

Akerman Practice Update

REAL ESTATE AND ENVIRONMENTAL

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Federal Court: Phase I Report Errors Not Covered by Consultant's Insurance Policy

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Based upon a recent Florida Federal court case, companies should no longer rely on an environmental consultant's professional liability policy to assist in mitigating the risk that an environmental consultant may make a mistake when performing a Phase I Environmental Site Assessment. In an August 20, 2008 decision, the Eleventh Circuit Court of Appeals held an insurer has no duty to defend or indemnify an environmental consultant against a suit claiming the consultant negligently performed an environmental assessment by not identifying certain conditions because the environmental consultant's professional liability policy contained a pollution exclusion. *James River Insurance Co. v. Ground Down Engineering, Inc.*, 07-13207 (11th Cir. 8-20-2008) [21 Fla. Weekly Fed. C102]

The facts of the case are:

A developer/buyer retained an environmental consultant to perform a Phase I Environmental Site Assessment ("ESA") in connection with the proposed acquisition of real property. The consultant did not identify any recognized environmental conditions in the Phase I ESA Report. The developer closed on the property and during the development of the property, the developer discovered an underground storage tank, several buried 55 gallon drums, and buried construction debris. The developer cleaned up the identified environmental conditions and sued the consultant for reimbursement. The consultant, in turn, notified its insurer and requested the insurer defend and indemnify for the claim. The insurance carrier filed an action requesting the court to find that the insurance carrier owed no defense or indemnity because of the pollution exclusion in the professional liability policy. The exclusion stated that claims "arising out of" pollutants were not covered under the policy.

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The Eleventh Circuit Court of Appeals agreed with the insurance carrier and held that the pollution exclusion applied and the insurer owed the consultant no coverage duties for the claims for damages because the claims for damages “arise directly out of the alleged discovered pollution, and are covered explicitly by the exclusion.”

Conclusion:

Companies purchasing and developing real property could be subject to significant environmental liability which may exceed the value of the property, if an environmental consultant makes a mistake and fails to identify certain environmental conditions in a Phase I ESA Report. As if this scenario is not bad enough, the Eleventh Circuit Court of Appeals has ruled that insurance protection is NOT available from the environmental consultant’s professional liability insurance policy to mitigate the environmental costs incurred to cleanup certain missed conditions, if the insurance policy contains a pollution exclusion clause.

The lessons from this case are:

(1) Select a Competent, Qualified, and Reputable environmental consultant, even if the cost of using a more qualified environmental consultant is higher;

(2) DO NOT SIGN AN ENVIRONMENTAL CONSULTANT’S STANDARD AGREEMENT WITHOUT CAREFUL REVIEW BY LEGAL COUNSEL - have legal counsel review the terms and conditions of any consultant’s standard consulting agreement, explain potential exposure, and propose any suggested changes;

(3) Obtain indemnification from the environmental consultant in addition to any potential coverage from the environmental consultant’s insurance policy; and

(4) Review all environmental consultants’ insurance policies for a pollution exclusion before relying on the policies, if the consultant refuses to provide indemnification.

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