

IMPROVING YOUR BOTTOM LINE BY EMPLOYING A DORMANT ASSET

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Summary

Fiscal responsibility is more important today than ever before. So if you have an asset that is dormant you should put it to work. And, if that asset is dissipating over time you should put it to work sooner rather than later. At the very least, you should know what that asset is. It is your old insurance policies. Thought they were worthless, expired or impossible to put to use? Depending upon your company's circumstances this may not be the case. In fact these old policies may be worth millions. Suppose you had an accident thirty years ago and did not realize it. Today, you discover it? Do you have insurance? You may have but it isn't today's insurance policy. It is the policy that was in effect when the accident occurred. If your company has had an asbestos claim, you probably already know all this. But if you have environmental liabilities that were caused by activities that were legal at the time and now have to be cleaned up because the regulations are now more restrictive then you may have an insurance asset that can provide coverage. Of course the devil is in the details but today's economy demands that you leave no stone unturned. It might require a little effort to track down your old policy information pertaining to comprehensive general liability policies before the addition of pollution exclusions but your efforts may be handsomely rewarded. Saving your policies for a rainy day does not make sense for a variety of reasons so our advice to you is to postpone procrastination and take action while your former insurance carrier is still answering the phone.

Introduction

If the longest journey begins with the first step, an insurance recovery (IR) project is no exception. It's not that the process is difficult; it's more like a thousand piece jigsaw puzzle. But, if we can find all the pieces and assemble them, you might just net a few million dollars in the process. There are three main elements of IR: articulating the corporate history, assembling the insurance asset and delineating the environmental liabilities at each site where exposure exists. Without litigation and without any upfront investment you can discover whether you have a viable opportunity. Here's an example to get started.

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| <p>Main Elements of Insurance Recovery</p> <ul style="list-style-type: none">- Articulating the Corporate History- Assembling the Insurance Asset- Delineating the Environmental Liabilities |
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Example

Suppose you have a tree on your property that your neighbor has warned you is leaning over his driveway. If that tree later falls on your neighbor's car destroying it, you would be responsible for the damage. Luckily, you probably have insurance to cover the cost. You might think about the total cost of the claim and sort out the pros and cons of filing a claim but assuming the cost is significant, it would be ill-advised not to file a claim since this is why you buy insurance in the first place.

In our case, we are dealing with the release of a chemical or some polluting substance onto your neighbor's land. And suppose this was due to a leak in an underground storage tank that had been installed fifty years ago and had begun leaking sometime after it was installed. All this was unknown to you for many years and the chemical slowly moved with the groundwater until it was recently discovered in a nearby stream some distance away. Now there is a major cleanup project that must be undertaken. The question is, do you have any insurance coverage to cover the cost? Assuming that you purchased insurance over the years that the tank was leaking, our answer to you is yes, indeed, you do have coverage, at least for some of the years. After about 1985, comprehensive general liability policies have pollution exclusions added to them so there is no longer coverage after 1985. But if the tank is fifty years old that still leaves you with twenty-five years or more of coverage. Under the theory that the contamination moved continuously each year you may be able to make a claim under each year's policy for a part of the damage. We understand that today you must file your claim during the policy period but pre-1985, this was not the case. As long as the damage occurred during the policy period you can still make a claim.

This is the concept and without going into the myriad of details, your company may have insurance to cover the remediation obligations it is facing today and it is sound fiscal responsibility to make sure you take advantage of this source of funding. After all, you bought insurance for a reason – to cover you in case of an occurrence. Let's think about a company and some of its complexities.

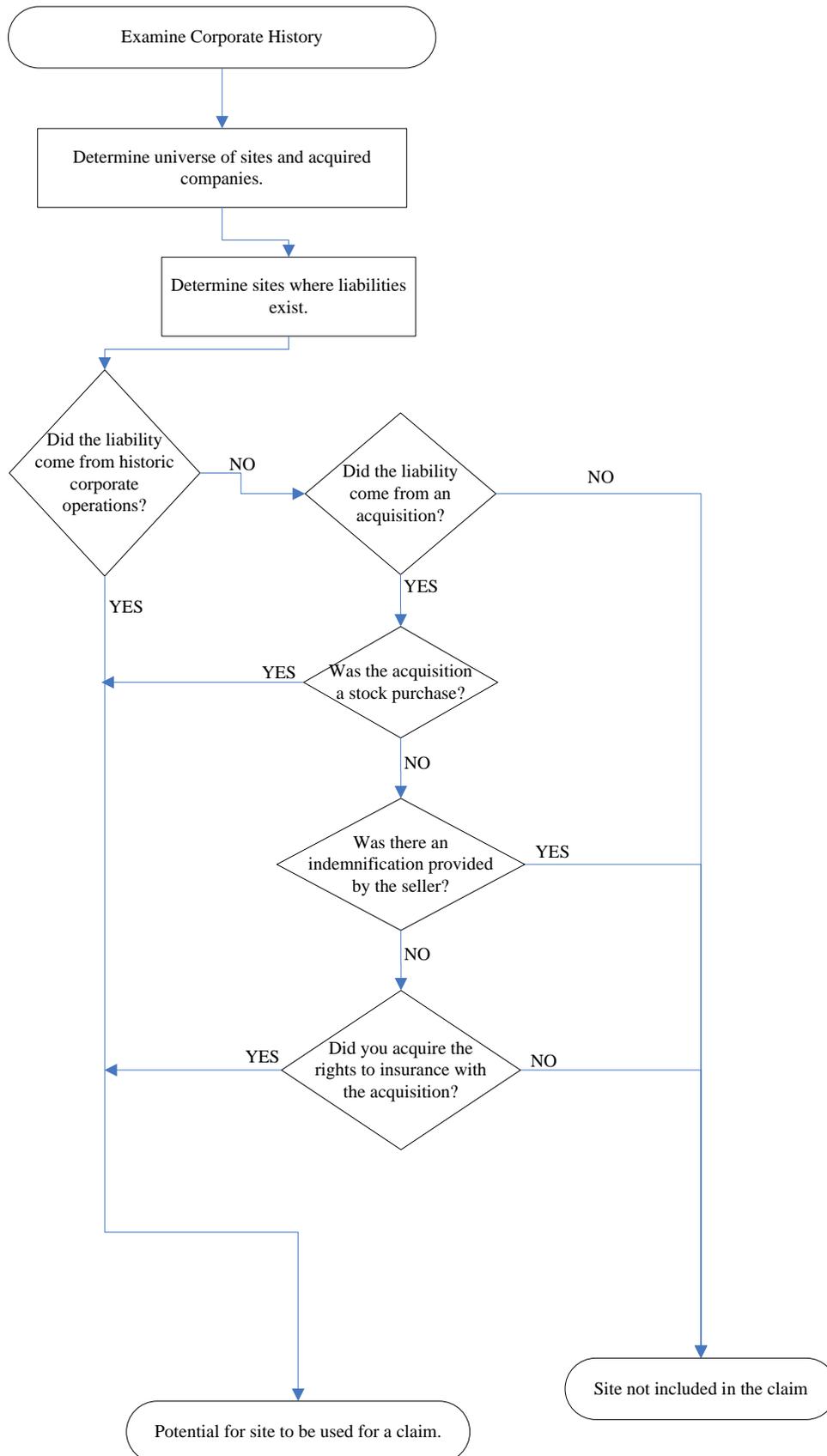
Corporate History (Figure 1)

If your company grew organically then your corporate history may be very straightforward, but if you grew by acquisitions then you may have entities moving in and out of the larger corporate structure and your liability exposures and insured rights get more complicated. Was the acquisition an asset purchase or a stock purchase and in which States are the sites with liabilities located? Did you acquire all or only part of the company or its assets? What is the operating history of the site or sites? What were the years of operations and were there predecessors at the site of the company that was acquired? Each acquisition likely had its own insurance program prior to the acquisition, and what is the likelihood that the insurance records are still intact? If you are like many others, a document purge may have taken place after the acquisition and most of the former entity's records were discarded. This is not always fatal and there are ways to reconstruct the insurance information, but it does require time and effort. By now, you should be beginning to get the picture. There are lots of details. Our goal is to minimize your time input and maximize your return. So long as you are willing to allow us to work on a confidential basis, we would prefer that you provide us access to your internal records and we will do the rest.

Which State a site is located in may impact your claim. Insurance law has developed on a State-by-State basis. This means that there might be very different interpretations of the claim based on its location. One example of this is found in the interpretation of the so-called "qualified pollution exclusion" found in most policies in the 1970's and early 1980's, where the policy language refers to coverage for pollution but only if it is "sudden and accidental." In some

Figure 1

Examining Corporate History Structure



States this means that the pollution had to have been temporally abrupt such as a chemical spill caused by a ruptured railroad tank car. In other States, “sudden and accidental” has been interpreted to mean “unexpected and unintended,” so that a small leak in an underground storage tank over a long period of time might be covered.

Insurance (Figure 2)

Let’s move on and talk about the insurance assets. You may have had the same insurer for the past fifty years but, if so, then you are the exception not the rule. Most companies changed insurers from time-to-time for a variety of reasons. Furthermore, insurance companies themselves have been through many mergers and acquisitions, so that you need to locate who, today, is responsible for the policies issued decades ago. In addition, there has been more carrier insolvency than you might imagine. If a carrier was bought by another you likely still have a potentially valid claim, but if the carrier has gone insolvent chances are you are out of luck, at least for that time period. Different companies may have different policy wording and each carrier has their own personality. It is also true that insurance was bought in layers and the primary layers have deductibles or self-insured retentions. There may be aggregates on your policies or defense clauses and sometimes there are things like retrospective premiums to consider. A medium-sized company operating for, say, fifty years may have purchased two or three layers of insurance of differing amounts over time, and there will likely be gaps in coverage where the carrier is insolvent or the coverage cannot be located. But, ultimately, the question becomes how much should any given policy be required to pay of your overall claim. What is a fair price?

Environmental Liabilities (Figure 3)

Were the environmental liabilities acquired with the company or was some indemnity provided by the seller? All these details must be worked out and assembled to prove to an insurance carrier that insurance coverage is proper for the claim you tender. Do the liabilities exist on your operating sites, or at third party disposal sites or both?

You may have a variety of sites in different stages of evolution. At some, perhaps the remediation has been completed. At others, you may have characterized the site and have some idea what the site costs will be, but these costs have not yet been incurred. At other sites there may have been no environmental issues to-date. It is also possible that you may have divested a site and, although it is completely off your radar screen, there may be some lingering environmental issues that you might be brought back into in the future. As we said, there are lots of pieces to the puzzle. In any event, the site universe is determined and sites are included or excluded in an insurance claim based upon the specific site facts. As needed, we include your future costs in the claim and estimate them based on any available information or upon first principle reasoning from analogous sites.

Figure 2

Examining Historical Insurance Assets

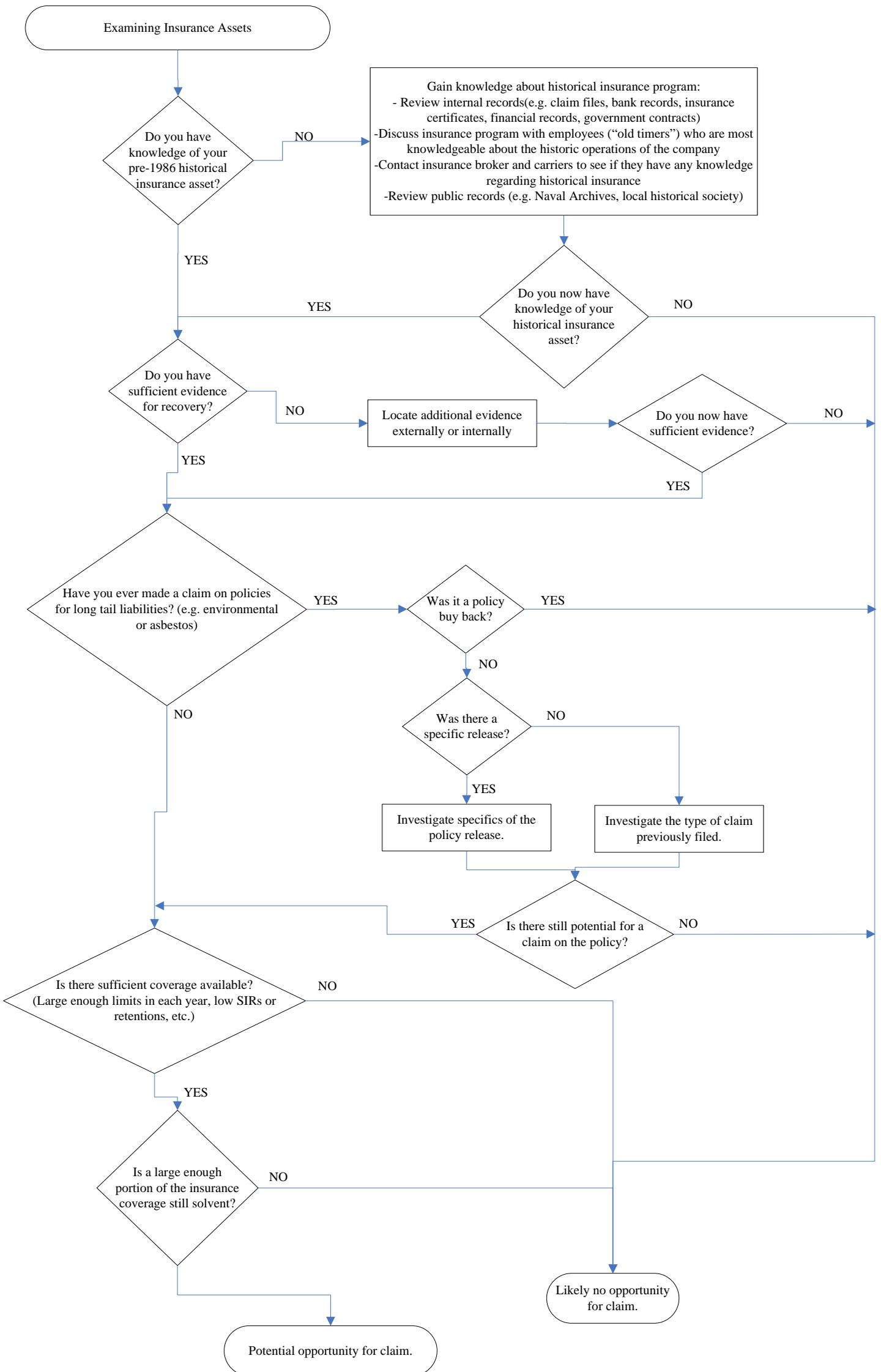
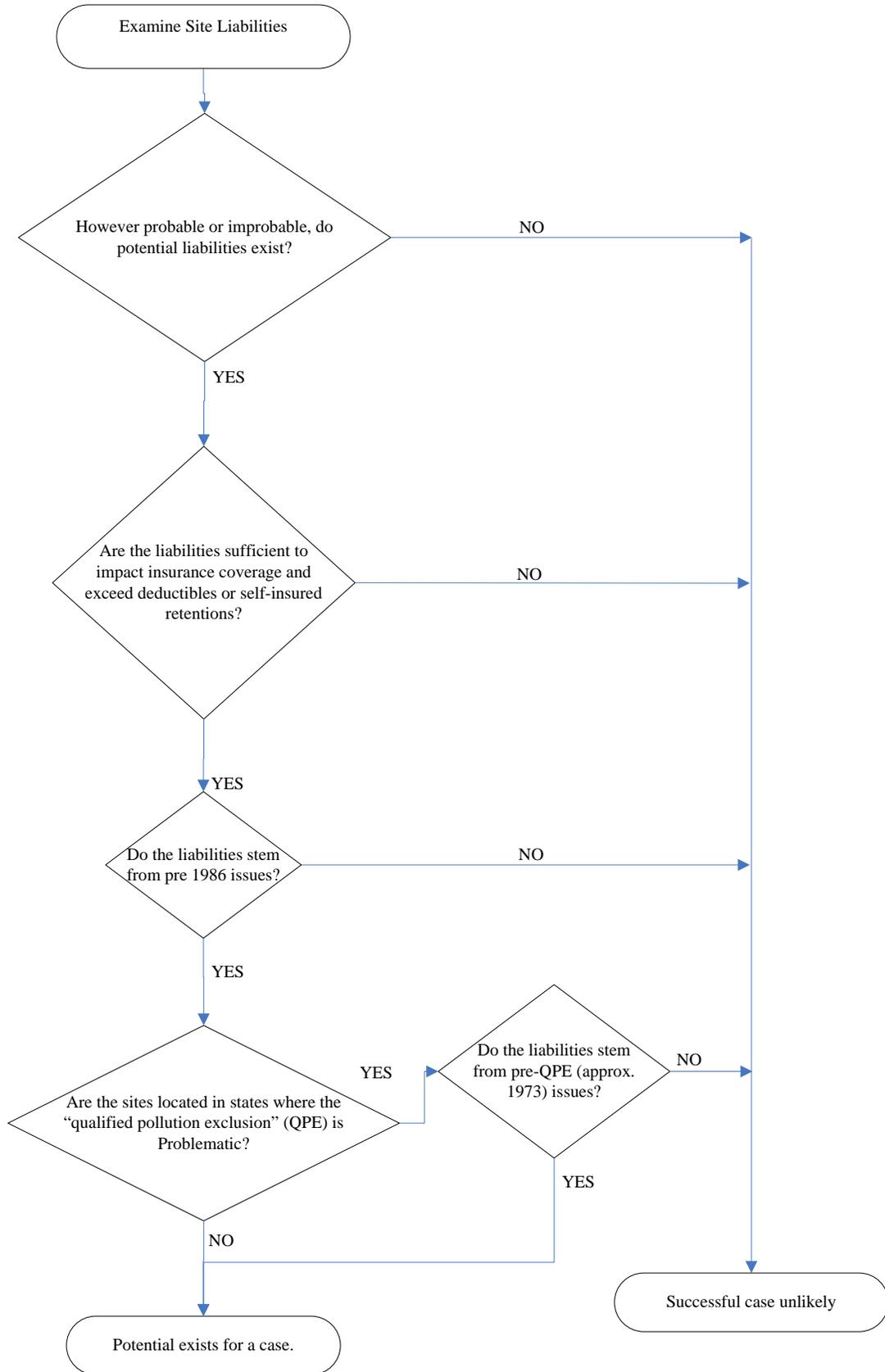


Figure 3

Investigating Environmental Liabilities



Final Thoughts

You may be thinking that you should hold on to your insurance policies until you know more exactly how much your total claim might be. The problem with saving the coverage for a rainy day is that, in the interim, your carriers may go out of business or the insurance law might become less favorable. And finally, keep in mind that a \$100,000 policy often is only worth a certain amount (probably not \$100,000) no matter how large your liability might be. If you can extract the fair value for this old policy now, you should seriously consider doing so or satisfy yourself that there is a good reason not to take advantage of the opportunity. Certainly there are still companies out there who have not done an IR project yet but these are becoming fewer and fewer. Typically, when the client understands the process fully, there is a realization that there are not very many reasons not to pursue a claim.

The purpose of this article is to introduce you to IR, to expose you to the main elements of IR and to get you to think about the specifics of your insurance recovery case. Then, in discussion with you, our goal would be to do triage on your opportunity and estimate the value of any recovery so that you might make an informed decision about the pros and cons of your particular case. It might just be worth millions of dollars.

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