LITIGATION MINUTE: EMERGING CONTAMINANTS: MINIMIZING AND INSURING LITIGATION RISK

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WHAT YOU NEED TO KNOW IN A MINUTE OR LESS

As the scientific and regulatory landscape surrounding various emerging contaminants shifts, so too do the options that companies can consider taking to minimize and insure against the risk of emerging contaminant litigation.

The second edition in this three-part series explores considerations for companies to minimize that risk and provides consideration for potential insurance coverage for claims arising from alleged exposure to emerging contaminants.

In a minute or less, here is what you need to know about minimizing and insuring emerging contaminant litigation risk.

Minimizing Litigation Risk

As we discussed in our first edition of this series, regulation of emerging contaminants often drives emerging contaminant litigation. For example, in emerging contaminant litigation that alleges an airborne exposure pathway, plaintiffs' complaints often prominently feature information from the US Environmental Protection Agency's (EPA's) Air Toxics Screening Assessment (AirToxScreen) screening tool and its predecessor, the National Air Toxics Assessment (NATA). AirToxScreen, and NATA before it, is a public mapping tool that can be queried by location, specific air emissions, and specific facilities to identify census tracts with potentially elevated cancer risks associated with various air emissions. Despite these tools' many limitations, their simplicity and the information they provide have served as a foundation for many civil tort claims.

The takeaway: Since NATA and AirToxScreen use the EPA's National Emission Inventory (NEI) as a starting point, companies with facilities that have emissions tied into NEI should carefully consider the implications of their reported emissions. For example, in some situations for some companies, it could be appropriate to consider whether to examine reported emissions and control technologies to determine whether adjustments can be made to reduce reported emissions to better reflect reality on a going-forward basis. In addition, requests for emerging contaminants sampling and reporting by regulatory agencies may be made publicly available.

Regulatory compliance is not always an absolute defense in tort litigation, but in most situations, compliance with existing regulations will be relevant to whether a company facing emerging contaminant litigation met the applicable standard of care. Companies should examine applicable regulations against established compliance efforts and, as appropriate and applicable to any given company, consider whether it may be appropriate to closer examine compliance programs for continued improvements or audit established protocols to substantiate safety.

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Insurance Coverage Considerations

Policyholders facing potential liability for claims arising out of alleged exposure to emerging contaminants should consider whether they have insurance coverage for such claims.

Commercial general liability insurance policies typically provide defense and indemnity coverage for claims alleging “bodily injury” or “property damage” arising out of an accident or occurrence during the policy period. While some insurers are now introducing exclusions for certain emerging contaminants (and most policies today have pollution exclusions), the underlying claim(s) may trigger coverage under occurrence-based policies issued years or decades earlier, depending on the alleged date of first exposure to the contaminant and the alleged injury process.

These older insurance policies are less likely to have exclusions relevant to emerging contaminants, and policies issued before 1986 are more likely to have a pollution exclusion with an important exception for “sudden and accidental” injuries, or no exclusions at all. In addition, some courts have ruled that pollution exclusions do not apply to product-related exposures or permitted releases of certain emerging contaminants.

In deciding whether there is potential insurance coverage for claims alleging exposure to emerging contaminants, policyholders should also consider whether they have potential coverage for such claims under insurance policies issued to predecessor companies. If insurance records are lost or incomplete, counsel can often coordinate an investigation, potentially with the assistance of an insurance archaeologist, and may be able to locate and potentially reconstruct historical insurance policies or programs.

The takeaway: Do not overlook the possibility of insurance coverage for potential liability regarding claims arising out of alleged emerging contaminant exposure. To maximize access to potential coverage, policyholders should act promptly to provide notice under all potentially responsive policies in the event of emerging contaminant claims. Our experienced Insurance Recovery and Counseling lawyers can help guide policyholders through this process.

Our final edition will touch on considerations for companies defending litigation involving emerging contaminants. For more insight, visit our Emerging Contaminants webpage.

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