

JUDICIAL RECONSTRUCTION OF MISSING INSURANCE POLICIES

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This article is the first in a series of six that outlines how a party can reconstruct missing insurance policies that have not been located through traditional methods of insurance archaeology. Lost policies may be reconstructed using secondary, or circumstantial, evidence in a court of law, allowing a policyholder without a policy in hand to prove coverage to address a claim. This series is intended to provide a basic overview of the reconstruction process and is not designed to provide a do-it-yourself manual for reconstruction of lost policies. Future articles in this series will explore the basic concepts explained herein in greater detail.

For several decades now, insurance archaeology—the discipline of researching and locating missing insurance policies—has provided proof of coverage to address legacy, or long-tail, liability claims. However, this discipline alone cannot always provide sufficient documentation of coverage without additional methods of policy reconstruction. These methods are most often accomplished through an expert with a strong insurance and legal background.

When claims arise that implicate past insurance policies, a party may be unable to find those policies. Much has been written about the methods a party may employ to find old policies, yet, despite extensive research with even the best methods, some policies may never be located. Although a

party may be unable to locate a complete policy through diligent research, nevertheless the party may find various components of the policy, or information about its critical and necessary elements. While this may not seem beneficial initially, such partial evidence of a policy may still be useful in proving up coverage, because other necessary components of the policy can be reconstructed through methods introduced by a policy reconstruction expert or other experienced insurance professional.

Thus, with relevant policy evidence in hand, a party can confidently continue the policy reconstruction process with the additional help of experts, typically an insurance coverage lawyer and a policy reconstruction expert. To know how best to proceed, some understanding of certain legal concepts is required. An examination of these concepts can be grouped into three categories: an explanation of the rules of evidence, a discussion of common law cases that have ruled on policy reconstruction issues, and an introduction to concepts related to burden of proof. Each of these concepts will be considered in turn.

Federal Rules of Evidence

Insurance policy reconstruction in a court of law begins with each court's own rules of evidence. In 1965 the U.S. Supreme Court commissioned an advisory committee to draft a set of evidence rules for use in the

federal courts. (Federal Rules of Evidence: 2009–2010 Edition, West, 2008, page iii). The resulting Federal Rules of Evidence (FRE) were approved by Congress in 1975. While each state is free to enact its own set of rules, most use the FRE as their template and some have even adopted the FRE in whole without change. Nevertheless, each legal jurisdiction will have its own set of evidentiary rules, and legal advice is required to understand how such rules will apply to a specific reconstruction matter. For the sake of simplicity, and since the FRE provide a common ground for the federal courts in each state, this discussion will address this particular set of rules.

It is axiomatic that the party seeking insurance coverage for a claim must establish that a relevant policy was purchased. Obviously, an insurance policy is a written contract and under the FRE for a party "to prove the content of a writing ... the original writing ... is required, except as otherwise provided by these rules" (FRE 1002). Unfortunately, producing the original, especially in the case of insurance policies, is not always an option. When the original is not available, the Federal Rules of Evidence allow for secondary evidence to be used to establish the existence of the original document under the following conditions:

1. The original is lost or destroyed;
2. The proponent of the document has not acted in bad faith; and
3. A diligent search for the original was unsuccessful. (FRE 1004).

The first element of this rule is typically established by a company employee who can testify that the original policy was destroyed or has not been discovered and is therefore presumed lost. The second element is intended to bar policyholders from destroying documents that would suppress

damaging information. The final element of the rule requires that the policyholder will have mounted a diligent effort to retrieve the policy and is usually satisfied when an experienced insurance archaeologist has been retained to search for the missing policy.

When documents are presented as secondary evidence of a missing policy, such documents must also satisfy authentication standards and fall within exceptions to the rule against hearsay. The authentication of documents is governed by FRE 901, which requires that a document must be authentic to be admissible, i.e., that it is what it purports to be. Authentication can occur in a number of ways, including the testimony of a person with knowledge about the document or evidence that it has been in existence for 20 years or more and meets certain other conditions. (See FRE 901(b)(1) and FRE 901(b)(8).)

Hearsay is essentially a statement made outside of a courtroom, which is inadmissible because it is not made under oath. Several exceptions to the rule against hearsay exist under the FRE. When such hearsay statements appear on a document, for example a premium invoice identifying the policy number and period of an old insurance policy, such invoice (and the hearsay statement it includes) can be admissible under the business record exception to the hearsay rule if it were kept in the course of regularly conducted business and meets several other conditions. (See FRE 803(6).) Additionally, statements in a document in existence 20 years or more and properly authenticated under FRE 901 can be admissible as an exception to the hearsay rule. (See FRE 803(16).)

Relevant Caselaw

Assuming threshold requirements under a court's rules of evidence are met, a policyholder then has the burden to prove both the policy's existence and its critical contents. *Emons Indus. Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982). The existence and contents of the policy can be shown through a variety of documents and corroborating testimony. A few examples include the following:

1. Insurer documents, such as a declarations page or partial policy: *Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670 (W.D. Mich. 2003);
2. Broker documents, such as a premium invoice: *MAPCO Alaska Petrol., Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991);
3. Policyholder documents, such as board of directors' meeting minutes: *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, modified, 642 F. Supp. 1020 (S.D.N.Y. 1986); and
4. Testimony of a witness, such as an insured's employee: *Coltec Indus., Inc. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N.D. Ill. 2002).

A policyholder need not establish every word of a lost insurance policy. The policy may be proven by secondary evidence without having to reconstruct the language of the policy verbatim. *Dart Indus. Inc. v. Commercial Union Ins. Co.*, 28 Cal. 4th 1059, 52 P.3d 79 (Cal. 2002). This means that once the existence and contents of the policy have been shown, "the proponent of the lost document need only prove the relevant substance of the document."

This "relevant substance of the document" can often be established by standard insurance policy forms. Most insurers used common policy forms drafted by industry associations that were approved by state regulators. Policy reconstruction experts can testify that an insurer used such policy forms with a presentation of the language in use at the relevant time period.

Burden of Proof

In presenting evidence of a missing insurance policy, a party must satisfy the court's "burden of proof." Essentially, this burden is the amount of evidence required by the court to establish proof. This burden is not established by federal or state rules of evidence, but rather by the precedent of case decisions previously reached in the jurisdiction. Thus, various state and federal courts may have differing burdens of proof that a party must satisfy to prove a missing policy.

While many courts have announced the burden required to prove a missing insurance policy, a number of jurisdictions in the United States have not decided the issue. Of those courts which have decided the issue, the majority rule appears to be that the burden of proof required to establish the issuance and terms of a lost policy is a "preponderance of the evidence." See for example, *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1420, 1423–1424 (D. Del. 1992). This means that the policyholder must demonstrate that it was more likely than not that the policy existed and embodied the language presented by the evidence.

Some courts have established a more exacting burden of proof that requires a policyholder prove the missing policy by "clear and convincing evidence." See *Boyce*

Thompson Inst. for Plant Research, Inc. v. Ins. Co. of N. Am., 751 F. Supp. 1137 (S.D.N.Y. 1990). This means that the policyholder must establish that it was substantially more likely than not that the policy existed and embodied the language presented by the evidence. Thus, the evidence must not only be "clear," but also "compelling," suggesting something more than the quantum of evidence required by a "preponderance." Only a handful of jurisdictions have adopted this burden of proof. Again, the assistance of legal counsel is required to know what burden of proof may be required for a particular matter and how that burden might best be met through available secondary evidence and the assistance of experts.