

The Environmental Corner

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Still Fighting the Good Fight

Using Old Insurance to Cover Investigation and Clean-up Costs

More often than not, environmental contamination and historical operations of a dry cleaning business go hand in hand. While this may sound unfair, one could say the same thing about the historical operations of a gas station, a metal plater, even a computer microchip manufacturer. Particularly true for activities in the 1970's and 80's, industries that used chemicals for cleaning and degreasing were not aware that those chemicals when spilled, even accidentally and in small quantities, could and often have lead to soil and groundwater contamination.

Degreasers are often comprised of a hydrogen atom, tightly connected to chlorine atoms and fall under a general organic chemistry category called chlorinated hydrocarbons or chlorinated solvents. These chemicals are characterized as being heavier than water (so they sink in the groundwater zone), persistent in the environment (meaning they don't decompose very

fast over time), volatile (meaning they prefer being in the gas phase over the liquid phase) and carcinogenic (meaning they have been determined to either cause cancer or may likely cause cancer to people being exposed at certain levels). No matter which side of the argument you stand on, whether cleaning solvents cause cancer or not, one thing everyone should agree on is that investigating and remediating sites where chlorinated solvents like PCE (PERC) or TCE are present is very expensive.

With respect to responsibility, any person or company that owned or operated a business where chlorinated solvents were used should know that with very few exceptions, they are legally liable for contamination associated with that business and operation. Worse yet, the law states that an individual or the business is held jointly and severally responsible.

Finally, like taxes, environmental liability is considered a long-tail liability in that it never goes away.

Continued on page 2

As Seen In...

Cleaner & Launderer

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On the face of it, what I've presented seems so unfair. After all, chlorinated solvents were considered to be safe and state-of-the-art and were not explosive or flammable like petroleum based products (e.g. kerosene or Stoddard solvent). People were handling the solvents in accordance with the laws of the time some 50 years ago and now they are considered an environmental risk subject to legal enforcement. Businesses that operated with good housekeeping practices and followed the rules are subject to be in the same category as a business that showed blatant disregard for the laws or the environment and operated a filthy business. A business that operated one year is just as liable for the environmental contamination as a business that operated for 20 years. Who makes this stuff up? It most certainly is not fair.

Enough of the doom and gloom, what can a person do to protect themselves from a possible environmental contamination lawsuit? It's all about the records and the most valuable documents a person can find and keep are old insurance policies. Additionally, parties that are legally liable for contamination need to be searching for past owners and operators of businesses that may have contributed to the contamination. The search should also include the past property owners.

Old insurance policies; normal, everyday, comprehensive general liability (CGL) insurance policies, which were written years ago for protecting a business from slip and fall accidents, fires, other unexpected risks, can also cover unexpected and unintended spills and releases of solvents.

It is important to know that insurance case law is dynamic and specific issues are being tried and changed

continuously in the state and federal courts. Some states would be considered pro-policyholder and some states pro-insurance depending on fact patterns, circumstances and specific court decisions. What is commonly accepted in one state may not be true in another state.

For years we have espoused that business owners need to find their old insurance policies and store them in a safe, dry and fireproof place. CGL policies were purchased by business owners to cover them against liability exposures of a business, unless such liabilities were specifically excluded in the policy. Generally speaking, prior to the early 1970's, CGL policies did not contain language that excluded environmental pollution and contamination. Between 1972 to 1985, CGL policies contained language that covered "unexpected and unintended releases." Such unexpected and unintended releases mean accidental releases or accidental spills, not intentional releases, which would be better defined as dumping or disposing. For example, common insurance policy language in the 70's and 80's states, "This policy does not apply: To personal injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water, but this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental."

After 1985, most insurance companies added very specific language to CGL policies that contained absolute pollution exclusion. In other

words, they were not covering individuals and businesses for pollution or contamination associated with dry cleaning operations. A separate environmental policy would be required to cover environmental pollution and contamination.

Better still, the courts in some states have ruled that the term "pollution" and therefore "pollution exclusion" is an ambiguous term the way the insurance policies were written, even after the nationwide changes that took place in 1985. Consider this logic, gasoline is purchased by a service station. If an accident happened while you were filling your car at that service station that injured you or someone you were with, you would expect the service station or someone involved with the accident to have insurance that would pay for your injuries. Yet, if the gasoline drained into the ground and caused contamination to a drinking water body it was not covered by insurance because the gasoline was now considered a contaminant. I think that logic was in play when courts of some states ruled that the word contamination was ambiguous.

So, going back to the basic point, if you or your business bought CGL insurance before the policies contained absolute pollution exclusion language, you are likely to have insurance coverage that can address environmental contamination, even if that contamination has only been recently discovered. If you acquired the business, the business before you may have insurance that would cover environmental contamination costs.

You might ask, that's all great, but what if I can't find my old policies

Continued on page 3

or the policies that were bought by former owners? In my experience, more times than not, those old policies (or evidence of insurance) can still be found. There are companies that have investigators called insurance archeologists that focus on finding old policies or evidence of old policies. In my experience, more often than not, a good insurance archeologist can find evidence of old insurance.

OK, you have found old insurance, now what? Insurance is designed to defend and indemnify a policyholder against a claim. That claim is the demand from the regulatory agency or third party requiring action to mitigate the damage or harm. In some states a claim or suit could be a letter from the regulatory agency or a neighboring property owner demanding a response to identified environmental contamination. In other states the courts have determined that the insurers must only defend an actual lawsuit.

In pulling this concept together, a defense would include paying for lawyers dealing with the environmental contamination. A defense would also include quantifying an individual or business's exposure and liability. The only way to quantify environmental liability is to collect environmental samples (e.g. soil, soil gas, indoor vapor, and groundwater). It would also

mean determining how expensive a cleanup would be, which means that aquifer tests, feasibility studies and remediation technology evaluations should be covered.

Obviously, the process of using old insurance policies has many parts. There may be an insurance archeology component, a legal component, and a technical component and they all have to work together. Understanding all aspects of the process is not your job, that's what you hire experts for.

If you're facing an environmental liability of hundreds of thousands of dollars, you should look into how old insurance policies could work for you. Hundreds of business owners have used historical insurance to help pay for investigations and remediations and it doesn't stop there.

Depending on the set of facts, known environmental insurance claims can be sold and assigned to other third parties to manage and run. Small businesses, including their stock, insurance assets and liabilities can be bought and sold. There are numerous permutations to the business side of managing environmental claims and a whole new industry is in front of us.

It might be encouraging to know that there are those out there still fighting the good fight.

With over 30 years of experience, Steve Henshaw has built a leading edge environmental engineering company that specializes in finding the funding to pay for environmental liabilities. He holds professional geology registrations in numerous states. And serves as executive manager on hundreds of environmental projects. He specializes in managing environmental risk and liability and has been involved with complex business transactions that have included shifting environmental liabilities, insurance claim assignment and third party assumption of insurance assets and associated claims. He is a regular contributing writer for several dry cleaning trade publications on environmental and regulatory issues and remains active with dry cleaning associations by providing insight on changes in law and policy. Contact www.enviroforensics.com; e-mail: shenshaw@enviroforensics.com.