BY-LINED ARTICLE

ACORD, but No Satisfaction: The Recent Changes in Certificates of Insurance

By Richard H. Lowe, Stanley A. Martin, A. Peter Prinsen and Sean H. Brogan
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In September 2009, a change made to the Association for Cooperative Operations Research and Development's (ACORD) Form 25, Certificate of Liability Insurance, eliminated language in the old form where the insurer agreed to "endeavor" to provide notice to the certificate holder of a cancellation of the first named insured's policy—and instead clarified that the policy itself governs the duty to notify of cancellation of the policy.

This change has only recently begun to affect the marketplace because ACORD gives its brokers a year before they are required to start using the new form.

The change in the language arose in response to comments from insurance commissioners' offices in several states that the prior language may have been misleading. A basic tenet of insurance law is that a certificate of insurance cannot modify or amend the terms of an insurance policy. Regarding notice of cancellation, most policies did not require the insurers to notify certificate holders or additional insureds; rather, the insurer's duty to notify ran only to the first named insured. Thus, if the old ACORD certificate stated that the insurer would "endeavor to" notify certificate holders—many of whom were additional insureds—that could be construed as misleading, even if the old certificate also contained language that the insurer could not be held liable for failure to provide such notice.

Another reason for the language change may have been that the old ACORD certificate contained one blank that had to be filled in to clarify the number of days before cancellation that the notice had to be provided. Typically, the number 30 was inserted, to show that the insurer would endeavor to provide 30 days' notice. An issue with that language, however, was that most policies required only 10 days' notice if the reason for the cancellation was failure to make payment of the insurance premiums. Therefore, the fact that the certificate had only one blank to fill in—when there were two different time periods that might apply—made the language all the more inaccurate.

Now that the ACORD certificate with the new language is required, and will now be the standard form seen in the marketplace, the following question arises: Should any action be taken?

The simple answer is "yes," but different action is suggested for different scenarios.

The most basic action that should be considered is to review pending contracts to determine if the change in the terms of the ACORD certificate leads to a situation where the lower-tier party cannot comply with the insurance provisions of its construction contract. This could occur in an owner–general contractor contract, if that contract requires the general contractor to provide a certificate of insurance that requires the contractor's insurer to provide notice to the owner regarding the cancellation of the contractor's liability policy.

Inability to comply with contract terms could easily occur, because many contracts have provisions that require the general contractor to deliver a certificate of insurance that contains specific language. For example, the American Institute of Architects' (AIA) A201 "General Conditions" contains such language, as follows:

§ 11.1.3 Certificates of insurance acceptable to the Owner shall be filed with the Owner prior to commencement of the Work and thereafter upon renewal or replacement of each required policy of insurance. These certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner.

Similarly, the ConsensusDOCS 200 "Standard Agreement and General Conditions between Owner and Constructor" contains a provision requiring a contractor to provide insurance that provides notice to the Owner of a cancellation of the policy:

10.2.4. The policies of insurance required under subsection 10.2.1 shall contain a provision that the coverage afforded under the policies shall not be cancelled or allowed to expire until at least thirty (30) Days' prior written notice has been given to the Owner.

Thus, if the contract under review contains language such as that noted above, but there is no longer any "endeavor to" language in the ACORD certificate to satisfy that contractual obligation, a general contractor could easily be in violation of its contract if the policy follows the familiar path of not requiring the insurer to provide notice to anyone other than to the general contractor as the first named insured.

In such a case, the following possible solutions may be worth consideration.

Starting with the easiest scenario, the policy might already require the insurer to provide notice to certificate holders or additional insureds. If so, a copy of the relevant portion of the insurance policy can be appended per the new ACORD certificate as "additional evidence" on a separate sheet, as part of the certification that the policy complies with the contractual requirement.

If the insurance policy does not require the insurer to provide notice of cancellation to certificate holders or additional insureds, it may be possible to add an endorsement to the insurance policy whereby the insurer agrees to provide notice of cancellation to specified entities. This endorsement could take two forms. The first form would list specific entities to whom the insurer agrees to provide notice (see, for example, The Travelers Indemnity Company form IL T4 00 12 09). The second form would be for the endorsement to reflect the insurer's agreement to provide "blanket" notification to a list of organizations shown on a schedule provided by the first named insured (see, for example, Zurich American Insurance Company form U-GL-1114-A CW). It is more likely that an insurer would be willing to agree to an endorsement in which the specific names are included when the endorsement is added, to potentially avoid any additional administrative burden on the insurer if the need for providing notice arises at a later date. It is important to note one concern with this approach: As a practical matter, insurers may take many months to issue endorsements, much longer than the time it takes a broker to issue an updated certificate. Therefore, the endorsement approach may not be speedy enough to serve as a practical solution.

Now consider the scenario that may be more challenging to resolve: If the insurance policy does not contain language compatible with the contractual obligations *and* the insurer will not agree to add an endorsement addressing the issue, then

the lower-tier party (in this case, the general contractor) who needs to be in compliance with its contractual obligations may have another way to address the issue. Perhaps the contractual language is vague about how the notice can be given. Indeed, neither the AIA nor the ConsensusDOCS language cited above specifies that it is the insurer who must provide the notice. Rather, the language is written in the passive tense—merely that notice of cancellation must be provided. Thus, the possibility remains that the lower-tier party could comply with its contractual obligations by giving the required notice (typically 30 days). To be safe, perhaps the lower-tier could suggest that the two parties enter into a no-cost change order, clarifying that the lower-tier party can provide the notice itself. The higher-tier party (the hypothetical owner) may object to this approach because of the risk of having to rely on the lower-tier party for notice, when the likely reason for having to provide the notice is the fact that the lower-tier contractor has failed to pay its insurance premium. As a practical matter, if the lower-tier party cannot pay its insurance premium, the higher-tier party may have more concerns about the lower-tier party's ability to perform the contract other than the lapse of insurance coverage. Perhaps having a promise of notice from the lower-tier party is better than nothing.

The higher-tier party can gain some comfort that the lower-tier party's insurance remains in place by requiring the lower-tier party to provide new and updated certificates of insurance on a monthly basis—perhaps with payment applications—in order to confirm that the insurance remains in place. Even if there is a cancellation without prior notice, the period that could be subject to the lapse of coverage would be relatively short and contained.

If the higher-tier party refuses to enter into a "no-cost" change order to address the changes in the ACORD certificate, the lower-tier party may provide notice to the higher-tier party that its refusal to accept notification from the lower-tier party is a force majeure event, should the lower-tier party be able to show that its inability to comply with the contractual requirements arises from actions beyond its control.

It is important to consider that both parties might try improving their abilities to track the dates on which policies expire. Third-party vendors can help with this task.

Finally, the risk of cancellation of a policy may not be the largest risk that a higher-tier party faces. The greater risk to an owner may be that its general contractor fails to assure that its subcontractors continue to provide new certificates of insurance after the coverage period reflected in the certificate of insurance provided when the subcontracts originally commenced. Thus, a renewed sense of vigilance, to confirm that the insurance required to remain in place for the duration of a project actually does remain in place, may be a favorable benefit of issues raised by the new ACORD forms.

Richard H. Lowe concentrates his practice in construction and commercial litigation and construction law. Mr. Lowe is a Fellow of the American College of Construction Lawyers and a Fellow of the Litigation Counsel of America. Mr. Lowe has been extremely active in the Associated General Contractors of America (AGC). As chair of the AGC's BIM Forum's Legal Subforum, he led a national effort to create a BIM Addendum, the first contract form in the world specifically applicable to projects using Building Information Modeling. Also, he served as the vice-chair of the AGC's Contract Documents Committee, a leader in the promulgation of the ConsensusDOCS family of documents that now rival the AIA form documents.

Stanley A. Martin practices construction law, particularly in the areas of contract negotiations, procurement, performance and claims, arbitration and litigation. He is a Fellow of the American College of Construction Lawyers and is an active member of the Associated General Contractors of America and AGC of Massachusetts. Mr. Martin has served as a lecturer on construction law at the Massachusetts Institute of Technology and at Northeastern University. He has served as chair of

the Massachusetts Bar Association's Public Law Section and of the Construction and Public Contracts Committee and has chaired several committees in the construction division of the Section of Public Contract Law of the American Bar Association.

A. Peter Prinsen is vice president and general counsel, and a member of the Board of Directors of The Graham Company, a commercial insurance broker based in Philadelphia. He practiced insurance defense and insurance coverage litigation with Duane Morris before joining The Graham Company in 1989. He has received numerous awards in trial advocacy, including the International Academy of Trial Lawyers Award and the Lewis F. Powell Award for Excellence in Trial Advocacy. Mr. Prinsen is on the Board of Directors of the Insurance Society of Philadelphia. He is a licensed Insurance Agent, a Chartered Property and Casualty Underwriter (CPCU), Registered Professional Liability Underwriter (RPLU) and has the Associate in Surplus Lines Insurance (ASLI) and Associate in Claims (AIC) designations awarded by the Insurance Institute of America.

Sean H. Brogan is an attorney and producer at The Graham Company. Mr. Brogan joined The Graham Company in 2006 as associate general counsel, and served as a technical and legal resource for clients, producers, account managers and claims consultants, particularly in claims situations. In 2007, Mr. Brogan transitioned into the role of a producer, where he now draws on his 10 years of experience as an insurance coverage litigator to assist clients with the design and implementation of comprehensive, cost-effective insurance programs and risk management strategies.