



PALADIN LAW GROUP®, LLP

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When Best Management Practices Aren't Enough

Environmental Laws, Insurance, and the Metal Finishing Industry†

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Introduction

So, you've taken over dad's plating company and you think that as long as you maintain good environmental business practices, you're not at risk of environmental enforcement. WRONG. Even if the regulators say you have the cleanest shop they've ever stepped into, you may be liable for spills that took place decades ago.

Allegations of soil and groundwater contamination are becoming commonplace in many industries. Businesses are being sued by regulators and private parties alike. Whether or not your company is the subject of an environmental investigation, there are economical steps that you can and should take now to protect your business. Keep reading because what you learn here could save you millions of dollars of attorney and environmental consultant fees.

Insurance Basics

Generally, liability insurance policies obligate insurance companies to perform two important duties. If you

are sued for a potentially-covered claim, your insurance company has a duty to defend – *i.e.*, it must pay for the defense of the case. In addition, your insurance company has a duty to indemnify you for liability up to specified limits for covered claims. Although insurance policies written today typically exclude coverage caused by pollution, that was not always the case. In the 1960s, liability insurance policies did not contain pollution exclusions. In the 1970s, however, the insurance industry started writing policies that contained an exclusion for pollution coverage, but the exclusion contained a glaring exception – the so called “sudden and accidental” exception. Under these policies, the insurance companies contractually agreed to provide coverage if the pollution was the result of a sudden and accidental event. After years of paying out claims, the insurance industry changed again in the mid-1980s and put in place what is commonly referred to as an “absolute pollution exclusion.” (Some courts have found that even this exclusion did not apply.)

The change in liability insurance policies is particularly important because the old policies never expire and continue to provide coverage today for events that took place decades ago! A “sudden and accidental” spill in 1970 may continue to trigger the insurance for every subsequent year of coverage where the property damage exists. Accordingly, the insurance companies you used in 1971, 1972, and so on will each have an independent obligation to defend and indemnify your business.



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But this information is literally disappearing! Every time someone moves their office, files get discarded in the process. If these files contain your company's old insurance policies, you may be throwing away millions of dollars in insurance coverage.

Steps for Proactive Business Owners

In order to ensure that these valuable insurance assets are not lost and are available should the need ever arise, business owners should take proactive steps to identify and understand their historical insurance program. All too often, clients wait until they actually have a problem before consulting with an environmental attorney. More often than not, the focus turns to how to defend the claim and the identification of insurance becomes secondary. But for as little as a few thousand dollars, companies could hire an attorney knowledgeable on insurance coverage issues in environmental cases to analyze and report on existing coverages, how the policies might be used to address current environmental problems, understand where coverage is missing, and be able to respond quickly and effectively in the event of a future claim.

The time to act is now, before those files are discarded. The people with the information about your insurance program are getting up in age. Even if you can not locate your old insurance policies, the people who handled insurance matters 20, 30, or 40 years ago may be a great help in

identifying these valuable assets. But don't stop there. Once you've found your old insurance policies, make sure that you understand their coverages and exclusions, have them scanned and backed up onto a disc for safekeeping, and begin the process of filling in any gaps in coverage.

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