



Certificates of Insurance Issues & Answers

**Second Edition
March 2008**



Disclaimer

The purpose of this paper is to assist agents and brokers in considering issues relevant to certificates of insurance. The paper includes only general information, and is not intended to provide advice tailored to any specific insurance situations. It was prepared solely as a guide, and is not a substitute for agents and brokers independently evaluating any relevant business, legal or other issues, and is not a recommendation that a particular course of action be adopted. If specific advice is required or desired, the services of an appropriate, competent professional should be sought.

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Certificates of Insurance: Issues & Answers

Second Edition, March 2008

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The most recent edition of this document can be found at <http://www.iiaba.net/VU/NonMember/Certificates.htm>, along with a number of related documents and articles.

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Acknowledgements

The foundation for this document is a series of Virtual University web site articles written by myself and members of our 50-person volunteer faculty and published in our free bi-weekly email newsletter, *The VUpoint*.

To subscribe to this free newsletter, go to:



<http://www.iiaba.net/VU/NonMember/newsletter.htm>

This foundation of information was supplemented by literally hundreds of emails, articles, and conversations with insurance and risk management professionals from around the country.

Once the draft of this paper was completed, I distributed it to over 100 agents, consultants, educators, attorneys, and risk managers for their feedback.

In particular, I'd like to thank author, speaker, and consultant Don Malecki for his thoughtful comments, several that I've quoted liberally within the text of this document. In addition, thanks to Joel Volker of ACORD and the staff at Westport Ins. Co., the E&O carrier for most IIABA members, for all of their helpful suggestions.

In March 2008, after our board of directors adopted a position paper on certificates of insurance, we began to offer this white paper and related documents and articles for free to the general public. To access our Certificates Resources section of the public area of our Virtual University web site, go to:



<http://www.iiaba.net/VU/NonMember/Certificates.htm>

Finally, throughout this paper, you will find web links to information on our web site as well as others. Most of these links take you to the public area of our web site. However, because the vast majority of our 4,000+ pages of content is proprietary, some of these links require a login and are accessible only to IIABA members and paid VU subscribers. If you are interested in membership or subscription, go to:



<http://www.iiaba.net/VU/NonMember/subscription.htm>

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Preface

“A certificate of insurance is a document issued by or on behalf of an insurance company to a third party who has not contracted with the insurer to purchase an insurance policy. The most common type of certificate is that provided for informational purposes to advise a third party of the existence and amount of insurance issued to the named insured.” (Allan D. Windt, *Insurance Claims and Disputes*, 4th ed., 2001)

These informational certificates are usually issued in conjunction with a contractual relationship between a third party and the named insured, requiring that the named insured have a particular amount and type of insurance. Such requirements are particularly common in construction contracts with large contractors, government entities, and major corporations.

In addition to describing the insurance available to the named insured, a certificate may also convey information that the certificate holder is an additional insured under the policy issued to the named insured, thus giving the certificate holder some interest in the policy itself.

According to the 8th Edition of Black’s Law Dictionary, a certificate of insurance is “A document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers.” Certificates are simply snapshots of basic policy coverages and limits at the time of issuance of the certificate. Certificates are not intended to modify coverages or change the terms of the insurance contract.

From the insurance agency’s perspective, problems with certificates most often arise when they are requested by insureds in response to business contracts that seek to hold them responsible for “any and all liabilities” or similar wording.

In addition, the certificate holder may request the insured to ask the insured’s agent for a letter attesting to the fact that “in the opinion of the agent, the policy contains the required insurance coverages/indemnifications required by the contract with the insured.” These words are excerpted from an actual letter received by an agent on behalf of his insured.

In this instance, the certificate holder is demanding that the insured’s agent warrant coverage to their benefit without exclusions, something that is impossible to do. In addition, the contract might require that the certificate holder be named as an additional insured (something the insurer may or may not be willing to do), be provided notice of cancellation (something not often provided for in an insurance contract for additional insureds), or be provided with a type of coverage (e.g., completed operations) that the insurer cannot or will not provide. Such contracts may specify certain endorsements by form number and edition date that the insurer cannot provide because they have been superseded by newer editions and the older ones have been withdrawn.

As a result, agents are sometimes asked to produce a certificate that cannot comply with the contract the insured has signed. Refusing to do so, agents are often faced with an assertion by the insured that they know of agents who, according to the certificate holder, can or will provide such certificates. Failure to do the same could mean the loss of an account for the agency.

To illustrate, here is an actual inquiry from an agency:



Is there a 'paper' explaining to account managers what is automatically included in a CGL policy, who is covered contractually and how the terms hold harmless, waiver of subrogation, and primary non-contributory are addressed in the standard policy language of the CGL and commercial auto? More and more requests are coming in trying to transfer liability to another party.

It is getting very difficult to explain to our employees how to handle these requests. Once we determine what language can or cannot be put on the certificate, we then have to try to explain it to our customers. Usually, they have signed a contract agreeing to specific coverage language and are then upset that it cannot be done.

Unfortunately, we are considered by some clients to be the 'bad guys' that are jeopardizing their livelihoods. I'm not sure exactly what the answer to this problem is or anything can be done about it, but maybe a clarification 'paper' would help.

When IIABA members speak, IIABA staff listens. Read and enjoy.

Introduction

In this section, we'll examine why agents need to be concerned about certificate of insurance problems, along with the scope of the problem.

E&O Statistics & Case Studies

We all know that, by and large, certificates are not contracts. So, there's no need to be overly concerned about the accuracy and wording on the certificate, right? Not according to E&O statistics. During the past year of data collection, E&O claims involving certificates of insurance have increased 28%.

About 1 in 25 E&O claims involves a certificate of insurance, with over half of all claims arising from an error or omission by a CSR. About 75% of E&O claims for certificates involve a CGL policy, with the next highest category being workers compensation at 10%.

The two main sources of certificate E&O claims are claims of failure to add, or improperly identifying, additional insureds (36%) and misrepresenting coverage on the certificate that doesn't actually exist (21%). CSRs are primarily accused of being responsible for the former and producers for the latter.

Agents often fall into a routine with policyholders that frequently require certificates. In these situations, the agent can become lax in checking to make sure that the coverage hasn't changed. E&O claims have arisen from certificates issued on policies that have lapsed or certificates that indicate a specific type of coverage is in place when, in fact, the insured recently dropped it. This problem may be more prevalent in larger agencies where the personnel issuing certificates are different from those making policy changes. It is important, no matter what the size of an agency, that procedures be in place that require staff to confirm all coverages before issuing a certificate.

In one recent case, the agent placed a CGL policy for a contractor that had successfully bid a project with the federal government. The agent issued a certificate to the government reflecting coverages as of a certain date. Shortly thereafter, the contractor allowed its coverage to lapse due to nonpayment of premium. Subsequently, the contractor negligently caused damage to government property. The government sued the agent for failing to advise of the cancellation.

Although a certificate is intended to be a snapshot of coverages as of the date of issuance, some non-ACORD certificates require notice of cancellation. Since the agent above had unilaterally issued the certificate, the government argued that the language created a duty on the part of the agent. The government also argued that certain federal regulations imposed a duty on the agent to update the certificate for the lapse of coverage. As discussed later, all non-ACORD forms should be referred to the insurer for issuance.

Scope of the Problem

There seem to be three major problems that come up often regarding certificates of insurance: (1) certificate fraud by agents and insureds, including agents who indicate coverages that don't exist so an insured subcontractor can get a construction job or get paid for one, (2) onerous contractual insurance requirements by large contractors, huge corporations, governmental/public entities, etc. that cannot be met by coverages typically available in the marketplace, and (3) the issue of (not) notifying certificate holders of cancellation.

Certificate fraud is an issue addressed largely by contract law, regulatory governance, and specific statutes in some states. Certificate fraud is not limited to unscrupulous agents and, in fact, may be undertaken by insureds themselves. To illustrate one aspect of the problem, here is a recent inquiry from an agent:

"I issued a GL binder for a 30-day period to a general contractor/design-build headed down to Florida to do some work for a large city there. A lady with the city called yesterday and wanted to file a claim. I told her the coverage was canceled before the date of loss. She said my binder indicated coverage was for a 12-month term. She faxed it to me.

"The contractor I assume used Excel and created his own what he called 'ACORD Insurance Certificate Binder 75 - (1/98).' This thing is so real it's scary, except the spelling was as follows:

"Limbirty - written five times (should be 'liability')

"Residendential

"Martthew

"Propety

"Bro - for broad

"Comercial

"You would think a large municipality would be more diligent in scrutinizing certificates and binders. I'm aware of some that won't even accept them anymore...they want to see the actual dailies and/or policy forms and often verify them with a phone call because of the rampant fraud."

The issue of onerous insurance requirements is largely an educational one. From the standpoint of many businesses and governmental entities, it doesn't hurt to ask for the moon, even if you know you won't get it. As one attorney noted, "I ask for everything I can get. It's the other guy's responsibility to say 'no.'" In many instances, these organizations are asking for concessions for which there is no insurance product in the marketplace. They ask because they have the leverage to do so. Unfortunately, some agents will indicate, usually by a certificate of insurance, that their insured is in compliance with specific insurance requirements. It could be that the additional insured isn't concerned, knowing that the agent's E&O insurance provides a backstop.

Often organizations will ask for coverages out of ignorance. Contracts may specify additional insured endorsements that are dated over 20 years ago. If a company (or ISO) has filed a new endorsement and withdrawn an older one, the carrier cannot legally provide the older form without refiling it. However, some agents indicate on the certificate of insurance that the form or its equivalent is being provided.

One other issue is the “will endeavor to” cancellation wording that very few insurers follow. This has the potential to become a legal problem, though many consider it one of ethics...is it ethical to provide a certificate that says the insurer will attempt/try (i.e., “endeavor”) to provide cancellation notice when it's clear that the insurer has no intention of doing so?

These and other issues are addressed in this paper.

Construction Contracts



Consider this all-too-common scenario: Your insured is bidding on a construction contract with a large, national builder. The contract includes an insurance addendum that requires that certain coverages, limits and terms be in place. Compliance would necessitate adding the builder as an additional insured, restructuring the coverages, and even modifying the coverage forms themselves (or implying that the forms have been modified). The builder also wants major revisions to the certificate(s) of insurance.

Of course, the current carrier refuses to do any of this. What do you do? The insured insists that, without these concessions, he will not get the job. You know that if you don't assist the insured in complying, you may lose the account to an agent who is willing and (allegedly) able to meet the builder's demands... sometimes, remarkably, with the same carrier who refused your request. Before we examine the issues and seek some solutions, let's go back to the start....

Here's a list of some of the requirements in this construction contract insurance addendum for this builder, along with some commentary (Note: These are all real contract provisions.):

- The following additional insured endorsements must be added to the contractor's CGL policy (though it isn't clear which): CG 20 26 11 85; or CG 20 10 11 85; or CG 20 10 10 93 (but only if modified to delete the word “ongoing” and insert the sentence “Operations include ongoing and completed operations” to track the 1985 versions).
 - o CG 20 26 11 85 - Additional Insured – Designated Person or Organization says, “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule as an insured but only with respect to liability arising out of **your operations** or premises owned by or rented to you.”
 - o CG 20 10 11 85 - Additional Insured – Owners, Lessees or Contractors – (Form B) says, “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of **'your work'** for that insured by or for you.”
 - o CG 20 10 10 93 - Additional Insured – Owners, Lessees or Contractors (Form B) says, “WHO IS AN INSURED (Section II) is amended to include as an insured the person or organization shown in the Schedule, but only with respect to liability arising out of **your ongoing operations** performed for that insured.”

Note from the contract wording that they want the word “ongoing” deleted and replaced to ensure that coverage is provided for both ongoing and completed operations. This requires that an older withdrawn endorsement be modified, which quite possibly cannot be done by the carrier without violating insurance laws. In addition, the wording of the referenced 1993 form was deliberately modified by ISO to eliminate P/CO coverage for additional insureds to begin with.

Keep in mind that many insurers, particularly those that closely follow ISO filing schedules, no longer have the requested 1985 endorsements available. The drafters of the construction contract cite the older endorsements either because they don't know newer editions exist, don't want to modify their contract every time the forms change, or because they prefer the language of the older forms.

Sometimes endorsements are revised because of revisions in the primary policy. Using an older endorsement with a newer primary policy could create havoc in coverage. For example, revising an old additional insured endorsement to add completed operations coverage will create a problem if the current primary policy form does not include that coverage for the additional insured (more on this below).

Even more important, if the carrier has adopted a new endorsement, chances are they may be legally unable to use an older one, it having been withdrawn at the time the newer form was filed. It is often best if all parties work with the latest forms available, some of which may be more appropriate for current exposures and arrangements, such as the CG 20 37 07 04 and CG 31 15 10 01 cited below (forms current at the time of the publication of this paper).

- The additional insureds are to include the builder entities (a partnership and corporation), the site owner, and all of their respective officers, directors, partners, members, and employees. The additional insured endorsements are designed to pick up incidental, largely vicarious, liability exposures of specific persons or organizations. The contract provision in this example basically expands the contractor's CGL Who Is An Insured section to include almost everyone affiliated with the builder and/or owner, including office workers at the corporate headquarters. As an agent, do you realistically expect your carriers to assume that kind of exposure?
- The contract effectively requires that the contractor's CGL policy continue in force to cover the additional insureds for BI and PD that occurs after all work on the site has been completed. There is no specific termination date and, at the builder's request, the contractor must provide certified copies of all subsequent policies for at least five (5) years. This would preclude any future designated premises exclusions. If the contractor goes out of business, this would appear to necessitate discontinued operations coverage. In addition, as discussed below, it is even questionable whether the additional insured has P/CO coverage...the modified additional insured endorsement implies that it exists, but the current CGL policy may not grant that coverage to additional insureds.

At issue is whether this is reasonable and, as the agent, are you willing to provide this service indefinitely (or for at least five years) for free? Are you willing to remain vigilant in monitoring continuing coverages for perhaps dozens or hundreds of projects for a one-time commission? Do

the rating plans in place for your carriers contemplate this broader, longer term exposure? Is your insured willing to deplete his aggregate limit several years down the road due to a claim against one of these additional insureds?

- The contract requires thirty (30) days notice *by certified mail* for cancellation, nonrenewal, and modification or reduction in coverage. It also mandates that the certificate of insurance be revised to delete the wording “endeavor to” and “but failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives” from the cancellation portion of the certificate.

The contract, to the fullest extent permitted by law, also calls for the deletion of anything in the certificate of insurance that would imply that it does not confer rights to the insurance. This probably refers to the language on the ACORD 25 that says, “This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.”

There is significant case law to support the position that the certificate holder has no rights, under the certificate, to the insurance contract. Clearly, the builder wants to attempt to create such rights, even if there is no basis for requiring the carrier to do so.

In addition, the back of the certificate of insurance form says, “The Certificate of Insurance on the reverse side of this form does not constitute a contract between the Issuing Insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.”

The back of the form also says, “If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).”

- The contract clarifies that coverage is not limited to vicarious liability and it prohibits any endorsement limiting coverage for ANY negligent acts, errors or omissions of the builder. Although it may or may not be the intent, this would imply that coverage goes beyond that of the CGL which does not cover, in a strict sense, “errors or omissions” that do not meet the definition of “occurrence” and result in BI or PD. It may also imply that no exclusions apply, as ludicrous as that may sound.
- The contract forbids exclusionary language for things such as soil subsidence, earth movement, pollution, mold or fungus, EIFS, etc. How many agents represent carriers whose CGL policies cover pollution without exception? Increasingly, most policies now also exclude or limit claims arising out of fungi and EIFS. This one provision alone makes it virtually impossible for the contractor to comply with the contract.
- If insurable by law, the policy must cover punitive damages, fines or penalties. CGL policies don't cover fines or penalties...in fact, it's likely that an agency's E&O policy doesn't cover them either.

- The contractor must require (and provide proof of upon request) each subcontractor to comply with the insurance requirements of the contract and the sub must sign a hold harmless/indemnity agreement specified by the contract, naming the builder, owner, officers, etc. (not the contractor) as beneficiaries. A complete subrogation waiver is also required. Unless prohibited by the policy or law, the contract requires an assignment of the policy to additional insureds if the contractor is out of business or cannot be located.

The contract makes the contractor's policy primary, which isn't unusual for additional insureds... the Other Insurance condition of the 1998 CGL states that it is excess over, "Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement."

Note, with regard to the discussion above, that this applies only to the Named Insured, not all other additional insureds specified by the construction contract. Also note that this applies to "operations"...it does not mention completed operations as required by the contract, though one could interpret "operations" broadly enough to include both "ongoing" and "completed" operations. This is the danger that arises when trying to apply nebulous contract provisions across varying editions of policy forms and endorsements.

What is particularly disturbing is that coverage is required to be extended to the builder on a primary basis for its own negligence, not just the contractor's negligence. In fact, it makes the contractor's insurance primary for ALL acts of the builder. So, the contract does more than provide primary coverage for the builder if held liable for the contractor's actions...it attempts to provide direct liability coverage for the builder even if the contractor isn't liable. The current ISO additional insured endorsements do not cover sole liability of the additional insured, as outlined in this VU article:



"ISO's New Additional Insured Endorsements"

<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/Wilson2004AIEndorsements.htm>

This agreement is a good example of a risk manager and/or attorney gone amok (not from the builder's perspective, of course). The attempt here is to essentially remove all potentially insurable risk from the builder and place it on the shoulders of the contractors and subcontractors who typically have far fewer resources than the large corporations making these demands.

The builder can, or can at least try to do this because of size and market clout. By passing along significant costs to contractors and the insurance industry, they keep their costs lower and make themselves even more competitive relative to other builders who don't require such onerous contracts.

So, what can you, as the agent, do when faced with these types of insurance requirements imposed on your insureds? These issues and options are what we will explore in this paper.

Contractual Insurance Requirements

Certificate requests often arise from contractual relationships. A client's contractual obligations can present several problems for agents. First, agents are often requested to review contracts for their clients, despite the fact that few agents have law degrees or are otherwise well versed in how to complete contract reviews.

Second, these contracts often include undefined terms or requirements that make compliance difficult if not impossible. For example, parties requesting additional insured status often want the other party's CGL to be "primary and noncontributory," with the latter term being undefined and probably ambiguous. Waivers of subrogation are commonly requested and certificate holders invariably want notice of cancellation that is typically more liberal than the policy even grants the named insured.

Third, there are often issues as to how additional insured status is granted and whether the CGL, in the absence of an additional insured endorsement, might provide some coverage to another party via the definition of an "insured contract."

Finally, there are decisions that are steeped in ethics rather than contract law or other legal theories. For example, if a contract specifies a minimum liability limit but the insured's policy provides a *higher* limit, on the certificate where it asks for the limit of insurance, should the agent show the requested limit or the policy's actual limit? Another such decision involves notice of cancellation and is discussed later in this section.

So, let's examine each of these issues...

Reviewing Contracts for Insureds

It is not uncommon for insureds to ask agents to review the insurance requirements in contracts such as leases and construction agreements in order to advise what types of insurance are needed to comply with these contractual requirements. For example, here is how one agent says his office handles such requests:

"Our agency permits insureds to send in copies of the contract or at least the insurance portion (I feel better looking at the whole contract). We will then review the insurance requirements and give our insured a list of the insurance deficiencies and needs in the proposed coverage (if no contract is received, we tell the insured that we have no idea if they have the proper coverage). Some insurance deficiencies can be remedied by buying coverage. Some are beyond what the insurance company is willing to do. Some are beyond what the insurance *industry* is willing to do.

"We also stamp each certificate with the following: 'This certificate of insurance represents coverage currently in effect and may or may not be in compliance with any written contract.' In our experience, no insurance policy or collection of insurance policies will completely cover

most insured's indemnification promises. We make that clear to our clients and leave it up to them how to best advise the parties they're contracting with.

"We will NOT, under ANY circumstances, issue a certificate that implies there is coverage of some type or at some limit that does not exist. One problem is that we typically see the contracts AFTER they have been signed and we're asked to certify coverage the insured doesn't have, can't get, or is impossible to provide. **Sometimes an insured or prospect will say that other agents do this, and that they can take their business to them if we won't do it. I have personally lost at least two accounts because of this. As far as I'm concerned, these are not the types of clients and business relationships I want, so I have no problem letting my competitors deal with them.**" [emphasis added]

From a practical standpoint, many agencies feel that the depth of review of such contracts is a business decision made by the agency. From an E&O standpoint, the recommendation is for the insured or prospect to have their own legal counsel proficient in contract law review these contracts, then inform the agent what exposures need addressing from an insurance standpoint. If agents and (probably more often) brokers are taking on the obligation of reading and interpreting a construction contract to determine what additional insureds or lienholders need to be named, they may need to seek legal advice because they may be assuming responsibility for the accuracy of their interpretation of the contract, even if the insured consults with his or her attorney. In some states, and likely under egregious circumstances, that also may expose the agent to claims by the state bar association that the agent has engaged in the practice of law without a license.

Few agents and brokers have the legal training and skill to interpret a contract that could be 200 pages long, with insurance requirements sometimes buried throughout the document. Some of these contracts are very hard to understand. Many contract lawyers will tell you that business and commercial construction contracts are more complicated and harder to understand than most insurance contracts. So, in general, these types of contracts should be analyzed and interpreted by the insured's lawyers, not producers or CSRs. **The trend in risk management is to try to transfer all liability (or as much as is legally possible), whether insurable or not. It takes an astute, well-trained, experienced, and qualified individual to undertake the scavenger hunt often necessary to identify exposures in lengthy or complex contracts.**

To summarize, business contracts can be very complicated. Construction contracts, in particular, can be huge and complex. When these agreements are reviewed by individuals who do not have the experience or qualifications to do so, it increases the likelihood of errors and thus exposure to liability.

The following is a short article on this subject written by VU faculty member Mike Edwards of Edwards & Associates, reprinted with his permission:

"Reading Contracts for Insureds – Guidelines and Sample Disclaimer"

As every E&O attorney knows, there are a sizeable number of E&O claims against agents that arise out of the agent trying to do a favor for an insured. Especially for agents that insure contractors, that "favor" often involves reading or reviewing contracts signed by the contractor. Of course, other insureds sign contracts, such as lessors, lessees and others.

Agents are caught in a Catch-22 when it comes to reviewing contracts signed by their insureds. To run from the task would call into question the agent's professional service. On the other hand, to tackle the project with no written guidelines or disclaimers could be disastrous for the agent and agency. The most common sense approach, and one that is recommended by many E&O attorneys, is the middle ground: review the contracts, but with ample caveats. Of primary importance is to state in writing that the agent is only reviewing the insurance requirements of the contract, and is not providing any sort of legal advice.

In addition, such a disclaimer should be provided at least annually to insureds for which the agent frequently and routinely reviews contracts. For situations where a contract review is done only infrequently, it is recommended that the disclaimer be provided to the insured each time. Those who favor a conservative approach recommend using the written disclaimer each time a contract is reviewed, no matter how many contracts are reviewed for an insured each year.

Below is a possible disclaimer letter that could be used when reading contracts for insureds. This draft disclaimer is provided solely for illustrative purposes, and any disclaimer actually used by an agency should be reviewed with the agency's legal counsel prior to actual use with an insured.

Our Agency has, upon your request, reviewed the contract indicated above. Specifically, we reviewed only the insurance requirements contained in Section __, Page __.

The scope of our review was to determine if the current insurance program which you have placed through our Agency addresses the types and amounts of insurance coverage referenced by the contract. We have identified the significant insurance obligations, and have attached a summary of the changes required in your current insurance program to meet the requirements of the contract. Upon your authorization, we will make the necessary changes in your insurance program. We will also be available to discuss any insurance requirements of the contract with your attorney, if desired.

In performing this review, our Agency is not providing legal advice or a legal opinion concerning any portion of the contract. In addition, our Agency is not undertaking to identify all potential liabilities that may arise under this contract. This review is provided for your information, and should not be relied upon by third parties. Any descriptions of the insurance coverages are subject to the terms, conditions, exclusions, and other provisions of the policies and any applicable regulations, rating rules or plans.

As an example of how simply doing a favor for an insured by reading or reviewing a contract can quickly bring an agent to the verge of litigation, a recent case is illustrative.

The agent insures several large contractors, and reviews contracts for these insureds on a very regular basis. In an unfortunate oversight, the agent failed to notice that one construction contract his insured had signed required limits of \$20 million. The insured carried \$10 million limits. Two weeks after the job had begun, the risk manager for the building owner called the

contractor to notify him that the Certificate of Insurance the agent had sent reflected inadequate limits, and that work must stop immediately until sufficient limits could be obtained and verified.

The contractor immediately called the agent, who was totally embarrassed by the oversight. Later that same day, the agent was able to obtain the additional \$10 million excess quote for approximately \$8,000 in premium. The contractor was then angry that the additional premium was essentially going to have to come out of his profit on the job, since he hadn't figured that additional cost into his bid. He told his agent that he should pay the additional premium, since it was the agent's error.

While this case has not yet gone to trial by the publication time of this article, the agent was advised by an E&O attorney not to pay the additional premium no matter how embarrassed he was by the oversight. If the agent paid the \$8,000 additional premium, the attorney advised that it might be construed as admitting fault, which violates one of the key provisions of all E&O policies. Below is an excerpt from a typical E&O policy:

General Terms & Conditions.

1. Reporting and Notice. Insured's duties in the event of a claim or any potential claim:

- A. The insured shall not, without our written consent, do any of the following:***
- 1. Admit liability;***
 - 2. Participate in any settlement discussions nor enter into any settlement; or***
 - 3. Incur any costs or expense.***

Since the job had been underway for two weeks, with a \$10 million gap in limits, the agent could theoretically be liable for the "missing" \$10 million should an injury already have occurred. And by paying the additional premium and thus possibly being construed as admitting fault, the agent might invalidate any otherwise applicable E&O coverage and be "bare" with no E&O coverage at all.

Moral of the story: Doing "favors" for insureds can lead to bad results for the agency if not handled just as carefully as any other "regular" tasks.

Moral #2: If reviewing contracts for insureds, use an appropriate written disclaimer letter.

Primary and Noncontributory

Many, if not most, contracts require that (sub)contractors or other parties provide coverage that is "primary and noncontributory." Certificates with this language are issued daily by agents attesting that the referenced CGL meets these requirements. However, is this really true? In general, the current ISO CGL policy on which someone is named an additional insured DOES provide primary coverage for that additional insured. In addition, the additional insured's own CGL states that it is excess over any policy that names them as an additional insured. Here is the applicable ISO 2004 CGL language:

4. *Other Insurance*

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in c. below.

b. Excess Insurance

This insurance is excess over:

(2) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

Of course, this assumes that all of the policies involved are ISO forms or otherwise concurrent in language to the desired effect. At issue is how does the agent know if this is actually the case? All the agent can do is attest that his or her insured's policy naming the certificate holder as an additional insured IS primary. Again, under current versions of the ISO CGL, primacy isn't a major issue, but it can be under non-ISO or even non-CGL forms. For example, the 2006 ISO Business Auto Policy is primary only if the named insured owns the vehicle or assumes liability under contract (Condition 5, Other Insurance, subparagraph c.); otherwise the coverage is excess. Umbrella policies are company specific and therefore do not follow ISO verbiage in all instances. And, again, not all CGLs are ISO.

However, does the ISO CGL policy respond on a "noncontributory" basis? The answer to that question depends on what the author of the contract means by "noncontributory." This term usually is not defined in a contract and, when you ask what the term means, the person offering the contract probably doesn't have a clue. If you can track down the attorney who wrote it, chances are he or she won't know either since it's a boilerplate term they picked up somewhere along the way, and even if they do, that may not be the interpretation of all parties to the contract.

If "noncontributory" means that the coverage is intended to be excess only, then the ISO CGL and additional insured endorsements pretty much take care of that, as pointed out above. The following contractual insurance requirement implies that "noncontributory" and "excess" are synonymous:

"The General Liability endorsement shall be at least as broad as Form CG 1010 11-85 edition. Each policy shall stipulate that the insurance afforded to the additional insureds shall apply as primary insurance and the any other insurance carried by the Contractor, the Owner, or the Lender, if any, or their directors, offices or employees **will be excess only and will not contribute to the primary insurance." [emphasis added]**

On the other hand, if it means that the insurance won't contribute, even on an excess basis, then you have a problem since the insured has contractually agreed that his or her CGL will be the sole source of recovery. Insurers often will add a certificate holder as an additional insured on a primary basis, but not on a noncontributory basis.

To illustrate why some carriers avoid this language, if "noncontributory" means that, under the contract, the additional insured's policy won't contribute at all to a claim or suit, then effectively the party naming them as an additional insured has agreed to an indemnity arrangement. If the insured's CGL limits are inadequate, then in order for the additional insured's policy to be noncontributory, the insured must pay any amount over and above his or her CGL limit out of pocket. If the additional insured's CGL insurer does tender a defense and indemnity, then the additional insured's insurer is subrogated to the additional insured's contractual right to recover from the party who had inadequate limits (despite the limits meeting the contract's minimum requirements).

Insurers will also most likely refuse to permit the "primary and noncontributory" language on the workers compensation section of a certificate. The main reason for this is that which employer/policy is primary depends on what the law prescribes. In the construction industry, a sub's employees are entitled to coverage under the sub's policy. As long as the policy exists, there is no need for a certificate given to a general contractor to include the "primary" language. It's only purpose would be to make the sub responsible for reimbursing the general or its workers compensation insurer if the sub had no workers compensation policy. In addition, there is no need for the "noncontributory" wording since the employees are only entitled to statutory benefits and would have no need to collect such benefits under more than one policy.

As a general E&O rule, when language like this appears in a contract, it should never be added to a certificate. Wording like this on a certificate of insurance has no force or effect whatsoever other than to create a potential E&O exposure for the agent/broker if the policy is not endorsed to provide the "certified" coverage. As discussed elsewhere in this paper, such modifications of certificate wording may be illegal in some states, inappropriate as outlined in some agency/company agreements, or otherwise a very bad idea. Any time a non-ACORD certificate is requested, the insurer needs to issue the certificate or otherwise authorize it.

Waiver of Subrogation

Contracts will often stipulate that the right of subrogation must be waived. The CGL only restricts waivers of subrogation *after* a loss. It does not restrict waiving subrogation before a loss (written, oral, or implied). Specifically, the policy language in the 2004 CGL says:

Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

In addition, it is generally accepted that insurers cannot subrogate against their own insureds except in rare instances such as intentional losses. Thus, additional insured status possibly grants some degree of insulation from subrogation *after* loss. However, to fully comply with some contractual requirements, it may be necessary to attach ISO form **CG 20 04 10 94 – Waiver of Transfer of Rights of Recovery Against Others To Us** which amends the condition above by adding the following language:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

Workers compensation waivers typically must be endorsed to the policy and they must be in writing according to the workers compensation endorsement (e.g., the NCCI WC 00 03 13, Workers Compensation Waiver of Our Right to Recover From Others endorsement).

If a contract requires a full waiver of subrogation, it is advisable that the agent not indicate compliance on the certificate of insurance unless authorized to do so in advance by the insurer based on policy language. In addition, some state statutes require the attachment of an endorsement even though the policy grants waivers prior to loss.

For a much more detailed (3,000 words) article on waivers of subrogation, including a discussion of waivers in property, auto, and workers compensation, check out this article on the Virtual University:



"Waivers of Subrogation"

<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/WilsonSubrogationWaivers.htm>

Notice of Cancellation



A certificate holder will often request that notice be provided of cancellation. Typically the request is for 30 days (or more) notice. For example, here is some wording from a lease agreement: "All policies of Tenant's Insurance shall contain endorsements that the insurer(s) shall give Landlord and its designees at least 30 days notice of any cancellation, termination, material change, or lapse of insurance." No common commercial policy grants this type of broad notice and use of the term "All policies" is overly broad in that it could be construed to apply even to auto policies in which the landlord would have no interest.

As a practical matter, most additional insured endorsements don't extend a right of notification of cancellation, much less a right of notification of a "material change." Under an ISO Commercial Package Policy, notice of cancellation is only required to be provided to the First Named Insured. In addition, unless state statutes specify otherwise, the insurer normally only has to provide the First Named Insured with 10 days notice of cancellation for nonpayment or 30 days for other valid reasons.

If cancellation notice is essential, then in lieu of additional insured status, the party requesting the certificate could ask the insured to obtain an Owners & Contractors Protective (OCP) policy. Also, it should be noted that some carriers do offer special proprietary endorsements to comply with cancellation requests such as one insurer's "Designated Entity – Earlier Notice of Cancellation/Nonrenewal Provided by Us" endorsement. This endorsement provides for notice of cancellation, nonrenewal, or material limitation in coverages for a specified number of days in advance for any statutorily permitted reason other than nonpayment of premium.

Pressure is frequently brought to bear against insurance agents for endorsements that cannot be issued. Consider the following scenario. A subcontractor has to provide proof of CGL insurance to a general contractor in the form of a proprietary certificate that says the “issuing company” will provide the general with 45 days notice of cancellation for any reason. None of the agent’s companies will provide such notice since it is more than that given to the named insured and the policy requires that only the “first named insured” be notified of cancellation. In fact, it is likely that no admitted insurer in the state will grant such notice.

When the agent advises the subcontractor of this, the sub contacts the general who advises the sub that he will not be given the job unless the certificate is issued to the general and that the general knows of at least two other agents who can/will do this. When the sub advises the agent of this, the agent issues the certificate. When the policy is cancelled for nonpayment, neither the agent nor carrier advise the general contractor. Shortly thereafter, a claim is made or suit is filed against the general contractor for a loss arising from the sub’s work.

The general now threatens suit against the agent and insurer for failure to notify him of the cancellation so that he could take preventative measures. The agent or insurer might respond that the certificate does not constitute a contract because there was no consideration. The general contractor might respond that the consideration he paid was in providing the subcontractor the job in return for the certificate, which insured directly to the agent and insurer since they would have lost the account if they were unwilling to issue the certificate.

There are other potential grounds for claims or suits against agents involving certificates other than purely contractual ones. For example, the ACORD certificates of insurance say that the issuing company “will endeavor to” provide notice of cancellation to the certificate holder. Various dictionary definitions of “endeavor” include:

- to exert oneself to do or effect something; make an effort; strive.
- a strenuous effort; attempt.
- a conscientious or concerted effort toward an end; an earnest attempt.
- to attempt by employment or expenditure of effort.

Clearly, “endeavor” means at least to try and probably to make a significant effort to do something. In the case of many or most insurers today, there is no intent to provide any notice of cancellation. Therefore, why should there be any indication on the certificate of cancellation notice when none is required by the policy nor otherwise intended by the insurer? It raises the question as to the ethics and professionalism of the party making such a statement not to mention their potential legal liability.

The “we will endeavor to” certificate of insurance cancellation provision introduced in 1976 was pertinent in the days that insurers routinely notified certificate holders. Today, this is the rare exception, not the rule, and it raises the question of whether the cancellation provision should be stricken completely from the ACORD forms.

As a postscript, it is worth noting that there are some situations where actually providing notice of cancellation to a certificate holder can create problems. For example, momentary lapses in payments (particularly for financed premiums) can result in cancellations followed immediately by payment and reinstatement. In the meantime, cancellation notices may have been sent to certificate holders (some carriers have special programs to at least semi-automate this process) who are not aware that coverage has been reinstated.

This can cause difficulties for insureds and agents that are so obvious, they hardly need be mentioned here. In fact, one carrier advised that this was the primary reason for no longer providing cancellation notice...missed premium installments, cancellations and reinstatements were far more common than outright mid-term cancellations and did little more than anger and frustrate agents and their insureds.

Contractual Liability vs. Additional Insured Status

This issue is included in this paper because it involves a question that has been submitted to our Virtual University "Ask an Expert" service several times in the past year. Here is the most recent inquiry:

"My question has to do with additional insureds. I have had discussions with agents who believe that the wording in the ISO CGL policy pertaining to an 'insured contract' covers the requirement to add additional insured status to a policy when required in the sub-contract agreement. They attach a copy of that wording in place of the additional insured endorsement. I feel this is a real stretch. I would look forward to your thoughts."

Saying that equating contractual liability coverage to additional insured status is a "stretch" is an understatement. Anyone not providing true additional insured status via endorsement could be opened up to a potentially significant E&O exposure.

The contractual liability coverage exception to the contractual liability exclusion provides coverage to the insured if the insured's breach of an "insured contract" causes bodily injury or property damage. It does not make the other party to the contract an insured, nor does it give that party any right except as a claimant seeking indemnity.

The 2004 CGL "insured contract" definition cited below does not give additional insured status to the non insured contracting party involved. What it does is create the undefined status of "uninsured indemnitee" for the individual that is being held harmless by the named insured in the "insured contract," but has not been added as an additional insured.

"Insured contract" means:

That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement....

The most obvious problem of relying on this provision rather than actual additional insured status involves defense costs. All insureds under the CGL have their defense costs outside limits. The “uninsured indemnitee” has his or her defense costs *inside* limits. Since the 1996 edition of the CGL, it has stated as much under Coverage A, exclusion 2.b. Contractual Liability, subparagraph (2):

Solely for the purposes of liability assumed in an “insured contract”, reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of “bodily injury” or “property damage”....

The complexity of the situation is outlined, in part, in this article from the public area of the International Risk Management Institute:

“Additional Insured Endorsements – A Potential Minefield (Part 3)”

<http://www.irmi.com/Expert/Articles/2006/Stanovich03.aspx>

The limited contractual liability coverage in the CGL is insufficient when additional insured status is needed. Even full contractual liability coverage may be inadequate, as discussed in an article from CGL guru Don Malecki in Rough Notes magazine:

“The Belt and Suspenders Approach to Contractual Liability”

<http://www.roughnotes.com/rnmagazine/2003/sept03/09p70.htm>

Finally, if you are relying solely on contractual liability coverage (even the provision that says it applies to the assumption of tort liability), you're opening yourself up to claims that an event is not an “occurrence” under the policy if it consists of a pure breach of contract shrouded in tort. This is a real danger in many jurisdictions, as discussed in this VU article:



“The ‘No Occurrence’ CGL Claim Denial”

<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/WilsonNoOccurrence.htm>

When the other party is given additional insured status, this becomes a non-issue since you aren't relying exclusively on contractual risk transfer.

Don Malecki provides the following commentary on the subject of contractual liability vs. additional insured status:

“This is a subject that is complex and changing. Prior to 2004, no one bothered with contractual liability coverage because insurers issued broad additional insured endorsements. What many insurers ignored, at time of claim, is whether an additional insured endorsement was even permitted in the first place. Some states do not permit additional insured endorsements covering the sole or partial fault of the additional insured (indemnitee) under their anti-indemnity statutes. Yet, insurers continued to issue AI endorsements.

“The situation has changed. The majority of states still permit the assumption of an indemnitee’s sole or partial fault, particularly if covered by insurance. The problem is that the new ISO AI endorsements may not be broad enough to encompass covering such assumptions, particularly where liability must be caused in whole or in part by the named insured. In these cases,

contractual liability coverage may be broader, particularly if the CGL is not amended by the Contractual Liability Limitation endorsement CG 21 39 or Amendment of Insured Contract Definition CG 24 26. I think this is minefield for agents!

“The problem, as you said, is that if the contractual liability coverage were to apply instead of an AI endorsement, defense costs for contractual are within limits, unless both parties are named in a suit and can meet those 12 conditions that are destined to fail under the Supplementary Payments provision. If these conditions are met, defense costs are in addition to limits. We can forget about meeting those conditions.

“The point is that someone is going to have to determine whether the hold harmless as prescribed is permitted by law (not unenforceable under some anti-indemnity statute), and see to it that either the AI endorsement is broad enough to encompass that permissible liability assumed, or the CGL policy is issued without one of those limiting contractual endorsements.

“I have seen too many CGL policies issued with CG 21 39 which takes tort liability coverage away from the policy. When this happens, the latest ISO AI endorsements will be broader, since they include tort liability of the AI, regardless of how limited coverage may be.

“What I am saying here is that the Belt or Suspenders concept has to be revisited. With the Belt (AI status) or Suspenders (Contractual), everyone relied on the Belt, given the broad coverage. But now it will be difficult to determine whether the Belt or Suspenders is appropriate.”

Certificate vs. Policy Limits

Consider this very common situation:

Your insured contractor has gotten a job where the insurance requirements include “not less than” \$1,000,000 in CGL coverage. Your insured has a \$2,000,000 CGL occurrence limit. He doesn't want them to know that he has this much insurance, so he asks you to issue the certificate showing a \$1,000,000 limit, the minimum required by the contract. So, what do you show on the certificate...\$1,000,000 or \$2,000,000?

The ACORD 25 Certificate of Liability Insurance simply provides a place for a policy number and the limits associated with that policy. It does not address what a construction contract might say nor does it address the issue of “minimum” vs. “actual” limits. The ACORD Forms Instruction Guide says, “*Enter limits corresponding to those found on the policy declarations page.*” Therefore, it is clearly the intent of the ACORD certificate to show the actual policy limits, regardless of what the construction contract calls for.

The construction contract, though, simply asks for proof that the contractor has at least a \$1,000,000 limit of insurance. So, do you comply with the literal reading of the certificate (and ACORD instructions) and show the actual policy limits, perhaps providing more information that the insured would want the contracting party to know? Or, do you comply with the perceived spirit of the construction contract by only advising that the insured has the minimal limits required?

While this may appear to some be a question of ethics or business practices, given that a number of states have adopted statutes or regulatory guidelines with regard to “fraudulent” certificates, and given the litigious environment in which we live, care should be taken to accurately reflect the limits of coverage in accordance with the instructions on the certificate and any other directions provided by the carrier.

We ran this issue, from an ethical and business (i.e., non-legal) perspective, by the VU faculty and our *VUpoint* Newsletter readers and they were split exactly 50/50 on what the proper course of action should be. IIABA members and paid VU subscribers can read the article and review the survey responses here:



“Certificate vs. Policy Limits”

<http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/FacultyCertificateLimits.htm>



“Surveys & Polls: Certificate vs. Policy Limits”

<http://www.iiaba.net/VU/Lounge/YourVUpoint/YourVUpoint0306.htm>

Once again, Don Malecki opines with:

“My opinion is that all of the limits should be disclosed because the certificate is supposed to reflect what the policy says and not what limits are being requested. In addition, “not less than” is a minimum and not a maximum.

“I was involved in the Chicago Flood case 10 years ago. Lloyds issued the ISO CGL policy (1973 edition), an umbrella policy. This policy included a provision that stated to the effect that additional insureds were automatic but only to the extent of the operations and limits as shown on the certificate of insurance. So, if there were a lease and limits of \$1 million were required, the ACORD certificate would mention the lease under Description of Operations and list the appropriate limits of \$1 million for CGL even though the NI was maintaining \$25 million limits.

“For the City of Chicago, the certificate reflected that it was covered for any liability having to do with the project. I testified that this meant all liability of the City, i.e., sole or partial fault, particularly since the contractual liability coverage was blanket and broad form.

“Anyway, I have seen this approach a couple of times and it is a departure from the statement that the certificate does not amend, extend or alter coverages of the policy. I have described this as an exception where the certificate does amend the coverage and that is where the policy and certificate work in tandem.”

Policy and Processing Forms

This section focuses primarily on issues involving ACORD forms; however, the importance of taking care when approached with non-ACORD forms is critical, as is the issue of copyright violations outlined below.

Additional Insured Endorsements

ISO now has dozens of additional insured endorsements and many carriers have their own, including proprietary blanket endorsements. If a third party is seeking additional insured status and requesting that it be verified by a certificate of insurance, it is imperative that such status be obtained from the insurer before a certificate is issued...simply issuing a certificate showing a third party as an additional insured does not grant them this status under the policy. In addition, it is important that the proper type of endorsement(s) be used.

ACORD Forms

The *ACORD Forms Instruction Guide* states the following about certificates:

“Agents or brokers should not change any provisions on this form without prior consent of the issuing company. The ACORD Certificate should be issued only in compliance with company instructions. ACORD recommends that the Certificate NOT be used in the following situations: to waive rights; to quote wording from a contract; to attach to an endorsement; to quote any wording which amends a policy unless the policy itself has been amended.”

Agents should not modify ACORD forms for several reasons. First, the forms are copyrighted and licensed for use, so they cannot be modified (according to ACORD, as discussed below) outside the license agreement. Second, several states expressly prohibit modification of certificates since they have to be filed with the department of insurance. Third, an unwary agent can create a significantly higher E&O exposure by modifying the form. Fourth, it may result in a breach of the agency appointment contract since many of them restrict producers from modifying company-approved forms without advance approval.

In the ISO Commercial Package Policy’s Common Policy Conditions (IL 00 17), under Item B. Changes, the contract says, “This policy’s terms can be amended or waived only by endorsement by us and made a part of the policy.” In other words, only the insurer has the authority to amend policy coverages since only the insurer and insured are parties to the contract.

Unfortunately, far too often, certificates ARE used in an attempt to effect the terms of business contracts by implying that policy coverages or conditions exist that actually do not. Below are the ACORD certificate and evidence forms most often used and some of the issues involved in their use. Also, be

sure to review the section below on Non-ACORD Forms & Agency/Company Agreements, particularly references to violations of such contracts.



ACORD 24 – Certificate of Property Insurance

According to the *ACORD Forms Instruction Guide*, if a third party wants to verify that coverage exists and has no direct interest in the policy, then a certificate of insurance (as opposed to “evidence” of insurance) form should be used. In one typical scenario, the ACORD 24 is used by a lessee to provide evidence of insurance to a lessor.

Key wording:

“THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.”

This statement attempts to establish that the certificate holder has no contractual rights under the certificate. It also points out that, regardless of what the certificate might say or imply, if there is a discrepancy between the certificate and policies, the latter govern.

“THIS IS TO CERTIFY THAT THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.”

Again, the certificate affords no contractual rights even if such rights are referenced or made a part of the contract between the insured and certificate holder.. The insurer is not a party to the business contract between the insured and a third party.

“SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING COMPANY WILL ENDEAVOR TO MAIL _____ DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE COMPANY, ITS AGENTS OR REPRESENTATIVES.”

Absent any consideration or express policy provisions to the contrary, the insurer has generally been found to have no contractual obligation to provide notice of cancellation to the certificate holder. This issue was discussed previously in the “Contractual Insurance Requirements” section of this paper.

ACORD 25 – Certificate of Liability Insurance

If the certificate requestor desires to have an interest in the policy, for example, as an additional insured, the policy must be endorsed prior to issuing a certificate attesting to this insured status. This situation often arises due to agreements between contractors and in lease agreements.

The three paragraphs previously excerpted from the ACORD 24 are the same as those in the ACORD 25 except that the “THIS IS TO CERTIFY THAT” introductory wording of the second paragraph above is missing in the ACORD 25. In addition, the ACORD 25 provides a second page that contains two provisions not found in the ACORD 24. The first provision states, in two paragraphs:

“IMPORTANT... If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

“If SUBROGATION IS WAIVED, subject to the forms and conditions of the policy, certain policies may require an endorsement. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s).”

The first paragraph clarifies that, if the certificate holder has asked to be named as an additional insured, this cannot be accomplished simply by the issuance of a certificate...the policy must be endorsed. The same is true of waivers of subrogation (see discussion under “Contractual Insurance Requirements”).

According to the *ACORD Forms Instruction Guide*, “[V]irtually every other state [that does not require the filing of certificates] will not allow any change in a certificate of insurance that would attempt to modify a policy unless the revised certificate is filed and approved.”

“DISCLAIMER... The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.”

This provision reinforces the first paragraph from the front page of the certificate cited above. It is important that, when the ACORD 25 is issued, BOTH sides be provided to the certificate holder. Most of the other caveats that apply to the ACORD 24 apply to the ACORD 25 as well.

Finally, at least one other provision on this form presents significant problems for agents and that’s the overly broad information block titled, “description of operations/locations/vehicles/exclusions added by endorsement/special provisions.” The *ACORD Forms Instruction Guide* provides the following explanation:

Description of Operations/Locations/Vehicles/Exclusions Added by Endorsement/Special Provisions

Record information necessary to identify the operations, locations or vehicles for which the certificate was issued. Any exclusion endorsement or special policy conditions should also be indicated.

Information about additional insureds should also be shown here. However, if it is necessary to show several additional insureds for liability coverages (e.g., mortgagees, vendors, landlords, etc.), and there is not enough room on the form, use the Descriptions box to indicate “see Additional Interest form, ACORD 45, attached” and use ACORD 45 to show the information pertinent to the additional insureds.

The information addressed here is so overly broad that it makes it almost impossible to accurately (much less succinctly) describe this information for large and/or multi-state businesses. For example, how do you “describe” 800 locations or an auto fleet of 7,000 vehicles? More important, it can become exceedingly complex to describe exclusionary endorsements that might vary, by existence or edition date, from state to state. And, just what are “special provisions”?

One approach might be to consider that the material wording is “for which the certificate was issued,” such that the information could reasonably be limited to that pertinent to the job for which the certificate is being issued. ACORD has been asked to consider removing or clarifying this information block or providing a checklist approach similar to the ACORD 28 and they advise that they will consider making the suggested change.

ACORD 27 – Evidence of Property Insurance

If a third party has a verifiable insurable interest in a policy, such as a mortgagee, lender, lienholder, or perhaps secured creditor, then this form (personal lines) or the ACORD 28 (commercial lines) should be used in lieu of a certificate of insurance. The ACORD 27 can also be used as evidence of physical damage coverage for loss payees under a personal auto loan. If the vehicle is leased, the ACORD 23, Leased Auto Certificate of Insurance, can be provided to the owner or lender rather than the ACORD 27.

Note that the ACORD 27 is used for property, not liability, insurance. Using the Virtual University’s “Ask an Expert” service, an agent reported that an attorney for the Small Business Administration had insisted on the ACORD 27 for a liability and workers compensation exposure, and also asked that the SBA be named as an additional insured on the insured’s workers compensation policy. The agent advised that the requests were impossible and the attorney assisted, claiming that he knew of at least fifty agents who had done this. The agent refused and the SBA backed off, accepting the ACORD 25.

Prior to July 2006, the ACORD 27 and ACORD 28, unlike the ACORD 24 and ACORD 25, *did* convey certain rights to the holder, including notice of cancellation. This changed with the 2006 editions of each evidence of insurance form, as outlined in the Virtual University newsletter, *The VUpoint* (<http://www.iiaba.net/VU/Nonmember/Newsletter.htm>).

Specifically, the prior edition of the ACORD 27 provided broader coverage and conditions than the new edition. The form now tracks the ACORD 24, Certificate of Property Insurance form by saying it doesn't change the terms and conditions of the policy and the “will endeavor to” language with regard to notice of cancellation. The prior version said the policy was in force and that notice of cancellation **WILL** be sent.

This lead-in language was in the prior edition of the ACORD 27:

“THIS IS EVIDENCE THAT INSURANCE AS IDENTIFIED BELOW HAS BEEN ISSUED, IS IN FORCE, AND CONVEYS ALL THE RIGHTS AND PRIVILEGES AFFORDED UNDER THE POLICY.”

The language in the new edition of the ACORD 27 now tracks that in the ACORD 24 and ACORD 25 and reads:

“THIS EVIDENCE OF PROPERTY INSURANCE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE ADDITIONAL INTEREST NAMED BELOW. THIS EVIDENCE OF PROPERTY INSURANCE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.”

The following language is new to the 2006 ACORD 27 form and is virtually identical to that in the ACORD 25:

“THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED, NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS EVIDENCE OF INSURANCE MAY BE ISSUED OR MAY PERTAIN. THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. LIMITS SHOWN MAY HAVE BEEN REDUCED BY PAID CLAIMS.”

This is the cancellation language of the prior ACORD 27 form:

“THE POLICY IS SUBJECT TO THE PREMIUMS, FORMS, AND RULES IN EFFECT FOR EACH POLICY PERIOD. SHOULD THE POLICY BE TERMINATED, THE COMPANY WILL GIVE THE ADDITIONAL INTEREST IDENTIFIED BELOW _____ DAYS WRITTEN NOTICE, AND WILL SEND NOTIFICATION OF ANY CHANGES TO THE POLICY THAT WOULD AFFECT THAT INTEREST, IN ACCORDANCE WITH THE POLICY PROVISIONS OR AS REQUIRED BY LAW.”

This is the cancellation language of the new ACORD 27 form which is almost identical to that in the ACORD certificates:

“SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL _____ DAYS WRITTEN NOTICE TO THE ADDITIONAL INTEREST NAMED BELOW, BUT FAILURE TO MAIL SUCH NOTICE SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.”

The following is an explanation from Bill Perkins, a staff member of the Florida Association of Insurance Agents, of the evolution of these forms:

For years agents have used the Evidence of Property Insurance (ACORD 27) when a secured interest such as a mortgagee or loss payee or an additional insured sought proof of property coverage was in effect. The evidence of property insurance afforded the additional interest two benefits not found in a certificate of property insurance. First, the evidence of property insurance stipulated that the insurance had “been issued, is in force and conveys all the rights and privileges afforded under the policy.”

In contrast, the certificate of property insurance merely states that it is meant as a “matter of information and confers no rights upon the certificate holder.” While it is true only the policy can confer rights and privileges but the ACORD Evidence of Property form makes it clear the additional interest bears evidence of whatever rights or privileges are afforded under the policy. The same cannot be said of the certificate holder.

Second, the evidence of property insurance included a cancellation provision that obligated the insurer to provide the additional interest notice and to “send notification of any changes that would affect that interest” as prescribed by the policy or law. This language has been a part of the form since its inception in 1993. But there have been changes in 2004 and again in 2006.

With the 2004 changes, ACORD retitled the form to Evidence of Personal Property Insurance. The effect of inserting the new word “personal” restricts the application of the commonly used form to personal property only and is no longer applicable to real property. While use of such a document was still valuable to loss payees and additional insureds, the form would not be appropriately used in connection with mortgagees. One of the reasons for the change to the ACORD 27 was due in part to the introduction of a new form, the Evidence of Commercial Property Insurance.

This new form (ACORD 28), introduced in 2004, was designed with input from the Mortgage Bankers Association and other interested parties to afford a statement to lenders and additional interests of the scope of commercial property insurance in lieu of a copy of the policy. Like the ACORD 27, this new form contained statements reflecting conveying rights and privileges afforded under the policy and the obligation to send a written notice of cancellation or changes affecting the additional interests as provided by the policy or law.

In 2006, ACORD revised both evidence forms. Two of the more significant changes involve the notice conferring rights and privileges and the cancellation notice. The new evidence forms contain the same language found in the certificates of insurance forms. In other words, the evidences of property forms (both ACORD 27 and 28) are “issued as a matter of information” and “confer no rights or privileges” to the additional interests shown on the document.

Secondly, the new evidence forms no longer obligate the insurer to send a notice of cancellation to the additional interest or to notify of any changes that affect the additional interests. Rather, the new forms state the insurer “will endeavor” to mail a notification, but failing to mail said notification “shall impose no obligation” upon the insurer, its agents or representatives. Lastly, the ACORD 27 reverts to its previous title and will be known as the Evidence of Property Insurance.

ACORD 28 – Evidence of Commercial Property Insurance

For all practical purposes, the 2006 changes in the ACORD 28 mirror those in the ACORD 27. Likewise, the ACORD 28 can be used as evidence of physical damage coverage for loss payees under a commercial auto loan. If the vehicle is leased, the ACORD 23, Leased Auto Certificate of Insurance, can be provided to the owner or lender rather than the ACORD 28.

Copyright Issues

All ACORD forms are copyrighted by the ACORD Corporation (Association for Cooperative Operations Research and Development) and filed with the U.S. Copyright Office. Therefore, anyone using ACORD forms without permission and/or outside a license agreement with ACORD may be subject to statutory copyright violations. In fact, under 17 U.S.C. section 504(c), the copyright holder may be able to recover statutory damages, even without proving other financial loss, in an amount ranging from \$200 to \$150,000, depending on several factors, including willfulness.

It is not uncommon for insureds to provide agents with copies of seemingly proprietary certificates of insurance offered by large corporations, government entities, large general contractors, and others. It is equally common for these certificates to be almost verbatim reproductions of ACORD forms, with minor changes such as modifications of a cancellation provision or the striking of language such “endeavor to” or the complete omission of certain conditional statements and disclaimers.

One agent wrote ACORD a few years ago, advising that a national franchiser was requiring agents to strike the “endeavor to” and “but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives” language from the Cancellation box on the ACORD 25, and to grant 30 days notice of cancellation.

According to the franchiser, “all the other agents are doing it” and their legal department said the agent could strike out the words to reflect that actual coverage on the policy (in this case, there was no basis for notice of cancellation to third parties in the policy and the 30 days notice was more than that afforded to the named insured).

The agent contacted ACORD and asked if he was authorized to make such changes to an ACORD form to satisfy the certificate holder. ACORD’s customer service unit responded with, “You are not permitted to modify or alter any ACORD forms, as they are copyrighted by our organization.” To make matters worse, the form in question was provided by the franchiser with their name on it and ACORD’s copyright notice removed and their logo “whited out.”

The *ACORD Forms Instruction Guide* indicates that some states require that certificates be filed with the state department of insurance (see “Statutes and Regulations” section of this document). The *Guide* advises, “In these states, the text of ACORD’s certificates cannot be modified, unless the modified form is filed for approval by the respective state Departments of Insurance.”

Even where certificates are not required by law to be filed, according to Joel Volker of ACORD, “ACORD vigorously pursues copyright violators anytime we are made aware of ‘knockoffs’ or similar violations. This has been a constant task for at least twenty years.” While agents are advised not to issue non-ACORD forms without express insurer permission, they should be especially vigilant about not using certificates that they know represent clear violations of federal copyright law and agents should not themselves modify copyrighted ACORD certificates by deleting or adding language outside the obvious informational fields that must be completed.

Non-ACORD Forms, Agency/Company Agreements, and E&S Markets

All non-ACORD forms should be referred to the carrier for at least three reasons. First, these forms typically refer to the “issuing company” or “issuing insurer.” As the agent of an insurer, unilaterally issuing these forms could result in an E&O claim by the carrier against the agency for overstepping its authority under agency law. Second, the agency is exposing itself to E&O claims from the insured or third party as outlined earlier. Third, the agency might incur contractual liability for violating its agreement with the insurer.

With regard to the third reason, in many cases, while agents have authority to issue certificates of insurance, the carrier may not have given them authority to issue other ACORD forms nor *any* non-ACORD forms. For example, one carrier’s agreement states:

“Your Business Authority and Commission Schedule from XYZ Insurance Company gives you the authority to issue standard and unaltered ACORD Certificates of Insurance for your business customers. Only the following forms may be used: ACORD Certificate of Property Insurance (ACORD Form 24) and ACORD Certificate of Liability Insurance (ACORD Form 25). You do not need to send standard and unaltered ACORD Forms 24 and 25 to us. You can simply issue the certificate and record the name of the holder and basic information in your log.”

Note that the agreement only authorizes the agency to issue two ACORD forms and NO non-ACORD forms. Later in the agreement, the ACORD 27 and ACORD 28 are expressly prohibited. It is critical that agents follow company guidelines such as these in order to avoid exceeding their agency authority.

Increasingly, agents are availing themselves of the E&S marketplace in order to meet contractual guidelines. For example, some third parties may insist upon additional insured endorsements that are over twenty years old that “standard” companies can no longer offer. However, these forms may be available from E&S markets. In most instances, the retail agent may not have authority to issue certificates on behalf of surplus lines carriers. In such cases, the agent must request the certificate from the insurer or surplus lines broker.

Agency Certificate Procedures

VU faculty member and agency consultant, Judi Newman, conducted a survey of her clients three years ago. The following is the question she posed and a sampling of the responses.

“I am looking for some input from you, please. This relates to an operational issue that I am sure many agencies face. I recently reviewed an agency that issues a fair number of certificates of insurance. In reviewing the processes I found that about 75% of the requests for certificates included something that needed the okay of the underwriter or even an endorsement to the policy and, in many cases, these are money bearing endorsements.

“My questions are two-fold. First, is this true in most agencies? Second, many of the contractors have contracts or agreements that they send to the agency for an interpretation on what is required on the certificate of insurance. Do most agencies have the producer review the contract or the CSRs?”

One of the issues – reviewing contracts for insureds – has already been addressed earlier in this paper. The following are “in the trenches” comments from agents. Caution: We are not suggesting or endorsing any of the procedures discussed below...in fact, in some cases (e.g., contract review), agency staff are engaged in practices that obviously increase their E&O exposure or which may violate various laws or regulations.

“If a contract comes in for interpretation, it is given to the producer to review. On the first point, some companies now have a blanket additional insured endorsement so you do not have to add and make a charge each time. We do see more and more items in the contracts which require review by a company and maybe some type of charge to the client.”

“We teach constantly that certificates should reflect exactly what is already on the policy. But under pressure from contractors, lots of agencies will alter them instead of losing a customer to the agency down the street who will alter it. Usually just a CSR handles certificates...rarely will a producer be involved.

“This is not true in our agency. Per our client services manager, there are some instances where they are requesting modification of the certificate to allow for additional insureds, but we never have certificate requests that require underwriter approval or money-bearing endorsement of the policy.

“Secondly, our CSAs review the insurance requirements of the contractor agreements (all are licensed) and if they have questions or are not certain about any information in the agreement, they will take it to the producer for clarification.”

“Our agency risk management committee is currently dealing with this issue also. We do receive certificate requests that need underwriter okay and/or endorsements. I'm not sure that our

percentage is as high as 75%, but it still remains a significant problem. If the client submits a contract or agreement for interpretation, it usually goes to the CSR first. If it is fairly routine, they will handle it. If the particular situation hasn't been dealt with for this or some prior request, the producer will be brought in to the discussion.”

“When presented the opportunity, we review every contract, hopefully before it's been signed, often making suggestions to delete onerous wording and suggesting other changes. We advise on uninsurable issues, always suggest two-way hold harmless agreements, and get pricing from companies for endorsements requiring additional premium.

“We try to educate our clients on these issues, whether a contractor, storeowner, etc. Every business faces a lease or contract at some point, and most contain insurance requirements. We suggest they consult their attorney on legal issues we're not qualified to opine on.

“Then there are the contracts we get after they've been signed. It's hard to explain the pitfalls after the insured has committed to them.

“Another issue we face is when we speak to an owner or contractor about some of their requirements, and that we can't or won't do some of them, and they respond, ‘I'll have your client call XYZ Agency, they gave us the certificate.’ This usually means the agency or CSR issued the certificate without review or company approval and they've unwittingly created an E&O exposure.

“Our clients appreciate what we do, once they understand the purpose of our advice!”

“We are careful and I would be surprised that 75% would be in this area...probably 25% for us and it is a concern but we do a lot of training on this issue. Since 50% of our volume is construction, we have producers and high level CSRs review contracts and do the certificates. “

“Although there are amendments to certificates, most are predictable and should be discussed with underwriters when the program is marketed and bound. The requests generally are repetitive and not totally unusual. Knowing what the underwriter will do and their general feeling on certificates is important to resolve up front. With contractors and PEOs, yes, almost all require unique wording, but it can be handled smoothly if the upfront work is done with the carrier.

“Having the producer review certificate requests probably isn't in the best interests of the agency, broker or client. A technical person should do this.”

“Our agency requires insureds to send in copies of the contract or at least the insurance portion (I feel better looking at the whole contract). We will then review the insurance requirements and give our insured a faxed list of the insurance deficiencies of the current coverage (if no contract is received, we tell the insured that we have no idea if they have the proper coverage). Some can

be remedied by buying coverage. Some are beyond what the insurance company is willing to do. Some are beyond what the insurance industry is willing to do.

“We explain that. If the insured wants a certificate with just the current coverage, we explain that the certificate may not be reviewed before the work is done. With a review and rejection after the work is done, we cannot get retroactive insurance and they may not be paid for the work. We also stamp each certificate with the following: *‘This certificate of insurance represents coverage currently in effect and may or may not be in compliance with any written contract.’* As a matter of fact, no insurance policy or collection of insurance policies will completely cover the insured’s indemnification promise in many instances.

“A brilliant question. The answer is difficult. First, an agency or brokerage that issues a certificate without the permission, and often without the knowledge, of the insurer is in trouble and should immediately notify its E&O insurer of multiple potential claims. If brokers are taking on the obligation of reading and understanding a construction contract to determine what additional insureds or lienholders need to be named as additional insureds or just certificate holders, they should seek legal advice and consider making a report to their E&O insurer because the broker may not have the legal training and skill to interpret a contract that could be 200 pages long.

“This is even more dangerous if a CSR reviews the document. Many lawyers will tell you that a construction contract is more complicated and harder to understand than an insurance contract. I would like to see the statistics gathered since the practice described, which I think is widespread, is very dangerous. Contracts should be analyzed and interpreted by lawyers, not producers or CSRs.”

“I think certificates are a problem for most agencies. The professional agencies usually review contracts for insurance requirements. The problem is that they get the contracts after they are signed and the agents are often being asked to certify coverage the insured doesn’t have. The trend in risk management is to try to transfer all liability whether insurable or not.

“To compound the problem, many insurers have told agents they don’t want to see copies of certificates. I always caution agents about putting any additional wording on the certificates (e.g., advance notice of cancellation, wording from the contract, reference to specific coverage, etc.). I recommend these requests be sent to the insurer for issuance (or, more likely, denial).

“Also, many contracts require the completion of nonstandard certificates that do not contain the typical disclaimers contained in the standard ACORD certificate. The agent is in a ‘catch-22’ situation. If he doesn’t issue the certificate requested, the contractor doesn’t get paid. If he does issue the certificate, he might be extending or implying non-existent coverage.”

Based on the authority granted in the agency/company agreement, and incorporating sound E&O principles, it may be worth considering inclusion of explicit certificate-handling procedures in the agency procedures manual. These procedures can be communicated to agency staff members, with follow-ups for any changes in forms or authority.

Statutes and Regulations

To address some of the problems outlined in this paper, a number of states have taken legislative or regulatory action. We have developed a state by state listing of statutes, regulations, or other measures in states that we are aware of at this time. This is not an exhaustive list of all potentially relevant laws and regulations in states named, nor should the fact that some states are not named result in a conclusion that they have no potentially relevant laws or regulations. In addition, this information could change at any time, so it is important that you be informed of potentially relevant state laws and regulations that may affect the issues discussed in this paper.

Because statutes, regulations, and regulatory directives, memos, and bulletins are constantly evolving, we have removed this section from the white paper and established a regularly updated web page in the Certificates Resources section of the public area of our Virtual University web site. You do not have to be an IIABA member or paid VU subscriber to access this page. For our current listing of state statutes, regulations, and regulatory directives, go to:



"Certificates of Insurance Laws and Regulations"

<http://www.iiaba.net/VU/NonMember/WilsonCertLawsRegs.htm>

Court Cases

In addition to statutes, regulations, or contractual guidelines, the use of certificates may be governed by court cases. Such cases exist with regard to contractual obligations, fraudulent certificates, ostensible agency authority, deceptive, incomplete or misrepresentative certificates, and non-ACORD certificates.

In order to keep up to date on case law involving certificates without reissuing this white paper constantly, we have created a special supplement to this paper that discusses a number of court cases. To access this information, go to:



“Certificates of Insurance Court Cases”

<http://www.iiaba.net/VU/NonMember/WilsonCertCourtCases.htm>

Conclusions

Again, there seem to be three major problems that come up regarding certificates of insurance:

(1) certificate fraud by agents and insureds, including agents who indicate coverages that don't exist so that, for example, an insured subcontractor can get a construction job or get paid for one, (2) onerous contractual insurance requirements by large contractors, huge corporations, governmental/public entities, etc. that cannot be met by coverages typically available in the marketplace, and (3) the issue of not notifying certificate holders of cancellation.

The following are steps that your agency may want to consider taking to help decrease your potential legal exposure.

Provide your client with information/a disclaimer at the beginning of your business relationship.

Provide a written notice to all new and/or existing clients advising that your agency will only provide current, accurate information on certificates; will discuss the current status of client's coverage with the client or client's attorney, but will not review and interpret any client contracts; and will remind the client not to promise in a contract to get or maintain coverage that he does not have, or cannot/will not obtain.

Do not exceed your legal or contractual authority.

All certificates must conform to the state insurance code (statute, regulation, or regulatory directive) for the state in which the subject of insurance is located. State laws or regulations sometimes require a statement that a certificate neither affirmatively nor negatively amends, extends nor alters the coverage afforded by the policy. Also, prior to use, in some states each insurer must file the form of certificate with the state insurance regulator.

In addition, the agency should never exceed its authority to issue certificates or bind coverage in violation of agency/company agreements and related policies and procedures. This is particularly true if the agent is acting in the capacity of a broker representing the insured, rather than as an agent of the insurer. The agency's authority to issue certificates should be communicated to all agency personnel, such as by inclusion within the agency's procedures manuals, via face-to-face education, or by internal communications.

With regard to E&S markets, be wary. In many cases, only the carrier, MGA, or authorized E&S broker can issue a certificate. In some cases, the retail agent may be granted that authority, but don't assume it...get such authority in writing, in advance.

Minimize the review of contracts for insureds and use a disclaimer.

In general, contract reviews should be conducted by the client's legal counsel. Insureds and prospects also can be encouraged to have their legal advisers review any contracts entered into by the business. The insured's counsel should then present the insurance requirements to the agent for review, procurement, and/or verification via certificate. The response to such requests can be accompanied by a legal disclaimer drafted by agency counsel.

Never modify an ACORD certificate.

ACORD forms are copyrighted documents that are typically used by insurers and agents under license agreements. Other than completing the questions and fields on ACORD forms, the documents cannot be modified in any way without the express consent of ACORD in advance. In addition, as mentioned above, some states require the filing of ACORD forms prior to use and forbid the modification of such filed forms without refiling. Therefore, unauthorized modifications of ACORD forms could be construed as violations of copyright law, and any changes that are not filed as required could violate statutes and regulations. Such modification may also be prohibited by the agency/company appointment contract.

Never issue a non-ACORD certificate without insurer approval.

ACORD forms have been extensively tested in the court system, while many non-ACORD forms have not. Such non-ACORD forms may result in unknown liabilities for the agency. In addition, these forms may have been drafted in violation of ACORD copyrights. No non-ACORD forms should be issued without express insurer approval in advance.

Proof-read all certificates and perform periodic QC checks.

Agencies should consider designating one or more individuals to review all certificates before they are released to insureds or certificate holders. In addition, certificates should be reviewed periodically as part of the agency's overall quality control program.

Establish a procedure for handling certificates.

Based on the authority granted in your agency/company agreement, incorporating sound E&O principles, and taking state law and regulations into consideration, develop specific certificate-handling procedures in your agency, including for any subsequent changes in forms or authority, and communicate them to staff members. Follow the "Invariable Practice" rule...one way, all the time, for everyone.

Always send a certificate holder the entire certificate.

Never send only the informational front page of a certificate. Some automated systems permit the omission of the second page which contains no unique entries, perhaps as a cost-saving measure. The reverse side of the certificate includes conditional statements and disclaimers that must be included.

Send copies of all issued certificates to the identified carrier(s).

While many insurers prefer not to receive copies of certificates, from an E&O standpoint, agents are encouraged to provide copies anyway. The ACORD form indicates that the insurer “will endeavor to” provide notice of cancellation. It is impossible to do so without knowing that the certificate exists.

Use the correct coverage form to fulfill certificate requests.

Check with the carrier to see what edition dates of forms are being issued in each state to see that coverage certified is uniform and in compliance with the coverage requirements of the certificate holder, particularly if that party is a multi-state or national business. Because of filing variances in different states, it is not unusual for there to be at least two versions of an additional insured endorsement in use by a carrier. Since coverage can be dramatically different from one form edition to another, more than one endorsement form may be needed and, in fact, it may be impossible to comply in some states with all contract requirements. In addition, a contract might specify a specific endorsement or form edition date or its “equivalent.” Agents should use great caution where a specific form edition is no longer available.

Never certify coverages that do not exist.

Only indicate coverage that exists at the time of issuance of the certificate. Never specify coverage that does not exist. Make sure the policy is endorsed or modified as required. Only after changes have been made, not simply ordered, should certificates be issued. Frequently requested certificate alterations include:

- Adding a lessor as an additional insured to the lessee’s coverage. Adding an entity or project owner as an additional insured to contractor’s insurance.
- Making a contractor’s insurance coverage primary and the certificate holder’s coverage “excess” and “noncontributory.”
- Having the insurance cover the insured’s contractual obligations to the certificate holder, such as waiving subrogation rights, hold-harmless and indemnity agreements, and obligations to pay damages and defend.

When your insured is the certificate holder...

Be sure a general contractor's file includes qualified certificates of insurance and a copy of the written contract with the subcontractor to fully document insurance, adequacy of limits, and the relationship between the subcontractor and general contractor. This kind of documentation should help avoid large unexpected additional premiums upon audit and show that the parties were "adequately insured." Advise your insured to be wary of fraudulent certificates...it may be appropriate to verify coverage independently from the certificate.

Appendix

Note: Under the “Additional Reading and Resources” section, to access the Virtual University articles, you will need to be an IIABA member or a paid Virtual University subscriber. If you work for an IIABA member agency, but don’t have or remember your login information, you can obtain it by emailing logon@iiaba.net. If you are not an IIABA member or a paid VU subscriber, but would like information about subscribing to the VU, visit <http://www.iiaba.net/VU/NonMember/subscription.htm>.

Certificate Checklist

The checklist on the next page was developed and copyrighted by the Florida Association of Insurance Agents, and is reprinted with permission of the state association. It may not address all the issues presented by a given insured, so use it as a guide to assist you and make changes where you or your counsel deem appropriate.

[Agency letterhead or mast heading]

Name of Insured/Job

INSURANCE/CERTIFICATE CHECKLIST

[To the insured:] After counsel has read the construction contract, indicate below what items apply by checking the appropriate box. Attach a copy of the insurance requirements and counsel analysis and send with this checklist to our agency before signing the construction contract.

NOTE: Your policy/certificate of insurance may not be amended to include one or more of the items shown below.

1. Additional Insured Requirements

- | Yes | No | |
|--------------------------|--------------------------|--|
| ☐ | ☐ | A. Include additional insured for general liability |
| ☐ | ☐ | B. Include completed operations ("your work") for additional insured |
| ☐ | ☐ | C. Include additional (designated) insured for automobile |
| ☐ | ☐ | D. Additional insured's exact name and address is attached |

2. Waiver of Subrogation Requirements

- | Yes | No | |
|--------------------------|--------------------------|-------------------------|
| ☐ | ☐ | A. General liability |
| ☐ | ☐ | B. Automobile |
| ☐ | ☐ | C. Workers compensation |

3. Certificate of Insurance Requirements

- | Yes | No | |
|--------------------------|--------------------------|--|
| ☐ | ☐ | A. Delete "endeavor to" and/or "but failure to mail..." from cancellation notice |
| ☐ | ☐ | B. ____ days written cancellation notice required |
| ☐ | ☐ | C. Requires "primary and noncontributory" be shown on certificate |

4. Miscellaneous

- | Yes | No | |
|--------------------------|--------------------------|--|
| ☐ | ☐ | A. General liability: Aggregate applies (circle one): project or location |
| ☐ | ☐ | B. Automobile: Any Auto (Symbol 1) required |
| ☐ | ☐ | C. Limits greater than \$1 million required |
| ☐ | ☐ | D. Length of time required to maintain proof of insurance is greater than 1 year |
| ☐ | ☐ | E. |

Completed by (print): _____

Date: _____

Additional Reading and Resources in the Big “I” Virtual University

- **“Additional Insureds and Certificates”**
<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/FacultyAICerts.htm>
- **“Following Up on Certificates of Insurance”**
<http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/FacultyCertificates.htm>
- **“Agency Certificate Procedures”**
<http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/NewmanCertificates.htm>
- **“Certificate vs. Policy Limits”**
<http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/FacultyCertificateLimits.htm>
- **“Surveys & Polls: Certificate vs. Policy Limits”**
<http://www.iiaba.net/VU/Lounge/YourVUpoint/YourVUpoint0306.htm>
- **“Waivers of Subrogation”**
<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/WilsonSubrogationWaivers.htm>
- **“CGL ‘Primary and Noncontributory’ Certificate Requirements”**
<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/FacultyPrimaryNoncontributory.htm>
- **“Managing Commercial Lines E&O Exposures (Part 2 of 3 - Certificates of Insurance)”**
<http://www.iiaba.net/VU/Lib/Bus/AM/EOLossControl/WiltsCLEO02.htm>
- **“Automated Certificate Systems...How Accurate Are They?”**
<http://www.iiaba.net/VU/Lib/Tec/AS/Miscellaneous/FacultyCertificates.htm>
- **“Should Agents Review Contracts for Insureds?”**
<http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/EdwardsContractReview.htm>
- **“The ‘No Occurrence’ CGL Claim Denial”**
<http://www.iiaba.net/VU/Lib/Ins/CL/CGL/WilsonNoOccurrence.htm>

Other Additional Reading and Resources

- **“What Does an Additional Insured Endorsement Cover?”**
<http://www.irmi.com/Expert/Articles/2000/Postel07.aspx>
- **“What Does an Additional Insured Endorsement Cover? Part II – Manuscript Endorsements”**
<http://www.irmi.com/Expert/Articles/2000/Postel10.aspx>
- **“Is Additional Insured Coverage Becoming Just an Illusion?”**
<http://www.irmi.com/Expert/Articles/2002/Postel07.aspx>
- **“Additional Insured Endorsements – A Potential Minefield (Part 3)”**
<http://www.irmi.com/Expert/Articles/2006/Stanovich03.aspx>
- **“The Belt and Suspenders Approach to Contractual Liability”**
<http://www.roughnotes.com/rnmagazine/2003/sept03/09p70.htm>
- **“What’s Fair Involving Additional Insureds?”**
<http://www.contractormag.com/articles/column.cfm?columnid=362>
- **“Your Additional Insured Status: What Does It Really Get You?”**
http://www.constructionweblinks.com/Resources/Industry_Reports_Newsletters/May_24_2004/insured.html
- **“Certificates of Insurance: What Every New York Risk and Insurance Professional Needs to Know”**
<http://www.sacslaw.com/CM/Articles/Articles29.asp2>
- **“Certificates Of Insurance in Construction Accident Coverage Litigation: The Disclaimer Language Is Effective”**
<http://www.dcba.org/brief/junissue/2002/art40602.htm>
- **“Graham v. USI MidAtlantic: Should I Be Concerned”**
<http://www.irmi.com/Expert/Articles/2006/Warren08.aspx>
- **“The Additional Insured Book”**
<http://www.irmi.com/IrmiCom/Cart/Default.aspx?CategoryID=4&ItemID=400>
- **“Subrogation Can Spell Trouble”**
<http://www.roughnotes.com/rnmagazine/1998/january98/01p79.htm>

How To Access the Big “I” Virtual University

Visit www.independentagent.com and select Virtual University from the top navigation menu. On the VU public area home page, you will be able to access our Certificates of Insurance Resources section for free. Other features of the VU require a logon as an IIABA agency member or a paid VU subscriber.

Big “I” Member Agencies –Free Access! Membership at the state association level entitles you to access to the research library, newsletter, “Ask an Expert” service, white papers, consumer articles and more, at no additional charge. Each person within an agency is required to log into the VU Home page with their own login ID and password. Individuals can obtain their login ID and password by clicking on the “Don’t Know Login” link, located on the Big “I” Web site, or by contacting their state association.

Subscription Services Are Available! If you are an insurance company employee, affiliate or an associate member, you may purchase an annual subscription to the Big “I” Virtual University. Visit the Subscribe Today Web page for details. Insurance company personnel are encouraged to visit the Company Partner section on the Subscribe Today Web page, as discounted subscriptions may be available in recognition of a company’s support of Big “I” programs.

How To Subscribe to the FREE *VUpoint* Newsletter

Much of this document originated from a number of articles published in our FREE bi-weekly email newsletter, *The VUpoint*. You do not have to be an IIABA member or paid VU subscriber to receive the this newsletter. We currently have about 25,000 newsletter subscribers in over 70 countries around the world. According to a survey conducted by Specific Software Solutions, the *VUpoint* was the #1 rated industry newsletter, garnering four times as many votes as the second place finisher.

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