



Commercial Insurance Update

Topics Concerning Buyers of Commercial Insurance

MSP C 12/2008 – ‘Protecting Against Environmental Liability’
Commercial Insurance Update Newsletter

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Protecting Against Environmental Liability

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As federal and state regulators have increasingly instituted more stringent environmental regulations, many industries, particularly real estate owners, are finding themselves subject to greater environmental liability exposures and related financial loss. As with any potential exposure, it is imperative to have a proactive approach to the risk analysis, risk control and risk transfer options.

Potential environmental liability concerns can provide a major ‘deal breaker’ in the sale or transfer of commercial properties. Sellers want to be free of environmental liability after a sale. Buyers, on the other hand, do not want to assume liability for a site that could possibly have some degree of contamination. Likewise, prospective investors and lenders/financial institutions are understandably

concerned about unexpected cleanup costs, delays and environmental liabilities that could derail an otherwise promising real estate project. And they had every reason to be, based on the results of several high-profile claim cases. For instance:

1. At a shopping mall in southeastern Pennsylvania, a mall employee called 911 complaining of symptoms produced by an odorless, colorless gas. After the fire department arrived, eight people

Environmental Liability (continued on page 2)

In this issue...

Protecting Against Environmental Liability	1-4
2009 Risk Management Seminar Series	3
HR Tidbits—The I-9 Form	4
Beating ‘Blackberry Thumb’	5
IRS Indexed Limits for 2009	6
Community Bulletin Board	7

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Environmental Liability (continued from page 1)

were taken to a local hospital, treated with oxygen, and released. It was determined that the gas emissions were caused by a chimney collapse that sent carbon monoxide into the ventilation system. In addition to having to close the mall, several bodily injury claims were filed by affected parties that led to \$250,000 in legal defense costs.

2. In another claims scenario, the owner of a hardware and grocery store that sold gasoline notified the company that owned and installed the underground gasoline storage tanks about some newly discovered leaks. After repeated complaints, the storage tank company removed the tanks, but not before allegedly causing personal injury and property damage to the storeowners, who were forced to close their doors to their customers.

The store owner's insurer rejected the suit, citing a pollution exclusion in the store's commercial general liability policy, which excluded injury or damage *'arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants.'*

The store owner later sued the insurer for coverage, citing that the term 'pollutants' was ambiguous. A circuit court agreed with the store owner, only to have the ruling overturned by the State Supreme Court, which upheld the pollution exclusion in its policy. Clean-up of the resultant contaminated soil and groundwater cost \$350,000.

Some commercial real estate owners have seen even more significant losses:

3. The owner of a strip shopping center purchased the center from another entity who had owned the shopping center for approximately five years. During a capital improvement and expansion, perchloroethylene (PCE) contaminated soil and groundwater was encountered from former drycleaning activities at the site.

The current owner conducted environmental due diligence prior to the acquisition; however, the Phase I Environmental Site Assessment did not identify a former dry cleaner at the property, and in fact, declared no Recognized Environmental Conditions at the site and did not recommend a Phase II Environmental Site Assessment. Apparently, the dry cleaner was at the site long before the prior owner owned the property.

The shopping center expansion activities ceased until all of the resultant PCE-contaminated soil and groundwater was remediated. The clean-up costs totaled nearly \$1.2 million.

As the above-mentioned situations show, commercial property owners have significant environmental concerns



to be aware of. Other environmental risks commonly associated with commercial real estate may include but are not limited to:

- Contaminants from known and unknown historical usage / operations or neighboring properties
- Sick Building Syndrome, i.e. carbon monoxide, mold, or bacterial air releases from faulty heating, ventilation or air conditioning systems
- Construction debris containing hazardous materials
- Hazardous chemical storage, i.e. laboratory chemicals, medical wastes from doctor and dentist offices, dry cleaning solvents such as PCE (perchloroethylene), pesticides and herbicides used both indoors and outdoors, etc.
- Inadequate containment for hazardous materials, waste, and process areas, and at loading/unloading areas
- Lead, asbestos, polychlorinated biphenols (PCBs) and radioactive materials
- 'Midnight dumping' on vacant land parcels



2009 Risk Management Seminar Series

Cavignac & Associates FOCUS Room

450 B Tower (formerly Bank of America Plaza)
450 B Street, Suite 1800, San Diego, CA 92101-8005

- Risk Management 101
Thursday, January 15, 2009 — 9:00 - 11:00 a.m.
- Sexual Harassment Prevention Training
Satisfies requirements under AB 1825
Friday, March 13, 2009 — 9:00 - 11:00 a.m.

All training sessions available to our clients
Reserve early / seating is limited! *

For more information about upcoming seminars
Contact Darcee Nichols at dnichols@cavignac.com
or 619-744-0596

* NOTE: Due to the popularity of our seminars and limited seating, we regret we cannot provide refunds or credits with less than 72 hours advance notice of cancellation.

Environmental Liability (continued from page 2)

- Past landfills, lagoons, and other solid waste disposal areas (from former industrial uses)
- 'Contaminated' surface water run-off
- Leaking underground or aboveground storage tanks or piping

Managing the Risks

Environmental liabilities do not need to be an obstacle to a property transfer, acquisition or securing financing for a purchase if they are proactively identified, managed and mitigated.

Commercial real estate developers and owners alike have mitigated their environmental exposures over the past several years either contractually or through the use of environmental insurance, or by employing a combination of both.

External pressures to address environmental impairment of commercial real estate (store fronts, strip centers, malls, offices) continues to mount due to the pressure applied by financial institutions to protect loans by way of environmental insurance. Owners want to add environmental hold harmless and indemnification

language to their lease agreements. Other driving factors include private equity firms wanting to ensure a maximum return on their investments, and sellers of real estate assets wanting to walk away free from the potential of future claims from unknown, pre-existing environmental issues.

Standard liability and property insurance policies have excluded coverage for claims associated with pollution events for the past two decades, leaving significant coverage gaps in insurance programs throughout the United States. Due to the total pollution exclusions in commercial insurance policies since 1979, environmental liability insurance has been a rapidly growing segment of the insurance marketplace. This has also caused the market for pollution liability insurance to dramatically change over the past five years. Coverages have been broadened, limits have been steadily increased, and premiums have been significantly reduced.

Each environmental liability insurer offers a portfolio of environmental liability coverage forms, with the largest carrier offering up to 15 different coverage forms. At present there are over 100 forms in the marketplace. Nevertheless, the major coverages can be placed into three major categories:

1. Premises Environmental Liability / Pollution Legal Liability (PLL)
2. Contractors Pollution (CPL) / Professional Liability (CPrL)
3. Clean-Up Cost Cap Coverage covers remediation/clean-up costs overruns or new contamination discovered during remediation. As it pertains to commercial real estate, the focus is on Pollution Legal Liability coverage.

Available Coverages

- Premises Environmental Liability / Pollution Legal Liability (PLL) provides coverage for pollution conditions or events on, at, under or migrating from a covered location(s). Coverage is afforded for third-party bodily injury, property damage, clean-up costs and legal defense expense. A unique feature of many PLL policies is their ability to offer various and different coverage parts under one policy form. Such coverage parts include, but are not limited to:
 - New pollution conditions
 - Existing pollution conditions
 - On site clean-up coverage
 - Transportation coverage

Environmental Liability (continued on page 4)

- Non Owned Disposal Site (NODS) coverage
- Business interruption including Loss of Rental Income
- Mold liability coverage and clean-up
- Fines and Penalties and Punitive Damages where allowable by law
- Natural Resource Damages

PLL is an effective risk management tool for commercial real estate for a number of reasons. The coverage helps fill the 'environmental gap' left in most general liability policies for owners of property and operators of facilities or sites, and thus helps reduce the uncertainty about environmental liability associated with the property. It also provides simple asset protection from potentially catastrophic environmental events associated with day-to-day operations.

In today's environmental insurance market, available programs can be tailored to address the diverse needs of each property and can be structured to meet a variety of requirements and objectives, including, but not limited to, regulatory obligations, contract requirements, lender requirements, landlord obligations, and business objectives.

Another important aspect of coverage offered under PLL is that if a known environmental condition exists at a site, the policy may be structured to provide coverage for the existing contamination.

- Contractor's Pollution Legal Liability (CPL) is intended to provide pollution liability coverage for any type of contracting operations. Whether for environmental companies performing environmental or remedial contracting or non-environmental contractors such as general contractors and artisan contractors performing typical construction, CPL is a viable and cost-effective alternative to help finance a company's environmental liability losses.

All contractors face environmental liability in four major areas: job site operations, transportation of waste/materials, disposal activities, and owned/leased properties. CPL can be structured to address each of these areas of environmental risk.

- Remediation Cost Cap (RCC) is intended to provide coverage for the increased costs of remediation associated with environmental projects. From a commercial property owner to a remediation firm or redevelopment authority, the RCC program can assist by reducing the uncertainty associated with costs to remediate contaminated properties. As a

rule of thumb, the cost of remediation or clean-up must be greater than \$2 million.

Summary

With increasing concern about environmental liabilities, commercial real estate developers and owners need to make sure they are adequately analyzing their environmental exposures and are aware of various methods to transfer that risk. Fortunately, the environmental risk transfer marketplace has continued to adapt and broaden its environmental risk management solutions to keep pace with the growing demands of real estate owners. ✨

John J. Heft is Vice President of New Day Underwriting Managers LLC, a specialty resource for agents and brokers that focuses on finding appropriate, high-quality environmental and construction related professional liability insurance coverages. More information about the company is available on its Web site at www.newdayunderwriting.com.

Matthew R. Slakoff, CIC, CRIS, CWCA specializes in analysis and placement of environmental risks as well as design and implementation of risk management programs for clients in the real estate, development and construction industries.

DISCLAIMER: This article is written from an insurance perspective and is meant to be used for informational purposes only. It is not the intent of this article to provide legal advice, or advice for any specific fact, situation or circumstance. Contact legal counsel for specific advice.

HR Tidbits... I-9 Forms

Are you using the most current edition, which is Form I-9 (Rev. 06/05/07) N? (Look for this information at the bottom right hand side of the I-9.) If not, you can download the latest version:

www.uscis.gov/files/form/I-9.pdf

The current version expires on 06/30/09 (the expiration date is located on the upper right hand corner of the I-9).

NOTE: YOU MUST ALWAYS USE THE MOST CURRENT EDITION OF THIS FORM.

Do you provide new hires with *all 4 pages* of the I-9, and allow them to select and produce for inspection the documents which will show their legal right to work in the USA?

For full and complete information about the I-9 and the employer's responsibilities, download the *Handbook for Employers* online at:

<http://www.uscis.gov/files/natedocuments/m-274.pdf>

HR Tidbits are provided by Sandra W. Rugg, SPHR-CA, Director of Human Resources, Cavnac & Associates

Beating 'Blackberry Thumb'TM, or Texting Trauma

By Stuart Nakutin, CSIT, CSA, CEET, WCCP
Director of Loss Control and Claims, Cavnac & Associates

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Personal Digital Assistants (PDAs) are everywhere in today's business world. Hand-held electronic devices allow millions of Americans to check and compose e-mail, access the Internet, exchange instant messages, and manage their daily schedules. PDAs are often equipped with a miniaturized QWERTY-style keypad, which allows users to type with the thumbs. The thumb is not designed for the repetitive movements involved in typing, especially isolated movements as are used with these devices.

Injuries related to overuse of the thumbs include aggravation of arthritis and/or thumb extensor tendonitis called deQuervain's Disease. The term 'BlackBerryTM Thumb' has recently been coined to describe injuries related to PDA use and the thumb. Below are steps you can take to prevent PDA injuries:

➤ Synchronize and Work from a Computer

Use a docking station or wireless network to synchronize with a computer. This feature will allow you to reconcile e-mail messages, folders, contacts, and other information to your desktop computer and vice-versa. An appropriately arranged computer workstation can be used for longer periods than a PDA with less discomfort.

➤ Reduce Keystrokes—Use 'AutoText' Feature

Users can create AutoText entries, allowing them to type a much shorter string of characters for common phrases. Once an AutoText entry is created, the desired phrase will be substituted any time the AutoText entry is typed. For example, a user might create an AutoText entry that replaces `ttyl` with `talk to you later` or `slm` with `see last mail`.

➤ Use an External Keyboard

The CoolMIR external keyboard attaches through a PDA's USB port. It is flexible and can be rolled up to fit in the user's pocket. Using this nearly full-sized keyboard for longer e-mails and documents will decrease the demands placed on your thumbs:

www.man-machine.com/coolmir.htm

➤ Take a Break and Stretch

Pay attention to your body. It can take only a few minutes of heavy thumb typing to cause damage. Before you begin to feel discomfort or fatigue, take a break, stretch, and work on something else for a few minutes.

The American Physical Therapy Association (APTA) recommends the following simple stretches:

- Tap each finger with the thumb of the same hand. Repeat five times.
- Alternate tapping of the palm of your hand and the back of your hand against your thigh as quickly as you can. Repeat 20 times.
- Open up your hands and spread fingers as far apart as possible. Hold for ten seconds and repeat eight times.
- Fold your hands together; turn your palms away from your body as you extend your arms forward. You should only feel a gentle stretch. Hold for ten seconds and repeat eight times.
- Fold your hands together; turn your palms away from your body and extend your arms overhead. You should feel the stretch in your upper torso and shoulders, to the hands. Hold for ten seconds and repeat eight times.

Stretching can help relieve discomfort and fatigue at the workstation or when using a PDA device. ✨



What YOU Should Know about IRS Indexed Limits for 2009

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The IRS has announced the following 2009 indexed dollar limits applicable to qualified retirement plans:

Item	IRS Code Reference	2008 Limit	2009 Limit
401(k) Employee Deferral Limit ¹	402(g)(1)	\$15,500	\$16,500
457 Employee Deferral Limit	457(e)(15)	15,500	16,500
Catch-Up Contribution ²	414(v)(2)(B)(i)	5,000	5,500
Defined Contribution Dollar Limit	415(c)(1)(A)	46,000	49,000
Defined Benefit Dollar Limit	415(b)(1)(A)	185,000	195,000
Compensation Limit ³	401(a)(17); 404(I)	230,000	245,000
Highly Compensated Employee Income Limit ⁴	414(q)(1)(B)	105,000	110,000
Key Employee Officer	416(i)(1)(A)(i)	150,000	160,000
Social Security Taxable Wage Base		102,000	106,800

¹ Employee deferrals to all 401(k) and 403(b) plans must be aggregated for purposes of this limit. A lower limit applies to SIMPLE plans.

² Available to employees age 50 or older during the calendar year. A lower limit applies to SIMPLE plans.

³ All compensation from a single employer (including all members of a controlled group) must be aggregated for purposes of this limit.

⁴ For the 2009 plan year, an employee who earned more than \$105,000 in 2008 is an HCE. For the 2010 plan year, an employee who earns more than \$110,000 in 2009 is an HCE. ✨

Note: This information is provided for informational purposes only. It is not intended to provide legal advice. Contact legal counsel for specific advice.



Community Bulletin Board

'Neighbors helping neighbors in San Diego'



Reaching Your New Year Goals

Happy Holidays from the Downtown YMCA! We all know that health is one of the most important gifts you can give yourself. The Downtown YMCA offers two ways to incorporate fitness into your New Year:

39th Annual Resolution Run

Start your year with fitness by participating in the Downtown YMCA's FREE Resolution 5k Run/Walk!

- WHEN** Saturday, January 3, 2009
Begins at 11 a.m.
- WHERE** Meet at Balboa Park, 6th & Laurel
- COST** FREE! (Donations accepted for the Downtown YMCA's low-income and homeless children program)
- REGISTRATION** No pre-registration; register at the event

SAVE! No Joiner Fee* on Jan 15, 2009!

Save up to \$150! The Downtown YMCA offers:

- FREE 12 week Exercise Program with Personal Trainer
- Over 200 FREE Group Exercise Classes per week
- Full Basketball Court
- Group Cycling Classes
- Personal TVs with Cable on Cardio Equipment
- FREE access to Mission Valley, Toby Wells and Hazard Center YMCAs

* No Joiner Fee offer good on 01/15/2009 ONLY — Membership Plus NOT included

QUESTIONS?

Call Alicia Gettys at
619-232-7451 or e-mail
agettys@ymca.org



NEW! Surf the Web and Shop to benefit



Take **three easy steps** to help **Senior Community Centers** raise money!

1. Enter **Good Search** or **Good Shop** into your browser, or click on the link below:
<http://www.goodsearch.com/?charityid=5-2850121>
2. Make sure you see **Senior Community Centers** in the '**Choose Your Cause**' box, and click '**Verify.**' this will save **Senior Community Centers** as your **Charity of Choice** so that it automatically receives money every time you search or shop.
3. Every time you use the **Good Shop** search box, **Senior Community Centers** will receive **up to 37%** of every purchase you make! You can add the **Good Shop** search box to your tool bar, or simply add it as a 'Favorite.' When you plan to make an online purchase, simply go to your Favorites, open the **Good Search / Good Shop** page, and click on the link to your favorite stores to do your online shopping.

There are a host of retailers to choose from, including **Amazon, Best Buy, Target, and E-Bay**, to name only a few. You can purchase almost anything — plane tickets, rental cars, hotels, cruises, amusement park tickets, I-Tunes, DVD rentals, technology, clothing, books, flowers—even your credit report!

This is a great way to benefit Senior Community Centers by making online purchases and investing five seconds of your time. Please forward this to your friends and the people in your office responsible for supply orders and travel bookings.

Thank you for your help! Please contact us if you have any questions.



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www.serving seniors.org