

Is The “Ancient Documents” Hearsay Exception Going To Be Ancient History In 2016 And What Impact Will It Have On Proving Missing Insurance Policies?

December 7, 2015 | [Insurance, Policyholder Protection](#)

Next year, we may see the end of the hearsay exception for “ancient documents” found in Federal Rule of Evidence 803. Rule 803(16) has long held that “a statement in a document that is at least 20 years old and whose authenticity is established” is not excluded by the hearsay rule. This exception is often used in the insurance context when trying to prove the existence and terms of old, missing liability policies when a company has a latent claim. It appears the push to eliminate the ancient documents hearsay exception may go hand in hand with the rise of e-discovery and recent amendments to the Federal Rules of Civil Procedure to address e-discovery issues that took effect on Dec. 1. However, when a missing historic liability policy may respond to a claim, the elimination of this hearsay exception may create additional hurdles for a policyholder. An insured bears the burden of proving the existence and coverage terms of a missing policy, which often times creates the need for “ancient documents.” It is common for an insured to retain an insurance archeologist to assist with its investigation if it does not have copies of its historical policies. Sources like litigation dockets, historical periodicals and treatises and researching old standard commercial general liability forms are good and common tactics to prove the existence and terms of a missing policy. But now, if the ancient documents hearsay exception is eliminated, policyholders should anticipate that insurance companies will assert that there is a higher bar for policyholders to leap over to prove the terms of missing policies. Insurance disputes over missing policies can look to documents sold more than a half a century ago, and witnesses with knowledge of such ancient documents often are no longer available to authenticate the documents. Nonetheless, other evidentiary rules should be available to make such ancient documents admissible if the exception is eliminated. Some options might include other hearsay exceptions like records of regularly conducted activity, market reports and commercial publications, learned treatises, recorded recollection or the residual exception within Rule 807. In short, the possible elimination of the ancient documents hearsay exception may lead to insurance companies suggesting there is a new and more stringent test for policyholders trying to prove missing insurance policies, but this should not be viewed as an insurmountable burden, as multiple evidentiary rules should permit the introduction of necessary materials. Moreover, this potential change serves as a reminder to companies and risk departments about the importance of maintaining good record-keeping habits and maximizing the company’s knowledge of its historic insurance coverage so they are ready if a latent claim comes along in the future.

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