

Insurance Archaeology: Time is of the Essence

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Insurance archaeology originally developed in response to the great waves of corporate liability imposed first by asbestos related lawsuits beginning in the 1970s, and then by Superfund-mandated environmental cleanup enforcement beginning in the 1980s. Maximizing insurance recoveries for the ensuing waves of toxic tort and environmental liabilities has been a best practice ever since.

The onslaught of asbestos and environmental litigation over the past several decades has exhausted many companies' policy limits and driven scores of insurers into insolvency and runoff. This erosion of insurance assets has heightened the importance of documenting every policy that could potentially provide coverage for historic liabilities.

Why Insurance Archaeology?

The value of older liability policies often increases with age, as older policies have broader coverage and fewer exclusions. Old policies may now be worth millions of dollars, especially since historic-general liability policies typically provide unlimited defense coverage in addition to the policy limits. The defense cost provisions alone make a search for every lost policy worth the painstaking research described below.

Even when the actual insurance policies no longer exist, courts have regularly upheld the validity of secondary evidence in proving the terms and conditions of historic insurance policies. Secondary evidence can consist of one or more documents, other than policies themselves, that provide evidence regarding the insured's coverage such as: invoices for premium payments, certificates of insurance, correspondence, policy applications, board minutes, renewal numbers and schedules of underlying insurance from excess policies.

Since environmental liabilities often emerge decades after the period of exposure, companies facing environmental litigation have long recognized that old liability policies are easy to lose track of and that efforts to recover such policies often pay rich dividends.

Finding Evidence of Missing Policies

A search for missing policies is not a pro forma exercise. For any company that is considering insurance archaeology research, current business conditions have heightened the difficulty of reconstructing lost policies. Records disappear with every merger, downsizing and relocation. Information is also lost in the transition of legacy computer systems, as well as through the inevitable layoffs attending every merger.

Even companies relatively unaffected by consolidation themselves, are subject to the effects of consolidation within the industries of its natural partners in the search: insurance carriers, brokers, records storage companies, accounting firms and law firms—all have been transformed by mergers up and down the food chain.

Researching the Corporate History

The first step is to confirm the history of the company including the corporate names, location(s) and owners from the dates of first exposure through the present. Since corporate names change over time, it is critical to identify the correct names in specific time periods to locate pertinent information in public records. This is especially important when the company has had one or more former owners as it is possible that multiple insurance programs may be involved.

If the research involves predecessor companies, the closing documents will often identify numerous leads to outside sources, including names of outside counsel, major contracts, customers and details of civil litigation that may have involved insurance. If this information cannot be located in internal files, it can often be tracked down in the records of outside counsel for both the buyer and the seller.

Conducting a Search – Corporate Records

Today, the investigation of corporate records often begins at the computer screen. Storage vendors now maintain electronic indices detailing the contents of corporate records retained offsite. While access may be instantaneous, it is often incomplete – thanks in large part to consolidation within the storage industry itself.

Critical information on coding, dates, locations and even description fields has often been lost in the transfer of legacy systems in this industry. Identifying the relevant boxes can be a byzantine research project in itself which often requires keyword searches, cross referencing codes with department names and comparing descriptions from various indices prepared at different points in time.

Tapping Institutional Memory

Much of the detective work in insurance archaeology research involves tapping into the institutional memory of a company's past key employees, outside counsel and brokers. Corporate officers can often be identified in online government filings, as well as on numerous websites preserving various other forms of historic corporate information. Once the names of key people have been identified, they can often be located through online searches. Interviews with these people in turn often identify carriers, brokers, companies that received certificates of insurance and information on past claims and litigation.

Conducting a Search - External Sources

Insurance Carriers

Requests to carriers should be submitted to any primary, excess or workers compensation carriers identified in years where policies are missing. Carriers should be requested to search all of their records including applications and underwriting files that may help to identify prior or subsequent coverage. These requests should also include the records of all affiliated and legacy carriers as other policies could have been issued by these carriers.

Even insolvent carriers should be contacted as their records may contain secondary evidence of missing policies. In addition, reviewing the insolvent policies can help to identify leads to potential outside sources such as brokers or additional insureds.

Former Brokers

Consolidation among insurance brokers has been so extensive that identifying the successors often requires painstaking research. State insurance regulators, historic phone books, Secretary of State filings and even obituaries can provide details to help unravel these complex histories. Records requests should also be sent to the successors of each broker.

The brokers that handled the account can also be critical to identifying carriers, contracts that required evidence of insurance, past claims and litigation. Social media, including Facebook and LinkedIn profiles, can help to locate these people.

Additional Insureds and Certificate Holders

Since many commercial contracts contain hold harmless and indemnification provisions, it has been a routine requirement for companies to arrange to have customers, lessors, vendors, railroads and financial institutions added as additional insureds onto their primary policies. Any of these parties may have retained copies of certificates and, in some instances, copies of actual policies.

Government Entities

Government contracts have historically been the most onerous in terms of insurance requirements and documentation. State regulatory agencies also require evidence of insurance for certain industries or operations and FOIL requests can be used to request these filings.

Court Research

Policies and secondary evidence of insurance can be found in court records in civil liability cases ranging from trip and falls to products liability cases. Pertinent cases in both state and Federal courts can be identified in Westlaw and LEXIS searches. Since many courts maintain indices that can be searched by the name of the defendant, requests can be made directly to the courts for cases where the company or its subsidiaries was a party in the pertinent years. The records for any cases will identify defense counsel which can also be a key source of information.

Law Firms

Law firms often retain records for decades or more and are a key source of historic insurance information. A firm that acted as general counsel can have a wide range of records that contain information on insurance coverage including correspondence, litigation, real estate, mortgages, contracts, etc. Records of defense counsel are particularly important as they often contain pertinent information from prior searches for insurance, correspondence with carriers and even copies of policies.

Map the Results

The return on investment of time and resources to locate and organize the records will be greatly enhanced if the complex and detailed coverage information is illustrated on a coverage chart. The charts can be used to illustrate several complex issues at a glance.

Time is of the Essence

Given the enormous costs of defending and settling asbestos lawsuits and remediating environmental sites, documenting lost policies has often made the difference between bankruptcy and survival. The erosion of insurance assets via insolvencies and run-offs combined with the exhaustion of aggregate limits in environmental litigation has heightened the urgency of locating and pursuing solvent coverage while it is still available.