

Texas Fertilizer Plant Explosion Raises Questions About Personal Responsibility of Directors and Officers

Publication Date: July 3, 2013

Source: BestWire Services

The April fertilizer plant explosion that may cause more than \$100 million in damage to the community of West, Texas, highlights the need for companies to purchase adequate insurance to protect their directors and officers.

Generally speaking, officers and directors of a corporation are not held liable for torts or crimes committed by the corporation simply by virtue as their role as directors and officers, said William Eggleston, a Houston-based commercial attorney. But the West fertilizer explosion raises interesting questions, he said.

"If it is determined that the directors and officers were aware of the overabundance of dangerous chemicals, in conjunction with the knowledge that those chemicals could result in liability in far excess of the limits of liability insurance obtained by the corporate leadership, a court very well may find that the directors and officers may be held personally responsible for the resulting damage," Eggleston said in an email.

West Fertilizer, about 80 miles south of Dallas, exploded on the evening of April 17 following a fire (Best's News Services, April 19, 2013). The blast sent shockwaves through the town of about 2,500, causing widespread property damage. Fifteen people were killed and up to 200 people were injured by the blast, the Insurance Council of Texas has said (Best's News Service, April 24, 2013).

Lawsuits against the facility have already emerged. Four subsidiaries of W.R. Berkley Corp. recently filed a lawsuit against the fertilizer plant owners claiming negligence. The suit was brought by the insurers on behalf of several businesses, individuals and a church that sustained losses (Best's News Service, April 25, 2013). The town of West itself has also filed a suit against the company.

The issue of businesses lacking adequate insurance is not limited to chemical companies. About 70% of companies are 40% underinsured, according to Marshall & Swift.

"These type of stories tend to increase the volume of inquiries that we get," said Brian Wanat, national practice leader for Aon Risk Solutions' Financial Services Group. "Ninety-nine point nine percent of publicly traded companies buy D&O insurance otherwise you'd have difficulty attracting board members because no one wants to put their personal assets on the line. The large majority of private companies also buy D&O insurance."

But the smaller the company, the less likely it is to have D&O coverage, said Monica Minkel, senior vice president of executive protection for insurance broker Poms & Associates' Greenwood Village, Colo. office. She estimated as many as 50% of private companies do not carry D&O coverage. Companies that are backed by private equity or venture capital are more likely to have sophisticated leadership and buy appropriate coverage, she said. "We are hoping this situation will spark an interest in people taking a look at their policies," Mark Ulrich, senior vice president of employee benefits and property and casualty with Poms & Associates' Los Angeles office.

The West Fertilizer Co. had just a \$1 million liability policy, without any excess or umbrella coverage. The company did not carry directors and officers insurance. "As a family-owned business with no officers or directors, the liability insurance was the full extent of the insurance carried," said Daniel Keeney, a spokesman for Adair Grain Co., which owns West Fertilizer Co. Tonya G. Newman, a partner with the law firm of Neal, Gerber & Eisenberg in Chicago, said it's unusual for a chemical company's general liability limit to be that low. "It's quite shocking," she said.

Fertilizer plants do not have a minimum requirement for insurance coverage, said Scott Callahan, a Houston-area personal injury lawyer. "They are self regulated. Allowing any plant to store dangerous products like fertilizer without adequate insurance is like letting the fox run the hen house. The bottom line is that nobody knows how much insurance coverage the plant across the street from your home or close to your children's school is carrying for potential explosions," Callahan said.

Ted Devine, chief executive officer of Insureon, an online insurance agency catering to small businesses, said adequate coverage is often an issue of education. "Insurance is an incredibly cost effective tool to manage the balance sheet of the company," Devine said. "You are using the insurance capital to protect your balance sheet in case there's a loss. That's the beauty of

insurance. You can get \$1 million to \$3 million in coverage for a \$1,000 premium. That is outstanding." Adequate insurance coverage is even more important for smaller companies, which are less likely to be able to absorb a big loss on their balance sheets, he said.

It's really two issues, Minkel said: "How many people are buying the product? The second component is how good is the product you bought?"

Newman said some D&O insurance policies include an exclusion that stops the policy from being triggered if the business owner failed to buy adequate insurance coverage in other areas, such as a general liability policy. Wanat, of Aon, said business owners should never accept that exclusion. "But it probably happens when you don't have proper advisors or a sophisticated management team or board of directors," Wanat said. Many of the small community banks that ran into trouble during the financial crisis lacked adequate insurance coverage. "Sometimes a local agent will accept an off-the-shelf policy with inferior language, and you're not going to encounter any problems until there's a serious event, and you find out you are woefully underinsured. Then it's too late," he said.

It's not just about negotiating the limits, "it's about negotiating terms and exclusions, and making sure the coverage is as comprehensive as possible and really provides the coverage that the policyholder thinks it does," Newman said. Ulrich of Poms & Associates' Los Angeles office, said businesses should audit their insurance coverage annually. "As your business changes, so will your coverage needs," Ulrich said.