

NEW YORK CASE LAW ON “LOST” POLICIES: A PRIMER

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GENERAL RULES

New York’s basic rules for “lost” policy cases are straightforward. As the party claiming under the policy, the insured bears the burden of proving the existence and terms of the insurance contract. When the policy itself cannot be found, the insured may prove its existence and terms through secondary evidence. Before being permitted to introduce such secondary evidence, the insured must first satisfy two requirements:

- first, the insured must establish a reasonable explanation for why the policy is missing, and that there was no bad faith or fraud surrounding its loss or destruction;
- second, the insured must show it undertook a diligent, but unsuccessful, search for the policy.

See generally, Leitner, D.L., Simpson, R.W., & Bjorkman, J.M., 3 LAW & PRACTICE OF INSURANCE COVERAGE LITIGATION §§ 40:1 *et seq.* (2005); 4 N.Y.Prac., Com. Litig. in N.Y. State Courts §§ 60:6, 60:34 (2nd ed); Ostrager, B.R., & Newman, T.R., HANDBOOK ON INSURANCE COVERAGE DISPUTES §§ 17:01 *et seq.* (11th ed. 2002).

Once those two threshold requirements are met, the insured may use any and all kinds of secondary evidence to prove the prior existence and terms of the policy circumstantially. In reported cases, such secondary evidence has included affidavits and testimony from witnesses, documents referring to the policy, accounting and other financial records (including those showing the payment of premium, loss, or commission), minutes of meetings, records of third parties (*e.g.*, brokers, agents, adjusters, and lawyers), evidence of a routine custom or practice, the insurer’s own records, and certificates of insurance. The insurer is always entitled to attack the *sufficiency* of such secondary evidence, but such an attack goes only to its *weight*, not its *admissibility*. Once such evidence is admitted, the trier of fact decides whether it satisfies the insured’s burden of proving the existence and contents of the policy. The burden of proving any exclusions from coverage, or conditions or limitations on coverage, rests with the insurer. *See generally*, Leitner, D.L., Simpson, R.W., & Bjorkman, J.M., 3 LAW & PRACTICE OF INSURANCE COVERAGE LITIGATION §§ 40:1 *et seq.* (2005); 4 N.Y.Prac., Com. Litig. in N.Y. State Courts §§

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60:6, 60:34 (2nd ed); Ostrager, B.R., & Newman, T.R., HANDBOOK ON INSURANCE COVERAGE DISPUTES §§ 17:01 *et seq.* (11th ed. 2002).

APPLICABLE EVIDENTIARY STANDARD

Once past the basic rules outlined above, questions become thornier. For example:

- What evidentiary standard must an insured satisfy to prove the existence and terms of the alleged insurance? *I.e.*, can an insured prove the existence and terms of such insurance by a mere preponderance of the evidence, or must it make some heavier showing?
- Whatever the evidentiary standard is, how much secondary evidence does it take to satisfy it?

In some older cases, courts required insureds to prove the existence and terms of lost or missing insurance policies by evidence that was “clear and convincing,” “clear, satisfactory, and convincing,” or words of similar import. *Boyce Thompson Inst. for Plant Research, Inc. v. Ins. Co. of North America*, 751 F.Supp. 1137 (S.D.N.Y. 1990); *State of New York v. Union Fork & Hoe Co.*, 1992 WL 107363 (U.S.D.C., N.D.N.Y., May 8, 1992) [noting that a “clear and convincing” standard would apply at trial, but applying an even more stringent “beyond factual dispute” standard, because the insured was moving for summary judgment]. A “clear and convincing” standard “is satisfied when the party bearing the burden of proof has established that it is **highly probable** that what he or she has claimed is actually what happened.” *Home Ins. Co. of Indiana v. Karantonis*, 156 A.D.2d 844, 845, 550 N.Y.S.2d 77, 79 (3rd Dep’t 1989) [emphasis added]. This standard is “more exacting than the standard of preponderance of the evidence, but less exacting than the standard of proof beyond a reasonable doubt.” *Maryland Cas. Co. v. W.R. Grace & Co.*, 1995 WL 562179 (S.D.N.Y., September 20, 1995).

More recent decisions have required an insured to prove the existence and terms of a lost or missing insurance policy by a mere preponderance of the evidence. *E.g.*, *Gold Fields American Corp. v. Aetna Cas. & Sur. Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup.Ct., N.Y.Co., 1997). *Gold Fields* is the only decision by a New York State court I have found on this issue. It has been followed by federal courts in New York. *Employers Inc. of Wausau v. Duplan Corp.*, 1999 WL 777976 (U.S.D.C., S.D.N.Y., September 30, 1999); *Burt Rigid Box Inc. v. Travelers Property Cas. Corp.*, 126 F.Supp.2d 596 (W.D.N.Y., 2001), *aff’d in part, rev’d in part*, 302 F.3d 83 (2nd Cir. 2002) [trial court followed *Gold Fields, supra*; 2nd Cir. did not decide

issue, but affirmed on basis that insured had satisfied even the higher “clear and convincing” standard]. The preponderance-of-the-evidence standard is much less exacting than the “clear and convincing” standard. To satisfy a preponderance-of-the-evidence standard, an insured need prove only that its version of the facts is more likely than not. Courts applying the lower preponderance-of-the-evidence standard have given two reasons for doing so:

- (a) the heavier “clear and convincing” standard should be required only to prove the existence and contents of documents evidencing an interest in land or decedents’ estates, or when required by statute, or when important civil rights are at stake, but not in an ordinary contract action;
- (b) requiring proof by “clear and convincing” evidence would encourage insurers to discard their records of older policies, to make such proof that much more difficult.¹

HOW MUCH EVIDENCE IS ENOUGH?

As to how much evidence it takes to satisfy either the “clear and convincing” or “preponderance” standards, there is no clear rule: the answer always depends on the specific secondary evidence offered, how persuasive the trier of fact finds it to be in the circumstances of the particular case, and the procedural posture in which the question arises. Although the reported decisions are necessarily fact-specific, a few examples are illustrative:

- In *Boyce Thompson Inst. for Plant Research, Inc. v. Ins. Co. of North America*, 751 F.Supp. 1137 (S.D.N.Y. 1990), the insured presented an affidavit from a broker, plus accounting ledger entries showing the insured had made payments to that broker and received payments from INA. The court held that was not enough to satisfy the “clear and convincing” standard.
- In *Gold Fields American Corp. v. Aetna Cas. & Sur. Co.*, 173 Misc.2d 901, 661 N.Y.S.2d 948 (Sup.Ct., N.Y.Co., 1997), the court held that check stubs from settlement payments, plus invoices from premium audits, were enough to raise an issue of fact as to whether a policy had existed, and therefore to defeat an insurer’s motion for summary judgment.
- In *Employers Ins. Co. of Wausau v. Duplan Corp.*, 1999 WL 777976 (U.S.D.C., S.D.N.Y., September 30, 1999), a broker’s uncorroborated, one-page “Confirmation” of coverage was sufficient to raise a question of fact and defeat an insurer’s motion for summary judgment,

¹ The insurer in *Goldfields* had apparently done exactly that.

even though the “Confirmation” did not identify the insured. The court said that, under a “preponderance” standard, a reasonable jury could infer from the “Confirmation” that coverage had existed during the stated coverage period. The court even said a reasonable jury could infer from the “Confirmation” that coverage had existed in an *earlier* coverage period, as to which *no* evidence of coverage had been offered!

- In *State of New York v. Blank*, 820 F.Supp. 697 (N.D.N.Y. 1993), *vacated on other grounds*, 27 F.3d 783 (2nd Cir. 1994), the insured moved for summary judgment, offering an affidavit from its broker, a copy of an alleged dec page, and a specimen policy of the same general type. The court held this was enough to establish a *prima facie* case for coverage. The insurer submitted no contradictory evidence, so the court granted summary judgment for the insured.

A close reading of these and other cases leads to three general conclusions:

1. It does not take very much evidence to make out a *prima facie* case for coverage under a mere “preponderance” standard.
2. Courts are particularly impressed if the insured offers multiple items of secondary evidence from separate sources, and those items corroborate one another.
3. Under a “preponderance” standard, once an insured offers secondary evidence sufficient to make a *prima facie* showing of coverage, the carrier should not just sit back and criticize the weight, credibility, or persuasiveness of that evidence, or point to gaps in the insured’s proof. The carrier also can not rely on speculation, surmise, or its own unsupported contentions about what the insured’s evidence means. Rather, whether at trial or on a motion for summary judgment, the carrier should come forward with whatever evidence it can to *contradict* the insured’s evidence. If it does not do so, the carrier will probably lose.