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Protecting Against Environmental Risk in Changing Climates

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POLLUTION LEGAL LIABILITY COVERAGE & HOW IT CAN AFFECT PROFITABILITY

Already expecting a downturn, the commercial construction industry was further impacted when COVID-19 either delayed or shuttered projects nationwide and a seemingly endless barrage of storms caused more than $95 billion in damages across the United States alone. This is on top of the growing array of emerging contaminant liability claims that increasingly plague jobsites and the rise of nuclear verdicts in the casualty line sector that grew by 335% from 2012 to 2019 according to American Transportation Research Institute.

As a result of these devastating conditions and the growing societal and governmental emphasis on environmental responsibility, the benefit for certain project and business owners, developers, and contractors to insure against a multitude of risks, including the disposal of hazardous waste and the risk of legionella outbreaks (which causes flu-like symptoms and is particularly dangerous when working with water) have grown exponentially over the past decade.

The problem is that the bottom lines of many of these shareholders just haven't kept pace with the rising cost to protect their businesses with the appropriate risk management strategies. Due to an unprecedented spate of exposures and the greater scrutiny of carriers, U.S. commercial property insurance rates are now rising at their fastest pace since

9/11 according to the Council of Insurance Agents & Brokers. As an example, Risk Placement Services Inc. recently reported that it expects commercial property insurance buyers to see higher prices in 2021, with rate increases in the high single-digits to 15% range even on clean accounts.

MODERN RISKS

So, where does this leave a struggling company looking to protect itself from financial ruin in today's highly litigious environment? For many, it means cutting costs to make ends meet. In some cases, this even involves eliminating the risk management strategies needed to help prevent against the very real exposures, challenges, fines, and claims that can plague jobsites on a near daily basis. For example, the Merit Energy Company recently agreed to pay $115,000 in fines after it spilled nearly 20,000 gallons of wastewater and crude in western Wyoming. This is in addition to the site's cleanup and remediation costs.

Other key considerations surround the Biden administration's renewed emphasis on environmental justice. Largely considered industry-friendly, many of Trump's mandates and executive orders are likely to be withdrawn and replaced by the eco-friendly policies introduced throughout the Obama years. This may even include a more heavily regulated environment that imposes actions on everything from climate change and chemical usage to the enhanced protection of wetlands, waterways, and endangered species.

Nevertheless, despite the added potential for liability in today's environmental space, many insureds are increasingly looking to lower costs by skimping on the coverage forms that, in many cases, have never been more needed. In some cases, this could be due to the continued false impressions of policy holders, who believe their existing property insurance policies will protect against the exposures, while failing to actually cover these exposures. This includes the liabilities that can span from the inadvertent disturbance of preexisting contaminants to the discovery of unknown preexisting conditions that are many times found during a construction or redevelopment project.

PROTECTING YOUR BUSINESS

However, the truth is there isn't really a good time to gamble with the future. Without certain coverages in place, the cost to remediate a spill or contaminated landsite could cost anywhere from tens of thousands of dollars to tens of millions. And this is without considering the associated claims and lawsuits which have been on an upward trajectory due to the increase in microbial matter, disinfection expenses, and soil and groundwater contamination exposures.

Subsequently, the benefits of a well-crafted pollution legal liability (PLL) policy should never be dismissed. Its ability to facilitate contaminated property transactions and buoy the balance sheets of large real estate assets are just a few of the advantages offered to virtually every industry that owns, leases, acquires or divests real estate. For example, in 2020, this claims-made coverage consistently managed the on- and off-site cleanup and remediation expenses; third-party bodily injury and property damage; and defense expenses of insureds representing the commercial/habitational real estate, manufacturing, health care, and education industries, among others.

Such benefits many times involve the inclusion of contingent business interruption, defense outside the limits, and first-party diminution of value for inert real estate portfolios. Indemnity triggers have also been used to address the known pollution conditions identified in contaminated property transfers.

As for the future, the demand for PLL is expected to rebound as the U.S. economy slowly emerges from the COVID-19 global pandemic. Despite the exit of a major carrier in the PLL space during the first quarter of 2021, the availability of PLL coverage has never been greater with approximately 25 carriers offering some form of the coverage.

Other advantages include the market's growing understanding of the benefits and risk management protections provided by this policy form.

Although the scrutiny is also likely to become increasingly tighter for most insureds, the advantages may still greatly outweigh the policy costs for the insureds unfortunate enough to suffer devastating environmental incidents.

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