



Episode 2: Healthcare Environmental Liability

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SPEAKER: Welcome to the Willis Towers Watson podcast, Vital Signs-- Risk and Insurance for Health Care, where we discuss the risk management and insurance trends and issues facing the US health care industry. We'll speak with our industry experts and clients in search of ways to improve your risk and insurance vital signs.

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Maryann McGivney: Welcome, everyone to Willis Towers Watson's podcast, Vital Signs-- Risk and Insurance for Health Care. Today's podcast represents episode two of our first podcast series. In this series, we are looking at health care professional liability coverage issues in a hard market. And today, we're going to be discussing environmental liability. My name is Maryann McGivney, and I head up Willis Towers Watson's health care industry practice.

I'd like to welcome Robin Kelliher. Welcome, Robin.

Robin Kelliher: Hi, Maryann.

Maryann McGivney: And I have Brian McBride. Welcome Brian.

Brian McBride: Hey, Maryann. Glad to be here.

Maryann: Glad to have you here. Robin and Brian are both from Willis Towers Watson's environmental industry practice.

Thank you both for joining me this morning. Let's talk specifically about the health care industry for a moment. I find environmental liability for health care to be a little difficult to sort out. There are some obvious risks in health care, but Healthcare Professional Liability forms, or HPL forms, do have a pollution exclusion. So where to find coverage sometimes is hard to determine. Maybe we can start at the very beginning, and talk a little bit about how this coverage has evolved over the years.

So Brian, as the industry practice leader for Willis's environmental practice, where did environmental coverage originate and how was it first used to address health care exposures?

Brian: Well, environmental coverages actually were developed in the early 80s, and by a handful of carriers. It mainly is a result of some of the ground breaking legislation that was going on at the time that was there to protect our natural resources. So like Superfund Liability, Clean Air Act, Clean Water Act. When that legislation broke, a lot of general liability policies excluded environmental liability from their coverages. But today, there are over, like, 40 carriers offering environmental coverage on a global basis.

And some of the coverages that were originally site-related coverages that benefited health care, some of those coverages included, like, coverage for tanks. So backup generators, potentially financial assurance if they needed it, infectious or medical waste is part of the definition of pollution condition. Any waste flow issues that a hospital might have, such as chemicals, or Mercury, or other items. Incinerators-- in many cases, some hospitals formerly had incinerators on site, which created all kinds of pre-existing issues that needed to be addressed. And other things like business interruption and extra expense, depending on the presence of contamination on a hospital property.

Maryann: Yeah, and I do remember both the Superfund and the medical waste stories of things showing up, washing up on beaches, and the need to clean up Superfund sites. Those were all real big in the news for quite a while.

Brian: Love Canal and Silent Spring was a book that was very popular at the time all of that legislation was coming out. So--

Maryann: Yeah. So Robin, are there other environmental coverages associated with health care exposures that we haven't talked about yet?

Robin: Absolutely. Construction projects cause a wide range of environmental risks. So a lot of our health care clients have older buildings, so renovation of older buildings. Yeah, we deal with lead based paint, asbestos containing materials in the ceiling tiles or roofing, We have PCBs in Caulk. So renovations, when our clients are doing renovations, it can easily spread contaminated dust throughout the facility. And also during construction expansion, excavation for parking garages, or just expansion of a pad, can lead to the discovery of unknown contamination. So we often see the need for possibly a Contractor's Pollution Liability Policy to address the risks that are caused during the construction project itself.

Maryann: For our health care clients, with patients that are potentially immunocompromised, I can see where construction and renovation can be really risky to patient care.

Robin: Yeah, the importance of controlling that dust and making sure you have proper containment, doing work in health care facilities is critically important, yes.

Brian: And Robin and I, we have seen some significant bodily injury and even fatality claims around construction projects for that very issue. So, unfortunately.

Maryann: So, have these environmental coverages further evolved for the health care sector since their introduction to the market? I mean Brian, I think you said the 1980s were the first forms, and a lot has happened since then. So what's new today?

Brian: Well, beyond the exposures associated with the operations of the sites, facilities and things in the ground and things, like, that are going on within the facilities, you know, indoor air quality became more of an issue, like, around 2003. Mold became an issue. Again, general liability policies first began excluding mold.

And then 2005, legionella became more of an issue. A lot of legionella cases in the news. Again general liability excluded. Environmental was there to step in. And initially, when those first broke, environmental did exclude mold and legionella just like their GL brothers and sisters, but, very quickly, they figured out a way to become more comfortable with writing these exposures, by having mold plans, legionella plans, indoor air quality plans, how they would deal with things. And that led them to believe that they could write these-- underwrite these more successfully than general liability.

Robin: Then similar, and can continue on that point, you know, as the pollution-related risks were becoming more and more excluded under the general liability but also property policy forms, as the carriers got more comfortable with them, our environmental carriers, they actually started introducing branded health care forms that really targeted hospitals and health care facilities. They brought in coverage by having policy forms that literally said Health Care. They also added affirmative coverage for bacteria and virus, where the policy form was silent, and maybe there was an argument for coverage, because, again, it was a branded forum targeting hospitals, bacteria and virus actually became affirmatively listed within our policy definitions.

And the way the carriers got comfortable with providing this coverage is by introducing the concept of facility borne illness versus communicable disease. So the carriers would add coverage for what they deemed to be facility born, but then limit coverage by putting a communicable disease exclusion, or some sort of limitation on there. So it was a way to get some coverage in a way the carriers felt comfortable providing it.

Maryann: And I understand that the different court interpretations of the definition of pollutant can impact how coverage may apply. So that something may be a pollutant in one state and may not be in another.

Robin: That's true. That's true and we'll be talking about that in about two or three minutes with respect to what we're seeing with COVID. But the fact that the carriers are affirmatively, or had been affirmatively, adding bacteria and virus to the policy is really, kind of, speaks to the fact that silence created ambiguity maybe in the CGL forms, which resulted in-- or HPL forms-- which resulted in specific exclusions. The pollution carriers picked it up by specifically listing them and, you know, we're kind of where we are pre COVID.

Maryann: Well, you mentioned the COVID word so I'm gonna move us along to today's exposures, but this has been great background regarding the development of exposures and how those pollution policies have evolved. But let's talk a little bit about pandemics because those have been some of the more recent concerns. So Brian, do you want to provide some thoughts on pandemics?

Brian: Sure. I mean and to really get a good look and have a good discussion on where we are with COVID, you really have to kind of back up a little bit further than that to some of the other pandemics that we've had, like SARS, swine flu, H1N1, and Ebola, which was around 2014, I believe. And in the US, it really had minimal effects, so we really didn't have the exposure to the forms like we have with COVID.

Maryann: And what about COVID, Brian?

Brian: What about COVID? Yeah, that's a whole different matter, right? You know, major effect on everything in our industry. You know, from a claims standpoint, which Robin's about to address. But from the underwriting and broking side of renewal terms and conditions, major effect on every renewal that we've looked at.

Anything that had affirmative coverage before has pretty much evaporated since March, April, May, and all of the renewals now, it's affecting. Any midterm modifications to any coverages. If there wasn't- If you had affirmative cover, that's going to be gone, and they're gonna be looking to actually affirmatively limit the coverage going forward.

Any midterm modifications, any coverage extensions could be affected. So projects that were, like, mothballed during the COVID quarantine, as we need to add more term onto the end to complete these coverages, to complete these projects, it's going to be more difficult to do so.

And also, the addition of any new properties to a site pollution coverage, those properties are going to have less coverage than the ones originally written prior to COVID.

Maryann: Robin, what other things should we be considering as we talk about COVID?

Robin: As Brian alluded to,-- or didn't really allude to as said it-- we're seeing a lot of claims. So the sheer number of claims for COVID that were reported under our pollution policy to date equal the number of claims

that were reported under our property policies. So we're seeing a significant number of COVID claims and we're seeing the carriers take different positions as respects to how their policies respond. Some of those positions are a little disappointing, but we're early on in the process. We've seen some coverage litigation so I think we're gonna be looking to see how the courts have been interpreting, you know, how these pollution policies will respond.

It's been, again, a little bit surprising, a little bit disappointing. But one thing I can say, the carriers are being consistent and they're being very thoughtful in the way that they respond. A response to a COVID claim is the same response. For one insured, you're going to see the same response for every insured. The carriers really need to, from their perspective, be very consistent in how they're handling these matters.

But as a result of that, COVID claims, we're also seeing some pullback on some of the other coverages that we were taking for granted over the last 10 to 15 years. So, you know, while there's still coverage for bacteria-- non-bacteria, non-virus virus exposures, the carriers are providing that coverage, but they're underwriting it more and maybe even pulling back on some of the coverage for mold and legionella.

Maryann: And I've seen some bleed over into the health care professional liability and commercial general liability forms as well, particularly with the mold exclusions, which are in some cases are being expanded to include things like viruses, communicable disease, pathogens. So meaning there's probably even less coverage available in those forms when it comes to COVID via the mold exclusion.

So it seems to me that coordination between all of these coverages is becoming even more important, particularly as our exposures have been evolving over the years to make sure that we know what is and isn't covered in each form.

Robin: Agreed.

Brian: Yeah, I think you really hit it right on the head there, Maryann. I mean, and what that needs to happen, the way we affect that really, is for us as brokers that are given specialties like environmental and health care to be talking to each other even more to find out what's going on in our part of the insurance world versus what you've got going on over there. And, you know, hopefully, that will allow us to be in a situation where we can know exactly where HPL leaves off and environmental begins.

Maryann: Good. Yeah, really great points. So one final question, because I think it's always easier to understand coverage through claims examples. Do you have some life stories, some horror stories that you can share with us?

Brian: We've had many, many claims regarding legionella associated with the nice fountains that greet everyone as they enter the front door of most health care facilities, unfortunately.

Robin: I wish I had a zombie apocalypse one but I don't.

[LAUGHtER]

But, now I do have one relating to construction. Again, as I said, when our clients are doing mass excavations to do expansions, in certain geographic areas, they have a fungus in the soil. So unfortunately, we had one claim where there was a fungus released during the excavation that got into the hospital and caused all sort of havoc with respect to the testing results and diagnostic issues. So, yeah that was a big one. That was a significant one. But no zombie ones yet, but I'll let you know.

Brian: You could call that one the fungus among us claim. How about that?

Robin: Well, if we had a zombie claim, we'd probably have a zombie exclusion too, so we don't have that yet.

[LAUGHTER]

Brian: It would start in the GL first and then the environmental would figure out a way to cover it though.

Maryann: That's right.

Well, I'd like to thank you both for joining me today. It's helpful to have a pair of experts in-house to work through these discussions and figure out how these coverages coordinate. So thanks for joining me, Robin.

Robin: Thank you, Maryann.

Maryann: And thank you, Brian. We're glad to have you too.

Brian: Always a pleasure.

Maryann: I'd also like to thank our audience and those that tuned in to join our discussion. As I mentioned earlier, this is the second podcast of a five part series addressing HPL coverages and some of the more important exclusions. So we hope you will join us again next time. Thanks again for joining our podcast, Vital Signs-- Risk and Insurance for Health Care.

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SPEAKER: Thank you for joining us for this Willis Towers Watson podcast featuring the latest thinking on the intersection of people, capital, and risk. For more information, visit the Insights section of willistowerswatson.com.

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