



CONCURRENT SESSION III: A

Attorney Road Map to Navigating Top 3 Environmental Issues

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Contaminated Properties Are Opportunities

Solutions for Risk Avoidance and Environmental Remediation

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Contaminated Properties Can Be Opportunities

Typically, environmental contamination on a property will kill the deal. Understanding the legal protections buyers can obtain, the risks associated with the contamination, and whether there is a party that can pay for the cleanup can turn these deals into opportunities



Typical Contaminated Properties

Reclaiming lost land and returning it to productive use

COMMON BROWNFIELDS



FOUNDRIES



MANUFACTURING
PLANTS



METAL PLATING
FACILITIES



DRY CLEANERS



GAS STATIONS

Turning Liabilities Into Assets

Factors To Evaluate

- Protection for Buyer and Lenders
- Environmental Conditions
- Funding Sources - Identifying Responsible parties and their Insured

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Environmental Liability

- ❖ Comprehensive Environmental, Response, Compensation, and Liability Act (“CERCLA”).
- ❖ To clean up past and future contamination, Congress made liability under CERCLA draconian!



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Environmental Liability

Why do I mean draconian?

- ❖ Because CERCLA's liability scheme is:
 - Wide in scope (all parties that may have caused or contributed to the contamination have liability);
 - Strict (it is not based on fault); and
 - Joint and several (each party is responsible for all damages, not just their share).

Environmental Liability – Wide

- ❖ Wide in scope – CERCLA imposes liability for environmental contamination upon four broad classes of parties (though we will focus on only two):
 1. The owner and operator of any property where a hazardous substance has come to be located.

Environmental Liability – Wide

2. Any person who at the *time of disposal* of any hazardous substance *owned or operated* the property at which such hazardous substances were disposed.

Property Past Owner 1 → Property Past Owner 2 → Property Current Owner 3



disposal



no disposal



no disposal

Environmental Liability – Strict

- ❖ CERCLA's liability scheme is wide in scope, and it is also strict.

Environmental Liability — Joint & Several

❖ Joint and Several



Past Owner 1
disposal (but defunct)



Past Owner 2
disposal (but defunct)



Owner
no disposal

Environmental Liability

- ❖ CERCLA's broad liability scheme creates a significant barrier to the redevelopment of contaminated sites.
- ❖ This is because "parties can be held liable for the entire costs of cleanup, even if they purchased the property after the contamination occurred or were otherwise innocent parties." Robert C. Smith, *Brownfields Revitalization and Environmental Restoration Act of 2001*, S. Rep. No. 107-2, at 2 (2001).
- ❖ Thus, CERCLA produced an unintended consequence.

Phase II Environmental Site Assessment

Conducted after Phase 1 ESA identifies a Recognized Environmental Condition (REC)
Determines the extent of contamination and associated risk
Scope is flexible and tailored to the property's specific needs



Reasons to do a Phase II

- ❖ CERCLA Protection (BFPP) – Essential for Bona Fide Prospective Purchaser (BFPP) to qualify for liability protection under CERCLA
- ❖ Document Property Condition – Provides data on contamination extent, aiding future defense against regulatory actions
- ❖ Assess Financial Obligations – Helps assess future risks and mitigation costs and can lead to purchase price adjustment or escrow creation

Scope of Phase II

- ❖ Tailored to address RECs identified in Phase I
- ❖ Key Considerations
 - ❖ Timing – can take weeks or months depending on scope
 - ❖ Cost – more expensive than Phase I due to sampling and analysis
 - ❖ Investigation Scope – Varies based on property history and identified RECs (includes soil, groundwater and air sampling)

Protecting Environmental Due Diligence

- ❖ Confidentiality Agreements – Limits disclosure of sensitive findings
- ❖ Attorney-Client Privilege – Can be used to protect advice and analytical results and investigation findings
- ❖ Attorney-Work Product Doctrine – Protects material prepared in anticipation of litigation
- ❖ Environmental Audit Privilege Laws – Protect self-audit findings in some states (limited applicability)

What is Not Protected

- ❖ Protected – Legal analysis, communications between counsel and client, portions of consultant reports related to legal advice
- ❖ Not Protected – Raw data (sampling results, laboratory analysis)

Benefits of Attorney-Client Privilege for Environmental Due Diligence

- ❖ Protection from future litigation
- ❖ Protection from disclosure to regulators
- ❖ Protect draft reports

Practical Steps for How to Protect Consultants Work Products

- ❖ Lawyer engages the environmental consultant
- ❖ Environmental consultants coordinates with lawyer on draft reports

Waiver of Privilege

- ❖ Sharing privileged information with third parties may waive protection
- ❖ Maintaining confidentiality is crucial to avoid losing privilege

Traditional Redevelopment Funding Sources Rely on Grants

- ❖ Traditional Brownfield Redevelopment has relied on EPA and State grants.
- ❖ But...grants identify the problem. They rarely are sufficient to clean them up.



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Successful Alternatives to Funding Cleanups

- ❖ Look to the parties that caused the contamination
- ❖ Look to the parties that owned the property when the contamination occurred
- ❖ Find historical insurance assets of former owners and operators
- ❖ Consider having a company specializing in acquiring contaminated properties purchase it and selling it back to the municipality or developer after cleanup
- ❖ Consider having a third party manage the environmental claims on behalf of the municipality

Responsible Parties

Responsible Parties or RPs in by CERCLA definition would include four categories:

- Business owners and operators that would have caused or contributed to contamination
- Property owners that owned property during the period when property contamination occurred
- Arrangers – parties that arranged for the disposal of hazardous waste
- Transporters that took contamination (e.g. drums of waste) to a facility or landfill for disposal

What if the RP Has No Money?

Cleanups can be expensive and many small business owners and individual property owners do not have sufficient money to pay for the necessary work.

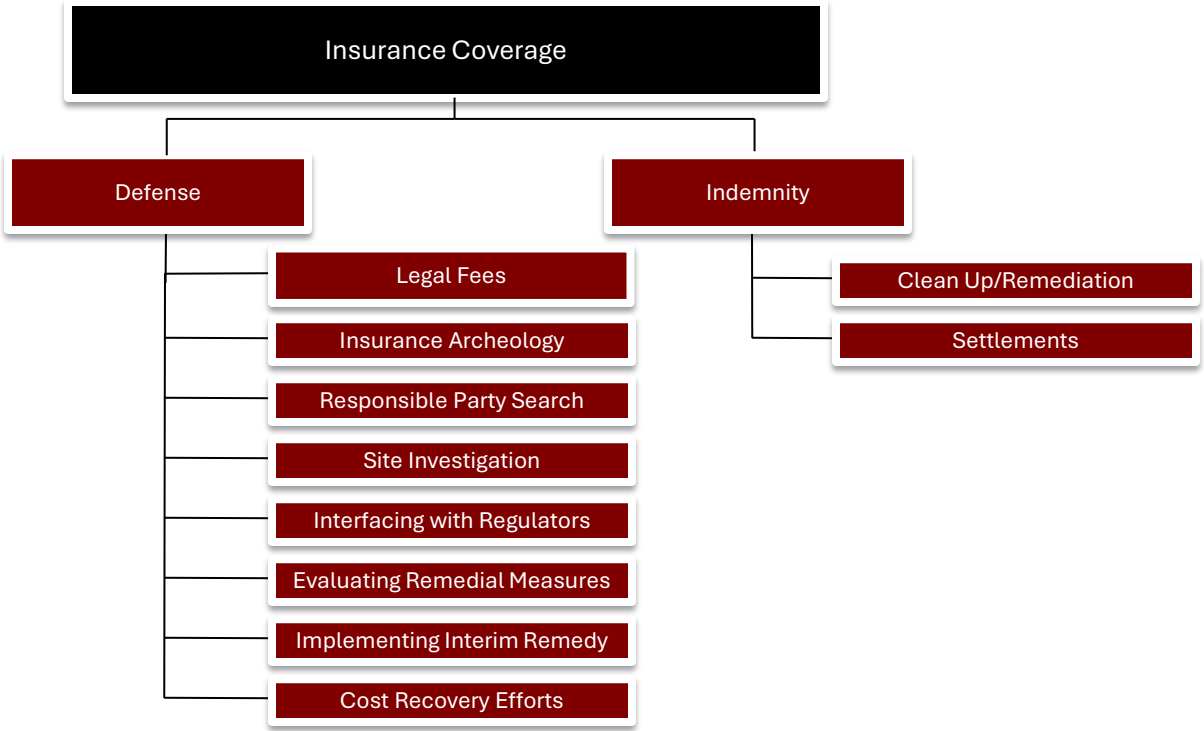
Historical Insurance May Be a Solution



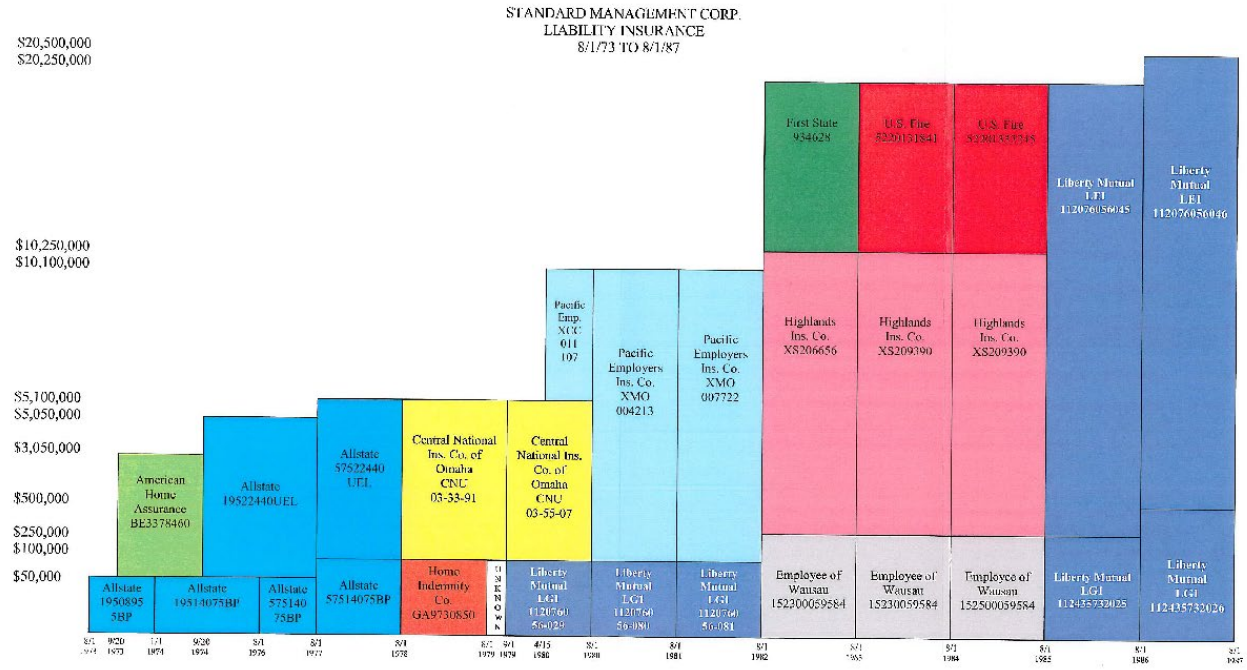
Historical Insurance Facts

- Historical Insurance Assets are buried treasure!
They can bring millions of dollars to pay for cleanup!
- Occurrence based insurance policies never expire!
- Insurance companies are likely to deny coverage, including the duty to defend, until the insured can provide proof of an insurance policy.
- The only ones that benefit from lost or destroyed insurance policies are the insurance companies.
- Evidence regarding historical insurance is disappearing!

Historical General Liability Insurance Policies Will Fund

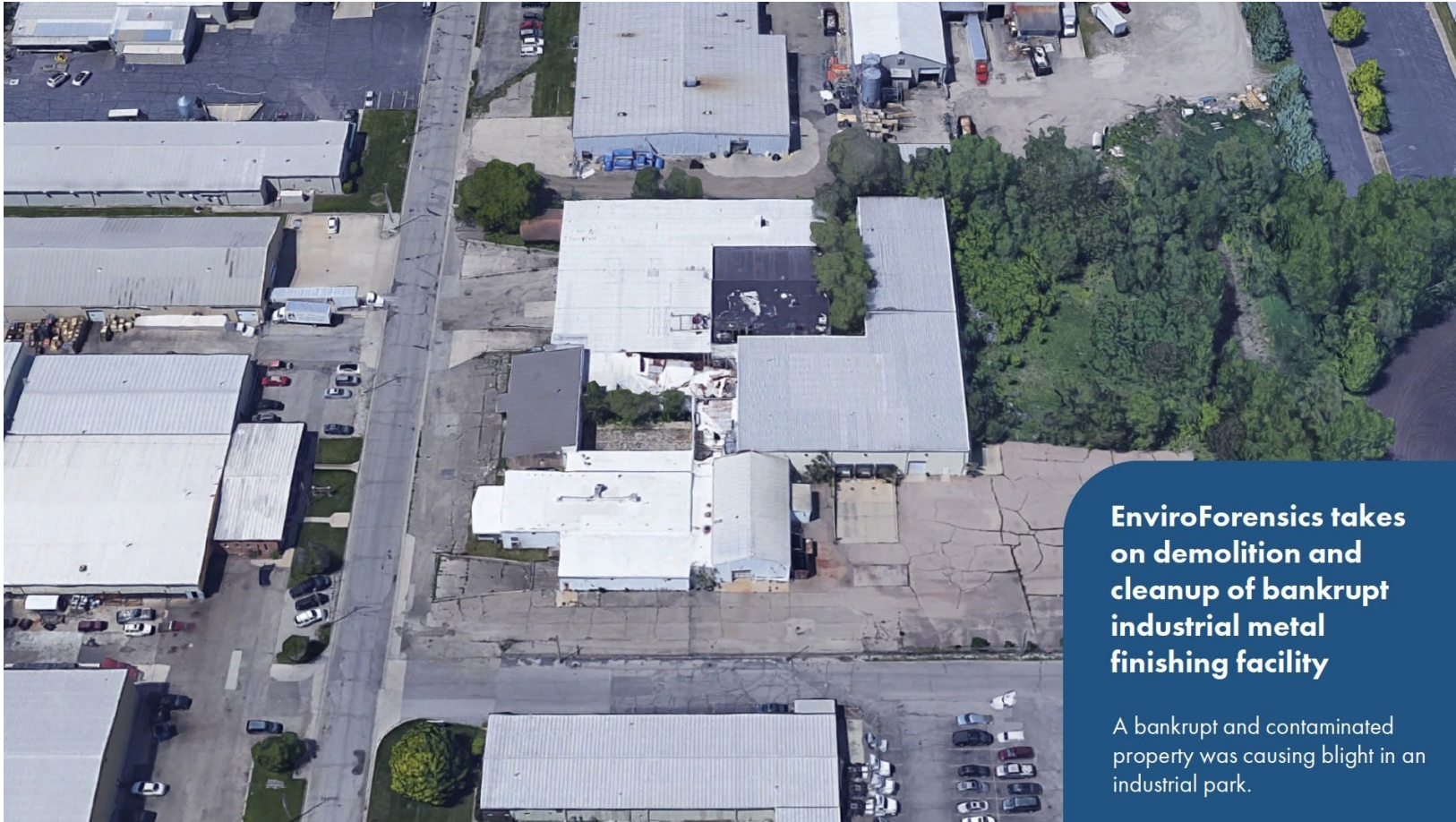


Example Insurance Coverage Chart



Partnerships that May Open Up More Opportunities

- ❖ Private partners that will put their money where their mouth is and not be dependent on getting money from the Buyers
- ❖ Private partners that will agree to take on liability
- ❖ Private partners that will guarantee cleanups
- ❖ Private partners that will take ownership of contaminated properties for the benefit of the future developer
- ❖ Private parties that will manage environmental claims for a fee, at no out of pocket cost to the client



**EnviroForensics takes
on demolition and
cleanup of bankrupt
industrial metal
finishing facility**

A bankrupt and contaminated
property was causing blight in an
industrial park.

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A former manufacturing facility is being redeveloped into senior housing along Madison's historic riverfront

An investor acquired a contaminated manufacturing property as part of Madison, Indiana's Riverfront Development Project along the Ohio River, and hired EnviroForensics to remediate the property and pursue cleanup costs.

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Our team resolves complex environmental problems involving technical, regulatory, legal, financial and political issues.

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