The Environmental Corner

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Do You Know Your Company's Most Valuable Assets?

When executives talk about a company's assets, they generally refer to people, property, buildings, equipment, clients, job contracts and intellectual property. I'm sure there are more, but how often do executives think that some of their greatest and most valuable assets are old insurance policies that were purchased 10, 20, even 50 years ago? It's true - old insurance policies, normal commercial general liability (CGL) insurance policies, that were purchased to protect and cover against claims of bodily injury, other physical injury or property damage and to protect your businesses against incidents that may have occurred on your premises or at other locations where you conduct business could be worth millions of dollars.

If you already know this, then I'm sure you have all of your old insurance policies stored safely and securely. You also have a summary that shows the coverage by year, along with the names of the insurance companies that issued the coverage, the policy numbers and the policy limits. If you don't have this information safely stored, protected from fire and water damage, then you should read on.

CGL policies are commonly used to defend and indemnify businesses and individuals against a number of unexpected and unintended situations, ranging from claims involving environmental contamination of soil and groundwater at one of your properties to personal injury claims such as alleged asbestos exposure. These old insurance policies can also protect you and your business from third-party claims regarding the disposal of material that has allegedly caused harm to the environment or an individual. Old policies have even been used to defend schools, churches and businesses against sexual and physical abuse claims stemming back decades.

In addition to the benefit of safely storing old CGL policies in the event that you are sued at some future date, old policies can also be used proactively to fund site investigation and cleanup activities. Routinely, we see individuals that want to sell

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Cleaner & Launderer

May 2012

their company only to find out that their property is contaminated. The business they were counting on for retirement is now not only unattractive for sale, but the cost to clean-up the contamination is greater than the value of the business. Another common situation we run into is when companies and individuals want to use their properties as secured assets to obtain loans from a bank. Banks require due diligence, which turns up showing that the properties are contaminated and the banks aren't able to use them to secure loans. Maybe you wanted to refinance the property to obtain a lower interest rate or to create some operating capital? Same story; the bank will require a due diligence or Phase II investigation and if contamination is identified, you're out of luck. The loan refinance will either be killed or, at best, you'll be required to put a large sum of money into escrow to pay for the cleanup of the property in order to facilitate the loan.

In all of the situations presented, we have had tremendous success in helping businesses restore their properties to their uncontaminated values. Turning environmental liabilities into assets is what we do. EnviroForensics and its affiliated partner, PolicyFind, are Indianapolis-based companies that specialize in finding old insurance policies and using those old policies to pay for environmental site investigations and remediations as well as the legal services necessary to defend companies and individuals against claims arising from lawsuits and regulatory enforcement demands.

PolicyFind provides insurance archeology services to private businesses, law firms, municipalities and yes, even insurance companies. Insurance archeology is the business service of locating old policies or evidence of old policies that can be used to prove the existence of insurance during a given policy period or year. There is no computer database where this information exists. In fact, if company ABC were to call an insurance company and ask for copies of their old policies, they would likely be told that the insurance company cannot find those old policies. More often than not, it is incumbent on the policyholder to prove that they were insured by a specific company. In other words, we develop proof that insurance was purchased. Such proof might be a certificate of insurance, cancelled checks, billing statements or correspondence. One key piece of evidence is a policy number. Knowing the policy number is an important step in proving that coverage was purchased and it is one of the strongest forms of evidence.

Once it can be established that a business or individual was covered, the carriers will typically issue a Reservation of Rights letter stating that it may deny coverage for some or all of the claim, even while the company is investigating the claim or beginning to treat the claim as if it were covered. The insurer generally provides a defense to the insured when it issues a Reservation of Rights letter.

For a claim involving groundwater contamination, a defense would include conducting the investigative work necessary to quantify the environmental liability and exposure to the policyholder, such as the collection of soil, soil gas, indoor air and groundwater samples. This work would typically include characterizing the vertical and horizontal extent of the environmental impacts, evaluating cleanup alternatives and even conducting pilot tests to demonstrate that certain remedial alternatives would be effective in cleaning up the contamination and to better refine cleanup cost estimates.

In addition to the environmental engineering work, a defense would also include paying for legal counsel to represent the policyholder. Such legal work could include negotiating site access agreements on neighboring sites, negotiating with regulatory agencies, pursuing previous owners and operators that may have contributed to the environmental conditions, and defending the policyholder against third party claims that could arise if neighbors or individuals believe they were harmed by the contamination or event. Even the work of locating other insurance carriers can be considered a defense activity.

One interesting fact associated with environmental claims is that the release does not have to occur during the policy period for the carrier to defend the claim. If the release occurred before the insurance policy period, it is generally believed that the release continues to cause harm until that harm has been abated or cleaned up. So, a release may have occurred in the early 1970's, but because the release continues to migrate over time, later policies can come into play to address the release. It is important to note that the insurance industry became well aware of the potential liabilities associated with environmental claims in the early 1970's, again in the mid-1980's and in the case of Indiana law, again in the late 1990's. To some extent,

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the insurance industry modified the language within CGL policies to exclude pollution as a covered event. However, the courts continue to grapple with insurance contract language and decipher whether such modified language clearly articulates the exclusion of pollutants as covered events or whether such language is ambiguous. As such, it is always better to put all of the historical insurance carriers that you know about on notice of a claim.

For a personal injury claim, such as asbestos exposure or abuse, the exposure is much more time sensitive. A personal injury exposure only occurs when an individual has been exposed or harmed. A pipe fitter or welder is exposed when they come into contact with asbestos. An individual is exposed to sexual abuse at the time of the abuse. In instances of personal injury, it is important to find insurance policies that were issued at the time the exposure occurred or allegedly occurred.

One important aspect of having the carriers agree to defend a claim is the fact that the cost to defend a claim does not go against the coverage limits of the policy in question. It could cost over a million dollars to adequately determine the environmental exposure associated with a claim but, generally speaking, the cost of that defense does not draw down the limits of the policy coverage.

The other part of insurance coverage is the indemnity portion. Indemnity is somewhat synonymous with compensation or reparation. It is the insurer's obligation to, in essence, remedy the claim. For environmental claims, the indemnity may be the actual cleanup. In determining how much money is available for cleanup, one needs to look at the policy limits. In most states, each year of coverage has a policy limit and the years can be aggregated together to come up with a total available sum. In addition to the underlying coverage, many businesses purchased umbrella or excess insurance coverage. This insurance coverage sits on top of, or above, the underlying coverage. There is an art to accessing the excess coverage and it also depends on the interpretation of the courts in how and when the underlying coverage is exhausted.

Sometimes, carriers may attempt to settle a claim for environmental damages with the policyholder rather than defending and eventually indemnifying the policy holder. Many times, carriers offer a monetary settlement to their policyholder in exchange for a release from the claim and future issues arising from the claim. In a personal injury claim, the indemnity is more often than not a monetary settlement to resolve the claim and close the file. Whether an insurance carrier is responsible to provide an indemnity is predicated on the facts of the claim and the state and federal courts' interpretation of the insurance coverage laws. It is always easier to obtain a defense from your carrier than an indemnity, but those issues are more complex than can reasonably be distilled in this article. Suffice it to say that settlements are completed between policyholders and their insurance carriers all of the time and, in exchange for obtaining a settlement, the policyholder must give up something. Often times that "something" is bringing up future claims associated with the same site.

Hopefully, you have a better understanding of the value of locating and safely storing your old insurance policies. After all, old insurance policies may be your most valuable asset. They have value and can be used in multiple ways that may not seem intuitive at first glance. Whether the old insurance policies pay for defending lawsuits and claims, funding environmental investigations and remediations, or simply cashing out the insurance policy for money, there may be real value in that old paper.

If you take away just one thing from this article, it is that finding your old insurance policies may be the single best business decision of your life and one of your most profitable. If you have your old policies, save them in a fire proof and water proof safe or in your safety deposit box at your bank. If you don't have your old policies, there are insurance archeology services like PolicyFind that may be able to find that information. Call us or e-mail us with your questions. We are in your corner and environmental liabilities don't have a statute of limitations.

Steve Henshaw has built a leading edge environmental engineering company that specializes in finding the funding to pay for environmental liabilities. By combining responsible party searches with insurance archeology investigations, Enviro-Forensics has been successful at remediating and closing sites for property owners and small business owners across the country with minimal capital outlay from clients. He is a regular contributing writer to Cleaner & Launderer on environmental and regulatory issues and remains active with dry cleaning associations by providing insight on changes in law and policy. Contact him at www.enviroforensics.com or e-mail: shenshaw@enviroforensics.com.