Historic Insurance Policies

The Legal Concerns of Historic Insurance

Insurance Archeology Part 2

by John H. Kazanjian

Brownfield developers may be able to tap the insurance of prior site owners or operators to recover environmental cleanup costs associated with these properties. This historic insurance can be a valuable complement to current insurance that developers already have in place. Determining whether insurance coverage is available under historic policies depends upon locating and reviewing all potentially applicable policies or documents reflecting the existence and terms of those policies. It also depends upon a careful analysis of several legal issues and the state law applicable to those issues. This article will attempt to guide the reader through those gateways to coverage.

Comprehensive (or commercial) general liability (CGL) insurance of prior owners or operators is the type most likely to respond to today's claims for the cleanup of environmental damage spanning many years, although other kinds of insurance should not be overlooked. Under CGL insurance, developers potentially may recover not only the site remediation costs but also the expense of defending against federal or state environmental agency directives and suits brought by public or private entities. This "litigation protection" is a major asset of CGL insurance because the cost of defending environmental claims or suits, by itself, can impose a crushing burden on the developer of brownfield properties.

Older policies can be valuable in responding to today's environmental damage claims because they typically contain fewer exclusions, lower deductibles and perhaps no aggregate limits. CGL policies issued before the early 1970s, for instance, did not have pollution exclusions. Finding and analyzing all potentially relevant policies, or evidence of those policies, is paramount.

While insurance recovery is, of course, dependent upon the language of the policies it is also a function of which state's law ultimately will apply. This is because insurance coverage is a matter of state law and different states' laws can vary on key coverage issues—sometimes dramatically—even with respect to standard policy language. Since most CGL policies do not specify the applicable state law, governing law will depend on a variety of factors. Developers must be cognizant of the effect that the applicable law can have in pressing their coverage claims with the carriers that issued historic policies.

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Finding the Policies

The first step is to identify all insurance policies for the years that operations took place at a site from the earliest possible time up through the present. Several different kinds of historic insurance might cover pollution-related claims. Our focus will be on the type most likely to respond: CGL insurance at the primary, umbrella and excess levels. What makes CGL coverage so valuable is that much of it has been written on an "occurrence" basis, meaning that it will cover damage or injury that occurred during the policy period, even if it is not detected at that time and a claim is not made against the policyholder until years later.

Identifying the historic coverage will require a thorough search for all potentially applicable insurance policies purchased by prior owners or operators as well as any documentary evidence of those policies. An effective search likely will necessitate the cooperation of prior site owners or operators. Presumably this will not pose an insurmountable hurdle, particularly if a brownfield developer has assumed the risk for environmental liabilities at a site.

Use of Secondary Evidence

Even if some or all of the older insurance policies cannot be found, developers still can establish the existence and terms of lost insurance policies through other materials known as "secondary evidence" and pursue coverage on that basis. In other words, documents and information referring to missing insurance policies may be sufficient to demonstrate that the coverage existed and that the developer is entitled to insurance proceeds, even though the actual policy itself cannot be found. Many courts have allowed the use of secondary evidence to prove the existence and terms of a missing policy as long as the party seeking coverage can show that it made a diligent but unsuccessful search for the policy.

Numerous kinds of secondary evidence may be adequate to substantiate that an insurance policy had been issued. Examples include canceled checks for the payment of premiums under the lost policy; documentation referring to claims submitted to or paid by the insurance company under the lost policy; and references to the lost policy in other insurance policies. For instance, renewal insurance policies frequently identify expiring policies and umbrella or excess policies often refer to underlying policies. Interviews with present or former employees responsible for purchasing insurance or handling claims also may turn up useful information.

In addition to the records a developer may have acquired in connection with a property or to which it is given access, outside sources may be of help in locating historic insurance policies or evidence of their

existence. Developers can ask current or past insurance brokers or agents to review historical records and search for evidence of missing policies. There are also companies known as "insurance archeologists" who are in the business of locating old insurance policies. Retaining one may be prudent given the expertise necessary to unearth archival documents and the amount of money at stake.

The terms of missing policies also can be proved by means of secondary evidence. One way to do this is to obtain policy forms used by the insurance industry during the relevant policy period. Insurance companies almost always use preprinted forms with standard language drafted by insurance industry trade organizations. Courts have found standard-form language from the period of the missing policy to be satisfactory evidence of the policy's terms.

Standard for Proving Missing Policies

While insurance companies will argue that policyholders should be required to prove the existence and terms of missing policies by "clear and convincing evidence," a higher standard than normally used, a number of recent decisions have concluded that the policyholder's burden of proof should be no greater than the "preponderance of evidence" standard typically used in civil litigation.

In one such case, Gold Fields American Corporation v. Aetna Casualty & Surety Company, a New York trial court examined the nature of CGL policies—insurance that never expires—in ruling that the lower "preponderance" evidentiary standard was the appropriate one for proving the existence of a lost policy through secondary evidence. It observed that insurance companies are aware that their liability under CGL policies "might well extend for many years beyond the end of the policy period," and that a higher clear-and-convincing standard of proof could encourage carriers to destroy CGL policies in the hope that policyholders would be unable to find them after a substantial time period. This led the court to conclude that there is nothing unfair in employing the usual preponderance of the evidence standard for proving the existence and terms of a missing policy "where the carrier, which is in the business of selling policies, chooses to keep no records of those policies."

The next step is to review and analyze the older insurance policies to determine the availability of coverage. In conducting this, it is helpful to prepare an insurance chart depicting all primary, umbrella and excess coverage for each year with the name of insurance company, the amount of coverage, pertinent exclusions and any deviations from standard language.

It is crucial to ensure that prompt written notice of any environmental claim or suit is given to all insurance companies. Most CGL insurance policies require a policyholder to give its insurance company notice of an accident, occurrence, claim or suit. In general, the policyholder must give notice as soon as reasonable under all of the circumstances. Even when the policyholder does not give prompt notice, the law in most states will excuse untimely notice unless the insurance company can prove that it was prejudiced by its receipt of untimely notice. In a minority of states, like New York, timely notice is a precondition to coverage. Policyholders who give late notice may forfeit insurance coverage in those states, even if the insurance company was not prejudiced.

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If a prior owner or operator has not given notice of a pending claim or suit under a historic CGL policy, the developer must see to it that notice is provided as soon as possible. Since giving notice constitutes an insurance claim under the policy, it is preferable that the notice be given by the actual policyholder in whose name the policy was issued. Where a developer has acquired the environmental liability for a property, however, it should be able to pursue the insurance that was purchased to cover that liability. A developer assuming such liability may want to request that the original policyholder convey to it the rights to assert an insurance claim and receive the policy proceeds. This should not run afoul of any "anti-assignment" clause prohibiting the transfer of a policy without the insurance company's consent because the policy itself is not being assigned.

Threshold Legal Questions

As the notice issue demonstrates, applicable state law can be the difference in whether or not coverage exists. Since most CGL insurance policies are silent on the issue of governing law, it is important to ascertain the key facts that will determine which state's law applies to coverage issues. This can become complicated because there are also different "choice of law" tests for deciding the governing law. Significant factors in this analysis, however, typically include the state where the insurance policy was made, the location of the site, the residence of prior owners or operators and of any insurance brokers or agents over the years of applicable coverage. The law of each potentially applicable jurisdiction on key legal issues must then be studied carefully.

Variations among state law may affect coverage issues. However, the focus with a historic CGL policy should be on the core questions of whether the insurance company has a duty to defend and duty to indemnify environmental liability claims or suits asserted in connection with brownfield properties under applicable law. Recent decisions from the California Supreme Court illustrate how one state's law can affect the outcome.

Duty to Defend

Standard CGL policies provide that the insurance company will defend any "suit seeking damages" against the policyholder. As noted earlier, this duty to defend is a signal feature of CGL coverage. Many CGL policies, especially older ones, do not count defense costs against policy limits, which further enhances their value. A threshold question with respect to brownfield properties, then, is whether administrative proceedings by governmental agencies like the Environmental Protection Agency will be considered to be the equivalent of a "suit" activating an insurance company's duty to defend or whether only a traditional lawsuit will suffice.

The California Supreme Court ruled in a 1998 case, Foster-Gardner Inc. v. National Union Fire Insurance Co., that only civil

suits filed in a court trigger an insurance company's duty to defend and that proceedings by state or federal government agencies, such as the EPA, do not qualify. Although there are similar decisions in some other jurisdictions, courts in a majority of states have ruled otherwise and permit coverage for the defense of government agency proceedings.

Duty to Indemnify

Standard CGL policies also provide that an insurance company has a duty to indemnify its policyholder for "all sums that [the policyholder] is legally obligated to pay as damages because of bodily injury or property damage." This requires a legal determination of whether the costs associated with government cleanup orders or directives are covered "damages." Again, state law differs on this subject with California being of particular concern.

Just this year, in Certain Underwriters at Lloyd's, London v. Superior Court of Los Angeles County (Powerine Oil Co.), the California Supreme Court ruled that an insurance company's duty to indemnify its policyholder is limited to money judgments ordered by a court. Therefore, under California law, CGL carriers are not required to pay for cleanups mandated by administrative agencies in compliance with environmental statutes. This case, like the California Supreme Court's decision in the Foster-Gardner case, represents a significant departure from the majority of other state courts which allow indemnification of the costs of compliance with administrative agency proceedings, even in the absence of a formal lawsuit in a court.

State law can also diverge on a number of other issues, such as exclusions, trigger of coverage and allocation among multiple policy periods. However, those questions will never be reached unless applicable state law grants the essential assets of CGL coverage—defense and indemnity—in the first place. As the California decisions demonstrate, governing state law can make or break an insurance claim under historic policies.

Brownfield developers must be diligent in searching for historic insurance policies or evidence of that coverage. There is a growing body of case law allowing insurance recovery even under missing policies as long as there is adequate secondary evidence of older policies. Developers must also be aware of the divergent treatment accorded to insurance coverage of environmental claims by courts in different states. This knowledge is critical to presenting an insurance claim in the most advantageous light possible. Insurance companies have been known to resist payment of environmental claims. Developers who are well prepared and persistent will be in the best position to successfully resolve any disputes over insurance coverage under historic policies.

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