

Anticipating the Insurance Oh No's

- 1) Pre Due Diligence:: No meeting of the minds on the key risks of concern to both parties in PSA and between the broker and underwriter in the quote, because the wrong lawyers (non-environmental) were hired; they had no clue about environmental liabilities or how to allocate them. Example: CT site where the buyer's lawyer provided a broad environmental indemnity and didn't understand what he had signed (committed him to "signing the Form III" and IC/EC responsibility in perpetuity). Therefore, the buyer didn't appreciate the value of an unusual and hard to obtain insurance quote covering IC/EC liabilities; he got another policy excluding them from his own (non-environmental) broker at the last minute and forced seller to accept it. How to avoid: hire competent lawyers and brokers, i.e., environmental experts, who can put the right things in both contracts and explain them to you.
- 2) Execute PSA, Enter Due Diligence. Stuff happens. The pre-binding surprise can cause discrepancies between the binder and last quote, sometimes but not always a good thing. Can be due to long delays with intervening changes of law or conditions, or changes in personnel (the insurance company or the "phantom broker"). Example: NJ site being bought by church in which I was brought in by the lender's lawyer when Chubb underwriters left for Quanta and Chubb could not honor their quote, which was inadequate anyway because it didn't cover cleanup costs due to unknown conditions. I got a good quote from XL, including coverage for bodily injury due to known or unknown conditions. However, binding was delayed almost 2 years due to the Highlands Protection Act; in the meantime, the proposed VI regulations came out. In order to bind coverage, XL insisted on air monitoring in Building D, which the church planned to use as a school. Fortunately, the tests revealed no problem and coverage was bound. How to avoid: the phantom broker can be avoided by a broker of record contract with client; the threat that additional testing may prevent necessary coverage can be avoided by preparation and more on-going coordination with the engineering company.
- 3) Post-Acquisition The policy is ignored or not used or serviced properly post-acquisition. Examples: a PLL policy for a NJ site that would have covered a claim that was obviously due to happen because of a change in use of the property that everyone, including the insurance company, knew would require additional investigation; however, the buyer's lawyer put the policy in a drawer for 4 years while the investigation proceeded (and discovered some hot spots). Policies often need new endorsements for post-remedial liabilities such as reopener but no one contacts the original broker when the no further action letter is received. To avoid: keep the original broker in the loop.
- 4) Post Remediation, Post-Sale. Policy is useless for subsequent sales because of certain exclusions, especially for post-closure risks. Example: a NJ site purchased by developer/construction company had a combined CCC/PLL policy that didn't cover any post-closure risks and was useless as a PLL policy for the subsequent buyer. Another PLL policy was useless in a subsequent transaction because of a site development exclusion. To avoid: make sure the policy you purchase now covers post-closure risks including IC/EC's. Be sure the PSA you enter into now requires the buyer to do what it takes to provide the underwriting support for the coverage. PLAN!