

Following the Trail of the Missing Policy

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It is no longer unusual to hear of law suits which stem from events that occurred long ago while typewriters were in frequent use and no one had a cell phone. The claims pose some thorny problems for insurers. An individual or organization might state that it was historically insured by an insurer that does not have any record of the policy. If the policy cannot be located, the insurer needs to consider two separate issues: (a) Did it issue a policy to this "insured"? (b) If it did issue a policy, what were the terms of coverage?

Did the Insurer Issue a Policy to this "Insured"?

In the event that no one has a copy of the policy, the next step is to look for any information from other sources. The investigation requires the parties to be insurance sleuths following historical clues evidencing coverage. A starter's list of evidence that can assist in determining whether a policy was issued to the "insured" includes:

- information from the insurance broker's file (for example, cover letters setting out that a policy has been issued; memoranda to the insurer confirming premiums and/or risk factors; slips confirming a premium had been paid; letters or applications to other insurers setting out the insurance history for the individual/organization);
- evidence from members of the insurance brokerage as to their recollection of the coverage secured for the insured (if the "insured" was a large account for the brokerage and there was a long history of coverage with one insurer, there may be individuals who can remember some details of historical coverage);
- minutes from the board of directors of the insured;
- the insured's budgets or accounts indicating payments of the premiums;
- any letters between the insured and the insurer (or through the broker); and

- claims files held by the insurer regarding claims made closer to the time of the policy period.

While the onus is on the insured to establish the existence of the policy (and its terms), an insurer should be prepared to answer questions as to the efforts made to locate a missing policy if the matter ever ends up in court.

What Were the Terms of Coverage?

Even if everyone is agreed that an insurer issued a policy for the relevant time, the terms of coverage might not be known. A court will not "write" a policy for the parties. If the terms cannot be established, a person or organization could be left with no coverage at all. The onus to establish the terms is on the insured. There is a duty of good faith on the insurer to attempt to locate information that assists terms of coverage to a policy it issued. The duty of good faith does not change the onus on the insured but the insurer must be ready to establish that it has made a reasonable effort to assist its insured in the search for the missing policy. Locating policies issued within the same time frame to similar institutions might be helpful in establishing the terms of coverage. If there is any evidence that the insured was issued a manuscript policy, however, policies issued to other institutions will be of limited (if any) value.

Many of the sources reviewed to establish the initial policy are also helpful in determining terms of coverage. Brokerage files, brokers or underwriters who worked at the relevant period of time on the account, historical claims files and the insured's own business records might all provide clues along the coverage trail.

Let the Investigation Begin!

A case involving a missing policy brings out the opportunity for everyone involved to be Miss Marple or Sherlock Holmes. We take out our magnifying glass and search for clues in all available records. Unfortunately, even with tremendous ingenuity, the trail may turn cold leaving everyone in frustration. However, keeping in mind some of the major sources for information in this type of case the insurer can ensure that the duty of good faith has been fulfilled and that the search has been complete.

Given the difficulties that can be faced in establishing historical coverage, insureds may want to consider holding on to policies rather than sending them to the garbage or shredder as we might with credit card invoices and bank statements. Even better than ensuring a proper investigation into missing policies is to not need to do an investigation at all.