

Insurance Recovery: Additional Funding for Brownfields



David Biss

Eisenstein Malanchuk LLP



EISENSTEIN MALANCHUK LLP

Introduction

- Environmental remediation is expensive
- Funding sources can be elusive
- A solution – historic liability insurance policies
- Negotiation of environmental coverage claims can benefit stakeholders by providing money, and benefit insurers by providing closure on uncertain exposures
- Insurance is an often overlooked source of funding for brownfields

Insurance recovery introduction

- Historical liability insurance policies (pre-1985) represent a deteriorating asset
- These policies can be monetized and married to environmental liabilities resulting from the pre-1985 operations, taking into account past and future projected costs, and resulting in substantial financial gain
- You have every reason to evaluate whether insurance recovery is feasible, and an additional source of funding for brownfields

Insurance Recovery for Environmental Liabilities

- General liability insurance prior to the mid-1980's was written broadly, and usually covers environmental liabilities
- Even if an entity has insufficient assets to pay for cleanup, companies who contributed to the pollution still have valuable insurance rights
 - essentially all companies bought liability insurance
 - so did many municipalities
 - but frequently no one has pursued insurance recovery, due to lack of knowledge or expertise
- Even if the old company does not exist, insurance recovery can often be pursued due to
 - owners or officers with policy rights
 - insurance policy provisions dealing with company liquidation

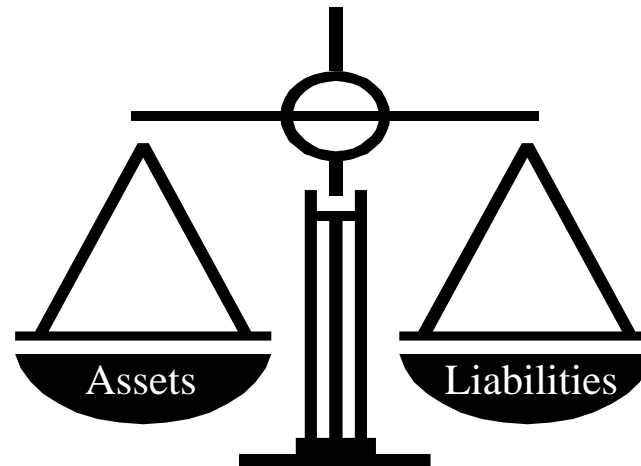
What Coverage? Who's Coverage?

- Hypothetical ABC Chemical Company, with site operating since 1960
 - Courts would generally allow claims on any policies issued during 1960 to 1985
- For a contaminated site coming into a developer or municipality's possession in 2017, operated by ABC Chemical Company beginning in 1960, a claim could be made on ABC's liability insurance spanning 1960 to 1985
 - Issues
 - Do you have rights to make a claim under ABC's policies?
 - If not, can you get cooperation of someone with authority for ABC?
 - Can you find ABC's policies?
 - Does ABC still exist?

Other Coverage Issues

- Insurance does not extend to “intentional” pollution, e.g., criminal conduct
- Coverage exists for remediation costs but not for redevelopment – costs need to be segregated in brownfields context
 - Similarly, restoration costs (e.g., mining restoration agreed as part of the mining lease) are not covered
- Owned property exclusion – need to have impacts offsite or to groundwater

The Goal



- Balance assets with corresponding liabilities and cash out the deteriorating assets. Manage the process to improve the bottom line. Use the proceeds to refund or manage site remediation, purchase more modern insurance without the flaws of the historic coverage or use funds for other purposes

The steps in the process

Is there a case?

Corporate history

- Stock or asset purchases
- Flow of liabilities
- Policy rights

Liabilities

- Past costs
- Future costs
- Regulatory compulsion

Policies

- Existence/evidence
- Terms
- Exclusions
- Solvent carriers

Determine whether sufficient coverage exists to support a claim



Build the claim

Provide details of transactions to demonstrate coverage is proper

Prepare an analysis of each site in the claim describing the site, the nature of the problem, the proposed solution for risk transfer purposes, the costs to date and the future costs for the Proposed solution

Perform allocations according to various theories to determine how much each policy/carrier should pay of the total damages

Complete the detailed insurance coverage chart and policy language analysis

Implement standstill and confidentiality agreements



Negotiate the claim

Develop settlement strategy

Prepare targets and demands for each carrier

Hold principal-to-principal meetings with each carrier to settle the claims

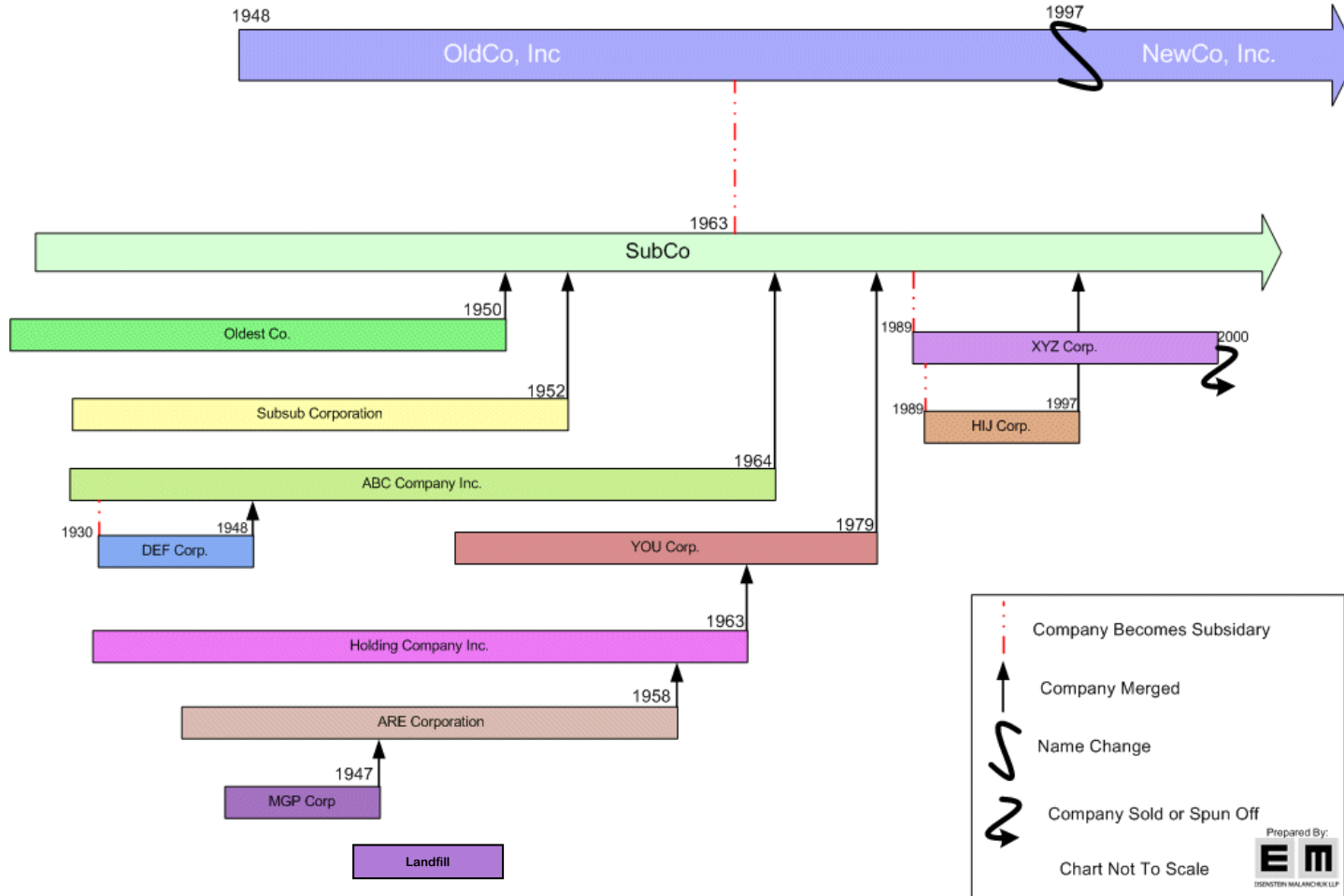
Recovery Process - Step 1 – Research & Document

- Site and corporate history
 - Who operated the site
 - Who is the successor to those entities
- Liabilities
 - Past, current & expected costs
- Assets – general liability policies
 - Many sources
 - Many ways to prove cover – policies not needed
 - Insurance archeologists

Site History

NewCo, Inc. Corporate History Chart

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Insurance Information – Where do you find it?



Or here....



Or here...



Sometimes we hire consultants to help us



Evidence

Alexander & Alexander

Period	Deposits	Installments	W/C	MPT	Total
10/1/80 - 10/1/81					
1 Comp Gen'l Liab					
2 CL 70 387 006861	172100	526000	491400	210630	721100
3 Credit amend deposit	<2400>		<1600>	<700>	<2400>
4 To adjust installments					
5 from 5400 to 5200		<600>	<200>	<1500>	<600>
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8 Cr. over bill on audit	<2000>		<1500>	<600>	<2000>
9	319300	521000	581350	252100	840500
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11					
12 Comm. Auto Liab.					
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15 To adjust installments					
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17	72600	230000	217000	90700	302600
18 Final Audit 79-80	4200		1940	1260	4200
19	76800	230000	218940	92000	306800
20					
21 Workmans Comp.					
22 70 387 006822	413700	1630000	1523130	652770	2175500
23 Final Audit 79-80	<190000>		<120500>	<75000>	<190000>
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Misc General Cr Mows	<25296>		<17207>	<7589>	<25296>

Adjusting Journal Entries
9-30-79

DATE	DESCRIPTION	DEBIT	CREDIT
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9-30-79	Liability to mem. of Labors	507	6990
	To correct entries for check # 7539 to Pignatelli & Co.	106	
	<19>		
9-30-79	Advances to Labors	7	10000
	To correct entries for check # 10798 to Labors	106	
	was an advance to Wallis G. Allen made 6-20-79.		
	<20>		
9-30-79	Misc Exp. office coffee, misc. Petty Cash Fund	407	6014
	To write down bill books fund to actual as of 9-30-79.	3	
	<21>		
9-30-79	Accounts Payable	71	32433
	Ripans & M. Co. Inc.	205-55	
	To write up the account payable to Fulton Supply Co. for invoice entered in Sept 1979. Account Co. all the that we could not locate & which the Co. indicated was a zero balance.		

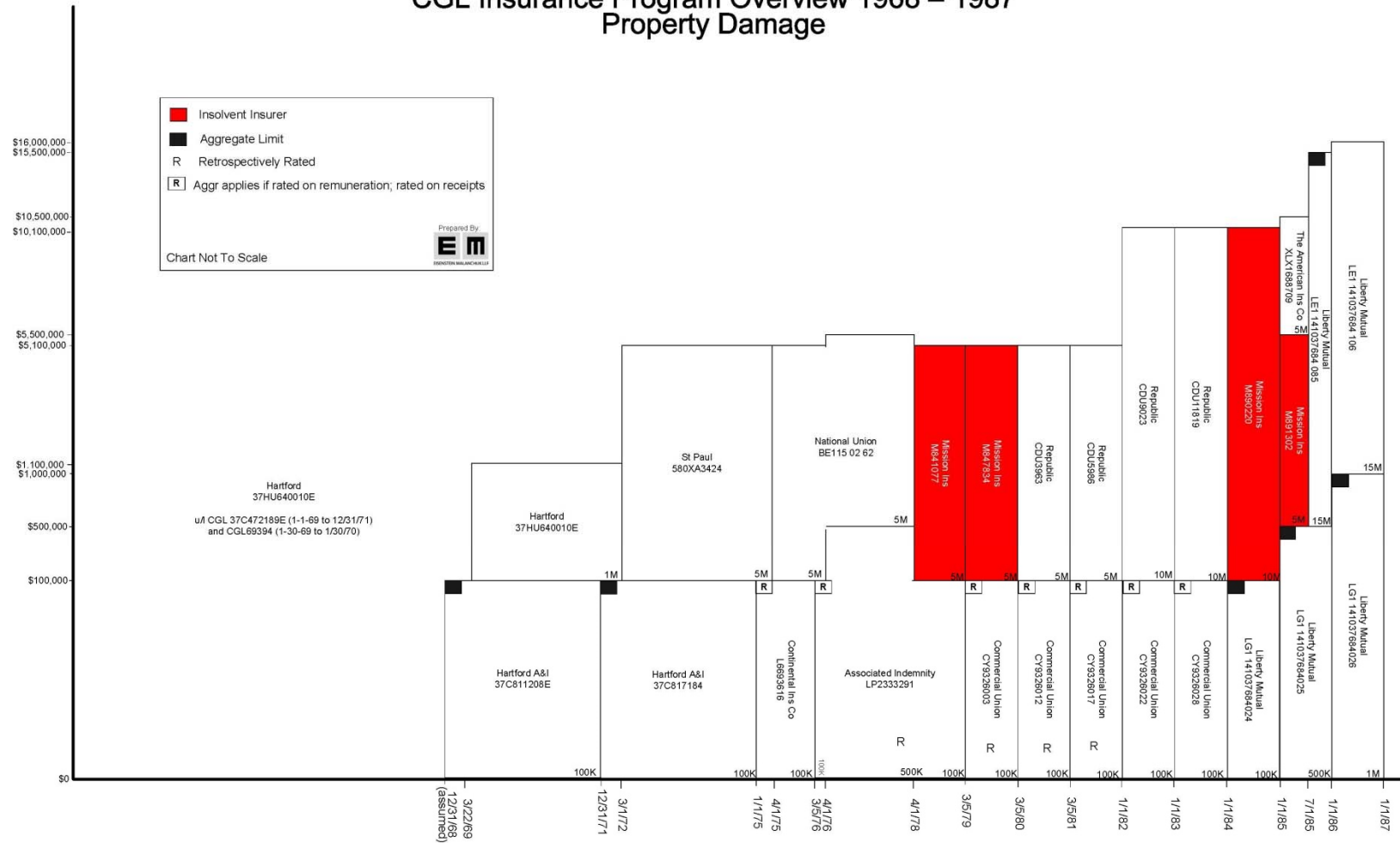
Recovery Process - Step 2 – Build the Claim

- Ownership of liability & assets
- Detailed coverage analysis
- Detailed site analysis
- Perform allocations – various theories

Insurance Information

XYZ Company CGL Insurance Program Overview 1968 – 1987 Property Damage

Draft – Dec 5, 2011
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Recovery Process - Step 3 – Negotiate Settlements

- Standstill & confidentiality agreements
- Agree on settlement strategy
- Prepare demands to each carrier
- Direct meetings to settle – expect a 2 year process
 - At executive levels with settlement authority
- Alternative fee arrangements frequently utilized

Why the Process Works

- Confidential
- Insurance was purchased and premiums were paid
- Insurance carriers have set aside reserves to cover historic liability policies
- Settling these claims allows carriers to release these reserves
- Carriers have reinsurance that helps offset their payments to you
- Creating a win-win circumstance benefits all parties

Are there any disadvantages to pursuing insurance recovery

- There is very little down side
- No new data are collected
- No new environmental investigation is required for this process
- The time investment is minimal
- The cost is low

Preserving Insurance Rights -- Assignment of Insurance Proceeds

- Developers and municipalities often fail to adequately consider the preservation of insurance rights when doing brownfields deals
- Acquisition of contaminated property also should include consideration of insurance rights. Acquisition of a site, by itself, would not convey insurance rights unless there is some explicit agreement with the seller
 - By contrast, insurance rights generally are conveyed with acquisition of a company

Preserving Insurance Rights -- Assignment of Insurance Proceeds

- Generally a conveyance of insurance rights can be done through a simple insertion of a few sentences. State laws vary, and must be consulted, however typical language would be:
 - Seller agrees to irrevocably assign to Buyer all rights to insurance claims proceeds under the Insurance Policies that relate to the Site, including but not limited to all proceeds under the Insurance Policies with respect to actual or potential environmental claims and with regard to all expenditures to-date relating to actual or potential environmental claims. Seller further agrees to reasonably cooperate with and assist Buyer's efforts to assert and pursue such claims for insurance coverage, including to execute all necessary documentation to effectuate this assignment and to allow the pursuit and collection by Buyer or its designee of any insurance claims proceeds.
- It is critical that conveyance of insurance rights be explicit, and it is generally critical that only the rights to insurance proceeds (and not the policies themselves) be assigned to you as buyer of the property

David Biss
Eisenstein Malanchuk LLP
(202) 965-4700
Email: DBiss@em-law.com
www.em-law.com