

INSURING AGAINST ENVIRONMENTAL UNKNOWNNS

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I. INTRODUCTION

The Florida Department of Environmental Protection (FDEP), the United States Environmental Protection Agency (EPA), as well as other state, federal, and even local government agencies have stepped up their enforcement activities and broadened the reach of environmental laws and regulations in recent years. At the same time, as the number of people moving to Florida increases and more property is developed, due diligence investigations reveal an array of environmental problems associated with all types of land uses be it agricultural, industrial, or commercial. In many instances, land is being converted from one or more of these uses to residential use. In addition, environmental science and, particularly, risk assessment have developed more sophisticated analytical and evaluative techniques to determine the scope and extent of impacts to human health and the environment. In response to these developments, the Environmental Risk Transfer (ERT) and insurance industries have emerged to provide alternatives for potentially responsible parties (PRPs) to address these issues.

In particular, two recent developments in Florida have the po-

tential to increase the number of lawsuits brought against owners of contaminated property causing off-site impacts on neighboring property. First, the FDEP promulgated the Global Risk-Based Corrective Action (Global RBCA) rule, which provides for the use of risk-based corrective action in the remediation of contaminated property.¹ On its face, the application of risk-based corrective action principles does not appear to increase an owner's exposure to a third-party suit. Upon closer reading, however, the highly contested notice provisions contained in the final rule will raise the public profile of numerous sites causing off-site impacts.² Second, in *Aramark Uniform and Career Apparel, Inc. v. Easton*, the Florida Supreme Court held that section 376.313 of the Florida Statutes creates a private cause of action imposing strict liability for damages against an adjoining landowner without proof that the adjoining landowner actually caused the pollution.³ Amidst these concerns lies the EPA's All Appropriate Inquiries (AAI) rule,⁴ adopted on November 1, 2006, which delineates the requirements of conducting environmental due diligence and is used by purchasers to avail themselves of defenses provided under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).⁵ Together, these developments have created a legal framework that will expose many property owners to increased liability for third-party claims for property damages.

This Article will analyze these recent developments in Florida and will provide an overview of the challenges facing PRPs, purchasers of contaminated property, owners of contaminated property, and the various ERT and insurance options available to them to insure against environmental unknowns.

II. THE INADEQUACY OF CGL POLICIES

Historically, businesses purchased standardized liability insurance, called comprehensive general liability (CGL) insurance, which provided broad-based coverage for all liabilities not specifically excluded in the policy.⁶ Revisions to the standard form CGL

1. FLA. ADMIN. CODE ANN. r. 62-780.220 (2005).

2. *See id.*

3. 894 So. 2d 20, 28 (Fla. 2004).

4. 70 Fed. Reg. 66070 (Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

5. 42 U.S.C. §§ 9601-9675 (2000).

6. 4 SUSAN M. COOKE, *THE LAW OF HAZARDOUS WASTE: MANAGEMENT, CLEANUP, LIABILITY, AND LITIGATION* § 19.01[2], at 19-12 (1993). The authors would like to point out that the descriptions of insurance policies and coverage contained in this Article are based upon information available to the authors as of the writing of this Article, and they urge the reader to contact the insurers mentioned in this Article directly for current information on the policies and analysis of such described in this Article.

policy over the last forty years, however, have all but eliminated coverage for environmental liabilities. Increased social awareness of exposure to environmental hazards and legislative responses to those concerns spurred these changes to the CGL policy. Specifically, the federal government passed many significant pieces of environmental legislation, including CERCLA and the Resource Conservation and Recovery Act (RCRA),⁷ which forced businesses to bear the cost of remedying harmful environmental conditions they helped create. These businesses, accustomed to having all of their liabilities covered under one policy, expected these new environmental liabilities to be covered under their CGL policies. However, the insurance industry, overwhelmed by the number and cost of claims by insureds that were liable under these statutes, amended the standard form CGL policy to specifically exclude environmental liabilities.⁸ First, in 1973, the insurance industry added the “sudden and accidental” pollution exclusion, which excluded from coverage any pollution events not sudden and accidental.⁹ However, this attempt by the insurance industry to limit pollution liability spawned a massive amount of litigation concerning the meaning of that phrase. The most significant change to the standard form CGL policy occurred in 1985, with the addition of the “absolute pollution exclusion.”¹⁰ As its name implies, the absolute pollution exclusion sought to exclude coverage for losses attributable to environmental pollution.

Prior to the addition of the absolute pollution exclusion, policyholders tried to argue in court that the sudden and accidental pollution exclusion in the CGL policy provided coverage for liability resulting from pollution events as long as they were not expected or intended.¹¹ The policyholders’ key argument in this respect was that sudden was synonymous with accidental.¹² The insurance

7. 42 U.S.C. §§ 6901-6992 (2000).

8. Nancer Ballard & Peter M. Manus, *Clearing Muddy Waters: Anatomy of the Comprehensive General Liability Pollution Exclusion*, 75 CORNELL L. REV. 610, 612 (1990).

9. *Id.* The standard 1973 CGL pollution exclusion clause provides that coverage: does not apply . . . to bodily injury or property damage [arising out of pollution or contamination caused by oil or] arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; *but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental.*

Id. at 613 (citing Insurance Services Office (ISO) Form GL 00 02, Ed. 0173).

10. *Id.*; see also KENNETH S. ABRAHAM, ENVIRONMENTAL LIABILITY INSURANCE LAW 161 (1991).

11. *Allstate Ins. Co. v. Klock Oil Co.*, 73 A.D.2d 486, 488 (N.Y. App. Div. 1980).

12. *Am. Motorists Ins. Co. v. Gen. Host Corp.*, 667 F. Supp. 1423, 1427 (D. Kan. 1987).

industry, on the other hand, argued that sudden was distinct from accidental and should be interpreted temporally such that pollution events which occurred gradually should be excluded from coverage.¹³ While courts initially sided with policyholders regarding the interpretation of the sudden and accidental exclusion, over time, more courts began to reject their arguments, closing the door to environmental liability claims under the CGL policy.¹⁴

In Florida, the seminal case precluding coverage for environmental liabilities under the CGL policy is *Dimmitt Chevrolet, Inc. v. Southeastern Fidelity Insurance Corp.*¹⁵ In *Dimmitt*, a car dealer and oil treatment company were notified by the EPA that they were potentially responsible for cleanup costs resulting from the oil treatment company's operations at its plant.¹⁶ The oil treatment company disposed of waste oil sludge in unlined storage ponds on its property, causing contamination of groundwater.¹⁷ The car dealer, who sold used oil to the oil treatment company, was strictly liable under CERCLA, as CERCLA imposes liability on "anyone who generates, transports, or disposes of hazardous substances."¹⁸ The car dealer, however, was insured under a CGL policy containing a sudden and accidental pollution exclusion during the period in which the car dealer sold its used oil to the oil treatment company.¹⁹ The issue before the Florida Supreme Court was whether the sudden and accidental exclusion in the policy precluded coverage.²⁰

In ruling that coverage under the CGL policy was excluded, the court rejected the policyholder's contention that the phrase "sudden and accidental" was ambiguous and should therefore be interpreted in favor of the insured.²¹ The court noted that to construe the term 'sudden' as synonymous with 'accidental' would render

13. *Claussen v. Aetna Cas. & Sur. Co.*, 259 Ga. 333, 335 (1989).

14. *See, e.g., Dimmitt Chevrolet, Inc. v. Se. Fid. Ins. Corp.*, 636 So. 2d 700, 711 (Fla. 1993).

15. *Id.*

16. *Id.* at 701.

17. *Id.*

18. *Id.*

19. *Id.* at 702. The policy covered Dimmitt for all sums it was obligated to pay as a result of bodily harm or property damage caused by an occurrence, which was defined in the policy "as an accident including continuous or repeated exposure to conditions . . . neither expected nor intended." *Id.* But, the policy excluded coverage for "BODILY INJURY or PROPERTY DAMAGE arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids, or gases, waste materials . . . into or upon land, the atmosphere or any water course or body of water." *Id.* However, this exclusion did not apply "if such discharge, dispersal, release or escape [was] sudden and accidental." *Id.*

20. *Id.* at 701.

21. *Id.* at 704.

both words redundant.²² The court also noted that the ordinary and common usage of the word ‘sudden’ implies a temporal notion of immediacy or abruptness.²³ Thus, the Court held that the sudden and accidental pollution exclusion was not ambiguous and, therefore, the gradual pollution on the oil treatment site for which the car dealer was liable was not covered under the CGL policy.²⁴ As a result of *Dimmitt* and similar cases, a gap in coverage under the CGL policy formed and created the need for specialized environmental liability insurance.

III. GLOBAL RBCA

In 2003, the Florida Legislature passed Committee Substitute for House Bill 1123,²⁵ commonly referred to as Global RBCA,²⁶ which was signed into law by Governor Bush on June 20, 2003.²⁷ Global RBCA extended the use of risk-based corrective action to all contaminated sites resulting from a discharge of pollutants or hazardous substances where legal responsibility for site rehabilitation exists pursuant to other provisions of chapters 376 and 403.²⁸ Risk-based corrective action is not a new principle but has been used for several years in Florida at contaminated sites under the supervision of specific FDEP programs, namely: the Petroleum Program,²⁹ the Brownfield Program,³⁰ and the Drycleaning Facility Restoration Program.³¹ Risk-based corrective action utilizes site-specific data, modeling results, risk assessment studies, institutional controls (i.e., a deed restriction limiting future use to industrial only), engineering controls (i.e., placing an impervious surface over contaminated soils to prevent human exposure), or any combination thereof, to develop a unique remediation strategy for the site that considers the intended use of the property and aims to protect human health and safety and the environment. Based upon this information, risk-based corrective action may incorporate engineering controls, institutional controls, or even alternative cleanup target levels, to achieve a “No Further Action”

22. *Id.*

23. *Id.*

24. *Id.* at 704-05.

25. Act effective June 20, 2003, ch. 2003-173, 2003 Fla. Laws 1125 (codified at FLA. STAT. § 376.30701 (2005)).

26. RBCA is generally pronounced like “Rebecca.”

27. FLA. STAT. § 376.30701 (2005).

28. *See id.*

29. *Id.* §§ 376.3071-.3072.

30. *Id.* §§ 376.78-.875.

31. *Id.* §§ 376.3078-.3081.

determination from FDEP.³²

Prior to the introduction of risk-based corrective action at non-program sites, contamination at a site was typically remediated to the default Cleanup Target Levels (CTLs) contained in Table II of rule 62-777.170, at which point site rehabilitation would typically be deemed complete.³³ Consequently, there was little flexibility to provide for site-specific remediation strategies. For example, the soil CTLs are flexible only to the extent that there are two sets of default cleanup target levels: one set for property that will be used for residential purposes following remediation,³⁴ and the other for sites that are to be used for industrial purposes following remediation.³⁵ Furthermore, the soil CTLs are highly conservative and were developed based on the assumption that individuals will be at their residence for 350 days per year and live at the same place for thirty (30) years, or in the case of industrial property, that a worker will spend 250 days per year and twenty-five (25) years at the same workplace.³⁶ As such, contaminated property was often remediated to conservative residential or industrial levels even though actual exposure would, in reality, be far less than the assumed exposure. Consequently, remediation was often inefficient and overly expensive. Risk-based corrective action provides for a flexible site-specific cleanup that reflects the intended use of the property following cleanup, while maintaining adequate protection of human health and safety and the environment through the evaluation of the toxicity of the contamination and the exposure pathways by which human and environmental receptors may be exposed. This may result in significant cost savings during remediation, leading to more efficient cleanups, and more properties being remediated.

Shortly after the statute became effective, FDEP commenced what was to become a lengthy and contentious rulemaking process designed to implement the provisions of Global RBCA. Some of the most vigorous debates during the rulemaking process concerned the notice provisions which required owners of contaminated property, upon the discovery of contamination beyond their

32. *Id.* § 376.30701(2) (enabling rulemaking authority of the Department of Environmental Protection).

33. FLA. ADMIN. CODE ANN. r. 62-777.170, tbl. II (2005); *see also id.* at 62-770.200(7) (2006).

34. *Id.* at r. 62-777.170, tbl. II (2005).

35. *Id.*

36. CTR. FOR ENVTL. & HUMAN TOXICOLOGY, UNIV. OF FLA., FINAL TECHNICAL REPORT: DEVELOPMENT OF CLEANUP TARGET LEVELS (CTLs) FOR CHAPTER 62-777, F.A.C. 73 (Feb. 2005), [http://www.dep.state.fl.us/waste/quick_topics/publications/wc/FinalGuidanceDocumentsFlowCharts_April2005/TechnicalReport2FinalFeb2005\(Final3-28-05\).pdf](http://www.dep.state.fl.us/waste/quick_topics/publications/wc/FinalGuidanceDocumentsFlowCharts_April2005/TechnicalReport2FinalFeb2005(Final3-28-05).pdf).

property boundaries, to notify neighboring property owners that pollutants had been discovered on or under their property.

The proposed rule developed for the first rulemaking workshop was published in August 2004 and dramatically increased then existing notice requirements.³⁷ These new notice provisions were developed in response to criticism of FDEP's actions in certain high profile cases in which property owners had not been notified of the migration of contamination from neighboring sites onto their property.³⁸ Originally, FDEP proposed the requirement of verbal notice to affected property owners within three days of discovery of off-site migration of contaminants.³⁹ Additionally, constructive notice was to be provided to residents and business tenants of any real property into which contamination migrated from the source property by publishing a "notice, at least 16 square inches in size, in a newspaper of general circulation in the area."⁴⁰

FDEP eventually modified these proposed notice provisions to require written notice to FDEP within ten days of the confirmed discovery (i.e., laboratory analytical data) of contamination on property beyond the boundaries of the property that is the subject of site rehabilitation activities.⁴¹ The final rule, which became legally effective on April 17, 2005, also sets out the specific information that is to be included when providing such notice to FDEP.⁴²

In response to the events at the Tallevast facility, and the impact on his constituents, State Representative Bill Galvano sponsored a bill which essentially mirrored the notification requirements in Global RBCA.⁴³ Committee Substitute for House Bill 937, often referred to as the Tallevast Bill, was signed into law by

37. See Fla. Dep't of Env'tl. Prot., Combined Rule Workshop (Aug. 3, 2004), <http://www.dep.state.fl.us/waste/categories/wc/pages/August032004Workshop.htm> (last visited Nov. 14, 2007).

38. See, e.g., Deborah Alberto, *DEP Investigates Itself in Handling of Coronet*, TAMPA TRIB., Sept. 24, 2003, at Metro; Scott Carroll, *A Stormy End to Tallevast Talks*, SARASOTA HERALD-TRIB., Dec. 9, 2005, at B1; Scott Carroll, *Warrior Women with Community Support*, SARASOTA HERALD-TRIB., July 19, 2004, at A1; Editorial, *Coronet's Problems Were Kept Quiet for Far Too Long*, TAMPA TRIB., Aug. 1, 2003, at Nation/World 16.

39. FLA. DEP'T OF ENVTL. PROT., AUGUST 3RD WORKSHOP DRAFT: CONTAMINATED SITE CLEANUP CRITERIA CH. 62-780, F.A.C. 10 (2004), http://www.dep.state.fl.us/waste/quick_topics/publications/wc/Rule_Workshops/780TextFinalAugust2004Workshop.pdf.

40. *Id.* at 11.

41. FLA. ADMIN. CODE ANN. r. 62-780.220(2) (2005).

42. *Id.* Notice should include the location of the property, all record owners, parcel identification, current owner's contact information, table listing contaminants by their medium, and a vicinity map showing where samples had been taken in correspondence with the laboratory results. *Id.*

43. See Joe Follick, *'Tallevast' Bill Becomes Law*, SARASOTA HERALD-TRIB., May 25, 2005, at B; Jeremy Wallace, *'Tallevast' Bill Just the Beginning*, SARASOTA HERALD-TRIB., May 6, 2005, at B.

Governor Bush on May 24, 2004.⁴⁴ For the most part, this legislation codified the contamination notification requirements promulgated in chapter 62-780 of the Florida Administrative Code, by requiring those conducting site rehabilitation of contaminated property to notify potentially affected persons of the existence of contamination.⁴⁵ Specifically, the statute provides that if at any time during site rehabilitation, conducted pursuant to specific provisions of chapter 376, the person responsible for site rehabilitation or his or her agent or representative discovers from laboratory analytical results that contamination as defined in applicable FDEP rules exists in any medium beyond the boundary of the property at which site rehabilitation was initiated, the person responsible for site rehabilitation shall give actual notice no later than ten days from such discovery to the FDEP Division of Waste Management in Tallahassee.⁴⁶ A copy of the notice must also be simultaneously mailed to the applicable FDEP District Office, County Health Department, and all known lessees or tenants of the source property.⁴⁷

Within thirty days of receiving the actual notice (or if the FDEP already possessed information equivalent to that required by the notice, within thirty days of the effective date of the legislation), the FDEP must notify all owners of record of real property, except for owners of property where site rehabilitation was initiated, at which sites contamination was discovered.⁴⁸ This particular provision imposes a significant burden on FDEP and requires it to review all sites undergoing FDEP supervised site remediation and identify all instances of actual contamination beyond the source property boundaries.⁴⁹ As a direct consequence of this statutory requirement, in May 2005, FDEP began sending out notice letters to all persons affected under this statute (and Global RBCA) for sites undergoing state supervised remediation.⁵⁰ FDEP further identified those sites where off-site contamination was suspected, but not confirmed, and also provided notice to the property owners. Where there was off-site contamination, pursuant to this statute, FDEP was required to notify all owners of record where contamination had been discovered.⁵¹ The FDEP developed

44. Act effective Sept. 1, 2005, ch. 2005-50, 2005 Fla. Laws 937 (codified at FLA. STAT. § 376.30702 (2005)).

45. FLA. STAT. § 376.30702(2) (2007).

46. *Id.*

47. *Id.*

48. *Id.* § 376.30702(3).

49. *Id.*

50. See FLA. ADMIN. CODE ANN. r. 62-780.220(2) (2005).

51. See FLA. STAT. § 376.30702(2)(d) (2007).

template letters to inform the affected property owners whether pollutants were found in soil, groundwater, or both media at “properties in your area” or “at your property.”⁵² In addition, the letters identified the source property and included a table listing the specific pollutants found during the assessment of the source property.⁵³ Also included were statements regarding measures property owners could take to minimize their potential exposure to any such pollutants, such as, “[y]ou can reduce the risk of exposure to soil pollutants by thoroughly washing your hands after gardening . . .” and “[i]f [your well] has not been tested within the past three years, we recommend having the water sampled . . .”.⁵⁴

The Florida Legislature intended for the provisions of this legislation to increase awareness and knowledge of contaminated sites by requiring early notification of the discovery of contamination. While it is hard to develop an argument against the public policy interests being served in ensuring that innocent property owners are notified of contamination to their property caused by neighboring property, it is too early to evaluate the true impact of these notification requirements. However, the broad notification requirements contained in the legislation, the expansion of the notice to include suspected contamination, and the ambiguous notification letters being sent by FDEP may well result in an increase in litigation concerning contaminated properties and cause undue public alarm where risk to human health from such contamination is minimal or non-existent.

IV. STRICT LIABILITY AND ARAMARK

Sections 376.30 through 376.319 provide for the protection and preservation of lands, surface waters, and groundwaters of Florida, and confer upon the FDEP the broad power to deal with environmental and health hazards, as well as threats of danger and damage posed by the storage, transportation, and disposal of pollutants, drycleaning solvents, and hazardous substances.⁵⁵ Generally, these statutes prohibit the discharge of pollutants or hazardous waste substances into or upon the surface or ground waters of the state or lands and establish both civil and criminal penalties for the violation of these statutes.⁵⁶ By way of a civil enforcement

52. See e.g., Fla. Dep’t of Env’tl. Prot., Public Notification of Offsite Contamination, <http://www.dep.state.fl.us/waste/misc/notification/default.htm#map> (last visited Nov. 14, 2007).

53. See *id.*

54. See *id.*

55. FLA. STAT. §§ 376.30-376.319 (2007).

56. See *id.* § 376.302.

mechanism, FDEP is authorized to file a civil suit against any person who causes a discharge of pollutants, or hazardous substances, or who owns or operates a facility at which a discharge occurs.⁵⁷ This statutory provision also enumerates the limited defenses that may be raised in such an action.⁵⁸ A similar cause of action is provided for individuals who have suffered damages resulting from a discharge or condition of pollution covered by these statutes.⁵⁹ Specifically, section 376.313(3) provides:

Except as provided in s. 376.3078(3) and (11), nothing contained in ss. 376.30-376.319 prohibits any person from bringing a cause of action in a court of competent jurisdiction for all damages resulting from a discharge or other condition of pollution covered by ss. 376.30-376.319. . . . [I]n any such suit, it is not necessary . . . to plead or prove negligence in any form or manner. [A] person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s. 376.308.⁶⁰

Since its enactment, practitioners and courts in Florida have wrestled with whether the legislature intended to create a strict liability cause of action. First, in *Cunningham v. Anchor Hocking Corp.*,⁶¹ Cunningham and several other individuals, who were all workers in Anchor Hocking's glass manufacturing plant, sued Anchor Hocking, alleging that "they were exposed to toxic substances resulting in respiratory problems, liver damage, brain tumors, pulmonary disease, cancer, and other disorders."⁶² The First District held that the trial court erred in dismissing claims that were based on a statutory strict liability theory under section 376.313, suggesting that section 376.313 creates a private cause of action for persons injured by a defendant's release of hazardous materials that cause environmental as well as health hazards, regardless of whether the damages are associated with the pollution of land or water.⁶³

57. *Id.* § 376.308(1)(a).

58. *Id.* § 376.308.

59. *See id.* § 376.313.

60. *Id.* § 376.313(3).

61. 558 So. 2d 93 (Fla. 1st DCA 1990).

62. *Id.* at 94.

63. *See id.* at 99; *see also* Gary K. Hunter, Jr., *Statutory Strict Liability for Environmental Contamination: A Private Cause of Action to Remedy Pollution or Mere Legislative*

Second, in 1993, in *Mostoufi v. Presto Food Stores, Inc.*,⁶⁴ Mostoufi, the owner of a gasoline station, sued Presto, the previous owner, seeking compensation for damages from petroleum contamination of Mostoufi's property which Presto allegedly caused during the time that Presto owned the property.⁶⁵ Mostoufi brought a strict liability claim under section 376.313(3) to recover the reduction in value of the property caused by the contamination.⁶⁶ In affirming the trial court's dismissal of the claim, the Second District found that section 376.313(3) did not create a new cause of action.⁶⁷ The Court pointed to the introductory sentence in section 376.313 and concluded that the statute is framed so as not to prohibit bringing a cause and should not be interpreted as creating a new cause of action.⁶⁸ In dicta, the Court stated that to interpret section 376.313(3) otherwise would negatively impact the purpose of sections 376.30 to 376.319, which "is to protect the lands and waters of Florida and to provide for the prompt containment and removal of damage to those lands and waters by pollutant discharge."⁶⁹

In *Kaplan v. Peterson*,⁷⁰ Kaplan, the current owner of commercial real property, sued Peterson, the prior owner, seeking compensation for damages from petroleum contamination of Kaplan's property which Peterson allegedly caused during the time Peterson owned the property.⁷¹ Kaplan sought damages for the expenses and costs associated with remediation of the property based on a strict liability claim under chapter 376.⁷² The Fifth District found that section 376.313(3) contemplated and permitted such a private cause of action and recognized that, although "[c]ourts are reluctant to read into a statute a new . . . cause of action," section 376.313 makes "little sense if it does not do so."⁷³

To resolve the conflict between the district courts of appeal, the Florida Supreme Court accepted jurisdiction in *Aramark*, and held that the statute creates a strict liability cause of action.⁷⁴ In *Aramark*, the Florida Supreme Court approved the First District's

Jargon?, 72 FLA. B.J. 50 (1998).

64. 618 So. 2d 1372 (Fla. 2d DCA 1993); see also *Morgan v. W.R. Grace & Co.-Conn.*, 779 So. 2d 503, 505-07 (Fla. 2d DCA 2000).

65. 618 So. 2d at 1373.

66. *Id.*

67. *Id.* at 1376-77.

68. *Id.* at 1376.

69. *Id.* at 1377.

70. 674 So. 2d 201 (Fla. 5th DCA 1996).

71. *Id.* at 202.

72. *Id.*

73. *Id.* at 203.

74. *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 28 (Fla. 2004).

opinion and disapproved *Mostoufi* to the extent that it was inconsistent with the holding in *Aramark*.⁷⁵ Specifically, the Supreme Court held that section 376.313(3) creates a private cause of action imposing strict liability for damages against an adjoining landowner without proof that the defendant actually caused the pollution.⁷⁶ In addition, the Court held that the defendant is limited to the statutory defenses found in section 376.308.⁷⁷

Aramark acquired a property upon which a dry cleaning business was operated and which had been determined to be contaminated.⁷⁸ Aramark began assessment and remediation of the property pursuant to a consent order with the FDEP that, among other things, required Aramark to remediate any contamination in the groundwater under the neighboring property owned by Easton.⁷⁹ Easton subsequently learned that chemical solvents from Aramark's property had contaminated Easton's soil and groundwater.⁸⁰ Easton sought monetary damages and injunctive relief from Aramark for the prior and ongoing migration of contamination onto and under his property, asserting various common law theories as well as a claim under section 376.313(3).⁸¹ The trial court concluded that although "contamination of Easton's property had diminished its value by \$153,000," Easton failed to prove that Aramark or the prior owners of the property had caused the contamination.⁸² Thus, the trial court entered judgment in Aramark's favor.⁸³ The First District reversed, holding that section 376.313(3) creates a private cause of action for strict liability and does not require proof that the defendant caused the contamination.⁸⁴ The Florida Supreme Court agreed that section 376.313(3) creates a private cause of action because the precise cause of action that the statute authorizes provides a remedy unavailable under the common law.⁸⁵ Under the common law, a landowner whose land is damaged by pollution from an adjoining landowner can assert various claims, but all available common law claims require proof that the defendant caused the pollution resulting in the damages.⁸⁶ On its face, however, section 376.313(3), "departs from

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* at 21.

79. *Id.*

80. *Id.* at 21-22.

81. *Id.* at 22.

82. *Id.*

83. *Id.*

84. *Easton v. Aramark Unif. & Career*, 825 So. 2d 996, 999 (Fla. 1st DCA 2002).

85. 894 So. 2d at 24.

86. *Id.* at 23-24.

the common law by creating a damages remedy for the non-negligent discharge of pollution without proof that the defendant caused [the discharge].”⁸⁷

The Court found further evidence that section 376.313(3) creates a private cause of action in the limited defenses that the statute allows (for example, the innocent purchaser defense, an act of God, an act of war, and the third party defense).⁸⁸ The Court stated that “[s]uch defenses would be superfluous if a plaintiff had to prove, as part of the . . . action, that the defendant caused the contamination.”⁸⁹ After all, “[s]uch person need only plead and prove the fact of the prohibited discharge or other pollutive condition and that it has occurred. The only defenses to such cause of action shall be those specified in s. 376.308.”⁹⁰

In addition, the Court found that other parts of section 376.313(3), including its title (“Nonexclusiveness of remedies and individual cause of action for damages under ss. 376.30-376.319”), “evidence[d] the legislature’s intent to create a cause of action rather than modify existing ones.”⁹¹ The Court also pointed to a cumulative remedies clause and an attorney’s fees provision in the statute, both evidencing that the statute creates a new cause of action in addition to those available under the common law.⁹²

Finally, the Court noted several public policy reasons for interpreting section 376.313(3) to create a private cause of action. It reasoned that “between the owner of contaminated property and a victim of pollution, the current owner is in a superior position to protect itself through pre-purchase due diligence and negotiation of indemnities with the seller.”⁹³ The Court also noted that “[p]rospective purchasers of contaminated property also have recourse to an entire industry providing pre-acquisition environmental audits and environmental insurance products that protect against third party damage claims.”⁹⁴ Thus, the Court remanded the case to the circuit court “to apply section 376.313(3) as a strict liability statute, without requiring proof that the petitioners caused the contamination on their own property, and to determine whether any of the statutory exceptions and defenses apply.”⁹⁵

In the wake of *Aramark*, environmental risks for which land-

87. *Id.* at 24.

88. *Id.*

89. *Id.* at 25.

90. FLA. STAT. § 376.313(3) (2006).

91. 894 So. 2d at 25.

92. *Id.* at 25-26.

93. *Id.* at 25.

94. *Id.*

95. *Id.* at 28.

owners may be held strictly liable in Florida are potentially greater than ever.⁹⁶ Because those risks are no longer covered under the CGL policy following *Dimmitt*, more and more purchasers of property and owners of contaminated property are well advised to avail themselves of one of the many types of specialized environmental insurance policies now available. Yet, underpinning these growing concerns is the responsibility of purchasers to conduct thorough due diligence. Without this integral step, the existence of environmental liability insurance will only yield futility and frustration.

V. IMPORTANCE OF CONDUCTING ALL APPROPRIATE INQUIRIES

Environmental due diligence is arguably the most effectuating step in the decision to purchase or sell real property. Contamination of real property can result in thousands of dollars in damage and even more to remediate. From a public policy perspective, conducting due diligence benefits both the seller and buyer of a real estate transaction. The buyer may avoid possible remediation costs and consequently any future litigation costs in attempts to attach liability to the seller. The seller, assuming he or she conducted due diligence prior to purchasing, may avoid liability for prior injuries to the real property. Ultimately, performing due diligence puts all parties on a level playing field and securing environmental liability insurance may be seen as the last necessary step in making sure each party is afforded the proper protection.

The EPA's adoption of the AAI rule in November 2006 has placed the need for environmental liability insurance at the forefront of the real estate process. With respect to commercial property, sellers and buyers must comply with this rule or risk losing any defenses available to them.⁹⁷ These defenses, apart from the standard act of God and act of war defenses, include the innocent landowner, the bona fide prospective purchaser, and the contiguous property owner defense.⁹⁸ To avail oneself of these defenses, one must demonstrate that he or she did not know, or have reason to know, of the presence of hazardous substances, requiring one to conduct "all appropriate inquiries" into prior ownership and uses.⁹⁹

96. See, e.g., *Brottem v. Crescent Res. LLC*, 19 Fla. L. Weekly Fed. D786 (M.D. Fla. 2006) (noting that a Florida court could find a private cause of action for personal injury damages suffered by employees of previous owners suing a new "innocent" owner).

97. For discussion of defenses and AAI requirements, see Ralph A. DeMeo & Lynn S. Scruggs, *All Appropriate Inquiries in Commercial Real Estate Due Diligence: What Inquiring Minds Need to Know*, 81 FLA. B.J. 24 (2007).

98. 42 U.S.C. § 9607(q), (r) (2000); see also 42 U.S.C. § 9601(35)(B) (2000).

99. Standards and Practices for All Appropriate Inquiries, 70 Fed. Reg. 66070, 66,072

Under the AAI rule, purchasers are required to conduct a thorough investigation into the prior uses and ownership of the subject property, including interviews of past and present owners, on-site visual inspections, and reviews of historical and governmental records.¹⁰⁰

Increasing demands of environmental due diligence, together with *Aramark*, puts prospective purchasers and owners at risk for a strict liability action. These risks are what make environmental liability coverage so important in the equation of real estate transactions.

VI. TYPES OF COVERAGE AVAILABLE

A key element of an insurance policy is what is known as a coverage trigger. The coverage trigger determines which incidents, temporally speaking, an insured can claim under the policy. Under a claims-made policy, the trigger for coverage is the claim being made to the insurer. As long as the release that causes injury occurs on or after the retroactive date, if any, and a claim is made during either the policy period in which the claim arose or during any automatic or optional extended reporting periods, it will be covered.¹⁰¹ If the policy does not provide a retroactive date, then it provides unlimited prior acts coverage and the only requirement is that the claim be made during the policy period in which the claim arose.¹⁰² With claims-made insurance, the insured must maintain an environmental insurance policy, either by renewing annually or by purchasing a multi-year policy, in order to be covered against environmental liabilities.¹⁰³

With occurrence based policies, on the other hand, the trigger for coverage is the occurrence of the pollution event. As long as an occurrence based insurance policy was in place at the time the pollution event took place, any claims arising out of that event will be covered under the policy.¹⁰⁴ The downside to this type of policy is that it requires knowledge of when the pollution event occurred, which is particularly difficult in instances of gradual pollution.¹⁰⁵ In these cases it is possible for a dispute to arise concerning which

(Nov. 1, 2005) (to be codified at 40 C.F.R. pt. 312).

100. 70 Fed. Reg. at 66,074.

101. Ann M. Waeger, *Current Insurance Policies for Insuring Against Environmental Risks*, SK029 A.L.L.-A.B.A. 709, 717 (2004).

102. DAVID J. DYBDAHL, A USER'S GUIDE TO ENVIRONMENTAL INSURANCE 29, <http://erraonline.org/usersguide.pdf> (last visited Nov. 22, 2007).

103. Waeger, *supra* note 101, at 717.

104. DYBDAHL, *supra* note 102, at 35.

105. *Id.*

policy covers the losses, especially if the insured switched insurers around the disputed time.¹⁰⁶

All of the insurance policy types discussed below are of the claims-made variety, except for contractor's pollution liability coverage, which is offered on either a claims-made or occurrence basis.

A. Pollution Legal Liability

Pollution legal liability (PLL) is the quintessential form of environmental insurance, specifically developed to address and fill the gap left by the absolute pollution exclusion in the CGL policy.¹⁰⁷ PLL is the generic designation for this type of policy,¹⁰⁸ but other names such as Pollution Legal Liability Select, Environmental Impairment Liability, and Pollution and Remediation Legal Liability are used interchangeably, depending on the insurer.¹⁰⁹ The standard PLL policy type covers third-party liability for new or existing pollution events on, at, under, or arising from locations specifically covered in the policy,¹¹⁰ and also pays first-party remediation costs resulting from unknown pre-existing or new pollution incidents at the covered location as well as bodily injury and property damage.¹¹¹

PLL policies are of the claims-made insurance type; but, policies offer a sixty-day free extended reporting period and the option for the insured to purchase an additional reporting period, ranging from one to four years, upon the termination of the policy. These policies generally offer menu-style coverage, where a business can peruse a list of available coverages and select the ones that best fit its needs.¹¹² Also available under these policies is coverage for business interruption caused by a release of pollutants, clean up costs associated with pollution conditions arising from pollution releases from transported cargo, and liability for costs associated with the clean up of non-owned disposal sites.¹¹³ Legal defense

106. *See id.*

107. *Id.* at 27.

108. Another common generic name for this type of policy is environmental impairment liability ("EIL") insurance. *Id.*

109. The authors acknowledge the assistance of Michelle Clark, Underwriter for AIG Environmental, in Atlanta, GA for her contributions.

110. Zurich North America, Environmental Impairment Liability (2003), <http://www.zurichna.com/zus/zsource.nsf/AttachByIDType/310Marketing%20Material?openDocument&id=310> (follow "Env Impairment Liability" PDF file link).

111. *See, e.g.,* AIG Environmental, Pollution Legal Liability Select (2007), <http://www.aigenvironmental.com/environmental/public/envproducts/0,1338,65-13-4162,00.html> (last visited Nov. 14, 2007) [hereinafter AIG Environmental].

112. Waeger, *supra* note 101, at 720.

113. *Id.*

expenses are also generally covered, but the cost of such defense is deducted from the policy limit and ceases when that amount is exhausted.¹¹⁴ Typical PLL terms include a minimum premium of between \$5,000 to \$15,000 per year, a minimum deductible between \$5,000 to \$10,000 per incident, with policy limits from \$1,000,000 to \$100,000,000, although higher limits can be negotiated.¹¹⁵

In addition to the generic PLL policy, insurers have developed specialized PLL policies to meet the needs and risks of certain industries.

1. Commercial Pollution Legal Liability

The Commercial pollution legal liability policy was specifically developed for first-time buyers of environmental insurance.¹¹⁶ It is modeled after the standard CGL policy, which is written in a more familiar form than the menu-style of the PLL policy and offers coverage for a broad range of environmental risks.¹¹⁷ This policy is marketed towards industries that range from manufacturing and chemical, to education and medical.¹¹⁸ The key difference between commercial PLL and standard PLL is that the former offers blanket coverage for environmental liabilities including those associated with owned/operated properties, disposal sites, contracting operations, and transportation exposures, without the need to schedule each individual site or operation.¹¹⁹ In contrast, the standard PLL policy only offers site specific coverage. The commercial PLL policy addresses disposal site liability by setting a retroactive date in the policy and covering all liabilities arising from disposal activity after that date. Typical terms include a minimum premium of \$10,000 per year, a minimum deductible of \$10,000 per incident, and policy limits ranging from \$1,000,000 to \$100,000,000.

2. Real Estate Pollution Legal Liability

Real estate pollution legal liability is an insurance product

114. See, e.g., AIG Environmental, Pollution Legal Liability Commercial, <http://www.aigenvironmental.com/environmental/public/envhome> (follow "Pollution Products" hyperlink under "Our Product Categories"; then follow "Pollution Legal Liability Commercial" link) (last visited Nov. 14, 2007).

115. *Id.*

116. *Id.*

117. Waeger, *supra* note 101, at 720.

118. AIG Environmental, *supra* note 111.

119. *Id.*

marketed to real estate investors. It is also offered under the names Pollution Legal Liability Real Estate and Real Estate Environmental Liability. The purpose of this policy type is to protect buyers and sellers of real estate who are involved in mergers, acquisitions, or divestitures from first-party cleanup costs at an insured property and third-party claims resulting from pollution conditions that cause on- or off-site bodily injury, property damage, or require cleanup.¹²⁰ In addition to offering protection against historical contamination or future pollution events, a real estate PLL policy can reduce or eliminate collateral requirements to support environmental provisions contained in the underlying sales agreement.¹²¹ It can also serve to meet due diligence requirements in a more efficient manner, by eliminating the need for a Phase I audit in some cases.¹²² Also, depending on the policy, new sites can either be added easily or automatically added to the policy as the policy-holder's portfolio changes.¹²³ As an additional feature of interest to real estate investors, some insurers advertise that "[c]onsent to policy assignment requests will not be unreasonably withheld."¹²⁴ For coverage to exist, a pollution condition must be discovered and reported within the policy period. Discovery of such pollution conditions happens when any officer or any employee with management responsibility of the insured becomes aware of such pollution conditions.¹²⁵ Typical terms include a minimum premium of \$10,000 per year, a minimum deductible of \$25,000 per incident, and policy limits ranging from \$1,000,000 to \$100,000,000.

3. Contractor's Pollution Liability and Environmental Professional Errors and Omissions Insurance

Contractor's PLL insurance is marketed to those who perform environmental remediation services on contaminated sites.¹²⁶ It is also offered under the names Professional Consultants Liability, Contractors Pollution Liability and Occurrence, and General Con-

120. See, e.g., AIG ENVTL., POLLUTION LEGAL LIABILITY COMMERCIAL REAL ESTATE POLICY SPECIMEN (1999), <http://www.aigenvironmental.com/environmental/public/envfile/download/0,1337,1088,00.pdf>.

121. CHUBB ENVTL. SOLUTIONS, ENVIRONMENTAL SITE LIABILITY INSURANCE FOR BUYERS AND SELLERS OF PROPERTY (2005), <http://www.chubb.com/businesses/cci/chubb3487.pdf>.

122. Waeger, *supra* note 101, at 721.

123. See, e.g., Zurich North America, Environmental - Real Estate Environmental Liability, <http://www.zurichna.com/zus/zsource.nsf/display?openform&id=309> (last visited Oct. 14, 2007).

124. *Id.*

125. AIG Environmental, *supra* note 111.

126. DYBDAHL, *supra* note 102, at 34.

tractor's Pollution Legal Liability.

Contractor's PLL policies differ significantly from standard PLL policies and are aimed at the specific risks faced by contractors. First, where standard PLL policies are site-specific in the sense that they are written for a designated premises, contractor's PLL policies cover both a contractor's operations and activities at a project site and the contractor's completed operations and contractual liability exposures.¹²⁷ Thus, the policy covers the contractor's *operations* at a project site rather than the site itself.¹²⁸ These policies are available either on a blanket basis for all of the contractor's operations or on a project specific basis. A second key difference is that contractor's PLL policies are offered on both a claims-made and occurrence basis.¹²⁹ Additionally, contractor's PLL policies typically contain a retroactive date, meaning that prior acts coverage is not included unless it is negotiated.¹³⁰ The contractor's PLL policy also omits exclusions found in the standard PLL policy so that the contractor's PLL policy will cover completed operations, damage to the insured site, and "the cost of remediating the job site for a loss created by the contractor's operations."¹³¹ Other exclusions not found in the contractor's PLL policy are asbestos, lead, underground storage tanks, and non-nuclear radioactive matter.¹³² Finally, these policies offer vicarious coverage for subcontractor's operations.¹³³

Most insurers also offer a combination policy that provides both contractor's PLL coverage and errors and omissions (E&O) coverage. E&O insurance provides coverage for acts, errors and omissions arising from services performed on behalf of the insured. In its pure form, it is marketed toward environmental professionals, such as environmental engineers, testing labs, and consultants, who are subject to many of the same liabilities under CERCLA as are site owners.¹³⁴ The combination policy offers coverage for full-service environmental firms who perform both field operations and professional services.¹³⁵ Typical terms include a minimum pre-

127. *Id.*

128. *Id.*

129. *Id.* at 35.

130. *Id.* at 34.

131. *Id.* at 35.

132. Zurich North America, Environmental - Contractor's Pollution Liability, <http://www.zurichna.com/zus/zsource.nsf/display?openform&id=384> (last visited Oct. 14, 2007).

133. DYBDAHL, *supra* note 102, at 34.

134. For example, pursuant to 42 U.S.C. § 9607(a)(3), such individuals may be subject to liability as an arranger for the disposal of treatment of hazardous substances.

135. AIG Environmental, Contractor Operations and Professional Services (COPS), <http://www.aigenvironmental.com/environmental/public/envproducts/0,1338,65-13-4230,00.html> (last visited Nov. 14, 2007).

mium that can range from as low as \$5,000 per year for basic liability coverage to a minimum of \$22,500 per year for combined liability and E&O coverage (premiums are slightly higher for occurrence based policies). Minimum deductibles varies greatly depending on the coverage but can be as low as \$10,000 per incident on a basic liability policy, with policy limits ranging from \$1,000,000 to \$100,000,000 (per loss and aggregate).¹³⁶

4. Lender Liability Insurance

Lender liability insurance is also available. Specific products offered are Lender Environmental Protection, Securitization Collateral Protection, Environmental Liability Insurance, and Real Estate Lender's Policy.¹³⁷ These lender liability policies are designed for financial institutions that hold or invest in loans backed by commercial real estate.¹³⁸ They provide coverage in the event of a default on the loan for cleanup costs resulting from pollution events occurring or discovered during the policy period. The policy trigger for these types of loans is "a mortgage loan default and the filing of a claim against the [policyholder] for pollution conditions or simple discovery of pollution conditions."¹³⁹ These policies generally offer the option of coverage for the unpaid loan amount, remediation costs, and third-party liability claims arising from pollution events on the property.¹⁴⁰ Each insurer puts a different twist on their coverage. For instance, one offers a "lesser of" policy that pays the lesser of the outstanding loan balance or the estimated cleanup costs.¹⁴¹ However, if the estimated cleanup costs exceed fifty percent of the outstanding loan balance, the insured can choose a claim payment covering either the unpaid loan amount or the estimated cleanup costs.¹⁴² This policy can be used in place of a Phase I or other environmental audit, usually for less than the cost of an audit. Also, borrowers are not insured under

136. See, e.g., AIG ENVTL., CONTRACTOR'S OPERATIONS AND PROFESSIONAL SERVICES ENVIRONMENTAL INSURANCE POLICY SPECIMEN (2000), <http://www.aigenvironmental.com/environmental/public/envfiledownload/0,1337,1197,00.pdf>.

137. AIG, a major insurer, recently stopped offering its Secured Creditor Impaired Property Insurance due to large claims made under the policy. See Waeger, *supra* note 101, at 724.

138. See, e.g., Zurich North America, Environmental - Lender Environmental Protection, <http://www.zurichna.com/zus/zsource.nsf/display?openform&id=604&changemenu=No>. (last visited Nov. 14, 2007) [hereinafter Zurich North America].

139. XL Environmental, Coverage Details for Real Estate Lender's Policy, <http://www.ecsinc.com/asp/frame.asp?strID=RELP> (last visited Nov. 14, 2007).

140. *Id.*

141. Zurich North America, *supra* note 139.

142. *Id.*

the lender liability policy so they will need to purchase their own policy. Typical policy terms include a “target premium” of \$20,000, though lower premiums are negotiable, a minimum deductible as low as \$0, with policy limits from \$1,000,000 to \$100,000,000 per incident.¹⁴³

5. Other Specialized Liability Policies

In addition to the common variations on the standard PLL policy listed above, insurers have also developed a number of different policies tailored for specific industries. A partial list includes: Pollution Liability for Healthcare Industry, Automobile Dealer and Repair Pollution Liability, Professional Consultants Liability, Professional Environmental Consultants Liability, and Dry Cleaners Pollution Liability¹⁴⁴

Another significant type of specialty liability policy is Commercial Storage Tank PLL insurance.¹⁴⁵ This type of policy is necessary since most PLL policies contain a known underground storage tank exclusion. It is marketed to owners of scheduled storage tank systems, and the purchase of a policy can be used to meet state and federal financial responsibility requirements for storage tank owners and operators.¹⁴⁶ Premiums for this type of policy can be quite affordable (as low as \$500) and premium discounts are offered to users of state of the art storage tank technology.¹⁴⁷

Both the Florida petroleum and dry cleaning programs require a facility owner to maintain some form of financial responsibility for potential property damage or injury to third parties. In addition, as a condition of operating underground storage tanks (USTs) or aboveground storage tanks (ASTs) that contain petroleum or petroleum derived products, a facility owner must maintain financial responsibility for corrective action resulting from the discharge or release from such tanks. The owner or operator of a UST that handles on average more than 10,000 gallons of petroleum per month must demonstrate financial responsibility in the amount of \$1,000,000 for taking corrective action and for compensating third parties for bodily injury and property damage.¹⁴⁸ There are sev-

143. See, e.g., GREENWICH INS. CO., POLLUTION AND REMEDIATION LEGAL LIABILITY REAL ESTATE LENDER'S POLICY (2003), <http://www.ecsinc.com/forms/pdf/GIC-RELP4CP.pdf>.

144. See Zurich North America, *supra* note 139; AIG Env't'l, *supra* note 137.

145. See AIG Environmental, Storage Tank Liability Insurance (TankGuard), <http://www.aigenvironmental.com/environmental/public/envproducts/0,1338,65-13-4199,00.html> (last visited Nov. 14, 2007).

146. *Id.*

147. *Id.*

148. 40 C.F.R. § 280.93(a) (2005); see also FLA. STAT. § 376.309(1) (2005); FLA. ADMIN.

eral methods of providing proof of financial assurance.¹⁴⁹ The most common method, however, is by way of insurance.¹⁵⁰ Under the dry cleaning program, a dry cleaning facility owner or operator must maintain third-party liability insurance for \$1,000,000 of coverage for each operating facility.¹⁵¹ Third-party liability is defined as “the insured’s liability . . . for bodily injury caused by an incident of contamination related to the operation of a drycleaning facility.”¹⁵²

B. Cleanup Cost Cap

Every major insurer offers a cleanup cost cap (CCC) policy, the second main type of environmental insurance. Other names for this policy type include cost containment and remediation stop loss. A CCC policy protects against cost overruns when cleanup expenses exceed projected costs.¹⁵³ In other words, it caps the cost of a remediation project by insuring the policy holder for any amounts that exceed the projected cost (minus the deductible and buffer layer). In order to obtain a CCC policy, a potential insured must have a government or insurance company approved remediation plan in place and a cleanup estimate/scope of work from a reputable contractor.¹⁵⁴ Coverage, however, attaches above the expected cost of cleanup as determined by the insurer following a detailed internal engineering review of the contractor’s estimate/scope of work. Also, under these policies, payment occurs only when the cost overruns are caused by specific triggers: discovery of actual contamination greater than expected, discovery of unknown pollution during the course of the covered remediation plan, off-site contamination from pollutants considered in the remedial plan that are emanating from the covered site, or changes made by the regulatory authority to the scope of the remediation project or to the cleanup standard.¹⁵⁵ Such additional or unknown pollution must be linked to the pollution conditions which are the subject of the remediation plan for coverage to exist since CCC policies do not cover unrelated or newly discovered pollution conditions.¹⁵⁶

CODE ANN. r. 62-761.400(3)(a)(2) (2005).

149. See 40 C.F.R. §§ 280.94-.107 (2005).

150. See *id.* § 280.97.

151. FLA. STAT. § 376.3078(10) (2005).

152. *Id.* § 376.3079(3)(a).

153. Waeger, *supra* note 101, at 722.

154. *Id.*

155. See *id.*

156. See *id.*

While CCC policies do not offer third-party liability coverage, most, if not all, insurers offer a combination cleanup cost cap and PLL policy. They also have relatively few exclusions compared to liability policies because CCC policies are written on a first-party coverage basis; however, losses due to intentional acts or misrepresentations, bodily injury, contractual liability, fines or penalties, and war are generally excluded.¹⁵⁷ Typical terms include a minimum premium in the amount of eight to fifteen percent of estimated cleanup costs, a self-insured retention (SIR) equal to the estimated cost of the cleanup, plus ten to thirty percent to eliminate any incentive for underbidding and to account for losses almost certain to occur, and policy limits up to \$300,000,000 subject to reinsurance availability, but generally limits are twice the cost of cleanup.¹⁵⁸ Insurers will generally not cover cleanups costing under \$1,000,000.¹⁵⁹

Cleanup cost cap policies are being used increasingly to facilitate contaminated property transactions. In a transaction concerning contaminated property, it is typical for sellers to favor low estimates for the cleanup costs and buyers to favor high estimates, because these costs are integrated into the sale price and sellers are very wary of taking on a cleanup where the cost is uncertain.¹⁶⁰ A CCC policy helps to satisfy the buyer that costs will not exceed a certain amount, and the cost of purchasing the policy can be integrated into the deal, thus bringing certainty and moving the deal forward. Additionally, CCC policies are used by remediation contractors hired to perform remedial activities at a site. By purchasing a CCC policy, the contractor is able to give the property owner a fixed price contract with minimal risk. In such cases, however, an insurer will require the contractor to co-insure the excess to ensure that the contractor maintains an interest in the cleanup being completed within the contract price.

C. "Legacy" Insurance

In addition to the above policies of insurance written specifically to address the current needs of property owners with an interest in contaminated properties, it may also be possible to identify older "legacy" policies of insurance, which, in many cases, are long forgotten. So-called "insurance archeologists" discover

157. DYBDAHL, *supra* note 102, at 42.

158. Waeger, *supra* note 101, at 723.

159. *Id.*; see also GREENWICH INS. CO., REMEDIATION STOP LOSS POLICY SPECIMEN (2003), <http://www.ecsinc.com/forms/pdf/GIC-RSLCP.pdf>.

160. DYBDAHL, *supra* note 102, at 41.

through archival research the existence of policies of insurance, typically CGL policies written prior to the inclusion of the pollution exclusion. In many cases, these policies were written decades ago yet they still provide liability coverage to the insured. Even though there may be coverage defenses available to the insurer to avoid coverage, in many cases, insureds have been able to recover significant amounts of unanticipated money, often considered a windfall to the insured. Furthermore, recovery on these old legacy policies can be used as a vehicle to fund the purchase of the environmental insurance products dismissed above. Working on an hourly or contingent fee basis, companies and law firms have arisen that will research and identify these legacy policies and pursue claims against the insurer. For sites that have been around for many, many years, property owners, and others interested in acquiring contaminated properties, should investigate the existence of these older policies.¹⁶¹

VII. CONCLUSION

As a result of the notice provisions contained in Global RBCA and section 376.30702, and the broad retrospective notification requirements implemented by FDEP, it is expected that there will be an increase in third-party lawsuits brought against owners of contaminated property. Furthermore, as a result of the Florida Supreme Court's ruling in *Aramark*, the owners of property contaminated by neighboring operations may now march into the courtroom armed with a statutory cause of action providing for strict liability and the recovery of costs and attorney's fees. In addition, the EPA's adoption of the new AAI rule adds yet another consideration, requiring adherence to its complexities in order to be afforded any defense to liability.

Out of the CGL pollution exclusion, and subsequent litigation, a whole insurance industry has emerged providing coverage for specific environmental concerns. As third-party lawsuits increase and state and federal environmental agencies step up enforcement actions against industry and business for environmental harms, more and more people will likely turn to insurance policies to protect them from such environmental unknowns. It is clear from the Florida Supreme Court's ruling in *Aramark* that, from a public policy standpoint, a court will grant a prospective purchaser little relief, and thus, such purchasers should avail themselves of "an en-

161. The authors acknowledge the assistance of Laurence Eisenstein, with Eisenstein Malanchuk LLP, in Washington, D.C. for his contribution on legacy insurance.

tire industry providing pre-acquisition environmental audits and environmental insurance products” to protect themselves from third-party liability.¹⁶²

Environmental risk insurance is an effective way to manage risk and exposure to unforeseen liability. The insurance industry, however, is not a panacea, and many individuals who think that they are protected fall afoul of the numerous exclusions and requirements contained deep within the policies. An insured must remember that an insurance policy is a contract that contains certain conditions precedent which must be satisfied prior to coverage being provided. The courts, unwilling to alter the terms of such a contract, typically construe such exclusions and requirements strictly, rather than extend coverage for which the insurer has not bargained.¹⁶³ Recent terrorist attacks and natural disasters, and the growth of certain litigation areas, such as asbestos and mold litigation, have dramatically increased the number of claims being handled by the insurance industry. The insurance industry is responding by attempting to handle claims in a more “efficient” manner, thereby reducing its own risk. In addition, environmental coverage is typically available only through an insurance broker, who ideally assists purchasers with all the nuances of a policy. An owner of contaminated property or potential purchaser of property must, therefore, not only avail itself of appropriate environmental insurance, but must ensure that the policy is tailored to the particular concerns of the insured. Equally important, the insured must remain vigilant in complying with the requirements therein in order to minimize the insurer’s ability to deny a claim for coverage.

Owners of contaminated properties and those interested in acquiring contaminated properties should include a careful analysis of all available policies of insurance in their due diligence investigations. This investigation should include review of all existing and legacy insurance policies that may be in existence. If insurance of this nature does not exist, owners and prospective purchasers of contaminated properties should give serious consideration to obtaining one or more of the various coverages described above. The insurance industry is dynamic and individuals with an interest in contaminated properties must move fast to stay ahead of the game. While it is not feasible to protect oneself against any and all risks of environmental liability, the various policies of insurance described in this article do provide a mechanism for help-

162. *Aramark Unif. & Career Apparel, Inc. v. Easton*, 894 So. 2d 20, 25 (Fla. 2004).

163. *See, e.g., Gulf Ins. Co. v. Dolan, Fertig & Curtis*, 433 So. 2d 512 (Fla. 1983).

ing to manage and, in many cases, limit those risks. By taking advantage of the options available to them one can insure against environmental unknowns.