Fracking: There’s Insurance Coverage for That?

In recent years, the use of hydraulic fracturing technology has increased, leading to the extraction of more oil and gas from places deep under the ground where hydrocarbons were previously unrecoverable. This has led to a boom in drilling resulting in thousands of fracking wells throughout the U.S.

The increase in fracking has led to significant exposures, such as groundwater contamination, explosions and earthquakes, on the part of energy companies, drillers and others involved in fracking. As of Spring 2013, nearly 30 fracking-related lawsuits had been filed across the United States. We expect more filings in the near term as fracking becomes even more prevalent. Within these 30 lawsuits, cases have been brought against:

- Manufacturers of well equipment
- Well operators and contractors (oil and gas drillers)
- Waste handlers and haulers
- Landowners, including municipalities, where fracking activities take place

A typical fracking case may allege bodily injury or property damage arising out of contaminated groundwater (methane or other pollutants such as fracking fluid). However, there have also been cases involving air-pollution, nuisance and trespass, well blowouts, disposal of fracking fluids, earthquakes, and corporate malfeasances by directors and officers.

Depending on the nature of the underlying claim, certain insurance policies may respond to these claims to pay for both the defense costs that a policyholder incurs as well as any settlement or judgment reached in that action. In order to help you and your company navigate the challenges associated with fracking, we have highlighted a series of specific corporate insurance policies that could protect your company.

**COMPANIES CAN BE EXPOSED TO FRACKING LIABILITY EVERY STEP OF THE WAY**
**Representative Experience**

**Comprehensive General Liability (CGL) Policies**
CGL policies provide third-party liability coverage for bodily injury, property damage and, potentially, trespass and nuisance. More important, these policies provide coverage for the defense costs that the policyholder incurs while defending against a lawsuit—which may be significant. Coverage under CGL policies could be subject to certain policy exclusions that could either limit or totally bar insurance coverage protection for fracking claims. The most significant exclusion is the so-called absolute pollution exclusion, which bars coverage for any claims arising from the use of a pollutant. Insurers typically argue that chemicals, such as methanol and boric acid present in the fracking fluid, are pollutants, thus triggering the policy’s absolute pollution exclusion. Depending on the factual underpinning of the case, policyholders may have arguments in response to an insurer’s absolute pollution argument.

**Environmental Impairment Liability (EIL) Policies**
EIL policies provide coverage for bodily injury and property damage as well as governmentally mandated investigation and cleanup costs arising out of pollution claims. EIL coverage is written on a claims-made basis, meaning that the claim must take place and be reported to the insurer during the policy period. The claims-made nature of the coverage is essentially comparable to the sudden and accidental coverage of a CGL policy. Thus as with CGL coverage, EIL policies also do not provide coverage for long-term gradual pollution claims.

**First-Party Property (Property) Policies**
While Property policies are typically written to provide coverage for physical damage or loss to the policyholder’s own property, they also cover economic losses that a policyholder suffers on account of an interruption of its business due to the property damage, for example, a well blowout or an earthquake caused by vibrations and pressures associated with fracking activities. The business interruption (BI) coverage of Property policies may prove invaluable because it reimburses the policyholder for lost profits resulting from actual damage to its property. Property policies may also contain contingent business interruption (CBI) coverage, which provides insurance protection for lost profits resulting from damage to the policyholder’s supply chain, as the damage is of a type that would be covered under the policyholder’s own insurance policy.

**Operator’s Extra Expense (OEE) Policies**
OEE policies are named-peril policies typically purchased by well-drilling companies to insure against losses arising from well-blowouts (named-peril), which are typically excluded under CGL and EIL policies. OEE policies provide coverage for: (i) expenses incurred for controlling the out-of-control well; (ii) re-drilling and restoring the well; and (iii) liability for any above-ground pollution. Because the OEE policies provide coverage only on a named-peril basis and then only for above-ground pollution, the scope of insurance protection for fracking cases, where most of the damage comes from perils other than a well-blowout (well leak) and much of the drilling and ensuing pollution damage takes place below ground, is somewhat narrow.

**Directors & Officers (D&O) Policies**
D&O policies protect a company and its senior management against claims by shareholders and certain other third parties that allege corporate negligence or some other malfeasance. Fracking activities could lead to claims alleging a failure to exercise due care to prevent underlying fracking-related liabilities. Companies may also face securities litigation and investigations arising out of their failure to disclose the hazards associated with fracking in their public filings. In each of these cases, the company and its directors and officers may look to their D&O policies for both defense and indemnity coverage.

While fracking is still relatively new, it pays for companies to spend time reviewing their current policies and addressing known risks. Perkins Coie’s Insurance Recovery lawyers are well recognized for their work on behalf of their policyholder clients, and counsel them on the types of coverage available. Together with the firm’s Energy, Environment and Resources lawyers, Perkins Coie presents companies with a well-rounded approach to assess risk from all fronts. Not only do we understand the environmental concerns, we know how to prepare for them.