

Risk Monitor



Knowing Your CERCLA Liability for Hazardous Substance Removal

In 1980, Congress passed The Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) to address the issue of cleaning up hazardous substances at inactive or abandoned sites. The law is sometimes referred to as the "Superfund" because the cleanup program it established includes a Trust Fund used by the EPA and other agencies to clean up hazardous waste sites when the original polluter cannot be identified. CERCLA also requires the immediate reporting of any releases of hazardous substances at a construction site if the amount released meets or exceeds the level designated by the law as a reportable quantity.



The Emergency Planning and Community Right-to-Know Act (EPCRA), originated from CERCLA. This law requires the use of emergency planning, and provides citizens, local governments, and local response authorities with information regarding the potential hazards in their community. Before beginning the bidding process, the owner or developer needs to

research the history of the construction site to find out if there was any hazardous substance use or disposal at the site. This review will give contractors a better understanding of potential risks and liabilities.

There is the likelihood that your project will be subject to Superfund or EPCRA requirements if hazardous substances are discovered during construction activities such as grading, digging or demolition. If your site was previously used for industrial or commercial activities that may have created hazardous substances, or there is the possibility that waste was disposed at the site, you should test the soil, surface water, and groundwater before beginning.

To determine if your construction site is subject to EPCRA emergency planning requirements, you need to determine if it meets both of the following criteria:

- An extremely hazardous substance or any substance regulated by your state or local authority is stored on site.
- A substance above the designated Threshold Planning Quantity is stored on site. The quantity varies by substance.

You can find additional information at: <http://yosemite.epa.gov/oswer/ceppoweb.nsf/content/epcraOverview.htm>.

As for responsibility for meeting CERCLA requirements, if hazardous substances are discovered during construction, the contractor or subcontractor who first discovers it is responsible for notifying the general contractor, developer or owner. Because the hazardous substance was at the site before construction began, the developer or owner is responsible for seeing that the hazardous substances are handled and disposed of properly.

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Subcontractor/Vendor/Lease Agreements and Contracts

Do you frequently sign documents (contracts or agreements) enlisting the services of others? Are you contractually protected in these documents? Is there adequate risk transfer away from you and to those that "should be" responsible? Are you bearing the risk of others? If you don't know the answers to these questions, forward these documents to us before they are executed. We will review them for insurance purposes and our recommendations to you for further consultation with your counsel.

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Is Your Intellectual Property At Risk?

Intellectual property is the crown jewel of any business, no matter its size. That's why R&D departments exist and also why companies incur great expense to obtain patents. In fact, the race to innovate has heated up dramatically. But as Tom Aepfel noted in an October 25, 2004 The Wall Street Journal article entitled "Patent Dispute Embroils Industries," the growing drive to be first has also ushered in another phenomenon:

"The number of U.S. patents issued annually has more than tripled over the last two decades to 187,017 in 2003 as companies try to distinguish themselves among other global competitors with new products or processes. But patents are also the source of growing litigation. There were 1,553 patent-infringement lawsuits filed in 1993 in U.S. federal court, compared to 2,814 last year."

In the past, many businesses relied on the coverage provided under the advertising injury portion of their comprehensive general liability insurance to protect them if they were accused of violating intellectual property. The parameters of advertising injury in these policies included coverage for the unintentional acts of misappropriating advertising ideas, or the infringing upon copyright, title or slogan that occurred during the course of advertising goods, products, or services. However, since most companies' activities go well beyond the scope of what could realistically be defined as advertising, the protection provided by commercial general liability is obviously too limited in this area to be of real value. Under the typical commercial general liability policy, infringement of intellectual property claims that resulted from activities other than advertising would not be covered. By the same token, intentional acts of infringement are also not

covered.

The gap between what is and what is not covered in terms of intellectual property infringement under commercial general liability presented a serious problem as competition increased. That's why insurers developed a specialized type of coverage called Intellectual Property Insurance. This type of coverage has two forms. The most popular form is defense coverage. This is designed to underwrite both the cost of mounting a legal defense against an intellectual property infringement lawsuit and the cost of any settlements or judgments that result from it.

The second type of coverage is called enforcement or pursuit coverage. This policy is for the party that has been wronged so that it can pursue anyone that has infringed upon its intellectual property. This type of coverage is especially appealing to a company that has a valuable patent, but may not be positioned in terms of its capital to exploit that patent's potential as well as one of its larger competitors. Having this coverage safeguards the company's intellectual property rights while it acquires the capital it needs and enables it to go after a competitor who violates those rights.

Losing one's intellectual property can mean the death knell in the current global economy. As companies find themselves having to compete both domestically and in emerging markets abroad, it's clear that innovation is the only way to stay in front of the herd. If that's the case, then it stands to reason that Intellectual Property Insurance is one more necessity for doing business in the new economy.

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However, if you excavate or spread soils containing a hazardous substance, you may be responsible under CERCLA as an operator, arranger, or transporter:

- You may be an operator if you spread soil that contains a hazardous substance on the land.
- You may be an arranger if you dispose of a hazardous substance or arrange to have it removed from the construction site.
- You may be a transporter if you move hazardous substance from one location to another.

If there is a hazardous substance release above the reportable quantity for CERCLA, you must immediately notify the National Response Center at 1-800-424-8802 and your State Emergency Response Commissions (SERC) and

Local Emergency Planning Committees (LEPC). If there is an extremely hazardous substance release above the reportable quantity for EPCRA, you must immediately notify your SERC/LEPC. If no notification occurs, the owner, contractor and subcontractor may all be held responsible.

The penalties for non-compliance are stringent. EPA has the power to impose administrative, civil, and criminal sanctions on a property owner and/or contractor. Administrative penalties and civil penalties can reach \$32,500 per violation per day. In addition to fines, you may need to cover legal fees. If legal action is taken against your construction site, you could also be the recipient of increased scrutiny by regulatory agencies at all the construction sites that you operate.


Using Insurer Financial Ratings to Choose Your Insurance Carrier

also affects profitability, which is another area for evaluation.

Other more general aspects that are assessed include the overall conditions of the market, how diversified the carrier's product line is, how competitive they are when measured against other carriers with a similar product lines, the experience level of their management team, how much of their product line is made up of policies that are extremely risky to underwrite and how large a reserve they have to cover risk. An insurance carrier that receives high marks in all of these areas of assessment is one that you can depend on to be around when you need them.

You have access to this information by reading reports generated by the insurance evaluation services. There are a number of them available, but the three most commonly used are:

- **A.M. Best Company** – they are the original insurance raters, established in 1906. They use letter ratings to evaluate not only the company's current financial condition, but also its future outlook. They also have a NR designation, or "not rated." The NR designation includes the general reason why a rating was not assigned. Best list its ratings scale and insurer profiles on its web site www.ambest.com.
- **Standard & Poor's** - they assign an insurer a financial strength rating based on an assessment of whether or not the carrier has the financial capability to meet its obligations as outlined in the terms of its insurance policies and contracts. A Standard & Poor's evaluation uses both hard numbers and subjective factors such as general attitudes toward the company. Their ratings categories and reports can be found at www.standardandpoors.com.
- **Moody's Investor Services** – they also use an evaluative approach that includes both objective and subjective factors to determine if a carrier can meet its obligations to its policyholders. You can find their reports at www.moodys.com.



The right to choose is one of our most closely guarded freedoms. But along with that right comes the responsibility of being accountable for the consequences of your choice. If the choice turns out to be a poor one, the consequences can have devastating effects, especially if the decision-making is in a business context.

When you select an insurance carrier you need to weigh each option against the same set of objective criteria. The goal is to use a set of pre-established conditions that will ensure the selected carrier will have the financial strength to stick with you over the long-term. This concept is the foundation for what insurance evaluation services perform.

Analyzing a carrier's financial standing is a fairly complex task requiring a lot of intricate calculations. Each of the recognized insurance ratings firms have a somewhat subjective way of arriving at the ratings they give companies. However, there are some common criteria they all use in their evaluations. The first criterion is the company's liquidity. Going-hand-in-hand with liquidity is leverage. Leverage is the amount of money a company borrows to increase its assets either through purchase or investment. The more leveraged a company is, the more debt and conversely, the less equity they have, which affects their liquidity.

Of course, companies are rated on their investment portfolio because it also affects their liquidity. Their portfolio needs to be diversified with quality securities in order to receive a high mark in this area. The next evaluation point is risk-based capitalization. This is the theoretical amount of capital needed to cover the risks associated with their operation. If this money is put in reserve, it lessens a company's available liquid assets. It

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abrasions. Ropes should be made from material that is not affected by heat or by acids or other corrosives.

All scaffolds and scaffold components should be inspected before each use to ensure that structurally sound portions of buildings or structures are used to anchor droplines for body belt, harness systems, and tiebacks for suspension scaffold support devices. Droplines and tiebacks should be secured to separate anchor points.

Employees should be provided with appropriate fall protection systems and understand how to use them correctly. Generally, workers should be protected by a Type I guardrail system or a combination of body belt or harness system with a Type II guardrail system. The Type I guardrail systems are

capable of providing the necessary fall protection without the use of body belts. Where the Type II guardrail systems accentuate the scaffold edge, restrain movement, provide handholds, and prevent wrong moves, they still must be supplemented by body belt or harness systems to provide the necessary fall protection.

The requirements differ when single-point and two-point adjustable suspension scaffolds are used. Workers must be protected by both a body belt or harness system and a Type I or Type II guardrail system. If boatswain chairs, catenary scaffolds or float scaffolds are used, workers only have to be protected by a body belt or harness system.

Scaffolding Safety

According to the Bureau of Labor Statistics falls remain the number one killer of workers in the construction industry and the number two killer of workers in private industry. One of the most likely ways to prove those statistics true is to look at the number of falls from scaffolding. This problem was so prevalent for such a long time, that it prompted OSHA to revise their standards on scaffold safety in the late 1980s.

The standard that OSHA devised has been periodically updated; but it still contains several key provisions:

- Fall protection or fall arrest systems—Each employee more than 10 feet above a lower level must be protected from falls by guardrails or a fall arrest system. However, employees on single-point and two-point adjustable suspension scaffolds must have both.
- Guardrail height—The height of the top rail for scaffolds manufactured and placed in service after January 1, 2000 must be between 38 inches and 45 inches.
- Crossbracing—When the crosspoint of crossbracing is used as a top rail, it must be between 38 inches and 48 inches above the work platform.
- Midrails—Midrails must be installed approximately halfway between the top rail and the platform surface. When

a crosspoint of crossbracing is used as a midrail, it must be between 20 inches and 30 inches above the work platform.

- Footings—Support scaffold footings must be level and capable of supporting the loaded scaffold. The legs, poles, frames, and uprights must be placed on base plates and mudsills.
- Platforms—Supported scaffold platforms must be fully planked or decked.
- Guying ties, and braces—Supported scaffolds with a height-to-base of more than 4:1 have to be restrained from tipping by guying, tying or bracing.
- Capacity—Scaffolds and scaffold components must support at least 4 times the maximum intended load. Suspension scaffold rigging must support at least 6 times the intended load.

In addition to complying with OSHA requirements for the design and construction of scaffolds, employers need to follow other scaffolding safety practices. They must ensure that scaffold suspension ropes and body belt or harness system droplines are shielded from heat-producing processes such as welding, hot acids or other corrosive substances, or cut by sharp edges or

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