

Financing Options: Using Claims on Historic Insurance to Fund Brownfield Redevelopment



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Introduction

- Environmental remediation is expensive
- Funding sources can be elusive
- A solution – historic liability insurance policies, particularly those issued prior to 1985 (without so-called absolute pollution exclusions) have been found to provide coverage for environmental liabilities
- Negotiation of environmental coverage claims can benefit the policyholder by providing money, and benefit insurers by providing closure on uncertain exposures

Negotiation vs. Litigation

- 20 years ago environmental coverage claims were all litigated
- Today, there has been enough case law that claim values can be negotiated as a business transaction
- Components of the negotiation
 - Size of the environmental claim
 - Allocation methods
 - Legal discounts taken based on likely litigation outcomes
- Approach is multidisciplinary

What Coverage?

- **Liability insurance policies generally cover “all sums” you are “legally obligated to pay as damages due to property damage”**
 - Property damage = environmental contamination
 - Legally obligated = regulatory pressure
- **Focus on policies with pollution not excluded**
 - Pre-1973 generally no exclusions
 - 1973 to 1985 qualified pollution exclusions
- **A deteriorating asset**
 - Carrier insolvency or runoff
 - Lost policies

What Coverage?

- For a manufacturing site operating since 1950, courts would generally allow claims on policies issued spanning 1950 to 1985
- For a contaminated site coming into a developer's possession in 2001, operated by ABC Chemical Company beginning in 1960, a claim could be made on ABC's liability insurance spanning 1960 to 1985
 - Issues
 - Do you have rights to make a claim under ABC's policies?
 - If not, can you get cooperation of someone with authority for ABC?
 - Can you find ABC's policies?
 - Does ABC still exist?

Other Coverage Issues

- Insurance does not extend to “intentional” pollution, e.g., criminal conduct
- Coverage exists for remediation costs but not for redevelopment – costs need to be segregated in brownfields context
 - Similarly, restoration costs (e.g., mining restoration agreed as part of the mining lease) are not covered
- Owned property exclusion – need to have impacts offsite or to groundwater

Recovery Process

Step 1 – Research & Document

- **Site and corporate history**
 - Who operated the site
 - Who is the successor to those entities
- **Liabilities**
 - Past, current & expected costs
- **Assets – general liability policies**
 - Many sources
 - Many ways to prove cover – policies not needed
 - Insurance archeologists

Recovery Process

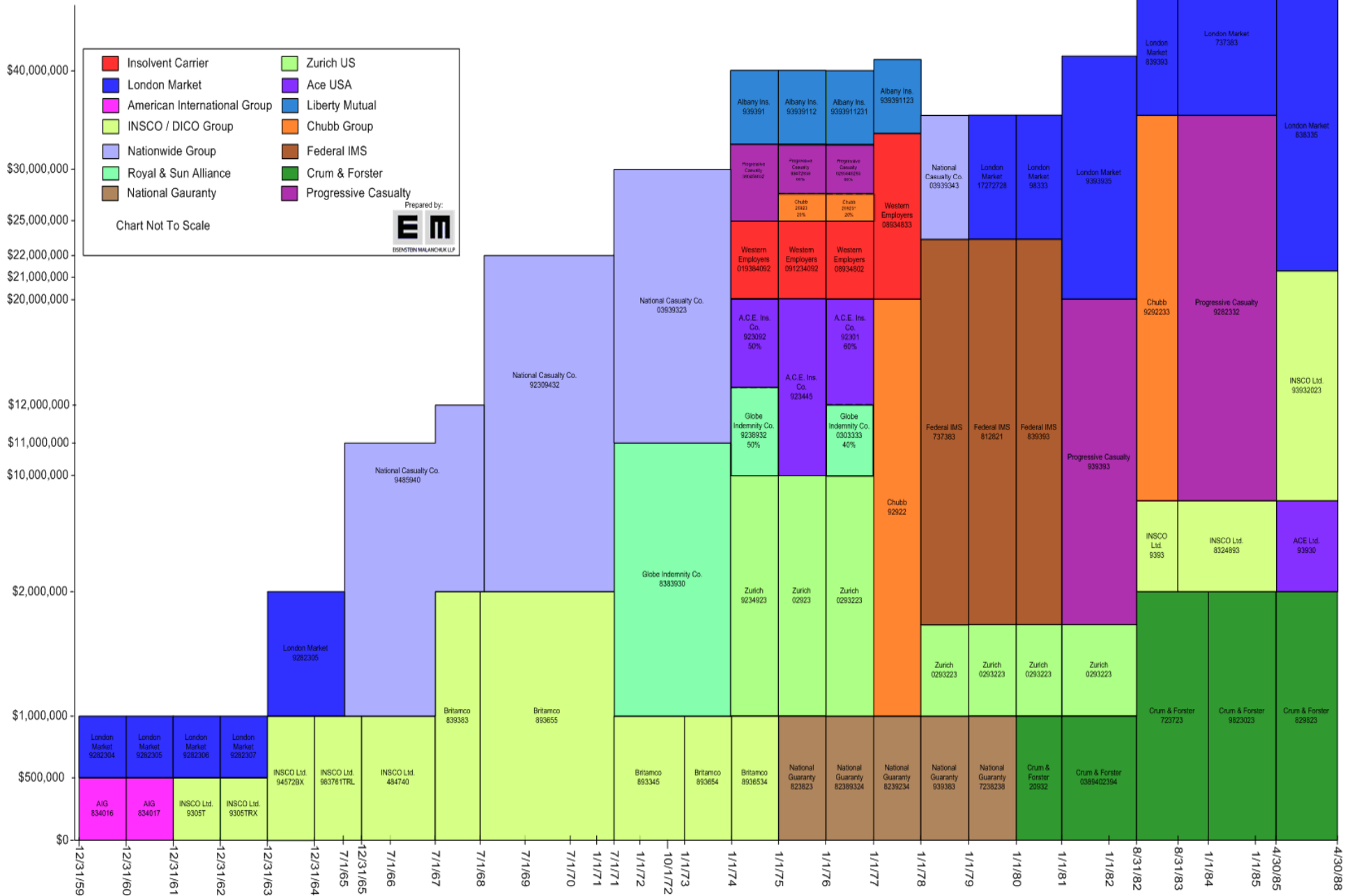
- Goal in step 1 is to identify companies with liability pre-1985, who either still exist or else a successor entity or former officer/director can be found
- Work cooperatively to pursue insurance if these companies lack sufficient assets to pay for the remediation
 - Finding the coverage
 - Potential sharing of insurance proceeds
 - Sometimes a formal assignment agreement is helpful

Recovery Process

Step 2 – Build the Claim

- Ownership of liability & assets
- Detailed coverage analysis
- Detailed site analysis
- Perform allocations – various theories
- Report to client for decision

NewCo, Inc. Insurance Program Overview 1959 - 1986



Recovery Process

Step 3 – Negotiate Settlements

- Standstill & confidentiality agreements
- Agree on settlement strategy
- Prepare demands to each carrier
- Direct meetings to settle – expect a 2 year process
 - At executive levels with settlement authority
- Alternative fee arrangements frequently utilized

Why The Process Works

- **Minimizes resources & time**
- **Minimizes up-front costs for all parties**
- **Team with legal, environmental & insurance expertise**
- **Fully documented claims**
- **Honest valuation of the claims – likely outcomes of key coverage issues**
- **Developed relationships with carriers**

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