

Secondary Evidence of Missing Insurance Policies for Child Victims and Adult Survivors Act Claims

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In 2019, the New York State Legislature passed the Child Victims Act (CVA), and in 2022, it passed the Adult Survivors Act (ASA). Each statute created a “look back” period within which victims of sex abuse could bring previously time-barred claims against both (1) their abusers and (2) institutions legally responsible under various theories of secondary liability, including negligence in hiring, retaining and supervising the abuser. Thousands of CVA and ASA lawsuits have since been instituted, and—consistent with the statutes’ purposes—most of those lawsuits deal with abuse allegedly committed many years ago.

Responding to CVA and ASA claims requires the utmost care and sensitivity, so that past abuses can be meaningfully redressed and so that victims can achieve a measure of closure. The defense and resolution of an abuse case can also be a very expensive process. There have been multi-million-dollar awards, and the cost of litigating can by itself be quite substantial. Institutional defendants therefore must look for insurance coverage to meet these costs. Indeed, because many CVA defendants are charitable institutions with finite means, insurance coverage can be essential in order for victims of abuse to have a chance at a significant monetary



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recovery and in order for socially valuable charitable institutions to avoid bankruptcy.

For claims from the more distant past, defendants will typically look to their comprehensive general liability (CGL) policy for the year or years in question for coverage. Historical CGL policies are especially valuable to the policyholder in abuse cases, because historical CGL policies often have fewer exclusions and limits on liability.

However, it is often difficult for the defendant/policyholder and for its insurance company to find an insurance policy issued decades ago. That is especially true where either party has since undergone a merger or the like. Similarly, it

may be hard to find old policies where document retention policies call for the periodic destruction of old files, where offices have moved, where knowledgeable employees have retired, or where computer systems have been updated. For all these reasons, old policies may be missing or permanently lost.

The first steps for the defendant/policyholder to take in this circumstance are fairly obvious. The policyholder must make a vigorous search for the relevant policy and for related documents (1) in its own files and (2) in the files of its historical insurance brokers; the policyholder must also ask (and, when necessary, forcefully insist) that its insurance company (or companies) for the relevant time period do the same (notably, New York's Department of Financial Services has issued a circular that directs insurance companies to act in "utmost good faith" and cooperate fully with policyholders in locating historical policies and related records in CVA cases "so that victims may be compensated," Insurance Circular Letter No. 11 (2019), N.Y. Dept. of Financial Services).

The policyholder should be *persistent* when asking its insurance company to provide historical policies and related documents. Insurance companies recognize that, at least in a narrow sense, it may be against their interest to furnish proof of coverage. As a result, some insurance companies do not fully cooperate when first asked for evidence of historical policies. Instead, they conduct only a cursory search for the policy itself, or are less than forthcoming as to what related documents they do possess.

Other insurance companies take a broader view. They know they will likely ultimately be compelled by a court to produce all relevant documents; and they recognize that by cooperating from the start they will (1) avoid any claim that they have violated their duty of good faith and fair dealing and (2) be able to more accurately

assess at an earlier date their own potential exposure (if any) and to plan accordingly.

It is helpful for the policyholder to engage experienced coverage counsel and/or an insurance archaeologist to assist in searching for missing historical policies and related documents. Obviously, engaging counsel or an archaeologist entails expense; but in view of the substantial damage awards that can be granted in abuse cases (and in view of the fact that a single sex offender sometimes abuses multiple victims, thus giving rise to multiple cases), this is often an essential measure.

Sometimes the policy can be found through a well-organized search. If not, it is usually the case that "secondary evidence" of the policy—that is, business documents that refer to the policy and reflects its terms—can be found.

Where the insurance company denies the existence of a policy, or denies that the missing policy's terms include coverage for abuse claims, either the policyholder or the insurance company may institute a legal action to determine whether the insurance company is obligated to provide coverage. Then a court must decide whether secondary evidence of the missing policy is admissible and sufficient to establish coverage.

The Best Evidence Rule Generally

Under New York law, the "Best Evidence Rule" provides as a general matter that when "a party seeks to prove the contents of a writing...that is in dispute, the writing...must be proved by production of the *original*, except when the production is excused..." New York State Unified Court System, "Guide to New York Evidence", §10.03 (emphasis added).

However, New York law also recognizes that in appropriate circumstances the loss of an original document can be excused. This "mitigating principle" is necessary so that valid claims and defenses will not be defeated; otherwise,

we would be returned “to the bygone and unlamented days in which to lose one’s paper was to lose one’s right.” *Schozer v. William Penn Life Insurance*, 84 N.Y. 2d 639, 643 (1994), *quoting* 2 *McCormick on Evidence*, §237.

Thus, under New York law, when an original document is lost secondary evidence is admissible to prove its contents, *provided* that: (1) there is no evidence of bad faith by the proponent of the secondary evidence in connection with the loss or destruction of the original document and (2) the proponent of the evidence demonstrates that it has undertaken a diligent but unsuccessful search for the original. “Guide to New York Evidence”, §10.07; *Schozer*, 84 N.Y.2d at 643-44. Rules 1002 and 1004 of the Federal Rules of Evidence are to substantially the same effect as New York’s Best Evidence Rule. *Burt Rigid Box v. Travelers Property Casualty*, 302 F.3d 83, 91-92 (2d Cir. 2002).

Secondary Evidence and Lost Insurance Policies

Applying the Best Evidence Rule and the analogous FRE 1004 to insurance policies, the law in both New York state court and the Second Circuit is that secondary evidence may be admitted to prove the existence and terms of a lost policy, provided that (1) the proponent did not act in bad faith by deliberately losing or destroying the policy and (2) the proponent has conducted a diligent but unsuccessful search for the original. *Burt Rigid Box*, *supra*; *Gold Fields American v. Aetna Casualty and Surety*, 173 Misc. 2d 901 (S. Ct. N.Y. Co. 1997). See *generally* R. Haig, 4c “Commercial Litigation in New York State Courts”, §90:6 (5th Ed.).

This requirement of a “diligent search” is another reason why the policyholder should engage coverage counsel and/or an insurance archaeologist. They can provide the court with reliable evidence in an orderly form demonstrating that

a diligent search for the original policy has been conducted, which is a necessary predicate for the admission of secondary evidence.

It is well-settled that the policyholder has the burden of establishing the existence of the policy and the basic material terms of the policy that provide for coverage; and it is the insurance company that bears the burden of proving the existence of applicable policy exclusions and other limitations on coverage. See *Burt Rigid Box* and *Gold Fields*, *supra*; *Burroughs Wellcome v. Commercial Union Insurance*, 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986).

However, there is a division of authority as to the precise burden of proof. Some (mostly older) cases have held that a policyholder who seeks to prove the existence and terms of a policy through secondary evidence must do so by *clear and convincing* evidence; other (mostly newer) cases have held that the burden is the ordinary, and less demanding, civil standard of the *preponderance* of the evidence. See *Glew v. Cigna Group Insurance*, 590 F. Supp. 2d 395, 411-12 (E.D.N.Y. 2008) (collecting authorities for each standard, and concluding that the preponderance standard is now “the almost universally accepted general rule”). The leading reported New York state court case that directly addresses this question holds that the less demanding “preponderance” standard is the correct one. *Gold Fields*, *supra*.

Types of Secondary Evidence

There are many types of secondary evidence that can help prove the existence and terms of a lost policy. Typically, such secondary evidence has included:

- Certificates of insurance
- Insurance ledgers or schedules of insurance; broker placing slips
- Binders or cover notes; declaration pages
- Excess or umbrella policies referring to the underlying policy; reinsurance records

- Premium invoices and payment records; premium audits
- Correspondence about the purchase or sale of the policy
- Correspondence about claims made under the policy
- Loss runs
- Board of Directors meeting minutes
- Policies for years close in time to the policy at issue
- Specimen or sample policies used by the insurance company
- Testimony by witnesses who recall the purchase or sale of the policy and/or the policy's terms

See e.g., *Burt Rigid Box and Burroughs Wellcome*, *supra*. See generally Ostrager and Newman, "Handbook on Insurance Coverage Disputes" (21st Ed.), §17.04.

Of course, it is not enough for the policyholder to prove merely that *some* policy exists. The policyholder must also show that the policy's essential terms cover the claim at issue. *Glew*, 590 F. Supp. 2d at 413. Where there is no direct evidence of the missing policy's language, this can sometimes be accomplished by reference to specimen or model policies used by the insurance company during the relevant time period, and/or by reference to other still-available policies issued by the insurance company during years close in time to the missing policy. Expert testimony as to standard policy terms can also be useful in this regard. See *American Precision Industries v. Federal Insurance*, 14 Civ. 1050, 2018 WL1046790 (W.D.N.Y. Feb. 26, 2018) and *Gold Fields*, *supra*.

Whether secondary evidence is *sufficient*—as opposed to *admissible*—to prove the existence and terms of a policy is necessarily a

case-specific and fact-intensive inquiry. Plainly, the more specific and detailed the secondary evidence is, the more persuasive it will be. And the greater the number of items of secondary evidence that tend to corroborate the existence of a policy, the stronger the policyholder's case will usually be. But, beyond these obvious truisms, it is difficult to make generalizations as to how much and what kinds of secondary evidence will be sufficient to meet the policyholder's burden of proof.

Conclusion

The Child Victims and Adult Survivors Acts have given rise to a large body of cases now slowly working their way through the courts in connection with which defendants must look back in time to find insurance policies issued decades ago. Many of the relevant policies are now lost. Accordingly, both defendants and insurance companies must understand the legal rules that govern the admissibility and sufficiency of secondary evidence to prove the existence and terms of lost policies. In the next few years, new court decisions will undoubtedly come down in the CVA and ASA context that will more fully develop New York law in this important area.

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