



**Lowenstein Sandler's Insurance Recovery Podcast:
Don't Take No For An Answer**

Episode 12 - Protecting Against Environmental Risks

By [Michael Lichtenstein](#)

Guests: Howard Tollin

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Michael Lichtenstein: Welcome to this episode of "Don't Take No for an Answer", an Insurance Recovery podcast. As we've discussed in previous episodes, President Biden has made no secret that he intends to vigorously enforce the federal environmental laws using the full power of EPA and the Department of Justice. I thought this would be a good time to talk about your insurance options for protecting yourself against that potential risk.

I have a guest today my friend and colleague, Howard Tollin, who is President of Sterling Risk Environmental and Professional Services. Howard is both a lawyer and a full-time insurance broker with over 30 years' experience in this area. And I've asked Howard on today to share some of his knowledge with us. So morning, Howard, how are you?

Howard Tollin: Good morning. Great, Michael, thank you for inviting me.

Michael Lichtenstein: My pleasure. Have you ever done a podcast before?

Howard Tollin: I have not.

Michael Lichtenstein: All right. Well, don't be afraid, our audience doesn't bite, so I think you're going to be fine. So let me just kick it off with a very basic question, Howard, what is environmental insurance coverage?

Howard Tollin: The short answer, Michael, is that it's insurance coverage all commercial property owners should at least explore, and most often have to cover risks that are otherwise not covered by the rest of their insurance program. If we step back to when I was a litigating lawyer, we had claims that were not being covered by general liability policies because of a variety of pollution exclusions from the 1970s all the way through 1985, where it became an absolute and total

pollution exclusion. So I was on opposite sides from you, Michael, Lynda Bennett, and your law firm saying that there was no coverage under general liability policies.

Michael Lichtenstein: I remember, but I forgive you. I remember those cases, but I'm going to forgive you so go ahead.

Howard Tollin: And then in the late nineties environmental insurance policies arrived to fill the gap in insurance, and I decided to come to your side and proactively-

Michael Lichtenstein: Woohoo.

Howard Tollin: ... protect policy holders so that they would have the appropriate coverage that was meant to cover environmental risks.

Michael Lichtenstein: So Howard, why don't you tell our listeners a little bit what type of coverage is available under those policies. Because as I recall those policies, there are some surprises in there. For example, business interruption, something you wouldn't necessarily think comes in a pollution liability policy. So why don't you talk about the types of policies and the types of coverages that are available?

Howard Tollin: The policies have become much more comprehensive over the years. They cover both on-site and off-site remediation cleanup costs, and all kinds of liability claims. Any claim from property damage that you affected somebody else's property, like diminished the value of their property, indoor air quality exposures, as long as there's some kind of damage to the physical property.

So it's a combination of both first party, meaning property types of coverages, and liability coverage, to the extent that you're sued, it protects defense costs. And to your point, it also covers business interruption arising from any loss from an environmental claim.

Michael Lichtenstein: So I'm just curious, I don't think we talked about this before we started taping, but were any COVID type losses harbored by any environmental policies that you broker?

Howard Tollin: So they're still being litigated and pursued. You need some kind of physical damage to a property. It's not meant to cover communicable disease, exposure from human-to-human, not knowing where the claim even arose from and how it was contracted. Exclusions are coming in to these policies specific to a communicable disease, but if there's actual bacteria, and we're litigating right now whether we have coverage depending on the wording in certain environmental insurance policies.

But what the environmental insurance policies do cover are mold, Legionella, inadvertent exposure to asbestos claims, all kinds of indoor vapor claims that arise from all kinds of thousands of chemicals, like perc, emerging contaminants

of perfluoros. Of course petroleum spills and a whole host of other indoor air quality and infectious disease claims, like MRSA, and anything that's attributable to the property would potentially be covered. And there are thousands of those types of claims, separate from a communicable disease or pandemic.

Michael Lichtenstein: Okay. So I know that in the last decade, EPA has been really hot on vapor intrusion. As we know, there are a lot of places in the country that have groundwater contamination, in particular chlorinated solvents. But it's only been in the last decade or so that the regulators have really focused on vapor intrusion risk. Which, for the listeners, means that the solvents in the groundwater can come out of the groundwater, get into your foundation and get trapped in there, and then ultimately come into the occupied areas of a residence or a building.

Are those sorts of investigation and cleanup costs covered by these policies?

Howard Tollin: Yes. Those are typical examples of what is covered, and becoming to your point, Michael, more prevalent than ever. What happens with solvents is they percolate very easily from soil to groundwater, they move with the groundwater and then vaporize into buildings, so many buildings now ... And you might not have the property where that solvent arose from, particularly if you were near a dry cleaner, the dry cleaner may have dumped the perc in its yard and it percolated to your property. And now you have a vapor intrusion issue in your building of no fault of your own.

And as you know, Michael, and this is why it's great to always team up with lawyers and knowledgeable lawyers like yourself and your law firm, is that you explain the environmental laws. And there's dozens of environmental laws with all kinds of acronyms that get very complex, but they result in sometimes strict liability, retroactive liability. Where if you're the owner, you're liable for anything on your property, even if it happened many decades ago. If you're an operator, you get pulled into claims that may have nothing to do with your operations, but because you're next to a contaminated property, it's in the neighbor's interest to sue all the neighboring properties saying, "It wasn't from our property, it must've been from one of our neighbors." So we're often seeing these policies respond to defense costs, even when there really is no culpability.

Michael Lichtenstein: Excellent. So won't you tell our listeners a little bit about how these policies are underwritten and generally what they cost, just in terms of ... Just a bit of a scale so people have a sense of what they're talking about here.

Howard Tollin: Absolutely. As I mentioned, the coverage has gotten much more expansive and the cost has remained pretty much the same over the past two decades. I've been estimating the cost to be 10,000 roughly a year. As you know, you could buy multiple year policies. So you could buy today a 10-year policy, that's the maximum term, pay for it upfront and have coverage in place for the next 10 years at roughly \$10,000 a year for a three to \$5 million policy limit.

Howard Tollin: In terms of underwriting, it's become easier. Whatever environmental reports or property assessment reports exist, that's what we use as a basis for underwriting. We ask about what the current operational use is and the intended future operational use, whether there's going to be any development at the property. And if there are no environmental reports, we actually do an environmental database review, pull out the publicly available information, and we use that to underwrite the property.

So it's become very easy. We don't even ask for an application until we know the carrier that's going to be the most aggressive on the risk. And then it's a very short application to warrant that you've disclosed the environmental information that's in your possession. Again, typically called a Phase One, which is just really a database review done by an environmental consultant. Or a Phase Two, if it exists, which is actually intrusive testing of the property of hundreds of recognized contaminants.

Michael Lichtenstein: So is it a requirement that a potential policyholder do a Phase One and or Phase Two in the underwriting process?

Howard Tollin: No.

Michael Lichtenstein: So if you're buying into a property and you don't really know much about it, how does the underwriting work there?

Howard Tollin: Well, we believe it's good practice to hire an environmental consultant to at least do a Phase One, and then we provide that information to the underwriter. Alternatively, we will do an environmental database review. It won't be priced and the coverage may be a little bit more restrictive, such as if we think there are historic problems at the property or on the neighboring properties.

And there's no Phase Two, we may have a certain limitation in the policy called the voluntary investigation limitation, where if you go to do Phase Two testing, the carrier won't pay for the cleanup costs associated with what we find as a result of that Phase Two intrusive testing report. But the policy will cover any kind of fortuity third-party claims where you're pursued by a regulator or a neighbor, and it had nothing to do with you testing your own property.

Michael Lichtenstein: I want to ask you a little bit about who's in this space, how many carriers are writing? Are there a lot of different forms you have to worry about? What's the state of the market, hard or is it a soft market right now? And also if you could talk a little bit about, are there COVID specific provisions or endorsements that carriers are pushing now?

I know in my practice, I'm seeing that a lot now on the D&O side, professional liability side, even the GL side, where carriers don't want anything to do with COVID or future pandemics, as you alluded to earlier. There certainly is a lot of litigation out there, so there's a lot of unknowns. And I think if you look at the

cases on balance, the carriers have probably been winning more than they're losing, but it's not 100% and it doesn't take more than a couple of policyholder victories to ... You start hearing things like, "The trend is in the other direction," or, "There's a move by the courts toward coverage."

Michael Lichtenstein: And I know I've been following what's going on in the UK, where in England, they basically created a case against the entire market to try and determine whether or not there should be coverage for business interruption under certain types of property policies in the UK, but they fast tracked all the way to the Supreme Court. And those cases generally, I think, came down in favor of policyholders.

So what I'm seeing is carriers in the States certainly want to avoid that ambiguity going forward. So if you could tell our listeners a little bit about who are the players, lots of different forms, state of the market, things like that.

Howard Tollin: So there are two dozen carriers or more offering robust coverage. The policies are meant to cover all kinds of environmental claims, other than communicable disease or pandemic claims. Similar to all the other policies, property policies, general liability policies, they don't intend to cover environmental claims, but environmental insurance policies do fill that gap in coverage. There is no product yet, specifically for pandemic, so communicable disease claims.

And you're right, we are tracking and on our website, we have a daily tracker of all of the litigation as well, and saw something this morning as an update. And we'll see what the courts do with the specific COVID issue. There are probably six or seven carriers willing to offer up to 10 years in coverage. Most of the carriers want to keep it in the three to five year term for the policy space. They see better results on claims when they're out one to five years, but we still do have carriers willing to write up to 10 years of coverage.

Like I said, the pricing has remained fairly stable because of the entry of new markets into the space when we started writing these policies. And I started doing this, by the way, full-time I started using environmental insurance to help us settle our litigations, Michael, in the late nineties, for all the unknown risk and to cap some of the known claims. But I started doing this full-time in 2001. So over the past 20 years, we've seen a bunch of carriers go under, but two recently, two of the biggest carriers for environmental shut down their units, and that was AIG and Zurich. And Zurich just this past year, in January. But we also have two dozen carriers that came into the marketplace and pricing has remained stable.

Michael Lichtenstein: Did they shut down their units just because the claim results were so high, they just didn't seem profitable?

Howard Tollin: Correct. Both AIG and Zurich had too many claims, all of the carriers have many claims. They're collecting premium to pay these claims, the claims arise again

often from a fortuity standpoint where something migrates to your property or there's a mold issue or an indoor vapor issue. We've seen an uptick in Legionella claims.

Howard Tollin: There's also emerging contaminants, they're called perfluoros being newly regulated, particularly and already regulated in New York and New Jersey in the parts per trillion, which is a very small amount. So as these laws emerge and to your point, the federal government becomes more vigorous in enforcing the laws, we're going to see a big uptick in litigation and claims. And some carriers are getting prepared for that, and many carriers are even putting exclusions specific to those contaminants in their policies.

Michael Lichtenstein: I don't like to get too selfish on my own podcast, but I know we've been working with you for a long time and you have a phrase you call the Team Approach. And in fact, I think you and Lynda wrote an article back 13 years ago, talking about that. So where, if at all, does insurance coverage counsel fit in, in the underwriting process, et cetera?

Howard Tollin: Virtually every single one of my deals, the more set of eyes, the better. These are heavily manuscripted policies. We need lawyers on the other side, talking to the client about their specific exposures, the specific limitations in the policy, because most of our policies have a dozen or more endorsements. These are negotiated contracts and maybe the most important contract ever to be negotiated. And we need knowledgeable lawyers on the other side assisting in that process.

I represent the policyholder to negotiate the best coverage with the carrier, but it's often helpful to me to have a lawyer like you, Michael, saying, "This is what we require. Tell your underwriter that we absolutely need this language because of this legal reason." And it gives us leverage to say, "Listen, we're not asking this for every single deal and every single policy, but it's really important for this deal, this lawyer, this client, to have this language. Go back to legal and have this language manuscripted into the policy."

Michael Lichtenstein: And I would say from my perspective, and of course I've also worked with clients purchasing many, many environmental policies, and it's equally as important to have a broker who really specializes in this type of coverage. As you've mentioned, there are dozens or at least a dozen potential carriers, which means there's at least a dozen different forms. For our listeners, when you hear manuscript, that just means heavily negotiated. Now you might have a basic forum that comes off the shelf, but there's going to be a lot of changes made to that generally by endorsement.

And language really does matter in these policies. It can be just a couple of words here or there that can be the difference between coverage, not coverage, full coverage, partial coverage. So it's really important in this space, as I think you've heard in other episodes, in almost every space to have a broker who really knows this type of coverage. To really give you the advice that you need

to make sure the policy you buy and you're paying for is going to give you the coverage that you really want.

Michael Lichtenstein: All right. So Howard, at the end of these podcasts, I like to give you the last word. If there were two or three tips that you'd want to share with our listeners about the purchase of these types of policies, what would they be?

Howard Tollin: One is it doesn't cost you anything to explore the option and see how much coverage you want at what premium to transfer the risk, which is a significant risk. Because my second takeaway is that when there is a claim, it's usually a severity claim. We're usually talking at least the hundreds of thousands between defense costs, settlement, to get you out of that environmental claim that usually take years, not a couple of months, to get you out. You need a good environmental lawyer to represent you, to get you out. And the environmental insurance carriers have made an investment in this product line to have the best environmental lawyers, consultants, public relations to protect the client.

The other takeaway is that the insured can choose their lawyer and have the carrier reimburse at acceptable rates, so you can choose your own environmental lawyer. The third thing I would mention is that while the cost generally is \$10,000 per year, there are programs ... We have one program with Chubb, for example, with a million dollars in coverage for certain types of risks, that is \$3,000 for an annual policy. So I wouldn't let the premium stand in the way. Again, we're talking about a significant risk in an expanding field of environmental laws. We used to say that they weren't very frequent, but when they happen, they were really bad. Now they're both frequent and they're really bad.

Michael Lichtenstein: The worst of both worlds. So Howard, thank you so much. This has been great. Would it be okay, could you give our listeners maybe some contact information so that if they have any questions or want to explore the possibility of purchasing coverage, would you mind if they contacted you directly?

Howard Tollin: Not at all. My email is htollin, T-O-L-L-I-N, @sterlingrisk, R-I-S-K, .com. My phone number, and this is my cell phone number, Michael, I'm not giving my social security number.

Michael Lichtenstein: Right.

Howard Tollin: My cell phone number is (516) 641-1674. And the office number is (516) 773-8718. And thank you again, Michael, for this opportunity.

Michael Lichtenstein: Really a great pleasure. All right, folks. That's the end of this episode on environmental insurance. I look forward to hearing from you about how you liked this episode, and we will see you down the road as we continue to release about two episodes a month. And again, thanks so much for listening.

Kevin Iredell:

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