



Using Old Insurance to for Environmental Cleanups

Business owners may not realize it, but their old insurance policies may be valuable assets when it comes to paying for environmental cleanups. Comprehensive General Liability policies in effect prior to 1986, the year the industry adopted the "absolute" pollution exclusion, are fair game when making claims to pay for the damages whose onset occurred during coverage periods. Moreover, policies in effect after 1986 are also available for claims under certain circumstances.

"Small to mid size companies, just like their Fortune 500 counterparts, have much to gain through insurance cost recovery. Regardless of size, management must be willing to do some homework and proceed systematically," comments Ken Anspach, author of the Environmental Law and Insurance Handbook (1997).

Comprehensive General Liability Insurance

Comprehensive General Liability Insurance was written to cover bodily injury and property damage, including events caused by environmental contamination. However, in response to a number of costly environmental claims in the '60s and '70s, the insurance industry added a standard exclusion to limit coverage to "sudden and accidental" releases of contaminants.

As a result of this change, some companies sued their carriers for broader coverage. As it turned out, many courts interpreted the "sudden and accidental" provision in a way that favored claimants. The insurance industry's answer to the court rulings was the "absolute" pollution exclusion, which basically eliminated any coverage for environmental damages under the CGL policies.¹

¹ See the CARLSON REPORT (Feb. '01) for a review of environmental insurance products available today to augment CGL policies

Coverage Still Counts

The catch, and it's a big one, is that the insurance companies remain liable for environmental damages whose onset occurred prior to 1986. That's because CGL insurance was written as an *occurrence* policy. With occurrence policies, what matters is whether the problem began during the time the policy was in effect, not whether the policy coverage has expired. For example, if the contamination began in 1965 and a CGL policy was in place but expired in 1970, the insured could still file for damages even if the problem was not discovered until decades later.

"Now that some of the initial legal issues have been dealt with," says Richard Carlson, President of Carlson Environmental, Inc., "the insurance industry anticipates these claims, expects them to be made, and has set aside reserves to deal with them."

The Basics of Making a Claim

Before venturing down the path of insurance cost recovery, attorney Don Jernberg advises companies to "get realistic advice on your legal and factual position. If there is a supportable claim and it is presented reasonably, a negotiated settlement without expensive litigation should be achievable. If the claim is a stretch, expect a fight that could last some time."

Investigate: The first step is to locate old CGL policies, going back as far as possible. Review the policies to understand coverage terms. Also look to other companies that may have contributed to the environmental problem for coverage under their CGL policies.

If the old policies can't be found, a company can still file a claim but evidence of coverage will have to be reconstructed through secondary information. Insurance archeology companies like R. M. Fields or the Insurance Archeology Group will pore through a company's old accounting records and legal files

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and invariably find evidence of insurance coverage. They also know how to access records from Lloyds of London and US insurance companies and brokers.

Prompt Notice: As soon as possible, typically within 30-60 days of discovery, a company should notify all appropriate insurance carriers of the environmental problem and potential claim. Prompt notification is essential. Waiting too long may invalidate your claim.

Valuing the Claim: Valuing a claim is based on past expenses and expected future cleanup costs. Estimating the dollar amount is usually the job of the environmental consultant. For complex situations with multiple sites and huge damages, economists and management consulting firms will use models and quantitative tools to value damages.

Filing a Claim: The goal is to submit a clear, supportable, fair claim. Be sure to follow any specific instructions before sending the claim by registered mail with return receipt. Upon receiving the claim, the insurance company has three choices:

1. Accept the claim for coverage
2. Accept coverage under reservation of rights, or
3. Deny coverage.

The insurance company will often reserve the right to decline coverage until an investigation is conducted.

Cooperate: Insurance companies expect claimants to fully cooperate during the claim investigation period. Failing to provide appropriate records can result in the insurer arguing that because it was denied information that the case should be dismissed. It is common for the claimant to protect its legal rights in case the matter goes to court.

Getting the Money

Rarely do companies recover 100% of their cleanup costs through old insurance; 40% to 60% is a more likely figure. There are two parts to getting the money:

1. Reaching a **negotiated settlement** is usually faster and cheaper than lawsuits, and therefore many consider it the preferred path. A negotiated settlement may involve alternative dispute resolution. In this case, a lawyer or judge can provide neutral intervention to avoid litigation.
2. **Lawsuits** should be considered the last resort because of costs and the uncertainty. Furthermore, court is not the best place to discuss

the nuances and technicalities of complex environmental damages. Nevertheless, sometimes a court battle is the best way to get the largest possible settlement. But it won't be easy, insurance companies are well prepared to vigorously litigate.

Costs for resolving insurance recovery cases vary substantially, depending on whether the claim is negotiated or litigated. Negotiated settlements can cost as little as \$25,000 to settle though they can easily be more. The same case could easily exceed \$150,000 if it went to court.

Simple cases can take between one and two years to resolve, but the more complicated will carry on for years. The length of time depends on the nature of the problem, the parties involved, and the number of insurers. If there is more than one insurer, it is usually advantageous for the company to settle with all the insurers simultaneously to avoid multiple negotiations.

Caveats

While the basic concept is pretty straightforward—find your old insurance policies and submit a claim for environmental damages if the onset began before 1986—the devil is in the details. You must read your policies closely and understand the laws governing old insurance issues because they will vary from state to state.

Final advice? Think of your old CGL insurance policies as assets whether or not you have a current environmental problem. Notes Henry Booth, managing director of R. M. Fields, "Old insurance does not die. CGL Coverage even survives the demise or liquidation of a company—it may yet come in handy."

Resources

Environmental Law and Insurance Handbook,
Anspach & Associates
Kenneth Anspach
(312) 407-7888; kenanspach@mindspring.com

Donald V. Jernberg, President
ClaimResolver, Inc.
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Insurance Archeology

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