



Contractors and Certificates of Liability Insurance

Certificates – not again!!! Haven't we heard enough about this topic? Apparently not. In this article, we are going to talk about Certificates and the contracting risk. Yes, I know, Certificates are issued for all sorts of insureds, so anything I say here applies to those clients, as well. But, the contracting risk is the most dangerous of them all.

Why does the contractor ask for a Certificate? The answer is simple. They need it to get the job or they need to get paid for work they have already performed. That is all they really care about. They want it, they want it now (or yesterday), and they want it their way. Which means, if the insured contractor's client (or business associate) requests language added, language removed or persons added to a Certificate, all of which may be improper, the insured wants to have it done that way. This leaves the agent/broker in harms way. On the one hand, they want to keep their client happy. On the other hand, everyone involved in issuing the Certificate is a potential defendant in an E&O or bad faith lawsuit for incorrectly completing the form.

Back to Basics - Who should issue Certificates?

Only an appointed insurance agent should issue Certificates. What does this mean? Well, it means that if YOU are a broker, YOU do not issue a Certificate; if YOU are writing insurance through an MGA, YOU do not issue a Certificate; if YOU are placing coverage with a pool, YOU do not issue a Certificate.

This can be more complex than it first appears. For example, an insurance agent or broker (retailer) may be appointed as an "agent" of an MGA or act as a "broker" placing business through an Excess and Surplus Lines Broker. Although the retailer may have a contract with the wholesaler, this does not create a contractual relationship between the retailer and the insurance company providing the insurance policy.

Therein lies the problem. In order for a retail broker to issue a Certificate in a wholesale coverage placement, the retailer must receive that permission from the insurance company **NOT** the wholesaler. This normally does not happen but rather the wholesaler gives this permission. If the wholesaler is not willing or able to issue the necessary Certificates, the agent/broker should provide only the information requested, attach all pertinent endorsements, NEVER change any pre-printed language on the Certificate and send a copy to the wholesaler (even if they don't want it). Clearly, any written authority provided by the wholesaler on behalf of the insurance company to the retailer allowing the retailer to issue Certificates should be retained in the retailer's files. This does not mean it is a correct transaction but rather is documentation of the incorrectness of it all.

Back to Basics - Why issue Certificates?

Certificates, generally, are written to provide evidence of insurance to a party other than your insured. No more, no less. That is important because the person for whom

the Certificate is issued is not a party to the insurance contract and has not paid a plug nickel for the privilege of coverage (this is called a consideration for a contract). After all, your insured only needs it to get the job and prove they have insurance. This issue is the crux of much insurance litigation.

Back to Basics - What Certificate form should be used?

The insurance industry standard for Certificates of Liability Insurance is Form 25, promulgated by the ACORD Company. In part, the ACORD guidelines for Certificates of Liability state:

“In 1974, the Court of Appeals, Fifth District ruled that a certificate is not a contract between the holder and the insurer. It only provides information to an interested third party that insurance is in force at the time of issuance. The court also stated: ‘The provision regarding notification in the event of cancellation is a mere promise, unsupported by any consideration.’ Although many companies provide notice of cancellation to certificate holders, they are not obliged to do so, since the holder is not a party to the contract. Agents or brokers should not change any provision on this form without prior consent of the issuing company.”

So, here’s the General Contractor (Certificate holder), 8 years later, Certificate in hand, knocking on the subcontractor’s proverbial door. Surprise, surprise - the Certificate for the Subcontractor’s CGL was issued incorrectly, providing notice of cancellation and Additional Insured status for the Certificate holder who now has been denied coverage for a claim by the insurance company listed on the Certificate.

The agent issued the Certificate showing the GC as an Additional Insured, but the policy was not endorsed accordingly. The agent removed the “endeavor to mail” language from the bottom of the Certificate after the liability underwriter gave the agent permission to do so in writing. Okay - got it. The underwriter gave the agent permission to commit professional suicide.

What went wrong? Better question—what went right?

- First, a Certificate is not an endorsement so there is no coverage.
- Second, if the agent removes the “endeavor to mail” language, the AGENT is now responsible to notify the Certificate holder in the event coverage is canceled. Everyone knows that the policy states that only the First Named Insured and the agent or broker of record get the notice and if you want it to say something different, amend the policy. And, just to keep it real, that is NEVER going to happen – so just get over it. Without an endorsement showing not only the specifically named Additional Insured as well as an agreement to notify that specific party in the event of cancellation, the insurance company is NOT going to send a notice of cancellation to a Certificate holder or an Additional Insured. Ever. Don’t get too excited over getting this endorsement: Not ever insurer will do this and if they do, it is because the premium size is worth it to them or your

agency volume is significant to them AND they will charge a fairly hefty additional premium.

- Third, the insured is gearing up for legal warfare since the GC is suing them for breach of contract and the insured will file either a direct action or a cross-complaint against their agent. Note also, that in some states, the Additional Insured is bringing standard of care claims directly against the agent that issued the documents to them. So now you are vulnerable to a party who is not your client and has never paid you anything for this service.
- Fourth, the insurance company is going to file a cross-complaint against their agent due to the bad faith litigation commenced by the insured.
- Fifth, do you really think the E & O carrier is going to take care of all this mess? The agent might have done something wrong, but was it really an “error” or an “omission”? You absolutely knew you shouldn’t change the “endeavor to” wording and you knew it was part of the policy because you asked your underwriter for this and they declined. Try asking an E & O claims adjuster that question and see what you get as a response.

The watchwords for today – Keep out of trouble

Let’s start with the obvious:

- When writing coverage for a contractor, FIND OUT WHAT THEY ARE AGREEING TO IN THEIR CONSTRUCTION CONTRACTS.
- If the contractor is agreeing to provide things that you cannot do, tell them – in writing.
- Help the contractor understand what they can provide and work with them to have that language inserted in the construction agreement, BEFORE they sign it.
- In other words, avoid the problems, don’t create them.

When issuing Certificates:

- Enter only full legal company name(s) as found in the file copy of the policy.
- Enter limits corresponding to those found on the policy declarations page.
- Use the most current edition of the Certificate, print and issue both pages.
- Do NOT state extra-contractual language, such as: “This insurance is primary and any insurance carried by the Certificate holder shall be excess” or “The certificate holder is an additional insured” without an endorsement to the policy.
- Use the current edition of the ACORD Certificate that does not allow any changes in the notice of cancellation. Do NOT override and put anything different in the operations description box.
- Only issue the Certificate of Liability insurance showing the coverage lines as specifically requested by the Certificate holder.

Final word to the wise: Don't take the Certificate of Insurance for granted. This document can come back to haunt you years into the future.

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