

Memorandum Bulletin of October 5, 1990

Pollution carrier exemptions for government funds

October 5, 1990

THIS COULD AFFECT YOUR POLLUTION LIABILITY

Many pollution policies covering petroleum pollution have provisions which exclude coverage if there is payment from a government fund to the insured or payment for clean-up or which contain subrogation clauses for any payment made from the fund to the insured.

The South Dakota Attorney General has written an opinion, AGO 90-36, relating to those exclusions and subrogation clauses. The opinion resulted from passage of SDCL 34A-13-9.2 which states:

The fund shall be subrogated to any insurer, risk retention group or third party payor. The fund has the right to recover from insurance or any third party payor and that right may not be waived by contract.

In interpreting the statute, the Attorney General stated, "it is my opinion that the fund may recover from persons who are not responsible persons within this definition, and it may also recover from insurers, risk retention groups, or other third party payers who are not 'responsible persons.'" The Opinion further states that "clauses voiding coverage in insurance policies. . . are void as against public policy. . . Nothing apparently prohibits an insurer from incorporating such a provision in its policies, but, in my opinion, faced with the clear mandate of SDCL 34A-13-9.2, the courts would not enforce such a policy."

Based on that opinion, clauses voiding coverage because of state pollution funds may be void and policies should be reviewed in light of that opinion. SDCL 34A-13-9.2 became effective February 20, 1990; therefore, the opinion would apply to any policies issued after that date.

A copy of the opinion, AGO 90-36, may be obtained by contacting the following:
{Footnote 1}

Petroleum Release Compensation Fund
330 South Poplar Avenue
Pierre, SD 57501

Mary Jane Cleary
Director of Insurance