ELT WHITE PAPER

What Every Bankruptcy Advisor Should Know About Environmental Liabilities

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An In-Depth Look at Environmental Liability Transfers (ELTs) During Bankruptcies

A corporation striving to exit Chapter 11 bankruptcy with an improved balance sheet, may be hindered from doing so if they retain environmental liabilities after they emerge, 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 unique financial tool that allows for the legal transference of environmental liabilities from one party to another."

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 PRP (potentially responsible party) 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 times 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.

The Adverse Consequences to Public Institutions during Corporate Bankruptcy

It is estimated that $300 million USD of environmental liabilities are involved 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,

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creditors, vendors, and other entities that are 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 necessary funding to complete the remediation. This has resulted in shuttered industrial facilities in a perpetual state of deterioration often times 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 have now begun recognizing the rights of the public sector to stake their claim to 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, and assume 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.

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 that a new Responsible Party is established and guarantees 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 a more accurate allocation of capital to reestablish operations void of environmental baggage.

Case Study #1: ASARCO Bankruptcy Stalls Over Multi-State Remedial Trust Dispute

1

In 2009, Environmental Liability Transfer, Inc. (ELT) 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, NJ and Houston, TX.

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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, at that time.

A federal judge ordered $1.79 billion USD 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 ASARO's past operations.

Two states were not 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.

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

As a condition of the agreement, ELT 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, below grade, whether the issues occurred in the past, present, or future.

As a condition of the assumption of environmental liabilities, ELT entered into and signed a consent order with the New Jersey Department of Environmental Protection (NJDEP) and the Texas Commission of Environmental Quality (TCEQ), which positioned ELT as the new Responsible Party at each site. NJDEP and TCEQ were then 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 the 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 the 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 was required to obtain a cost cap policy with limits up to $12,800,000 USD. ELT was also required by NJDEP to meet a Financial Assurance obligation of $8 million USD.

Since acquiring the sites in 2009, ELT 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 required decontamination of radiological matter – all remedial objectives have been met and the site in now undergoing environmental

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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.

In March 2015, during a ceremony to kick-off the demolition stage of the New Jersey site, Perth Amboy Mayor Wilda Diaz said the following about ELT's private financing of the project:

"For several decades, outer State Street (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 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

Case Study #2: RG Steel Bankruptcy & the 3,100 Acre Brownfield Site at 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 the 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 frustration, 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. However, when no such bids were offered, Sparrows Point was at further risk of prolonged blight and decay.
Environmental Liability Transfer, Inc. (ELT) and liquidator Hilco Trading, then agreed to purchase the site for $72.5 million USD from the bankruptcy estate. As a condition of the

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sale, ELT 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's acquiring affiliate) entered into and signed Consent Orders with the United States Environmental Protection Agency (US EPA) and Maryland Department of the Environmental (MDE), which made Sparrows Point, LLC the new Responsible Party. Sparrows Point, LLC then placed $48 million USD into a remedial trust to serve as financial assurance for the remedial work ahead.

Following the transaction, ELT commissioned EnviroAnalytics Group LLC (EAG) to assist in the large-scale environmental remediation of the site's legacy contamination which includes the treatment of oil and groundwater impacted by 125 years of steel making and finishing operations.

EAG is currently working to reopen distinct areas of the site in accordance with the regulatory standards set by the Maryland Department of the Environment (MDE) and EPA Region 3. EAG is on track to comply with the agreed timelines, and is 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 is now on a pathway towards 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 greater than before.

Following the ELT 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".

Case Study #3: General Motors Resolves Environmental Liabilities During Bankruptcy

3

In 2011, Environmental Liability Transfer, Inc. (ELT) played an important role in the Chapter 11 bankruptcy reorganization of General Motors and the subsequent redevelopment of an environmentally-distressed former automotive manufacturing plant located in West Mifflin, PA.

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 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 (PCBs).

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During General Motor's bankruptcy in 2011, ELT agreed to purchase the real estate, buildings, facilities, and environmental liabilities. As a condition of the sale, ELT agreed to assume, and permanently indemnify GM from all environmental responsibilities involving the affected property, including known and unknown, above and below grade, and onsite and offsite 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 then entered into and signed a Consent Order with the Pennsylvania Department of Environmental Protection (PADEP), which positioned ELT as the new Responsible Party. PADEP was then 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 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 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 was the catalyst this environmentally-distressed 1,000,000 sq/ft 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 brownfield site to redevelop and put into commerce, making a multi-million dollar investment and creating good jobs for our community."

Catalyst for Redevelopment

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 a new vision for the redevelopment.

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

Benefits to Corporations

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

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Benefits to Regulators

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.

Benefits to Municipalities

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.

Benefits to Local Communities

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.

About the Author

Randall Jostes founded Environmental Liability Transfer, Inc. (ELT) in 2004 and currently serves as its Chief Executive Officer. Over the past decade, Mr. Jostes has greatly improved the landscape of brownfield remediation and redevelopment in North America by successfully assuming and repositioning over $1 billion USD in environmental liabilities. His innovative approach has led to win-win solutions for environmentally-impacted real estate, helping clients navigate the complexities of environmental liabilities and improve their bottom line.

About Environmental Liability Transfer, Inc. (ELT)

Environmental Liability Transfer, Inc. (ELT) is a comprehensive environmental liability acquisition company providing its clients complete and final environmental liability transference services. With robust financial backing and a unique blend of expertise – real estate, environmental, legal, and insurance – ELT has successfully assumed over $1 billion USD in corporate environmental liability for its clients throughout North America.

ENVIRONMENTAL LIABILITY TRANSFER

Contact ELT

For a confidential discussion regarding your environmental liabilities or to learn more about the ELT option, please contact us.

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