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Some Thoughts on Proving an Insurance Contract in Court

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Insurance companies often have their backs against the wall in any dispute. Typically, in a coverage or premium action brought by the insurance company, it bears the burden of proving its insurance contract and any exclusionary endorsements. In inter-company disputes that may be a bit easier and the rules may be a bit looser (e.g., reinsurance arbitrations), but in court, the policy has to be proven by the best evidence available.

Even if the dispute is just about one aspect of the policy, most courts require that the entire policy be proven, including all endorsements and other addenda. That can be problematic when the "original" policy was issued through a broker or agent and delivered to the insured. Often times, the "home office" copy may not contain all the pieces of the actual policy issued to the insured.

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In this blog post, I will talk about a case we had many years ago and the challenges of proving an older, continuous policy, and a recent case in a New York intermediate appellate court where issues arose on appeal with the evidence presented about the policy.

Many years ago we represented a carrier trying to collect additional premiums on a retrospectively rated policy. The policy had been around for decades and there were annual retro endorsements with return premiums (at the beginning) and additional premiums (as time went on). The policy was a comprehensive commercial general liability policy covering liability, workers' compensation, and auto for an insured that owned many facilities, including hospitals and residences. As you can imagine, there were literally hundreds of endorsements for all sorts of reasons over the years.

Because we were only seeking additional premiums on certain years and the only dispute related to the additional premium calculations, we submitted the main text of the policy along with the relevant retro endorsements. The court, however, wanted every single endorsement and addendum going back to inception even if it had no relevance to the dispute. We did not have all of them and neither did the insured. The result was sub-optimal.

Flash forward to *Pennsylvania Lumbermens Mut. Ins. Co. v. B&F Land Development Corp.*, No. 2016-08692 (N.Y. App. Div. 2d Dep't Jan. 16, 2019). Here, there was a dispute about coverage, including whether the location was listed in the policy as an insured location and whether there was an exclusion for bodily injury arising out of the insured's ongoing operations. The policy submitted into evidence was compiled by a claims vice president based upon information contained in the underwriting file. The motion court declared that the carrier had no duty to defend or indemnify. The appellate division reversed.

The reversal was based on the improper admission of the compiled policy into evidence because of discrepancies between the proffered policy and policy terms produced during discovery. Apparently, during discovery the exclusionary endorsement produced was a different version from the compiled copy. Additionally, the compiled copy did not specify a location for which the policy applied. The company witness did not know which version of the endorsement applied and could not explain the discrepancies between what was produced in discovery and what was proffered at trial.

In reversing, the appellate court stated that the best evidence rule requires the production of an original writing

where its contents are in dispute and are sought to be proven. The proponent of secondary evidence has the heavy burden of establishing that it is a reliable and accurate portrayal of the original. Here, said the court, the error in admitting the compilation was not harmless because, "without the original policy or an accurate replication, the carrier could not establish what locations were covered by the policy, what exclusions to coverage, if any, existed under the terms of the policy or the insured's responsibilities with respect to providing notice of claim."

Maintaining accurate home office policies that replicate exactly what was issued to the policyholder is critical to avoid these kinds of disputes. This is especially important when the insurance company commences the action and seeks to avoid coverage. The burden of proof is on the insurance company to prove the policy, including all exclusions, not on the policyholder.

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