

JUDICIAL RECONSTRUCTION OF MISSING INSURANCE POLICIES

(Part 4 of 6 – Proving Standard Policy Language of Missing Insurance Policies)

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This article is the fourth 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. The [third article](#) explored the authentication and admissibility of secondary evidence and the proper methodology of an expert witness in assessing the evidence for policy reconstruction. This article considers how a policyholder proves the policy language of a missing policy using standard industry forms.

In the United States, the form language of commercial general liability (CGL) insurance policies must be submitted to and approved for use by insurance regulatory authorities in the states where an insurance company desires to conduct business. An individual insurance company can draft and submit such policy forms, or more commonly, historically, various insurance company trade bureaus have drafted and

submitted them on behalf of their member and subscriber companies.

Stock and Mutual Insurer Contract Wordings

Stock insurance companies have utilized standard contract wordings over the past 60 years as drafted for the insurance industry. This was first done by the National Bureau of Casualty Underwriters (NBCU) and, after January 2, 1968, by its successor, the Insurance Rating Board (IRB). As of April 1, 1971, the successor to the IRB, the Insurance Services Office, Inc. (ISO), has done so.

For mutual insurance companies, essentially the same standard contract wordings were drafted, first by the American Mutual Insurance Alliance (AMIA) from 1935 to 1968, then, after reorganization and a name change, by the Mutual Insurance Rating Bureau. As of 1971, ISO took over as its successor also.

The CGL Policy Wording

The NBCU issued the first standard CGL policy form in 1941, and revised forms were issued in 1943, 1947, 1955, 1966, 1973, 1986, 1988, 1990, and 1993. See E. Anderson Eugene, J. Stanzler, and L. Masters, *Insurance Coverage Litigation*, 2d ed., Aspen Law & Business (1997) §§ 1.02, 15.02. If an insurance company was a

member of, or subscriber to, the NBCU or its successors, it was required to use the various NBCU forms in the CGL policies it issued.

The NBCU instructions to both the 1947 and 1955 CGL forms, for example, provide that each

form is expressed in standard language which may not be amended and no part of which may be omitted, except, (a) as indicated by these instructions, or (b) as indicated in reference notes shown below referring to specific portions of the form, or (c) by an endorsement which states an amendment or exclusion of some provision of this form ... , the form of which endorsement has been approved, if required, by the supervising authority of the state in which the policy is issued; provided, however, any major "Insuring Agreement," which defines a particular class of insurance, and all other provisions of the policy relating solely and specifically to that class may be omitted from the printed policy form at the option of the company.

Significantly, neither the instructions to the NBCU forms nor the reference notes permit any alteration to the standard language of the insuring agreements of the forms; that is, to the "grants of coverage." The only option an insurer may have to alter such an insuring agreement is to omit it altogether or to provide an endorsement approved by a supervising state authority where required. However, if secondary evidence of a missing CGL policy on an NBCU form indicates that such policy provided bodily injury coverage or property damage coverage, then the insuring agreements for those coverages must be the standard language provided on the NBCU form and approved by the state regulators.

This principle was affirmed in the case of *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."

In 1966, the NBCU and AMIA collaborated in producing a standard form CGL policy changing the insuring agreement of coverage from an "accident" basis to an "occurrence" basis. The CGL policy forms bureau insurance companies adopted in 1966 utilized boilerplate language that incorporated or followed the insuring agreement, definitions, conditions, and exclusions of the 1966 standard form. ISO and its predecessors did not change the basic CGL policy form between 1966 and 1973. Any insurance company following the NBCU standard forms would have utilized the same basic insuring agreement in policies from 1967 to 1973 as those found in the 1966 standard form.

Of particular note to policyholders seeking coverage for pollution cleanup and abatement, in 1973, on behalf of both stock and mutual insurance companies, ISO drafted a revised standard CGL policy form that, among other things, incorporated a "sudden and accidental" pollution exclusion. The CGL policy forms adopted by bureau insurance companies in 1973 utilized boilerplate language that incorporated or followed the insuring agreement, definitions, conditions, and exclusions of the 1973 standard form. ISO did not change this basic CGL policy form until 1986. Any insurance company following the ISO standard forms would have utilized the same basic insuring agreement in policies from 1973 to 1986 as those found in the 1973 standard form.

Manuscript Policies

These standard contract wordings were issued by ISO and its predecessors and have been generally adopted by the insurance industry, with modifications at times made by individual insurance companies and filed with state regulators. Typically, a member or subscriber insurer of an insurance rating agency utilized the standard form in its own distinctive format and utilized a distinctive policy numbering system that can serve almost like a unique "fingerprint" to identify the insurer of a missing policy. Once the insurer of a missing policy is identified, additional research can establish whether that insurer was a member of, or subscriber to, the NBCU and its successors. Additionally, for any insurer that may have subscribed to the NBCU but also drafted and submitted its own policy forms to regulatory authorities for approval, the policy number of a missing policy will oftentimes establish whether such policy was underwritten on a bureau form or on the insurer's separately filed form.

For example, the Indemnity Insurance Company of North America (IINA) was a major U.S. underwriter of general liability policies in the 1950s and 1960s. While IINA was a subscriber to the NBCU during this time period, it also created and received approval in certain states for its own "manuscript" policy form. Precisely what form IINA may have used for any given missing policy can be resolved if the policy number is known. If the policy number had a "CGL" prefix, then the policy form was a bureau form the NBCU drafted and IINA adopted. If the policy number had an "LAB" or "LB" prefix, then the policy form was IINA's manuscript form.

The state of New York is one of several states that historically only authorized the

use of bureau forms for CGL policies underwritten within the state. Accordingly, any policy issued in that state in the 1950s and 1960s necessarily had to be a bureau form the NBCU or AMIA and their successors issued. Periodically, the New York Insurance Department, as the insurance regulatory authority of the state, would issue a report on the insurers underwriting in the state, titled "Report on Examination of the National Bureau of Casualty Underwriters by the New York Insurance Department." Such reports would include a list of all members and subscribers of NBCU underwriting in the state of New York during the time period covered by the report and prove an invaluable resource for identifying whether a particular insurer was a member or subscriber of the NBCU and therefore required to use NBCU policy forms for its CGL policies. Further, because these lists identify an insurer's status generally as a member or subscriber of the NBCU, their relevance extends beyond the state of New York to any other state where such insurer was underwriting CGL policies.

Proving the Language

A typical CGL insurance policy historically is made up of the following components: (1) a declarations page, (2) an insuring agreement, (3) exclusions to coverage, (4) conditions of coverage, (5) definitions (sometimes included in the "conditions" section), and (6) any amendments or endorsements to coverage. The elements of a CGL policy typically found on the declarations page include (1) the parties to the insurance contract, (2) the policy period of the contract, (3) the types of risks or hazards the contract covered, and (4) the monetary limits of the contract, including deductibles and aggregates where applicable. If the policy includes any endorsements, the declarations page also

often lists those endorsements and identifies them by form numbers—in some instances, the same form numbers ISO or its predecessors assigned.

Therefore, if a policyholder can produce the declarations page of a missing policy or evidence of the elements normally contained in the declarations page, the existence of the missing policy and its financial components can be established. If the insurer is also established to be an NBCU member or subscriber, then the material nonfinancial terms of the missing policy—including the insuring agreement, definitions, and conditions—are thereafter established with reference to the standard forms ISO and its predecessors drafted for the insurance industry. Because the forms were standardized and widely used, it is frequently possible for a policy reconstruction expert to produce an appropriate form to establish important material terms of a missing policy.