

## Past Policies Vital When Faced With Liability

BY STEVEN J. PUDELL AND  
NATASHA Z. MILLMAN

When you, as the owner of a drycleaning business, are faced with the prospect of corporate or personal liability for an environmental clean up of your drycleaning property, the situation may seem overwhelming.

Along with the uncertainty and burdens posed, the cost of the clean up may be more than you ever anticipated, eating into your nest egg that you built up by hard work over many years. If you do not have a copy of the insurance policies that may provide coverage for the clean up, you may think all is lost.

This article is intended to show you that options exist for people in your situation to potentially access this insurance coverage, even if the insurance policy itself cannot be found.

### **Why should you seek out the lost policies?**

Insurance coverage may be available to pay for the clean up and investigation of environmental contamination at and under your property. Coverage may be available from a variety of different insurance policies you may have purchased, including commercial general liability policies or all-risk policies. Coverage may also even be available from those policies that you or your predecessors (if you purchased the establishment) purchased decades ago.

That is, even if you discover environmental damage after many years,

you still may be able to access coverage from the policies that were in force years ago. These policies may pay for portions of the investigation, clean up and attorney's fees.

### **Seeking out the policy, or some evidence of its existence**

When an insurance policy cannot be found, many people believe the insurance company will have a copy. Unfortunately, insurance companies often (albeit unfairly) destroy documents after seven years.

Unless you are a packrat, your business may not have a copy of the old policies, either. Nonetheless, you should search for these policies – because each one you find will mean money in your pocket.

New Jersey courts have routinely sided with policyholders in these situations if the policyholders can prove (i) the policy is lost or otherwise unavailable; (ii) the policy has not been destroyed in bad faith; and (iii) the policyholder has performed a good faith, diligent search for the policy; and the policyholder can provide some “secondary evidence” of the policy's existence and its terms.

It is worth your diligent effort to locate the policy, or, if it cannot be located, some secondary evidence of its existence, to potentially realize the benefits of your company's insurance coverage.

### **Suggested actions**

First, you should undertake a thorough search of your files. In our experience, policies have

been found in some unexpected places. Search carefully, especially in files containing information on claims you may have made under the policy, and for correspondence to and from your insurance broker – who can play a key role in locating the policy or evidence of its existence.

There are various documents that are considered acceptable forms of secondary evidence, with courts typically showing no preference for one over the other. These include, but are certainly not limited to:

- correspondence to and from your insurance company or broker;
- cancelled checks;
- prior and/or subsequent insurance policies and/or renewal policies;
- policies marked for renewal;
- insurance binders;
- insurance company's claim files;
- worker's compensation records of your state;
- accounting ledgers showing payment of premiums;
- bills and/or invoices with the insurance policy numbers;
- certificates of insurance;
- umbrella and/or excess insurance policies that may list the underlying coverage;
- reinsurance policies or documents;
- premium reports;
- declarations pages;
- internal memoranda referencing the policy;
- loan and/or mortgage documents from past transactions

where you may have had to provide proof of insurance coverage for your company;

■ New Jersey Compensation Rating & Inspection Bureau files on your company – a letter under the Open Public Records Act can in most cases give you access to what, if anything, is on file for your business;

■ your corporate minutes;

■ merger and acquisition and/or sale or closing documents for your business, if any exist; and

■ past lawsuit files that may contain copies of policies about the issues surrounding that lawsuit, or written judicial opinions and other legal documents that may describe or reference the missing policy in some detail.

It may be worth a call to the insurance company as well (before any potential litigation is instituted, of course) to inquire what documents it has in its possession, including its claims files relating to your corporate policies.

Second, touch base with your insurance broker(s) who assisted in placing insurance coverage for you. Explain the situation, and ask that they also undertake a diligent search for the policy in their files. If they do not have the policy, ask for their files

containing correspondence, ledgers accounting for your premium payments, and copies of invoices and/or receipts.

Third, document and organize what evidence you do find. Make sure you make at least two copies of each document and catalog what documents you have found. Keeping a chronological file of your company's insurance policies is a good practice and can help piece together the puzzle of the coverage you need to access.

Finally, you may need the assistance of an insurance archeology firm, which is a team of professionals engaged in the business of forensic insurance policy reconstruction and analysis.

You may also want to call an attorney specializing in insurance coverage recovery, who can assist you in analyzing the situation and navigating the process of dealing with the insurance company with respect to your potential claim.

A lawsuit against the insurance company may or may not be necessary, depending on the facts and a cost-benefit analysis of your particular situation.

If you have not found the policy, but only secondary evidence of the policy, the next step for you is to find

the facts you need to prove the terms of the policy – in other words, proving that the policy in question actually provides insurance coverage for the occurrence at issue.

In New Jersey, a policyholder must demonstrate “by a preponderance of the evidence,” or that it is more likely than not, that the policy's terms provided coverage. Testimony from brokers, agents or insurance experts with knowledge of the specific policy may be sufficient to do this.

Correspondence with the broker or agent can also prove helpful in demonstrating the terms of the policy, especially if it is comparing a prior or subsequent policy to the missing policy.

Be tenacious – the possibility of accessing potentially available insurance coverage is definitely worth your due-diligence efforts. A lost policy does not have to mean that all is lost when you are faced with an environmental liability. **DCN**

*Steven J. Pudell is a shareholder in the law firm of Anderson Kill & Olick PC. Natasha Z. Millman is an associate with the firm. Anderson Kill has offices in New York, New Jersey, Washington, D.C., Philadelphia and Chicago.*