

# Insurance

## Lost Or Missing Policy?

### The Basics Of Insurance Policy Reconstruction

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# Commentary

## Lost Or Missing Policy? The Basics Of Insurance Policy Reconstruction

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### I. Introduction

The increase of litigation, particularly asbestos, silica, and other toxic torts, has caused policyholders, many facing lawsuits for the first time, to recognize the need for finding their historic insurance policies. Due to the passage of time, such policies may have been destroyed or lost. Nevertheless, coverage may still be available to the policyholder if secondary evidence of coverage is introduced.

This article will discuss insurance policy reconstruction through the use of insurance archaeology services and judicial reconstruction. As a part of the discussion on judicial reconstruction, the article will discuss the burden of proof/standard of proof issues associated with policy reconstruction, as well as methods of proving the contents of a policy.

### II. The Archaeology Hunt — Insurance Policy Reconstruction

When reconstructing historic insurance policies, archaeologists develop a plan of attack.

First, they develop the scope of the search. The search includes looking for policies as far back in time as possible — i.e., the first sale of the offending product, the first pollution activity, the first alleged exposure, etc. It is important to search for primary as well as umbrella and excess policies in order to reconstruct the highest possible limits of coverage. Umbrella and excess policies will often specifically identify underlying coverage. Moreover, primary policies will often reference earlier coverage.

Second, the archaeologists determine where the search will be conducted, how much time it will take, who will perform the work and the cost of the project.

Third, predecessor and successor company policies are identified and located. Frequently, the company that allegedly caused the problem has been sold or dissolved. Under the law of successor liability, any company in line of title is potentially at risk for a problem allegedly caused by a predecessor. The starting point of any policy reconstruction is to identify the offending company and all succeeding companies. Acquisition and divestiture agreements may contain important indemnity and insurance language concerning the assumption of liabilities.

Fourth, the archaeologists identify possible sources to investigate. Interviews of key individuals associated



with the policyholder are often worth their weight in gold. Someone who has been with the company for a long time often has valuable information to convey regarding company procedures, company history and the names of former and current employees who may have knowledge of the insurance policies. Internal policyholder files often contain evidence of insurance policies. Insurance companies are another fruitful source of insurance documents since many insurance companies maintain the policies in hard copy or on microfiche. Other sources include insurance agents or brokers, attorney files, accountant or bookkeeper records, the national archives, military archives, federal and state court files, regulatory agencies, customer files, business partner files, state agencies, and independent archives, to name a few.

Finally, the archaeologists properly record and maintain the information once it is found. The secondary evidence is copied and a document identification form is attached to record when and where it was found. Then, the policy evidence is safely stored. Safe storage can include a vault or a fire proof file. Scanning the policy evidence and keeping a backup of the hard copy on the computer is advisable. A computer database can also be used to record the following key information:

- Insureds
- Policy Number
- Carriers
- Brokers
- Policy Periods
- Occurrence/Claims Made
- Occurrence Limits/Aggregates
- Deductibles and SIRs
- Insurance Layers
- Aggregate Erosion

As shown above, insurance archaeologists can help maximize a policyholder's insurance asset by locating the actual missing policy or secondary evidence of it. Even when the actual policy cannot be found, an insurance company may accept secondary evidence as proof of the policy's terms and address the claim based on that evidence. If the insurer and insured reach an impasse due to the insurer's refusal to accept secondary evidence as proof of coverage, a lawsuit may ensue. Judicial reconstruction of lost or missing policies is discussed in more detail below, as is the insurance archaeologist's role in the litigation process.

### III. Off To Court — Judicial Reconstruction Of Lost Or Missing Policies

Even if the policyholder cannot find a copy of the insurance policy itself, it may establish coverage through secondary evidence if two evidentiary principles are satisfied. The Rules of Evidence permit proof of lost instruments through secondary evidence.<sup>1</sup>

First, the policyholder must demonstrate that it conducted a diligent search for the policy, that the policy was lost or destroyed, and that the loss or destruction was not the result of bad faith.<sup>2</sup> There is no precise definition for what constitutes a diligent search. Often, a corporate officer of the policyholder will submit an affidavit that discusses the company's document destruction policy and attests to the company's inability to locate the policy despite a thorough search. In addition, a policyholder can hire an insurance archaeology firm to aid it in locating its historic insurance policies. As discussed above, a great number of sources can be searched by an insurance archaeology firm to help demonstrate that the policyholder has undertaken a diligent search. Moreover, a representative of the archaeology firm can submit an affidavit regarding the search efforts. If the court finds that the policyholder did not conduct a diligent search or acted in bad faith, the court may rule that no secondary evidence can be admitted to establish coverage.<sup>3</sup>

Second, the policyholder must prove the existence and material terms and conditions of the policy.<sup>4</sup> Importantly, it is not necessary for the policyholder to reconstruct the missing policy word for word.<sup>5</sup> Courts have stated that the policyholder need prove only "essential terms." Some courts require that the insured prove the identity of the named insured, the policy term, the type of coverage and the limits of coverage.<sup>6</sup> Other courts have specifically defined what must be proved by the policyholder to establish coverage under a lost or missing policy. For instance, in Michigan,<sup>7</sup> a policyholder must demonstrate:

- the issuance and terms of the policy
- the period of coverage
- the types of coverage
- the named insured
- the limits

In New York, a policyholder, in addition to proving a lost policy's existence and material terms, must also prove the lost policy's execution and delivery.<sup>8</sup>

The burden of establishing the existence and material terms of a lost or missing policy is on the policyholder.<sup>9</sup> Many courts require the policyholder to establish the lost or missing policy by a preponderance of the evidence.<sup>10</sup> Other courts require a stricter "clear and convincing evidence" standard.<sup>11</sup>

The insurer bears the burden of proving any limitation to coverage. Once the policyholder has met its burden of proof regarding coverage under the lost or missing policy, the burden shifts to the insurer to prove that the policy contained limitations that precludes coverage.<sup>12</sup>

Assuming the above two evidentiary principles are met, secondary evidence of the policies may be introduced. There is a wide variety of secondary evidence that can be utilized. Under the best evidence rule, there is no hierarchy of secondary evidence. Policyholders will have better success using a combination of secondary evidence — some documentary and some testimonial.

Documentary evidence may include, but is not limited to:

- Partial policies, declaration pages or other records showing policy numbers and dates of coverage<sup>13</sup>
- Unexecuted policy forms accompanied by a declarations page or other supporting evidence<sup>14</sup>
- Certificates of Insurance<sup>15</sup>
- Subsequent policies suggesting prior similar coverage<sup>16</sup>
- Records produced by insurance brokers, including ledgers or schedules of insurance<sup>17</sup>
- Interoffice memoranda and correspondence proving the insurer believed a policy existed<sup>18</sup>

- Premium invoices<sup>19</sup>
- Proof of premium payment, such as checks<sup>20</sup>
- Board of Directors' meeting minutes<sup>21</sup>
- Excess policies providing references to primary policies<sup>22</sup>
- Loss prevention surveys conducted by insurers<sup>23</sup>
- Specimen or sample policies used by the insurer during the policy period in question<sup>24</sup>
- Accounting records or billing information
- Binders or cover notes<sup>25</sup>
- Retrospective premium reports<sup>26</sup>
- Reinsurance records<sup>27</sup>
- Placing slips<sup>28</sup>
- Loss history cards<sup>29</sup>
- Schedules of underlying policies<sup>30</sup>

Testimony can also establish coverage. That testimony can include the following:

- Testimony from an insurer's employees concerning coverage<sup>31</sup>
- Testimony of the insured's employees as to the minimum amounts of insurance maintained by an insured<sup>32</sup>
- Testimony of brokers, consultants or insurance experts as to policies that were issued to an insured<sup>33</sup>
- Testimony of insured's employees regarding insurance policies issued to the insured<sup>34</sup>

There are several recent cases that discuss the use of secondary evidence. In *Dart Industries, Inc. v. Com-*



*mercial Union Insurance Co.*, 28 Cal.4th 1059, 52 P.3d 79 (Cal. 2002), the California Supreme Court recognized that lost policies may be proven by secondary evidence, and further held that the language of the policies does not have to be proven verbatim. "The proponent of the lost document need only prove the relevant substance of the document."<sup>35</sup> "[T]he claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue, and (2) the substance of each policy provision essential to the claim for relief, i.e., essential to the particular coverage that the insured claims. Which provisions those are will vary from case to case."<sup>36</sup> "In turn, the insurer has the burden of proving the substance of any policy provision 'essential to the . . . defense.'"<sup>37</sup>

*PSI Energy, Inc. v. The Home Insurance Company*, 801 N.E.2d 705 (Ind. App. 2004), involved an issue on the insured's proof of lost policies. In reversing summary judgment for the insurers on the proof of lost policies issue, the Court of Appeals, relying on the *Dart* and *Aero-Motive* cases, held that the insured's submission of secondary evidence with regard to the lost policies was sufficient. The secondary evidence included internal business records describing the policy periods, limits of liability, premiums, and coverage, testimony of an insurance expert, and a copy of an underlying policy.<sup>38</sup>

In *Burt Ridge Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2nd Cir. 2002), the Second Circuit held that the policyholder had proved the existence of a number of general liability policies by presenting the following evidence: (1) corporate parent documents showing the insurer's policy numbers and dates of coverage; (2) a letter from the insurer's claim representative acknowledging the policy numbers; (3) financial statements from the policyholder showing that the policyholder had allocated funds for purchasing insurance from the insurer; (4) testimony from the insurer's claims counsel that claims had previously been made under the policies and that those policies were general liability policies; (5) correspondence between the policyholder and the insurer regarding the claims; (6) testimony from the policyholder's risk manager that all subsidiaries were insured under the corporate parent's policies; (7) an excess policy listing the insurer as the underlying carrier and (8) corporate officers of the policyholder testifying and corroborating the other secondary evidence.<sup>39</sup>

In *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp.2d 670 (W.D. Mich. 2003), one of the issues facing the court was evidence pertaining to lost insurance policies. The court, applying Michigan law, held that "secondary evidence may include documentary evidence, such as binders and declarations pages, testimony from insurance agents or brokers responsible for obtaining insurance for the insured, testimony from representatives of the insurers, insurance policy reconstruction experts, and standard policy forms in use by the insurer during the relevant period."<sup>40</sup> To establish the existence of the lost policies, Aero-Motive presented schedules of underlying policies, correspondence from the insurer's counsel stating that the insurer did not contest the existence of the policy, deposition testimony of a representative of the insurers, testimony of an insurance reconstruction expert, copies of pre-paid insurance ledgers, insurance binders, ledger sheets, and declaration pages. The court held that Aero-Motive presented sufficient evidence to meet its burden of establishing the material terms of the policies.<sup>41</sup>

In *Coltec Indus. Inc. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N.D. Ill. Sept. 30, 2002), the insured presented evidence during the relevant time period that Zurich Insurance Company was a regular subscriber to the rating and policy services of the National Bureau of Casualty Underwriters ("Bureau") and, as such, was required to use the Bureau's general liability insurance forms unless it applied for and received approval from the Illinois Department of Insurance to deviate from those forms. Other evidence presented included certificates of insurance describing the policies at issue as CGL policies, a memorandum by an employee of the policyholder, the insurer's premium ledger and loss history cards showing that the insured had paid the policies in full and that the insurer had defended bodily injury and property damage claims under the policies. The court held that Coltec proved the existence and material terms of the insurance policies issued by Zurich.<sup>42</sup>

#### IV. Conclusion

Lost insurance policies have become an important issue for many policyholders as a result of the surge in litigation involving long-tail claims. Lost insurance policies, however, are not a bar to coverage. With a diligent search, such policies, or secondary evidence of them, can be found and then used to demonstrate that coverage exists for the claim or claims at hand.

## Endnotes

1. *Coltec Industries, Inc. v. Zurich Insurance Company*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002). Insurance companies are obligated to conduct a search for any policies issued to the Insured. It is important to make sure that their search is comprehensive. In Oregon, the legislature enacted ORS §465.479 which, among other things, codifies the insurance company's obligation to commence an investigation into its records for lost policies issued to the policyholder.
2. *Burt Ridge Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83 (2nd Cir. 2002); *Arichem Corp. v. St. Paul Fire & Marine Insurance Co.*, 942 F. Supp. 1143 (W.D. Mich. 1995); and *United States v. McGaughey*, 977 F.2d 1067 (7th Cir. 1992).
3. *Estee Lauder International, Inc. v. World Wide Marine Service, Inc.*, 1989 U.S. Dist. LEXIS 12192 (S.D. N.Y. Oct. 13, 1989).
4. *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Colonial Tanning Corp. v. Home Indemnity Co.*, 780 F. Supp. 906, 922 (N.D. N.Y. 1991); *Remington Arms Co. v. Liberty Mutual Insurance Co.*, 810 F. Supp. 1420 at 1422-23 (D. Del. 1992 ).
5. *Dart Industries, Inc. v. Commercial Union Insurance Co.*, 28 Cal.4th 1059, 52 P.3d 79, 86 (Cal. 2002).
6. *Bell Lumber and Pole Co. v. United States Fire Insurance Co.*, 847 F. Supp. 738 (D. Minn. 1994).
7. *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003); *Star Steel Supply Co. v. United States Fidelity & Guaranty Co.*, 186 Mich. App. 475, 480, 465 N.W.2d 17, 20 (1990).
8. *Boyce Thompson Institute for Plant Research, Inc. v. Insurance Company of North America*, 751 F. Supp. 1137, 1140 (S.D.N.Y. 1990).
9. In *Dart Industries, Inc. v. Commercial Union Insurance Company*, 28 Cal. 4th 1059, 52 P.3d 79 (2002), the California Supreme Court ruled that the claimant has the burden of proving (1) the fact that he or she was insured under the lost policy during the period in issue; and (2) the substance of each policy provision essential to the claim for relief; i.e., essential to the particular coverage that the insured claims. In turn, the insurer has the burden of proving the substance of any policy provision essential to the defense.
10. *Turner v. Ewing*, 255 La. 659, 232 So.2d 468 (1970); *Arichem Corp. v. St. Paul Fire & Marine Insurance Co.*, 942 F. Supp. 1143 (W.D. Mich. 1995); *Coltec Industries Inc. v. Zurich Insurance Co.*, 2002 U.S. Dist. LEXIS 18979 (N.D. Ill. 2002); *Remington Arms Co. v. Liberty Mutual Ins. Co.*, 810 F. Supp. 1420 (D. Del. 1992); *Dexter v. North River Insurance Co.*, 1999 U.S. Dist LEXIS 23187 (D.N.J. 1999).
11. *Emons Industries, Inc. v. Liberty Mutual Fire Insurance Company*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Parker Hannifin Corp. v. American Motorists Insurance Co.*, 1990 U.S. Dist. LEXIS 20212 (D. N.J. July 23, 1990); *In Re: The Aetna Casualty & Surety Co. v. The Wallace & Gale Co.*, 2002 U.S. Dist. LEXIS 25800 (S.D. Md. 2002).
12. *City of Tacoma v. Great American Insurance Co.*, 897 F. Supp. 486, 487 (W.D. Wash. 1995).
13. *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986).
14. *UNR Industries, Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434 (N.D. Ill. 1988).
15. *MAPCO Alaska Petroleum, Inc. v. Central Nat. Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).
16. *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Northeast Utilities v. Century Indemnity Co.*, 1999 Conn. Super LEXIS 1660 (June 21, 1999).
17. *Pearl Assurance Co v. School Dist. No. 1*, 212 F.2d 778 (10th Cir. 1954); *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119 (D.C. Cir. 1986); *Rubenstein v. Royal Ins. Co. of America*, 694 N.E.2d 381 (Mass. App. 1998).
18. *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Northeast Utilities v. Century Indemnity Co.*, 1999 Conn. Super LEXIS 1660 (June 21, 1999); *Coltec Industries, Inc. v. Zurich*



- Insurance Company*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002); *Remington Arms Co. v. Liberty Mutual Ins. Co.*, 810 F. Supp. 1420 (D. Del. 1992).
19. *MAPCO Alaska Petroleum, Inc. v. Central Nat. Ins. Co.*, 795 F. Supp. 941 (D. Alaska 1991).
  20. *UNR Industries, Inc. v. Continental Ins. Co.*, 682 F.Supp. 1434 (N.D. Ill. 1988); *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003).
  21. *Burroughs Wellcome Co. v. Commercial Union Ins. Co.*, 632 F. Supp. 1213, *modified*, 642 F.Supp. 1020 (S.D.N.Y. 1986).
  22. *Id.*
  23. *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982).
  24. *Rodgers v. Prudential Ins. Co.*, 267 Cal. Rptr. 499 (Cal. App. 1990); *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996); *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003); *Central Illinois Light Company v. The Home Insurance Company*, 342 Ill. App.3d 940, 795 N.E.2d 412 (Ill. Ct. App. 2003).
  25. *Diplomat Homes, Inc. v. Commercial Standard Ins. Co.*, 394 F. Supp. 558 (W.D. Mo. 1975); *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003).
  26. *Remington Arms Co. v. Liberty Mutual Ins. Co.*, 810 F. Supp. 1420 (D. Del. 1992).
  27. *Rodgers v. Prudential Ins. Co.*, 267 Cal. Rptr. 499 (Cal. App. 1990); *Clendenin v. Benson*, 117 Cal. App. 674 (1931); *Central Illinois Light Company v. The Home Insurance Company*, 342 Ill. App.3d 940, 795 N.E.2d 412 (Ill. Ct. App. 2003).
  28. *Central Illinois Light Company v. The Home Insurance Company*, 342 Ill. App.3d 940, 795 N.E.2d 412 (Ill. Ct. App. 2003).
  29. *Coltec Industries, Inc. v. Zurich Insurance Company*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002).
  30. *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003).
  31. *Rodgers v. Prudential Ins. Co.*, 267 Cal. Rptr. 499 (Cal. App. 1990); *Clendenin v. Benson*, 117 Cal. App. 674 (1931); *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996); *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982); *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003).
  32. *Bituminous Casualty Corp. v. Vacuum Tanks, Inc.*, 75 F.3d 1048 (5th Cir. 1996); *Emons Industries, Inc. v. Liberty Mutual Fire Ins. Co.*, 545 F. Supp. 185 (S.D.N.Y. 1982).
  33. *Transamerica Ins. Co. v. Pennsylvania Nat'l Ins. Co.*, 908 S.W.2d 173 (Mo. App. 1995); *Century Indemnity Company v. Aero-Motive Company*, 254 F. Supp. 2d 670 (W. D. Mich. 2003); *Dart Industries, Inc. v. Commercial Union Insurance Company*, 28 Cal. 4th 1059, 52 P.3d 79 (2002).
  34. *Northeast Utilities v. Century Indemnity Co.*, 1999 Conn. Super. LEXIS 1660 (June 21, 1999); *Coltec Industries, Inc. v. Zurich Insurance Company*, 2002 U.S. Dist. LEXIS 18979 (N. D. Ill. 2002).
  35. *Dart Industries, Inc. v. Commercial Union Insurance Co.*, 28 Cal.4th 1059, 52 P.3d 79 (2002).
  36. *Id.* at 1071.
  37. *Id.* at 1072.
  38. *PSI Energy, Inc. v. The Home Insurance Company*, 801 N.E.2d 705, 721-722 (Ind. App. 2004).
  39. *Burt Ridge Box, Inc. v. Travelers Property Casualty Corp.*, 302 F.3d 83, 91 (2nd Cir. 2002).
  40. *Century Indemnity Company v. Aero-motive Company*, 254 F. Supp.2d 670, 680 (W.D. Mich. 2003).
  41. *Id.* at 687- 693.
  42. *Coltec Industries, Inc. v. Zurich Ins. Co.*, 2002 U.S. Dist. LEXIS 18979 (N.D. Ill. Sept. 30, 2002). ■