



# **FRACKING**

## **UNIVERSAL KEY ISSUES IN POLLUTION DAMAGE INSURANCE COVERAGE**

**Fracking is due to start in South Africa  
within the next two to three years  
despite adamant opposition**

**Shale gas provides cheaper “cleaner” energy  
yet is contrary to**

- **global water security**
- **protection of the environment**

## Potential damages

- (a) contamination:  
surface and shallow groundwater**
- (b) over-extraction of water resources**
- (c) air pollution (burn-off)**
- (d) accumulation of toxic and naturally  
occurring radioactive materials  
in soil or stream sediments: no clean-up**
- (e) increase in seismic activity**
- (f) personal injury? health?**

## Consequences

- **property devaluation**
- **stigma damages**
- **business interruption**
- **reduced profitability of farming operations**
- **damage to the natural environment**
- **injury?**

## **Methane permeated water:**

No sufficient data available  
of the detrimental effects  
on human and animal health

# Can you set your water on fire?



# Reality for the insurance industry in a nutshell:

(1) Long-term pollution

(2) Unpredictable risks

(3) Uncertain nature of liabilities

## Examples of universal complications for insurance

- (1) Policy wording/extent of cover:  
“property damage”; “sudden and accidental” etc.
- (3) Exclusions and limitations
- (4) Cover for pre-existing conditions
- (5) Insurance triggers (vesting of claim)
- (6) Allocation of liability:
  - Multiple or collateral causation by polluters
  - Multiple insurance covers

Policy wording affects cover:

*Warren Drilling v Ace American Insurance Co*

‘Sticks and stones may break my bones,  
but words shall never hurt me - although,  
unless carefully chosen,  
they may have a somewhat unfortunate effect  
on my financial affairs’,

# Insurance trigger events

Especially problematic for

- gradual damage (i.e. slow seepage);
- damage caused by old burdens of historic causation (i.e. slow migration)

## **A major area for concern:**

Insurance claims that do not proceed  
to final settlement  
until a length of time  
beyond the policy term has passed

‘Long-tail liability’

## Phases of polluting occurrence :

(1)\_\_\_\_\_ (2)\_\_\_\_\_ (3)\_\_\_\_\_ (4)\_\_\_\_\_ (X)

(1) Fracking

(2) Permeation

(3) Manifestation

(4) Claim against insurer

(X) payment of compensation.

.

## Six phases in liability insurance

- (a) wrongful conduct
- (b) factual occurrence that causes damage
- (c) effect of the damaging facts/circumstances on person/property
- (d) manifestation of damage
- (e) liability of insured
- (f) notification to insurer of liability

# Insurance trigger events

- (a) act-committed / occurrence-based
- (b) loss occurrence/ loss manifestation
- (c) claims-made
- (d) other: i.e. multiple trigger/continuous trigger

# **Long-tail liability in insurance**

**Complications occur  
if the insured changes cover**

**where policies have  
different trigger events**

.

## 1. Act-committed basis

Cover when polluting act occurred  
irrespective of future manifestation

Can provide potentially extensive prospective  
cover  
that is as yet uncertain

## Danger for insured:

### Historical insurer

- insurer's continued existence
- lost records
- policy limits insufficient
- policy provisions outdated

Insurer at time of occurrence remains  
under a latent duty  
to indemnify the insured  
until discovery of damage,  
even though the policy period has expired;

Does each exposure of property  
to the same contaminant  
constitute a new occurrence and 'new' damage,  
triggering a multitude of policies?

## **2. Loss-occurrence /loss-manifestation trigger**

Cover when the loss or damage  
caused by the pollution  
becomes evident,

irrespective of when it was caused in the past.

Property insurance  
usually issued on a 'loss-occurrence' basis.

Coverage clauses in public liability policies  
also usually  
'occurrence', 'event' or 'accident' based

Case law in the UK, for example,  
endorses implementation of  
'loss-occurrence' or 'injury-in-fact' trigger  
for coverage of  
progressive environmental damage  
under liability policies.

Germany and in France,  
for example,  
acknowledge

the 'verifiable first discovery' of the loss  
as the trigger for a claim

Additional write back cover possible

Add a  
time element pollution endorsement  
at an additional premium

### 3. Claims-made trigger

Retroactivity

Insurer inherits historical claims

Preferred in modern policies

## Two requirements:

- (a) manifestation of the damage still present within the period of insurance cover; and
  - (b) the claim made strictly within the period of insurance cover.
- .

## **Risk for insured:**

When changing  
from claims-made to loss-occurrence trigger

No cover  
unless buy-back or  
additional 'tail endorsements'

# **Risk for insurer**

Infinite liability

Prevent by linking to fixed retroactive dates

i.e. 'claims-made plus three years'

## Advantages from the insurer's perspective

- More predictable risk as time of cover is finite
- More precise risk differentiation and adaptation of premiums
- Although risk in the short run is greater  
(during time policy is in place)  
*there is no liability for potential future claims*

## The advantages for the insured

- generally pays a lower premium  
(not charged for cover for future claims)
- Enjoys cover for losses predating the inception of the 'claims-made' policy
- higher limits, and
- the inclusion of latest terms and conditions

## Serious disadvantages for insured.

- ☐ Insured has knowledge of an earlier occurrence and fails to disclose: misrepresentation
- ☐ Does disclose earlier occurrence:
  - potential insurer may decide not to cover known risk



Loss-occurrence

has in the past been a popular trigger,

Insurers currently prefer  
the claims-made trigger  
as a more practical alternative.

No laws in *most* countries  
that prescribe mandatory or general trigger  
theories.

Trigger depends on  
the intentions of the parties and  
the policy provisions.

## Liability insurance trigger

Legal liability,  
whether statutory or civil  
must exist.

In some cases cover triggered only after  
judgment; final award/determination

Some cases only when  
insured has actually compensated injured party  
(*Warren case*)



As civil claims for environmental damages  
are complicated

Lengthy liability litigation

could delay the trigger of liability policy cover

## **Multiple insurers/polluters**

- Multiple covers with different triggers
- Multiple liability policies provide cover

## **Contribution to damage**

Difficult if not impossible in most cases to  
prorate liability

Allocation of liability  
for multiple or collateral causation  
is uncertain  
unless specifically regulated by law

## Possible allocations:

- (a) joint and several liability;
- (b) proportionate allocation;
- (c) market share;
- (d) others, for example:

(i) The time on which insurer was at risk,  
based on a '*pro rata* by years' approach,  
irrespective of policy limits

(ii) Possibility of policy limits:

Aggregate of each policy added

every insurer pays its share of the loss

proportionate to its share in the aggregate

(iii) Both time limit on risk and  
policy limits

Aggregate limits are usually apportioned  
according to both time periods and limits

*unless*

the application of another standard is justified;

Courts often support this approach  
as the presumptive rule

unless exceptional circumstances  
justify the application of a different standard

Introduces degree of certainty and predictability  
especially in continuous-trigger cases  
due to its mathematical approach.

(iv) carry equal shares in the loss

simply divided equally

between the number of insurers of the risk,  
to the limit of each insurer's liability

(v) an equitable apportionment

in the discretion of the court  
depending on the facts and circumstances  
of each case:

Often the approach  
unless  
the policy provides for another allocation

(vi) allocation of  
the amount of the damage  
that occurred during each triggered policy

Possible, yet has not been applied  
in any known judgment  
- difficult to determine



Solution lies not  
in a single standard method,

but in the most suitable alternatives

for each specific situation  
where an allocation is required

This would require  
ombudsmen, arbitrators and courts  
to follow innovative approaches  
to provide acceptable solutions

OR

require introduction of suitable laws

## Pollution exclusion clauses

*Pro forma* clauses included in CGL policies since the 1950s.

By the 1970s  
most liability and property policies contained  
extensive pollution exemption clauses.

“Sudden and accidental”

‘Absolute pollution exclusion clause’

New version approved in 1986

Requirement that the incident, event or happening  
must have been  
‘sudden and accidental’  
was removed.

## ‘Total pollution exclusion clause’

Accepted in 1988  
excluded damage caused by  
heat, smoke and fumes.

Also barred claims arising from

- ☒ product liability;
- ☒ completed operations;
- ☒ specific off-site operations conducted by the insured

## **‘Comprehensive exclusion clause’**

Comprehensive model pollution exclusion clause  
(Association of British Insurers)  
most widely used version in industry

‘A. This policy excludes all liability in respect of Pollution or Contamination other than caused by a sudden identifiable unintended and unexpected incident which takes place in its entirety at a specific time and place during the Period of Insurance.

All Pollution or Contamination, which arises out of one incident, shall be deemed to have occurred at the time such incident takes place.

Statutory regulation in some countries  
prohibits inclusion of clauses in specific policies

or

Requires mandatory insurance  
without exception/exclusion