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LITIGATING LOST OR MISSING INSURANCE POLICIES

A client faces a liability or risk for which it has insurance coverage, but the insurance policy is lost or missing. Can the client still obtain coverage for its claim? This is an increasingly common scenario, particularly in cases of environmental liabilities or toxic torts, where the damage from a covered event may not become manifest until many years after the spill of contaminants or exposure to hazardous substances occurs. [1] Because most businesses do not maintain records for more than a few years, insurance policies providing coverage for events giving rise to such a claim may be difficult or impossible to locate.

In general, Colorado permits a party to present secondary evidence of a lost or missing insurance policy if it first establishes that (1) the insurance policy is lost or was destroyed, (2) the policy was not lost or destroyed fraudulently or in bad faith, and (3) the party has exercised due diligence in attempting to find the lost document.

Prerequisites to Admissibility Of Secondary Evidence

Before secondary evidence of a lost or missing insurance policy may be presented, the proponent must first satisfy the requirements of Rule 1004 of the Colorado Rules of Evidence ("C.R.E.") and Colorado's "lost documents statute," CRS § 13-25-113.

The "best evidence" rule requires a party seeking to prove the contents of any writing, including an insurance policy, to present the original or an authenticated copy of the document. [2] Rule 1004 carves out an exception to this rule where the original or an authenticated copy of the document cannot be located. Under this Rule, a party may introduce secondary evidence of a lost or missing insurance policy on a showing that (1) all originals are lost or have been destroyed, unless such documents were destroyed in bad faith, or (2) no original can be obtained by any available judicial process or procedure. [3]

If the requirements of Rule 1004 are satisfied, Colorado's lost documents statute further requires the party seeking to admit secondary evidence of a lost or missing insurance policy to make an "oath" as to the loss or destruction and "substance" of the policy. That statute provides:

> When, in the progress of any suit in any court in this state, either party thereto relies for its maintenance or defense, in whole or in part, on any deed, bond, note, draft, bill of exchange, letter, or *any other writing alleged to have been executed, signed, or written by the adverse party, and to have been lost or destroyed*, the party so relying on the same as evidence in his behalf in the trial of the cause shall not be permitted to give evidence of the contents thereof by a competent witness until said party or his agent or attorney first makes an oath to the loss or destruction thereof, and to the substance of the same. [4] [*Emphasis added.*]

The oath requirement is generally satisfied by presenting an affidavit from the insured, or the insured's custodian of records. The affidavit should explain the circumstances surrounding the loss or destruction of the document. If, for example, the policy was destroyed in the normal course of the insured's business, the affidavit should detail the insured's document retention policy.

The affidavit also must describe the "substance" of the missing policy; however, the degree of specificity required in the description is not great. The Colorado Supreme Court has noted that "it is not necessary that witnesses should be able to tell the contents of the instrument with absolute verbal accuracy, it being sufficient if they are able to state it in substance." [5]

Finally, although not a statutory requirement, Colorado courts have required parties seeking to admit secondary evidence of a lost or missing document to demonstrate that they have exercised due diligence in attempting to find the document before such evidence may be admitted. [6] The due diligence requirement is satisfied if the party seeking to admit secondary evidence shows that he or she has made a "thorough, careful and vigilant search" for the original policy. [7] This requirement may be satisfied by a brief statement in the insured's oath pursuant to CRS § 13-25-113 describing the insured's efforts to locate the policy.

Types of Evidence Admissible

Once a party has satisfied the prerequisites for the admission of secondary evidence, any form of probative evidence maybe admitted to establish the existence and contents of the policy. There is no hierarchy or preference of secondary evidence for establishing the missing or lost policy. [8] The secondary evidence should describe not only the existence, but also the execution, delivery, loss, and general terms and conditions of coverage provided under the lost policy. [9] Evidence that establishes only the existence of the policy is insufficient. [10]

***116** Courts have admitted various types of documentary evidence, including correspondence referring to the policy, financial statements, annual reports, minutes of meetings of insurance companies, check registers, ledgers, accounting records, certificates of insurance, broker's placing slips, and contracts that refer to insurance, as proof of lost policies. [11] Proof of premium payments and method of premium computation also have been widely recognized as relevant to whether a particular coverage has been purchased or was in effect at a given time. [12] Specimen policies also may be admitted as evidence of the terms and conditions of the lost policy if the insured can establish that it purchased such coverage from the insurer. [13]

In addition, testimony of witnesses such as insurance agents, risk managers or others involved in purchasing or maintaining records of insurance coverage, as well as experts in the insurance industry, may be probative to establish the lost policy. [14] Insurance experts can be particularly useful in determining which policy forms and terms and conditions of coverage were in use by various insurers at a given time.

The U.S. District Court for the District of New Mexico's opinion in *Servants of Paraclete, Inc. v. Great American Insurance Company* [15] is instructive as to how various types of evidence may be used to establish the terms and conditions of a lost insurance policy. In that case, the plaintiff presented the following evidence in support of its claim: (1) letters from the insurer acknowledging the existence of the policy, (2) an affidavit of a business analyst attesting to the type of policy based on the policy number and apparent policy limits of that policy, (3) deposition testimony from the insurer's underwriter revealing that the insurer used three general liability coverage forms during the relevant period, one of which was denoted by the insured's policy number, and (4) the business records of the insured's insurance agency that reflected the term of policy and premium payment. [16] Taken together, the court found such evidence sufficient to withstand the defendant insurer's motion for summary judgment on the issue of the "lost" policies.

Locating Evidence of Lost Or Missing Policies

There are many different sources an insured may explore to locate evidence of a lost or missing insurance policy. The insured's own offices are frequently the most fertile grounds for locating such evidence. For example, old legal or claims files may contain correspondence from insurers, adjusters or attorneys referring to the lost policy. In addition, contractor or vendor files may contain proof of insurance coverage, such as certificates of insurance routinely required by contractors or various government entities. Further, the insured's accounting records may reflect premiums paid or dividends or premium refunds received, all of which may be used to establish the existence of coverage.

Various industry sources also may be helpful in locating evidence of lost policies. For example, if a complete policy number is available, it may be possible to identify any standardized policy forms that might have been issued to the insured. Such standardized forms may be obtained from the insurer or from various industry groups such as the Insurance Services Office ("ISO"), which often drafted the forms. A copy of the form may then be used as a specimen to establish the terms and conditions of the lost policy.

Thus, the search for evidence of a lost or missing insurance policy should not stop with the client's insurance or risk management records; there are many potential sources of information that may reflect the client's insurance coverage.

Quantum of Proof Required

Whether a party has satisfied the statutory prerequisites for the admission of secondary evidence of a lost document is a question of law for the court to determine. [17] Once the proponent has satisfied these initial burdens, the sufficiency of the evidence to establish the terms and conditions of the document is generally a matter for the trier of fact.

Colorado's appellate courts have not addressed the evidentiary standard relating to a missing insurance policy. [18] In *Walker v. Drogmund*, however, the Colorado Supreme Court held that a party relying on secondary evidence must present evidence that is "clear and satisfactory as to the contents of the documents involved." [19] *Walker* dealt with two specific instances: (1) parties seeking specific performance of a contract, and (2) parties seeking to establish the existence of a deed. In both cases, the need for certainty as to the terms and conditions of the contract provided compelling reasons for the clear and convincing evidentiary standard. A heightened standard of proof may not be required to establish a lost or missing insurance policy.

There is a split of authority in other jurisdictions as to whether an insured may establish the terms and conditions of the missing policy by a preponderance of the evidence or whether clear and convincing evidence is required. [20] The principal basis for a heightened standard of proof with respect to lost insurance policies is the risk of fraudulent claims. [21] However, this position has been sharply criticized by some courts. As the U.S. District Court stated in *Servants of Paraclete*, mentioned above:

> A heightened standard of proof is required in the civil context where fraud is a concern, such as proving the existence and contents of a lost will or oral contract. Missing insurance policies are not similarly as vulnerable to fraud because the business records and standard forms used to prove the existence and contents of the policies are inherently more reliable than the majority of papers offered into evidence. [22]

Similarly, a U.S. District Court in Delaware recently criticized jurisdictions applying the clear and convincing evidentiary standard for lost insurance policies, stating:

> This Court fails to see the logic in creating a heightened standard of proof because a matter [lost policies] is a common problem. As plaintiff effectively points out in its surreply brief "[g]arden-variety automobile accidents and breach-of-contract cases are also 'common problems,' but no one would argue that claimants in such actions must prove the elements of their case by anything other than a preponderance of the evidence." [23]

Because standardized policy forms are commonly used in the insurance industry, and because business records of the type usually relied on to establish lost or missing policies are generally presumed to have a greater reliability than other records, [24] an insured in Colorado may make a compelling argument that it is not required to establish the existence and terms of a missing policy by clear and convincing evidence; a preponderance of the evidence may suffice.

Proof of Policy Exclusions

Under Colorado law, it is the insured's burden to establish coverage under an insurance policy, and if proven, it is the insurer's burden to establish any exclusions or limitations to coverage in that policy. [25] Accordingly, in dealing with lost or missing insurance policies, the insured need ***117** prove only the existence and terms of the document sufficient to establish coverage. It is then the insurer's obligation to present secondary evidence to establish any exclusions or limitations to coverage in that policy.

Conclusion

Litigation over lost or missing insurance policies is becoming increasingly common, especially in cases involving "long tail" liabilities such as environmental claims or toxic torts, where the covered event may have taken place years or even decades before a claim is made. Many problems can be avoided by advising clients who may face such long tail risks to assemble a complete policy history before any claim is made. However, if such policy information is unavailable, Colorado law will permit the insured to recover under its lost or missing insurance policy provided sufficient secondary evidence is produced.

Footnotes

Note 1. *This article was written by Craig N. Johnson, Denver, a litigation associate with Kutak Rock, (303) 297-2400.*

1 For a discussion of which policies may be "triggered" by such long tail liabilities, *see* Anderson and Plunkett, "Trigger of Coverage: A Policyholder's Perspective," 16 *Ins. Lit. Rptr.* 252 (June 1994).

2 *See People v. Williams*, 654 P.2d 319, 323 (Colo.App. 1982); C.R.E. 1002.

3 C.R.E. 1004.

4 CRS § 13-25-113.

5 *Walker v. Drogmund*, 74 P.2d 1235, 1236 (Colo. 1937); *see also IMCERA Groups, Inc. v. Liberty Mut. Ins. Co.*, 50 Cal.Rptr.2d 583, 594 (Cal.App. 1996) ("The insured need not prove the policy's contents verbatim; proof of the substance is sufficient.").

6 *See, e.g., Askins v. Easterling*, 347 P.2d 126, 129 (Colo. 1959) (showing of due diligence required for admission of secondary evidence of trust instrument).

7 *See* Ostrager and Newman, *Handbook on Insurance Coverage Disputes* § 17.02 at 737 (8th ed. 1995).

8 *See* F.R.E. 1004 (official comment) (regarding proof of lost documents); *see also* 19 *Couch on Insurance* § 79:6 (2d ed. 1983).

9 *See Gooch v. Rodewald*, 432 P.2d 755, 756 (Colo. 1967) (*citing* 54 C.J.S. *Lost Instruments* § 27e); *see also UNR Indus., Inc. v. Continental Cas. Co.*, 682 F.Supp. 1434, 1447-48 (N.D.Ill. 1988) (insured must provide sufficient evidence of policy's coverage provisions).

10 *See Bituminous Cas. Co. v. Vacuum Tanks, Inc.*, 975 F.2d 1130, 1132, n.2 (5th Cir.1992), *aff'd following remand* 75 F.3d 1048 (5th Cir.1996) (ledger sheets and testimony from agent showing that policy was issued held insufficient); *IMCERA Groups, supra*, note 5 at 590 (bulletins with notations of policy attachments insufficient to describe terms of policy).

11 *See, e.g., Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F.Supp. 1213, 1222-23 (S.D.N.Y. 1986); Ostrager and Newman, *supra*, note 7 at § 17.04 and cases cited therein (discussing various types of admissible evidence).

12 Ostrager and Newman, *supra*, note 7 at § 17.04.

13 *See Bituminous Cas. Co., supra*, note 10 at 1051-52 (specimen policy admitted as to terms and conditions of insured's lost policies); *but see U.S. Fidelity & Guar. Co. v. Thomas Solvent Co.*, 683 F.Supp. 1139, 1171-72 (W.D. Mich. 1988) (testimony insufficient to show that insured's policies contained same terms and conditions as standard forms).

14 *See, e.g., Bituminous Cas. Co., supra*, note 10 at 1051-52 (testimony of plaintiff's insurance agent and director of Texas Department of Insurance admitted to establish terms of policies); *Zurich Ins. Co. v. Northbrook Excess & Surplus Ins. Co.*, 494 N.E.2d 634 (Ill. App. 1986) (extrinsic evidence, including expert testimony, sufficient to prove missing policies).

15 857 F.Supp. 823 (D.N.M. 1994).

16 *Id.* at 829.

17 C.R.E. 104(a).

18 The Denver District Court, however, recently instructed a jury as to the preponderance of the evidence standard with respect to certain lost or missing insurance policies in *Public Service Co. of Colorado v. Admiral Ins. Co.* (Denver Dist. Ct., Case No. 92-CV-7652, March 16, 1995). This decision is currently on appeal.

19 *Supra*, note 5 at 1236; *see also Gooch, supra*, note 9 at 756-57 (applying clear and convincing standard).

20 *Compare Servants of Paraclete, supra*, note 15 at 829; *Remington Arms Co. v. Liberty Mut. Ins. Co.*, 810 F.Supp. 1420, 1426 (D.Del. 1992); *Mapco Alaska Petrol., Inc. v. Central Nat. Ins. Co.*, 784 F.Supp. 1454 (D.Alaska 1991) (applying preponderance of evidence standard); *with Boyce Thompson Inst. for Plant Res., Inc. v. Insurance Co. of N. America*, 751 F.Supp. 1137, 1140 (S.D.N.Y. 1990); *Emons Indus., Inc. v. Liberty Mut. Fire Ins. Co.*, 545

F.Supp. 185, 188 (S.D.N.Y. 1982); *Keene Corp. v. Insurance Co. of N. America*, 513 F.Supp. 47 (D.D.C. 1982) (applying clear and convincing standard).

21 *See Remington Arms, supra*, note 20 at 1425-26 (discussing justifications for heightened standard of proof).

22 *Servants of Paraclete, supra*, note 15 at 828 (citations omitted).

23 *Remington Arms, supra*, note 20 at 1423.

24 *See, e.g., People v. Holder*, 632 P.2d 607, 609 (Colo.App. 1981) (business records exception to the hearsay rule justified by trustworthiness of records); C.R.E. 803(6).

25 *American Fam. Mut. Ins. Co. v. Johnson*, 816 P.2d 952, 953 (Colo. 1991); *Hecla Mining Co. v. New Hampshire Ins. Co.*, 811 P.2d 1083, 1090 (Colo. 1991).

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