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USING ENVIRONMENTAL INSURANCE TO MANAGE RISK ENCOUNTERED IN NON-TRADITIONAL TRANSACTIONS

I. INTRODUCTION

Environmental insurance has been available for commercial clients since 1979.1 Although available for over twenty years, it has only become increasingly popular in the last ten years.2 In response to government legislation enacted in the 1970s to protect the environment, insureds faced potential environmental liability.3 Consequently, they looked to their Commercial General Liability (CGL) insurance policies to pay for cleanup of property damaged by pollution released into the environment by the insured.4 Never intending CGL policies to cover property losses due to environmental exposure, CGL insurers began excluding environmental liability from their CGL policies.5 Insurers initially allowed insurance coverage under CGL policies to pollution claims resulting only from “sudden and accidental” events.6 The “sudden and accidental” ex-

1. See John Conley, Hidden Dangers: Taking the Uncertainty Out of Mergers and Acquisitions, Risk Mgmt., Apr. 2000, at 12, 14 (explaining development of environmental insurance was in response to government legislation that required clean-up of contaminated properties in United States).

2. See Susan Doering, Understanding Environmental Impairment Liability, (Society of Environmental Insurance Professionals, Middleton, WI), Spring 2001, at 1, 1 at http://www.erraonline.org/spring2001newsletter.pdf (stating environmental insurance has become highly specialized and marketed by most major insurers at competitive rates). Growing popularity of environmental insurance can also be seen by the fact that, as of 1995, policy limits ranged between $10 million to $20 million, while in 2000, policy limits extend up to $300 million in multiple-carrier deals. See David Reich-Hale, M&As Seen Spurring Growth of E & M Market, NAT'L UNDERWRITER, Feb. 21, 2000, at 6.

3. See John H. Grady, A Break for Buyers On Inheriting Pollution Problems, Mergers and Acquisitions, Jan./Feb. 1999, at 33, 35 (explaining that courts continually held corporations liable for increasingly higher levels of environmental liability).


clusion, or qualified exclusion, has been heavily litigated through the years. In ruling on the issue, courts agree that “accidental” refers to an event that occurs “unexpected[ly] and unintended[ly].” The majority of courts hold that “sudden” relates unambiguously to an event occurring abruptly or of short duration. Therefore, most courts hold that “sudden and accidental” provisions included in pollution exclusion language does not allow coverage for damage caused by pollutants released gradually. A minority of states, however, hold either that “sudden” has no relation to time or that its meaning is ambiguous and refers to “unexpected or unintended.” In such states, CGL policies cover damage resulting from gradual release as long as the contamination was “accidental,” that is, unexpected and unambiguous.

To further reduce coverage, insurers included a new type of limitation in policies beginning in 1985. Insurers introduced the “absolute pollution exclusion” in their attempt to avoid coverage of all pollution conditions, whether the pollutant release occurred abruptly or gradually, or whether it was intentional or unintentional. The applicability and scope of the absolute pollution

The “sudden and accidental” exclusion developed “as a response to several high-profile cases of environmental contamination, such as those occurring at Love Canal, New York; Times Beach, Missouri; and Jackson Township, New Jersey.” Maryann Susavidge, Insuring Healthcare Organizations Against Environmental Liability, HEALTHCARE FIN. MGMT., Nov. 2001, at 66, 66. The “sudden and accidental” pollution exclusion is also known as the qualified pollution exclusion. See Thomas M. Reiter & John K. Baillie, Better Late Than Never: Holding Liability Insurers to Their Bargain Regarding Coverage for Unforeseen, Gradual Pollution Under Pennsylvania Law, 5 DICK. J. ENVTL. L. & POL’Y 1, 2 n.4 (1996).

7. See O’Connor, supra note 6, at 612 (explaining that “sudden and accidental” pollution exclusion excluded coverage for bodily injury or property damage arising out of discharge, dispersal, release or escape of pollutant unless discharge, dispersal, release, or escape was sudden and accidental).

8. Id. The courts have had an easier time deciding the scope of the term “accidental” than the term “sudden.” See id.

9. See id. A majority of the courts apply a “temporal meaning of abruptness or of a short duration” to the word sudden. Id.

10. Id. (stating interpretation given by majority of courts to “sudden and accidental”).

11. Id. (stating interpretation of “sudden” in minority of states).

12. See O’Connor, supra note 6, at 612 (stating CGL insurance coverage allowed in minority of states).

13. See id. (explaining evolution of coverage from CGL policies to environmental insurance policies).

14. See id. Under the “absolute pollution exclusion,” pollution conditions are defined broadly to include “the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalies, toxic chemicals, liquids or gases, waste materials or other irritants, contaminant’s (sic) or pollutants into or upon land, the atmosphere or any watercourse or body of water.” Id. This definition of “pollution condition” covers more than pollution caused by hazardous waste. See David J. Dybdahl,
exclusion have been litigated extensively in the past several years, especially in the context of insureds that are in industries that do not naturally produce pollution or release pollutants over a period of time.\(^\text{15}\)

In the 1980s, the insurance industry designed a highly specialized insurance policy to meet the needs of those seeking insurance coverage from exposure to environmental liability.\(^\text{16}\) At that time, a few insurers offered environmental insurance to a handful of companies.\(^\text{17}\) Today, however, many underwriters have taken on high levels of risk and have done so with premiums comparable to other lines of commercial insurance.\(^\text{18}\) In addition, its application has been extended to non-traditional transactions.\(^\text{19}\) For instance, environmental insurance has become acceptable for use in mergers and

\(\text{Environmental Impairment Liability Policy, (Society of Environmental Insurance Professionals, Middleton, WI), Spring 2001, at 3, 3 at }\text{http://www.erronline.org/spring2001newsletter.pdf. For example, milk becomes a pollutant when, as a result of it being dumped into a stream, it reduces the oxygen in the water and kills fish. See id. While CGL policies exclude milk, environmental insurance covers it. See id. Just like milk, concrete sealant is not viewed to be a pollutant. See id. However, it was seen as an \textquoteleft irritant \textquoteright\ when introduced into a hospital ventilation system and caused the hospital to be evacuated. See id. Evacuation and cleanup expenses would be covered by an environmental insurance policy but not by a CGL policy. See id.}\)

\(^\text{15. See O'Connor, supra note 6, at 612. Even given the widespread acceptance of this exclusion, a \textquoteleft growing majority of states \textquoteright have declined to apply the policy exclusion to claims\textquoteright brought by insureds that are not considered a part of an industry that produces pollution. Id. at 612-13; see also Keggi v. Northbrook Prop. and Cas. Ins. Co., 13 P.3d 785, 792-93 (Ariz. Ct. App. 2000) (holding that \textquoteleft absolute pollution exclusion\textquoteright did not bar coverage for injuries sustained by golfer after drinking contaminated water); Freidline v. Shelby Ins., Co., 774 N.E.2d 37, 40 (Ind. 2002) (upholding appellate court's decision against insurer upon finding that plaintiff's policy was ambiguous and applied to injuries sustained by tenants in building owned by plaintiffs from carpet glue used during installation of carpet); Roofer's Joint Training, Apprentice & Educ. Comm. of W. New York v. Gen. Accident Ins. Co. of Am., 713 N.Y.S.2d 615, 617 (N.Y. App. Div. 2000) (granting plaintiff's motion for summary judgment against insurer upon finding that plaintiff's policy was ambiguous and applied to injury caused to student when toxic fumes were released while plaintiff made classroom demonstration to show how to apply roofing membrane with hot air gun).}\)

\(^\text{16. See Bailey & Gulledge, supra note 5, at 27. As environmental damage claims against CGL policies increased in both frequency and severity, the insurance industry designed a highly specialized insurance policy to meet the needs of the environmental market. Id.}\)

\(^\text{17. See Doering, supra note 2, at 1 (providing history of development of environmental insurance).}\)

\(^\text{18. See A Guide to Environmental Insurance, (Society of Environmental Insurance Professionals, Middleton, WI), Fall 2000, at 1, 1 at }\text{http://www.erronline.org/newsltr.htm1fa112000newsletter.pdf (stating that current environmental insurance industry is very competitive and policies are available to \textquoteleft virtually any legal activity\textquoteright ).}\)

\(^\text{19. See Conley, supra note 1, at 14 (explaining evolution of environmental liability insurance).}\)
acquisitions, real estate lending, brownfields development and restructuring a corporate balance sheet.\textsuperscript{20} Premiums, nevertheless, for nontraditional transactions can be expensive and are determined by the size of the transaction, the type of insurance and the nature of the liabilities and risks being insured.\textsuperscript{21}

When purchasing environmental insurance, insureds should carefully analyze environmental insurance policies to ensure that the policies provide the most effective coverage for their particular situation.\textsuperscript{22} Although environmental liability coverage is widely available, insureds and their counsel should remain cautious of a policy's effectiveness since the policies have not been given judicial scrutiny because they have not yet been litigated.\textsuperscript{23}

A lawyer who fails to address environmental liability associated with a property transfer or a merger or acquisition can face profes-

\textsuperscript{20} See Reich-Hale, supra note 2 (listing transactions for which environmental insurance is now used for more than "simply transferring environmental risk."). Brownfields are defined as either "commercial, industrial or institutional properties with actual or perceived contamination and a realistic potential for redevelopment." Jerry Ackerman, Finding Your Brownfield of Dreams, WASTE AGE, Mar. 2001, at 166, 169 (recognizing that economic development potential hinges on "surrounding infrastructure, environmental conditions, [and] demographic profiles."). For a discussion of the use of environmental insurance in mergers and acquisitions, lending situations, brownfields development and balance sheet restructuring, see infra notes 67 - 126 and accompanying text.


\textsuperscript{22} See Sara Beth Watson & Kristina M. Woods, Environmental Issues in Transactions: Old Swamps and New Bridges, NAT. RES. AND ENV'T, Fall 2000, at 75, 78 (advising that attorney should review environmental insurance with care).

\textsuperscript{23} See id. at 77 (explaining that counsel should carefully evaluate environmental insurance policies to ensure insurance accomplishes what client wants); see also David J. Dybdahl, Risk Management for Insurance Professionals, (Society of Environmental Insurance Professionals, Middleton, WI), Fall 2001, at 4, 4 at http://www.erronline.org/fall2001newsletter.pdf. To date, environmental insurance policies "have a stellar record of paying claims." Id. at 5. There have, however, been disputes. See Ann M. Waeger & Farer Fersko, Current Insurance Products for Insuring Against Environmental Risks, SE23 A.L.I.-A.B.A. 577, 597 (1999) (citing Mealeys Insurance Supplement October 15, 1998). On September 15, 1998, Owens Financial Group Inc. filed a complaint against American International Group, Inc. [hereinafter AIG]. See id. at 612. The complaint alleges that AIG failed to pay a claim under a Pollution Legal Liability Policy with respect to real property on which a tire recycling facility was located. See id. Specific policy definitions, conditions and insuring agreements were included in the Complaint. As of 1999, the parties were negotiating a resolution. See id. at 613. If the suit were to go to trial, the court may have to interpret the policy definitions, conditions and insuring agreements included in the Complaint. See id.
sional liability loss exposures. For instance, in Fall 2001, the Los Angeles Unified School District sued O'Melveny & Myers, one of the oldest and most prestigious law firms in Los Angeles, for failing to advise the district of the availability of environmental insurance during construction of a new high school. This example illustrates the importance of attorneys discussing environmental insurance with their clients.

This Comment examines how environmental insurance reduces the risk of exposure to environmental liability in non-traditional transactions. Section II describes the current types of insurance used in non-traditional transactions. Section III shows how environmental insurance minimizes the risk of liability associated with 1) a merger or acquisition, 2) real estate lending, 3) brownfields development, and 4) restructuring a corporate balance sheet. Section IV provides recommendations for negotiating an environmental insurance policy. Section V discusses the known loss doctrine and how its divergent application in state courts affects coverage under CGL policies that may still apply today. The conclusion, Section VI, summarizes the importance of environmental insurance in non-traditional transactions and steps that insureds

24. See Dybdahl, supra note 23, at 4 (reflecting possibility of liability being imposed on attorneys).

25. See Donald C. Nanney, Environmental Risk in Today's Market, REAL EST. ISSUES, Fall 2001, at 28, 30. Without any advice regarding environmental insurance, the school district assumed full environmental risk for the site. See id. The school district subsequently spent $200 million before abandoning the site because of the risk of “methane gas and hydrogen sulfide from the old oil field [previously] at the site.” Id.

26. See Dybdahl, supra note 23, at 4 (recommending discussion to prevent professional liability). If the school district had pursued insurance coverage, the insurer’s assessment requirements could have alerted the school district to the risks of site contamination. See Nanney, supra note 25, at 28, 30.

27. For a discussion of the application of environmental insurance in non-traditional transactions, see infra notes 58 - 66 and accompanying text.

28. For a discussion of types of insurance used for non traditional transactions, see infra notes 33 - 57 and accompanying text.

29. For a discussion of how environmental insurance can minimize environmental liability in non-traditional transactions, see infra notes 67 - 126 and accompanying text.

30. For a discussion of issues to consider during negotiations of non-traditional transactions, see infra notes 127 - 159 and accompanying text.

31. For a discussion of how the various state courts interpretations of the known loss doctrine could effect non traditional transactions, see infra notes 160 - 180 and accompanying text.
should take to ensure adequate coverage through the use of both environmental and CGL insurance policies.\textsuperscript{32}

II. Types of Environmental Insurance Coverage

Pollution Legal Liability (PLL) Insurance and Remediation Stop Loss Insurance are two types of environmental insurance that are used in non-traditional transactions.\textsuperscript{33} PLL insurance can come in three forms: 1) Property Transfer Insurance, 2) Secured Creditors Environmental Insurance and 3) Underground Storage Tank Insurance.\textsuperscript{34}

A. Pollution Legal Liability Insurance

Pollution Legal Liability Insurance, also known as Environmental Impairment Liability Insurance, covers site-specific exposures where “an active release of pollutants” caused pollution conditions.\textsuperscript{35} PLL policies provide insurance coverage that enables the insured to eliminate the risk associated with property that may be contaminated as a result of its prior use but does not currently require remediation.\textsuperscript{36} These policies include “coverage for on-site and off-site liability for property damage, bodily injury and clean-up costs triggered by pollution conditions.”\textsuperscript{37}

PLL policies are generally claims-made policies where contamination must be discovered and reported within the effective date of

\textsuperscript{32} For a discussion of how an insured can minimize the risk of obtaining environmental insurance in non-traditional transactions, see infra notes 33 - 180 and accompanying text.

\textsuperscript{33} See A Guide to Environmental Insurance, supra note 18, at 1-3. There are two other types of environmental insurance that are used in non-traditional ways: Environmental Professionals Errors and Omissions Insurance and Contractors Environmental Impairment Liability Insurance. See id. at 2. Contractors Environmental Impairment Liability Insurance covers claims against contractors performing environmental remediation services on contaminated sites. See id. Environmental Professionals Errors and Omissions insurance is similar to the traditional professional liability insurance carried by architects and engineers. See id.

\textsuperscript{34} See id. at 2 (listing most common forms of Pollution Legal Liability [hereinafter PLL] insurance).

\textsuperscript{35} Id. Because there are no industry standards for environmental insurance, PLL insurance, environmental insurance is also called environmental impairment liability insurance. See id.

\textsuperscript{36} See Steven L. Humphreys, Getting the Deal Done: A Survival Guide to Environmental Problem-Solving in Brownfields Transactions, 11 FORDHAM ENVTL. L.J. 799, 838 (2000) (noting PLL coverage is obtained for property known to have been contaminated and cleaned up but which continues to carry risk of future contamination).

\textsuperscript{37} Anna Amarandos & Diana Strauss, Environmental Insurance as a Risk Management Tool, NAT. RES. AND ENV'T, Fall 2000, at 88, 89 (describing types of coverage provided by environmental liability insurance).
the policy in order for the insured to recover on the policy.\(^\text{38}\) On the other hand, policies similar to occurrence-based policies can be obtained that lengthen the time in which the insured can report an environmental pollution claim.\(^\text{39}\) PLL policies cover claims arising from both sudden and gradual releases of pollutants from insured locations.\(^\text{40}\) In addition, PLL coverage can be obtained for contaminated property where the insurer knows of the pollution and an underwriter ascertains that the concentrations of the known contaminant fall below the regulatory levels requiring remediation.\(^\text{41}\)

Amongst the three forms of PLL insurance, Property Transfer Insurance is a form of PLL insurance specifically designed for use in the sale a purchase of property.\(^\text{42}\) This insurance can protect a lender when the borrower cannot pay for the cleanup costs of land on which contamination was found subsequent to the loan transaction.\(^\text{43}\) Property Transfer Insurance usually covers only clean-up costs; as a result, third-party liability coverage is often purchased in conjunction with property transfer insurance.\(^\text{44}\) Property Transfer Insurance should be used in addition to, but should not replace, an indemnity from the seller for cleanup costs and third party claims for bodily injury and property damage.\(^\text{45}\)

Another form of PLL insurance is Secured Creditors Environmental Insurance.\(^\text{46}\) This insurance protects the lender’s interest in

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38. See id. (explaining that claims-made policies only pay for damage claimed during policy period).
39. See id. Occurrence policies pay for damage that occurred while the policy was in effect but claimed after the policy expired. Id.
40. See A Guide to Environmental Insurance, supra note 18, at 1-2 (explaining coverage is no longer limited to “sudden and accidental” pollution as it had been in prior years).
41. See Amarandos & Strauss, supra note 37, at 89 (reflecting competitive environmental insurance market).
42. See A Guide to Environmental Insurance, supra note 18, at 2 (reflecting that environmental insurance policies have been adapted to meet requirements of marketplace).
43. See Lorelie S. Masters, Back To The Future: Coverage For Environmental Loss In The New Millennium, THE METROPOLITAN CORPORATE COUNSEL, INC., Mid-Atlantic Edition, Apr. 2000, at 10. This type of insurance is appropriate where the property has been cleaned up but where it is capable of future liability for either the borrower or the lender. See id.
44. See id. (explaining coverage of property transfer insurance).
45. See id. (referring to traditional indemnity or hold-harmless agreements).
46. See Dybdahl, supra note 14, at 3 (explaining Secured Creditors Environmental Insurance is based on property transfer coverage but restricts insured to lender only and restricts payment of claim only when borrower defaults on loan and pollution exists on property).
property used as collateral by the borrower.\textsuperscript{47} The policy pays the claim in the event that the borrower defaults on the loan after finding contamination on the insured property.\textsuperscript{48}

A third and final form of PLL insurance is Underground Storage Tank (UST) insurance.\textsuperscript{49} UST was developed to help owners and operators of underground storage tanks meet the requirements of the Resource Conservation and Recovery Act.\textsuperscript{50} Owners and operators must demonstrate their financial ability to pay claims resulting from release of fuel or hazardous materials.\textsuperscript{51} Underground storage tank owners and operators can use UST insurance to demonstrate they can meet their financial responsibility.\textsuperscript{52} UST covers "third-party liability claims for bodily injury, property damage, off-site as well as on-site clean-up costs, and defense costs."\textsuperscript{53}

B. Remediation Stop Loss Insurance

Remediation Stop Loss, also referred to as Cost Cap Insurance, provides coverage to the insured for any cost overrun incurred in excess of a deductible as part of an approved remediation project of a contaminated site.\textsuperscript{54} Cost Cap Insurance does not cover the known costs of a cleanup; instead, it becomes effective when actual costs exceed the initial projected costs of cleanup.\textsuperscript{55} This type of insurance becomes useful in the sale of contaminated property for which a cleanup plan has been approved and cleanup costs esti-

\textsuperscript{47} See id. Usually, the borrower will pay the premiums for the insurance coverage as part of the loan transaction even though the lender is the named insured. See id.

\textsuperscript{48} See id. There are two basic types of coverage: the policy will pay the lender for the cost of cleanup or the policy will pay the lender for the cost of cleanup or the outstanding loan balance, whichever is less. Id.

\textsuperscript{49} See id. (relating to liability for tanks used for storage of fuels or hazardous materials).

\textsuperscript{50} See id. (stating regulations of Resource Conservation and Recovery Act [hereinafter RCRA] apply to owners and operators of underground storage tanks).

\textsuperscript{51} See Dybdahl, supra note 14, at 3 (noting modifications made to RCRA in 1986 required owners and operators of underground storage tanks demonstrate their financial ability to cleanup any tank leaks).

\textsuperscript{52} See id. (emphasizing some tank policies only cover corrective action as defined in RCRA, and not other environmental damage claims).

\textsuperscript{53} Id. (explaining coverage of Underground Storage Tank insurance).

\textsuperscript{54} See Amarandos & Strauss, supra note 37, at 89 (emphasizing initial projected cost of cleanup is responsibility of insured and coverage is not effective until projected costs and buffer have been exceeded).

\textsuperscript{55} See Masters, supra note 43, at 10 (explaining that Cost Cap insurance does not transfer all of risk to insurer but introduces certainty by capping insured’s maximum exposure). Cost cap insurance is the riskiest type of insurance for the insurance industry because estimated cleanup costs can easily rise. See Reich-Hale, supra note 2, at 6.
mated.\textsuperscript{56} By setting a limit on possible future exposure, Cost Cap Insurance may provide adequate security for the completion of the sale.\textsuperscript{57}

III. APPLICATION OF ENVIRONMENTAL INSURANCE TO REDUCE RISK

Environmental insurance coverage has changed and expanded in many ways since its inception in 1979.\textsuperscript{58} When first introduced, environmental insurance covered only third party property damage and bodily injury exposures; it now covers first party cleanup and bodily injury costs as well as third party coverage.\textsuperscript{59} Prices have dropped significantly due to the market becoming increasingly competitive.\textsuperscript{60}

Companies in industries traditionally involved with pollution emission or hazardous material handling, treatment, disposal, storage and transport have purchased most of the environmental insurance policies issued to date.\textsuperscript{61} However, companies that do not have an inherent risk of releasing contamination, such as automobile dealerships, hospitals, universities, restaurants, dry cleaning establishments, retail stores and light manufacturers have started to realize the benefit of environmental insurance.\textsuperscript{62} For example, a small commercial laundry operation incurred property damage liability when it inadvertently discharged chlorine gas into the air, which caused paint to peel off of the cars parked near the laundry operation.\textsuperscript{63} Likewise, a university incurred environmen-

\textsuperscript{56} See Masters, supra note 43, at 10 (applying use of Cost Cap insurance).
\textsuperscript{57} See id. (explaining Cost Cap insurance limits exposure to higher cleanup costs than projected).
\textsuperscript{58} See Conley, supra note 1, at 14 (recounting introduction and development of environmental insurance).
\textsuperscript{59} See id. at 16 (demonstrating major change in policy coverage since introduction of environmental insurance). First party insurance involves damage to insured's own property. See Richard L. Fruehauf, Note, The Cost of Knowledge: Making Sense of "Nonfortuity" Defenses in Environmental Liability Insurance Coverage Disputes, 84 Va. L. Rev. 107, 119 (1998). Third party liability insurance covers property damage or personal injury done to a third party for which the insured is legally obligated.
\textsuperscript{60} See Conley, supra note 1, at 16 (demonstrating major change in policy coverage since environmental insurance was first introduced).
\textsuperscript{61} See id. at 18 (noting companies traditionally involved with hazardous material are legally and financially responsible for environmental cleanup).
\textsuperscript{62} See id. at 17 (recognizing companies that do not have pollution as direct byproduct of business can benefit from environmental insurance).
\textsuperscript{63} See Doering, supra note 2, at 1 (describing environmental loss is not normally inherent in dry cleaning operation).
tali liability when sewer piping was found to be contaminated by mercury.\textsuperscript{64}

Moreover, environmental liability insurance has been applied to broader business issues since its introduction.\textsuperscript{65} Companies have used environmental insurance in business transactions, such as in mergers and acquisitions, real estate lending, development of previously contaminated and abandoned properties (brownfields development) and restructuring of the corporate balance sheet.\textsuperscript{66}

A. Mergers and Acquisitions

Environmental insurance for mergers and acquisitions has gained acceptance in the marketplace.\textsuperscript{67} Insurance can minimize the acquisition candidate’s environmental risk that consists of “on-site contamination, off-site migration of contaminants, off-site disposal of hazardous waste, regulatory actions, administrative fines or penalties, criminal misconduct, worker safety actions and toxic tort Suits.”\textsuperscript{68} Environmental liability exposure associated with contamination already known or revealed by due diligence can be quantified and shared between the buyer and seller.\textsuperscript{69} Contamination that remains undetected, and therefore unquantified, creates uncertainty regarding future environmental risk for the acquirer.\textsuperscript{70}

A Phase I Environmental Site Assessment (ESA), conducted by an environmental consultant, as part of due diligence, includes a comprehensive historical review of the property to assess the likelihood that the property will incur future environmental liabilities.\textsuperscript{71}

\textsuperscript{64} See id. (describing environmental loss is not normally inherent in educational setting). Chemistry lab students had disposed of mercury improperly by washing it down a drain for years. See id.


\textsuperscript{66} See Reich-Hale, supra note 2, at 6 (attributing recent interest and growth in environmental insurance to use in financing transactions).

\textsuperscript{67} See id. (acknowledging most interest in environmental insurance has been generated by mergers and acquisitions within utility industry).

\textsuperscript{68} Hammer, supra note 21, at 24. Identification of the type of risk is the first step in determining how to minimize the risk. See id. at 23.

\textsuperscript{69} See Nanneney, supra note 25, at 29 (stating due diligence cannot eliminate all environmental risk).

\textsuperscript{70} See Conley, supra note 1, at 18. Such uncertainty involves the magnitude of the exposure and whether the buyer or seller will accept the risk, or whether they will share the risk or whether the deal will result in a discounted price. See id. at 20.

\textsuperscript{71} See Michael Kukla, What Lies Beneath? How ESAs Can Dig Up the Dirt, J. of Prop. Mgmt., July/Aug. 2001, at 61, 61 (explaining Phase I survey includes thorough review of the building, as well as assessment records, aerial photographs, topographic maps, soil surveys, a site inspection with a photographic log of the site and surrounding properties, interviews with owners and occupants, interviews with
Under the Comprehensive Environmental Response and Compensation Liability Act of 1980 (CERCLA), a purchaser of contaminated property is responsible for the cleanup of the property even though it did not participate or contribute to the actual contamination. The purchaser, however, can use the “innocent purchaser defense” provided by CERCLA if pollution was discovered on the property after the purchase as long as the purchaser had a properly commissioned Phase I survey performed before purchase and that survey did not reveal any type of contamination at the time of the survey. Purchasers generally have not been able to take advantage of this defense because many courts have ruled that if the contamination was not discovered prior to purchase, the survey was performed improperly. In addition, the defense is not available to the acquirer when the acquisition is accomplished through a stock purchase, rather than an asset purchase.

local government official, [and] a review of regulatory files . . . ”). If the Phase I Environmental Site Assessment [hereinafter ESA] showed no recognized environmental concerns [hereinafter RECs], then the due diligence has been completed and usually no additional investigation is necessary. See id. at 63-64. Commonly recognized environmental concerns include property that had been used for dumping, property with poor historical waste management, and properties with underground storage tanks. See id. If a REC is discovered, a Phase II investigation is usually conducted to confirm if the contamination is in excess of regulatory levels. See id. at 64. A Phase II survey consists of soil samples and water samples. See id. Phase III involves the actual design and implementation of a remediation plan which is based on the type of contaminants and acceptable regulatory levels. See Humphreys, supra note 36, at 831.


73. See id. (emphasizing benefit of conducting site survey).

74. See Larry Schnapf, Cost-Effective Environmental Due Diligence in Corporate Mergers and Acquisitions, NAT. RES. AND ENV’T, Fall 2000, at 80, 81 (stating “innocent purchaser defense” is rarely successful).

75. See Nanney, supra note 25, at 29 (recognizing acquirer in asset transaction does not usually acquire liabilities of company from which assets were acquired). An asset purchase, however, is not a guarantee that the acquirer will not be liable for environmental liabilities of the acquired company. See Hammer, supra note 21, at 21, 25. Asset acquirers can be deemed “successor corporations” and thus, liable if “(i) the buyer expressly or impliedly agreed to assume the seller’s obligations, (ii) the transaction amounts to a de facto merger, (iii) the buyer is a mere continuation of the selling corporation, or (iv) the transaction in entered into fraudulently in order to avoid liability.” Id. Where a corporate acquisition is accomplished by a merger or consolidation, the surviving entity generally assumes the liability of the entity with which it merged. See Grady, supra note 3, at 35. Until the United States Supreme Court decided United States v. Bestfoods in 1998, both an asset acquirer, via successor liability, and a surviving entity of a stock transaction would assume environmental liabilities associated with an out-of-business or sold-off subsidiary of the acquired company. See id. The decision in the
Environmental risk associated with the purchase of a privately held corporation is usually allocated between the buyer and the seller using indemnities and cleanup covenants.\textsuperscript{76} Escrow agreements or holdback accounts can also be used to fund any expected remedial work that occurred after the transaction was completed.\textsuperscript{77} Such traditional methods of risk sharing may not be available to a publicly held company in a competitive merger and acquisition market.\textsuperscript{78} However, environmental insurance is an effective way to minimize the unknown and unquantified risks associated with acquisition of a public company.\textsuperscript{79}

B. Real Estate Lender Liability

The real estate lending business has also begun utilizing environmental insurance.\textsuperscript{80} Without secured lender environmental insurance coverage, lenders charge a higher interest rate or even

\textit{Bestfoods} case eliminates the risk, and uncertainty that an acquirer used to face with regard to inheriting environmental liability for clean up of a property no longer owned by the newly acquired subsidiary. See id.; see also United States v. Bestfoods, 524 U.S. 51, 55 (1998) (holding parent corporation that actively participated in, and exercised control over, operations of subsidiary may not, without more, be held liable as operator of polluting facility owned or operated by subsidiary unless corporate veil may be pierced and holding corporate parent that actively participated in, and exercised control over, operations of facility itself may be held directly liable in its own right as operator of facility).

\textsuperscript{76} See Amarandos & Strauss, supra note 37, at 88-89. Such risks should be detected during the due diligence process. See Schnapf, supra note 74, at 80 (explaining environmental due diligence is necessary in order to minimize unexpected liabilities post closing).

\textsuperscript{77} See Amarandos & Strauss, supra note 37, at 89 (explaining traditional methods of risk allocation can be difficult to negotiate between buyer and seller).

\textsuperscript{78} See Judith A. Walkoff & Eric B. Rothenberg, \textit{Minimizing Risks in Public Company Mergers and Acquisitions}, NAT. RES. AND ENV'T, Fall 2000, at 84, 85 (highlighting difference in traditional risk allocation methods between acquisition of privately held corporation and publicly held corporation).

\textsuperscript{79} See id. at 130 (emphasizing that minimization of environmental risk is accomplished through indemnification, trust and escrow agreements for acquisition of privately held company and through environmental insurance for acquisition of publicly held company).

\textsuperscript{80} See Watson & Woods, supra note 22, at 77-78. The 1996 Asset Conservation, Lender Liability and Deposit Insurance Protection Act [hereinafter Act] provided banks and other lending institutions with protection from liability as a Potentially Responsible Party [hereinafter PRP] under CERCLA. See Paul Stanton Kibel, The Urban Nexus: \textit{Open Space, Brownfields, and Justice}, 25 B.C. ENV'TL. AFF. L. REV. 589, 604-05 (1998) (citing 42 U.S.C. § 9601(20)(E)-(G) (1994); 42 U.S.C. § 9607(n) (1994)). Under the Act, banks and lenders are able to take certain steps to protect their security interests in contaminated property without being liable as a PRP. See id. at 605. These steps include foreclosure, reselling and leasing of the premises. See id. (citing 42 U.S.C. § 9601(20)(E)(ii)). Banks and lending institutions continue to be liable, however, for their actions affecting how an owner handles environmental damage on the property. See id.
choose not to issue a loan when they suspect future environmental liabilities. In addition to a severe impairment of their collateral from contamination, lenders are concerned about a borrower’s potential for being assessed an excessive cleanup penalty that could jeopardize the borrower’s ability to repay the loan. As a result of a penalty, lenders could be left holding real estate subject to environmental exposure. Environmental insurance allows lenders to eliminate the risk in real estate lending.

To ascertain whether a property has potential environmental liability, lenders typically require that a Phase I ESA as part of due diligence be conducted for the property. Lenders, however, have come to view environmental insurance coverage as less risky than depending solely on due diligence. In fact, Moody’s Investor Services has deemed environmental insurance a suitable alternative to environmental due diligence for certain “commercial mortgage-backed security transactions.”

Although environmental insurance can eliminate the risk associated with real estate lending, insurance should not be used by the borrower as a substitute for due diligence. A Phase I site survey is

81. See Scott Britt & Jane DeRafelo, Transferring Environmental Liability, Risk MGMT., Feb. 2000, at 44, 44 (explaining higher interest rate offsets potentially high cost of settling environmental claims). Secured creditor insurance protects the lender from environmental liability that could develop when the bank decides to dispose of the property as a result of foreclosure or default of the loan. See Amarandos and Strauss, supra note 37, at 90.


83. See Conley, supra note 1, at 18. The borrower typically uses the real estate on which the loan is being sought as collateral for the loan. See id.

84. See Fletcher, supra note 65, at 12 (recognizing use of environmental insurance in real estate lending transactions).

85. See Kulka, supra note 71, at 61 (stating that financial institutions request most Phase I surveys be conducted). For a discussion of Phase I survey, see supra notes 71 - 74.

86. See Britt & DeRafelo, supra note 81, at 44 (viewing environmental insurance as “effective risk transfer tool”).

87. Id. (stressing acceptance and importance of environmental insurance in financing of acquisitions since 2000).

88. See Laura Sullivan, Environmental Insurance May Leave You Exposed, Risk MGMT., June 1999, at 8, 8 (explaining environmental insurance should supplement, not replace, environmental site assessment). Banks and other lenders may be tempted to substitute environmental insurance for a Phase I survey because of time and expense. See On Main Street: Environmental Policies Available Through Bankers’ Bank in Texas, AMERICAN BANKING, Apr. 4, 2002, at 22A. The cost of a policy is cheaper than the survey and a policy can be written in one to four business days while a Phase I survey and resulting report takes between four to six weeks. See id.
the only way to preserve the “innocent purchaser defense.”98 Lenders should not be lenient about requiring a Phase I survey or about alerting the borrower of the need for a survey.99 If the lending institution fails to inform the borrower about a Phase I survey, the borrower may be able to bring suit against the lender for violating a fiduciary duty to disclose to the borrower.100

C. Brownfields Development

Another non-traditional transaction that can benefit from environmental insurance is the development of brownfields.101 Brownfields development involves a sale of a former industrial, commercial or institutional property to a developer who intends to redevelop the site for “a less intensive use.”102 The property usually contains “actual or perceived contamination and [has] a realistic potential for redevelopment.”103 As part of the transaction, the seller wants to minimize its indemnification obligation to the developer and to achieve regulatory closure regarding known contamination.104

Similarly, a brownfields developer should take certain steps to protect its interest in an acquisition.105 The developer must identify unknown or undisclosed environmental issues and the impact of environmental issues on the property’s redevelopment and subsequent sale.106 In addition to a Phase I survey of the site, the brownfields developer should identify potential environmental lia-

89. Schnapf, supra note 74, at 80 (recounting one of many reasons for environmental due diligence).
90. See Sullivan, supra note 88, at 8 (recommending lenders not rely solely on environmental insurance).
91. See id. (explaining borrower would not have purchased property with knowledge of pollution).
92. See Waeger & Fersko, supra note 23, at 616 (recognizing brownfields development caused increase in number of environmental insurance policies issued).
93. See Brent C. Anderson, Valuation of Environmentally Impaired Properties, Nat. Res. and Env’t, Fall 2000, at 100. Detroit recently built a new baseball stadium on contaminated property that had long been abandoned. See Reich-Hale, supra note 2, at 6. Brownfield sites fall into one of the following seven categories: old utility sites, former textile mills, old institutional, commercial, or residential complexes, old petrochemical sites, former manufacturing properties, closed landfills and old governmental facilities. See Ackerman, supra note 20, at 170.
94. Ackerman, supra note 20, at 169. Since 1995, at least 1000 sites within the United States have been cleaned up with another 450,000 to 650,000 sites awaiting remediation. See id. at 166.
95. See Anderson, supra note 93, at 100 (stating concerns of seller of brownfields property).
96. See id. at 136 (emphasizing brownfields projects involve quantitative and qualitative analysis of many factors).
97. See id. at 100 (stating concerns of buyer of brownfields property).
bility of off-site properties to which hazardous substances have been transported in the past from the property under redevelopment.\textsuperscript{98}

Environmental insurance can minimize the risk of environmental liability associated with brownfields development.\textsuperscript{99} For instance, a brownfields developer can use Pollution Legal Liability (PLL) and Remediation Stop Loss/Cost Cap policies to reduce the risk in a brownfields transaction.\textsuperscript{100} Typically, environmental insurance coverage cannot be obtained for property that was known to be contaminated when the property was purchased unless the contamination has been cleaned up or unless a no-further action letter issued by the appropriate regulatory agency has been received.\textsuperscript{101} In a competitive insurance market, however, it is possible to obtain coverage where there is known pollution that has not yet been cleaned up but the underwriter’s engineering personnel determine that the contamination is less than regulatory action levels.\textsuperscript{102}

The brownfields developer should also identify the coverage under insurance policies purchased by the previous landowners.\textsuperscript{103} To maximize insurance coverage for a brownfields site, a brownfields developer “should locate all old insurance policies purchased by owners, prior owners, tenants of the property, and possibly even vendors who were involved in handling chemicals, disposing of waste, etc.”\textsuperscript{104} The CGL policies issued between 1970 and 1985 may provide coverage because they were written on an “occurrence” basis.\textsuperscript{105} Many of the policies written between 1970

\textsuperscript{98} See Humphreys, supra note 36, at 831 (illustrating brownfields developer should conduct expanded search to minimize environmental risk).

\textsuperscript{99} See Anderson, supra note 93, at 136 (stating environmental insurance can control or transfer environmental risk).

\textsuperscript{100} See Humphreys, supra note 36, at 837-38 (specifying types of environmental insurance coverage best suited for brownfields development). Pollution Legal Liability insurance protects the brownfields buyer from the risk of incurring future environmental liability because of past contamination of the property. See id. Cost Cap insurance allows the brownfields buyer to limit exposure for remediation to a maximum dollar amount. See id.

\textsuperscript{101} See Amarandos & Strauss, supra note 37, at 89 (recognizing norm in insurance industry).

\textsuperscript{102} See id. (acknowledging impact of competition in insurance industry on brownfields development).

\textsuperscript{103} See Masters, supra note 43, at 10. For instance, coverage may have been obtained under a CGL policy or “other types of primary, umbrella, or excess liability or property insurance.” Id.

\textsuperscript{104} Id. Conversely, policyholders should locate and indefinitely retain copies of all insurance policies that relate to any property that could qualify as a brownfields site. See id.

\textsuperscript{105} See Reiter & Baillie, supra note 6, at 4 n.20 (explaining that occurrence policies were norm from 1970 to 1985). For a further discussion of PLL policies, see supra notes 38 - 39 and accompanying text.
and 1985 may also provide coverage because many of them incorporated the qualified pollution exclusion.\textsuperscript{106} Qualified pollution exclusions allowed coverage only for contamination that occurred as a result of a "sudden and accidental" release of pollution.\textsuperscript{107} Coverage could also be available under policies issued before 1970 because they generally did not have any pollution exclusions.\textsuperscript{108} Although the insurance industry has pronounced that pollution exclusions in policies written before 1985 preclude all coverage for environmental liability, courts, after examining the facts surrounding the pollution and the intent of the insurance policies, have found that coverage may still exist.\textsuperscript{109}

To ensure that coverage stays intact during the sale of the property to the brownfields developer, the transaction should specifically include the transfer, or assignment, of all insurance policies covering the property.\textsuperscript{110} Even though insurers tend to oppose such a transfer, courts have enforced the non-assignment provisions if the assignment is completed before the loss occurs.\textsuperscript{111} Certain courts have even enforced non-assignment provisions that do not allow assignment after a loss without the insurer's consent.\textsuperscript{112} With environmental liability arising prior to the brownfields transaction, "the anti-assignment provisions in the insurance policies should not negate insurance coverage" since the "developers may not have actually disposed of contaminants and thus could not have intended to cause damage."\textsuperscript{113} Since an insurer's financial interest may best be served through litigation rather than by merely paying an environmental claim, the brownfields developer should be aware of the risks associated with old insurance policies and the cost involved.

\textsuperscript{106} See Reiter & Baillie, \textit{supra} note 6, at 2 n.4 (explaining environmental insurance policies written after 1985 include absolute pollution exclusions which generally bar all pollution damage claims).

\textsuperscript{107} See \textit{id}. The words "sudden and accidental" have been heavily litigated through the years. See \textit{id}. at 1, 3.

\textsuperscript{108} See \textit{id}. at 5-6 n.20 (citing \textit{Lancaster Area Refuse Auth. v. Transamerica Inc. Co.}, 263 A.2d 368, 369 (Pa. 1970) as example of policy without pollution exclusion).

\textsuperscript{109} See Masters, \textit{supra} note 43, at 10 (explaining need to preserve insurance policies indefinitely).

\textsuperscript{110} See \textit{id}. If the brownfields transaction is structured as a stock sale, an environmental claim made by the new owner would probably be honored. See \textit{id}.

\textsuperscript{111} See \textit{id}. (citing \textit{Northern Ins. Co. v. Allied Mutual Ins. Co.}, 955 F.2d 1353, 1354 (9th Cir. 1992)).

\textsuperscript{112} See \textit{id}. (basing decisions on public policy grounds).

\textsuperscript{113} Id. (arguing that insurer should provide coverage for brownfields site).
with their enforcement.\textsuperscript{114} Therefore, the purchaser of a brownfields property should consider the legal costs that could be incurred while trying to enforce any applicable insurance policies.\textsuperscript{115}

D. Restructuring the Corporate Balance Sheet

The final way a corporation can benefit from environmental insurance is in the restructuring of its balance sheet.\textsuperscript{116} While an acquiring corporation often obtains environmental insurance to minimize the risk of environmental exposure resulting from its purchase, a selling corporation will use environmental insurance to improve its balance sheet.\textsuperscript{117} For instance, when a corporation prepares for a future sale, it may be interested in transferring known and unknown liabilities, including environmental liabilities, off its balance sheet.\textsuperscript{118} To restructure its balance sheet, a corporation will structure a loss portfolio transfer and sell its liabilities to an insurance company, completely removing them from the corporation's balance sheet.\textsuperscript{119} As a result, the company can command a higher selling price, can experience an increase in the market value of its stock and may obtain better financing arrangements.\textsuperscript{120}

In December 1996, the Securities and Exchange Commission (SEC) and the Financial Accounting Standards Board issued financial reporting requirements that generated some interest in envi-

\textsuperscript{114} See Masters, supra note 43, at 10 (indicating brownfields developers should account for possible cost of litigation when assessing purchase price of property).

\textsuperscript{115} See id. (stressing insurance carriers will defend against having to provide coverage).

\textsuperscript{116} See Fletcher, supra note 65, at 12 (recognizing corporations use environmental insurance to protect balance sheet). Environmental insurance can be used by a long term manufacturing company that wants to change its focus from manufacturing to a services oriented company. See Conley, supra note 1, at 20.

\textsuperscript{117} See Conley, supra note 1, at 20. Companies also benefit from environmental insurance when that company wants to remove liabilities from its balance sheet for tax purposes or when the company is faced with the need to refinance. See Anderson, supra note 93, at 100.

\textsuperscript{118} See Anderson, supra note 93, at 100. Proper environmental accounting requires that a company maintain a certain level of cash reserves to cover both known and unknown environmental issues. See Kathy Williams, Do You Consider Environmental Issues When Planning Growth?, STRATEGIC FIN., Feb. 2001, at 21, 21.

\textsuperscript{119} See Green, supra note 21, at 64 (explaining method and effect of transaction).

\textsuperscript{120} See Fletcher, supra note 65, at 12. Lenders, investors and potential suitors will be more apt to feel comfortable that the corporation has control of its liabilities because the risk has been identified, quantified and transferred off the balance sheet. See id.
ronmental insurance.121 These reporting requirements mandate that publicly traded companies report environmental liabilities in their financial statements.122 Currently, a movement by the Calvert Funds and the World Resources Institute (WRI) seeks the SEC to increase its efforts to ensure that corporations comply with these reporting requirements and more fully disclose environmentally related risks.123 The Calvert Funds and the WRI conducted a study of the pulp and paper industry revealing that most of the companies surveyed failed to adequately disclose the impact of known environmental risks to their financial and competitive Positions.124 Reporting environmental liabilities on a corporation’s balance sheet can depress its stock price, hinder its ability to obtain financing and cause it to appear “unattractive to potential suitors.”125 Conversely, if a company uses environmental insurance to reduce the need to report liabilities on its balance sheet, it could become less risky to the investor and more attractive to the investment community.126


122. See id. Environmental disclosures must be included in a company’s registration statements, quarterly reports and annual reports. See id.

123. See Lauren Pervis, Environment Risks Should Be Disclosed in Financial Statements, ENVTL. REP., Feb. 9, 2001, at 283, 283. The Calvert Funds is a mutual fund company located in Bethesda, Maryland. See id. It describes itself as an “environmentally and socially responsible” investment firm. See id. at 284. The World Resources Institute is an organization located in Washington, D.C. dedicated to “research that provides information and proposals for change to foster environmentally sound and sustainable development.” Id. at 283. They based their opinions on two studies conducted on thirteen companies within pulp and paper industry with their findings reported in Coming Clean: Corporate Disclosure of Financially Significant Environmental Risks and Pure Profit: The Financial Implications of Environmental Performance published by The World Resources Institute. See id.

124. See id. (analyzing impact of environmental risks on “input costs, revenues, asset values, competitive advantage and shareholder values” to determine the companies’ risks). The factors included “recently announced regulations to reduce long range transport of ozone pollution precursors, and location of mills on impaired waterways where Section 303(d) of the Clean Water Act may force reduction in effluents.” Id. Other factors included fiber supply issues pertaining to “the possibility that harvesting on privately owned forests will be affected by state forestry regulations, by actions under the Endangered Species Act, or by carbon sequestration incentives implemented as part of the U.S. climate change policy.” Id.

125. See Fletcher, supra note 65, at 12 (explaining need for environmental insurance).

126. See id. (recognizing benefit of identifying, quantifying, and transferring off balance sheet both known and unknown environmental risks). Corporations that improve their management of environmental risk tend to be more financially stable. See Shari Caudron, The “Greening” of Corporate America, BUS. FIN., Oct. 2000, at 47, 47-48 (explaining that investors perceive such corporations as less risky).
IV. How to Minimize the Risk of Environmental Insurance

While environmental insurance provides a degree of certainty by transferring the risk to an insurer, the insured must consider the limitations associated with obtaining this insurance.\textsuperscript{127} Even though environmental insurance can be a cost-effective risk allocation tool to control pollution liability, the insured must properly negotiate the specific terms of the policy to achieve maximum protection.\textsuperscript{128} Although negotiations and subsequent inclusions in the policy will likely increase the policy premium, the increase will also expand the insured’s coverage.\textsuperscript{129} To achieve maximum protection, the insured should carefully review the following policy provisions: the carrier’s duty to defend and duty to indemnify, the scope of the indemnity provisions, the policy exclusions, and the insured’s obligation to cooperate with the insurer.\textsuperscript{130}

A. Carrier’s Duty to Defend and Duty to Indemnify

In CGL policies, insurers typically provide two “separate and independent forms of coverage”: (1) a duty to defend and (2) a duty to indemnify.\textsuperscript{131} While the insurer’s duty to defend is initiated at the beginning of a lawsuit and continues through the course of the litigation, the insurer’s duty to indemnify is initiated at the end of the lawsuit.\textsuperscript{132} Insurers may try to alter their duty to defend under environmental insurance policies.\textsuperscript{133} For instance, the policy may not state clearly “whether the ‘potential for indemnity’ standard applies for recovery of defense costs, as in the case for CGL coverage, or whether the insured must first prove that a duty to

\textsuperscript{127} See Amarandos & Strauss, supra note 37, at 88, 89 (acknowledging both advantages and disadvantages of environmental insurance).

\textsuperscript{128} See id. at 90 (stating “off-the-rack” policies may contain terms detrimental to insured).

\textsuperscript{129} See id. (balancing increased cost of policy against increased level of protection).

\textsuperscript{130} See id. at 90-91 (highlighting risk areas of environmental insurance policies). Additional relevant terms that the insured may want to negotiate include insured, arbitration, notice, property damage, underground storage tanks, asbestos and lead paint, contractual liability, cancellation, subrogation, severability, divested property, no-assignment provision, and natural resource damages). See Waeger & Fersko, supra note 23, at 599-602.

\textsuperscript{131} See Amarandos & Strauss, supra note 37, at 90-91 (defining typical forms of coverage of CGL policies).

\textsuperscript{132} See id. at 91 (explaining point at which insurer’s obligation begins in typical CGL policy).

\textsuperscript{133} See id. (describing attempt by insurer to limit traditional duty to defend concept in environmental insurance policy as compared to CGL policy).
indemnify actually exists."¹³⁴ The ambiguous policy language allows the insurer to argue that the duty to indemnify does not apply to the recovery of defense costs.¹³⁵ Even though ambiguous language is generally interpreted in favor of the insured’s “reasonable expectation of coverage,” the insured should clarify the duty to defend before the policy is purchased.¹³⁶

In an attempt to alter the duty to defend, the insurer may limit the amount of defense costs coverage by either imposing a cap or by applying the defense expense against policy limits.¹³⁷ In contrast, under a CGL policy an insurer’s obligation is limitless when defending a claim provided that the “potential for indemnity” standard is satisfied.”¹³⁸ With an environmental insurance policy, therefore, the insured should become aware of any caps and depletions of policy limits before purchase.¹³⁹

The insurer may also attempt to reduce its obligation to indemnify or defend by including in the policy the choice of law and choice of forum that most favors its position when applied to the interpretation of a policy.¹⁴⁰ The insured should, however, advocate for a more neutral or favorable forum for the insured.¹⁴¹ For instance, the insured could negotiate the use of the principal location of the insured risk as defined in the Restatement Second of Conflict of Laws Section 193 to govern the choice of applicable law.¹⁴² As an alternative to the Restatement, the insured could state

¹³⁴. Id. (combining principles of duty to defend and duty to indemnify).
¹³⁵. See id. (highlighting danger of inadequate negotiations of “off-the-rack” environmental insurance policy).
¹³⁶. Amaranados & Strauss, supra note 37, at 91 (ensuring maximum protection under policy).
¹³⁷. See id. (explaining ways by which insurer attempts to limit duty to defend).
¹³⁸. See id. (showing difference between environmental policy and CGL policy regarding level of coverage for defense costs).
¹³⁹. See id. (identifying that certain limits on defense costs under new environmental policies could cause insured to bear legal costs previously covered by CGL policies).
¹⁴⁰. See id. at 133. Insurers usually try to apply state law and state forum that is pro-insurance carrier, such as the application of New York law in a New York forum because New York law is pro-insurer oriented. See id.
¹⁴². See Amaranados & Strauss, supra note 37, at 133 (recommending selection method for choice of law used for interpretation of policy).
its own preference for state law and forum in the policy.\textsuperscript{143} If the insurer refuses to include the law and forum desired by the insured, the insured should request to have the entire provision deleted from the policy.\textsuperscript{144}

B. Scope of the Indemnity Provisions

An insured can also minimize risk when obtaining environmental insurance by fully understanding the scope of the indemnity provisions within the policy.\textsuperscript{145} The insured should carefully review an environmental policy to determine if it defines terms in a restrictive or limiting way that could reduce coverage.\textsuperscript{146} For instance, the insured should make sure that the term “claim” is broadly defined so that in addition to coverage for environmental liability imposed from a lawsuit, the policy would include coverage for administrative actions issued by the Environmental Protection Agency or other regulatory agency.\textsuperscript{147} The policy should also include, but not be limited to, coverage for any written communication that alleges or imposes environmental liability on the insured.\textsuperscript{148}

C. Policy Exclusions

Another way that an insured can minimize its risk when obtaining environmental insurance is to understand the policy’s exclusion.\textsuperscript{149} The general rule for CGL policies in many states typically bars coverage for acts that result in expected or intended damage.\textsuperscript{150} Environmental insurance policies limit this rule by barring coverage when an act performed intentionally causes damage during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship under the principles states in § 6 to the transaction and the parties, in which event the local law of the other state will be applied.

\textsc{Restatement (Second) of Conflict of Laws} § 193 (1971).

\textsuperscript{143} See Amarandos & Strauss, \textit{supra} note 37, at 133 (recommending alternative method to choose law and forum used for interpretation of policy).

\textsuperscript{144} See Waeger & Fersko, \textit{supra} note 23, at 600 (recommending method for insured to protect itself against law and forum favorable to insurer).

\textsuperscript{145} See Amarandos & Strauss, \textit{supra} note 37, at 91 (ensuring insurer’s duty to indemnify is not reduced under environmental policy).

\textsuperscript{146} See id. (narrowing scope of indemnity provisions).

\textsuperscript{147} See id. This is necessary because of the “increased use of administrative actions by the Environmental Protection Agency and related agencies.” \textit{Id.}

\textsuperscript{148} See id. (ensuring maximum coverage for known conditions).

\textsuperscript{149} See id. (ensuring maximum protection for insured under policy).

\textsuperscript{150} See Amarandos & Strauss, \textit{supra} note 37, at 91 (defining basic exclusion of CGL policy).
that was reasonably foreseeable.\textsuperscript{151} The policy's broad exclusions should be revised for maximum protection for the insured.\textsuperscript{152} At the very least, such a provision should be changed to specifically reflect only the expectations and intentions of the compliance managers and officers of the company responsible for the oversight of environmental issues.\textsuperscript{153}

Likewise, an insured should limit the provision referring to known conditions to include only contamination conditions known by appropriate management personnel.\textsuperscript{154} In this way, an insured can protect against an insurer denying a claim because an employee knew about a pollution condition but had not yet reported it to management.\textsuperscript{155}

D. Insured's Obligation to Cooperate with the Insurer

An insured must also understand his obligation under the environmental insurance policy to cooperate with the insurer.\textsuperscript{156} For instance, the insured must determine the degree to which the insurer expects to be given privileged information by the insured regarding any potential lawsuit.\textsuperscript{157} In addition to waiving the attorney-client privilege, such disclosure could aid the insurer in developing its own defenses to deny coverage to the insured.\textsuperscript{158} The insured, therefore, should agree only to the sharing of relevant, non-privileged information.\textsuperscript{159}

\textsuperscript{151} See \textit{id}. (precluding coverage for damage that was not expected or intended).

\textsuperscript{152} See \textit{id}. An exclusion for intentional acts eliminates coverage for "any dishonest, willful, intention or deliberate act or omission committed by or at the direction of the insured or any deliberate non-compliance with [the] law." Waeger & Fersko, \supra note 23, at 600.

\textsuperscript{153} See Amaranatos & Strauss, \supra note 37, at 91, 133. The expectations and intentions should not reflect those of the company's rank and file. See \textit{id}. at 133.

\textsuperscript{154} See Waeger & Fersko, \supra note 23, at 599 (referring to environmental manager).

\textsuperscript{155} See \textit{id}. (ensuring maximum protection under known condition provision of policy).

\textsuperscript{156} See Amaranatos & Strauss, \supra note 37, at 133 (identifying need to acknowledge even before insurer has agreed to provide coverage to insured).

\textsuperscript{157} See \textit{id}. at 133. Privileged information includes communication between attorney and client and attorney's work product. See \textit{id}.

\textsuperscript{158} See \textit{id}. at 133-34 (jeopardizing insured's position in pending suit). For instance, the insurer could attempt to show that the damage was either expected or intended. See \textit{id}.

\textsuperscript{159} See \textit{id}. (ensuring maximum protection for insured under policy).
V. KNOWN LOSS DOCTRINE

Environmental insurance coverage usually cannot be obtained for contaminated property until the pollution is cleaned up or upon receipt of a no-further-action letter issued by the appropriate regulatory agency.\textsuperscript{160} Although an insurer will generally not insure a known loss, some insurers in today's market will offer a policy that provides coverage for known pollution conditions if the contamination is less than regulatory levels requiring remediation.\textsuperscript{161} A known loss exists "when an insured knows or has reason to know, \ldots, that there is a substantial probability that it will suffer or has already suffered a loss for which it seeks coverage."\textsuperscript{162} Where an insured legitimately obtains environmental insurance for a known loss, the decision is generally based on a risk analysis performed by both the insured and insurer.\textsuperscript{163} When an insurer obtains coverage for a known loss without divulging the existence of the known loss to the insurer, fraud results on the part of the insured.\textsuperscript{164}

Insurers frequently use the known loss doctrine to avoid payment under CGL policies for environmental damage.\textsuperscript{165} Most pollution liability suits to date have involved CGL policies issued without any pollution exclusions before 1973 and policies with the sudden and accidental pollution exclusion issued before 1986.\textsuperscript{166} In such cases, the insured identifies the loss after the policy expired and asserts that an event occurred during the policy period to cause the loss, and thus, argues that the policy should cover the loss.\textsuperscript{167} Within the environmental exposure arena, the insured usually be-

\textsuperscript{160} See id. at 89 (explaining general status of property before insured can obtain environmental insurance).

\textsuperscript{161} See Amaranos & Strauss, supra note 37, at 89 (reflecting exception to general status resulting from competitive environmental insurance market).

\textsuperscript{162} 7A JOHN ALAN APPLEMAN, INSURANCE LAW & PRACTICE, § 4528 (Jean Appleman ed., 1941) (Supp. 2002) (defining known loss).

\textsuperscript{163} See James M. Fischer, Insurance Coverage for Mass Exposure Tort Claims: The Debate Over The Appropriate Trigger Rule, 45 DRAKE L. REV. 625, 677-78 (1997) (stating insurance is generally obtained only for contingent or unknown losses).

\textsuperscript{164} See Appleman, supra note 162, § 4528. Deliberate concealment, affirmative misrepresentations and intentional omissions can be construed as fraud. See Michael Sean Quinn, Fortuity, Insurance, and Y2K, 18 REV. LITIG. 581, 607 (1999).

\textsuperscript{165} See Appleman & Appleman, supra note 162, § 4528. Insurers also assert the loss-in-progress doctrine, a doctrine closely related to the known loss doctrine. See id. Under the known loss doctrine, the loss has occurred while under the loss-in-progress doctrine, the loss is unavoidable. Id.

\textsuperscript{166} See Fruehauf, supra note 59, at 147 (providing dates as to when CGL policies narrowed their exposure to environmental liability).

\textsuperscript{167} See id. at 108-09 n.9 (employing concept of occurrence policies rather than claims made policies). For an additional discussion of PLL policies, see supra notes 38 - 39, 105 and accompanying text.
comes aware of contamination years after the conduct that caused the contamination took place.\(^\text{168}\) Determining exactly when the event occurred that caused an environmental loss is difficult, especially when the pollution was gradual.\(^\text{169}\) The insurer, therefore, argues that the loss was known when the policy was purchased and thus, relies on the known loss doctrine as an affirmative defense.\(^\text{170}\)

It is important for the brownfields developer or corporate acquirer relying on CGL policies issued prior to 1986 to be aware that state courts vary in their interpretation of the known loss doctrine.\(^\text{171}\) The differences in the court rulings stem from their analysis as to “whether and when an insured knew or had reason to know of the substantial probability of the loss at issue.”\(^\text{172}\) The majority of courts broadly apply the doctrine and bar insurance coverage if the insured knows or should know that its actions may result in potential environmental liability.\(^\text{173}\) The courts narrowly applying the doctrine bar coverage only when the insured knew of its legal liability, as alleged in a lawsuit or claim, to pay environmental damages before the insurance policy began.\(^\text{174}\)

168. See Quinn, supra note 164, at 604 (explaining basis for controversy of known loss doctrine).

169. See id. (illustrating difficulty with known loss doctrine).

170. See Appleman, supra note 162, § 4528 (stating insurers have burden of proof).

171. See id. A broad approach translates into savings for the insurance company while a narrow approach is more sympathetic to the insured. See Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172, 1177 (Pa. 2001) (explaining impact of narrow and broad constructions of known loss doctrine on parties in suit).

172. Appleman, supra note 162, § 4528 (stating underlying issue of known loss doctrine).

173. See id. Courts broadly construing the doctrine bar coverage “when the insured was substantially aware of a risk of loss.” Rohm & Haas Co. v. Cont'l Cas. Co., 732 A.2d 1256, 1256 (Pa. Super. Ct. 1999); Pittston Co. Ultramar Am., Ltd. v. Allianz Ins. Co., 124 F.3d 508, 517 (3d Cir. 1997) aff'g Rohm & Haas Co. v. Cont'l Cas. Co., 781 A.2d 1172, 1181 (Pa. 2001); Outboard Marine Corp. v Liberty Mut. Ins. Co., 607 N.E.2d 1204, 1210 (Ill. 1992) (holding insurance coverage was barred under known loss doctrine because insured had purchased insurance after receiving notice from Environmental Protection Agency that its discharge of PCBs had endangered health and welfare of those living on and using Lake Michigan, and so Outboard knew or had reason to know that there was a substantial probability of a loss); SCA Services v. Transp. Ins., Co., 646 N.E.2d 394, 395-96 (Mass. 1995) (holding coverage barred because insured had reason to know loss had begun before buying insurance policy because state court had already decided landfill was both "present and prospective public nuisance.").

174. See Appleman, supra note 162, § 4528. Some courts applying the doctrine narrowly hold that the insured does not bar coverage when the insured "had reason to know that a claim might be made against it." Allan D. Windt, Insurance Claims and Disputes Representation of Insurance Companies and Insureds § 6:46 (4th ed. 2001) 852, 857 (interpreting known loss doctrine narrowly allowing for coverage even though insured had knowledge of potential claim). Some courts
Pennsylvania, a jurisdiction that “has not . . . formally adopted” the known loss doctrine, applied the doctrine broadly for the first time in *Rohm & Haas Co. v. Continental Casualty Co.* The Pennsylvania Supreme Court held that barring coverage is appropriate when the evidence reasonably shows the insured was, or should have been, aware of a “likely exposure to losses exceeding the level of coverage.” Applying the known loss doctrine narrowly under New Jersey law in *Pittston Co. & Ultramar American, Ltd. v. Allianz Insurance Co.*, the Third Circuit held “that there is no loss of coverage [under the known loss doctrine] unless the legal liability of the insured had been a certainty” when the insured purchased the insurance policy.

The underlying issue of the unknown loss doctrine is “whether and when an insured knew or had reason to know of the substantial probability of the loss at issue.” It is a “question of fact, to be

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interpret the known loss doctrine more narrowly by holding that “the insured must have known that there was a substantial probability that a liability claim would be made against it.” *Id.* Other courts have taken an even more narrow approach by ruling that “the claim against the insured must itself have been known prior to the inception of the policy in order for the coverage to be forfeited.” *Id.* at 857-58; see also *Montrose Chem. Corp. v. Admiral Ins. Co.*, 913 P.2d 878, 906 (Cal. 1995) (holding coverage not barred because liability had not been established with certainty at time of purchase of insurance policy even though Montrose had been notified by regional water quality control board that landfill site was public nuisance); *CPC Int'l., Inc. v. Hartford Accident & Indem. Co.*, 720 A.2d 408, 422 (N.J. Super. Ct. App. Div. 1998) (barring coverage when liability is not imposed or amount determined with certainty).

175. *See Rohm & Haas Co. v. Cont'l Cas. Co.*, 781 A.2d 1172, 1177 (Pa. 2001). The court, in barring coverage, relied on evidence showing that insured became aware of arsenic pollution twenty-four years before making insurance claim, yet continued to purchase additional insurance on property. *See id.* at 1179.

176. *See id.* at 1177 (refusing to interpret known loss doctrine narrowly and rejecting insured’s argument that coverage should be barred only if insured knew level of damage from contamination was sufficient to reach excess liability coverage).

177. *Pittston Co. & Ultramar Am., Ltd. v. Allianz Ins. Co.*, 124 F.3d 517, 518 (3d Cir. 1997) (ruling that certainty of legal liability, instead of merely certainty of damage, is required before insurance coverage will be denied based on known loss doctrine). Ultramar acquired land from Pittston that a 1979 environmental study showed had been substantially contaminated by oil. *See id.* at 513. As part of the stock acquisition, Pittston indemnified Ultramar for contamination damages previously caused by Pittston. *See id.* at 513-14. Ultramar, however, purchased insurance coverage for pollution and added Pittston as an additional insured. *See id.* at 514. In 1985, the contamination of the land forced Ultramar to discontinue operations on the site and, as a result, Ultramar made a claim against Pittston for cleanup costs. *See id.* When Pittston subsequently filed claims with its insurer, the insurer denied Pittston’s claim based on the known loss doctrine. *See id.* at 517-18.

178. Appleman, *supra* note 162, § 4528. There is a complicated relationship between the level of knowledge and insurability. *See Quinn, supra* note 162, at 605.
decided on a case-by-case basis."179 Focusing on knowledge of damage results in a narrow interpretation of the doctrine while focusing on knowledge of injury results in a broad interpretation of the doctrine where coverage is more likely to be barred.180

VI. CONCLUSION

Environmental insurance can help a company manage and reduce the risk associated with environmental exposure encountered in non-traditional transactions.181 An environmental insurance policy could be extremely beneficial in protecting against environmental liabilities associated with the purchase of a company.182

Secured Creditors Environmental Insurance allows lenders to eliminate the risk in real estate lending.183 An environmental insurance policy can also minimize the risk of environmental liability associated with brownfields development.184 In addition, transferring environmental liabilities off the balance sheet through an insurance policy can improve a company’s financial profile when preparing for sale or applying for a loan.185

When purchasing an environmental insurance policy, the insured must purchase one that meets its needs and provides the

179. Id. (explaining no bright line exists).
180. See id. (noting knowledge of discharged waste is different than knowing discharged waste will pollute environment). In Pittston, the Third Circuit refused to broaden the application of the known loss doctrine when it rejected the lower court’s "common sense observation" that "some harm so clearly will result in legal liability that knowledge of the harm may be presumed to constitute knowledge of the insured liability for the purposes of the known loss theory." Id. (quoting Pittston Co. v. Allianz Ins. Co., 124 F.3d 508, 518 (3d Cir. 1997)).
181. See Watson & Woods, supra note 22, at 75, 77 (recognizing benefit in evolution of environmental liability insurance).
182. See Reich-Hale, supra note 2, at 6 (recognizing that environmental risk associated with acquisitions can be avoided through insurance). For an additional discussion of mergers and acquisitions, see supra notes 67 - 79 and accompanying text.
183. See Watson and Woods, supra note 22, at 77-78 (explaining that lenders can protect secured interest with environmental insurance). For an additional discussion of real estate lender liability, see supra notes 80 - 91 and accompanying text.
184. See Waeger & Fersko, supra note 23, at 616 (explaining lenders can protect brownfields investment with environmental insurance). For an additional discussion of brownfields development and environmental insurance, see supra notes 92 - 102 and accompanying text.
185. See Fletcher, supra note 65, at 12 (discussing use of environmental insurance as technique to cleanup balance sheet). For an additional discussion of restructuring the corporate balance sheet, see supra notes 116 - 120 and accompanying text.
proper type and level of protection required.\textsuperscript{186} During negotiation, therefore, the insured must analyze the carrier's duty to defend and duty to indemnify, the scope of the indemnity provisions and the policy exclusions.\textsuperscript{187} The insured should understand the degree to which the insurer expects the insured to cooperate with the insurer.\textsuperscript{188} Finally, if a brownfields developer or corporate acquirer must enforce previously issued CGL insurance policies, the insured should be cautious of the qualified and absolute pollutions exclusions, as well as, the varying state court rulings regarding the application of the known loss doctrine.\textsuperscript{189}

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\textsuperscript{186} See Amarandos & Strauss, \textit{supra} note 37, at 88, 90 (acknowledging environmental insurance policies have drawbacks and limitations if accepted without negotiation by insured). For an additional discussion of the limitations and drawbacks of environmental insurance, see \textit{supra} notes 127 - 130 and accompanying text.

\textsuperscript{187} See Amarandos & Strauss, \textit{supra} note 37, at 90-91 (summarizing steps insured should take to minimize risk of both environmental and CGL insurance policies). For an additional discussion of how to minimize the risk of environmental insurance, see \textit{supra} notes 131 - 155 and accompanying text.

\textsuperscript{188} See Amarandos & Strauss, \textit{supra} note 37, at 133-34 (emphasizing that insured must not inadvertently waive attorney-client privilege to aid insurer's defense not to provide coverage). For an additional discussion of the insured's obligation to cooperate with the insurer, see \textit{supra} notes 156 - 159 and accompanying text.

\textsuperscript{189} See Appleman, \textit{supra} note 162, § 4528 (explaining no bright line exists).