



USE OF ENVIRONMENTAL INSURANCE IN STRUCTURING TRANSACTIONS

Allocation of risk for known and unknown environmental conditions remains one of the major challenges in real estate transactions (conveyances or lending) – particularly transactions involving known or suspected environmental risks. Recent developments in Florida environmental law, notably the promulgation of “Global Risk Based Corrective Action” under Chapter 62-780, F.A.C., and a recent Florida Supreme Court case (*Aramark v. Easton*) (that held that existing statutory provision establish a strict liability cause of action against the owner of a contaminated property for damage caused to adjoining properties), underscore the concern.

Environmental insurance is now a recognized tool for addressing these risks, particularly where a transaction party may be unwilling or unable to provide meaningful indemnification for known or potential liabilities. While the use of environmental insurance transactions involving industrial or “Brownfield” property is obvious, environmental insurance can be used to problems in more “routine” settings, such as risk allocation in the context of the sale of shopping centers or strip malls that have or once had a dry cleaner tenant, automotive service center, or the redevelopment of former service station sites that have residual petroleum contamination.

Depending on the particular facts of each situation, coverage generally may be available for the following types of risks, including known conditions:

- on-site cleanup of pre-existing conditions;
- on-site cleanup of new conditions;
- third party claims for on-site bodily injury and property damage
- third party claims for off-site bodily injury including claims by off-site third parties for diminution of value;
- third party claims for off-site cleanup resulting from new or pre-existing conditions
- business interruption coverage

One of the particular advantages of these “pollution legal liability” (PLL) policies, is the ability to manuscript a policy that will “wrap around” other existing “coverage.” For example, policies can be written to wrap around the protections provided by the State of Florida Cleanup Programs (for example, the Petroleum Pre-Approval, Petroleum CP or Drycleaning Solvent Cleanup Programs) to cover risks not addressed by those Programs, such as: (1) the potential failure or insolvency of the State Program funds; (2) the failure of the Program to respond to an action to compel cleanup or to recover costs against the insured not otherwise barred by the amnesty provisions of the Florida Program; or (3) third party claims for bodily injury or property damage including claims of diminution of value raised by adjoining property owners. Similarly, polices can be written to “wrap around” an existing contractual cleanup obligation between a non-insured and the State.

Deductibles, specific coverages and policy term are all negotiable. Lenders can be added as insureds, and policies can be drafted to insure the transferability to successive owners and their lenders. These policies generally are not written on forms reviewed and approved by the State Insurance Commissioner, and the policies are not subject to protections under the State's insurance protection fund (as would, for example, a home owner's policy). Other forms of environmental policies are available such as "cost cap insurance (which is used to insure over anticipated costs of site remediation) or secured creditor coverage (which protects the lender, but not the transaction parties from existing environmental risks). We have worked with all the major underwriters including AIG, Chubb, XL and Zurich; and have experience with both PLL and cost cap policies.