

CLIENT ADVISORY AUTOMOBILE LIABILITY POLLUTION COVERAGE



On a rainy Monday morning, the interstate highway has been closed – a serious traffic accident involving a pickup truck and a truck-tractor hauling a gasoline tank semi-trailer (tanker) has been reported. Apparently, the pickup truck driver attempted to pass the tanker, lost control due to the wet conditions, and then cut in front of the tanker, causing both vehicles to veer off the road. Fortunately, no one was injured, but the accident caused the tanker to overturn and split open, releasing its cargo – the gasoline. In addition, the pickup truck's diesel fuel tank and oil pan ruptured, releasing both diesel fuel and motor oil into the environment. The state environmental authority has issued a cleanup order to both the owner of the pickup truck and the owner of the tanker.

The Pickup Truck

The Auto Liability Policy The pickup truck is owned by S&S Nurseries, Inc. with liability coverage provided by Green Mutual Insurance Company via an ISO Business Auto Coverage Form (March, 2006 edition) with *no endorsements*. S&S has tendered the state cleanup demand to Green Insurance.

The Denial Green Insurance admits the pickup is a covered auto, but categorically denies any responsibility for defense or payments for the cleanup, citing as its basis that cleanup is not “property damage,” the cleanup demand is not a “suit,” the costs of cleanup are not “damages” and that in any event the policy excludes pollution.

A Failure to Communicate Is Green’s denial proper? NO – Green has completely failed to consider the second Auto Liability insuring agreement – a promise to pay “covered pollution cost or expense” caused by an accident resulting from a covered auto. Green has also ignored a critical part of its obligation to defend – which includes a duty to defend alleged “covered pollution cost or expense.”

Pollution Exclusion – Cargo Despite “covered pollution cost or expense,” certainly the pollution exclusion relieves Green of any responsibility in this matter. But even a cursory review of the pollution exclusion plainly reveals it does no such thing – the pollution exclusion applies *only if* pollutants are being transported or towed by the auto, moved into or from the auto, stored or processed in the auto, or the pollutants are otherwise in transit by or for S&S. What’s more, the pollution exclusion clearly states *it does not apply* to the release of fuels or lubricants needed for the normal operation of the auto (such as contained in the fuel tank and the oil pan).

Pollution Exclusion – The Cargo of Another And for pollutants transported, but *not* in a covered auto (in this case, the gasoline being transported by the tanker, which is *not* an S&S covered auto), the pollution exclusion does not apply if the pollutants are released because an S&S auto caused the overturn of the other auto (the tanker), provided the accident does not happen on the premises of S&S.

Coverage Found In short, the auto liability policy with Green Mutual provides S&S with a defense as well as coverage (to the extent S&S is liable) for the cost of the cleanup of the diesel fuel, motor oil and gasoline, such cleanup costs subject only to the policy limit.

Covered Pollution Cost or Expense S&S seems to have received a huge benefit from covered pollution costs or expense. If this provision of the auto liability policy is so all encompassing, why does anyone need to purchase auto pollution liability coverage?

Cleanup Covered pollution cost or expense includes *any cost or expense from any demand or regulatory requirement* that an insured clean up or respond to pollutants. This includes any claims by or on behalf of a government authority, such as the cleanup demand made on S&S by the state environmental authority. Put another way, whether the cost of cleanup may be “damages” because of “property damage” or whether an environmental authority’s demand is a “suit,” or even if S&S is not negligent is *not relevant* – the auto liability policy will respond to defend and pay costs, subject to all other policy limitations and exclusions, for the cleanup demand made against S&S by the environmental authority.

Restrictions Covered pollution cost or expense does have its restrictions – similar to the pollution exclusion, covered pollution cost or expense *does not apply* and provides no benefit if the pollutants are being transported or towed by the auto, moved into or from the auto, stored or processed in the auto, or the pollutants are otherwise in transit by or for the insured. Enter the need for the “pollution buy-back” endorsement.

The Tanker

Auto Liability Coverage The owner of the tanker is Pump & Go, Inc. DBA P&G, a chain of retail gasoline stations. Auto liability coverage is provided by Gas Haulers Insurance Company via an ISO Business Auto Coverage Form (March, 2006 edition) with *several endorsements*¹, including Pollution Liability – Broadened Coverage for Covered Autos (CA 99 48), March, 2006 edition. P&G has also tendered the state cleanup demand to Gas Haulers Insurance Company.

THERE'S A BETTER WAY.

Acceptance of Coverage Gas Haulers Insurance Company does accept the tender of defense by P&G of the environmental authority's cleanup demand. The claims person handling the P&G claim for Gas Haulers Insurance carefully reviews the second insuring agreement, including the definition of covered pollution cost and expense, as well as the pollution exclusion – and determines *up to that point*, the policy provides *no coverage* for P&G as the pollutants were clearly being transported by P&G when released. However, the Gas Haulers Insurance claims person reviews the entire policy, including the so-called "pollution buy-back" which is actually the Pollution Liability – Broadened Coverage for Covered Autos endorsement.

Pollution Buy Back This endorsement deletes most of the pollution exclusion from P&G's Business Auto Liability – resulting in coverage for *bodily injury or property damage*, provided the liability for BI or PD is not the liability assumed by P&G in a contract or agreement. Put another way, if P&G has assumed the liability of others, regardless of whether the liability assumed is in an "insured contract," the pollution exclusion continues to apply, even with the "pollution buy-back."

Covered Pollution Cost or Expense The "pollution buy-back" also changes the policy definition of covered pollution cost or expense – P&G has the benefit of pollution cost or expense coverage even when the pollutants released are being transported or towed by the auto, moved to or from the auto, stored or processed in the auto, or otherwise in transit by or for P&G. It is because of this change in the definition of covered pollution cost or expense that the Gas Haulers Insurance claims person has accepted the tender of defense on behalf of P&G – the demand for cleanup by the state environmental authority falls squarely within the re-defined (via the "pollution buy-back") "covered pollution cost or expense."

Owned Premises By chance, some of the pollutants that escaped from P&G's tanker in the accident have migrated onto P&G's own property – a retail gas station that was near the highway where the accident occurred. Will Gas Haulers Insurance deny the cost of cleaning up P&G's own property as part of this cleanup demand? The claims person for Gas Haulers Insurance finds an exclusion in P&G's auto liability policy that applies to property owned by P&G. After originally preparing a letter of denial to P&G, the Gas Haulers Insurance claims person looks more closely at the "pollution buy-back" – and notices that it also removes the owned property or "care, custody or control" exclusion of the policy to the extent the claim involves pollutants.

Due to this change in the owned property exclusion, Gas Haulers Insurance Company *does* pay for the cost to clean up P&G's own property – its retail gasoline station.

Conclusion

In order to understand the need and scope of the auto liability "Pollution Liability – Broadened Coverage for Covered Autos (CA 99 48 03 06)" endorsement, it is important to first grasp the breadth and restrictions found in the promise to pay "Covered Pollution Cost or Expense." Auto Liability Pollution Coverage can be fully appreciated only after recognizing how "Covered Pollution Cost or Expense" works in conjunction with the "Pollution Liability – Broadened Coverage for Covered Autos."

Editor's Note

The CA 99 48 may not be made available to all insureds with potential cargo-related pollution exposures. Some insureds may be seeking additional, separate, or higher limits and perhaps pollution-related coverage beyond that provided by CA 99 48. In those cases, AmWINS can arrange separate coverage through a variety of specialized environmental markets. These markets offer a broad range of both primary and excess pollution related coverages.

¹ The MCS-90 Endorsement can be reviewed at <http://www.fmcsa.dot.gov/forms/print/MCS-90.htm>; See also "5 Important Things You Should Know About the MCS-90" http://www.colemont.com/US/documents/colemont/Feature_Articles/IA-MCS-90-Article-6-08.pdf

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