Cleaning up

Resolving your environmental liabilities with other people's money

Smart Business spoke to David E. Cranston of Greenberg Glusker Fields Claman & Machtinger LLP about how not to get saddled with the cleanup costs in environmental contamination cases.

A client of ours faced significant costs in cleaning up property contaminated by the operations of its tenants many years earlier. The client's former counsel opined pursuing claims against the tenants, who were mostly out of business, was not worth the time or money. Our investigation indicated otherwise. We learned that a tenant with a small scrap operation in the 1950s had changed names and its business, through a series of transactions, was acquired by a large publicly traded company. Another tenant, who was no longer doing business, had significant insurance assets. After prosecuting the claims that our client was about to abandon, we recovered several million dollars to pay for the cleanup.

All too often businesses fail to recognize the value of claims against their own insurers as well as the claims against those who are primarily responsible for the contamination. Recovering the costs of an environmental cleanup is no easy task but, given the potential exposure, every business facing these liabilities should understand the potential value — and costs — in making an informed decision on whether to prosecute the claims.

Here are the highlights of what a business in this position should know:

Recovering costs from your historical insurers

There are two types of insurance that potentially cover the costs of cleaning up your property. The most common is comprehensive general liability (CGL) insurance, now commonly known as commercial general liability. CGL policies are occurrence-based policies. This means that coverage under the policies in place when the contamination first occurred, and each subsequent policy, are potentially triggered. There also more recent specialized pollution liability policies. (This article will focus on CGL policies because, if your business bought pollution liability policies to address specific environmental risks, you are probably already well aware of their potential coverage benefits.)

CGL policies provide coverage for your company's liability for "property damage," which courts have construed to mean environmental contamination. But there are limitations.

The insurance industry began including the so-called "total" pollution exclusion in 1987, so you are searching primarily for pre-1987 CGL policies. CGL policies issued from 1972 to 1986 contained a limited pollution exclusion leaving coverage only for "sudden" pollution events. However, in our experience, most contamination was caused, at least in part, by events that were "sudden," as courts have construed the term. Policies issued prior to 1972 typically have no pollution exclusion. Thus, older CGL policies can provide an important source of funding, provided that:

- Prior to 1987, the contaminated property is one that was owned by your business (or by companies acquired by your business).
- At least some of the contamination resulted from events occurring prior to 1987 — which is usually the case due to the relatively poor care in handling hazardous materials many years ago.

You may need help in finding older policies from your attorney or insurance archaeology services.

Importantly, coverage under CGL policies is generally not triggered in California, and some other states, unless there is a lawsuit against the insured. Government agencies prefer to use orders and other administrative mechanisms to enforce cleanup requirements. This is one time where a business may welcome the filing of a lawsuit.

David E. Cranston
Chair, Environmental Group
Greenberg Glusker Fields Claman & Machtinger

There are a number of other potential limitations on coverage and you can expect insurers to try and take advantage of every one of them. In 25 years, I have yet to see an insurer pay for environmental cleanup costs without at least somewhat of a fight. It is important to have counsel on your side that knows how to win that fight quickly and cost-effectively.

Recovering costs from other responsible parties

The same laws that impose cleanup responsibility on owners of property simply because they are the owners also impose liability on others who owned or operated the property at the time the contamination occurred or who otherwise caused the contamination. Common law claims, such as trespass and nuisance, are also frequently available. In the case of tenants and former owners, look for contractual indemnities in the leases or purchase agreements that run in your favor.

A thorough investigation into the property's history, and the history of its tenants can usually identify who is likely responsible. Frequently, the businesses that caused pollution many years ago appear to be judgment proof: they may be defunct, dissolved or bankrupt and/or the individuals who ran them are deceased. And this is where even experienced environmental counsel often give up. That would be a mistake.

Most businesses operating after 1950 had CGL insurance and those insurers remain on the hook regardless of the status of their insured. A suit against those former businesses, even if they are dissolved our bankrupt, will trigger the obligations of the insurers. In addition, the environmental liabilities of former businesses may often reside with a person or entity with deeper pockets. Before you abandon your claims, make sure they have been carefully investigated and evaluated.

Choosing to pursue environmental cost recovery claims presents a difficult choice. Businesses are concerned about investing in the pursuit of claims where the outcome is usually far less than certain. Good environmental counsel is essential in evaluating the value of those claims and the likelihood of recovery. And counsel that has sufficient confidence in their evaluation may offer to share in the risk — and reward — by offering an alternative fee arrangement such as contingency fee. This may make your choice easier and help you avoid leaving valuable claims on the table. <<

DAVID E. CRANSTON chairs Greenberg Glusker's Environmental Group and the Climate Change and Sustainability Practice Group. He can be reached at DCranston@greenbergglusker.com or (310) 785-6897.