

## THE SCIENCE OF POLICY ARCHAEOLOGY

It's critical to be able to dig up old insurance records

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Many insurance policyholders do not recognize the importance of retaining their past policies. Too often, policyholders discard an old policy once the new one

arrives. Unfortunately, these policyholders can find themselves defendants in a lawsuit in which most, if not all, of their coverage comes from these previously discarded policies. This is especially devastating for general liability insurance policyholders sued in asbestos, environmental, toxic tort, certain construction-defect cases and other big-ticket litigation.



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Where alleged bodily injury or property damage is found to be progressive or continuous in nature, many courts allocate the duty to defend and indemnify a policyholder to all insurers who provided general liability coverage during the relevant time period, i.e., the date when the injury or damage first occurred to the date when the injury or damage ended. In asbestos and environmental cases, this period can involve several decades, multiple insurers and dozens of individual policies. These are sometimes referred to

as "long-tail" liability claims.

Problems arise when past policies have been thrown away, lost or destroyed. In such situations, the policyholder may be deemed uninsured or self-insured during those policy years, and the allocation of liability amongst insurers will then include the policyholder potentially paying a proportionate share of an otherwise fully insured loss. Depending upon the length of the uninsured period, a policyholder could be allocated a large percentage of the liability, which could mean that lost policies will cost the policyholder millions of dollars of exposure in some cases. Even though a policyholder may have paid the full premium to purchase liability coverage decades before a lawsuit, they lose the benefit of that purchase simply because of their failure to retain a policy.

### Notifying Insurers

When policyholders are named in law-

suits involving a long-tail liability claim, they should immediately identify all relevant past liability policies and notify corresponding insurers of the lawsuits. The failure to give timely notice to an insurer of a claim or suit, or of events that may give rise to a claim or suit, may result in a forfeiture of coverage. Even when policyholders are unsure as to whether they are covered under a policy, they should notify the insurer anyway. Policyholders lose nothing by notifying an insurer of an uncovered claim, but they may lose everything if they fail to notify an insurer of a covered claim.

If policyholders cannot find a policy, but have a certificate of insurance corresponding to a policy, they should notify the insurer and request a copy of the policy. It is important to understand, however, that generally a certificate of insurance is not proof of insurance. Policyholders should not get in the habit of retaining only their certificates of insurance instead of the actual policy. Further, in most states, insurers are not required to retain policies for extended periods of time. Insurers routinely request that policyholders produce older policies before acting on a claim. Therefore, policyholders cannot expect their insurers to produce a requested policy.

In the worst case, the relevant policy years in a long-tail liability claim date so far back that policyholders have no direct documentation regarding the policies. Policyholders may not even know who issued these past policies. Thankfully, in such a scenario, the existence and terms of a lost insurance policy may be proven by secondary evidence, so long as the policyholder has performed a diligent search for the policy.

Secondary evidence can consist of: busi-

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ness, financial and tax records, policies from prior and subsequent years, correspondence, memos, and testimony. The initial burden, however, is on the policyholder to prove the existence and terms of a missing policy.

During a search for past policies, a policyholder may only need to identify who the insurer was during the relevant time period. To do so, the policyholder should first contact their insurance brokers, past and present. The broker is the person who is most likely to have information regarding the policyholder's past insurers. Accountants, auditors and attorneys are also potential keepers of information pertaining to past insurance. In addition, policyholders should always speak with present and former employees who might have knowledge regarding past insurers.

When these steps fail, it is time to start digging through old files, looking for any clue of past coverage. For example, a thorough search of records may turn up a bill from an insurer for an insurance premium

or deductible, or information pertaining to a past claim.

### **Proving Coverage**

Once an insurer is identified, the policyholder may rely upon prior or subsequent policies from the same insurer to prove the coverage and limits afforded under a missing policy. If the policyholder does not have prior or subsequent policies, the policy can be re-created by ascertaining what coverage was typically provided by a particular insurer during a given time period.

This process is not as daunting as one might suppose because insurance policies are typically comprised of standard forms used universally throughout the insurance industry. Once a policy is re-created, it may be the insurer's burden to show that the standard forms were endorsed with more restrictive policy language which bars coverage.

### **Insurance Archaeologists**

The lost policy problem is common. In fact, there are services that specialize in

assisting policyholders in their search for coverage. These "insurance archaeologists" can locate secondary evidence of coverage for policyholders in an efficient and effective manner because they know exactly what to look for. Additionally, once secondary evidence is located, insurance archaeologists can have great success in re-creating a missing policy because they maintain most past standard insurance forms.

Needless to say, the identification and re-creation of insurance policies can be a painstaking process, sometimes ending in disappointment. Even if a policyholder never expects to be named as a defendant in a lawsuit arising from a long-tail liability claim, it is good practice to retain copies of all insurance policies, past and present.

A policyholder need not have boxes of old policies stored in a basement somewhere. It is too easy these days to scan paper policies to disc. Policyholders will sleep easier at night knowing that their policies will be there when they need them. ■