

The Willis Index

Willis

Environmental Newsletter

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Market Survey – Premium Levels Stabilise But Coverage Expands

We last surveyed the market on premium level trends in early 2006 (see our Q2 2006 Willis Index). Our 2006 survey found that premium levels had reduced to as low as 50% of levels quoted in 2004, particularly for long-term one-off policies. Since that time, much has happened within the Environmental Insurance Market, including the development of new environmental insurance products, as well as an increase in claims activity. But how has all this affected premium levels since our last survey? To find out, we asked Environmental Insurers.

Environmental Insurance covering future claims and regulatory action arising from historic (i.e. pre-existing) contamination is available for policy periods of up to 10 years, potentially providing a very cost effective method for the long term transfer of such liabilities. For such policies, which are typically "one-off" purchases, insurers considered that premium levels had continued to reduce by 20% or more, although had shown signs of stabilising over the last 6 months. One insurer reported that they quoted at their lowest

allowable premium level more frequently now than 12 months ago, even for relatively complex risks. Looking forward, insurers anticipated that premium levels would remain largely static over the next 6 months.

Opinion is split amongst underwriters as to the premium trend for renewable policies, which typically have policy periods of one to three years. This is due, in part, to the expanding range of low cost renewable environmental insurance products. As reported in our Q1 2007 Index, Environmental Insurers have developed a range of affordable insurance solutions to supplement their existing products. The latest of these, ACE Online, is a fully automated online quotation and policy production system, thus substantially reducing ACE's underwriting costs. Some insurers stated that their policies had continued to show as great a premium reduction, if not greater, than one-off policies. Others argued that premiums have steadily levelled off since 2005. As with one-off policies, there was general consensus that premiums were unlikely to reduce further over the next six months.

The Willis Index is a quarterly publication reporting on the relevant issues affecting the insurance industry and the impact they have upon our clients. Our quarterly review provides analysis of the Environmental Insurance Market, assisting buyers and their advisors on available solutions. Regular features include updates on the market conditions, case studies, technical analysis of coverage specifics and special features highlighting significant changes in regulation, insurance market news and forthcoming events and seminars.

Willis voted "European Commercial Broker of the Year 2006" by StrategicRISK magazine for the second consecutive year.

Willis voted "Best and Most Innovative Insurance Broker of the Year" by Reactions magazine for the second consecutive year.

Willis voted "National Broker of the Year 2006" by Insurance Times for the second consecutive year

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Reduction in Premium Levels for Comparable Risks



"Environmental Insurers have developed a range of affordable insurance solutions."

Market Survey continued

Premium is not everything of course, and it is evident that, although most insurers agree that premiums look set to stabilise over the foreseeable future, this is being offset by a greater willingness by insurers to offer policy enhancements. Examples include the availability of lower deductible (excess) levels than have traditionally been offered, and the offer of a higher policy limit for no additional premium. Depending on the nature of the risk, insurers may also be willing to offer coverage enhancements for no additional premium. Given the long-term nature of many environmental insurance policies, the provision of ongoing client support through mid-term policy administration is increasingly important, as is the availability of technical support such as through loss control surveys by insurers. In response to growing claims experience in the environmental sector, the importance of prompt and fair claims handling procedures is increasingly recognised by insurers.

So what does the future hold? Although premium levels look set to stabilise over the foreseeable future, there are no signs that premiums will start to increase. Furthermore, clients may continue to benefit from the soft market conditions through the increased availability of coverage "enhancements".



"Premiums look set to stabilise over the foreseeable future."

Country profile: Italy

The Willis Environmental Team provides a global resource to assist clients in managing environmental liabilities. Central to the success of any Environmental Insurance placement is a sound understanding of the applicable legislation. In this article we provide an overview of environmental legislation and the availability of Environmental Insurance in Italy.

Environmental Legislation

The principal national legislation in Italy is Legislative Decree 152/2006, referred to as the "Environmental Code". This was enacted on 3 April 2006 and contains the majority of national environmental provisions, including the transposition of the EU Environmental Liability Directive (2004/35/EC) (ELD). Italy was one of the few EU Member States to have transposed the ELD by the required deadline of 30 April 2007 (see Breaking News on page 6).

Laws enacted by regional councils must comply with the general principles set out in the national environmental laws. Regulations are issued by national, regional and local bodies to implement legislation, whilst non-binding instructions (Circolari or Istruzioni) also provide interpretation of legislation, although these are not legally binding on courts.

Enforcement

Many public agencies and bodies are involved in the enforcement and administration of environmental law in Italy. The Ministry for the Environment (Ministero dell'Ambiente e della Tutela del Territorio) is the principal national body responsible for environmental matters, with monitoring and compliance duties carried out by the National Agency for Environment Protection (APAT - Agenzia per la Protezione dell'Ambiente e per i servizi tecnici).

A breach of environmental law may result in a fine or penalty being imposed by the court, although serious infringements may carry a prison sentence. For example, a maximum fine of EUR 52,000 applies to operating a plant without a licence, whilst breaches of waste management laws can carry a fine of up to EUR 93,000 or a six year prison sentence (8 years in the case of radioactive waste infringement).



Land contamination is regulated under administrative law provisions of Part IV of the Environmental Code. The main enforcing authority is the relevant Province or Municipality, although the Ministry of the Environment retains such powers for sites of national interest. In line with the principle of the ELD, the regime follows the "polluter pays" principal.

A risk based approach is adopted to the identification of sites requiring remediation, taking into account the current and intended site use, as well as its environmental setting. If a site operator becomes aware of a pollution event, or the threat of such an event, they are required to notify the authorities, take prompt action to prevent the risk of damage, and investigate the incident to confirm whether environmental damage has actually occurred.

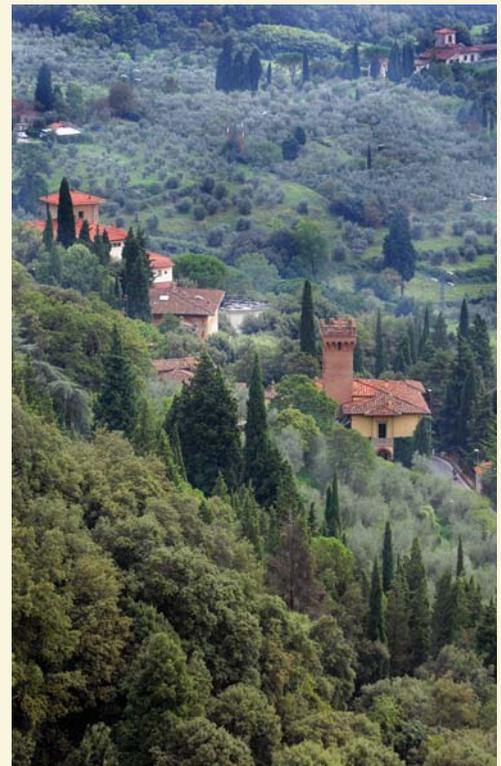
The same procedure applies to historic contamination; in such circumstances landowners can be held liable for the cost of remediating land contaminated by historic activities, where the original polluter is no longer traceable. The landowner's liability is limited to the value of the land, once cleaned up.

Environmental Insurance

At Willis, we have seen an increasing interest in the uptake of Environmental Insurance in Italy in recent years, partly fuelled by Italy's early transposition of the ELD. Coverage has been available through the London Environmental Insurance Market for many years, however insurers are increasingly able to offer cover locally under Italian language policy forms.

In addition to specialist Environmental Insurance, a pollution insurance pool scheme operates in Italy. The scheme, "RC inquinamento", is led by Swiss Re and participated in by the main insurance and reinsurance companies operating in the Italian market. The scheme offers a standard policy form providing cover for civil liability (but not first party losses) arising from pollution events. The coverage extends to "gradual" pollution incidents rather than being restricted to "sudden and accidental" incidents, and therefore provides broader coverage than would typically be available under general liability policies.

Whilst the RC inquinamento cover provides broader cover than general liability policies, there are a number of gaps in cover that can be addressed through the use of specialist Environmental Insurance. For example, first party losses such as on-site clean-up costs and business interruption losses are not covered under the pool scheme. Such losses, particularly in respect of historic contamination, may represent significant exposures for operators of hazardous activities or owners of former industrial land, and will often be a key concern during transactions. These and other exposures can however be covered by Environmental Insurance, enabling clients to obtain robust coverage for environmental losses by complementing the coverage available through the Italian pool scheme.



"Italy is one of the few member states to have transposed the Environmental Liability Directive."

North American Commentary

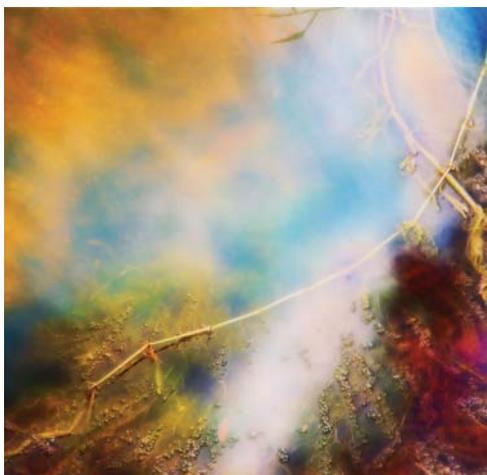
The Willis Environmental Team provides a global resource to assist clients in managing environmental liabilities, often working with Willis offices and other intermediaries throughout the World, including our colleagues in the Willis North American Environmental Practice. In this issue we feature an article originally published in the March 2007 Newsletter of the North American Practice, for which we are grateful for contribution from Carrie Goodman McKinney of Haynes and Boone, LLP. For the full article, please see the newsletter, available at:

www.willis.com/Services/Environmental/Publications.aspx.

CERCLA and Successor Liability

The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), enacted in 1980 and commonly known as Superfund, created a powerful system to force liable persons to pay for the costs of investigating and remediating contaminated sites. CERCLA imposes liability on a broad range of parties regardless of fault and does so retroactively, thus exposing corporations and individuals to potential liability for events that occurred decades ago.

CERCLA's broad sweep of liability has created some degree of concern and debate as well as numerous legal challenges regarding the circumstances under which a successor corporation has liability under CERCLA for the environmental obligations and liabilities caused by its predecessors. Corporations are well aware that the costs to manage, mitigate and remediate environmental conditions can be enormous. Directors and officers of US corporations are placing ever greater importance on identifying,



managing and avoiding these liabilities and risks. In this article, we discuss successor liability under CERCLA and the practical considerations for managing the risks of such liability.

Liability Under CERCLA

When CERCLA was passed, Congress wanted to ensure that those who benefited from an activity that caused contamination would be the ones to pay, rather than the innocent public. With this in mind, CERCLA imposed liability for contaminated sites on the following four classes of responsible parties:

- 1 current owners or operators of the site
- 2 owners or operators at the time contamination occurred
- 3 anyone who arranged for disposal of hazardous substances at the site
- 4 transporters who took hazardous substances to a site.

Responsible parties are jointly and severally liable, regardless of fault, for costs incurred in investigating or remediating the site.

CERCLA imposes liability retroactively and a claim need not be brought until some time after response actions begin. Often contamination is caused by activities conducted decades ago by corporations that no longer exist today and the question becomes whether the those corporations' successors should be liable for the activities of their predecessors. CERCLA does not specifically address successor liability and therefore the courts have had to balance traditional principles of corporate law against CERCLA's goal that those who benefited from the activity should pay.

What is Successor Liability?

Successor liability addresses the following question: Under what circumstances will one corporation that acquires the assets and/or business of another corporation also acquire all of the debts and liabilities of that corporation? Under well established principles of corporate law, in the event of a merger or consolidation, where one company disappears and the other continues to exist, the successor corporation is responsible for all of the liabilities of the former company. Likewise, when one corporation buys the stock of another, the buyer assumes all of the liabilities of the seller. However, if one corporation buys only the assets of another corporation, generally, the purchaser does not assume the liabilities of the seller.



Because of this protection from past liabilities, many corporate transactions are structured as asset sales even if essentially all of the assets and the entire business are being acquired. To address the potential for abuse inherent in these transactions, courts have developed some exceptions to the general principle of corporate law in order to hold an asset purchaser liable as a successor corporation. Thus a purchaser of assets can be held responsible for environmental liability relating to the acquired assets, even if "the corporation" did not agree to assume the liability under contract.

Typically in the due diligence process, corporations take great care in structuring sale and purchase agreements, common law states that a corporation acquiring the assets of another only takes on its liabilities if one of four exceptions are made:

- 1 The buyer expressly or by implication agrees to assume the liabilities at the time of purchase
- 2 The transaction amounts to a de facto merger or consolidation of the entities
- 3 The transaction is a fraudulent attempt to avoid liability
- 4 The buyer is merely a continuation of the seller

North American Commentary

Practical Considerations

Buyers should beware when considering the purchase of assets associated with environmental liability because of the possibility of successor liability. This is of particular concern when purchasing distressed assets with existing or potential Superfund designations. Environmental due diligence needs to be vigorous, in particular for those seeking to continue the operational activities of the seller once the corporate transaction has taken place.

Generally speaking, a correctly negotiated and drafted sale or purchase agreement should effectually manage these liabilities. However, in the case of bankrupt assets or companies entering bankruptcy, agreements and commitments may be difficult to obtain, even if the company or site has a parent corporation. Merely purchasing manufacturing assets through a subsidiary specifically created for that purpose or purchasing distressed assets, either entering bankruptcy or emerging from bankruptcy, may potentially result in corporate successor liability under CERCLA.

Depending on the circumstances of the transaction, the buyer may be able to negotiate protection in the form of corporate guarantees or escrows that specifically address potential environmental risks. Although getting the seller to provide a financial covenant to the buyer to manage costs related to historic conditions is always useful, where this cannot be readily obtained, other alternatives such as insurance may bridge that gap and provide additional cover for legacy management issues when the quality of the information is limited but where liability still may exist.

Successor corporations should be vigilant in their diligence and contractual efforts to avoid CERCLA successor liability, particularly when they will retain

the employees, managers or facilities. Be aware that something seemingly as innocuous as retaining management and employees can result in retention of environmental liabilities. It is important to specifically address these issues during the negotiations, because, even if the courts ultimately would not impose successor liability, it may be possible to take steps to insulate the purchasing company from having to defend against such claims.



Meet the Team



North America - Mike Balmer

The Willis North American Environmental Practice includes in excess of 30 specialists dedicated to the placement of environmental insurance solutions. The

Practice is deployed in regional teams covering the entire US and Canada. The teams are drawn from a wide cross section of professions and include engineers, lawyers and of course risk management and insurance specialists. Mike Balmer is the North American Practice leader. He is responsible for managing the regional teams and the Practice's general infrastructure. In addition Mike plays an active role in client projects and key account management. Prior to joining the North American Practice, Mike was head of the Willis European Environmental Practice. He previously held senior positions at a UK environmental consulting firm prior to which he held research posts at universities in London and Sydney.

His scientific background and extensive experience in both environmental consultancy and the insurance industry give him the expertise to address the diverse environmental risk issues facing Willis clients across all industry sectors.

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Italy - Sebastiano Doria

Sebastiano has more than 10 years of international insurance experience including the provision of insurance due diligence services and development of transaction solutions, including environmental

insurance. He is based in London and Milan and is responsible for developing the M&A opportunities in Continental Europe and particularly for the leadership of the Practice's activities in Italy & Spain.

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Breaking News

Bartoline Case Set for Appeal

As reported in our Q1 2007 Index, the recent UK court case of Bartoline Limited ("Bartoline") v (1) Royal & Sun Alliance Insurance plc ("RSA") (2) Heath Lambert Limited (2006) ruled that costs owed to the Environment Agency, and costs incurred through complying with statutory notices, were not covered by the claimant's public liability policy.

Facts of the Case

A fire at Bartoline's premises led to pollution of two watercourses, one of which was immediately adjacent to the premises. The Environment Agency ("the Agency") carried out various emergency works to clean up the watercourses. Acting under its statutory powers, the Agency subsequently invoiced Bartoline for the cost of the works. The Agency also served works notices requiring Bartoline to carry out certain additional clean up works. Bartoline sought to recover the invoiced sums from RSA, as well as the cost of the clean up work it had carried out in accordance with the Agency's works notices.

Policy Wording

The RSA public liability policy held by Bartoline indemnified the insured against (amongst other things) "legal liability for damages in respect of... damage to property... nuisance trespass to land or interference with any easement right of air light water or way". The principal issue considered was whether such wording was intended to cover the costs claimed by Bartoline, which were incurred as a result of the EA's statutory action rather than as a result of an action in tort.

Decision

The judge considered that "any liability to repay the expenses incurred by the Agency... and any liability to

pay damages in tort are... quite different animals. One arises out of the need to protect the public interest in the environment and the other to protect individual interests in property." The judge held that the core meaning of the policy term "damages" could be described as "the pecuniary recompense given by a process of law to a person for the actionable wrong that another has done him". It was held that the statutory debt and costs relating to clean up works would not fall within this meaning, although tortious claims brought by those with legal interests relating to the watercourses and their bed and banks may do so. Thus, the judgement draws a clear distinction between the statutory framework and the principles underpinning common law claims for damages.

Appeal

The case is set for appeal in October 2007. Clearly, the correct interpretation of any public liability policy will turn on its own specific wording. Nonetheless, whatever the result of the appeal, the case demonstrates that there is uncertainty about the extent to which public liability policies will cover pollution liabilities, even where a pollution incident is clearly of a "sudden and accidental" nature such as in the Bartoline case. The case provides further evidence that the only way of obtaining more certain insurance cover for clean-up costs is through the use of Environmental Insurance.



Member States Slow to Implement Environmental Liability Directive

Of the 27 EU Member States, Hungary, Italy, Lithuania and Latvia had met the deadline of 30 April 2007 to transpose the EU Environmental Liability Directive into national legislation. The Directive is intended to prevent damage occurring to water, protected species, natural habitats and land, and to increase the responsibility of operators to address such damage when it does occur.

A number of Member States, including Germany, Poland, Romania and Sweden, have implemented legislation since 20 April 2007 which fully or partially transposes the Directive. The majority of other Member States have issued draft legislation, however some, including the UK, had yet to progress beyond public consultation. As reported in our Q1 Index, the UK government's first consultation on options for implementing the Directive closed in February 2007. The second consultation on draft legislation is likely to be held in Autumn 2007.

Willis is one of the world's leading risk management and insurance intermediaries. We have approximately 16,000 professionals in over 300 offices around the world.

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