

Prevention Plan

Property owners can reduce their risk of asbestos-related litigation.

by Anne B. Schmidt, JD

Asbestos litigation poses legitimate challenges and potential economic hardship for commercial real estate property owners. Overall, both prospective and current property owners need to be aware of and guard themselves against asbestos-related risks associated with acquiring or owning a building constructed before the mid-1980s.

In the past, asbestos was used in building materials such as ceiling tiles, thermal insulation, soundproofing, and fireproofing. Today, asbestos' hazardous health effects, particularly mesothelioma, a form of cancer often caused by asbestos exposure, are widely known. Litigation involving such illnesses has become the longest-running mass tort in U.S. history, and commercial real estate property owners are the most recent business professionals faced with these lawsuits.

Plaintiffs' attorneys have directed their attention to the commercial real estate industry as traditional asbestos-products liability defendants have been either forced into bankruptcy or ceased operations. Many property owners now find themselves caught in lawsuits even though their businesses typically have nothing to do with the production of asbestos or

asbestos-containing products. However, there are some ways current and prospective commercial business/property owners can protect themselves against potential asbestos litigation.

Real Estate as a Target

Most pre-1980s buildings were constructed using some asbestos products, which still may be present in floor and ceiling tiles, transite board

Several defense strategies can protect property owners from liability that arises from prior asbestos exposures.

and pipe, fireproofing, pipe coverings, gaskets, refractory materials, roofing tiles, and various thermal and sound insulations. In addition, although property owners or tenants may have never manufactured asbestos-containing products, they may have used machinery with asbestos-containing components.

The causes of action filed against property owners normally include negligence, strict liability, ultra-

hazardous condition of property, and conspiracy. Further, many jurisdictions where these cases are filed impose onerous and stringent discovery requirements on corporate defendants. Spoliation of evidence claims — or altering or destroying documents — is routine as property owners are required to turn over to plaintiffs electronic and paper documents dating back 70 years in some jurisdictions. Failure to disclose these documents has resulted in severe sanctions, including the striking of a corporate defendant's pleadings and entry of judgment against it.

If a repairman, employee, or tenant alleges asbestos exposure is present at a particular facility, juries are asked to evaluate the case through "current eyes" rather than what may or may not have been known about asbestos 30 years earlier. However, the linchpin in determining a current property owner's liability to a specific exposure is if the present enterprise is substantially a continuation of the prior business and if the current owner had notice of an asbestos-related claim before the building was purchased.

One unfortunate aspect of an asbestos-caused mesothelioma claim is that up to 40 years may pass between an individual's initial exposure and subsequent development of asbestos-related cancer. This presents two problems for current and/or prospective property owners. During the latency period, prior property owners and their insurance companies may have either been subsumed into other companies or ceased operating altogether. Also, prospective or current property owners cannot be completely sure that future suits will not be filed by persons who claim they contracted mesothelioma or other asbestos-related illnesses from exposure on the premises.

Defense Strategies

Several defense strategies can protect current and future property owners from liability that may arise due to prior asbestos exposures. Carrying through on these strategies is particularly critical for property owners being sued by sick plaintiffs who claim there was asbestos on the premises before the current owner purchased the property.

Prospective property owners should seek an indemnification agreement backed by a bond from the seller. Most business or property sales include indemnification agreements, but they are difficult or impossible to enforce if the prior owner has ceased operations since the sale. For current property owners, securing an indemnity bond with a financially sound bonding company hedges some of this risk.

To avoid being sued, prospective owners should conduct a thorough pre-purchase chronological evaluation of all prior construction and maintenance activities. To do this, the prospective property owner should seek and secure all architectural, engineering, maintenance, health, safety, and abatement documents, inspection and occupancy permits, and prior asbestos surveys.

Current owners who want to ensure their properties are safe should procure these types of documents immediately from prior owners. Current property owners also should take a proactive role in defending themselves by investigating the claims to best disprove liability and/or to seek indemnification/insurance from prior owners and their carriers. The property owners who are generally most successful in extricating themselves from asbestos lawsuits are those who have access to the most information about their facilities during their ownership period and before.

Prospective property owners also should seek disclosure of and evaluate prior insurance coverage that may apply and continue to be accessible. In conducting this review, they should be cognizant that pollution and/or asbestos exclusions became part of many liability policies issued after 1970. Also, as part of this process, buyers should secure and catalog prior insurance policies associated with the business and its premises or its prior owners. They also should require and obtain confirmed assignments of prior insurance policies from sellers. If a current

property owner is sued, the previous owners may be brought into the suit to force disclosure of relevant insurance and other documents to attempt to force indemnification.

Finally, prospective property owners should work closely with their attorneys to avoid either the expressed or implied assumption of successor liability in the purchase/acquisition agreement with regard to asbestos-related liability. While there is never a guarantee that anything property

owners do will prevent asbestos-related lawsuits against them, they can take steps to protect themselves by obtaining solid advice early in the sale process and working closely with their insurance agents and attorneys.



Anne B. Schmidt, JD, is a partner at Hepler, Broom, McDonald, Hebrank, True & Noce LLC in Madison County, Ill. She also is a member of the firm's toxic torts practice area. Contact her at (618) 307-1241 or abs@heplerbroom.com.

Success Series 2008 Means Business



Real Estate Professionals • Issues • Solutions

Talk real estate with more than 1,000 prospective business partners at CCIM & IREM Success Series 2008, October 17-18, at the Hilton Chicago. Connect and share best practices with real estate management professionals and commercial brokers. And learn from some of the best minds in the business while benefiting from 30 education sessions on many of today's most popular topics, including surviving market cycles, negotiation, capital markets, new management techniques, and technology.

Register By 9-12 and Save \$200!



www.CCIMIREMSuccessSeries.com

1.800.837.0706 x4650



Platinum Sponsors

