THE EMERGING ROLE OF ENVIRONMENTAL INSURANCE IN COMMERCIAL REAL ESTATE TRANSACTIONS: ISSUES AND ANSWERS

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Introduction

The proliferation of federal and state environmental laws and regulations in recent years has dramatically increased the financial impact and risks involving industrial and commercial real estate transactions today. Historically, the real estate lawyer was primarily concerned with issues such as title, zoning and financing when representing a buyer, and with conveying the property on an “as is” basis when representing a seller. Similarly, when representing landlords or tenants, the real estate lawyer was primarily concerned with issues such as repairs, maintenance, work letters and the like. Although these issues remain significant, the solution of issues concerning environmental liability can dramatically impact the business risk of a transaction. Liability for on-site and off-site cleanup costs and third-party toxic torts easily can translate into sums far in excess of the transaction’s planned original investment.

Due to the financial risk posed by environmental liabilities, it was not too long ago that the discovery of contamination at a site would almost certainly have left a seller or a landlord with little opportunity for proceeding with a transaction. Even if a buyer or a tenant was prepared to go forward with the transaction, its lender almost certainly would have refused to grant a loan on the transaction. Consequently, many contaminated industrial and commercial properties, the so-called “Brownfield” sites, were left abandoned. During the last several years, however, a number of strategies and techniques have become available to address the liability and cost risks associated with an “environmentally challenged” real estate project.

Cleanup standard initiatives have been enacted that now provide alternatives to removal as the sole cleanup method. Tax incentives, grant programs, and low interest loan programs have been passed to lower cleanup costs. Liability protections have been enacted to provide comfort to the lending community. Also an increasing number of government initiatives, including “smart growth” legislation, and urban enterprise zone and environmental opportunity zone legislation, have been enacted to stimulate the redevelopment of urban areas, where most of these environmentally challenged properties are located. Because of these new laws and regulations, the development and lending communities have taken a new interest in the “brownfield” type project. The reaction of the insurance community to this phenomenon has been quite interesting. The

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insurance community has developed a host of new environmental insurance products that could positively influence many real estate transactions.

Consequently, the real estate lawyer must have a basic understanding of the various types of environmental insurance policies that are available, the anatomy of an environmental insurance policy (including the definition, exclusion and condition provisions of an environmental insurance policy), and the issues that must be examined when reviewing an environmental insurance policy.

**Environmental Insurance – Generally**

Extensive litigation between insurance carriers and their insureds arose as an early outgrowth of environmental legislation. This litigation centered on whether general liability insurance policies covered claims for environmental contamination. By 1986, to ensure that such claims were not covered, the insurance community included an “absolute pollution exclusion” in almost all general liability insurance policies. As a result, the insurance community insulated itself from any liability and responsibility for claims involving environmental contamination.

During the last few years, however, the insurance community has altered its position on environmental coverage. Like the development community, the insurance community has obviously determined that there are financial rewards in investing in environmentally challenged real estate projects. Although marketing efforts for these policies began slowly, the pace has quickened - so much so that it is almost impossible to keep abreast of the various types of coverage available and the carriers writing such coverage.

The largest insurance companies involved in the environmental insurance market today are: AIG Environmental, a division of American International Companies, which issues policies under American International Specialty Lines Insurance Company and Commerce and Industry Insurance Company; Zurich Insurance Company, which issues policies under Steadfast Insurance Company; Kemper Environmental Ltd.; XL Capital Ltd., through its underwriting manager ECS, Inc., which issues policies under Indian Harbor Insurance Company and Greenwich Insurance Company; Gulf Insurance Company, through its program manager Environmental Insurance Underwriters (which in July 2000 released its new Millenius line of environmental insurance products); and Chubb Insurance Company.

Environmental insurance can offer buyers, sellers, landlords, tenants, and lenders, solutions to regulatory, contract, and lender requirements and obligations by providing protection for on-site and off-site cleanup, and bodily injury and property damage, resulting from pollution conditions. The nature and extent of coverage required will vary with each transaction. Policies, more often than not, will thus need to be customized by way of endorsements that delete or modify policy exclusions, revise policy definitions and temper policy conditions. There is little in the way of case law, or loss and claims
experience, on which to rely in evaluating policy coverage and the carriers issuing policies containing environmental coverage. Consequently, it is particularly important that the nature and extent of coverage be carefully examined in each transaction to ensure that the policy secured will provide the intended coverage.

An environmental insurance policy is written for a term of years, and a one-time premium is paid when the policy is issued. Although the per square foot cost of a policy, when amortized over the life of a policy, may be small, there is nevertheless a significant up front capital expenditure. Other than contractor’s pollution legal liability insurance, which is available on an “occurrence basis”, most types of coverage are written on a “claims made” basis. As such, coverage will only be available for a claim made and reported to the carrier during the policy period, or in some instances during an extended reporting period. It is therefore important to evaluate properly the length of the policy term when acquiring an environmental insurance policy.

Types of Coverage

The various forms of environmental insurance coverage available in the market have grown tremendously over the past few years. Although some carriers limit the number of types of policies they issue, others are continuing to expand on their offerings, showing an ever-increasing degree of creativity to meet the growing demand of the marketplace.

This paper will focus on the main environmental insurance coverage offerings, namely pollution legal liability insurance, cost overrun insurance, brownfield insurance and secured creditor insurance. Insurance carriers refer to these forms of coverage by different names, and some offer variations on the same theme, depending on the risk involved. There are also a large number of additional types of environmental insurance policies available. They include:

- Storage Tank Pollution Liability Insurance
- Closure and Post Closure Care Insurance
- Contractor’s Pollution Liability Insurance
- General Contractor’s Pollution Liability Insurance
- Professional Pollution Liability Insurance
- Commercial General Liability Insurance with Contractor’s Pollution and Professional Liability Insurance
- Commercial General Liability Insurance with Pollution Liability Insurance
- Marina Pollution Liability Insurance
- Agribusiness Pollution Liability Insurance
- Dealer and Repair Pollution Liability Insurance
- Portfolio Pollution Liability Insurance
- Asbestos Pollution Liability Insurance
- Lead Abatement Contractors Pollution Liability Insurance
Pollution Legal Liability Insurance

Pollution legal liability insurance is the generic designation for the type of insurance issued by all of the insurance carriers that is designed to provide coverage for on-site cleanup costs, claims for off-site cleanup costs, and claims for on-site and off-site bodily injury and property damage resulting from a pollution incident. This type of insurance also includes legal defense costs (which will be both subject to and deducted from policy limits), and may include business interruption and extra expense coverage, as well as diminution in property value due to a pollution incident. Coverage is available for pre-existing and new conditions on a site, and depending on site conditions, coverage may be available for known conditions (for example, where contamination has been left in place with government permission and is being controlled by way of engineering controls, such as a cap).

Some insurance carriers have multiple policies for this generic type of coverage. Which policy the carrier will issue depends on the risk involved in the particular transaction and the coverage desired by the insured. For example: Gulf Insurance Company offers a policy entitled “Property Owner’s Policy” and a policy entitled “Pollution Legal Liability Policy”; Zurich Insurance Company offers policies entitled “Real Estate Environmental Liability Insurance,” “Environmental Cleanup and Liability Insurance,” and “Environmental Impairment Liability Insurance”; AIG Environmental offers a policy entitled “Commercial Pollution Legal Liability” and “Commercial Real Estate Pollution Legal Liability”; and Kemper Environmental Ltd. offers policies entitled “Environmental Response, Compensation and Liability Insurance,” “Environmental Liability Insurance” and “Environmental Insurance for Real Property Transfer.” These policies differ in that some are designed for low risk properties (such as office buildings) and provide broader coverage, either by way of a more expansive insuring agreement or fewer policy exclusions, while other policies are designed for medium or high risk properties (such as manufacturing facilities) and provided a narrower scope of coverage.

Each of the insurance carriers has its own set of minimums with respect to policy deductibles, but by way of a broad generalization, policy deductibles range from $5,000 to $10,000. Likewise, policies can be written for a term of up to ten years and policy limits of up to $100,000,000 per occurrence and $200,000,000 in the aggregate. Most insurance carriers will require a Phase I site assessment before issuing a policy, although in certain situations additional site investigation may be required. Some insurance carriers will only require a database search and a transaction screen before issuing a policy. The deductible, amount of coverage, term of coverage, site conditions and surrounding site conditions will all influence the policy premium.

Some insurance carriers will provide pollution legal liability protection for portfolios of real estate under a single policy. This provides the real estate investor the benefit of negotiating only one policy. There are a number of issues that must be addressed, however, when negotiating a portfolio type policy, including the conditions...
under which newly acquired properties can be added to the policy, and the cost for adding newly acquired properties to the policy.

Cost Overrun Insurance

Cost overrun insurance, which is also known as stop gap, cleanup cap, cleanup cost containment, and remediation stop loss insurance, is designed to cover an increase in the cost of a known cleanup due to cost overruns. Typically, cost overrun insurance is issued when an insured has completed a site investigation and has received an approval from a governmental authority of its remedial action plan. Today, however, many insurance carriers have their own risk control groups, and will issue coverage if their risk control group is satisfied with the cleanup plan.

A critical issue that must be examined when negotiating a cost overrun policy, is what events and circumstances will be covered as “cost overruns.” For example, will the policy cover increases in the cost of a cleanup if the increase is due to the following events or conditions?

- Higher concentrations of contaminants already noted in the cleanup plan
- The broader presence of known contaminants
- Newly discovered contamination within or outside of already identified areas of concern
- Broader cleanup requirements due to a change in regulatory requirements
- Failure of a cleanup plan
- Failure of a cleanup system
- Negligence of the environmental consultant
- Unexpected geological conditions

Depending on the insurance carrier, policy limits for cost overrun insurance can be as high as $100,000,000 per occurrence and $200,000,000 in the aggregate, and policies can be written for a term of one to ten years, and possibly longer, if an insurer can obtain reinsurance for the risk. These policies are written on a “claims made” basis. Consequently, when determining a policy term, an insured must consider whether the site will be the subject of a development and whether part of the development (such as improvements to be built) will serve as an engineering control in connection with the cleanup, thereby requiring the insured to account for the time period for obtaining development approvals and constructing the improvements. Notwithstanding the policy term, cost overrun coverage normally will end when a No Further Action Letter is issued for the cleanup (if that takes place prior to the expiration of the policy term). It is important that the policy be negotiated so that post-No Further Action Letter requirements (such as continued monitoring) are covered. In addition, the cost overrun policy will contain a self-insured retention, which normally will equal the estimated cost of a cleanup plus a multiple (ten or twenty percent) of the estimated cost of cleanup. Policy premiums generally will be a percentage of the estimated cost of cleanup, although the setting of the premium will be affected by the limits of liability, the self-insured
retention, the nature and anticipated duration of the cleanup, and the remediation contractor.

There is an increasing trend today for environmental cleanup contractors to quote fixed price cleanups. This phenomenon is a result of the increased competition between environmental remediation contractors, and the fact that the industry has gained greater experience in the nature of cleanups and the unknowns typically encountered during cleanups. To protect themselves, however, and at the same time provide a comfort level to the property owner, such contractors in many instances purchase cost overrun insurance.

Brownfield Insurance

Brownfield insurance is a policy that combines both pollution legal liability insurance and cost overrun insurance into one policy. A brownfield type of policy is the preferred choice where an insured is redeveloping a site on which a cleanup must be performed. The insured can better protect against a gap in coverage that easily can result if two different policies must be negotiated, with potentially two different sets of definitions, exclusions, and conditions.

Secured Creditor Insurance

Secured creditor insurance is a recent environmental insurance product. Although much of the lending community’s concern for environmental liability was addressed by the federal and state governments with the enactment of a variety of lender liability protections, the lending community still has had concerns over environmental issues and their potential impact on a credit facility. These concerns relate to questions regarding the borrower’s ability to meet its debt service obligations if faced with a costly cleanup during the life of a loan, and the lender’s ability to realize the full value from its collateral if the collateral is tainted by environmental contamination.

Depending on the insurance carrier issuing the policy, coverage under the secured creditor policy can be as high as $100,000,000 per occurrence and $200,000,000 in the aggregate, and the policy term can be as long as twenty years. Again depending on the insurance carrier, the policy can be written to cover first party cleanup costs, claims for third party cleanup costs, claims for third party bodily injury and property damage, legal defense costs, and payment of the outstanding loan balance. Typically, a secured creditor policy has been written to cover the lesser of the loan balance (provided there was a default under the loan) or cleanup costs (provided there was a foreclosure). Now, however, coverage is available to recover the loan balance after default, if there has been a pollution condition at the collateralized property.

Generally the insurance carriers will issue secured creditor policies based on a transaction screen and a data base search, although a Phase I site investigation may be required depending on the size of the loan and the operations conducted on the secured property. Insurance carriers are also providing such coverage on a portfolio basis, so that
a lender can add properties to the policy as new loans are closed. Insurance carriers are also marketing the insurance as an alternative to a Phase I site assessment. The coverage can be bound faster than the time period normally required to perform a Phase I site investigation, and the cost of the coverage is less than the cost for a Phase I site investigation. As a result, the borrower can save money and close the loan sooner than where a lender requires a Phase I site assessment.

Secured creditor policies have become particularly important in securitized loan transactions. Certain rating agencies, such as Fitch IBCA and Moody’s Investors Service, will give additional credit support to commercial mortgaged backed securities pools that use environmental insurance.

The Anatomy of an Environmental Insurance Policy

An environmental insurance policy generally includes an insuring agreement, a definitions section, an exclusions section, a section setting forth the conditions of coverage, which may or may not be separate from the notice and reporting provisions and duties of the insured, a limits of coverage section, and an extended reporting provision. The policy must be reviewed carefully. Each section of the policy will affect the overall scope of coverage. The following sections of this paper will provide the real estate lawyer with some examples of policy terms that require negotiation. However, the examples are by no means exclusive. The extent of the issues requiring negotiation largely depends on the particular transaction. It is also important to bear in mind that the negotiation of policy terms will likely result in an increase in the policy premium.

Definitions

Definitions of policy words and terms determine the extent of coverage afforded by the policy. Therefore, definitions must be constructed with precision. The following is an example of modifications that should be negotiated to the various defined terms in an environmental insurance policy.

- **Bodily injury** - This defined term needs to be broad enough to include all theories of relief on which “bodily injury” claims may be based. Thus it is important that a bodily injury claim include a claim for shock, medical monitoring, and fear of disease.

- **Business Interruption** – Although many insureds purchase coverage for business interruption loss, few realize that their property insurance policies contain a pollution exclusion, and therefore will not cover a loss due to a pollution condition. Business interruption coverage in an environmental insurance policy will generally provide the insured with reimbursement for its actual loss or lost rental value, and for the extra expense incurred by the insured during the restoration period. It is important that the policy not
condition coverage on the pollution condition being the sole and exclusive cause of the loss, since there could be multiple causes for a loss, such as a fire resulting in a tank containing hazardous waste to burst, creating a pollution condition. Also, some insurance carriers will limit the extra expense component of the coverage to those expenses that reduce the actual loss or the lost rental value. Extra expenses may be incurred to minimize the interruption of business operations, but may not necessarily reduce the actual loss or the lost rental value. Make sure that the concept of “period of restoration” is not artificially limited by excluding that period of time that is taken by a governmental authority to perform (e.g., approving work plans, processing permits and reviewing applications for approvals).

- **Claim** – The term “claim” is frequently crafted to require a written demand against the insured that seeks a remedy against the insured and asserts liability on the part of the insured. The term needs to be more broadly crafted so that any demand on the insured will trigger coverage, including administrative orders, consent decrees, lawsuits, and petitions filed against the insured. Also, coverage should be triggered as long as there is an assertion of liability on the part of the insured, regardless of whether a particular remedy is sought.

- **Cleanup Costs** – This defined term is usually drawn to include the removal, disposal and treatment of pollutants or contaminants, to the extent required by environmental law. It is important that the definition be broadened to include investigation, monitoring, immobilization, in-situ treatment, and neutralizing.

- **Environmental Laws** – “Environmental Laws” should be drawn broadly to include more than just laws of the federal, state or local government. It should include ordinances, rules, regulations, orders, directives, policies, amendments to each of the foregoing, new enactments and promulgations, as well as compliance with state voluntary cleanup programs. In addition, the definition should include the common law.

- **Insured** – Because an additional insured’s coverage is derivative of that of the named insured, the policy “insured” needs to include all persons and entities that are intended to be covered, rather than listing one named insured and a group of additional insureds. In creating the list of named insureds, consideration should be given to listing the following: sellers, buyers, landlords, tenants, lenders, joint venturers, investors, developers, condominium associations, property managers, past and present officers, directors, shareholders, members, partners, employees, principals, and the heirs, executors, administrators, personal and legal representatives, and assigns of the foregoing.

- **Policy Period** – As defined, policy period is sometimes written in a manner that will permit the carrier to terminate coverage unilaterally. The definition
needs to be limited to prevent the carrier from deleting a covered location or terminating coverage without the insured’s consent.

- **Pollutants** – “Pollutants” should be broad enough to include odors, toxic liquids and gases, hazardous materials, waste materials, including medical, infectious and pathologic waste materials, electromagnetic fields, low level radioactive waste and materials, and substances deemed hazardous or toxic under environmental laws.

- **Pollution Condition** – This definition should be broad enough to include: the presence of pollutants (whether or not in a container); seepage and migration; conditions naturally occurring in the environment, so long as the conditions detected exist in amounts or concentrations different from those that naturally occur in the environment; a discharge into or on structures on the land; and a midnight dumper or a tenant’s illegal abandonment of pollutants.

- **Property Damage** – Two key components of this definition must be diminution in value and natural resource damages. Some carriers are now including one or both of these concepts automatically, while others will include one or both of these concepts by way of endorsement. Some carriers, however, will not cover the risk if it relates to the insured’s property or if there is no actual physical injury to the property in issue (such as a neighbor whose property is not damaged by the pollution on the insured’s property, but claims that their property cannot be sold for full value because of the stigma attached to their property by reason of its proximity to the insured’s property).

### Exclusions

The insuring agreement section of a policy sets forth the broad array of coverage that will be afforded by a policy. The exclusions section of a policy is truly the heart of the policy, however, for it is here that the insurance carrier narrows and removes coverage ostensibly afforded by the insuring agreement. Consequently, the exclusions must be examined with utmost care, and a creative sense of how each exclusion may be used in the future to limit or deny a claim. The following are some examples of exclusions that typically require modification.

- **Asbestos and Lead Paint** – Most policies will have some type of exclusion relating to cleanup costs or damage involving asbestos and lead paint. Although there may be a legitimate basis to exclude first party clean up costs relating to the future discovery of lead paint or asbestos, coverage should be afforded in the context of a cost overrun policy where asbestos or lead paint are known contaminants.

- **Contractual Liability** – Many policies will exclude liability that an insured may have as a result of a contract. Consideration should be given to scheduling certain contracts, however, thereby providing coverage - for
example – for loan agreements, management agreements, joint venture agreements, sale agreements, partnership agreements, and lease agreements.

- **Divested Property** – This exclusion takes away coverage once a property is sold. Some policies will also exclude coverage when property is given away (such as gifting for estate tax purposes), and when property is abandoned, condemned or when the insured loses operational control. In most of these instances an insured will want and should be entitled to coverage. Consequently, this exclusion should be deleted in most cases.

- **Fines, Penalties, Punitive Damages and Multiple Damages** – Often policies will be written to exclude fines, penalties, punitive damages, and multiple damages. The exclusion should be qualified so that the carrier can only exclude coverage for these forms of loss if applicable law precludes recovery under an insurance policy. It should be noted that some carriers now craft their exclusion in this manner.

- **Intentional or Illegal Acts** – This is a broad exclusion that takes away coverage for any dishonest, willful, intentional or deliberate act or omission by or at the direction of the insured, or any deliberate non-compliance with law or notices of violation. At a minimum, an insured should limit this provision to the acts of certain specified individuals responsible for environmental affairs or officers of an insured. This exclusion must be deleted in the context of a cost overrun policy, since the carrier enters into the insuring arrangement knowing the condition of the covered location and how it resulted. The carrier, therefore, should not have the opportunity to exclude coverage after the fact.

- **Insured vs. Insured** – Policies frequently exclude from coverage claims made between insureds. If a landlord lists a tenant on the policy, however, it is critical that this exclusion not operate to preclude claims between such insureds. Also, when there are multiple insureds on a policy, it is important that the policy contain a severability clause, so that the bad acts of one insured do not serve as the basis for a denial of coverage for another insured. It should be noted that recently some carriers do cover claims between insureds if they result from claims initiated by a third party, such as a claim for contribution.

- **Insured Property** – This type of exclusion will exclude coverage for property damage to property owned by or in the care, custody or control of an insured, and may even exclude coverage for property damage to property leased by an insured. Depending on the nature of the insured’s operations, this exclusion may have to be deleted or modified.

- **Known Conditions** – Most policies have a known conditions exclusion that excludes coverage for conditions known to the insured pre-policy, but not
disclosed to the carrier. The critical issues are what constitutes a known condition and whose knowledge is relevant. Some policies will provide that a condition is known if a defined group of people could have expected that the condition would result in a claim or constitute a pollution condition. There should be a distinction between could have expected and should have known. Also, the definition must limit the group of people whose knowledge is determinative of whether a condition was “known” to a group of specifically identifiable people who have knowledge of the environmental affairs at the covered location, and both the ability and responsibility to address the condition. So, by way of example, the definition could include a property manager, but should not include an employee (such as a maintenance employee) who may have knowledge of a condition, but may not feel the responsibility to report the condition to a person in a management position. In addition, it is important that all facts and conditions disclosed on any reports provided to the carrier be deemed to constitute disclosure for purposes of the known conditions exclusion. Finally, it is important that the real estate lawyer review the application filed with the carrier to ensure that the definitions in the application match the definitions in the policy. For example, if the definition in the application of the relevant group of people with knowledge is narrower than the definition in the policy, the insured may find that coverage is excluded even though the insured provided complete disclosure consistent with the requirements of the application.

- Material Change in Operations – Most policies will exclude coverage if there has been a material change in operations at a covered location. Depending on the nature of the transaction (such as the redevelopment of an industrial facility into a residential facility) this exclusion will either need to be modified or deleted. Also, to the extent that this exclusion remains in the policy, the insurance carrier’s right to exclude coverage should be limited to that situation in which the insurance carrier can show that the pollution condition or the claim has some nexus to the change in operations. Finally, some environmental insurance policies express this concept as a condition of coverage, rather than as an exclusion, and further provide that the insurance carrier can terminate coverage in the event of a material change in operations. If the concept must be in a policy, it should be limited to excluding coverage of an individual incident, rather than affording a basis for terminating coverage.

- Products Liability – Some environmental insurance policies will exclude from coverage claims related to products manufactured or sold by the insured. If the project involves a redevelopment, particularly a residential redevelopment, then this exclusion must be modified to cover claims that could result from pollution conditions involving the residence, such as claims that were filed a number of years ago relating to urea formaldehyde used in the construction of homes.
Conditions

- **Access to Information** – Many policies condition coverage on the insured providing the insurance carrier with access to all information relating to a pollution condition or a claim. This condition should be narrowed to exclude information that is subject to a privilege (such as the attorney-client privilege).

- **Assignment** – Many policies prohibit assignment of policies. In our merger and acquisition oriented business society today, however, assignment by operation of law should expressly be permitted.

- **Choice of Law/Choice of Forum** – Many policies will provide that New York will be the forum for any claim between the insurance carrier and the insured, and that New York law will govern the dispute. Insurance carriers use New York because New York law heavily favors insurance companies. At the very least, these conditions should be removed from the insurance policy. Recently, some carriers have begun to provide for the jurisdiction of the covered location to control for purposes of choice of law and choice of forum.

- **Notice** – The notice condition of an insurance policy must be reviewed carefully. Often, notice is required immediately, and a failure to comply with the notice requirement results in a loss of coverage. The insured should only be required to provide notice as soon as is reasonably practicable, and if notice is not provided, then the insurance carrier should only be allowed to disclaim coverage if (and then only to the extent) the insurance carrier can show prejudice by virtue of the late notice.

- **Primary vs. Excess Coverage** – Often, environmental insurance policies will provide that the policy coverage is excess over any other available insurance coverage. An insured does not want to be locked in a battle with its insurance carrier over whether another policy may cover the incident. Consequently, it is important that the insured negotiate a provision that, at the least, ensures that any dispute between the insurance carrier and the insured will not result in a delay in payment under the policy. Thereafter the carrier, through its right of subrogation, can pursue any other potentially available coverage.

- **Subrogation** – Most policies provide the insurance carrier with a right of subrogation. However, an insured must modify this condition in a number of ways: first, the insured should provide that the right of subrogation is limited to the extent of payment by the insurance carrier; second, the right of subrogation should not be available in the event of a payment to one insured arising out of a claim against another insured (such as a claim between a landlord and a tenant); third, provide that the proceeds recovered by an insurance carrier by way of its right of subrogation be disbursed to both the
insurance carrier and the insured on a negotiated pro-rata basis, and that the expenses of recovery be paid based on the ratio of recovery.

**General Issues**

There are a number of general issues that should be considered when negotiating environmental insurance policies, including by way of example, the following issues.

- **Extended Reporting Period** – Some environmental insurance policies contain an automatic extended reporting period, and some also allow the insured to purchase an extended reporting period. An extended reporting period will allow an insured to obtain coverage for a claim first filed after the policy period that relates to a pollution condition that arose during the policy period. The provision should be crafted to extend coverage to first party cleanup required as a result of a change in the law during the extended reporting period.

- **Legal Defense Expenses** – The policy should be written to provide that the insured, in cooperating with the insurance carrier in the defense of a claim, will be compensated for expenses for the insured’s personnel attending legal proceedings, and that the compensation will not count towards the limits of liability, or the deductible.

- **Limits of Coverage** – The policy should provide that the internal expenses of the insurance carrier and its underwriter will not affect or apply to the limits of coverage afforded by a policy. In addition, the policy should provide that the carrier’s outside costs to investigate a loss or a claim will not affect or apply to the limits of coverage.

- **Notice of Possible Claim** – It is important that the policy contain a notice of possible claim provision, which will allow the insured, who gives notice of a possible (but not yet ripe) claim during the policy period to obtain coverage for the claim if it is filed during an agreed time period after the policy period.

- **Right of Renewal** – Depending on the nature of the transaction, particularly in the context of a portfolio type policy, consideration should be given to negotiating an automatic right to renew the policy at the expiration of the policy term, with a cap on the premium.

- **Right to Reinstate a Policy** – Depending on the nature of the transaction, particularly in the context of a portfolio type policy, consideration should be given to negotiating a right to reinstate the policy if the limits of liability have been exhausted.
Conclusion

Although there are a number of ways to address environmental risks, including site investigations and contract indemnities, environmental insurance policies should certainly be considered as a viable tool for managing environmental risks. However, it is critical that the policy be structured properly to satisfy the needs of the insured and the particular transaction at hand. In this respect, it is important that the real estate lawyer recognize that the foregoing lists of issues are not exclusive, and equally important, that the particular coverage must be crafted to address the known and potential environmental conditions peculiar to the covered location. Consequently, real estate counsel must work closely with environmental counsel, and a knowledgeable environmental consultant and insurance broker, to ensure that the policy properly accounts for the particular site conditions, and affords the broadest protection available for the particular transaction.