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INSURING YOUR BUSINESS

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CERTIFICATES OF INSURANCE: Understanding the Difference Between What Is Requested and What The Insurance Company Provides

By Jonathan H. Rudd

Many business contracts require one or both parties to maintain a certain level of general liability, commercial automobile, umbrella/excess liability, and other specialized forms of insurance coverage. There can also be a further requirement that one or both parties be added as an additional insured to the liability policies of the other party. The most common way to determine if the other party maintains the required insurance coverages and has carried out its obligation to name the other party as an additional insured is to require that the other party provide it with a Certificate of Insurance. There are frequently provisions in business contracts that attempt to dictate the type of information that must be included on a Certificate of Insurance. The following is a commonly worded provision in a business contract:

> Before [Company A] commences performance under this Agreement, [Company A] shall deliver to [Company B] certificates of insurance evidencing the insurance coverage listed below and [Company A] shall add [Company B] as an additional insured on the policies providing liability coverage. The certificates of insurance and policies shall contain a provision that no cancellation or non-renewal of, or material changes in, the policies shall become effective except upon thirty (30) days written advance notice thereof by the insurance company to [Company B], and that unless such notice is given, the purported cancellation will be ineffective.

Although these type of provisions requiring that the insurance company notify the certificate holder or additional insured in advance of the cancellation, non-renewal or material change in the insurance policies are quite common, they are contrary to the terms of the current standard Certificate of Insurance, and frequently in conflict with the express terms of the insurance policy and governing law. As such, they may provide no actual protection to either contracting party. For many years, the standard Certificate of Insurance contained a provision providing that the insurance company would provide notice of cancellation to the certificate holder or additional insured. More recently, the standard certificate was modified to state that the insurer would "endeavor to" provide notice of cancellation to the certificate holder or additional insured. The language from the standard ACORD Certificate of Insurance in use from the early 2000s until September 2009 provided as follows:

> SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE INSURER AFFORDING COVERAGE WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER NAMED TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE INSURER, ITS AGENTS OR REPRESENTATIVES.

The ACORD Certificate of Insurance was changed in September 2009 to eliminate any requirement that the insurance company "endeavor to" provide notice of cancellation. The ACORD Certificate of Insurance currently in effect provides as follows:

> SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

The change in the ACORD Certificate of Insurance was brought about in part because of changes in many state laws that recognized the conflict between the wording of the insurance policies and the language of the Certificate of Insurance indicating that the insurance company would "endeavor to" provide notice of cancellation to the certificate holder or additional insured. The standard liability insurance policy generally provides that the insurance company only needs to notify the first named insured as to the cancellation of the insurance policy, and puts no obligation on the insurance company to notify any additional insureds or certificate holders. Further, the standard liability insurance policy typically permits the insurance company to cancel the policy upon ten (10) days notice for nonpayment of premiums, which was in conflict with the standard language in the Certificate of Insurance providing for thirty (30) days notice.

As a result of the change in the ACORD Certificate of Insurance and law, a certificate holder and additional insured cannot plan on receiving any notice from the insurance company if the liability insurance coverage is being cancelled or non-renewed. This can potentially cause serious problems should the other contracting party not take steps to secure other insurance coverage upon cancellation of its liability insurance.

By attempting to eliminate their obligation to notify certificate holders and additional insureds of the cancellation of an insurance policy, insurance companies have placed certificate holders and additional insureds at risk of having no insurance coverage for serious bodily injury and property damage claims. The problem does not have a one-size-fits-all solution. Experienced insurance counsel is needed to negotiate and protect the interests of certificate holders and additional insureds.

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The McNees Insurance Recovery & Counseling group works to help clients deal with all of their insurance coverage issues, including any contractual requirements regarding the maintenance of insurance coverage, and the use of Certificates of Insurance. Please contact us for more information. ■

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CARRYING PEOPLE OR PROPERTY FOR A FEE: WHERE DOES COVERAGE STOP?

*By Charles T. Young, Jr. and James Welch**

Your neighbor's teenage son uses his car to deliver pizzas at a summer job. He is involved in an automobile accident. Does he have insurance coverage?

In *Prudential Property and Casualty Ins. Co. v. Sartno*, the Pennsylvania Supreme Court addressed this exact scenario. The court found that the pizza delivery driver had coverage for the accident even though it had occurred as part of his employment. The driver's policy, like most personal auto policies, excluded coverage for bodily injury or property damage occurring when an automobile is used to carry people or property for a fee. Although the driver received wages for making deliveries and performing other job responsibilities, the court held that the exclusion did not apply because in that case, there was no delivery charge. The ruling was consistent with other jurisdictions which have refused to deny coverage to pizza delivery drivers based on the "hired auto" exclusion.

In extending coverage, the court focused on whether the policy intended the term "fee" to encompass any payment made to the insured or only instances in which a fee is paid for use of the vehicle itself. Referencing an Ohio Supreme Court decision addressing a similar insurance provision, the court held in *Sartno* that because either interpretation was valid, the ambiguity is resolved in favor of the insured. The decision, while ending favorably for *Sartno*, appears to prime the ambiguity for resolution by insurers without prohibiting an explicit definition which creates the broader exclusion the court considered. Immediately after recognizing that the insurer was "free to define 'fee'" in a broad way, the court proceeded to list the absurd results of such a construction, including "employees driving co-workers to seminars," and "teachers carrying exams home to grade."

After *Sartno*, the existence of coverage under these types of provisions may turn on what the customer, and not the insured, is paying for. Courts have explicitly rejected attempts to focus on the benefit received by the insured, opting to focus on the existence of a delivery fee. In *Nationwide Mutual Insurance Company v. Brophy*, a court held that a mail carrier returning to the post office in an employer-issued truck could not recover under an insurance policy which included the "hired auto" exclusion.

In *Brophy*, because it was clear that the customer was paying for the delivery itself, the court held that the language of the policy was not ambiguous as applied to the mail carrier. Thus, policyholders with vehicle uses traditionally associated with a transportation service such as taxi drivers have been denied coverage under policies with "hired auto" exclusions. It appears then that when the customer is clearly paying for the delivery or transit of goods, a court would hold that the "hired auto" exclusion applies and an insurer would not be liable. Where, however, what exactly is being purchased is unclear, a court would be more likely to hold the terms ambiguous as to the situation and therefore hold for the insured under contra *proferentem*.

When seeking coverage, a policyholder may be best served by collecting any fees associated with the business for services other than the transportation itself. Such action may be particularly important where, like in *Sartno*, an injured party brings suit against the business as well as the individual driver. Policyholders, however, may not be successful if the insurer has drafted an agreement which creates a broader exclusion. Under the law as it stands, insurers are also not prevented from further defining the "hired auto" exclusion and resolving the ambiguity. Policyholders should therefore pay particular attention to what their policy considers transportation for a fee in order to determine what, if any, activities involved in their business may be excluded from coverage. ■

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