



Should you get environ. insurance for contaminated property deals?

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Many real estate deals disassemble when the specter of property contamination arises as a potential issue. One or more of the deal parties - or their attorneys - either run from the deal or run to their respective corners to dig in their heels until the other party gives sufficient concessions. Neither strategy productively resolves the matter.

Environmental insurance, offered by such major underwriters as AIG, XL, Zurich and ACE, can be used as a tool to forge the deal by offering an independent source of cost recovery to multiple insureds. However, these policies can be complicated, with different forms issued by different companies. With the recent rise in the number of Brownfield (contaminated property) transactions, developers have come to rely more and more on their attorneys to evaluate whether the policy truly covers the risks seeking to be insured.

Firstly, since the insurance policy is only as good as the company that issues it and that company's assets, it is important to qualify that the companies you are considering are financially rated "A" or better by AM Best, have a solid history of "writing" environmental insurance and have a good claims paying history. The deal should be "marketed" to more than one underwriter to initiate a competitive process for premium indications by a knowledgeable environmental insurance broker. At a minimum, the application package needs to be accompanied by a Phase I Environmental Site Assessment (ESA); depending on the results of the Phase I, a Phase II ESA may be required. Quotes are typically issued for a range of limits of liability, self-insured retentions and policy periods, so that insureds can have alternatives from which to evaluate price versus coverage.

Let's say you are a developer with plans for a condominium complex in an up-and-coming area and the price is right for the site, but a number of above and underground storage tanks were previously on site from its former use. In addition, the use of one adjacent property as a vehicle maintenance facility raises some issues. The seller won't give an indemnity and wants a release from all environmental claims. Furthermore, your lender is looking for some assurance that the deal won't collapse if unexpected pollution conditions are discovered.

This is the perfect application for a "Pollution Legal Liability" policy. This type of policy is site-specific and covers claims arising from pollution conditions at, on or migrating from the insured property. It offers insurance for (1) required cleanup by government agencies, (2) legal defense expenses and (3) third party bodily injury and property damage claims that might arise from either pre-existing or new pollution conditions that are discovered and reported during the policy period. Other coverage grants are available for an additional premium, such as contractual liability, non-owned disposal site coverage and business interruption (including development delay damages). Contractual liability coverage can be used to backstop specified indemnities.

Non-Owned Disposal site coverage can cover the "cradle-to-grave" liability created by hazardous waste laws. Business Interruption Loss arising from a pollution condition provides coverage for business income, extra expense and development delay.

With a PLL policy, the scope of coverage can be expanded or restricted either through endorsement or by definition. For example, attorneys should check the definitions of "cleanup" or "remediation" to see if it includes transportation and disposal of the contamination and restoration in the event remediation requires the demolition of certain improvements. The definition of "property damage" may or may not include natural resource damages and/or property diminution claims, which are other common and potentially costly environmental claims.

Beware of policy exclusions, such as "Material Change in Use," which means if your property is originally insured for use as light industrial and it later changes to heavy industrial use, this will vitiate the policy. Additionally, the policy excludes pre-existing pollution conditions already known to the insured. Unknown "phantom" underground storage tanks are covered, only if - after appropriate due diligence - they were not initially discovered. More current exclusions relate to claims resulting from mold or other indoor air conditions.

Other environmental policies are available that perform other uses in contaminated property transactions, such as Cost Cap or Remediation Stop Loss insurance, which insures against cost overruns in the cleanup of known contamination. In each case of the placement of environmental insurance, the enlistment of a team of legal and technical professionals with knowledge and experience in this area can mean the difference between claims paid or not.

Suzanne Avena, Esq. is co-chair of the Environmental Practice at Garfunkel, Wild & Travis, P.C., Great Neck, N.Y.

New York Real Estate Journal - 17 Accord Park Drive #207, Norwell MA 02061 - (781) 878-4540