Insurance Coverage for Nuisance Claims in the Oil Patch

This article was originally published by *Texas Lawyer* on July 24, 2015.

by Vince E. Morgan and Tamara D. Bruno

Vince E. Morgan
Litigation
+1.713.276.7625
vince.morgan@pillsburylaw.com

Vince Morgan is a partner in Pillsbury's Insurance Recovery & Advisory and Litigation practices. He is based in the Houston office.

Tamara D. Bruno
Litigation
+1.713.276.7608
tamara.bruno@pillsburylaw.com

Tamara Bruno is a senior associate in Pillsbury's Insurance Recovery & Advisory and Litigation practices and also is based in Houston.

Texas is one of the oil and gas producing states where mineral interests can be severed from the surface estate. As a result, property owners in that situation find themselves with oil and gas production activities on or near their property without sharing in the benefits associated with that production. The mineral estate is dominant, so the mineral owner has the right to freely use the surface estate to the extent reasonably necessary for the exploration, development and production of oil and gas on the property. That includes activities such as building roads, drilling wells and transporting equipment and personnel.

Frustrated property owners are increasingly bringing nuisance claims based on bright lights, loud noises, traffic, dust, odors, wastewater and other effects of these activities. A nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities. These lawsuits have had varying rates of success—many settle, some result in little or no liability but at least one case led to a headline-grabbing multi-million dollar verdict. Regardless of the outcome, these cases present a question facing the oil and gas industry as to whether the costs of such nuisance claims are covered by insurance.

1. Nuisance claims under liability insurance. Depending on the terms of a particular policy, nuisance claims can potentially be covered under various types of liability insurance. However, coverage for nuisance claims is most likely to be sought under commercial general liability insurance.

CGL policies generally cover an insured's liability for bodily injury or property damage that is caused by an accident. As defined in CGL policies, "accident" often includes "continuous or repeated exposure to substantially the same general harmful conditions." In response to oil and gas nuisance lawsuits, some insurance carriers have taken the position that the insureds' activities as alleged in the lawsuits are not an accident as defined in CGL policies. While nuisance lawsuits can be based on intentional conduct, such suits can also be based on negligent conduct or other conduct that is abnormal and out of place in its surroundings. Further, in order to be an alleged nuisance, the conduct at issue almost certainly must expose the plaintiffs to continuous or repeated exposure to the allegedly harmful conditions. Depending on the type of nuisance alleged, these lawsuits may trigger the insuring agreements of CGL policies.

2. Are the alleged harms from nuisance "bodily injury" or "property damage"? Some nuisance lawsuits allege physical harm, such as illness, headaches, rashes or nosebleeds. However, it is common for plaintiffs to allege damages from mental or emotional harm, such as discomfort, anxiety or "loss of peace of mind." Many CGL policies define "bodily injury" to include non-physical harm only if it results from physical harm, sickness or disease. Insurance carriers may deny coverage for nuisance liability on the basis that the only alleged damages are mental or emotional injury. Insureds should carefully review the facts for claims of physical harm.

With respect to property damage, some nuisance claims do allege physical damage to property caused by hazards such as water, dust or subsidence. Nuisance lawsuits typically claim loss of use and enjoyment of land. For example, plaintiffs often allege that they can no longer enjoy their outdoor space because of noise or dust. Plaintiffs may also allege that bright lights or noise interrupt their sleep or conversation. Some insurance carriers have taken the position that loss of use and enjoyment is not covered "property damage." However, standard CGL policies include coverage for loss of use resulting from physical damage to property as "property damage" and even define "property damage" to include any loss of use of property that is not physically damaged. Further, courts in a number of cases nationwide have found that the kind of non-physical injury alleged in nuisance claims does constitute "loss of use" as used in CGL policies' definitions of property damage.

3. Potential exclusions. CGL policies often exclude or limit insurance coverage for pollution claims. Pollution exclusions and coverage can differ from policy to policy, especially in the oil and gas sector, where pollution coverage can be more favorable to insureds than it typically is in other sectors of the economy. Generally speaking, "pollution" is typically defined to include, for example, "any actual, alleged, or threatened discharge, dispersal, escape, migration, release, or seepage of any pollutant." "Pollutant" is also often broadly defined to include "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste."

Some insurance carriers have taken the position that alleged injury or damage from dust, odors, wastewater or similar materials in nuisance lawsuits are excluded or limited as "pollution." However, nuisance lawsuits do not necessarily include traditional environmental or pollution claims. Further, many of the conditions often complained of in a nuisance lawsuit—such as excessive noises, lights and traffic—are not like the materials listed in the definition of a "pollutant." They may be "irritants," but they are not "solid, liquid, gaseous or thermal" irritants. Finally, some pollution exclusions (as well as other exclusions) may also be ambiguous with respect to coverage for these suits, which is another issue to closely examine.

When faced with nuisance lawsuits, insurers and insureds should carefully review their policy terms as well as the allegations and evidence in the lawsuit for potential coverage. Only a disciplined analysis will lead to the right result on whether a given claim is covered.