Lead in Drinking Water: How To Get the Most Out of Your Municipality's Insurance

By: Finley Harckham, Anderson Kill P.C., New York, New York



Lead poisoning in drinking water has been a problem since ancient Rome, and it simply won't go away. As the recent history of Flint, Michigan demonstrates, lead in drinking water can result in multiple serious, and extraordinarily expensive, challenges for municipalities. Since the problem in Flint was discovered in 2014, unsafe levels of lead have been reported in drinking water in a number of cities and towns across the country. In addition to health risks, municipalities may face enormous expense resulting from elevated levels of lead, including legal liability and the costs of emergency and remedial measures. Some or all of these costs may be covered by liability and first party property insurance, depending upon the specific factual scenario involved and the exclusions present in potentially applicable policies. Municipalities faced with lead contamination issues should identify and carefully analyze all potentially applicable insurance policies, promptly report all claims, losses and occurrences as required by the policies, and develop a plan for securing coverage.

General Liability insurance: When faced with claims of bodily injury or damage to third party property, municipalities should look to their general liability insurance. Such policies provide broad coverage for liability resulting from accidental injury or damage, but often contain exclusions for pollution that may bar coverage for lead contamination.

General liability policies typically provide coverage for an "occurrence," which is often defined as an "accident" which includes "continuous or repeated exposure to conditions." Therefore, exposure to contaminated drinking water should be considered an occurrence as long as it was not expected or intended by the insured. Most general liability policies provide coverage for injury which occurs during the policy period, even if the "occurrence" took place at an earlier time. If injury or damage takes place over an extended period of time, coverage may be provided by more than one policy period, meaning that multiple policy limits may be available. This may be very important to municipalities faced with enormous liability exposures and relatively low limits of coverage in any one year. Bodily injury claims, including claims for emotional distress, by people who drank from allegedly contaminated water supplies, will fall within the coverage grant of many commonly used general liability policies. Likewise, physical damage to, or contamination of, piping systems owned by third parties may be an "occurrence" under a general liability policy. Further, some general liability policies provide "personal injury" coverage for nuisance, trespass and/or an "invasion of the private right of occupancy." Personal injury coverage has been subjected to differing interpretations by the courts, so that it may or may not apply to a claim of lead contamination to property, depending upon which state's law is applied.

Most general liability policies contain one or more exclusions for bodily injury or property damage resulting from "pollution" or "contamination." However, it is difficult to generalize about whether those exclusions will bar coverage for claims involving lead in

drinking water, for a number of reasons. First, a variety of substantively different exclusions exist, including many non-standard wordings. Some may explicitly apply to contamination of water, while others do not. Second, whether a particular exclusion applies may depend upon the specific facts of a claim. For example, a pollution exclusion might apply to contamination of water from corroding lead pipes, but not to the damage to the pipes themselves. Third, insurance policies are interpreted under state law, which means that the same standard form clause can be given different meanings in different jurisdictions.

The courts have interpreted certain standard form pollution exclusions inconsistently, so coverage may turn upon which state's law is applied. For example, there is a split among the courts on the issue of whether certain standard form pollution exclusions apply only to contamination of the environment, as opposed to confined spaces such as a home or factory. An argument certainly can be made that when water is contaminated in a pipeline, as allegedly happened in Flint, that is not pollution of the environment. Also, some courts have ruled that pollution exclusions which apply to bodily injury and property damage claims are not applicable to personal injury coverage.

Municipal E & O and Public Officials Professional Liability Insurance

In addition to general liability insurance, some municipalities have coverage for liability resulting from errors or omissions by public entities and officials. Claims alleging lead poisoning or lead - related property damage are likely to assert malfeasance on the part of municipal officials and departments which may be covered by such policies. Also, these policies may not contain a pollution exclusion, or if they do it may be different from the clause in the municipality's general liability coverage.

Thus, lead exposure claims may be covered under errors and omission policies even if they are excluded from general liability coverage. Further, errors and omissions policies may provide some coverage for "crisis management" costs. That coverage is usually subject to low sublimits, but may help to offset public relations related costs. Errors and omissions insurance is often written on a "claims made and reported" basis, which means that coverage is only provided by policies in force at the time a claim is asserted, and only if the claim is reported to the insurer during the policy period or extended reporting period.

Third Parties' Insurance

A municipality may be covered for lead contamination claims as an additional insured under the insurance policies issued to its contractors. Many "additional insured" provisions of contractors' policies limit coverage to claims "arising out of" the work of the contractor. Fortunately, such language has been broadly interpreted by a number of courts to provide coverage even if the liability claim was not based upon conduct of the contractor, as long as there is some nexus between the contractor's work and the alleged injury. So, for example, a municipality may be covered under the insurance of a contractor who is involved with the monitoring of drinking water supplies.

The Importance of Defense Coverage

Widely publicized allegations of lead poisoning will undoubtedly result in a number of law suits which may cost many millions of dollars to defend. Therefore, the litigation defense coverage provided by many liability policies - often in addition to the limits of liability – can prove to be extremely valuable. It is very important to keep in mind that defense coverage may be provided even if a judgment or settlement in the case is ultimately excluded. As a general rule, defense coverage is triggered as long as any one allegation of a complaint is ***potentially*** covered. Thus, even if many of the allegations of a complaint would be excluded under a pollution exclusion, as long as a single allegation ***might*** not be excluded, a policyholder may be entitled to very valuable defense coverage.

First Party Property Insurance

The media has reported that the Flint, Michigan problem stems in part from corrosive river water which caused lead from aging pipes to leach into drinking water. Reportedly, it will cost tens or hundreds of millions of dollars to replace damaged pipes. To the extent damage like that occurs to a municipality's own pipes it may be covered by first party property insurance. Further, property policies often cover extra expenses resulting from a covered loss. So, for example, the costs of making alternative water supplies available to residents might be covered. Like general liability policies, property policies insure against damage which occurs during the period of coverage, which means that multiple years of insurance may be available. Property policies contain a number of exclusions, including pollution exclusions, which might apply to property damage involving lead contamination.

Tips for Getting the Most Out of a Municipality's Coverage

Lead contamination of drinking water is likely to result in a complex set of problems presenting a number of insurance coverage issues. With so much at stake, municipalities faced with such problems should make their insurance an urgent priority, taking steps that include:

1. Assembling a team of experts to identify and analyze all potentially applicable insurance. For first party property and extra expense claims, the team should also include loss quantification experts.

2. Complying with contractual obligations to provide insurers with prompt notice of claims, losses and circumstances;

3. Complying with all reasonable requests for documents and information from insurers. These requests may be burdensome and inconvenient, but failing to provide relevant information will delay the insurance claim and could even result in a forfeiture of coverage.

4. Complying with all contractual

Continued on page 14



Finley Harckham is a senior litigation shareholder in the New York Office of Anderson Kill and serves on the firm's Executive Committee. He represents corporate and government policyholders in insurance coverage matters, specializing in property loss, business interruption, environmental, construction, professional liability, aviation and general liability claims. He has successfully litigated, arbitrated and settled hundreds of complex coverage cases.

Lead in Drinking Water Cont'd from page 13

deadlines for the filing of proofs of loss or coverage actions (or securing written extensions of such deadlines);

5. Providing insurers with an opportunity to accept or reject the settlement of any potentially covered claim. An insurer may not unreasonably withhold its consent to a settlement, but coverage may be forfeited if a claim is settled without giving the insurer advance notice of settlements or other developments which may be deemed by a court to prejudice the insurer's rights.

6. Developing a plan for dealing with insurance claims handlers. For example, sustained vigilance is often needed to resolve large and complex claims in a reasonable period of time. The policyholder should keep a written record of everything of consequence that happens, and does not happen, in the adjustment of a claim. That record should be communicated to the insurer on a regular basis so it knows that its conduct is being monitored. This may deter dilatory claims handling and make a record, if needed, for a bad faith claim. Also, for many reasons a policyholder needs a clear idea of the insurer's coverage position, yet coverage determinations and reservations of rights letters may consist of nothing but lengthy quotations of policy provisions followed by a conclusory statement that "for the foregoing reasons the insurer denies coverage" or reserves its rights. The policyholder should respond to such letters with a demand for an explanation of the insurer's position. Further, the policyholder should be prepared to pursue its legal rights without delay in the event the insurer denies coverage. The policyholder may have a choice of court venues, or the option of different forms of ADR that are provided for in some policies. Those choices should be made, and acted upon, before the insurer seizes that opportunity for itself.

Conclusion

Insurance coverage for the serious problems being faced by Flint and other municipalities is too important to be put aside while dealing with other issues. Making insurance recoveries a high priority from the outset of a crisis gives you the best chance of success. ML

President's Letter Cont'd from page 5

agement practices when a lawyer's actions are directed by the firm or where training has not been adequate in a specific office management area, but I am not aware of the courts commenting on the operation of municipal law departments. Given the pressures to keep costs low and continuously meet service needs, I doubt many of us would say that entity regulation will not impact our operations and how we use our resources. That impact can be both positive and negative. I can't wait to hear that discussion at next year's conference!

IMLA is doing its share to ensure that as an organization serving the needs of municipal lawyers, we are also responsive and forward thinking. I am proud to have been on the Board for a number of years as former IMLA President Susan Rocha's 20/20 Vision has been implemented. This year sees a new phase of that program come into place as we are faced with the impact of term limits. I am grateful for the forward thinking of those with whom I served under Herb Thiele's leadership, who created a new Executive and Policy Committee to ensure that we can still tap into the passion and expertise of those no longer on the Board. Together with our Vision 20/20 Committee, we are still changing to better reflect the diversity of our membership.

Change is never easy but we are good at embracing it. I will be relying on my colleagues on the Board to help cultivate the talents and ideas of our rising stars. Many of IMLA's leaders of tomorrow cannot be present at our Conferences due to budget constraints. We need to think about how to ensure that IMLA represents all municipal lawyers, and helps you all in your practice. Let's carry that discussion forward this year. I am looking forward to welcoming our younger members into a closer connection with IMLA. Join a committee and become active in our organization. And please feel free to contact me at president@imla.org and share your ideas.

Yours respectfully,

Mary Ellen Bench, IMLA President ML

