

**MCC INTERVIEW: Martha N. Donovan & Margaret Raymond-Flood / Norris, McLaughlin & Marcus, P.A.**

# Clean Up Your Environmental Insurance

*For NY, NJ & PA companies, CGL policy review is critical*

**Norris McLaughlin** attorneys discuss the basics of environmental coverage law in New Jersey, Pennsylvania and New York under comprehensive/commercial general liability ("CGL") policies.

**MCC:** For companies in the NY/NJ/PA area, talk about some of the state-specific factors relating to environmental insurance policies and how companies should be looking at CGL provisions to ensure that their coverage is sufficient.

**Donovan:** Modern CGL policies (i.e., any policies issued after 1986) contain total or, at the very least, absolute pollution exclusions, so traditional pollution claims involving property damage resulting from the disposal of "pollutants" or "hazardous waste" probably won't be covered under any of these policies. To obtain coverage in any of these jurisdictions, whichever is the insured's "principal location of the insured risk," companies must seek products other than a standard CGL policy.

**MCC:** Drill down to a few other tips for companies in these states to ensure coverage.

**Donovan:** First, companies need to maintain copies of all liability policies (primary and umbrella) forever. In environmental property damage and bodily injury cases, these "occurrence"-based policies look to when the dumping or physical exposure took place (perhaps decades ago) and often "trigger" each of the policies between the dumping/exposure date until the claim is asserted or, at least in New Jersey, until the advent in 1986 of the absolute pollution exclusion. Second, companies

should never take the insurance company's denial of coverage as an accurate assessment of the interpretation and application of the insurance policy/contractual language. Pushback is necessary. Third, insurance coverage law questions are matters of state law, and choosing which state's law applies may make or break a coverage case. These tactical issues need to be addressed early on, especially if the insured's exposure is great or the carrier is concerned about the type of precedent that could be set. It is often a race to the courthouse in high-profile/high-exposure types of cases. New Jersey tends to be a very favorable forum for insureds to pursue carriers.

**MCC:** Are there emerging issues in this space for which courts haven't yet established reliable precedent?

**Donovan:** The scope and breadth of the absolute and total pollution exclusions are very much in play among the states as courts wrestle with whether insurers can deny coverage on what insureds characterize as "non-traditional pollution" (for example, fumes associated with the installation of carpeting that make people sick) as opposed to the disposal of hazardous waste. By way of another example, should a carrier be permitted to rely on the absolute or total pollution exclusion to deny coverage where the insured sold a useful product (which happened to contain hazardous materials) and the end-use customer buried it in his backyard, converting that backyard into a "dump"? We would argue and have argued that this type of denial in the face of a policy that provided coverage for the sale of the very product in issue is inappropriate.



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—Martha N. Donovan

**MCC:** From a risk management perspective, what's your best advice for companies facing these uncertainties?

**Donovan:** Aside from the preservation of all of its policies, a company needs to consider its past, present and future liability realistically and consider the creativity of the plaintiffs' bar. For example, did anyone really expect for products liability actions to be filed on the basis that MTBE had been added to gasoline? MTBE performed the function it was supposed to perform – it's just troublesome to the environment. To address these types of concerns, there are both standard form and manuscripted policies available to provide coverage (often on a claims-made basis) where the insured desires to spread the risk. Experienced environmental brokers and lawyers should be involved in limiting a company's risk.

**MCC:** Regarding risk transfer of environmental liability as a result of an emergency situation,

**Martha N. Donovan**

Member and co-chair of the Environmental Law Group of Norris, McLaughlin & Marcus, P.A.

[mndonovan@nmmlaw.com](mailto:mndonovan@nmmlaw.com)

**Margaret Raymond-Flood**

Member of Norris, McLaughlin & Marcus, P.A.

[mrflood@nmmlaw.com](mailto:mrflood@nmmlaw.com)

**Norris  
McLaughlin  
& Marcus, P.A.**  
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*what are some of the pitfalls for policyholders that rely solely on CGL policies for coverage?*

**Raymond-Flood:** One of the main issues that we see is that insureds do not have a full understanding of the various exclusions that are often part of the policies purchased. For instance, in the context of insurance claims, policies written between 1973 and 1986 contain the “sudden and accidental” pollution exclusion, while policies post-1986 contain an absolute pollution exclusion, a far broader exclusion. In addition, policies contain other exclusionary provisions, such as the “owned property” exclusion, which states that the policy does not apply to property damage to property owned or occupied by or rented to the insured. In addition to the exclusionary provisions that policies contain, the insured may face issues related to the trigger of coverage and allocation of coverage, both of which often determine the limits of coverage available. The interpretation of the exclusions and other such provisions differs by state and is often a determinative factor that must be considered early in connection with the filing of claims.

**MCC:** *What alternatives are available for companies seeking to further reduce this risk?*

**Raymond-Flood:** In light of the adoption of the absolute pollution exclusion, Pollution Legal Liability (PLL) coverage should be considered as it may be the only option for present and future environmental liabilities in most instances. However, PLL coverage may be expensive and is sometimes cost prohibitive to an insured. Balancing the risk with the cost is essential and should be carefully considered.

**MCC:** *What are the key factors in a company's analysis of damages calculation as it relates to establishing that a claimed loss falls within the scope of its CGL policy?*

**Donovan:** A company needs to have a handle on its available coverage, the state that will provide the best substantive law regarding which policies will be “triggered,” and how to maximize the available coverage by utilizing that state's law. The factual history must be documented and complete. Expert hydrogeologists and/or forensic chemists are often required to establish when and how the contamination first appeared in the soil and



## **P**ollution Legal Liability coverage may be the only option for environmental liabilities in most instances.

—Margaret  
Raymond-Flood

groundwater, how it got there and where it is going.

**MCC:** *Talk about your role at the negotiating table as details are hammered out.*

**Donovan:** After laying the historical groundwork, the focus is on the allocation among the primary and, if applicable, the excess carriers and knowing the goal/monetary exposure of the client. Sometimes carriers are willing to enter into a joint allocation agreement, but often they are not, preferring individual allocation agreements. If the carriers believe their exposure is minimal but there is value in settling, they may settle for what is known as a full site release. Sometimes, they will want a full policy release. If the client wants whatever money it can obtain and believes that it will never have another claim to which the policy(ies) may apply, a full policy release might be acceptable, but generally we steer clients toward a site release or, better yet, the allocation of the particular claim to the particular policies. Our job is to meet the client's particular need while advising it of possible future exposure.

**MCC:** *You have said that the duty to defend is broader than the duty to indemnify. Talk through the interesting aspects of these insurer obligations from the perspective of policyholders.*

**Raymond-Flood:** In the majority of jurisdictions, as long as a complaint creates the possibility of a covered liability, a primary insurer that has included a duty to defend is obligated to defend the insured even if there is a possibility that liability would not be covered. Often, the carrier will do so under a reservation of its rights. When negotiating for coverage, an insured should consider whether it wants

the choice to select counsel to defend or whether it is comfortable being represented by counsel selected by the carrier. An insured may also want to consider whether to hire independent, personal counsel in situations where only uncovered claims may be left for trial since the carrier would, at that point, have the right to withdraw its defense.

**MCC:** *On the issue of settlement versus litigation, what strategies are effective in enabling policyholders to take matters in their preferred direction?*

**Raymond-Flood:** The insured should consider whether the defense costs are capped as part of the limits of liability or whether they are unlimited in addition to the limits of liability. If defense costs are limited, it may be prudent for the insured to consider early settlement before limits are exhausted by defense costs. If defense costs are unlimited, it is one of the factors that an insurer will consider when evaluating the costs and risks of a claim and may be a determinative factor in convincing an insurer to settle a claim, versus litigating it.

**MCC:** *Talk about where the insurance industry is heading. Are there new/innovative coverage regimes or new areas of heightened risk that companies should be aware of?*

**Raymond-Flood:** Cyber liability insurance has become the new buzz phrase for all companies using highly developed technology. It is a must for virtually any company these days. However, companies need to be aware that traditional insurance is also constantly changing in response to market demands. For example, as a direct result of the so-called Licensed Site Remediation Professional (“LSRP”) program in New Jersey, carriers needed to and did create policies to provide the necessary coverage for the individual LSRP exposed to a lifetime of possible malpractice claims.

**MCC:** *How is Norris McLaughlin uniquely qualified to help?*

**Donovan:** Norris, McLaughlin & Marcus has decades of experience in insurance matters representing policyholders in connection with procuring and/or presenting claims pursuant to occurrence and claims-made policies in virtually every type of factual scenario that may arise. It is a complement to our litigation, real estate, products liability and corporate departments.