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Bridging the Divide: Strategies to Maximize Cost Recovery Options for Environmental Cleanups*

2018 Annual Meeting

Indiana Association of Regional Councils

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Introduction: Conceptual Framework

- In 2015 Indiana's manufacturing output was approximately 30% of its total gross state product (e.g. chemical products, motor vehicles/parts, petroleum/coal, primary and fabricated metals)
(National Manufacturing Association)
- Strong manufacturing base = environmental concerns
- Past 40-50 years, focus on cleaning up environmental impacts and implementation of more stringent controls
- Many property historically impacted; most cities and municipalities have a portfolio of such properties



Introduction: Conceptual Framework

- Cost recovery is a major concern for cleanups of environmentally impacted properties
- Environmental and insurance coverage firm working closely with property owners, cities/municipalities, and other potentially responsible parties
- Collaborate with environmental consultants, in-house and outside counsel, and other advisors and consultants
- Our focus today is solely on cost recovery options beyond the traditional brownfield grants, which can leave a substantial gap between granted amount and actual cost of remediation



Insurance Coverage in Indiana

- “An insurance policy should be so construed to effectuate indemnity...rather than defeat it”
 - *Masonic* (1929)
- Purpose of insurance is indemnification
 - *Lilly* (1985)
- Exclusions subject to close scrutiny
 - *Kiger* (1996)
- Policy term is ambiguous if has more than one reasonable interpretation
 - *Lilly*



Insurance Coverage in Indiana

- If ambiguous, construed in favor of coverage
 - *Kiger*
- Policyholder need not prove its construction is only possible, or “best” construction, only that it is reasonable
 - *Liggett*
- Reasonable expectation of coverage must be honored
 - *Lilly*



Types of Liability Coverage

- Two promises—to defend, and to indemnify
 - “[Insurer] shall pay all sums for which the policyholder shall become obligated to pay as damages. [Insurer] shall have the right and duty to defend any suit seeking such damages.”
- Different coverage parts of a policy may apply
 - Part A - Property and bodily injury
 - Part B - “Personal injury” (not same as bodily injury)
 - ❖ Specific “offenses”
 - Part C - Medical treatment
- “Claims made” or “occurrence”



Types of Liability Coverage

- Different layers of liability policies may apply
 - CGL primary
 - Umbrella
 - “Drop Down”
 - Excess
- Specialty liability policies may apply
 - Pollution liability
 - D&O
 - E&O
 - Property Damage



Coverage for environmental claims

Series of cases provides multiple ways such losses or liabilities are covered

- Pollution exclusions ruled unenforceable
- Administrative actions are “suits” insurers must defend
 - *Dana, Summit*
- Covered “damages” include costs of government-ordered cleanups
 - *Dana, Summit*
- Duty to defend broader than duty to indemnify, and applies even if evidence possible exclusions apply
 - *Seymour*
- Other exclusions do not apply
 - Owned property—*Dana II*



Who to look for?

Do not need to be the policyholder – just as in environmental claims, there are a variety of entities and even sometimes individuals who are “potentially responsible parties” or otherwise may have responsive insurance policies

- Property owners
- Operators
- Entities having access to the property (e.g. hauling waste to a site, or vendors delivering chemicals)
- Related companies



What to look for?

- Info on property owners (individuals or entities) and operators (may be owners or lessees or sub-lessees) and other PRPs
- Insurance broker and agent info
- Insurance companies
- Evidence of policies (e.g. declaration pages, schedules of coverage, partial policies)
- Full policies



Where to look?

- Business and personal records
- Transactional documents and contracts (e.g. deeds, business transactions, loan applications, settlement agreements)
- Governmental repositories (e.g. Recorder's Office, licensing/registration databases, environmental databases such as IDEM's virtual file cabinet)
- Agent/broker/insurer records (note: In Indiana, an insurer must provide a policyholder with a copy of a relevant policy upon request or will limit its ability to allege non-compliance)
- Public records (e.g. public filings, media coverage, litigation histories)



Key Principle #1: Perfection is not required.



Key Principle #2: More really is better here.



Practical Takeaways

- SAVE YOUR INSURANCE POLICIES (and broker/agent information), including from related/predecessor entities and prior owners
- Always consider insurance coverage as a potential cost recovery option
- Don't rely on assumptions or beliefs (including advice from agents/brokers) about what is covered and what is not
- Seek guidance and assistance when needed: modest investigations can be accomplished in a very cost-effective way that may result in significant recoveries



Questions?





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Recovery from Responsible Parties

- Environmental Legal Action Statute – I.C. §13-30-9-1 *et seq.*
- CERCLA – 42 U.S.C. §9607(a)(4)(B) and 42 U.S.C. §9613(f)
- Underground Storage Tank Act – I.C. §13-23-13-8
- Solid Waste Dumping Statute – I.C. §13-30-3-13(d)
- Private Attorney General Statute – I.C. §13-30-1-1 *et seq.*
- Other Causes of Action
 - Nuisance
 - Negligence
 - Trespass



Environmental Legal Action Statute

- A person may ... bring an environmental legal action against a person that caused or contributed to the release to recover reasonable costs of a removal or remedial action involving hazardous substances or petroleum.
 - I.C. §13-30-9-2
- Equitable Factors
- Can Recover Litigation Costs and Attorney Fees
- Statute of Limitations
 - *Elkhart Foundry & Machine Co.* (Ind. Ct. App. 2018)



CERCLA

- Government Entity Defenses to CERCLA
 - Involuntary Acquisition
 - Third-Party Defense
- Direct Action or Contribution Claim?
 - Voluntary Costs
 - Standard for Recovery
 - Statute of Limitations
- Federal Jurisdiction
- National Contingency Plan



Underground Storage Tank Act

- A person who undertakes corrective act resulting from a release from an underground storage tank ... is entitled to receive a contribution from a person who owned or operated the underground storage tank at the time the release occurred. – I.C. §13-23-13-8
- Equitable Factors
- Can Recover Litigation Costs and Attorney Fees
- Must Choose Between USTA and ELA Claim
- Statute of Limitations
- Excess Liability Trust Fund



Solid Waste Dumping Statute

- A landowner on whose land garbage or other solid waste has been illegally dumped without consent may ... recover from the person responsible for the illegal dumping reasonable expenses incurred ... in disposing of the garbage or other solid waste. – I.C. §13-30-3-13(d)
- Can Recover Attorney Fees
- Consent
 - *Reed v. Reid* (Ind. 2012)



Private Attorney General Statute

- [A] state, city, town, county, or local agency or officer ... may bring an action for declaratory and equitable relief in the name of the state of Indiana ... for the protection of the environment of Indiana from significant pollution, impairment, or destruction. – I.C. §13-30-1-1
- Notice Requirement
- Waiting Period/State Agency Preclusion
- Equitable Relief Only



Nuisance, Negligence, and Trespass

- Nuisance – A civil action to abate or enjoin a nuisance may also be brought by ... an attorney representing the county ... [or] any city or town in which the nuisance exists.
 - I.C. §32-30-6-7
 - Can Recover Reasonable Costs and Attorney Fees
 - Abatement or Enjoinment
- Negligence - Duties to Prevent Release, Investigate, Remediate
- Trespass - Must Affect Property Owned by Governmental Entity
- Statute of Limitations



Acquiring Contaminated Sites

- Condemnation and Preservation of Claims
 - Anything affecting the sale value [on the date of condemnation] . . . is a proper matter for the jury's consideration in attempting to arrive at a 'fair market value.' *State v. Bishop*, 800 N.E.2d 918, 923 (Ind. 2003)
 - Indiana Law Unclear on Post Condemnation Cost Recovery
- Negotiated Acquisition of Property
 - Uniform Acquisition Offer
 - Cooperation on Insurance Claims
 - Assignment of ELTF Rights
 - Indemnity Protections



Do Not Delay Cost Recovery Efforts

- Late Notice Defenses
- Insurer Liquidation
- Responsible Party Bankruptcy or Non-Viability
- Statute of Limitations
- ELTF Notice Requirements
- Discontinuation/Limitation of Funding Sources
- Expansion of Contaminated Area
- Continuing Threat to Human Health and the Environment





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