

JUDICIAL RECONSTRUCTION OF MISSING INSURANCE POLICIES

(Part 5 of 6 – Proving Renewal Policy Language of Missing Insurance Policies)

by Douglas L. Talley, J.D.
September 2011

This article was first published on IRMI.com and is reproduced with permission.

This series outlines how a party in a court of law may reconstruct missing insurance policies that have not been located through traditional methods of insurance archaeology. This fifth of six articles identifies some of the important insuring language of standard policy forms and how it may be used to reconstruct missing coverage for multiple policy years. Previous articles dealt with [basic legal concepts](#), [secondary evidence](#), [expert witness testimony](#), and [proving standard policy language](#).

As stated in a previous article, stock insurance companies have utilized standard contract wordings for comprehensive /commercial general liability (CGL) coverage over the past 60 years as drafted for the insurance industry, first by the National Bureau of Casualty Underwriters (NBCU); after January 2, 1968, by its successor, the Insurance Rating Board; and as of April 1, 1971, by its successor, the Insurance Services Office, Inc. (ISO). Essentially the same standard contract wordings were drafted for mutual insurance companies, first by the American Mutual Insurance Alliance from 1935 to 1968, then, after reorganization and name change, by the Mutual Insurance Rating Bureau and, as of 1971, by ISO as its successor.

CGL Policy Language

The first standard CGL insurance policy form was issued in 1941, and ISO and its predecessors issued revised forms in 1943, 1947, 1955, 1966, 1973, 1986, 1988, 1990, and 1993.¹ Because these standard CGL forms generally did not permit alteration to the insuring agreement language of the forms, the only option an insurer had to alter such an insuring agreement was to omit it altogether or to provide an endorsement approved by a supervising state authority. Accordingly, if secondary evidence of a missing CGL policy issued on a standard form indicates that such policy provided bodily injury coverage or property damage coverage, then the insuring agreements for that policy would typically have been the standard language provided on the CGL insurance form and approved by the state regulators.

This principle was affirmed in the case *Century Indem. Co. v. Aero-Motive Mfg. Co.*, 254 F. Supp. 2d 670 (W.D. Mich. 2003), where the court noted that a member or subscriber of the NBCU "was required to use NBCU CGL forms unless it applied for and received approval to deviate from those forms" (emphasis added).

In earlier years, the basic CGL policy form was unchanged for significant periods of time. The so-called accident form was

utilized for 11 years between 1955 and 1966. The "occurrence" form, introduced in 1966, was used for the next 7 years until 1973. And when the "sudden and accidental" pollution exclusion was introduced as a standard feature in the 1973 form, that exclusion, together with the rest of the form, was used for the next 13 years until 1986. Therefore, in the reconstruction of missing insurance policies, the important nonfinancial terms of coverage can be established for a significant span of time by reference to the standard forms issued in 1955, 1966 and 1973.

For example, the standard CGL insurance form for the NBCU's 1955 policy provided liability coverage as follows.

Blank Indemnity Company

Agrees with the Insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. Coverage A – Bodily Injury Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage B – Property Damage Liability

To pay on behalf of the Insured all sums which the Insured shall become

legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

Significantly, the 1955 CGL insurance policy form did not define the term "accident," which became the subject of repeated litigation. The 1966 standard CGL form attempted to correct this problem and provided liability coverage as follows.

COMPREHENSIVE GENERAL LIABILITY INSURANCE

I. Coverage A – Bodily Injury Liability

Coverage B – Property Damage Liability

The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of

- a. bodily injury or*
- b. property damage*

to which this insurance applies, caused by an occurrence, and the company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage

The 1966 CGL form expressly defined the term "occurrence" as "an accident, including injurious exposure to conditions, which results, during the policy period, in bodily injury or property damage neither expected nor intended from the standpoint of the insured...." The 1973 CGL form provided the same insuring agreement as the 1966 form but changed the definition of

"occurrence" by specifying that "occurrence" included "continuous or repeated" exposure to conditions resulting in bodily injury/property damage that was not expected or intended by the insured.

Establishing the Existence of Renewal Policies

With these basic insuring agreements established by reference to the standard forms issued by ISO and its predecessors, it is possible to reconstruct material nonfinancial terms of multiple insurance policies from 1955 to 1986 where the secondary evidence of the missing policies indicates the continued renewal of the missing policies.

For example, the secondary evidence of a missing policy may include a broker cover letter indicating that the missing policy was "renewed as expiring." Another common example is the declarations page of a policy, which indicates that such policy was a "Renewal of Policy ____" (usually identified by number). In instances such as these, the terms "renewed" and "renewal" have particular significance in the trade practice of the insurance industry.

As a firmly established principle of historic underwriting practice, a renewal policy will continue in force the same terms and conditions of a previous policy, absent notice to the contrary. This principle is readily supported by the learned treatises of the insurance profession, as in the following excerpt from the Applemans' treatise on insurance.

Where a policy is renewed by agreement of the parties, it is presumed that the same terms, conditions, premiums and subject matter obtain in the new contract as in the old. Where

the renewal agreement so recites, or unless it provides otherwise, the terms and conditions of the existing policy are not changed, enlarged, or restricted by a renewal but are merely continued in force as binding on the parties.

Appleman, John Alan and Jean. Insurance Law and Practice. Volume 13A, § 7648. St. Paul, MN: West Publishing Co., 1976.

Couch's treatise on insurance also supports this view.

It is certainly in keeping with the reasonable intent of the parties that where an insurer agrees to renew a policy, the insured should have a right to expect that the new protection will be in substance the same as that afforded by the former contract and upon the same conditions.... An insured is bound to know that a renewal policy is of the same tenor as the original policy.

Russ, Lee R. and Thomas F. Segalla. Couch on Insurance. Deerfield, IL: Clark Boardman Callaghan Pub., 2005.

In other words, if an agreement to renew a policy is made and no departure from the terms of the original contract is proposed or agreed upon, it will be presumed that the policy to be issued, that is, the renewal policy, is to contain the same terms and conditions as the policy which is to be superseded.

Id., § 29:41, at pp. 29–49.

As a corollary of the above principle, an insurer, in issuing a policy which differs from the original, is obligated to inform the insured as to the changes

if there has been no special agreement for terms differing from those of the original contract.

Id., § 29:42, at pp. 29–51.

The specific term "renewal" used according to standard industry-wide practice, therefore, has significant meaning. In the words of Couch, cited above, that term is a recital of continued coverage from one policy to the next, "where the renewal agreement ... recites ... [that] the terms and conditions of the existing policy are not changed, enlarged, or restricted by a renewal but are merely continued in force as binding on the parties."

Conclusion

Accordingly, absent any notice to the contrary, documents that indicate a renewal of previous coverage, such as on a policy declarations page or in a broker letter, provide evidence that both the previously issued policy and the renewal policy contain the same terms of coverage. Therefore, because of the use of standard policy forms—which changed very little over extended periods—missing policy coverage can frequently be sufficiently reconstructed over multiple policy years when the secondary evidence indicates a continued pattern of renewal.

¹ See Anderson E., J. Stanzler, and L. Masters. *Insurance Coverage Litigation*. 2d ed. Aspen Law & Business, 1997.