (Zurich). Such subtle

differences can be outcome-determinative in an actual claim situation.

Premises environmental liability insurance, also known as pollution legal liability insurance, is almost always written on a claims-made and reported basis, as opposed to an occurrence basis.

Finally, each policy will have its own list of exclusions, and these vary from policy

to policy. Exclusions relating to contractual liability, transportation, products, biological hazards and others may significantly restrict coverage for some policyholders depending on the nature of their business.

An experienced broker, working with the policyholder, will give careful consideration to the nature of the risk being insured, the stakeholders’ varying interests, the policy terms and conditions, as well as price and acceptability of the insurer. Having a qualified and experienced team of professionals is necessary to successfully navigate the waters of environmental insurance. ■

## Passing the Buck: Assignment of Bad Faith Claims in Ohio



By JoZeff Gebolys | [jgebolys@brouse.com](mailto:jgebolys@brouse.com)

When a policyholder forwards a lawsuit to his or her insurer, the expectation is that the insurer will vigorously defend against the action and work towards a resolution of the case that protects

Or perhaps the insurer agrees to defend, but does so subject to a reservation of rights, and with very different ideas about the value of the case or the quality of settlement proposals offered by the plaintiff.

recover against the insurer for breach of contract and bad faith to the plaintiff in return for a stipulated or consent judgment approved by the court. Combined with a covenant-not-to-execute against the rest of his or her assets, this provides the policyholder with a swift exit, and provides the plaintiff with an opportunity to collect against the insurer, who likely has a greater ability to pay damages.

But courts across the country, and specifically in Ohio, have not been entirely receptive to these agreements.<sup>1</sup> Because Ohio requires a contractual relationship in order for a party to bring a bad faith claim, third parties must acquire an assignment in order to recover against another's insurer. *Siemientkowski v. State Farm Ins. Co.*, 8th Dist. Cuyahoga No. 85323, 2005-Ohio-4295, ¶ 20. Even so, an assignment's validity may depend heavily on the insurer's involvement in the case.

Where an insurer unjustifiably refuses to defend the insured, "the insured[] [is] at liberty to



the policyholder's interests. That is not always how the situation unfolds, of course. Perhaps the insurer believes that no coverage exists for the underlying lawsuit, and refuses to defend the insured.

Both of these scenarios place an insured in an uncomfortable position. Some policyholders attempt to avoid the risks associated with ongoing litigation by assigning their rights to

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## Passing the Buck: Assignment of Bad Faith Claims in Ohio (Continued from page 4)

make a reasonable settlement without prejudice to their rights under the contract.” *Sanderson v. Ohio Edison Co.*, 69 Ohio St.3d 582, 586, 1994-Ohio-379, 635 N.E.2d

These decisions appear motivated by a fear that plaintiffs and insureds will collude to “manufacture” bad faith claims by agreeing to settlement amounts much larger than the actual value of the claim.

19. Afterwards, an assignment and consent judgment are likely to be effective against the insurer provided that there is no indication of collusion or fraud on the part of the insured and the plaintiff. *Andrade v. Credit Gen. Ins. Co.*, 5th Dist. Stark Case No. 2000CA00002, 2000 Ohio

App. LEXIS 5531, at \*19-26 (Nov. 20, 2000). That being said, the plaintiff will still be required to prove bad faith on the part of the insurer.

However, where an insurer is defending the action, but refusing to settle the case within policy limits, Ohio courts look much less favorably on the assignment of an insured’s breach of contract and bad faith claims. In this situation, Ohio law requires an *adjudicated* judgment against the insured in excess of the policy limits before a third party can recover against the insurer. *Romstadt v. Allstate Ins. Co.*, 59 F.3d 608, 611 (6th Cir.1995)(analyzing Ohio law). This analysis applies despite an insurer’s reservation of rights as to the existence of coverage, and even applies where the insurer has a declaratory action pending elsewhere. *Auto-Owners Ins. Co. v. J.C.K.C., Inc.*, 9th Dist. Summit No. 21847, 2004-Ohio-5186, ¶¶ 18-19. Thus, where the insurer is defending, a policyholder has few options until the case is resolved. These decisions appear motivated by a fear that plaintiffs and the policyholder-defendants will collude to “manufacture”

bad faith claims by agreeing to settlement amounts much larger than the actual value of the claim, thereby coercing insurers to settle. *Calich v. Allstate Ins. Co.*, 9th Dist. Summit No. 21500, 2004-Ohio-1619, ¶ 8. Despite these lower court decisions, the Ohio Supreme Court has yet to weigh in on the assignability of bad faith claims, and at least one court has rejected the majority view. *Ohio Bar Liab. Ins. Co. v. Hunt*, 152 Ohio App.3d 224, 2003-Ohio-1381, 787 N.E.2d 82, ¶ 30 (2d Dist.) (finding no adjudicated excess judgment necessary for a valid assignment). Thus, the state of the law in Ohio may still be subject to change.

Policyholders should carefully craft any covenant-not-to-execute in connection with an assignment so as to preserve coverage rights and avoid falling under policy exclusions relating to assignment. Of course, many considerations will go into determining how best to handle an uncooperative insurer. As each situation and jurisdiction is different, coverage counsel can be an invaluable tool in deciding whether an assignment is right for you. ■

# Managing Cybersecurity Risk in the Construction Industry



By Charles D. Price | [cprice@brouse.com](mailto:cprice@brouse.com)

Major data breaches are in the news almost every week. Although only the high-profile, mega-breaches make the headlines (e.g., Target, Sony, and Home Depot), cybersecurity breaches affect businesses of all sizes. Of the estimated 120,000 or so cybersecurity attacks per day, about 25% are aimed at companies with less than 100 employees. Moreover, cybersecurity breaches affect all industry sectors, construction included. Indeed, 2015 saw several reported cases of data breaches in the construction industry. Among the victims were two of the largest construction management companies in the United States. So the risk is real and must be managed effectively.

## The Cybersecurity Risks to Contractors

Like any other business, contractors must take reasonable precautions to protect against traditional cybersecurity risks—i.e., the risk of data breaches, system failures, and cyber-attacks that can compromise sensitive company and employee information. But there are industry-specific factors that expose contractors to some additional risks.

For instance, contractors often use computers and tablets to handle sensitive project information, such as images, blueprints, or architectural and engineering drawings. This information is often stored in huge electronic files where viruses and malware can hide. If not caught early, these malicious programs can compromise or destroy critical information, impacting project deadlines and creating significant financial liability.

Moreover, construction sites often provide a golden opportunity for thieves and hackers.

Employee laptops, mobile devices, and tablets—which are a treasure-trove of sensitive data—are frequently used at construction sites. And they are often targets of theft. Moreover, because these mobile devices are connected to an unsecured Wi-Fi network at a jobsite, hackers can potentially connect to your company's network without you even knowing.

Even if they are not interested in your data, hackers may exploit weaknesses in your system to obtain sensitive third-party information—such as customer or subcontractor data and financial records—or gain access to other IT networks. This is what happened in the Target case. Hackers gained access to the retail giant's billing system via an employee of an HVAC subcontractor. Once inside Target's network, the hackers accessed sensitive financial data for 110 million Target customers. The breach has reportedly cost Target over \$250 million.

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## Managing Cybersecurity Risk

In short, the impact of a cybersecurity breach on your business—or on your project owner's business—can be catastrophic. Accordingly, you should have a risk-management plan in place to avoid the potentially devastating impact of a data breach. While such a plan must be tailored to your unique cyber risks, here are some security measures you should consider:

- **Retain a cybersecurity expert to identify system vulnerabilities before a breach occurs;**
- **Establish security processes and protocols to detect breaches early;**
- **Install security software on your company's servers that can detect and block cyber threats before they infect your system and compromise your data;**
- **Ensure firewalls are enabled and updated regularly with security patches;**
- **Equip systems and mobile devices with software to encrypt data in your office and in transit;**
- **Secure your company's Wi-Fi network, both at the office and at the jobsite;**
- **Create a clearly-defined response protocol should a breach occur;**
- **Train employees on security policies and practices and enforce your policies.**

This last point warrants further discussion. Whether it's human error or malicious acts, studies show that the majority of data breaches originate inside company walls. One recent industry study suggests that 79% of employees engage in behavior (intentional or unintentional) that places their employer's data at risk. Another study concluded that employee conduct caused 59% of cybersecurity incidents last year.

## Insuring Against Cybersecurity Risk

Understand how you can protect your company through insurance, including cyber insurance. Most contractors purchase traditional insurance lines, including Commercial General Liability (CGL) insurance, which may not respond to damages to intangible property and often exclude data and technology losses. Further, other common types of insurance, such as crime policies, directors and officers insurance, professional liability, and first-party property insurance provide little, if any, meaningful protection against cybersecurity risks.

Cyber insurance, however, may cover damage caused by hackers or rogue employees who shut down your (or

your project owner's) website, computer system, or the systems of an essential service provider. Typically, a cyber policy will cover breach notification, crisis response services, data recovery expenses, business interruption, and cyber-extortion. Coverage for additional cyber-related risks—including security and privacy liability, technology errors and omission, and dependent business operation—may be available by endorsement or through a separate product. Talk to your lawyer or insurance broker about what policies and coverages are right for you.

## Conclusion

The construction industry is not immune to cybersecurity breaches. On the contrary, factors unique to the industry make it more susceptible to these risks. Given the prevalence of security attacks, contractors must anticipate being the victim of a cybersecurity attack or breach in the future. It is, therefore, critical to consider and evaluate your cybersecurity risks, particularly in determining risk management plans and the types and amounts of insurance you'll need to best protect yourself. ■



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Amanda M. Leffler  
Sallie Conley Lux  
Caroline L. Marks  
Meagan L. Moore  
Amanda P. Parker  
Charles D. Price  
Paul A. Rose  
David Sporar  
Anastasia J. Wade

## Attorney Highlights

**Gabrielle T. Kelly** spoke on Insurance Coverage for Construction Projects at the NBI seminar on May 16, 2016.

**Amanda M. Leffler** was inducted as a Fellow of the 2016 Class of the Ohio State Bar Foundation.

**Amanda M. Leffler** was appointed to a three-year term on the Board of Governors of the Ohio State Bar Association.

**Keven Drummond Eiber** spoke on maximizing CGL coverage was a speaker at the CMBA Advanced Insurance Law Seminar on June 7, 2016.

**Gabrielle T. Kelly** and her husband, Anthony Anderson, welcomed their new baby boy, Brayden Tate Anderson, on March 29, 2016.



*Brayden Tate Anderson,  
born March 29, 2016*

**Bridget A. Franklin** and her husband, Amir Darr, welcomed their new baby boy, Sufyan "Sufi" Darr, on May 8, 2016.



*Sufyan "Sufi" Darr,  
born May 8, 2016*

**Keven Drummond Eiber**, sailing with her husband Jeff and son Emery, took first place in the 2016 BVI Spring Regatta in Tortola, B.V.I., and first place in the inaugural Caribbean Cup Series, a combined two-regatta event, competing in the VX One class.



## Save the date!

**Webinar: "Broker Liabilities and Best Practices"**  
Presented by: Caroline L. Marks and Matthew K. Grashoff  
July 28, 2016, 1:00 p.m. to 1:30 p.m.  
*Invitation coming soon via email*

**Fourth Annual Insurance Coverage Conference**  
October 13, 2016, 1:30 p.m. to 5:30 p.m.  
**Location:** Embassy Suites Independence  
5800 Rockside Woods Blvd.  
Independence, OH 44131