

JUDICIAL RECONSTRUCTION OF MISSING INSURANCE POLICIES

(Part 2 of 6 – Probative Value of Secondary Evidence)

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This article is the second in a series of six that outlines how a party in a court of law may reconstruct missing insurance policies which have not been located through traditional methods of insurance archaeology. The first article, [Judicial Reconstruction of Missing Insurance Policies](#), discussed basic legal concepts that serve as the foundation for judicial reconstruction, including the rules of evidence, common law rulings on policy reconstruction, and concepts related to burden of proof. This article examines practical and legal considerations in evaluating the probative value of secondary evidence used to prove the existence and terms of missing insurance policies.

The "best evidence rule" as articulated in the Federal Rules of Evidence explains that an original document is preferred over other evidence. Federal Rules of Evidence: 2009–2010 Edition, West, Rule 1002 (FRE). In the case of a policyholder, this would mean production of the original policy. However, when the policyholder cannot meet this rule, one may turn to secondary evidence to prove the existence and terms of coverage. Under FRE 1004, secondary evidence is admissible where the original is lost or destroyed or not otherwise obtainable through judicial process, is in the possession of an opponent, or addresses a collateral matter not closely related to a controlling issue.

In commenting on this rule, the Advisory Committee to the Federal Rules of Evidence has stated:

Basically, the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactorily explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

FRE 1004, Advisory Committee's Note.

No Hierarchy of Preference

Once production of the original is excused, the proponent may offer any sort of evidence, otherwise admissible, including oral testimony, to prove the contents of a written document. As to the relative probative value of such evidence, the Advisory Committee has made the following significant observation:

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of

preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not.

Id., see also, *United States v. Standing Soldier*, 538 F.2d 196 (8th Cir. S.D. 1976), cert. denied, 429 US 1025 (1976).

Accordingly, as a practical matter, to convince a judge or a jury of the existence and terms of a missing insurance policy, the policyholder will strive to present both quantity and quality of documentation and testimony.

In proving the existence of a missing policy, there can be no hard and fast rule about what is sufficient quantity, nor what is preferred quality, nor what is the correct and proper balance between the two. In terms of quantity, the practice would logically be "the more, the better." Yet there will be cases where a single document, because of its quality, may have sufficient probative value to unequivocally establish the existence of the policy. For example, a copy of single policy declarations page on the insurer's customary trademark form may have such probative value.

In terms of quality of documentation, or what documents by their nature may be more convincing or compelling than others, there is again no hierarchy of preference, but if one is guided by a "juror's common sense," greater weight might be accorded to secondary documents in the following order:

- (1) insurer documents,
- (2) broker documents, or other third-party documents, and
- (3) policyholder documents.

For example, if the same copy of a certificate of insurance is produced by an insurer, or a broker, or a policyholder, logically the certificate that derives from the files of the insurer may have the most probative value simply because the insurer is the party with the least to gain and most to lose by its production. Likewise, the broker's copy of the certificate may be more probative than the policyholder's copy, because the broker is a disinterested party with nothing to gain or lose by its production. This order simply acknowledges the common sense thinking of a typical juror, even though the certificates of insurance from the three different sources are otherwise exactly the same.

This is not to say, however, that only insurer or broker documents can satisfy a burden of proof, or that policyholder documents alone cannot meet that burden. Certificates of insurance produced solely from the files of a policyholder, especially if provided on the letterhead of an insurer or broker, will certainly be of great probative value, since such certificates by industry custom and practice are designed to evidence the existence and certain material terms of a policyholder's insurance coverage. Courts have readily acknowledged that "missing insurance policies are not vulnerable to fraud because existence and contents of missing insurance policies are generally proved by evidence such as business records [and] standard forms . . . which is inherently reliable." *Remington Arms Co. v Liberty Mut. Ins. Co.*, 810 F. Supp. 1420 (D. Del 1992).

Types of Secondary Evidence

Ideally, to "present the most convincing evidence possible," a policyholder will

strive to locate a variety of documents from a variety of sources and to obtain a variety of testimony. FRE 1004, Advisory Committee's Note. As a guide in this effort, the following types of evidence were found by courts to be probative of the existence and terms of missing insurance policies:

1. Unexecuted policy forms accompanied by a declarations page or other supporting evidence. *UNR Ind., Inc. v. Continental Ins. Co.*, 682 F. Supp. 1434 (N.D. Ill. 1988).
2. Certificates of insurance. *MAPCO Alaska Petrol. v. Central Nat'l. Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).
3. Subsequent policies suggesting prior coverage was similar. *Emons Ind., Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Northeast Utilities v. Century Indem. Co.*, 1999 Conn. Super. LEXIS 1660 (Conn. Super. Ct. 1999).
4. Records produced by insurance brokers, including ledgers or schedules of insurance. *Pearl Assur. Co. v. School Dist.*, 212 F.2d 778 (10th Cir. Colo. 1954); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986); *Rubenstein v. Royal Ins. Co. of Am.*, 694 N.E.2d 381 (Mass. App. Ct. 1998).
5. Interoffice memoranda, correspondence, and e-mail proving the insurer believed a policy existed. *Emons Ind., Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Northeast Utilities v. Century Indemnity Co.*, 1999 Conn. Super. LEXIS 1660 (Conn. Super. Ct. 1999); *Coltec Ind. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002); *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1420 (D. Del 1992).
6. Premium invoices. *MAPCO Alaska Petrol., Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).
7. Proof of premium payment, such as checks. *UNR Ind., Inc. v. Continental Ins. Co.*, 682 F. Supp. 1434 (N.D. Ill. 1988).
8. 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).
9. Loss prevention surveys conducted by insurers. *Emons Ind., Inc. v. Liberty Mut. Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982).
10. Specimen or sample policies used by the insurer during the policy period in question. *Rodgers v. Prudential Ins. Co.*, 267 Cal. Rptr. 499 (Cal. App. 1990); *Bituminous Cas. Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996); *Central Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412 (Ill. App. Ct. 3d Dist. 2003).
11. Binders or cover notes. *Diplomat Homes, Inc. v. Commercial Standard Ins. Co.*, 394 F. Supp. 558 (W.D. Mo. 1975).
12. Retrospective premium reports. *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F. Supp. 1420 (D. Del 1992).
13. Reinsurance records. *Central Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412 (Ill. App. Ct. 3d Dist. 2003).
14. Broker "placing slips." *Central Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412 (Ill. App. Ct. 3d Dist. 2003).
15. Loss history cards. *Coltec Indus. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002).
16. Schedules in umbrella or excess policies identifying the underlying

primary policies. *Century Indem. Co. v. Aero-Motive Co.*, 254 F. Supp. 2d 670 (W. D. Mich. 2003); *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, modified, 642 F. Supp. 1020 (S.D.N.Y. 1986).

17. Broker and underwriter correspondence. *MAPCO Alaska Petrol., Inc. v. Central Nat'l Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991). *Central Ill. Light Co. v. Home Ins. Co.*, 795 N.E.2d 412 (Ill. App. Ct. 3d Dist. 2003).
18. Testimony of an insured's employee. *Coltec Ind. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002).

19. Testimony of an insurer's employee. *Rodgers v. Prudential Ins. Co.*, 267 Cal. Rptr. 499 (Cal. App. 4th Dist. 1990); *Clendenin v. Benson*, 117 Cal. App. 674 (Cal. App. 1931).

Frequently, the presentation of secondary evidence alone, whether by document or factual testimony, will not be sufficient to meet the requisite burden of proof in establishing the existence and particularly 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 the dots" between policy terms that are established. The use of policy reconstruction experts will be addressed in future articles in this series.