

## Environmental Law

### Weaving Straw Into Gold

Reconstructing insurance coverage, while difficult, can be invaluable

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Attorneys can clearly relate to the plight of the miller's daughter in *Rumpelstilzchen* who was ordered to turn straw into gold. Clients often expect attorneys to turn bad facts into a good result. This situation frequently arises in the environmental insurance context when a client expects the attorney to reconstruct insurance coverage based on minimal secondary documentation.

It is not unusual for the cleanup of groundwater contamination to cost \$1 million or more. While clients undertake the cleanup, they look to their attorney to obtain reimbursement from third parties. In turn, the attorney should not only look to responsible parties that may have caused the contamination, but also to insurance carriers who may be responsible to providing the needed

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funds for the cleanup.

Generally, comprehensive general liability policies issued prior to 1986 provide coverage for cleanup of environmental contamination where groundwater is impacted. It is a rare event when clients possess copies of policies that predate 1986. Typically, clients produce limited documentation indicating that such policies existed, such as insurance schedules or the name of a broker that placed their policies prior to 1986. However, an attorney can weave those secondary pieces of documentation into the proverbial "gold" by securing coverage for the environmental cleanup.

In New Jersey, an insured must prove by a "preponderance of the evidence" the existence and contents of the lost insurance policies. See *Borough of Sayreville v. Bellefonte Ins. Co.*, 320 N.J. Super. 598 (App. Div. 1998); see also *U.S. Fire Ins. Co. v. Durametallic Corp.*, 2002 WL 32058164 (N.J. Super. A.D. 2002). Ascertaining the existence of an insurance policy and its terms and conditions is a highly fact-sensitive process and a court is required to consider all evidence taken as a whole in making this determination.

In essence, the New Jersey courts have established two steps that an insured must take to reap the benefits of the missing comprehensive liability policies. The first step requires the

insured to show that the policies existed, which typically requires evidence of the name of the insurer, the policy number, policy period and in some cases, the policy limits. As the case law outlined below suggests, the following can be used to establish the existence of the policies:

- Insurance schedules prepared by the insured if corroborated by independent evidence;
- Certificates of insurance;
- Documents from insurance brokers; and
- Testimony of insurance brokers.

Other secondary documentation includes:

- Invoices from insurance agents/brokers or carriers;
- Cancelled checks evidencing payment of premiums;
- Records such as accountants' ledger sheets itemizing insurance coverage;
- Loan records;
- Lawsuit records;
- Lease/contract records; and
- Corporate minutes that document the approval of the purchase of insurance.

The second step is proving the actual terms and conditions of the missing policy. In most cases, during a particular time period, the insurer utilized standardized policies drafted by insurance organizations to which they belonged. Typically, these form policies contain

standardized terms and conditions. To satisfy the burden of proof, New Jersey case law allows an insured to rely on form policies used during the alleged time period that the policy was issued.

To prove that a form policy was used by an insurer, an insured will likely need a witness familiar with the insurance industry who can testify that a particular insurer belonged to an insurance organization that provided certain form policies. For the most part, such evidence is sufficient to establish the terms and conditions of a policy.

Although the case law in New Jersey is scarce on this specific issue, the cases outlined below describe the evidence the court requires to establish the existence and terms and conditions of a policy.

In *Borough of Sayreville*, the court held that plaintiff's evidence was sufficient to establish the existence of the policy and reversed the granting of a summary judgment motion. The court found that copies of insurance schedules that list the company policies by number, type, applicable limits, and dates of coverage combined with incomplete minutes from a borough meeting, indicating coverage was adequate evidence to satisfy the standard establishing the existence of the policies. As to the terms and conditions of the policy, the court noted that where the policy was missing, it was permissible for the insured to "introduce another policy coupled with evidence that it is the same in form as to the policy sued upon."

A similar result was reached in the unpublished decision of *Spectraserve, Inc. v. Crum & Forster Ins. Co.*, No. L-8510-93 (Sup. Ct. L. Div. 1995). *Spectraserve* was an environmental coverage case concerning three superfund sites. The issue before the court was a claim based on lost insurance policies. Plaintiff made a motion for a ruling to determine that the insurer issued policies to the plaintiff for two years. In attempting to establish the existence of the policies, the plaintiff introduced evidence that included certificates of insurance for the policies. The certificates of insurance

contained the policy number, limits of liability, and identified the policy type as general liability. The plaintiff also introduced documentation that it paid the policy premiums.

To prove the contents of the policy, the plaintiff offered as evidence two general liability insurance forms used by another insurer and testimony that the defendant insurer used the form policy. In addition, a representative of the defendant insurer testified that the form policy introduced by the plaintiff "was probably used from 1973," the time period for one of the missing policies. The court held that it was more likely than not that the form policies were the same as the terms of the plaintiff's general liability coverage policy.

The court in *Spectraserve* found that a similar policy form, even though not the policy of the insurer from whom the plaintiff was claiming coverage, coupled with testimony that the plaintiff's insurer used standard insurance forms, was sufficient to demonstrate by a preponderance of the evidence the terms and conditions of the policy upon which the insured made the claim.

Another New Jersey Appellate Division case addressing the issue of lost policies is *Durametallic Corp.* *Durametallic* sought coverage for asbestos-related claims under several policies issued by two insurers. At issue was the existence, terms and conditions of the policies issued by the insurers. Both insurers moved for summary judgment, but the court found that the policies existed and provided coverage to the plaintiff.

Specifically, the court held that the evidence produced by plaintiff was sufficient to establish the existence of the policies. The primary evidence was the broker's testimony on which the broker claimed he sold the policy at issue to the insured and was an agent for the defendant insurers. Further, there was documentary evidence supporting the broker's testimony, which included a letter setting forth the coverage history for *Durametallic*. The court held that "based on the testimony of [the broker], his

clear memory...his position as agent of the defendant's insurance company, as well as the documents offered as secondary evidence, clearly establishes, by both direct and circumstantial evidence, that the policies existed."

As to the contents of the policies, the Appellate Division found that the lost policies covered bodily injury that occurred during the policy period. The evidence introduced to support the plaintiff's position was testimony from the broker stating that the policy provided coverage for bodily injury claims and products liability, which was corroborated by the coverage history that was prepared by the broker/agent. In addition, the insurer's consultant testified that the insurer used preprinted policy forms that rating bureaus utilized from 1967 and 1968.

Due to the dearth of New Jersey law on lost policies, an attorney should look to other jurisdictions that require similar proof to establish the content of lost policies. One case of interest in New York is *Goldfield American Corp. v. Aetna Casualty & Surety Co.*, 661 N.Y.S.2d 948, N.Y. Sup., 1997. In *Goldfield*, the insurer moved for summary judgment on the grounds that plaintiff could not prove the existence or terms of its insurance policies. Plaintiff, however, contended that the insurer was a member of a national rating bureau during the relevant time the alleged policies were issued. The plaintiff then offered specimen policies issued by the rating bureau used by the insurer during this time period. The insurer did not dispute that it was a member of the rating bureau or the form of policy offered into evidence by plaintiff. The court noted that other courts have permitted the use of specimen policies to determine the terms of the policies. Based on the evidence offered by the plaintiff and the insurer's failure to rebut any of that evidence, the court found that an issue of fact existed.

Should the attorney succeed in establishing the contents of the policy based on the form used during the policy's alleged time of issuance, an attorney may face an uphill battle determining the

limits of liability. To the extent that an insured does not have any information regarding the limits of liability for a missing policy, an insurance expert could render an opinion. However, this opinion is not as persuasive as secondary documentation that sets forth the limits

of liability for the missing policy.

Despite the loss or destruction of insurance policies predating 1986, the law allows an attorney to recreate its existence and content through evidence such as secondary documentation, insurance expert opinions, form poli-

cies, and testimony of brokers or agents that purchased the policies. Once an attorney is able to reconstruct the policy by a preponderance of the evidence, there should be no excuse for the insurance company to fail to contribute to a client's cleanup. ■