



Insurance Matters!

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In This Issue:

Mission Statement 1

Conflicts in Representing Insureds and Insurers 1

Recent Changes to ACORD's Certificates of Insurance 1

Third Article (TBD) 2

Schedule of Upcoming Committee Meetings 4

Schedule of Upcoming RPPTL Section Meetings 4

A Newsletter of the **Real Property and Liability Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of the Florida Bar

Conflicts in Representing Insureds and Insurers

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Tripartite Relationship

The Tripartite Relationship between the insurer, the insured, and the attorney hired to defend the claim and represent either the interest of the insured or the dual interests of the insurer and insured. The tripartite relationship is governed by the 1) insurance policy, 2) the representation arrangement, and 3) duties owed by their common attorney to both clients under the ethics rules. In 1999, the Insurance Practices Special Study Committee (IPSSC) issued a disclosure statement to provide guidance to the defense attorneys and disclose information about representation to the insureds. This is known as the Statement of Insured Client's Rights which is now required by the Florida Bar in Rule 4-1.8 of the Rules Regulating the Florida Bar.

(See Conflicts, Page 3)

Recent Changes to ACORD's Certificates of Insurance

By: Scott P. Pence,
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The Association for Cooperative Operations Research and Development, or "ACORD" as it is more commonly referred to in the insurance industry, "is a global, nonprofit standards development organization serving the insurance industry and related financial services industries." ACORD recently updated its family of forms known as Certificates. The purpose of this paper is to discuss some of the practical effects of the most significant change to some of the more commonly used certificate forms ("Forms").

What is a Certificate of Insurance? Generally, a certificate of insurance is a document that summarizes a policy holder's current insurance coverage. It is typically requested by the policy holder to provide evidence to another party as proof of compliance with contractual insurance requirements. For example, a tenant may need to provide evidence to its landlord that it has appropriate liability insurance; a mortgagor of a building may request evidence of property insurance coverage upon closing; or a construction contractor may need to provide evidence to a developer that it has workers' compensation/employer's liability and appropriate liability insurance

(See Recent Changes, Page 2)

“To catch the reader's attention, place an interesting sentence or quote from the story here.”

Recent Changes, continued from page 1

coverage in place. Whatever the circumstances, the party to whom the certificate of insurance is provided, referred to as the certificate holder, often mistakenly believes it can rely upon the information in the certificate of insurance in the same way it could rely upon the information within the actual insurance policies.

Certificate holders need to be aware of the numerous disclaimers within the Forms that effectively limit the certificate holder's ability to rely upon the information within them. Each of the Forms generally contain the following disclaimers : (1) the certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder; (2) the certificate of insurance does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies identified within it; (3) The certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder; (4) the certificate of insurance certifies that the policies identified within it have been issued to the insured for the policy period indicated; and (5) notwithstanding any contract or other document for which the certificate of insurance is issued, the insurance afforded by the policies identified within the certificate is subject to all of the terms, exclusions and conditions of such policies.

So what does this mean? Generally speaking, a certificate of insurance is merely evidence that the policies identified within it are in force at the time the certificate of insurance is issued. It should be viewed as a snapshot in time, with no assurance that the coverage identified within it will not be modified or cancelled.

Recent Changes to Notice Language. The most significant recent change to the Forms relates to the insurer's requirement to provide notice in the event any of the policies identified within the certificate are cancelled before the expiration date noted therein.

The previous versions of the Forms contained language that said if any policy was cancelled before the expiration date of that policy, the issuing company would “endeavor to mail ___ days written notice to the certificate holder.” Frequently, certificate holders required the removal of the words “endeavor to.” Virtually every state does not allow a change in a certificate of insurance that attempts to modify a policy unless the revised certificate is filed and approved by the state as a policy form. Because most insurance policies require only that the insurer provide notice to the primary insured, the removal of the words “endeavor to” raised questions as to whether or not this constituted an attempt to modify the terms of the policy.

Driven by recent Certificate of Insurance Bulletins issued by the South Dakota Insurance Department, ACORD recently replaced the “endeavor to” language in the new forms with language stating if any policy is cancelled before the expiration date of that policy, “notice will be delivered in accordance with the policy provisions.” As noted above, the standard insurance policy requires the insurer to provide notice only to the primary insured. Therefore, this language is problematic from a certificate holder's perspective because the insurer has no obligation to provide notice of cancellation to the certificate holder.

Possible Solutions. So, what can the certificate holder do to address this issue? Following are a few options, and potential drawbacks associated with some of them, to consider:

- Require the insured's agent to issue the old version of the ACORD form, without the “endeavor to” language. This seems like the most obvious response. However, the problem with this is that agents are not authorized to use any other forms

(See Recent Changes, Page 3)

Conflicts, continued from page 1

Under the Insurance Contract or Policy **between the insurer and the insured**, typically the policy requires the insurer to provide a broad duty to defend any covered claim filed against an insured. Doe v. Allstate Ins. Co., 653 So.2d 371 (Fla. 1995). Insurers typically provide a good faith defense to the insured in exchange for the insured to relinquish control of the defense to the insurer and agree to cooperate in that defense. Schuster v. S. Broward Hosp. Dist. Physicians Prof'l Liab. Ins. Trust, 591 So.2d 174 (Fla. 1992). Under the Insurance Contract, the insurer protects its interests and the interests of the insured by assuming control of the defense and related costs. Doe v. Allstate Ins. Co., 653 So.2d 371 (Fla. 1995). Insurers' obligations are not just merely to fund the insured's defense, and instead insurers are required to protect the interest of the policy holders in the same degree that they protect their own interests. Schuster v. S. Broward Hosp. Dist. Physicians Prof'l Liab. Ins. Trust, 591 So.2d 174 (Fla. 1992).

The retainer agreement or representation agreement creates contractual rights and obligations **between the Insurer and defense attorney** all of which arise at the time the insurer retains the attorney. The representation agreement or retainer agreement outlines the terms and conditions under which the attorney will provide representation. The terms and conditions include billing guidelines, litigation guidelines, audits, all of which control the quality of representation and defense costs. In most jurisdictions, the retainer agreement is a dual representation agreement which represents the common interests of **both** the insured and the insurer so long as those interests are not in conflict.

Further, the **Rules Regulating the Florida Bar** provide for ethical rules to the tripartite relationship to ensure that neither the policy obligations nor the retainer agreement violate the attorney's duty to maintain confidentiality and to remain free of conflicting interests. A lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. Rule 4-1.7. A lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees.

Recent Changes, continued from page 2

than the most recent versions and doing so is a violation of the ACORD licensing agreement.

- Require the insured's agent to issue a "non-ACORD" certificate of insurance. Also an apparently obvious option. However, this raises several issues. First, there are copyright concerns if the certificate holder proposes the use of a specific form substantially similar to the ACORD form. For example, if an owner of a construction project requires a contractor to provide a certificate of insurance form with references to ACORD (e.g. copyright notice and logo) removed and modifications to the notice and disclaimer language, the owner could be subject to statutory copyright violations. Second, if the terms of the certificate are construed as an attempt to modify the policy, the certificate might need to be filed and approved by the state as a policy form.
- Require the insured contractually to provide notice of any cancellation, non-renewal or modification of the insurance policies directly to the certificate holder. This may provide some additional protection to the certificate holder, but there could be disincentives to the insured party doing so. For example, if the policy is cancelled because the insured party fails or refuses to pay the required premium, it is unlikely the insured party will be very keen on notifying the certificate holder of that cancellation. Therefore, this solution by itself is probably not sufficient.
- Have the insured obtain and endorsement to the policy requiring the insurer to provide the notice. This is probably the best solution for the certificate holder, but not all endorsements are the same. There are two different types of endorsements the insurer might be willing to provide:
 - Blanket Endorsement: Under a blanket endorsement, the insurer agrees to provide notice to the certificate holder if the insured has agreed to do so contractually. This is a good solution assuming the insurer is told to whom it is required to provide notice. However, there are several places where a breakdown in communication could prevent the insurer from obtaining this information. The insured must first notify its agent if it enters into a contract requiring cancellation notice to be given by the insurer to the other party to the contract. Then, the agent must similarly notify the insurer. If either of these parties fails to notify the next in line, the insurer will not know that is required to provide cancellation notice to the insured and the certificate holder will not receive the benefit of the endorsement.
 - Scheduled Endorsement: Under a scheduled endorsement, the insurer agrees to provide notice to the specific entity named as the certificate holder and the insurer adds that entity's name and contact information to the

(See Recent Changes, Page 4)

Committee Mission Statement

The Purpose of the Real Property and Liability Insurance and Surety Committee is to educate the Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management.

Schedule of Upcoming Committee Meetings

The Real Property and Liability Insurance and Surety Committee meets via teleconference on the third Monday of every month. The first part of each teleconference is devoted to committee business, followed by an insurance/surety-related CLE presentation, that typically lasts between 30-45 minutes. The call in information, times and schedule of upcoming committee meetings follows:

Dial-in number for all meetings: 888-376-5050; Participate Code: 8425484201#

Meetings are from 12:00-1:00 EST

Upcoming meetings: April 16, 2012; May 21, 2012; June 18, 2012; and July 16, 2012

Schedule of Upcoming RPPTL Section Meetings

May 31-June 3, 2012
Executive Council Meeting/
RPPTL Convention
Don CeSar Beach Resort
St. Petersburg, Florida

July 25-28, 2012
Executive Council Meeting
The Breakers
Palm Beach, Florida

September 13-15, 2012
Executive Council Meeting
Ritz Carlton Key Biscayne
Key Biscayne, Florida

Recent Changes, continued from page 3

policy itself. This is much better than a blanket endorsement because there is no potential breakdown in communication to prevent the insurer from knowing to whom it is required to send the cancellation notice.

- Instead of limiting the insured's obligation to provide a certificate of insurance to just once, the certificate holder could require an updated certificate of insurance to be provided according to an established schedule or established milestones (e.g. with each payment application, with any scheduled draws, monthly, quarterly, etc.) Each time the certificate holder receives a new certificate of insurance, it would provide a fresh "snapshot." Employing this option by itself, however, has potential drawbacks because the insured is not required to be provided notice in the event of a cancellation. Therefore, it is possible that the policy could be cancelled without the certificate holder's knowledge sometime between the established intervals.

Conclusion. Accepting a standard ACORD form certificate of insurance at the onset of a project as the sole form of evidence that another party is in compliance with specified insurance requirements does not provide adequate assurances to the certificate holder of continued compliance by the insured. There are several options available to the certificate holder that can increase the likelihood of being notified of any cancellation in coverage. However, no matter what options the certificate holder chooses to pursue, the key is to start exploring those options early in the negotiations process because they take time and, if started too late in the process, have the potential of delaying the finalization of the deal.