RISK MANAGEMENT

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From Trash to Cash

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Understandably, most companies do not view legacy environmental cleanup liabilities as a way to generate revenue. But any organization that purchased general liability insurance policies before the mid-1980s may be able to sell back coverage for substantial amounts of cash.

This new possibility is rooted in the fact that insurers historically balked at paying environmental cleanup costs, leaving companies with little choice but to sue their insurers for coverage. The litigation was expensive and the results were unpredictable. But the legal framework surrounding these claims has matured in recent decades-favorably for policyholders-and uncertainty has diminished, prompting many companies to forego litigation and pursue negotiated resolutions.

For some, the results have been highly profitable. Depending on the coverage and the nature of their environmental exposures, some have recovered tens of millions of dollars from insurers. But despite the obvious benefits of monetizing environmental insurance claims, some companies resist doing so. Part of this is because, beginning in the mid-1980s, coverage for pollution-related liabilities was excluded from general liability policies, meaning that companies with only newer policies probably do not qualify for a payout.

Other popular reasons do not hold much water, however. The following represent the seven most common misconceptions held by those who do not pursue a settlement.

1. We have no claim because the old liability policies are missing.
Many older policies that are assumed to be lost forever are later located through "insurance archeology," which involves conducting a review of the company's records, contacting the company's old brokers and reviewing government archives. And sometimes, insurers produce missing policies during the course of settlement negotiations.

2. Our claims have no value since we have not spent millions on cleanup.
While the costs that a company has already incurred are an important component of its claim, the risks presented by sites where industrial operations occurred, but contamination has yet to be discovered, are another key factor.

3. We cannot afford to pursue insurance recovery at this time.
Compared to litigation, a company's cost of presenting its claims for settlement are generally modest. Moreover, many experienced insurance counsel appreciate that these claims have real value and are willing to tailor their fees to accommodate the company. Pursuing a settlement also avoids a large demand on employees' time.

4. We should hold onto policies in case exposures expand over time.
The value of the typical company's insurance is decreasing steadily over time as a result of the continuing insolvencies of its insurers. It is not unusual for a company to find that half of the insurers that issued its old liability policies are now insolvent.

5. The recovery investigation may reveal additional contamination.
Investigation of environmental liabilities for insurance recovery should be limited to information already in the company's possession and should not require any further review. Not only does this limit the company's exposure for additional cleanup costs, but it diminishes the costs of the insurance recovery process.

6. Presenting claims to insurers will increase the risk of regulatory and third party claims.
In a settlement negotiation setting, the company's claims can-and should-be presented to the insurers only pursuant to strict confidentiality agreements, in which all information provided to the insurers is subject to federal and state protections.

7. Projecting future liability will create regulatory reporting requirements.
By their very nature, future cost projections prepared for purposes of monetizing insurance are neither "probable" nor "reasonably estimable" costs for purposes of accounting rules, and therefore do not trigger SEC reporting requirements.

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