



Transactional Pollution Liability

San Juan, PR

October 16, 2025





“The best kept secret in M&A insurance...”



The Polluter Pays Principle



Transactions create a transfer of liabilities



- The “Polluter Pays Principle” is universally applied within environmental law.
- However, in the absence of the polluter, the associated liabilities default to the owner/purchaser.
- Vendors want a clean exit – warranties and escrows/securities are a last resort.



Transactions create a transfer of liabilities

It is critical that the purchase agreement allocates the responsibility for environmental liabilities clearly and with specificity so there is no confusion or ambiguity that could lead to litigation

Because environmental laws establishing cleanup liability generally have no statute of limitations, sellers often want a sunset provision for their warranties, so they don't remain on the hook in perpetuity for liabilities

Buyers, however, may seek an indemnity that survives for as long as possible

- In the absence of an agreement, they look for insurance to bridge the gap.



Transactions create a transfer of liabilities

- Share deals mean the purchaser assumes responsibility for the past and the future liabilities.
- Property deals mean the purchaser assumes responsibility for the past liabilities, and the future ones should the tenant/operator default.

STOCKS

UFPT +2.16%

UFP Technologies, Inc. Expands Medical Device Capabilities with Acquisition of UNIPEC and TPI

July 17, 2025 — 09:14 am EDT

Written by None for Quiver Quantitative →

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TRANSACTIONS

JRK Property Holdings buys Hyatt-branded portfolio in Puerto Rico

By Esther Hertzfeld · Jan 12, 2024 8:45am



Increased Awareness



Increasing Awareness Within The Deal Process

ESG commitments - PE funds and corporates signing up

Regulatory environment and pressure continually developing

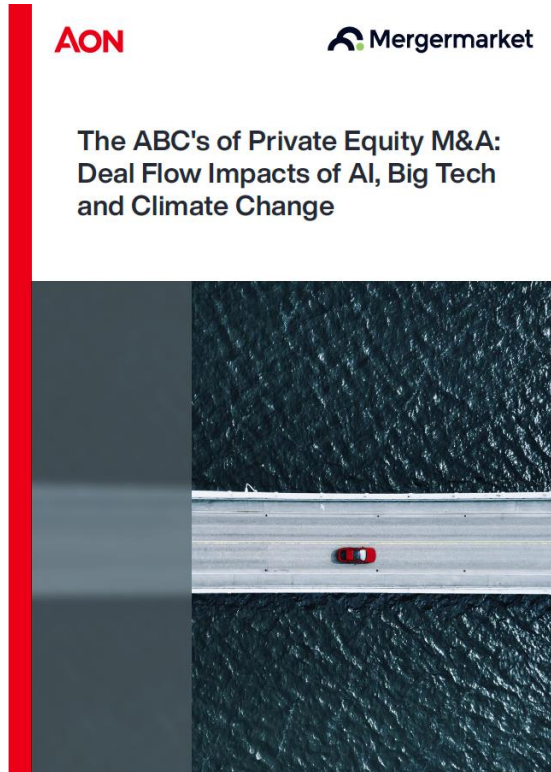
Increasing investor focus and awareness of reputational exposure

Losses and claims development, the benefit of experience/school of hard knocks

No longer a secret, now considered an opportunity and a viable risk management tool



Increasing Awareness Within The Deal Process



“Dealmakers are also having to adapt to an increasingly demanding regulatory landscape shaped by the urgent need to address environmental, social, and governance (ESG) concerns. The growing focus on sustainability and antitrust by policymakers is adding new layers of complexity to transactions.”

“The importance of thorough due diligence has never been greater, with cybersecurity, supply chain resilience, and ESG factors becoming critical considerations in assessing potential acquisition targets.”

[The ABC's of Private Equity M&A: Deal Flow Impacts of AI, Big Tech and Climate Change](#)



Environmental Due Diligence



“Recognized Environmental Conditions” - RECs

ASTM E1527-21

Standard Practice for Environmental Site Assessments:
Phase 1 Environmental Site Assessment Process

ASTM E1528-22

Standard Practice for Limited Environmental Due Diligence:
Transaction Screen Process

Recognized Environmental Condition: “...the presence, or likely presence, of any hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any hazardous substances or petroleum products into structures on the property or into the ground, groundwater, or surface water of the property.”



“Recognized Environmental Conditions” - RECs

EIL Policy

Fixed Site/Premises Pollution Legal Liability Cover

- **Pollution condition** means the emission, discharge, dispersal, migration, release or escape of pollutants provided such are not naturally occurring.
- **Pollutants** means any solid, liquid, gaseous, thermal irritant or contaminant, including but not limited to smoke, vapour, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.”



Example REC #1 -

“The ground(water) had to be remediated in 2010-2011 due to the presence of volatile chlorinated hydrocarbons. Initial remediation was carried out and an expected additional decrease in contamination levels had to be monitored until 2019. In 2019, it was determined that contamination values did not decrease as quickly as planned. Therefore, extended monitoring requirements have been put in place until 2026.

If the reduction continues according to plan, the remediation project is planned to be closed by the authorities in 2026. The monitoring and consultancy costs are approximately EUR 10,000 in these five years, according to Management. Should levels in 2026 have again not decreased to the required threshold maximum levels, additional remedial action might be necessary again.”



Example REC #2 -

“The fuel storage tank is considered as a relevant potential source of contamination, especially due to the lack of information about mandatory integrity tests since the beginning of the activity in 2013. On the other hand, the activities carried out in the surroundings, such as the hydrocarbon storage and supplier plant since the 1970’s (although not exactly upstream of the site) and the unknown activity performed North of the site (including the occupancy of part of the plot under study) during approximately 20 years, are considered as remarkable potential sources of soil contamination. Therefore, the risk of soil and groundwater affection is considered as moderate.”



Known REC?



Example REC #3 -

“The current activity on site has been carried out since 1987 and is considered as a potentially soil polluting activity. During the site visit, the following potential sources of contamination for soil were identified:

In the outside area there is one Fuel Aboveground Storage Tank (AST) of 6,500 l. This tank is metal made and is located over a concrete secondary containment in poor conditions, with cracks.

The operation on site use diesel, oil and derivatives in the machinery (access was not allowed to the entire area). Unlabeled containers in poor conditions and stains were spread around the warehouses. The paved soil contains cracks and there were drains close to the machinery area visited.

The risk of soil and groundwater pollution is considered as high due to the activities carried out, currently and historically, on site.”



Known REC?
Historical REC?



Key Considerations



Coverage Comparison

	W&I Policies	EIL Policies
Mechanism of cover	Removal of pollution exclusion from W&I policy	Affirmative and specific cover via a designated pollution liability product
Basis of cover	Loss associated with a breach of a warranty – contractual damages basis	Legal liability for pollution conditions
Target exposures	Low risk sites with “clean” EDD reports	All risk and activity types
Known RECs	Excluded	Known RECs can be underwritten and are covered unless explicitly excluded. Unknown pollution conditions are covered
Coverage	Generally limited to the breadth of the warranties included within the SPA and laws at time of signing/closing	Third party liability (bodily injury, property damage), first- and third-party cleanup, prevention and mitigation/emergency costs, business interruption costs, loss of profit, loss of rent Change in laws covered and policies can be updated during policy period to reflect changes in exposure or additional information becoming available
Time element	Historical cover only (prior to date of signing/closing)	Historical and future liabilities can be covered, including redevelopment/contractors’ risks. Policy periods up to 10 years.



Key transactional considerations

Advantages to starting on the sell side	Anything other than “Low Risk” in EDD, ESGDD &/or LDD can cause problems	Any real estate or industrial/manufacturing aspects to the deal?	Useful Tool
Time - Enables a truly tailor-made solution to be developed Last minute site investigations and sampling are rarely helpful and often derail the transactions, insurance option avoids this eventuality Increases the transaction success rate; clear risk transfer mechanism established early on, can also be hard stapled, Transparency and early solutions – no last-minute surprises, allows focus to remain on all the other complicated aspects of the deal	“Recognized Environmental Conditions” – RECs, can be known or unknown pollution Known pollution conditions identified in previous investigations Unknown pollution conditions relating to current and previous activities Inconclusive due diligence: not hard science and quality is variable, reliance can be limited, scope may be limited	It may look clean and inoffensive now, but the past is often a very different story Share deals and asset deals both create a transfer of liabilities Tenants are third parties - not just cleanup and 1st party business interruption, need to consider 3rd party BI/PD and loss of rental income exposures Redevelopment projects and operational exposures (new conditions) can also be covered	It’s not for everyone: Many transactions have negligible or limited exposures Solution to complex and technical issues requiring specialist understanding and dedicated scope of cover; confusion and doubt are bad for negotiations No minimum deal size/EV: Wherever there are RECs or anything but low risk there is a need and an opportunity



Claims Triggers



Common Claims Triggers



New incidents -
intervention produces
discovery or aggravation of
pre-existing pollution



**Unexpected aggravation
of known pollution
conditions**



**Changes in Regulatory
Environment**
Legal changes, emerging
contaminants, political shifts



**Development and
Redevelopment**
Demand for space, dynamic
surroundings, urban change



**Licensing and
Enforcement**
Regulatory inspections and
interventions



Common Claims Triggers



- Regulatory change in chemical storage regulations required improvements to secondary containment
- Works to replace damaged concrete floor of bund revealed buried chemical drums



Common Claims Triggers



- Explosion and fire at solvents recovery plant produced significant impact to soils and groundwater
- Remediation Project revealed significant additional historical impact to soils and groundwater clearly pre-dating the pollution caused by the fire



