

Lost Insurance Policy? Pursuing Coverage for Long-Tail Environmental Liability Still Feasible



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Companies facing environmental cleanup liability typically confront claims that are brought multiple decades after the alleged polluting activity took place. This passage of time often results in the loss or disappearance of crucial historic documents, including insurance policies, necessary to respond to the claims. Historic general liability insurance policies issued before pollution exclusions became commonplace in the 1970s are of particular value in protecting a company from exposure to “long-tail” environmental liability. Finding these policies, or evidence of their existence, therefore is a must. A recent New Jersey federal court decision serves as a helpful reminder that when the actual policies cannot be located, even limited documentary evidence of their existence, when buttressed by the expert testimony of a credentialed insurance archaeologist, may be sufficient to prove the coverage and facilitate recovery.

In *E.M. Sergeant Pulp & Chemical Co., Inc. v. Travelers Indemnity Co., Inc.*, Civ. No. 12-1741, 2015 WL 9413094 (D.N.J. Jan. 17, 2017), the plaintiff policyholder was seeking insurance coverage for defense and indemnity relating to environmental pollution claims arising out of a New Jersey site. The policyholder, a distributor of heavy industrial inorganic chemicals and raw materials, owned property in Newark from

1942 to 1984. In 2004, the United States Environmental Protection Agency notified the policyholder that it was a Potentially Responsible Party (“PRP”) with respect to the Diamond Alkali Superfund Site. In 2009, the policyholder was sued as a third-party defendant in a lawsuit alleging property damage caused by environmental pollution from activities occurring 50-75 years ago.

Faced with this potential cleanup liability, the policyholder conducted a historical search for insurance policies covering the time period of the alleged polluting activities. The search failed to disclose any insurance policies, but it did produce a handful of documents containing scattered information identifying a certain insurance company and years of possible coverage, but no detail about the terms of coverage. The insurance company denied that it had issued any policy, so the policyholder sued it for coverage. On the insurer’s motion for summary judgment, the court concluded that the policyholder’s indirect (or secondary) documentary evidence of coverage, while “scanty,” was “barely sufficient” to defeat the motion because it was supplemented by the expert opinion of an insurance archaeologist with 30 years of experience.

The policyholder’s documentary evidence consisted of (1) four pages of handwritten entries in its bookkeeping ledgers, (2) an application submitted to another insurer in 1964, (3) a note relating to the application and (4) certain standard policy forms that it obtained from the insurance company in discovery. In addition to this documentary evidence, the policyholder submitted the opinions of an expert in the field of insurance archaeology, an area involving the reconstruction and auditing of historic insurance coverage. The expert expressed his opinion that the missing policies provided coverage for “public liability,” including third-party bodily injury and property damage, and that the coverage was continuous from 1948 through 1965.

The court observed in its ruling that a missing policy is not fatal to a policyholder’s coverage claim, but emphasized that the policyholder has the burden of proving the existence and terms of the missing policy by a preponderance of the evidence under New Jersey law. It noted that other jurisdictions have utilized a higher standard of “clear-and-convincing” evidence. The key factor for the *E.M. Sergeant* court, however, was the expert testimony which provided sufficient illumination of the otherwise limited documentary evidence.

There are several important takeaways from this case for any company named as a PRP or sued in connection with Superfund or other environmental cleanup liabilities:

1. **Search for pre-pollution exclusion policies or evidence of such policies.** Prioritize locating general liability insurance policies for the time period of the alleged polluting activity and, if they cannot be found, carefully search the company’s historical records for any evidence of that coverage. A search should include not only the company’s insurance files, but also its financial records and claims files. As the *M. Sergeant* case demonstrates, ledgers and other bookkeeping records, including cancelled checks, may identify insurance companies in entries noting premium payments or refunds, and perhaps reference specific policy numbers. Claims files similarly may identify an insurance company that paid to defend or settle a claim in a particular year.
2. **Check with your broker(s).** The records of a company’s insurance brokers can

be a treasure trove of information. Brokers may have retained information on the placement of coverage in relevant years, including the specific insurance companies, policy numbers, limits and terms of coverage, if not the policies themselves. It is noteworthy that in the *M. Sergeant* case the broker's records were not available, but they could have bolstered the policyholder's otherwise meager documentary evidence.

3. **Consider retaining an insurance archeology expert.** The most significant takeaway from *M. Sergeant* is the singular importance of the insurance archaeologist expert's opinions with regard to the documentary evidence in that case. The expert opined, based on the available documents, that the missing policies included coverage for third-party property damage (that is, the environmental contamination), and that coverage continued for almost 40 years. As the court acknowledged, the expert's opinion supplemented the documentary evidence and was the "difference" in a close case. Insurance archaeologists may also assist in the search for secondary evidence of lost policies, both inside and outside of the company. This may be especially warranted in situations where a company is charged with inherited environmental liability from an acquisition, compounding the already tedious task of searching for historic records.
4. **Know your evidentiary standard.** It may be that more robust secondary evidence of historic insurance than that available in *M. Sergeant* would prove to be sufficient even without an expert's opinion -- at least under the "preponderance" evidentiary standard. In states with a higher burden of proof, however, an expert may be particularly valuable. Regardless of the evidentiary standard, it now behooves policyholders seeking coverage in a missing policy case to consider retaining an insurance archaeology expert to supplement available secondary evidence of coverage. Experienced insurance coverage counsel can provide helpful guidance and recommendations on this and other complicated issues in long-tail environmental coverage matters.

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