

## OUT OF THE PAST

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*Insurance archaeology has emerged as an effective way for companies to address environmental liabilities, as teams of specialists dig up forgotten policies and negotiate settlements with insurers. Facing environmental liability, but can't fathom where to dig up the money, or the insurance, to cover the costly bills? Maybe a policy exists in your corporate past that offers millions of dollars in coverage. The only catch is finding it. But should your organization risk valuable time searching for a mythical policy?*

These are pressing questions for companies, especially in today's atmosphere of environmental lawsuits and cleanup programs with price tags in the multi-millions, as they are held liable for contamination of sites to up to 20, 30, 40, or even 50 years after the contamination occurs.

Organizing an effective dig for lost mythical policies is tedious work, and requires skill and experience the liable company often lacks. This has led to the development of insurance archaeology, a specialty which researches a company's insurance program for policies supporting retroactive claims.

Such firms as the New York-based Insurance Archaeology Group and R.M. Fields & Co. Ltd. of Philadelphia offer teams of insurance archaeologists experienced in policy excavation. And then there is Akron, Ohio-based Risk International Services Inc., a privately-held company that addresses costly liabilities by providing the dual service of locating

policies ripe for long-tail environmental claims, and then recovering cleanup costs from the insurance carrier-all the while avoiding litigation.

Although Risk International provides services for almost any size company, vice president and counsel Doug L. Talley notes that the majority of Risk International's clients come in Fortune 500 companies such as manufacturers and chemical-makers. Risk International also has served smaller organizations – like a golf course with an underground storage tank problem - while Talley points out that long-tail claims need not be exclusively environmental in nature for the company to drop its rope ladder. It can be applicable to any toxic tort, such as lead or asbestos.

"An ideal client for us," says Talley, is a company that has grown by acquisition or has had a very active acquisition and divestiture history, and has liabilities that might arise from operations acquired over time, but lacks any insurance information with regard to those acquisitions."

### **The BFI Dig**

Just such a client of Risk International is Houston-based Browning-Ferris Industries Inc. (BFI), the country's second largest solid waste management company. BFI's growth has resulted from acquiring hundreds of smaller companies - and it is sometimes left in the dark regarding those companies' lost insurance programs, according to the firm's corporate risk manager, Robert Card.

"So we thought it was wise to do archaeology, especially to focus on liability policies which might protect against long-tail type claims," says Card. Having conducted a pilot project investigating firms practicing insurance archaeology and claims recovery, BFI found Risk International to be, according to Card, particularly capable of meeting its need for researching numerous smaller companies and effectively managing claims activity.

Unlike traditional archaeologists, Insurance archaeologists do not trek through lush rain forests or risk dehydration in scorching deserts, obviously, but they do aim to fill crucial historical gaps pertaining to potentially lucrative policies. Primary to an archaeological expedition is knowing where to dig. Risk International begins this process with interviews to generate leads for research. When the risk manager is unable to locate policies, "there are a whole host of other areas" worthy of investigation, says Talley, including legal and real estate records, past brokers, customers, law firms, accountants, or even government records.

There are even a few domestic and England-based insurance companies, such as Lloyd's of London, that have kept microfilm copies of their policies, says Talley.

"If a client is lucky enough to have done business with one of these companies," he notes, "we can get those policies very quickly."

When a dig fails to locate a policy, coverage can still be established, says Talley. "Case law has been pretty well-established that any documents which evidence the coverage [are] sufficient to prove the coverage, if they provide the critical information."

Even an old check stub may reveal to whom the check was issued, the policy number, the policy period, and the amount of the premium. "It's a great start for insurance research purposes," Talley observes. Risk International's own database, continuously maintained with excavated policy numbers, may even provide the crucial connection to a policy.

Adds Talley: "It's really a kind of detective work. You piece together your clues and reconstruct the coverage after you've acquired sufficient information."

### **Standstill Pacts**

Departing from traditional archaeology, Risk International archaeologists don't send excavated policies to a museum. Once the policy is restored, the insurance company is notified and invited to private negotiations to prevent litigation.

During negotiations, there exists an understandable potential for heightened anxiety levels. The threatening litigation, should talks fail, would only further delay cleanups and could further eat away company funds.

Indeed, effectively sidestepping litigation is paramount to companies like BFI. "Our goal," says BFI's Card, "is to take a constructive, non-litigious approach, and Risk International has been very supportive of that."

Litigation is never a sure thing. Even when the insurance profession adopted the standard practice of the pollution exclusion in general liability policies in the early 1970s, the courts have wavered on this provision, notes Talley. "There have been about 22 or 23 state Supreme Courts which have addressed the issue," he says, "and they

are split right down the middle as to whether [the pollution exclusion] prevents coverage for long-term pollution."

And since it is state law which decides long-tail claims, companies and insurers are naturally concerned about the state jurisdiction in which a suit is filed.

This is where a standstill agreement becomes critical to Risk International's cost recovery process. By having the disputing parties agree not to sue each other for a period of 6 or 12 months, "neither party has to worry about being jumped and pulled into a lawsuit in an unfavorable jurisdiction," adds Talley.

Managing the client's expectations concerning the excavated policies is fundamental to negotiations. Although Risk International represents its client's interests, there cannot be negotiations if a company resolves to squeeze every last dollar from the insurer. On the other hand, a company may not wish to risk long-term coverage with a carrier for the sake of a large recovery. "We're talking about huge sums of money, and the insurance companies are not parting with it willingly or readily," explains Talley.

Not surprisingly, insurance carriers may even recommend clients considering litigation to Risk International, adds Talley.

"Almost every one of these cases has settlement value," notes Talley, explaining that insurance carriers will almost always offer some money, but it's a question of how much the client is trying to recover. A policy may have two dozen snares, and only one must spring successfully for the insurance company to avoid coverage. "That's a very hard burden to shoulder ...

Sometimes clients will litigate and lose in a big way."

Aside from the pollution exclusion, says Talley, these loopholes can include exclusions for damage to property owned by, used by or rented to the insured.

Another issue is simply debating which policy written over a time period of up to 50 years would cover a loss. An insurance company may say it's not responsible for the costs because a company sending waste to a landfill should have expected property damage. There may also be an aggregate limit on a policy, or the insurance company can accuse the policyholder of giving late notice after a suit is filed against the policyholder.

The negotiation process tends to be aggressive and persistent. Money is not always the sole discussion item. For example, there's the issue of what the insurance company will get in return for covering the claim: Will the insurer be released of responsibilities for the site or the policy?

In the cost recovery process, Risk International will "zero in on the quick favorable recoveries to try to get the project in the black quickly," says Talley, adding that it can take a year to 18 months for settlements.

Thus, when the horizon snuffs the sun and a successful excavation and recovery concludes-which can take five to 10 years for a large project- the ratio of a client's total cost for recovered claims can be relatively small. Says Talley: "In some cases, it's less than 10 percent-and usually less than 20 percent-of the cost compared to the recovery dollars. And that's ... an 80 to 90 percent return on your investment dollar."