

By Canaan Crouch, Vice President, SullivanCurtisMonroe (Former Assistant Vice President and Northwestern Regional Manager, ACE Environmental; Senior Environmental Underwriter, AIG)

ENVIRONMENTAL CLEANUP COSTS:

Professional Negligence for Failure to Warn Successors and Beneficiaries

What would happen to your practice if you failed to advise a client of a potential liability that ended up costing them hundreds of thousands, or even millions, of dollars? Well, that is a risk faced unwittingly each year by thousands of California professionals who advise clients on business and estate succession planning.

It is clear that those who own or operate properties that have been contaminated by industrial chemicals or gasoline constituents can be faced with significant environmental cleanup costs or toxic tort liabilities. However, what is often overlooked in the environmental liability scheme is the risk that attorneys, accountants and financial advisors face for **failing to warn** their clients of the devastating consequences that might befall *heirs and successors* if potential environmental liabilities are not addressed during the estate planning or business succession planning process.

As an insurance underwriter specializing in contaminated real property, and now as a broker with the same emphasis, it is my job to recognize scenarios that could adversely affect the environmental liability of individuals, businesses and professionals. Succession planning concerns have recently been elevated to a high level on that list.

Consider a scenario where a succession planning professional is advising a client, the founder of a 40-year old family manufacturing business, on how best to structure the transition

of the family business to successors after death. It is well known that manufacturing processes utilize chemicals that may have the potential to negatively impact soil and groundwater. So, what happens if the family business, including title to the real property on which the business is situated, passes to the heirs, and significant contamination is later found?

If the cleanup costs are significant, the heirs and beneficiaries will often be looking for everyone who might be liable to help them pay for cleanup. In the instant circumstance, since they - as heirs - are also the owners of the manufacturing company that caused the contamination over a 50-year period, they won't have any other "polluters" in the chain of ownership or operation to point the finger at.

A big question in the minds of these heirs or beneficiaries, especially if they are being held *personally liable* for environmental cleanup costs or toxic tort liabilities, may well be, "Could my own personal liability have been avoided by better up front, pre-death planning?" If the answer to that question is "yes," as it often is, then that heir or beneficiary may well seek legal recourse against the professionals that allowed the estate to pass to her, and who completely ignored the environmental contamination "elephant in the room" issue.

While precisely what should have been done to address these concerns during the pre-death planning process is certainly an open question, the failure to even raise the issue during the estate or business succession planning process may well place financial and legal professionals at risk for their own errors and omissions liability.

If you know that one or more of your clients has a company that uses chemicals, or you know the client invests in industrial, agricultural or corner strip mall properties - which often have environmental contamination issues, as a professional you may well have a duty to suggest that an inquiry be undertaken. As a trusted business advisor, it is your responsibility to make clients aware of all the potential risks that could impact their business

and estate succession transactions, including environmental liabilities that may be passed on to heirs, beneficiaries or business partners along with the title to real property or the ownership of a business. The failure to address environmental issues can result in significant costs incurred by your client, and a serious impact to the relationship you have with them as well. Moreover, a costly error could potentially tarnish the good reputation that you have worked so diligently to develop.
