Insurance Recovery: Additional Funding for Brownfields

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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

1946: OldCo, Inc
1950: Oldest Co.
1952: Subsub Corporation
1954: ABC Company Inc.
1960: DEF Corp.
1962: Holding Company Inc.
1963: ARE Corporation
1964: YOU Corp.
1969: Landfill
1970: MGP Corp
1989: XYZ Corp.
1989: HIJ Corp.

Company Becomes Subsidiary
Company Merged
Name Change
Company Sold or Spun Off
Chart Not To Scale

Prepared by: EM
Insurance Information – Where do you find it?
Or here....
Or here...
Sometimes we hire consultants to help us
Evidence
Recovery Process - Step 2 – Build the Claim

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