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Emerging torts, mergers and acquisitions, coverage exclusions, and new policies have made insurance archaeology a corporate best practice.

The Evolving Art of Insurance Archaeology

SHEILA MULRENNAN

In the past two decades, corporate legal liabilities have metastasized, developing in directions not even an actuary could have dreamed. In 1995, the costs of civil liability in the United States totaled \$161 billion, or 2.3 percent of the nation's gross domestic product — up from 1.4 percent in 1970 and 0.6 percent in 1950, according to a study by Tillinghast-Towers Perrin. From asbestos contamination to environmental pollution, from the Dalkon shield to the Dow breast implant, from Ralph Nader's assault on "cars that crash and burn" to McDonald's

scalding coffee, from Love Canal to the latest "sick-building syndrome" (SBS) suit, U.S. businesses of all types and sizes have called on insurance coverage to keep them out of the red — or out of bankruptcy.

Insurance archaeology originally developed in response to the great waves of corporate liability imposed first by asbestos-related claims beginning in the 1970s, and then by Superfund-mandated environmental cleanup beginning in the 1980s. The most recent estimates place the insurance industry's unpaid losses for asbestos and environmental (A&E) claims at a sobering \$65 billion — and corporate liabilities run much higher, since the insurance industry acknowledges responsibility to cover only a fraction of actual policyholder losses.

The first section of this article will begin by tracing the evolution of insurance archaeology, from its origins as a dramatic search for one or several missing policy documents to its current function of reconstructing, documenting, and organizing an entire historic insurance portfolio. The second section will examine the trends both in the insurance industry and in American corporate structure that have made

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such complete audits a necessary “best practice” for risk management. Those trends include:

- the insurance industry’s multiplying of exclusions and restrictions on standard liability policies;
- emerging categories of major new tort litigation, including pharmaceutical and medical devices, “sick-building syndrome,” workplace injuries such as repetitive stress and hearing loss, and computer-related “techno-torts” such as Year 2000 (Y2K) problems;
- waves of downsizing, corporate relocations, and mergers and acquisitions (M&As) that have shortened institutional memory and created a need for lost policy searches as recently as the past decade;
- consolidation of the insurance brokerage industry, which has further curtailed companies’ means for reconstructing old coverage; and
- the common practice of marking records for destruction in 1999, a decades-old habit that adds urgency to the task of recovering records now.

Retroactive liability inspired high-stakes treasure hunts for often decades-old insurance policies.

The third section will detail the steps involved in a complete insurance audit, including the organization of existing on-site records, the search for missing policies and secondary evidence, and the detailed graphing and analysis of a company’s insurance history. This last step, the end product of an exhaustive insurance audit, positions a company to pursue coverage promptly and aggressively with all of its insurers as soon as a potential liability emerges.

A Short History of Insurance Archaeology

In a sense, insurance archaeology is a foster child of two Superfund provisions that vastly increased the number of companies, institutions, and organs of government faced with government-mandated environmental-response costs.

The first is Superfund’s imposition of “joint and several liability,” which provides that each entity

that bears any liability at all can be held responsible for cleaning up an entire polluted site. Since Superfund does not allocate proportionate liability, each party to a given cleanup does its utmost to transfer as much of the cost as possible to other parties. The result has been a maze of litigation that has accounted for at least one-third of Superfund cleanup costs to date. For any company caught in this web, simply establishing an insurance company’s duty to defend can be worth millions in legal fees.

The second Superfund provision that sent policyholders scrambling to recover lost policy documents is “retroactive liability,” which imposes cleanup responsibility on corporations and their successors that allegedly contributed to a site’s pollution at any time in the past. While joint and several liability vastly multiplied the number of corporations, small businesses, and municipalities staring down the barrel of potentially massive cleanup and legal expenses, retroactive liability inspired high-stakes treasure hunts for often decades-old insurance policies.

From Asset Recovery

Companies facing liability for pollution that occurred decades ago learned that standard commercial general liability (CGL) insurance policies are “occurrence-based” — that is, they *never expire* if damage is shown to have occurred within the policy period. A rule of thumb, moreover, is that the older a policy is, the less restrictive and more valuable it is likely to be. CGL policies from the 1940s, 1950s, and 1960s are particularly valuable because they generally contain no pollution exclusions, no aggregate limits, and no limits to defense costs. Policies from the 1970s, which contain a so-called “sudden and accidental” pollution exclusion, are easier to apply to Superfund liabilities than policies purchased after 1985, which contain a less ambiguous “absolute pollution exclusion.”

Of course, the older a policy is, the less likely it is that policy documentation will be neatly tucked away in a well-marked and easily accessed file cabinet. The ever-increasing momentum of corporate downsizing and M&A activity in the 1980s and 1990s, as well as the relocation of many corporate headquarters from the Northeast to the Sunbelt, displaced both people and records and, thus, shortened institutional memory. With increasing frequency, insurance archaeologists were dispatched as

raiders of the lost archive, tracking down the long-lost policy documents of long-forgotten predecessor corporations held liable — often decades after the fact — for manufacturing and disposal practices not understood at the time to be harmful.

Employing the combined skills of a detective, a historian, a claims specialist, and an excavator, insurance archaeologists learned to cull through brokers' slips, chase down retirees and descendants of former personnel, pore over accounting ledgers, search government archives, and venture into radon- or asbestos-contaminated vaults in search of old insurance policies. All of these skills remain part of the stock-in-trade of the insurance archaeologist today.

To Asset Management

In the past five to ten years, however, insurance archaeology has become far more than the dramatic search for a buried silver bullet. As companies dealt with the logistics of notifying and negotiating with scores of insurers involving decades of coverage, insurance archaeology expanded to include organizing all the records, filling in gaps for missing and incomplete policies, and creating graphs to illustrate the entire portfolio of assets. Just as an ordinary archaeologist must graph every historic strata and place all unearthed objects in their historic context, an insurance archaeologist creates a map of a company's entire coverage history.

As the potential legal liabilities faced by companies of all sizes have continued to multiply — and as insurers have grown evermore creative in finding grounds for denying claims — companies have increasingly recognized that a complete audit and preservation of their past and present insurance policies is an essential "best practice" of risk management. With legal liabilities taking up an ever larger proportion of any company's risk portfolio, managing the historic insurance portfolio has become as essential as managing expenses, revenue, or investments.

Ratcheting up the pressure to keep all insurance policies ready for rapid deployment is the insurance industry's increasing reliance on "timely notice" provisions as grounds for disclaiming coverage. Of all the weapons in an insurance company's arsenal against the policyholder, the most formidable is often the policyholder's own lack of preparedness. Because of poor record-keeping, many policyholders are unable to access policy information when they need it.

Plotting a Portfolio

The process of notifying scores of insurers of a claim that occurred over decades, and then dealing with the inevitable and overwhelming requests for documentation that follow, can severely tax any company's ability to pursue coverage. Unless a company comes prepared with full details of all possible coverage, it will be at a disadvantage in dealing with its insurers. Taking action now to locate and organize historic insurance policies and to document all secondary evidence of coverage will save time and money in the hour of need — when it's time to seek defense and indemnification for liabilities of long ago.

Reconstructing and preserving policy records will enable companies to maximize coverage when they need it.

It is not enough simply to maintain an index of past insurance policies. When presented with a complex and potentially expensive claim, an insurance carrier is likely to demand a copy of the insurance policy. Although courts have upheld coverage when secondary evidence of a policy's existence and terms is presented, no one relishes the long and costly prospect of insurance coverage litigation. Reconstructing and preserving policy records will enable companies to maximize coverage when they need it.

As experienced consultants trained in policy reconstruction, insurance archaeologists can help by organizing or conducting a formal audit of all pertinent historic coverage. If the audit identifies missing policies, insurance archaeologists can conduct a thorough search for the missing documents. Such a review may span 40 or 50 years of coverage, including policies for numerous corporate divisions and predecessor companies.

Piecing together an insurance history can be a nightmare when it is done in response to a demand for documentation under time pressure. On the other hand, a proactive, methodical search can uncover and preserve historic insurance assets worth hun-

dreds of millions of dollars. Beginning the research before a crisis arises will diminish the risk of losing records and ensure more time to pursue a number of possibilities — especially enlisting the aid of outside sources.

The Shifting Insurance Landscape

Insurance archaeology has evolved as a means of comprehensive insurance records management to help companies keep up with an insurance market of burgeoning complexity. As the types of liability exposures have multiplied in the past three decades, insurance carriers have introduced a maze of new exclusions and provisions designed to reduce the industry's exposure. These include the sudden and accidental pollution exclusion, the absolute pollution exclusion, the known prior acts exclusion applied to newly purchased subsidiaries, the employment practices exclusion, timely notice provisions, and, most recently, Y2K exclusions. These restrictions necessitate a more complex coverage portfolio, as the insurance industry develops new products to cover liabilities newly excluded from the standard CGL policy. More policies for the same coverage means more records to keep track of, which means — unless companies take proactive action — more lost policies or claims excluded on the grounds that “timely notice” deadlines were missed.

Postponing research of historic insurance records may mean consigning valuable coverage to oblivion.

The Year 2000 Impetus

The specter of Y2K adds further urgency to the need to reconstruct historic insurance coverage. In corporations throughout the United States, 1999 has long been the most popular year, and September 9, 1999, (denoted as 9/9/99) the most popular date, to mark records for destruction. Since the 1960s, multiple nines have served as “null value” codes in the date fields of many document management programs

— and many human minds seem to have taken the cue, choosing 1999 as a once-comfortably-distant scheduled destruction date. In their daily work, insurance archaeologists encounter this millennial time bomb in page after page of records management indices in virtually every industry. A true crisis thus looms in records retention. Now more than ever, postponing research of historic insurance records may mean consigning valuable coverage to oblivion.

The M&A Maze

Mergers and acquisitions also create conditions demanding a historic insurance audit. If a company has merged with or acquired other companies in its past, the likelihood increases that insurance documents have been misplaced or forgotten — since changes of ownership generally entail changes in personnel, closing and merging of offices and warehouses, and sometimes even wholesale relocation.

A company currently considering a merger or acquisition should consider a historic insurance audit of its potential acquisition as part of its due diligence, to be undertaken before the deal is closed. Given the broad transferability of insurance policies to corporate successors, a comprehensive audit of a potential acquisition's insurance coverage can spell the difference between acquiring a dynamic asset and acquiring a perpetual asset *drain*. Assessing a target company's insurance coverage is as essential as auditing its more visible assets and liabilities.

Where Have All the Brokers Gone?

In the past, companies seeking to reconstruct their insurance histories could rely heavily on brokers who had sold them the policies. While brokers remain an often-crucial source of information, a decade's worth of consolidation in the insurance brokerage industry means that brokers themselves can be almost as hard to trace as insurance policies. Not only have the “Top 10” brokers of a decade ago combined into a “Big Three” (New York-based J&H Marsh & McLennan, Chicago-based Aon Risk Services, and Willis Corroon Group of London), but one out of every three agencies with revenues of more than \$5 million acquired another agency just in the past year, as reported in the *Journal of Commerce* (November 30, 1998).

Just as a company's institutional memory may have been recently abridged by a merger or acquisition, the same is likely to be true of its broker from a

year or 10 years ago. Since many of the smaller agencies allowing themselves to be sold are run by aging partners, smaller acquisitions often trigger the retirement of brokers with decades of memories and records. Tracking down old records in retirees' garages is one of the insurance archaeologist's specialties.

Emerging Torts: Fruitful and Multiplying

Over the past quarter of a century, A&E claims, coupled with consumer activism on the product liability front, have (in the words of one insurance industry lawyer) "created a vast plaintiffs' coverage bar and a judicial, political, and information-gathering network that thrives on a third wave of new tort claims" (*Mealy's Environmental Claims Journal*, Spring 1998 — paraphrasing Tom Brunner of Wiley, Rein & Fieldings). Recently, class-action lawsuits targeting multiple defendants and consolidating the claims of thousands of plaintiffs nationwide have proliferated. The 1998 class-action tobacco-litigation settlement, which resulted in fees in the billions for several plaintiffs' firms, dramatically upped the ante and raised the profile of class-action litigation. Potential future sources of mass tort liabilities include the following.

Implanted Medical Devices

Major recent and pending cases include legal action on behalf of patients alleged to have been injured by breast implants; by fen-phen, an appetite suppressant alleged to cause heart damage, for which 18 million prescriptions were written and which is now the source of federal lawsuits filed in 58 courts nationwide; and by pedicle screws, more than 300,000 of which have been implanted by surgeons, often for uses other than those indicated by FDA approval but considered by most surgeons to be the medical standard of care.

One "side effect" of the rapid development of medical and pharmaceutical technology has been a climate conducive to litigation. In a highly competitive marketplace, new drugs and technologies are heavily advertised and receive sometimes frenzied media attention. Alleged side effects and injuries also become major news stories. Completing the media cycle, plaintiffs' lawyers often advertise for plaintiffs in class-action suits, according to William J. Ruane in "Staying on Top of Your Game," *For the Defense*, (September 1998).

Y2K and Other "Techno-Torts"

The failure of many computer systems to read post-1999 dates raises the threat of severe interruptions in commerce, banking, and governmental functions. Companies facing the expense of preventing Y2K failures may sue computer consultants or hardware and software suppliers who sold them non-Y2K-compliant equipment. Companies whose Y2K-related equipment failures cause problems for customers, trade partners, and other parties may face litigation. Directors and officers of publicly traded companies may be accused of breaching their duties if they are alleged to have failed to prevent or fully disclose Y2K failures or costs. Possible coverages include general liability, directors and officers liability, errors and omissions, property business interruption, workers compensation, and securities claims. *Best's Review* (May 1998) estimates remediation costs in the \$300 billion to \$600 billion range.

A company will probably find that examining existing, readily available records will lead down a winding trail.

Other "techno-torts" include a host of intellectual property issues, security breaches for the purposes of sabotage or theft, and defamation.

SBS and Workplace Liability

Suits are proliferating for personal injury alleged to be caused by a wide range of indoor pollutants, from lead paint poisoning to carbon monoxide poisoning, allergens in heating and ventilation, chemicals used in carpet cleaning, or any other release of substances alleged to cause major or minor ailments. The Environmental Protection Agency (EPA) estimates that over 1.3 million buildings in the United States have indoor air quality problems that could lead to SBS claims and that 100 million Americans potentially could suffer SBS-type symptoms in these environments. Major verdicts in sick-building litigation include a 1995 Florida jury verdict against Reliance Insurance by Polk County, FL, leading to a

\$25.9 million award and a \$35 million settlement in November 1996, and a \$950,000 verdict in 1993 against the EPA in a case involving the EPA headquarters building, as reported in *National Underwriter/Property & Casualty* (January 20, 1997).

Other common workplace liability claims include repetitive stress injuries and noise-induced hearing loss (NIHL). Of the 22 million Americans who have some difficulty hearing, an estimated 18 percent, or 4 million, suffer from NIHL. With 85 decibel average (dBA) generally recognized as a significant noise level, approximately 3 million workers are exposed to noise levels in excess of 90dBA; another 5 to 9 million are exposed to 85dBA to 90dBA.

The Historic Insurance Audit

Whether a company conducts an insurance audit using internal resources or hires a team of insurance archaeologists, it will probably find that examining existing, readily available records will lead down a winding trail in search of gaps in the coverage history. The following is an outline of the process as it has evolved over the past two decades.

Phase I: Marshal Existing Assets

It is advisable to begin an audit by pulling and organizing all existing primary and excess liability policies or secondary evidence of coverage. In the process of examining the documentation in detail, gaps and discrepancies in information will be revealed. Surprisingly, policies are often discovered that were not considered missing since they had not appeared on any lists. This exercise alone may add millions to the pool of available insurance.

Once policy records are organized, a chart should be prepared of the coverage that has been identified in Phase I. Color can be used to illustrate the type of documentation available for each policy so that it is easy to see where additional research is necessary for missing or incomplete policies. The advantage of a visual presentation lies chiefly in the immediacy with which priorities for further research can be identified and the possible monetary results quantified. (See Chart 1 as an example.)

Once the valuable assets have been painstakingly assembled in Phase I, working copies should be made; and the original records, preserved in fire-proof vaults or file cabinets.

Phase II: Research Missing or Incomplete Policies

The next step in the process is pinning down those policies that are missing.

Investigate Internal Sources

Indices of various corporate departments should be reviewed to identify those noninsurance records that could either document missing policies or provide leads to possible outside sources of records.

In the course of reviewing the corporate records, any possible external sources of records, such as brokers or outside counsel, should be identified.

Interview Key Personnel

Interviews with former employees and brokers can establish their recollections of the missing insurance policies and the internal procedures for records retention. Leads can also be developed to outside sources of information, such as former brokers and state and federal government departments that may have required insurance documentation.

In these litigious times, few large insurance claims go undisputed.

Expand the Search to Outside Sources

All domestic retail and surplus lines brokers should be contacted for records relating to any missing or incomplete policies identified in Phase I.

If any Lloyd's policies are missing, information can often be obtained from the London correspondents of the domestic brokers. Due to Lloyd's dominance in the North American insurance markets over many decades, the records maintained by the London brokers are often repositories of a wealth of documentation of both primary and excess coverage.

Other priority outside sources identified in the internal records and interviews, including additional insureds, outside counsel, auditors, government agencies, and financial institutions, can also produce a variety of documentation for the missing policies.

If evidence that a lost policy existed can be clearly established, a sample of the standard form for the lost policy can assist in reconstructing the terms and conditions.

Phase III: Understand the Program at a Glance

By this point, corporate managers will typically have assembled thousands of pages of records relating to hundreds of policies issued over several decades. Understanding the complexities of a historic insurance program, as well as the preacquisition coverage of numerous predecessor companies, is the primary objective of a historic insurance audit. The savings in time and money will be exponential if the following steps are taken:

1. Analyze the key policy terms and conditions, such as pollution exclusions, application of aggregate limits, and notice provisions.
2. Create a database flexible enough to accommodate lengthy text and to permit searches based on customized search criteria.
3. Update the bar-graph chart with the information developed in the research phase, and use the chart to illustrate changes in the policy language over time.

Once a coverage chart is complete, it is not unusual for the total cumulative policy limits to exceed \$1 billion. The graphic illustration of a total portfolio of historic insurance can dramatically convey the magnitude of potential recovery to senior management. Ultimately, the chart will save thousands of hours of staff time and streamline negotiations with insurers.

Negotiate From Strength

Over the past decade, insurance archaeology has evolved as a powerful tool to help corporations deal with a fundamental reality. In these litigious times, few large insurance claims go undisputed. The best response is to be prepared. The policyholder that has immediate access to its entire coverage history is ready to respond effectively to an insurance company's challenges. Once a historic insurance audit has been completed, the insurance company will have lost its best defense — the unprepared policyholder.

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