



EXPERT INSIGHT PANEL
**USING ENVIRONMENTAL LIABILITY
TRANSFERS TO RESOLVE CRITICAL
ENVIRONMENTAL ISSUES DURING
COMPLEX BUSINESS TRANSACTIONS**

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USING ENVIRONMENTAL LIABILITY TRANSFERS TO RESOLVE CRITICAL ENVIRONMENTAL ISSUES DURING COMPLEX BUSINESS TRANSACTIONS

Environmental liability transfers (ELTs) can be used as an alternative way to structure complex contaminated property transactions. ELTs are used to eliminate risk and resolve critical issues during mergers and acquisitions, bankruptcies, and other matters related to corporate environmental responsibility. The session, which will include the presentation of various case studies, will illustrate how an ELT can move an environmentally-distressed site out of stagnation, creating a financed pathway to remediation and redevelopment.



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Randall Jostes founded Environmental Liability Transfer, Inc. (ELT) in 2004 and currently serves as its Chief Executive Officer. During his tenure, Mr. Jostes has dramatically improved the landscape of brownfield remediation and redevelopment in North America by successfully assuming over \$1 billion USD in environmental liabilities for its clients. His innovative approach has led to win-win solutions for environmentally-impacted real estate and helped clients navigate the complexities of environmental liabilities. Mr. Jostes has assembled a team of uniquely specialized experts within the fields of environmental law, environmental engineering, environmental insurance, and real estate acquisition & development. By utilizing the talents of in-house professionals and the select use of outside support vendors, Mr. Jostes is able to ensure the delivery of the best possible environmental liability transfer program for ELT's clients.

Prior to becoming CEO of ELT, Mr. Jostes served as Director of Acquisitions for Commercial Development Company Inc. (CDC), an affiliate company of Environmental Liability Transfer, Inc. In this capacity, Mr. Jostes was responsible for the acquisition of over \$111,000,000 USD of industrial properties throughout North America.

Mr. Jostes enjoys public speaking and has provided keynote addresses throughout the nation in the field of environmental liability transference and real estate acquisition.



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AN IN-DEPTH LOOK AT HOW ENVIRONMENTAL LIABILITY TRANSFERS CAN RESCUE TROUBLED MERGER AND ACQUISITION TRANSACTIONS

This article provides an introduction to environmental liability transfers, or ELTs. ELTs can be used to remove environmental liabilities from merger and acquisition transactions by providing both the buy-side and sell-side with robust corporate indemnifications from and against all future environmental liability, Randall Jostes says. The article, the first in a series, introduces ELTs in the M&A context, examines case studies in which ELTs successfully have been used to facilitate transactions, and presents a criteria checklist for use in vetting potential third-party liability transfer firms.

Introduction*

Companies holding environmental liabilities are exposed to far more financial degradation than the estimated cost of the cleanup itself. This is especially true if environmental liabilities become part of a merger and acquisition (M&A) transaction. The mere presence of environmental contamination can produce a virtual quagmire of unquantifiable risk.

Experienced transaction underwriters consider known contamination to be a reliable indicator that unknown issues are nearby. Even known issues that have been well managed are subject to future regulatory reopeners and potential toxic tort claims. Out of an abundance of caution, it isn't uncommon for buy-side underwriters to devalue a targeted company by \$25 million for every \$5 million in environmental liability held on its books. All too often this 5 to 1 environmental devaluation leads to the termination of an otherwise well-crafted M&A transaction.

(a) The Use and Value of Environmental Liability Transfers

Many corporate holders of environmental liabilities are choosing to mitigate these risks through a transaction commonly referred to as an environmental liability transfer (ELT). During an M&A transaction, ELTs are used to remove environmental liabilities from the pending transaction while providing both the buy-side and sell-side with robust corporate indemnifications from and against all future environmental liability.

Under current environmental regulations, remedial obligations are proactive and retroactive — any entity that has held an environmental liability at any time, regardless of their role in the contamination, is considered a potentially responsible party.

It is estimated that \$1.2 trillion worth of environmental liabilities exists upon corporate-owned sites within the U.S. Therefore, M&A activity within the industrial sector will contend with the uncertainty of environmental risk for decades to come. That uncertainty can be removed through the use of ELTs.

A well-structured ELT removes environmental issues that are known, unknown, above grade, at grade, below grade and on- and off-site (originating on-site and naturally migrating off-site), whether the issues occurred or were caused to occur in the past, present or future. In addition, most ELT providers will agree to sign applicable regulatory orders and indemnify transferors from and against potential future regulatory reopeners.

In comparison to the lost opportunity costs of M&A transactions that fail to go through, ELTs provide a relatively inexpensive solution. It isn't uncommon for an ELT to be priced at 50% less than the devaluations proffered by the buy-side underwriters. This is due in large part to the experience of the ELT provider whose sole business model revolves around bringing heavily contaminated sites to regulatory closure in a timely and cost efficient manner.

The following are three case studies that examine the risks environmental liabilities pose to M&A transactions and the benefits ELTs bring to the negotiation table. These transactions were performed by Environmental Liability Transfer Inc. (ELT Inc.), a leading third-party liability assumption firm involved in over \$1 billion USD of environmental liability assumption. Due to the

* This article was written by Randall Jostes, CEO of Environmental Liability Transfer, Inc., a comprehensive environmental liability acquisition company providing its clients complete and final environmental liability transference. More information on Environmental Liability Transfer, Inc. is available at www.eltransfer.com.

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complex nature of mergers & acquisitions, confidentiality has been given to the profiled companies.

(b) Case Study #1: M&A Negotiations Stall Over Portfolio of Contaminated Properties

A European chemical manufacturing company (Buyer) with a market cap exceeding \$4 billion USD sought to acquire a U.S.-based chemical manufacturing company managed by a large U.S.-based venture capital firm (Seller) for a transaction valued over \$200 million USD.

In the last stages of deal negotiations, the European Buyer discovered higher-than-expected levels of environmental contamination at four tracks of real estate formerly operated by the chemical manufacturing company. Located throughout the U.S. Midwest, these sites were impacted by years of chemical manufacturing activities.

Environmental liabilities included: three pre-regulated industrial landfills used to dispose chemical waste, soil and groundwater impacted by chlorinated solvents and other chemical contaminants; vacant and distressed facilities containing asbestos; and other environmental concerns. Additionally, two of the four properties were located in close proximity to residential areas, magnifying the Buyer's level of concern. Overall, environmental liability estimates exceeded \$10 million USD.

The Buyer determined the scale of environmental liabilities and unknown risks in the portfolio represented a risk to the Company that outweighed the benefits of the acquisition.

To save the deal, transaction attorneys for both parties approached Environmental Liability Transfer Inc. and requested that ELT Inc. purchase the contaminated real estate, assume all environmental liabilities, and close within 30 days. ELT Inc. was able to work with both parties to structure a transaction that involved taking fee simple title to the full portfolio of contaminated sites, assuming responsibility for the environmental conditions at the sites, indemnifying the Buyer and Seller from future remedial obligations, and planning steps for remediation and redevelopment.

After the environmental liabilities were removed from the transaction, the negotiations resumed and the acquisition progressed to completion.

Following the liability transfer, ELT Inc. commissioned affiliate company EnviroAnalytics Group (EAG) to commence environmental remediation and bring all sites into full regulatory compliance with state and federal agencies. EAG entered into voluntary and required

remediation services agreements with the respective state environmental agencies and initiated the following remedial activities: significant soil treatment, soil vapor extraction, In Situ soil treatments and aggressive re-grading cap and cover activities. Three out of the four sites have been remediated fully and brought to regulatory closure; one remains active and is in the final stages of closure activities.

(c) Case Study #2: M&A Nearly Collapses as Buyer Learns of Site's Migrating Contaminated Groundwater Plume

A billion-dollar commercial printing company in the U.S. (Buyer) sought to acquire a U.S.-based ink manufacturer (Seller). When the Buyer discovered the scale of the environmental liabilities held by the Seller, negotiations stalled and the transaction was in danger of collapsing.

The Seller owned a 120,000 square foot surplus facility located in Topeka, Kan., that had become an environmental liability. Decades of manufacturing activities resulted in a groundwater plume of chlorinated solvents that had begun migrating off-site, affecting adjacent properties.

Under EPA regulations, the new property owner would be responsible for all associated environmental liabilities — which included the potential for compensating adjacent property owners for migrating contamination and diminution of value. The Buyer made it clear to the Seller that it wasn't willing to take on the environmental risks associated with this property and wouldn't close unless these environmental liabilities were removed.

The Seller reached out to Environmental Liability Transfer Inc. for liability assumption. ELT Inc. purchased the real estate, extended corporate indemnification to the Seller and Buyer, and assumed all environmental liabilities — both on- and off-site.

With the environmental liabilities and contamination migration no longer a concern, the deal progressed to completion.

ELT Inc. then began working with the Kansas Department of Health and Environment and affiliate consultancy vEAG to initiate a plan for containment, remediation and redevelopment of the property. Five years after the transaction, groundwater contamination has been contained and full abatement is expected to be achieved by 2017.



(d) Case Study #3: Potential Buyout Candidate Seeks Liability Transfer to Clean Its Balance Sheet

In preparation to sell their business, a U.S.-based petroleum company (Company) began taking steps to better position itself as a more attractive buyout candidate by removing environmental liabilities from their balance sheet. Not only would this action improve the Company’s valuation, it also would eliminate remedial obligations that would be passed on to a potential buyer.

The Company owned a site totalling over 100 acres site in the U.S. Midwest containing a facility previously used to process and refine crude oil. This facility operated from 1920 through 2003 and subsequently was shuttered for 10 years — resulting in a highly impacted, highly contaminated site restricted from future use.

The cost to remediate the environmental liabilities on this site exceeded the value of the property. As a buyout candidate, the Company wanted to remove all potential barriers that could dissuade a potential buyer.

The Company approached Environmental Liability Transfer Inc. to explore the option of liability transference. ELT Inc. took title to the contaminated site, assumed all associated environmental liabilities and indemnified the Company from future remedial obligations.

Weeks into the liability transfer process, the Company was approached by an interested buyer, a large North American energy infrastructure company. The interested buyer insisted on completion of the liability transfer prior to acquisition. Within 30 days, ELT Inc. acquired the property, assumed the liabilities and indemnified the Buyer and Seller from future remedial obligations — leading to the successful acquisition of the Company.

Following the liability transfer, ELT Inc. again commissioned EAG to commence environmental remediation and bring the site into full compliance with state and federal regulations. EAG entered into a voluntary services agreement with the state environmental agency and commenced a remediation and redevelopment plan.

(e) Checklist for Vetting Liability Transfer Firms

Mergers and acquisitions and environmental liabilities are business elements with high levels of variability and complexity. When combining both into one transaction, a competent environmental liability transfer facilitator is critical to a successful transaction.

While there are many options for liability transference, we suggest vetting potential third-party liability transfer firms under the following criteria:

(1) *Financial Strength*: When choosing an environmental liability assumption firm, the financial stability of that firm is critical to a complete and final transfer of liability. A strong facilitator will provide robust corporate indemnification backed by a fully-funded remedial trust and insurance policy.

Due to the unique nature of an ELT, which assumes obligations for known and unknown environmental liabilities, a competent ELT facilitator will allocate more than sufficient funds for full regulatory compliance. Be cautious of thinly-capitalized LLCs—before proceeding with a transaction, ask your ELT provider to open their financial documents to ensure required financial capacity.

(2) *Transaction Speed*: The terms and conditions of every merger and acquisition are different, but one thing is always valued: transactional speed and efficiency. During M&A transactions, the ability to close a real estate and environmental liability transaction quickly can make or break the deal.

(3) *Track Record*: Due to the complex nature of environmental liabilities, ELT facilitators must demonstrate a track record of success. An adept facilitator must demonstrate the ability to manage the entire process lifecycle and effectively turn environmental liabilities into productive community assets.

(f) Conclusion

These case studies demonstrate the value that ELTs bring when environmental concerns occur during the M&A process — through a fixed-cost solution to highly-variable environmental problems, deal barriers can be removed and environmental risks eliminated.

However, ELTs also have benefited corporations during divestitures, bankruptcies, crises of public perception, improvement of balance sheets and financial disclosures, PRP disputes, and other matters related to corporate environmental sustainability and responsibility. The uses and benefits of an ELT in these situations will be explored in detail in future articles.



AN IN-DEPTH LOOK INTO THE ROLE OF ENVIRONMENTAL LIABILITY TRANSFERS DURING BANKRUPTCIES

This article examines how environmental liability transfers (ELTs) can be used during bankruptcies and other corporate restructuring initiatives to protect interested parties. Chapter 11 bankruptcy doesn't provide a blanket release from environmental obligations, Randall Jostes says. The article, the second in a series examining the uses and applicability of ELTs, demonstrates how an ELT can relieve pressure by assuming non-dischargeable environmental obligations during the bankruptcy process and illustrates the process of using an ELT in a bankruptcy through detailed analysis of multiple case studies.

Introduction*

A corporation striving to exit Chapter 11 bankruptcy with an improved balance sheet may be hindered from doing so if, after they emerge, they retain environmental liabilities, which are considered by North American bankruptcy courts as non-dischargeable environmental obligations.

For post-bankruptcy companies, failure to resolve environmental obligations can be a burden during the recovery phase and an obstruction for new growth. This not only reflects poorly on balance sheet recovery but also creates environmentally contaminated sites stuck in a perpetual condition of stagnation and decay. A properly formed environmental liability transfer (ELT) can benefit corporations, state regulatory agencies and creditors by creating an off-balance sheet pathway to environmental remediation and redevelopment.

ELTs are a fixed-cost solution used as a hedge against unknown environmental risk; a unique financial tool that allows for the legal transference of environmental liabilities from one party to another. By assuming non-dischargeable environmental obligations during bankruptcy, an ELT effectively removes a debtor's designation as a potentially responsible party (PRP) and guarantees site remediation with a remedial trust, allowing corporations to emerge from Chapter 11 bankruptcy with a healthier balance sheet void of legacy environmental liabilities.

An ELT during bankruptcy often utilizes a sale-leaseback option to maintain operations. For a more in-depth look at ELTs, please reference the first article in this ELT series, found at EDDG 231:2631.

(a) The Adverse Consequences to Public Institutions During Corporate Bankruptcy

It is estimated that \$300 million of environmental liabilities are involved in corporate bankruptcy hearings annually in the United States, much of which leads to orphaned contaminated sites with little or no funding to remediate the contamination. Often located in highly-populated areas, the true impact of environmental liabilities in corporate bankruptcy can be felt for decades.

In a typical corporate bankruptcy, the judge recognizes stakeholders as those to whom financial recompense is obligated — lenders, creditors, vendors and other entities owed money by the bankrupted company. However, when an environmental liability is involved in the bankruptcy, this approach neglects to recognize another group of stakeholders that share in the impact — the public sector.

Following a bankruptcy, state and federal environmental regulators are burdened with the task of cleaning orphaned, contaminated properties without the funding necessary to complete the remediation. This has resulted in shuttered industrial facilities in a perpetual state of deterioration often resulting in an on-going risk to the environment.

Compounding the problem, these sites generate little or no tax revenue, depress real estate values and can pose a serious threat to human health and safety. However, certain bankruptcy judges now have begun recognizing the rights of the public sector to stake their claim to

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financial restitution along with traditional creditors when environmental contamination is involved.

In this situation, an ELT can be used to assume environmental liabilities on behalf of the state. Through an ELT, a private company will sign regulatory consent orders and legally become the new responsible party, assuming the environmental obligation to remediate the site to regulatory standards. A remedial trust, which is established and funded during bankruptcy, names the state as the sole beneficiary. If the remediation costs exceed the allocated funds in the remedial trust, the obligation falls to the new responsible party.

Through this unique public/private financing solution, an ELT will initiate a remediation and redevelopment plan that benefits the public sector. These redevelopment projects generate previously lost tax revenue for municipalities, eliminate blight, bring the prospect of new jobs to the local economy and benefit public health by removing environmental contaminants and safety hazards.

Additionally, ELTs can play a critical role in multi-state remedial trust dispute resolution, which is discussed in Case Study #1 later in this article.

(b) How ELTs Benefit Corporations During Bankruptcy

Corporations with a high exposure to environmental liabilities face an increased risk of default as they seek to emerge from Chapter 11 bankruptcy and reestablish operations. Environmental liabilities can be transferred during bankruptcy with the use of an ELT. An ELT will ensure a new responsible party is established and guarantee no environmental clawbacks by environmental regulators. The transference of responsibility is issued by the bankruptcy judge and is a legal transfer of remedial obligations going forward.

This provides an opportunity for corporations to emerge from Chapter 11 bankruptcy with a healthier balance sheet and more accurate allocation of capital to reestablish operations void of environmental baggage.

(c) Case Studies

(1) ASARCO (American Smelting & Refining Company)

In 2009, Environmental Liability Transfer, Inc. (ELT, Inc.) played a critical role in the Chapter 11 bankruptcy reorganization of ASARCO (American Smelting and Refining Company, LLC) and the subsequent redevelopment of environmentally contaminated sites in Perth Amboy, N.J., and Houston, Texas.

ASARCO was a leading producer of copper and one of the largest nonferrous metal producers in the world. Based in Arizona, the company was responsible for manufacturing sites around the country, some of which experienced contamination due to hazardous waste as a byproduct of operations, a common occurrence within the metals manufacturing industry.

Due to the high level of environmental stress that took place at ASARCO's metal manufacturing sites, when the company declared bankruptcy in 2009, it was the largest environmental bankruptcy in U.S. history.

A federal judge ordered \$1.79 billion to be paid into a multi-state remedial trust funded by the assets of the bankrupted ASARCO. The funds would be used collectively by 19 states to pay for past and future costs incurred by federal and state agencies at more than 80 sites impacted by ASARCO's past operations.

Two states weren't pleased with the proposed solution. Texas and New Jersey both realized the danger of a multi-state trust and feared a depletion and/or unfair allocation of remedial funds. Neither would comply with a solution that would put remediation and redevelopment in their states at risk. A solution was needed for the bankruptcy to progress.

ELT, Inc. was brought in to become a surrogate responsible party. ELT, Inc. signed regulatory consent orders and agreed to operate with funds exclusively dedicated to each state. ELT, Inc. became the new legally responsible party and assumed environmental obligations to remediate the sites to each state's regulatory standards. Additionally, ELT, Inc. agreed to be responsible to continue cleanup if the remedial funds proved insufficient.

As a condition of the agreement, ELT, Inc. agreed to purchase the real estate and permanently indemnified ASARCO against specified legacy environmental liabilities associated with the sites — including known and unknown, above grade, at grade and below grade, whether the issues occurred in the past, present or future.

As a condition of the assumption of environmental liabilities, ELT, Inc. entered into and signed a consent order with the New Jersey Department of Environmental Protection (NJDEP) and Texas Commission of Environmental Quality (TCEQ), which positioned ELT, Inc. as the new responsible party at each site. The NJDEP and TCEQ then were able to grant settlement agreements to ASARCO, permanently releasing them from legacy environmental liabilities at the sites.



Finally, the proceeds from the sale of the real estate and immediate release from the ongoing costs associated with environmental liabilities inured to the benefit of ASARCO's Creditors Committee.

With ASARCO, the regulators (NJDEP & TCEQ) and Creditors Committee now satisfied, the bankruptcy judge approved the agreement and the bankruptcy progressed to completion.

As a condition of the transaction in New Jersey, ELT, Inc. was required to obtain a cost cap policy with limits up to \$12.8 million. ELT, Inc. also was required by the NJDEP to meet a financial assurance obligation of \$8 million.

Since acquiring the sites in 2009, ELT, Inc. has been working with affiliate company EnviroAnalytics Group LLC (EAG) to bring the sites to state regulatory standards and prepare the sites for vertical development.

The Texas site required groundwater and soil decontamination of radiological matter — all remedial objectives have been met and the site now is undergoing environmental monitoring activities. Today, the site is occupied by a large import/export storage company.

At the New Jersey site, pre-development environmental remediation activities are ongoing and include soil treatment and excavation, asbestos abatement, demolition of existing structures, construction of a groundwater treatment system and other remedial measures.

During a March 2015 ceremony to kick-off the demolition stage of the New Jersey site, Perth Amboy mayor Wilda Diaz said the following about ELT, Inc.'s private financing of the project: "For several decades, [the site] has been plagued with hundreds of acres of environmentally challenged sites, but today is a new day in Perth Amboy. The creation of local job opportunities and the realization of new ratables are the primary goals of establishing a sustainable project that will carry Perth Amboy into a successful future."

Commercial Development Company, Inc. (CDC), another ELT, Inc. affiliate, has developed plans to reposition and redevelop the Texas and New Jersey sites to maximize their waterfront and logistical attributes. Vertical redevelopment plans for the sites are underway and include the construction of multiple industrial and mixed-use buildings. CDC is scheduled to break ground in 2017.

(2) Sparrows Point

In 1889, steel operations began at Sparrows Point, a 3,100 acre waterfront site in Baltimore County, Md. By the mid-20th century, Sparrows Point was home to the

world's largest steel mill — Bethlehem Steel, producing 600,000 tons of steel per year and employing 32,000 workers at its peak.

Steel production at Sparrows Point has a rich history, having played a critical role in war production during World War I and World War II, and manufacturing steel for the Golden Gate Bridge and George Washington Bridge. The site also holds deep sentimental value for families in Baltimore and surrounding areas, as the mill employed hundreds of thousands of workers throughout the years.

But in 2012, steel production came to a grinding halt as poor market conditions forced RG Steel — the current operator at that time — to stop production and close the doors. The economic impact of the shutdown included the loss of 2,000 jobs and created a massive, blighted urban area generating very low tax revenue and no jobs.

Compounding local frustrations were the legacy environmental problems from over 125 years of steel manufacturing. In bankruptcy court documents, Baltimore County attorneys called Sparrows Point "the most complex environmental cleanup site in the Chesapeake Bay watershed." What was once a robust economic engine for the northeast United States was at risk of becoming the largest brownfield site in American history.

A year after closing the doors at Sparrows Point, RG Steel filed for bankruptcy. Initially, RG Steel sought a buyer that would use the existing infrastructure to continue steel production. When no such bids were offered, Sparrows Point was at further risk of prolonged blight and decay.

ELT, Inc. and liquidator Hilco Trading then agreed to purchase the site for \$72.5 million from the bankruptcy estate.

As a condition of the sale, ELT, Inc. agreed with federal and state regulators to assume specified legacy environmental liabilities associated with the site. As a condition of the assumption of environmental liabilities, Sparrows Point, LLC (ELT, Inc.'s acquiring affiliate) entered into and signed consent orders with the U.S. Environmental Protection Agency and Maryland Department of the Environment making Sparrows Point, LLC the new responsible party. Sparrows Point, LLC then placed \$48 million into a remedial trust to serve as financial assurance for the remedial work ahead.

Following the transaction, ELT, Inc. commissioned EAG to assist in the large-scale environmental remediation of the site's legacy contamination, including the treatment

of oil and groundwater impacted by 125 years of steel making and finishing operations.

EAG currently is working to reopen distinct areas of the site in accordance with the regulatory standards set by the Maryland Department of the Environment and EPA Region 3. EAG is on track to comply with the agreed time lines and preparing the site for large-scale vertical development. Ongoing remedial activities include groundwater capture and treatment, in situ soil treatments, groundwater studies, vapor intrusion studies, multiple landfill closures and continual environmental and risk assessments.

Sparrows Point now is on a pathway toward redevelopment. Poor market conditions in the steel industry resulted in an unused, contaminated area in Baltimore — a temporary recession for the local community. Today, with an ELT, the potential economic benefit could be even greater than before.

Following the ELT, Inc. purchase of Sparrows Point, the Baltimore Sun published the following in an article entitled *Hope for Sparrows Point*: “Nearly one year after RG Steel filed for bankruptcy, the outlook for the 3,300-acre property is significantly brighter. The potential for redevelopment could yield as many as 10,000 jobs within 10–15 years as new businesses — particularly those related to the Port of Baltimore — take the place of steelmaking.”

(3) General Motors

In 2011, ELT, Inc. played an important role in the Chapter 11 bankruptcy reorganization of General Motors and subsequent redevelopment of an environmentally distressed former automotive manufacturing plant. Located on 72 acres in West Mifflin, Pa., General Motors occupied this 1,000,000 sq. ft. former stamping plant for 60 years.

Following decades of heavy manufacturing, the facility sat unused for three years, which resulted in a deteriorating facility filled with a host of growing environmental problems. For General Motors, this site was designated as an environmental liability and posed a dual threat to their balance sheet and the health of the local community.

Redevelopment of this former stamping plant was a significant challenge due to antiquated site improvements and a variety and high degree of environmental contamination, primarily petroleum hydrocarbons, chlorinated solvents and polychlorinated biphenyls.

During General Motor's bankruptcy in 2011, ELT, Inc. agreed to purchase the real estate, buildings, facilities and environmental liabilities. As a condition of the sale, ELT, Inc. agreed to assume and permanently indemnify GM from all environmental responsibilities involving the affected property, including known and unknown, above and below grade, and on- and off-site contaminants.

This transaction required approvals from the United States Treasury, Pennsylvania Department of Environmental Protection (PADEP) and Federal Bankruptcy Court. As a condition of the assumption of environmental liabilities, ELT, Inc. then entered into and signed a consent order with the PADEP naming ELT, Inc. as the new responsible party. The PADEP then was able to grant a settlement agreement to GM, permanently releasing them from legacy environmental liabilities at the site.

A required component of the work at this site was to obtain regulatory closure of the site from the PADEP's Land Recycling and Environmental Remediation Standards Act (Act 2 Program).

EAG then began remediation efforts, which included abatement of asbestos and other hazardous materials; demolition of existing structures and recycling of 100,000 tons of steel; post-demolition backfilling with local, clean materials; and the beneficial reuse of appropriate demolition materials, in-situ soil treatments, groundwater studies, environmental site assessments, risk assessments and environmental monitoring. Working with the PADEP, EAG completed the remediation according to the PADEP Act 2 voluntary cleanup program.

By transferring GM's environmental liabilities out of bankruptcy court in 2011, ELT, Inc. was the catalyst this environmentally distressed facility needed to progress out of blight and into environmental remediation. Today, this property is fully remediated and occupied by Pull-A-Part, a supermarket for refurbished automotive parts. With 20 locations in 13 states, Pull-A-Part is a stable company currently employing around 25 employees at this West Mifflin facility.

Shortly after Pull-A-Part announced it would be locating to this property, the mayor of West Mifflin said: “We are extremely gratified that Pull-A-Part has chosen a brown-field site to redevelop and put into commerce, making a multi-million dollar investment and creating good jobs for our community.”



(d) Conclusion

We have found that an environmental liability will remain in a perpetual state of decay until engaged by an outside catalyst. During corporate bankruptcies, ELTs often are the spark that starts the redevelopment process of blighted areas by providing a fresh infusion of capital and new vision for redevelopment.

ELTs not only benefit the bankrupted corporation but also regulators, municipalities and local communities.

An ELT will ensure a new responsible party is established and guarantee no environmental clawbacks by environmental regulators. This provides an opportunity for corporations to emerge from Chapter 11 bankruptcy with a healthier balance sheet and more accurate allocation of capital to reestablish operations void of environmental baggage.

ELTs can be used to assume environmental liabilities on behalf of the state, signing regulatory consent orders and designating a new responsible party. This relieves

the burden of state and federal environmental regulators tasked with cleaning orphaned properties without the necessary funding to complete the remediation.

Shuttered industrial facilities have been known to sit and deteriorate for decades. For cities and municipalities, this represents lost tax revenue and the potential for the industrial blight to creep. ELTs bring expedited recovery.

Capital-infused redevelopment projects attract new development and put blighted properties back on the tax rolls.

The true impact of unaddressed environmental liabilities during corporate bankruptcy trickles all the way down to local residents — depressed real estate prices, environmental contamination and health and safety concerns. ELT redevelopment projects provide a cleaner local environment and the prospect of new jobs for local economies.



AN IN-DEPTH LOOK INTO THE ROLE OF ENVIRONMENTAL LIABILITY TRANSFERS DURING CORPORATE DIVESTITURES

This article examines how environmental liability transfers (ELTs) can be used during corporate divestitures to protect interested parties. Thousands of acres of environmentally-contaminated land and facilities are being divested, Randall Jostes says in this article, the third in a series examining the uses and applicability of ELTs, which demonstrates how an ELT can relieve pressure by assuming non-dischargeable environmental obligations during the corporate divestiture process and illustrates the process of using an ELT in a divestiture through detailed analysis of a case study involving Shell Global.

Introduction*

The pace of change in market conditions today is happening at unprecedented levels. New industrial technologies and cleaner energy solutions are forcing well-established corporations and traditional energy providers to pivot to accommodate new market realities and demands. The shift to cleaner and more-efficient solutions is a good thing, but the transition is leaving behind thousands of acres of environmentally-contaminated land and facilities severely impacted by decades of operations. These environmental liabilities are typically found in oil refineries, coal-fired power plants, steel mills, chemical plants, and similar industries.

The EPA classifies these sites as “brownfields” and defines a brownfield as “a property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” Today the EPA estimates over 450,000 brownfield sites in the United States alone. Not only are these sites a blight to their communities and restricted from future use by the EPA, they are often located close to highly-populated areas, posing a threat to human health and safety.

Decades ago, the generally-accepted corporate strategy to resolve environmental issues was to install a fence around the contamination and forget about it. Today, most C-suites reject this course of action, and realize environmental contamination is a time-sensitive issue — ignoring it only makes the problem worse.

(a) A Dual Threat

The negative impact that brownfield sites have on corporations should not be underestimated. Unresolved environmental issues pose a dual threat to the corporate property holder: a threat to corporate growth potential and a threat to public health and safety.

For companies facing environmental risks, failure to resolve regulatory obligations can be a burden to new growth today and can represent the potential for environmental crises in the future. From a financial reporting perspective, the presence of unresolved environmental issues poses an unknown risk to corporate balance sheets. Risk-averse boardrooms and investors are increasingly favorable towards resolving environmental issues before they result in major financial liabilities and potentially massive environmental damages.

Recent global environmental crises shine a spotlight on the extent of damages environmental issues can cause to human health and safety. When a threat to public health and safety is exposed, the onus is on the property holder — legally and morally — to address and resolve the matter as expeditiously as possible. Environmental crises also cause immediate and often irreparable damages to public perception and brand equity. A comprehensible and sustainable divestiture of known and unknown environmental risks can be achieved, however some methods are more effective than others.

(b) Ineffective Ways to Divest Environmental Risk

(1) Creating Subsidiaries to Offload Environmental Liabilities

Creating subsidiaries to offload environmental liabilities does not work and is increasingly frowned upon by shareholders and the general public. While this practice

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is still commonplace, the long-term viability of these reorganizations is to be determined. This solution does not provide a true walk away solution, since the parent company is still responsible for environmental obligations should the subsidiary default. Investors are looking for corporations with limited or no exposure to environmental risk, and many believe shifting environmental obligations to a subsidiary is not the responsible way to resolve environmental issues.

(2) Traditional Remediation Services

In an effort to mitigate environmental risk exposure, many corporations choose a traditional “time and materials” remediation. Depending on the extent of the environmental problem, this can be a viable solution. However, “time and materials” services do not address unknown environmental liabilities and therefore do not represent a true elimination of environmental risk. Additionally, these billing methods often lead to protracted clean-up schedules and an overall increase in cost.

(c) The Effective Solution: Environmental Liability Transfers

Proactive corporations are lowering their environmental risk exposure by divesting environmental liabilities through a strategy known as environmental liability transfers (ELTs). ELTs are unique transactions that allow a corporation to shed environmental risk while jump-starting the remediation and redevelopment of the site through the private sector. (For a more in-depth look at ELTs, please reference the first and second articles in this ELT Series.)

An ELT combines the value of real estate and environmental liability, then transfers the environmental risk (including all future regulatory obligations) to an ELT provider. By assuming the environmental risk on behalf of a corporation, an ELT provider effectively removes an environmental risk and guarantees site remediation with a fully-funded remedial trust.

The ELT divestiture strategy addresses both threats to the corporate property holder: corporate growth potential and public health and safety. Transferring environmental risk to an ELT provider removes the liability from a company’s balance sheet, indemnifies all potentially responsible parties (PRPs), and secures environmental clean-up with a fully-funded trust.

A growing number of companies are shifting their environmental liabilities to outside parties. By transferring environmental risk to an outside party, ELTs provide a complete and sustainable “walk-away” option for companies seeking to divest legacy environmental

liabilities. For example, an ELT often utilizes during divestiture a sale-leaseback option to maintain operations.

If the transaction is properly executed, this can be a win-win solution for corporate balance sheets and global sustainability. At Environmental Liability Transfer, Inc., we have found the demand for these types of transactions has increased in relation to the shift from old energy to new energy.

(d) Benefits to Divesting Environmental Liabilities

(1) Resolving Hazardous Byproducts of Past Operations

A properly-formed ELT provides a financed pathway for carbon-intensive corporations to guarantee the complete and final restoration of contaminated real estate and eliminate any environmental impacts that may have been caused as a byproduct of past operations. By absorbing the risk on behalf of the property holder, an ELT is often the catalyst needed to jumpstart environmental clean-up.

(2) Sustainability Compliance

The potential expansion of global sustainability standards reporting took a big step forward during the COP21 conference in Paris in 2015. ELTs provide a way for carbon-intensive sectors to adhere to, and prepare for, what most foresee as an inevitable expansion of transparency in sustainability reporting.

(3) Increase in Overall Valuation and Share Price

Clients of Environmental Liability Transfer, Inc. have seen immediate and positive impacts from divesting environmental liabilities. One publicly-traded client reported that the transfer of environmental liabilities resulted in improved investor sentiment and an immediate 17% elevation in stock price. While these results are not guaranteed, and vary based on size and scope of company, unlocked capital and upgraded balance sheets win the approval of all company stakeholders and can improve the overall value of a company.

(4) Guaranteed Fixed Cost Solution

Environmental risk poses an inherently variable-cost problem. An ELT provider will underwrite and quantify the value of the risk and provide a complete and sustainable “walk-away” solution. When transferring environmental liabilities and remedial obligations, an ELT provider funds a mutually agreed upon environmental trust, a fixed-cost solution that guarantees the distressed sites will be fully restored. Any cost overruns are the responsibility of the ELT provider.



(5) Community Benefits

The ELT divestiture strategy also creates a financed pathway to repurpose the property after environmental clean-up is complete, often leading to an increase in local tax revenue, the elimination of industrial blight, the prospect of more local jobs, and a healthier and safer legacy when an established company leaves a community.

(e) Case Study: Shell Global

(1) Environmental Challenge

After decades of Canadian oil refining, Shell Global found themselves holding 135 environmentally distressed properties throughout Canada. These environmental liabilities consisted of former distribution centers for bulk petroleum products, oil transfer and refining facilities, and other sites impacted by years of petroleum-related business activities. Operations on these sites had ceased, leaving behind a large portfolio of shuttered sites impacted by petro-hydrocarbons.

Shell determined that managing contaminated real estate was outside their core business and decided to seek alternative options.

(2) Environmental Risk Assumption and Real Estate Purchase

Shell began searching for a way to divest these contaminated sites and transfer their environmental liabilities, while at the same time receiving fair compensation for the real estate. Additionally, due to their role in the contamination, Shell wanted to guarantee complete and final restoration, and eliminate any environmental impacts that may have been caused as a byproduct of their operations.

Shell approached Environmental Liability Transfer, Inc. (ELT) for a liability transfer solution. ELT was able to completely indemnify Shell of the contaminated properties. By transferring environmental liabilities and remedial obligations to ELT, Shell was able to receive corporate indemnification, guarantee that these distressed sites were restored, and reallocate capital and manpower to core operations.

The transaction enabled Shell the ability to divest non-core, contaminated real estate, transfer the environmental liabilities to a third party, and guarantee clean-up of the environmental conditions.

(3) Environmental Remediation

ELT then tasked their affiliate company, EnviroAnalytics Group, LLC (EAG), with the responsibility of cleaning these properties and bringing them into full compliance with Canada's Ministry of the Environment. EAG entered into a remediation services agreement with Shell Global to address the contamination in accordance with Shell's and the Canadian Ministry of the Environment's requirements, which will allow for full remediation and reintegration of these sites back into productive use.

(4) Sustainable Redevelopment

Remedial work has been prioritized to facilitate the reuse/resale of this portfolio. Commercial Development Company, Inc. is currently performing land studies and market assessments to determine the highest and best use for these sites going forward, which could include a variety of vertical development purposes including light-industrial, commercial, and mixed-use.

(5) Results

By transferring environmental liabilities and remedial obligations to ELT, Shell was able to receive corporate indemnification, guarantee that these distressed sites were restored, and reallocate capital and manpower to core operations.

(f) Conclusion

Many factors are forcing the hand of corporations to effectively resolve or divest environmental liabilities: new environmental regulations, balance sheet strains, pressure from activist investors, internal sustainability initiatives, and more. Stakeholders now realize that ignoring environmental problems can have serious and detrimental effects on a corporation.

Unresolved environmental issues impact corporate growth potential, as well as public health and safety. The ELT divestiture strategy tackles both issues. Transferring environmental risk to an ELT provider removes the liability from corporate balance sheets and secures environmental remediation with a fully-funded trust. This provides the spark needed to transform a brownfield property out of blight and return it to productive use.

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