

www.offitkurman.com

Volume 1, No. 5

INSURANCE RECOVERY ADVISOR

In This Issue:

Fracking in the Marcellus Shale

Contractual Risk Transfer and Insurance
Issues for Property Owners and
Municipalities

Pages 1-2

Insurance Coverage for Non-Profits:

Protecting Yourself While Focusing on Others

Pages 3-4

Events Calendar

Asbestos Litigation Conference: A National Overview and Outlook

Presented by Michael Conley

September 19 - 21, 2011

The Fairmont Hotel, San Francisco, CA

Register at www.perrinconferences.com

National Association of Independent Schools 2011 Leadership Through Partnership Workshop

Insurance 101 for Independent Schools

Presented by Michael Conley

Cyber Risk and Data Theft; Insurance and Coverage Issues for Independent Schools

Presented by Michael Conley

September 30 - October 2, 2011

Fairmont Hotel, Chicago, IL

Register at www.nais.org

About Offit Kurman

Offit Kurman is a dynamic full-service law firm assisting clients in the mid-Atlantic region. We are legal advocates who are experts in all aspects of commercial litigation, business law, real estate, estate planning, health care, labor and employment, estate and trust administration, construction law, government contracting, and asset protection. For more information about Offit Kurman, please visit us on the web at www.offitkurman.com.

Fracking in the Marcellus Shale

Contractual Risk Transfer and Insurance Issues for Property Owners and Municipalities

BY: MICHAEL CONLEY & MEGHAN FINNERTY

The debate over how to best balance concerns for the environment with the desire to increase our nation's energy independence is currently raging on in small town borough council meetings and the state and federal legislatures. The debate is fueled by ever escalating estimates of the amount of recoverable natural gas in shale formations across Pennsylvania, New York, West Virginia, Maryland, Ohio, Virginia, and New Jersey and the potential consequences of the methods used to extract the gas. According to the Associated Press, over 3,000 new natural gas wells utilizing hydraulic fracturing, or "fracking," have cropped up across rural Pennsylvania in the Marcellus Shale since 2005. With tens of thousands of additional wells planned, and enthusiastic projections of natural gas abundance in the adjacent Utica and Upper Devonian Shales, fracking activities are going to expand exponentially. As with any novel science, the only thing more certain than the controversy it stirs will be the claims and lawsuits that result. Indeed, a myriad of lawsuits seeking personal injury and property damage resulting from Marcellus Shale drilling have already been filed in courts throughout the region.

Despite assurances that the process of fracking is clean and safe, it is nevertheless imperative that municipalities, property owners, and mineral rights owners evaluate how to best protect themselves from the gambit of fracking-related claims and litigation, which will include everything from on the job injuries to environmental contamination. Other than campaign statements made by Pennsylvania's Governor Tom Corbett – who proclaimed that state regulation should require drilling companies to maintain adequate insurance - there has been surprisingly little discussion of the role that insurance and contractual risk transfer can play in protecting municipalities and property owners from these claims.

While every situation is unique, here are some considerations for property owners and municipalities when evaluating whether they are adequately protected for claims arising out of fracking:

Contractual Indemnity Provisions

Many Marcellus Shale oil and gas leases contain boilerplate indemnity provisions in which the gas company promises to indemnify and hold harmless the property owner in the event of a claim. However, when you drill down to the details, these provisions may be offering property owners a false sense of security.

Fracking in the Marcellus Shale continues on page 2

First, an indemnification provision is only as good as the party agreeing to provide the indemnification. Property owners and municipalities need to investigate the financial solvency of the entity signing the oil and gas lease or applying for the oil and gas permit, particularly where larger corporations are using LLCs and subsidiaries to enter into these legal contracts.

Second, in order to ensure that you have adequate protection in the event you are personally tied to allegations of negligence or wrongdoing, the indemnification provision should be as broad as allowable under applicable law. These indemnification provisions should include language indemnifying you for your own acts of negligence where such indemnity is not otherwise against public policy.

Additional Insured Provision

Shockingly, many oil and gas leases contain no provision requiring any type of insurance on the part of the companies engaging in the drilling. Property owners should require that they be named as an additional insured on all insurance policies of the oil and gas company, as well as on the insurance policies of any contractor that comes onto the property for any purpose related to the drilling.

In addition, simply asking to be listed as an additional insured is not enough. Property owners (and municipalities who require additional insured status as part of permitting) should keep in mind that not all additional insured provisions in insurance policies are the same. If left to the insurance company to choose, undoubtedly the insurance company will utilize as narrow an additional insured provision as possible. For the greatest protection, the additional insured provision in the oil and gas lease should specify the scope of the coverage for the additional insured.

Property owner should also investigate the scope of coverage contained in the oil and gas company's insurance policies. By way of example, most commercial general liability policies contain pollution exclusions, which insurance companies will undoubtedly rely upon to exclude coverage for the discharge of any "pollutant". Oil and gas companies and companies involved in drilling can and should carry specialty insurance for their operation that do not contain exclusions for pollution liability or contain only limited pollution exclusions. Property owners and municipalities should be aware that this specialized coverage is available; otherwise they may be arguing with the insurance company over coverage under a policy with a pollution exclusion.

Similarly, property owners and municipalities should be aware that many companies involved in oil and gas drilling have policies written on a "claims-made" basis. Claims-made policies generally are triggered when the claim is made by a third-party. In contrast, "occurrence" based policies general provide coverage for claims that take place at least, in part, during the policy period. For property owners and municipalities, the concern with "claims-made" policies is that they may not provide any coverage if the damage does not manifest itself until years later, which is often the case with environmental contamination.

Finally, insurance coverage is in many cases only as good as the limits and deductible or self- insured retention associated with that policy. In both of these instances, the property owner or municipality should dictate the terms of coverage acceptable to them.

One last word of caution – property owners and municipalities should not rely upon Certificates of Insurance as evidence of compliance with insurance provisions of a contract, or as evidence of compliance with permitting requirements. Certificates of Insurance may not be binding on an insurance company and often contain limited and incorrect information. The only way for a property owner or municipality to make sure the insurance policies meet either the contractual or permitting requirements is to obtain, and fully review, copies of the actual policies.

Claims Handling

In the event of a potential claim, property owners and municipalities need to be vigilant in making sure that timely notice of a claim or potential claim is provided to under every potentially applicable insurance policy. In no instance should the property owner or municipality rely on the gas company or contractor to give notice on their behalf. Even if you do not have all the particulars of your claim, give notice immediately, you can always supplement the notice later.

While landowners and municipalities may not be able to avoid fracking-related liability completely, by following these guidelines and turning to insurance recovery professionals when necessary, they can nevertheless minimize their uninsured exposure.

About the Authors

Michael Conley is a Principal at Offit Kurman and Chair of the firm's Insurance Recovery practice. Mr. Conley is a frequent speaker on insurance recovery and fracking issues. He can be reached at 267.338.1317 or mconley@offitkurman.com.

Meghan K. Finnerty is an Associate at Offit Kurman and a member of the Insurance Recovery practice. Ms. Finnerty's practice includes a focus on insurance recovery for environmental issues. She can be reached at 267.338.1322 or mfinnerty@offitkurman.com.

The Insurance Recovery Advisor is a quarterly newsletter at Offit Kurman. This newsletter is provided to inform its readers of insurance coverage issues that may affect them or their business. The articles in the *Insurance Recovery Advisor* do not constitute legal advice or opinion. If you require more information, legal advice or an opinion regarding a specific situation, please do not hesitate to contact Michael Conley at 267.338.1317, the authors, or the editorial board. This newsletter may contain attorney advertising.

Our insurance coverage attorneys assist businesses and individuals in identifying insurance available to pay a claim and recovering what they are owed from their insurance companies. Offit Kurman attorneys provide a realistic claim analysis, then work to develop a cost effective recovery strategy and beneficial resolution. Should negotiations break down, our team of seasoned litigators has the experience and expertise necessary to successfully see the matter through trial.

**INSURANCE RECOVERY
GROUP CHAIR**
Michael Conley
267.338.1317
mconley@offitkurman.com

EDITOR
William H. Pillsbury
267.338.1321
wpillsbury@offitkurman.com

Insurance Coverage for Non-Profits: Protecting Yourself While Focusing on Others

By: Frederick A. Pettit

Non-Profits come in a variety of shapes and sizes, and the focus of their work is endlessly diverse. Similarly diverse are the types of risk that Non-Profits can experience. While Non-Profits are typically comprised of individuals who work tirelessly to advance the mission of the organization, many of those individuals may not be familiar with how to anticipate and manage the risks faced by their Non-Profits. Risk management comes in several forms, and the most obvious form may be to finance risk through the purchase of insurance coverage. The purpose of this article is to generally provide an overview of the different types of insurance coverage that may be available and appropriate for a wide variety of Non-Profits.

Overall Considerations

Generally speaking, the types of insurance coverage that likely apply to Non-Profits can be organized into two categories: Liability Insurance and Property Insurance. Health insurance may also be an issue of importance for many Non-Profits, but it is beyond the scope of this article. There are a variety of sub-categories that fit within each of these categories, and we will discuss some of them below. The lists below are not exhaustive, but merely serve to provide examples of the types of insurance that may be available and appropriate for Non-Profits.

A. Liability Insurance

Liability insurance is designed to protect an organization from allegedly negligent conduct, as well as allegedly wrongful acts, errors, or omissions. Common liability insurance policies include:

Commercial General Liability (CGL) – Provides coverage for liability exposures common to many (if not all) organizations regardless of size or character. Typically provides coverage for general liability (bodily injury and property damage), personal injury and advertising injury liability, and medical payments. In addition, Non-Profits in the business of publishing, advertising, or e-commerce may want to also have Media or Cyber Liability coverage.

Directors' and Officers' Liability (D&O) – Provides coverage for alleged "wrongful acts" of directors, officers, and other policyholders under the policy. In the non-profit context, the majority of D&O claims are employment-related, and a non-profit D&O policy may include sufficient Employment Practices Liability

Employment Practices Liability (EPLI) – which is coverage for employment-related claims and may also be purchased as a stand-alone policy.

Professional Liability or Error & Omissions (E&O)– Provides coverage for errors and omissions occurring while providing professional services to clients or patients.

Fiduciary Liability – Provides coverage for claims arising out of alleged negligent violations of the Employee Retirement Income Security Act of 1974 (ERISA).

Workers' Compensation and Employers' Liability – Provides coverage for bodily injury by accident or disease caused by conditions during or related to employment and liability claims narrowly permitted by statute.

B. Property Insurance

Property insurance is designed to cover a building and its contents, such as inventory, furniture, machinery, supplies, money and securities, and accounts-receivable records, when damage, theft or some other loss occurs. As described below, the scope of coverage under a property insurance policy can be limited or expanded depending on the needs of a Non-Profit. Basic Property Insurance policies are historically based on coverage for damages caused by fire and are expanded from there. Endorsements that may be used to expand a property coverage policy may include:

Business Interruption (BI) - Provides coverage for the loss of income if a Non-Profit's premises are totally closed down for a period of time because of damage sustained from a covered peril.

Contingent Business Interruption – Provides coverage for the interruption of a Non-Profit's business because of damages away from the Non-Profit's property.

Extra Expense – Provides coverage for the additional costs of keeping a Non-Profit operational if its property is damaged by a peril that is covered under the policy.

Computer Hardware and Software - Provides coverage for damage arising from a peril that may be specific to computers, such as an electrical surge.

Valuable Papers – Provides coverage for the cost of salvaging or recreating important papers and records damaged by a covered peril.

Crime Insurance – Provides coverage for theft by insiders of the Non-Profit as well as theft by third-parties. Crime Coverage can include several types of coverage, such as a fidelity bond, forgery or alteration coverage, computer fraud coverage, extortion coverage, and theft, disappearance, and destruction coverage.

Boiler and Equipment Breakdown Coverage – Provides coverage for equipment-related accidents and breakdowns. Policies available can vary and should be reviewed to ensure an appropriate fit for an organization.

Flood Insurance – Driven by the cause of the loss, and provides coverage for damage to buildings and contents from flooding.

Insurance Coverage for Non-Profits continues on page 4

About the Author

Frederick Pettit is a Principal at Offit Kurman and a member of the Insurance Recovery practice. Mr. Pettit represents non-profits in a variety of insurance coverage matters. He can be reached at 267.338.1319 or fpettit@offitkurman.

C. Package Problems

Non-Profits may also be able to purchase packaged policies that include both liability and property coverage, such as a Business Auto Policy or a Business Owners Policy.

Business Auto Policy – Provides coverage for liability and physical damage relating to vehicles owned by a Non-Profit.

Business Owners Policy – Provides coverage that combines property, general liability, and crime coverage into a single policy, which can be a less expensive option than purchasing the multiple types of coverage as stand-alone policies.

Specific Considerations

As noted at the outset, the types, limits, and scope of insurance coverage needed by a specific Non-Profit will be driven by several factors, and each Non-Profit must perform an analysis to determine appropriate types, limits, and scope of coverage needed to protect itself and its people. Below are some considerations that may be unique to Non-Profits.

Broadening Endorsements for Non-Profits Under CGL

Policies - Some insurance companies offer unique CGL policies for Non-Profits that incorporate several broadening endorsements under one endorsement to enhance the scope of coverage.

Professional Liability Coverage Unique to a Non-Profit's Activities – Depending on the mission and work of a Non-Profit, it may be advisable to purchase a Profession-Specific Professional

Liability Policy (e.g., focused on educational institution, blood bank, counseling center, etc.), Allied Health Care Professional Liability Policy, or a Social Services Professional Liability Policy. Such policies contemplate the risks associated with a specific profession or practice and can provide coverage that otherwise might not exist under a CGL or other more generalized liability policy.

Non-Profits, depending on their work, may also want to consider the following types of insurance:

- **Sexual Abuse Liability Policy Endorsement**
- **Hired and Non-owned Auto Liability Coverage**
- **Volunteer Accident Insurance**

Non-Profits should also review state volunteer protection statutes to ensure that the Non-Profit has the liability insurance necessary to ensure protection under these laws.

Conclusion

As with any entity addressing risk management and insurance coverage, Non-Profits should consult with insurance professionals to help them identify risk unique to their organization, consider the types of coverage available to manage their risk, and make informed decisions about purchasing insurance coverage to finance that risk. Investing the time and effort to perform these functions intelligently and carefully can go a long way toward protecting the organization and the people who work so hard to advance the organization's mission.



Insurance Recovery Advisor

Volume 1, No. 5, Summer, 2011

www.offitkurman.com

Philadelphia
1801 Market Street
23rd Floor
Philadelphia, PA 19103
267.338.1300