NO POLICY, NO PROBLEM? HOW INSUREDS ARE FINDING COVERAGE EVEN THOUGH THEY CAN'T FIND THEIR POLICIES

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I. INTRODUCTION

The potential significance of proving the contents of an insurance policy came to light following the September 11, 2001 attack on the World Trade Center. There, disputes concerning billions of dollars in property coverage for the Twin Towers are complicated by the absence of an actual insurance policy.[1] With increasing frequency, injuries or damages are discovered many years or even decades after the act giving rise to liability has occurred.[2] Tort claims for asbestos exposure, pollution contamination, and products liability are common examples. In these situations,

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1. Carl Pernicone & James Deaver, *World Trade Center Disaster*, COMM. NEWS, (Tort & Ins. Practice, Ins. Coverage Litig. Comm.), Fall 2001, at 7, 11-12.

2. Craig N. Johnson, *Litigating Lost or Missing Insurance Policies*, 25 COLO. LAW. 115, 115 (Oct. 1996).

insurance claims are often filed long after insurance policies have been destroyed by both the insurance company and the insureds.

Insurance agreements are invariably reduced to writing. So claims for breach of insurance agreements involve allegations of breach of a written contract. Much of the information to complete the policy is unique to the specific insured. For example, coverage limits, locations for which coverage is provided, and the period during which coverage exists vary from one insured to another. As a result, the written contract is critical in determining the existence and scope of coverage. Traditionally, it has been the insured's obligation to prove coverage by producing the policy.[3]

Recently however, many courts have revisited the standards, burdens, and evidence necessary for one seeking insurance coverage without a policy.[4] The results should be cause for concern among insurers, who may face the task of proving the putative insured did not have the alleged coverage. The stakes can be very high, as often they involve multiple claims for indemnity and defense costs with millions of dollars at issue.

II. *REMINGTON ARMS CO. v. LIBERTY MUTUAL INSURANCE CO.* SIGNALS A DRAMATIC CHANGE

In 1992, a federal judge, sitting in corporate-friendly Delaware, denied an insurance company's motion for summary judgment and ruled that the existence and content of missing policies were questions of fact to be decided at trial.[5] The analysis included a dramatic and sweeping change in the burdens facing insurers and putative insureds in battles for coverage when neither side can locate a policy.[6] In the ten years since *Remington Arms Co. v. Liberty Mutual Insurance Co.*,[7] its analysis has been widely cited and adopted by other courts, leaving insurance companies reeling in its wake.[8]

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3. *See, e.g.*, JOHN A. APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 12094 (1980) ("The plaintiff suing on a policy of casualty insurance must establish that defendant was carrying the insurance risk and should produce the policy into evidence." (citation omitted)); Miner v. Bray, 513 N.E.2d 580, 582 (Ill. App. Ct. 1987) ("The existence of coverage is an essential element of an insured's case against his insurer; the insured has the burden of proving that his loss falls within the terms of his policy.").

4. *See, e.g.*, Rubenstein v. Royal Ins. Co., 694 N.E.2d 381 (Mass. App. Ct. 1998); Borough of Sayreville v. Bellfonte Ins. Co., 728 A.2d 225 (N.J. Super. Ct. App. Div. 1998); Gold Fields Amer. Corp. v. Aetna Cas. & Sur. Co., 661 N.Y.S.2d 948 (1997).

5. Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1428 (D. Del. 1992).

6. *See id.*

7. Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420 (D. Del. 1992).

8. *See* Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d at 228 ("Following *Remington Arms*, a number of courts have adopted its reasoning or cited it approvingly in applying a preponderance standard to missing policies."); *see, e.g.*, Servants of Paraclete, Inc. v. Great Am. Ins.

Remington Arms is perhaps shocking for its lack of critical analysis; even more perplexing is the extent to which other courts have relied on *Remington Arms'* holding with little thought for its reasoning. In short, longstanding standards of law have been casually wiped away with only fleeting explanations.

In *Remington Arms*, the judge noted generally accepted principles, making it very difficult for an insured to prove the existence and content of insurance policies absent the ability to produce the policy.[9] But the support for the principles was first questioned and then rejected by the court.[10] Judge Latchum concluded: "In essence, there is a chain of support with no anchor. Like a parrot repeating the words without any understanding of their meaning, each case in the chain cites a standard whose origin or justification is never made apparent."[11] Ironically, Judge Latchum's conclusions are only weakly linked to any recognized legal authority. Furthermore, the "clear and convincing evidence" standard was so firmly rooted in the law regarding lost instruments that Judge Latchum's criticism of previous authority lacking support is simply unfair.[12] Following *Remington Arms*, insurance companies have been forced to defend and then reestablish longstanding legal doctrines which previously were not seriously challenged.

III. UNDER *REMINGTON ARMS*, INSUREDS ENJOY A LOWER BURDEN OF PROOF

Historically, a party seeking to prove the existence of any lost, missing, or destroyed contract faced a substantial burden.[13] It is the proponent's burden to prove the existence of the contract and its terms by clear and convincing evidence.[14] The clear and convincing evidence standard is used when the potential for fraud is prevalent.[15]

Co., 866 F. Supp. 1560, 1572 (D.N.M. 1994) (citing *Remington Arms* as authority). For further examples of courts following *Remington Arms*, see note 26, *infra*.

9. Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. at 1423.

10. *Id.* at 1425-26.

11. *Id.* at 1424.

12. 54 C.J.S. *Lost Instruments* § 7, at 472 (1987) ("[I]n actions to establish a lost instrument the evidence of the former existence, execution, delivery, loss, and contents of the lost instrument should be clear and convincing . . . ."); 52 AM. JUR. 2D *Lost and Destroyed Instruments* § 25 (2000) (stating that courts unanimously hold something more than the degree of proof required in an ordinary civil action is exacted in cases involving the proof of existence and terms of a lost instrument).

13. *See* Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. at 1423-24.

14. *Id.* at 1423; *see* Boyce Thompson Inst. for Plant Research v. Ins. Co. of N. Am., 751 F. Supp. 1137, 1140 (S.D.N.Y. 1990). The insured bears the responsibility of "keep[ing] track of which carriers have provided it with liability insurance." Olin Corp. v. Ins. Co. of N. Am., 966 F.2d 719, 725 (2d Cir. 1992).

15. Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. at 1425 (citing examples such as oral contracts, wills, deeds, and constructive trusts).

The distinction between the preponderance of the evidence standard and the clear and convincing evidence standard is no small matter. Clear and convincing evidence has been defined as "evidence that produces in your mind a firm belief or conviction as to the matter at issue. This involves a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard; however, proof to an absolute certainty is not required."[16] By comparison, preponderance of the evidence is satisfied if something is "more likely than not."[17]

In *Remington Arms*, the court reached the dubious conclusion that because Liberty Mutual Insurance Company did not allege fraud, a standard of proof based on the potential for fraud was inappropriate.[18] Without any apparent support, Judge Latchum found that "[m]issing insurance policies are in no way analogously vulnerable to fraud because the nature of the documents used to prove the existence and contents of lost or missing insurance policies are inherently more reliable than the majority of papers offered into evidence."[19]

Even assuming that is correct, the availability of evidence should merely speak to the likelihood that the clear and convincing standard will be satisfied, not to whether the standard of proof should be lowered. The appropriate burden of proof should be based on public policy concerns and not on the probability that a party in a particular case might satisfy its burden. Important contractual matters are best reduced to writing. Public policy is better served when the written instrument is preferred over parol evidence of the parties' intentions. When the parties have clearly reduced their agreement to writing, it should be difficult for a contract's proponent to obtain relief without producing the contract.

Lost in the *Remington Arms* analysis, and in subsequent cases echoing it, is the substantial difference between proof that a policy existed and proof of the terms of that policy.[20] As every insurance underwriter knows, the terms of a particular insured's policies are usually tailor-made. Amendments and exclusions commonly limit the scope of coverage, which not only impact the insurer's willingness to write the coverage, but also affect the price charged for the coverage.[21] That is particularly

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16. FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS-CIVIL, No. 2.14, at 18 (1999).

17. 3 FEDERAL JURY PRACTICE AND INSTRUCTIONS-CIVIL § 104.01, at 32 (5th ed. 2000).

18. *See* Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. at 1426; *see also* Baker v. Aetna Cas. & Sur. Co., No. Civ.A.86-4974, 1996 WL 451316, at *17 (D.N.J. Aug. 5, 1996) ("[The] preponderance of the evidence standard should apply in the commercial insurance environmental context because the rationale of preventing fraud is absent.").

19. Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. at 1425.

20. *See, e.g.*, Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d 225, 228 (N.J. Super. Ct. App. Div. 1998) (criticizing the trial judge's finding in favor of the insurer "not so much because he doubted the policies existed, but because he did not know their terms").

21. *See* Sandy Codding, *Analyzing the Fiduciary Liability Policy*, 339 PRACTICING L. INST. 79, 86 (1993) (stating additional premiums are often required to remove or modify exclusions).

true in the case of commercial lines of insurance and complex exposures.[22] It is most often the large and complex accounts which result in claims filed long after coverage was provided.[23]

Every insurance policy contains limitations and exclusions, and every insured faces some exposures and risks against which they cannot insure. The larger and more complex the particular situation subject to insurance, the more likely the insured and insurer negotiated specific language which can only be determined by producing the policy.[24] The long tail exposures leading to claims filed years or even decades after coverage has expired most likely involve insureds with extensive and complex operations for which nonstandard policy language is to be expected. Without the policy, or at least the declarations page of the policy, the precise language of the contract remains unknown.

Furthermore, the *potential* for fraud, which drives the clear and convincing standard, is inherent in all lost or written instrument situations, including insurance policies.[25] For example, if the party in possession of the contract finds the terms unfavorable, it has incentive to destroy the document and proceed in hopes that the unfavorable terms will remain lost as the judicial proceedings struggle to recreate the instrument's terms.

In *Remington Arms*' wake, other courts have adopted the preponderance of the evidence standard as the burden of proof for those seeking to establish coverage in lost or destroyed policy situations.[26] The decision has spread with impressive

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22. *Cf.*, Johnson, *supra* note 2, at 117 ("Litigation over lost or missing insurance policies is becoming increasingly common, especially in cases involving 'long tail' liabilities such as environmental claims or toxic torts, where the covered event may have taken place years or even decades before a claim is made.").

23. *See id.*

24. *See* 44 AM. JUR. 2D *Insurance* § 1923 (1982) (discussing the likelihood that specific language has been bargained for and included in the contract).

25. *Compare* Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1425 (D. Del. 1992) ("Missing insurance policies are in no way analogously vulnerable to fraud because the nature of the documents used to prove the existence and contents of lost or missing insurance policies are inherently more reliable . . . ."), *with* Township of Haddon v. Royal Ins. Co. of Am., No. Civ.A.95-701, 1996 WL 549301, at *2 (D.N.J. Sept. 19, 1996) (finding although fraud may be absent in commercial environmental insurance cases like *Remington Arms*, the New Jersey courts have nonetheless applied the clear and convincing standard in lost insurance policy cases).

26. Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d 225, 228 (N.J. Super. Ct. App. Div. 1998); *see, e.g.*, Americhem Corp. v. St. Paul Fire & Marine Ins. Co., 942 F. Supp. 1143, 1144 (W.D. Mich. 1995) (holding the proponent to a preponderance of the evidence standard); Servants of Paraclete v. Great Am. Ins. Co., 857 F. Supp. 822, 828 (D.N.M. 1994) (concluding that the plaintiff must establish that the policy exists and its terms by a preponderance of the evidence); Am. States Ins. Co. v. Mankato Iron & Metal, Inc., 848 F. Supp. 1436, 1441 (D. Minn. 1993) (citing *Remington Arms* for the proof standard on the existence of an insurance policy); Northeast Util. v. Century Indem. Co., Nos. X03CV 9904954955, X0CV 9804954965, 1999 WL 476274, at *3 (Conn. Super. Ct. Jun. 21,

velocity because it is a federal decision and because it is viewed as a procedural rule, and therefore not inhibited within the federal system by the *Erie* doctrine.[27]

In *Borough of Sayreville v. Bellefonte Insurance Co.*,[28] the New Jersey Superior Court reversed summary judgment for the insurer, holding as a matter of first impression that the contents of lost or missing policies are proved by a preponderance of the evidence, not clear and convincing evidence.[29] The secondary evidence rule, a shifting-burden analysis, and an emerging sense that the insurer has some duty to prove the policy terms have made it increasingly difficult for insurance companies to defend these cases.[30]

IV. THE SECONDARY EVIDENCE RULE

The secondary evidence rule is the counterpart of the best evidence rule.[31] Generally, under the best evidence rule the original document, rather than a photocopy or other reproduction, must be produced as evidence.[32] Ostensibly, the best evidence rule creates a major obstacle to an insured seeking to establish coverage when the original contract is lost, missing, or destroyed.

When a diligent but unsuccessful search has been made for the original, courts may accept other evidence to establish the existence and terms of the insurance policy.[33] To meet the standard of proof, the insured need not produce the policy itself; rather, the policy's existence may be proven by secondary evidence.[34] Freed from the burden of producing the contract, insureds are privy to a wide range of

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1999) (explaining that plaintiff must demonstrate the existence and terms of a policy by a preponderance of the evidence standard); Rubenstein v. Royal Ins. Co., 694 N.E.2d 381, 384 (Mass. App. Ct. 1998) (disfavoring a heightened standard of proof to determine existence and contents of missing insurance policy); Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co., 661 N.Y.S.2d 948, 949-51 (Sup. Ct. 1997) (finding a higher standard of proof only applies in limited instances in New York).

27. Servants of Paraclete, Inc. v. Great Am. Ins. Co., 857 F. Supp. at 877.

28. Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d 225 (N.J. Super. Ct. App. Div. 1998).

29. *Id.* at 227-28.

30. *See infra* Parts IV-VI.

31. For example, California's secondary evidence rule, CAL. EVID. CODE § 1521, transforms the best evidence rule which requires the original document into an exception and instead allows secondary evidence to prove the contents of writings. Cynthia A. DeSilva, *California's Best Evidence Rule Repeal: Toward a Greater Appreciation for Secondary Evidence*, 30 MCGEORGE L. REV. 646, 657-58, 660 (1999).

32. FED. R. EVID. 1002.

33. *See* FED. R. EVID. 1003, 1004; *see also* Burroughs Wellcome Co. v. Commercial Union Ins. Co., 632 F. Supp. 1213, 1223 (S.D.N.Y. 1986) (noting secondary evidence may be relied on when the insured demonstrates that a diligent but unsuccessful search has been made).

34. Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp., 126 F. Supp. 2d 596, 611 (W.D.N.Y. 2001).

potential secondary evidence to establish that a policy existed. For example, the secondary evidence may include premium payment records, certificates of insurance, the agent's file information, claim information, general correspondence, and testimony.[35]

The terms of the policy might also be established through sample policies, standardized forms, statutory or regulatory filings and requirements, and company bulletins and memoranda.[36] It is accepted that a party seeking to establish the existence in terms of insurance coverage need not produce the actual policy.[37]

Without a doubt, the single most important form of secondary evidence is a declarations page because it is a part of the written contract. It usually includes the named insured, policy limits, and the policy period information[38]—the variable information that is case specific. Therefore, when the party seeking coverage produces a declarations page, the insurer is in a difficult position to deny coverage under the policy.

Still, the declarations page is a unique form of secondary evidence. It generally contains so much information that its authenticity is rarely subject to dispute.[39] These situations are distinguishable, as a matter of law, from situations in which a party seeks coverage while relying on evidence other than a declarations page.[40] When the declarations page is available, the proof is likely to satisfy the clear and convincing standard, at least to survive summary judgment. By lowering the evidentiary standard required to prove the existence of a missing policy from clear and convincing to a preponderance, the quality and quantum of evidence necessary to

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35. Todd Steward Schenk, *Litigating Claims Under Lost Insurance Policies in Illinois*, 87 ILL. B.J. 102, 103-04 (1999); *see also* Rubenstein v. Royal Ins. Co., 694 N.E.2d 381, 384 (Mass. App. Ct. 1998) ("That a policy has been lost or destroyed does not mean that its existence and contents may not be reconstructed from business records, underwriter's folios, or billings of the insurance company to the insured.").

36. *See* New York v. Blank, 820 F. Supp. 697, 703 (N.D.N.Y. 1993) (sample policy); Monsanto Co. v. Aetna Cas. & Sur. Co., No. 88C-JA-118, 1993 WL 563244 (Del. Super. Ct. Dec. 21, 1993) (insurance company coverage bulletins); Rubenstein v. Royal Ins. Co., 694 N.E.2d at 384-85 (internal company memoranda); Allstate Ins. Co. v. Ramirez, 618 N.Y.S.2d 396 (App. Div. 1994) (state motor vehicle registration record); N.H. Ins. Co. v. Rouselle, 732 A.2d 111, 114 (R.I. 1999) (standard form policy).

37. *See* New York v. Blank, 820 F. Supp. at 703-04 (finding existence of coverage could be proved by declarations page and terms of coverage could be proved by sample policies and the insurer's concessions in interrogatory responses).

38. BARRY A. BACHRACH & JAMES P. HOBAN, MASSACHUSETTS LIABILITY INSURANCE MANUAL, BASIC ELEMENTS OF THE INSURANCE CONTRACT § 1.3.3 (Mass. Continuing Legal Educ. 2000).

39. *See* New York v. Blank, 820 F. Supp. at 704 (stating that a declarations page "is a document that speaks for itself").

40. *See* Americhem Corp. v. St. Paul Fire & Marine Ins. Co., 942 F. Supp. 1143, 1145 (W.D. Mich. 1995) (presuming the validity of the information contained in declarations page).

defeat summary judgment is clearly reduced and cases are allowed to proceed to trial on scant evidence.

Adopting a more reasoned approach, the Texas Supreme Court explained that where the terms of a contract are unavailable, they may be established by secondary evidence; however, "[t]his alternative requires evidence of the policy terms, not just evidence of the existence of a policy."[41]

V. THE SHIFTING BURDEN OF PROOF

"The rule of evidence that the burden of proving a particular issue or of proving an entire action is upon the person who will be defeated if no evidence relating thereto is given on either side, is fully applicable to action upon insurance policies."[42] The burden is upon the plaintiff, in an action upon an insurance policy, of proving the execution, delivery, or consummation of the insurance contract.[43] If an insured comes forward with sufficient evidence to establish that a policy existed, the insurer may find itself in a position in which it must prove that the terms of the policy do not include coverage for the loss in question.[44] The insurer "bears the burden of demonstrating that an exclusion contained in the policy defeats the claim."[45] This often becomes very difficult for the insurance company.[46]

Insurance companies frequently attach exclusions to modify the terms of standard coverage forms. Oftentimes, exclusions tailor-made to a specific insured are designed to make an otherwise unacceptable risk acceptable to the insurance company.[47] Once the policy is lost or destroyed, the insurer's ability to establish what exclusions applied to the standard coverage form may be destroyed as well.

While historically it was the insured's burden to prove not only the existence of coverage but also the scope of coverage,[48] it is increasingly viewed as the insurance company's burden to prove the limitations that applied.[49] This can be a daunting

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41. Bituminous Cas. Corp. v. Vacuum Tanks, Inc., 975 F.2d 1130, 1132 (5th Cir. 1992).
42. 44 AM. JUR. 2D *Insurance* § 1923 (1982).
43. *Id.* § 1924.
44. Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp., 126 F. Supp. 2d 596, 622 (W.D.N.Y. 2001).
45. Moneta Dev. Corp. v. Generali Ins. Co., 622 N.Y.S.2d 930, 931 (App. Div. 1995).
46. Burt Rigid Box Inc. v. Travelers Prop. Cas. Corp., 126 F. Supp. 2d at 622.
47. *See, e.g.*, Jordan v. Atl. Cas. Ins. Co., 40 S.W.3d 254, 255-57 (Ark. 2001) (enforcing an insurer's clause excluding a high risk driver).
48. New York v. Blank, 820 F. Supp. 697, 701 (N.D.N.Y. 1993) (stating that "an insured can prove the existence and terms of a policy by circumstantial evidence, without ever producing the subject policy").
49. *See id.* at 702 (stating that "proving a prima facie case of the existence and terms of a lost policy is not easy" and the "burden is significantly heightened in the summary judgment context

task. Not only do insurance companies often lack sufficient documentation to establish the exclusions, personnel changes in the insurance company hinder the ability to lay a sufficient foundation for documents which are available and also hinder the ability to provide through testimonial evidence proof of exclusionary language. This creates a situation in which the scope of the insured's coverage may exceed that which actually existed on the policy. The company's inability to prove the exclusionary language may even promote fraud when an insured, in anticipation of filing a claim, discovers that the loss is excluded, destroys the policy, and hopes that the insurance company is unable to prove the exclusionary language.

VI. IS AN INSURER OBLIGATED TO MAINTAIN EXPIRED POLICIES?

Creeping into court decisions is a sense that the insurance company may have an obligation, even in absence of a statutory or regulatory requirement, to retain the policy information indefinitely. Traditionally, it has been the insured's burden to prove that a valid policy was in existence on a relevant date.[50] The burden is on the plaintiff to prove every fact essential to show that claims are within the coverage provided by the policy.[51] But, in an age in which automation has made it possible to store information at a fraction of the cost and inconvenience of maintaining paper files, insurers seem increasingly vulnerable if they have opted not to retain sufficient information. While leading cases involve policies issued prior to the widespread adoption of automated file retention,[52] companies that fail to organize and retain information on their dead files may do so at their own peril.

In *Gold Fields American Corp. v. Aetna Casualty & Surety Co.*,[53] the court wrote that the insurer's "knowledge that its liability on Comprehensive General Liability . . . policies might well extend for many years beyond the end of the policy period."[54] This creates a policy issue conflict and therefore imposing a higher standard of proof on the insured "would only serve to encourage carriers to destroy the policies as soon as possible in the hope that those who had paid for insurance would be unable to produce the policies after a substantial period of time."[55] In

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because it must establish *beyond dispute* that a policy existed as well as the terms of the missing policy").

50. Borough of Sayreville v. Bellefonte Ins. Co., 728 A.2d 225, 227 (N.J. Super. App. Div. 1998).

51. *Id.*

52. *See* Bituminous Cas. Corp. v. Vacuum Tanks, Inc., 975 F.2d 1130, 1131 (5th Cir. 1992) (policies from 1959-1965); Americhem Corp. v. St. Paul Fire & Marine Ins. Co., 942 F. Supp. 1143, 1144 (N.D. Mich. 1995) (policies from 1975-1980); Remington Arms Co. v. Liberty Mut. Ins. Co., 810 F. Supp. 1420, 1420 (D. Del. 1992) (policies from 1965-1972).

53. Gold Fields Am. Corp. v. Aetna Cas. & Sur. Co., 661 N.Y.S.2d 948 (Sup. Ct. 1997).

54. *Id.* at 951.

55. *Id.*

Borough of Sayreville v. Belafonte Insurance Co.,[56] the court reversed summary judgment and concluded "sufficient evidence exists to suggest a chance that plaintiff's burden by a preponderance as to the existence of the policies can be shouldered."[57]

VII. STATUTES OF LIMITATION AND REPOSE OFFER LITTLE POTENTIAL FOR INSURERS

Statutes of limitation, repose, and the equitable doctrine of laches have long been recognized as judicial bars to stale claims.[58] However, these principles offer little relief for insurers faced with claims on policies issued sometimes decades before the coverage claims. Discovery rules commonly extend the point at which the statute of limitations begins to run.[59] When the event triggering the coverage is a latent defect or exposure, the statute of limitations runs from the time when the insured knew, or reasonably should have known, that it was subject to liability.[60] Claims for thing such as asbestos exposure, environmental hazards, and product defects frequently become apparent long after the policy period has expired.[61]

Furthermore, these involve written contracts. The statute of limitations for breach of written contract is commonly the longest provided by a state's limitations of actions provision.[62] Ten years from the point of the breach is not unusual.[63] Again, the breach is generally construed to have occurred when the insurance company denies the claim.[64]

An insurer is likely to benefit from a bifurcated trial.[65] In the interests of judicial economy and convenience to the court and the parties, separating issues

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56. Borough of Sayreville v. Belafonte Ins. Co., 728 A.2d 225 (N.J. Super. Ct. App. Div. 1998).

57. *Id.* at 228.

58. *See, e.g.*, Stutts v. Ford Motor Co., 574 F. Supp. 100, 102, 105 (M.D. Tenn. 1983) (repose); D'Amico v. Smith, 600 P.2d 84, 85 (Colo. Ct. App. 1979) (laches); Ins. Co. of N. Am. v. Carnahan, 284 A.2d 728 (Pa. 1971) (statutes of limitation).

59. *See, e.g.*, Gudenau & Co., Inc. v. Sweeney Ins., Inc., 736 P.2d 763, 766 (Alaska 1987).

60. *Id.*

61. Prudential Home Mortgage Co. v. Super. Ct., 78 Cal. Rptr. 2d 566, 575 (Ct. App. 1998).

62. Randolph E. Sarnacki, *Contractual Theories of Recovery in the HMO Provider-Subscriber Relationship: Prospective Litigation for Breach of Contract*, 36 BUFF. L. REV. 119, 129 (1987).

63. *See, e.g.*, Johnson v. State Mut. Life Assurance Co. of Am., 942 F.2d 1260 (8th Cir. 1991).

64. *See, e.g.*, Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828-29 (Tex. 1990).

65. *See, e.g.*, William H. Howard & Margaret A. Mackowsky, *Bifurcated Trial Under Federal Rule of Civil Procedure 42(b): An Expeditious and Economical Procedure in Many Lost Insurance Policy Cases*, 12 ANDREWS INS. COVERAGE LITIG. REP. 8 (Dec. 28, 2001) (discussing the

relating to the existence and terms of the policy should be decided before damage issues are addressed.[66]

VIII. BIAS AGAINST INSURANCE COMPANIES

Insurance companies readily concede that they make less than sympathetic parties.[67] Courts accept this anti-insurance bias as well, as evidence of insurance is frequently prohibited,[68] and in most states the insurance company may not be named as a party in a tort action against its insured.[69] Of course, when the insured is suing the insurer for coverage, the insurance company will be named as the defendant.[70] Therefore, an insured's chances of success on the coverage action improve if the judge is unable to decide the issue as a matter of law and the existence and scope of coverage issues are submitted to a jury.

With the erosion of legal principles formerly favorable to insurers in situations of lost, missing, or destroyed policies, the company's best line of defense may be to prove the precise terms of the coverage by continuing to maintain its files long after the policy has been canceled. Also, maintaining related documents such as procedure manuals, underwriting guidelines, and statutory and regulatory filing information provides additional evidence the insurance company may need in these disputes.

The size of the amounts frequently at issue in these long tail exposures provides further incentive for companies to retain policy information. The higher the limit provided, the more incentive the insurer has to pay the cost for extended file retention.

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propriety of a separate trial to establish coverage and suggesting that bifurcation would be to the advantage of insurers because the insured carries the burden of proof).

66. *See* Howard & Mackowsky, *supra* note 65, at 12 (concluding that insurance claims involving lost policies should be bifurcated for the sake of "efficiency, economy, convenience").

67. *See* Pamela H. Bucy, *Health Care Reform and Fraud by Health Care Providers*, 38 VILL. L. REV. 1003, 1012 (1993) ("Insurance companies and governmental agencies, however, are not sympathetic victims in the eyes of most people.").

68. Alan Calnan, *The Insurance Exclusionary Rule Revisited: Are Reports of Its Demise Exaggerated?*, 52 OHIO ST. L.J. 1177, 1177 (1991).

69. *See* 7 COUCH ON INSURANCE §§ 104:2, :13 (Lee R. Russ & Thomas F. Segalla eds., 3d ed. 1997). Although *Couch on Insurance* does not specifically address the issue of naming an insurance company as a party, it is included in the larger issue of direct actions against insurance companies. *See generally* Joseph Kyle Fulcher, Note, *Un-Insuring Direct Actions Against Insurance Companies in Mississippi:* State Farm Mutual Automobile Insurance Company v. Ekanis, 20 MISS. C. L. REV. 375, 378 nn.32-43 (2000).

70. *See, e.g.*, Singer v. State Farm Mut. Auto. Ins. Co., 116 F.3d 373, 378 (9th Cir. 1997); Gallagher v. Fire Ins. Exch., 980 S.W.2d 833, 833 (Tex. App. 1998); McRory v. N. Ins. Co. of N.Y., 980 P.2d 736, 737 (Wash. 1999).

IX. CONCLUSION

The trends unfavorable to insurance companies in recent lawsuits for coverage in which policies are lost, missing, or destroyed should not be expected to reverse themselves. It is now a reality in many jurisdictions that the insured's burden of proof is by a preponderance of the evidence standard, rather than the previous and more exacting clear and convincing evidence standard. The secondary evidence rule allows insureds the opportunity to establish coverage through a combination of documents and testimonial evidence without ever having to produce the original or even a copy of the policy. The insurer may bear the burden of proving exclusionary language. An insurer's policy retention program will increasingly be scrutinized as the ability to organize and store information becomes less costly and burdensome. The time between coverage and claims will continue to increase for some types of calamities, especially for claims involving toxic chemicals.

Underwriters in the 1950s probably never imagined that claims would be submitted fifty years after issuance of the policy. Not only are claims submitted, but they are evaluated under current law and damages are measured by today's dollars. The exposures for some lines of insurance and some types of insureds greatly exceed the exposure contemplated by the premiums paid. We may have reached a point at which an insurer should either retain policy information to prove what the policy *did not* cover or establish that a policy did not exist by producing evidence to show a complete list of its portfolio for the period in question.