

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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Wilted Coverage Issue: New York Federal Court Addresses Lost Policies for Flower Grower

Policyholder's Claim Is Pushing Up Daisies

These days I see a “lost policy” case about as frequently as I see a Delorean. And that makes sense. With the number of environmental and asbestos claims diminishing, so too is the need to locate insurance policies that were on the risk during the Truman administration.

But the Eastern District of New York recently had occasion to address the lost policy issue and it did so in some detail. Since lost policy issues are still not extinct – although certainly on the endangered species list – it’s worthwhile to examine the decision as it may provide guidance to those still handling this issue.

The opinion in *Bianchi v. Florists Mutual Ins. Co.*, United States District Court for the Eastern District of New York, No. 08-1984 (September 24, 2009) is straightforward. Plaintiff’s parents, now deceased, owned I.W. Bianchi, Inc., a commercial flower growing business from 1929 through 1988. In 2007, the NY Dept. of Environmental Conservation advised the plaintiff that the location where Bianchi formerly did business had been identified as an inactive hazardous waste site. Plaintiff was identified as a responsible party and required to finance remedial work at the site. *Bianchi* at 2.

Plaintiff placed Florists’ Mutual on notice of the DEC claim and commenced a declaratory judgment seeking defense and indemnification. At issue before the court was the insurer’s motion for summary judgment that the plaintiff could not sustain its burden of proving the existence of any Florists’ Mutual policies. However, the insurer did acknowledge that it may have issued policies to Bianchi for certain unspecified years. *Id.* at 3.

The parties agreed that, despite their best efforts, neither was able to locate any physical policy of insurance issued by Florists Mutual to Bianchi. *Id.* at 6. First up for the court was to decide the burden that the plaintiff must bear to prove the existence of the policy and that it potentially covers the loss. After acknowledging that the burden of proof is in

dispute under New York law, the court adopted the preponderance of the evidence standard. *Id.* at 5.

Plaintiff's claim was based upon his belief that his parents' business was covered by Florists' Mutual policies issued during the 1960s, 1970s and 1980s. He based his belief upon discussions he stated that he had with his parents regarding the subject of their insurance. He also testified as to his belief that, in or around 1986 or 1987, his parents changed their insurance coverage from Florists' Mutual to the Farm Family Insurance Company. *Id.* at 6.

The court reviewed the deposition testimony of two representatives of Florist Mutual, one of which was its Chief Operating Officer. This testimony addressed the nature of the searches that the company undertook to locate any policies issued to Bianchi. At best, the searches turned up some evidence that, at some point in time, Florists' Mutual issued a policy to Bianchi. *Id.* at 6-8.

However, it could not be determined how many years Bianchi had coverage with Florists' Mutual, the type of policy that was issued, that such policy was even a commercial general liability policy or whether any such policy would have contained a pollution exclusion. *Id.* at 7.

The Bianchi's insurance broker testified at deposition that he knew that Bianchi was insured by Florists' Mutual in 1986 when he met with Plaintiff's parents and discussed the possibility of changing insurers to the company that he represented. "[The broker] stated that he recalled personally reviewing Florists' Mutual policies from 1984, 1985 and 1986. [The broker] stated that he had no idea as to whether Florists' Mutual insured Bianchi, Inc. prior to 1984, but stated that Plaintiffs' father told him that he was insured by Florists' Mutual 'for a lifetime.' As to the meaning of 'for a lifetime,' [the broker] testified that he had no idea as to the meaning of the term." *Id.* at 8-9.

In the end, the court treated the 1984-1986 period differently than the pre-1984 period for purposes of its decision. As to the pre-1984 period, the court granted the insurer's motion for summary judgment, reasoning as follows:

The only evidence before the court in connection with such policies is the Plaintiffs' assertion that he believed that his parents' business was always insured by Florists' Mutual, and Defendant's admission that it insured Bianchi, Inc. at some point in time. There is absolutely no paper evidence supporting the claim of existence of any particular policy during the time when Bianchi, Inc. began doing business in 1928 until it began purchasing insurance from Farm Families Insurance Company in 1986. Even if the court were to assume that Florists' Mutual insured Bianchi, Inc. prior to 1984, any conclusions regarding the broad

questions of the scope and nature of those policies would be pure speculation. For example, the jury would be called upon to decide, *inter alia*, the term, coverage, exclusions and renewal provisions of each policy issued over decades. Once these issues were decided, the jury would next be required to determine whether, for any given policy period, Plaintiff was a covered party. The level of such speculation is simply too high for a jury to undertake, and the court declines to allow a jury to do so.

Id. at 10.

As to the 1984 - 1986 period, the court denied the insurer's motion for summary judgment on the basis that all parties agreed that Bianchi, Inc. was insured by Florists' Mutual at some time and the insurance broker's testimony regarding policies written from 1984 through 1986 pushed the evidence beyond mere speculation. *Id.* at 12. However, the court was quick to point out that its ruling was simply that, for purposes of summary judgment, there was a sufficient question of fact concerning the existence of the policies. The court concluded that "[The insurer] will have the opportunity to argue against the existence of such policies and the scope of their coverage. It will be for Plaintiff to prove at trial that these policies existed, and that any such policy obligates [the insurer] to defend and/or indemnify him in connection with the claim of the DEC." *Id.* at 13.

So while the Plaintiff lives to see another day in his attempt to prove the existence of the 1984 – 1986 policies, the ultimate outcome seems inevitable. Given that everyone's best efforts to date have failed to turn up any substantive evidence of the existence and terms of such policies, it seems that the plaintiff has a tough road ahead in its quest for a reversal of fortune in this search.

A copy of the Eastern District of New York's September 24, 2009 decision in Bianchi v. Florists Mutual Ins. Co. is attached.

Please let me know if you have any questions.

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