JUDICIAL RECONSTRUCTION OF MISSING INSURANCE POLICIES

(Part 3 of 6 – Authentication, Hearsay and Reconstruction Methodology)

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This article is the third in a series of six that 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. The first article discussed basic legal concepts that serve as the foundation for judicial reconstruction. The second article examined practical and legal considerations in evaluating the probative value of secondary evidence used to prove the existence and terms of missing insurance policies. This article considers the authentication and admissibility of secondary evidence and the proper methodology of an expert witness in assessing the evidence for policy reconstruction.

When documents are presented as secondary evidence of a missing policy, such documents must satisfy authentication standards and fall within exceptions to the rule against hearsay. In federal court, the authentication of documents is governed by a rule that requires that a document must be authentic in order to be admissible, i.e., that it is what it purports to be: Federal Rules of Evidence: 2009–2010 Edition, Rule 901 (hereafter, "FRE"). Authentication can occur through a number of methods under FRE 901. Specifically with regard to reconstructing a missing insurance policy, the following three methods in authenticating documents frequently come into play.

- The testimony of a person with knowledge about the document (FRE 901(b)(1))
- Evidence of a record filed in a public office (FRE 901(b)(7))
- Evidence that a document has been in existence for 20 years or more and meets certain other conditions (FRE 901 (b)(8))

For example, if an original insurance policy is no longer extant, but a broker maintained a photocopy of the policy, that broker can provide testimony that the photocopy is a genuine reproduction of the original. As another example, authentication of the existence of a workers compensation insurance policy can be satisfied by submitting a copy of a public record from the state's workers compensation bureau, which often annually recorded such insurance information regarding the companies doing business within the state. Authentication of a certificate of insurance can be satisfied if the certificate is more than 20 years old and located in a company's archives where one would expect to find it.

Hearsay is a statement offered to prove the truth of the matter asserted made by someone other than the declarant in a trial or hearing (FRE 801). The Federal Rules of Evidence state that hearsay is inadmissible unless it falls under a permissible exception (FRE 802).

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Several exceptions to the rule against hearsay exist under the FRE. For example, the fact that an insurance premium invoice identifies a policy number and period of an old insurance policy would be hearsay, but such an 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 (FRE 803(6)).

The Advisory Committee to the FRE has noted that business record documents avoid the problems that typically accompany other recorded information because they tend to eschew the opinions and involvement of the document recorder (FRE 803 (6) Advisory Committee's Note). On this point, the Advisory Committee has stated:

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity, which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. Id.

As a practical matter, many missing policy reconstruction matters necessarily involve insurance policies underwritten before absolute asbestos and pollution exclusions came into existence in the late 1980s. Accordingly, a company's business documents that evidence insurance coverage prior to that time frequently are admissible as meeting the authentication standard offer 901 (b)(8) and falling within the hearsay exceptions of FRE 803(6) Records of a Regularly Conducted Activity and FRE 803(16) Statements in Ancient Documents.

Reconstruction Methodology

Once secondary evidence documents are authenticated and made admissible, they may not be necessarily sufficient to meet the requisite burden of proof in establishing all the terms of a missing insurance policy. Expert witness testimony may also be necessary to fill in the gaps of missing policy terms or to connect those terms. An expert witness who reconstructs missing insurance policies is not required to meet standards normally applied to an expert who offers testimony of a scientific nature. The opinions of a policy reconstruction expert are not the type that can be tested or verified or subjected to peer review. Century Indem. Co. v. Aero-Motive Co., 254 F. Supp. 2d 670 (W. D. Mich. 2003). Nevertheless, a policy reconstruction expert should still implement a sound methodology for assessing the evidence of a missing policy and compiling and piecing together the relevant terms of a missing policy. Such a methodology will be based on experience and common sense rather than a scientific protocol.

A sound and correct methodology for reconstructing missing insurance policies cannot be developed and utilized without at least some reference to rules of evidence and judicial decisions that have established guidelines for policy reconstruction. Logically, such a methodology would necessarily originate and be developed and applied according to principles established by law, just as a scientific methodology would originate and be developed and applied according to established laws of nature. Adhering to this foundational principle does not mean that a policy reconstruction expert must necessarily be a lawyer or that the expert need usurp the

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province of a judge in opining what particular legal principles apply in a missing policy case. Nevertheless, the expert still needs to be familiar with legal principles that apply in reconstructing a missing insurance policy to ensure that the methodology utilized is consistent with those established legal principles.

As a threshold matter, any reconstruction method that requires complete copies of an insurance policy is essentially no method at all and negates the possibility that a missing policy can ever be reconstructed from secondary evidence. On the other hand, one of the most glaring mistakes a policy reconstruction expert could undertake in implementing a methodology would be to make a selective and restrictive review of the evidence presented and conduct an analysis that does not address all the secondary evidence presented. Instead, a proper method of reconstruction necessarily requires that the expert be able to include, account for, and explain all relevant documentation in any final opinion about the terms of a missing policy. Flaws in a reconstruction methodology can be spotted when the expert

- narrowly selects and examines certain documents for what they do not say about the missing policies;
- avoids fully acknowledging and analyzing other documents for what they do say about the policies; or
- neglects to analyze the documents as a whole, therefore failing to reconcile the absence of material policy terms in some documents with material terms that are provided in others.

A flawed methodology may narrowly review and assess documents simply for what they do not say and then draw the summary conclusion that the policy cannot be fully reconstructed. For example, an opposing expert offered by the insurance company may review general ledger pages of an accounting record produced by the insured and correctly note that the ledgers do not provide details regarding policy numbers, limits of liability, or terms of the missing policies. However, such an interpretation would be much too narrow if the ledgers do establish other important details of coverage, such as the name of the insured or the insurer, the coverage type, or the coverage period. The flaw in this methodology is exposed by the incorrect assumption that every document presented must evidence every term of the missing policy.

In addition, a flawed methodology may also fail to fully acknowledge and analyze documents for what they do say about key policy terms. For example, it is not uncommon for an insurance company expert to state that a certificate of insurance is irrelevant and properly ignored, because such certificates, as a rule, only certify the fact that a policy was issued and do not supersede or govern the terms of the actual policy. While this statement may be correct, it ignores the additional fact that certificates of insurance routinely supply all the relevant key information normally found on the declarations page of an insurance policy, such as the name of the insured, the name of the insurer, the policy number, the type of policy coverage, the policy limits, and the policy period. Accordingly, such a certificate, when coupled further with the standard policy jacket of a policy issued by the insurer, will provide all the necessary information to establish the basic insurance contract.

Therefore, any methodology that fails to analyze all relevant documents as a whole

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and to reconcile them in a consistent manner will no doubt lead to incomplete or incorrect final opinions. If secondary evidence and accompanying testimony are analyzed in an even and consistent manner without singling out and unduly favoring one document over another and without ignoring certain relevant documents altogether—that is, without creating an unfounded and biased "hierarchy of preferences" (see FRE 1004, Advisory Committee's Note)—the missing material terms or inconsistencies that might appear in one document can often be filled in and explained by reference to other documents, and the missing policy can thus be sufficiently reconstructed.

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