



Congratulates

Bean Investment Real Estate, Inc.



on closing the sale of

Montego Bay

A 420 unit apartment complex
Located in Henderson, Nevada

Montego Investors, LLC
Winprop I, LLC
Schnitzer Abrams Partnership
River Road LLC
Bean Montego II, LLC
3901 Tilden Avenue, L.P.
1280 N. Laurel Avenue, LLC
12421 Pacific Avenue, L.P.
12815 Pacific Avenue, L.P.
As Seller

JIK Montego Bay, LLLP
As Purchaser

Sales Price:

\$50,100,000

Courts interpret brownfield insurance clause

Brownfield redevelopment projects have a reputation as being burdened by extreme uncertainty and high risk of liability losses.

As a result, risk management, and more specifically, risk transfers to others, is a primary focus for brownfield developers. Although comprehensive general liability insurance policies, known as CGL policies, historically provided the broadest spectrum of coverage for property damage claims related to brownfield sites, modern pollution exclusions bar coverage for environmental losses. Developers and land owners are thus forced to turn to new, expensive and untested environmental insurance products to bridge the gap between the risk of future harm and certainty.

However, this tide may be turning as the scope of the pollution exclusion in the CGL policy is slowly diluting. In fact, many claims once denied under the broad brush of the pollution exclusion may now trigger coverage under the CGL policy, allowing property owners and developers to mitigate the impacts associated with environmentally impaired projects.

In 1985, the CGL policy was amended for the second time to include an exclusion for pollution-related events. The immediate result of this change was a victory for the insurers because carriers were largely successful in using the so-called absolute pollution exclusion to bar coverage for any event that caused a loss arising out of any release of any irritant, toxic or otherwise harmful material. In fact, insurance carriers today routinely deny coverage for claims beyond what is normally understood as traditional environmental pollution, such as carbon monoxide poisoning; exposure to lead, ammonia and pesticide residues; and materials used in the roofing, carpeting and the construction industry.

Over time, courts have mostly sided with the insurers' interpretation of the absolute



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pollution exclusion, reading the exclusion broadly to bar coverage for a host of claims. Cracks, however, are beginning to appear in the exclusions' invulnerability.

A few courts, for example, focus on the word "release," finding that the exclusion does not apply where pollution is confined within an indoor space. Other courts draw a distinction based on location, holding that losses arising in an industrial setting are barred while nearly identical losses in a residential setting are not.

Perhaps the most promising development from the perspective of owners or brownfields developers is the finding by courts in a few states that the absolute pollution exclusion applies only to "traditional environmental harms," which means that insurers have to cover any claim that does not involve a traditional, industrial pollutant, such as a solvent or a degreasing agent.

California is one state that adopted this view, and a recent case illustrates how this new interpretation works. In *MacKinnon v. Truck Insurance Exchange*, the policyholder owned an apartment complex infested with yellow jackets. The property owner hired an exterminator whose pesticide use caused a tenant's death. The tenant's family filed a wrongful death action against the apartment owner, who tendered the claim to his insurer. The insurer relied on the absolute pollution exclusion to deny coverage.

Although the insurer won at the trial level, and again on appeal, the California Supreme Court reversed the decision and ruled that the claim was not barred by the absolute pollution exclusion because pesticides used to control yellow jackets are not

"traditional environmental contaminants." The court found that applying the exclusion outside of this context "leads to absurd results and ignores the familiar connotations of the words used in the exclusion."

The idea of limiting the exclusion to claims involving traditional environmental pollution seems to be gaining momentum. States are now more or less divided into two camps — those limiting the exclusion to traditional environmental harm and those that find that the exclusion is indeed absolute.

Among the jurisdictions where courts have adopted the "traditional environmental contaminate" limitation, as California has, are Illinois, Kansas, Louisiana, Maryland, Massachusetts, New York, Ohio, Pennsylvania and Wyoming. Courts in Wisconsin and Colorado have held that the exclusion applies in industrial, but not residential settings. Neither Oregon nor Washington have yet ruled on the issue.

In the event that you have a loss arising out of a seemingly harmful material in connection with a brownfield development project, or any other project, and your carrier denies coverage based upon the pollution exclusion, don't accept the denial at face value — hire a specialist who can determine whether you may actually have coverage. If your claim arises in a jurisdiction that defines the exclusion narrowly, and if you are able to characterize your loss as something other than traditional industrial pollution, you should be able to obtain coverage. Even if your claim arises in a jurisdiction that has yet to narrow the application of the exclusion, it may be worth fighting for because sound arguments exist for a narrow interpretation of the pollution exclusion, and momentum is on your side.

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