Acquiring new business and merging with another entity means that your company is taking on not only their business operations but also their liabilities. And some liabilities may be hidden from view.

**PERFORMING DUE DILIGENCE**

Such was the case when a major retailer was performing due diligence during the acquisition of a competitor. During that process, the buyer found that a dry-cleaning business was one of the tenants in common. The buyer then conducted a permeated slab, soil, and contaminated groundwater (PERC) test and discovered that the dry-cleaning operation had had ongoing leaks that contaminated the ground around the site. Furthermore, the closed-loop system meant to prevent leaks had failed unnoticed, causing year-long contamination.

Such a discovery is not uncommon. In most cases, contamination is discovered during:

- Property transfer which undergoes environmental due diligence
- Debt arrangement (new or refinance) to which lenders require environmental investigations, such as Phase 1 Environmental Site Assessment (visual plus open public records inquiry) and Phase 2 (subsurface sampling (soil, groundwater, bedrock)
- Implementation of capital improvements

When contamination is found, the implications can be widespread. Should a site test positive for contamination, remediation is required to avoid health hazards and further environmental damage. What that remediation looks like can often come down to expectations. When there is more than one party at risk, coming to a consensus on what remediation approach to take can get complicated. Remedial approaches vary but the result remains the same: disruption/delays and impacts to revenue.

**REMITIATING FOR THE CLIENT**

For our retailer client, who was the buyer, there were immediate concerns, which included:

- Potential tort liability arising from the gradual release of contaminants
- Exposure to visitors in the shopping center
- Potential liability to employees of tenants onsite

The retailer came to NFP, looking to obtain proposals for a pollution legal liability (PLL) policy. PLL policies are designed to cover third-party liability protection for gaps in traditional third-party liability policies, which do not cover pollution-related events.
A wise decision. The coverage afforded under a PLL policy includes coverage for:

- Cleanup costs arising from unexpected/unintended remediation activities
- Third-party bodily injury and property damage, which includes:
  - Damages to the environment (government sanction/fines/penalties)
  - Diminution in value (loss of value caused by environmental release)
- Legal defense expenses arising from pollution release
- Business interruption/loss of rental value (which should mirror business interruption contained in property insurance program)
- Liability arising from hazardous waste disposal
- Costs to mitigate a crisis event

Working with our top insurance carrier’s partners, we secured multiple PLL quotes. The coverage options included coverage for:

- Remediation expenses for new pollution events or changes in environmental standards that result in the client being required to implement new remediation methods
- Third-party liability in the event of nuisance claims arising from exposure to contamination, including tenants’ employees
- Loss of rental income should some or all stores need to close due to remediation efforts
- Legal defense expenses with the option for insured to appoint environmental defense counsel
- Ability to include tenants as additional insureds and waive the right of subrogation when contractually required
- Ability to pass amortized policy premium back to tenants via common area maintenance (CAM) charge
- Include debt as additional insured and extend coverage, allowing insurance to act as environmental indemnity backstop for entities and individuals
- 10-year policy term (the maximum on the market), which creates future value for exchanges and property transfers

Once the coverage was in place, the buyer could complete the due diligence phase and move forward with closing on the acquisition.

With every property transfer, financing scenario, and capital improvement, it behooves your organization to consider underlying environmental concerns during the due diligence phase. What is hidden from sight could become a long-tail issue that disrupts deals at best or causes costly remediation.

Having the right coverage in place can help alleviate the additional, often uncovered risks that come with acquisitions and improvements. NFP leverages national relationships with carrier partners to bring our clients policy options that address their most pressing concerns.

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