

**CERTIFICATES OF INSURANCE:
COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO
TO AVOID THEM**



JANA S. REIST
900 Jackson Street, Suite 100
Dallas, TX 75202
Telephone: 214-712-9512
Telecopy: 214-712-9540
Email: jana.reist@cooperscully.com

4TH ANNUAL CONSTRUCTION SYMPOSIUM
JANUARY 30, 2009

TABLE OF CONTENTS

	Page
I. Introduction.....	1
II. Law On Certificates Of Insurance	1
A. Generally, Terms of the Policy Control.....	1
B. Certificate Cannot Limit the Policy	3
C. No Obligation to Notify of Changes or Cancellation	3
D. Exceptions to the General Rule.....	4
E. Agents’ Liability	5
III. Common Issues That Arise With The Issuance Of Certificates Of Insurance AND HOW To Avoid Them	6
A. Addition Insured Status	6
B. Impossible or Impractical Requests	7
C. Notice of Cancellation or Changes in the Policy	7
D. Reviewing Contracts.....	7
E. Certificate vs. Policy Limits	8
IV. Conclusion	8

TABLE OF AUTHORITIES

	Page
<i>B.T.R. East Greenbush v. Gen. Accident Co.</i> , 615 N.Y.S2d 120 (N.Y. App. Div. 1994).....	4
<i>Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.</i> , 795 N.Y.S.2d 619 (N.Y. App. Div. 2005).....	6
<i>Bradley Real Estate Trust, et al. v. Plummer & Rowe Ins. Agency</i> , 609 A.2d 1233 (N.H. 1992).....	2
<i>Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.</i> , 794 P.2d 264 (Colo. Ct. App. 1990).....	2
<i>Brown & Brown of Tex., Inc. v. Omni Metals, Inc.</i> , 2008 Tex. App. LEXIS 2065 (Tex. App.—Houston [1st Dist.], Mar. 20, 2008, no pet. h.)	2
<i>Bucon, Inc. v. Penn. Manuf. Assoc. Ins. Co.</i> , 547 N.Y.S.2d 925 (N.Y. App. Div. 1989).....	4
<i>CIGNA Ins. Co. of Texas v. Jones</i> , 850 S.W.2d 687 (Tex. App.—Corpus Christi 1993, no writ).....	1
<i>C & W Well Service, Inc. v. Sebasta</i> , 1994 Tex. App. LEXIS 643 (Tex. App.—Houston [14th Dist.], March 24, 1994, no writ)	1
<i>Dryden Central Sch. Dist. v. Dryden Aquatic Racing Team</i> , 600 N.Y.S.2d 388 (N.Y. App. Div. 1993).....	3
<i>Glynn v. United House of Prayer for All People</i> , 741 N.Y.S2d 499 (N.Y. App. Div. 2002).....	2
<i>John Bader Ins. Co. v. Employers Ins. of Wausau</i> , 441 N.E.2d 1306 (Ill. App. Ct. 1982).....	5
<i>Mountain Fuel Supply v. Reliance Ins. Co.</i> , 933 F.2d 882 (10th Cir. 1991).....	3
<i>Nat'l Union Fire Ins. Co. v. Glenview Park Dist.</i> , 594 N.E.2d 1300 (Ill. App. Ct. 1992), <i>aff'd in part, modified in part</i> , 632 N.E.2d 1039 (1994)	2
<i>RNA Invest., Inc. v. Employers Ins. of Wausau</i> , 2000 Tex. App. LEXIS 7804 (Tex. App.—Dallas 2000, Nov. 16, 2000, no pet.)	1
<i>Scottsdale Ins. Co. v. Shahinpour</i> , 2006 U.S. Dist. LEXIS 23299 (S.D. Tex. March 14, 2006).....	3

Via Net v. TIG Ins. Co.,
211 S.W.3d 310 (Tex. 2006) 1

MISCELLANEOUS

Insurance Code §§4001.051(c) 6

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

I. INTRODUCTION

A certificate of insurance is an instrument used to verify that an entity is insured. The organization ACORD (Agency-Organized Research and Development) first introduced standard certificates of insurance in 1976. The ACORD form is the most common used today. The certificate will provide such information as the insurer, insurance agency, insured, types of insurance, policy numbers, effective dates, limits, certificate holder, cancellation procedures, additional insureds, and the name of the representative authorizing the policy.

Typically, agents and brokers issue certificates of insurance on behalf of the insured contractor. Processing the certificates can be a time-consuming and troublesome task. Contractors often want the certificate immediately to be able to bid or get paid on a job, creating time constraints upon the agent in issuing the certificate. For example, let's assume your client is a roofing contractor, and a general contractor is considering your client for a job that is out to bid and requests a certificate of insurance. The certificate is important to the general contractor or property owner because it serves as evidence that your client has the correct insurance in place. In fact, the general contractor or property owner may not allow your client to bid the job, begin work or get paid until he or she has received the properly issued certificate.

Obviously, this puts the property owner, general contractor and subcontractor in a difficult position because they want to begin work or get paid, while making sure the proper parties are covered under the policy. But this also puts agents who are issuing these certificates of insurance in the difficult position of both serving their client and following procedures designed to avoid liability. Insurance agents are often asked to provide certificates that cannot comply with the contract the contractor may have already signed. In an effort to satisfy their clients, agents may issue certificates of insurance that do not accurately reflect the policy, leaving the insureds and certificate holders unaware of the potential liability this creates.

Thus, it is important that all parties have a better understanding of the uses and limitations

of certificates of insurance. This article will discuss the law on certificates of insurance, common problems that arise when working with certificates, and what you can do to try to avoid these problems.

II. LAW ON CERTIFICATES OF INSURANCE

There is no specific law in Texas that regulates certificates of insurance. As a result, disagreements over the purpose and scope of certificates are common and can lead to litigation. It is often difficult to predict the outcome when such arguments go before the courts. The purpose of this section is to identify some of the key issues arising from the use and reliance upon certificates of insurance.

A. Generally, Terms of the Policy Control.

As a general rule, when policy language conflicts with the certificate of insurance, the policy language will govern.¹ For example, in *Via Net v. TIG Ins. Co.*,² Safety Lights sued its vendor, Via Net, for breaching the promise to provide additional insured coverage. Via Net agreed to name Safety Light as an additional insured, and its insurance broker issued a certificate of insurance listing Safety Lights as "holder" and stating that the "holder is added as additional insured re: General Liability." However, the certificate also stated:

THIS CERTIFICATE IS ISSUED AS A
MATTER OF INFORMATION ONLY
AND CONFERS NO RIGHTS UPON THE
CERTIFICATE HOLDER. THIS

¹ See *RNA Invest., Inc. v. Employers Ins. of Wausau*, 2000 Tex. App. LEXIS 7804 (Tex. App.—Dallas 2000, Nov. 16, 2000, no pet.) (unpublished opinion) (certificates of insurance do not create insurance coverage where none existed); *C & W Well Service, Inc. v. Sebasta*, 1994 Tex. App. LEXIS 643 (Tex. App.—Houston [14th Dist.], March 24, 1994, no writ) (unpublished opinion) (noting insurance coverage is that provided by policy, not certificate of insurance); *CIGNA Ins. Co. of Texas v. Jones*, 850 S.W.2d 687 (Tex. App.—Corpus Christi 1993, no writ) (certificate of insurance does not extend the terms of the insurance policies certified therein).

² *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310 (Tex. 2006).

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.

In the underlying suit, a Via Net employee sued Safety Lights after he was allegedly injured when a Safety Lights' employee allegedly dropped a 3000 lbs. steel plate on his hand. Safety Lights requested a defense from Via Net, and Via Net's insurance company denied the claim because the policy did not provide coverage for additional insureds, despite the language of the certificate of insurance. Safety Lights argued that there is little use for certificates of insurance if contracting parties must verify them by reviewing the entire policy.

The Texas Supreme Court found that the purpose of certificates of insurance is more general in that they merely acknowledge that a policy has been written and set forth the general terms of what the policy covers. The Court found that "[g]iven the numerous limitations and exclusions that often encumber such [insurance] policies, those who take such certificates at face value do so at their own risk."

Further, in *Brown & Brown of Tex., Inc. v. Omni Metals, Inc.*³, the Houston First District Court of Appeals relied upon *Via Net's* holding. In *Omni Metal Inc.*, Port Metal Processing stored steel belonging to Omni and processed the steel into coils. Port Metal purchased insurance from Transcontinental through Russell Lee Jacobe Insurance Agency, later acquired by Brown & Brown of Texas, Inc. Port Metal's president testified that he asked Jacobe to insure Port Metal's warehouse, including the steel they were storing. However, the policy excluded the property held in storage. In fact, the president testified that he asked Jacobe about the exclusion and was told that it meant Port Metal could not store property on its premises that was unrelated to its business. Jacobe testified that he knew Port Metal was charging a storage fee to its customers like Omni, and that he failed to explain to the president that the insurance policy excluded the steel Port Metal was storing.

³ *Brown & Brown of Tex., Inc. v. Omni Metals, Inc.*, 2008 Tex. App. LEXIS 2065 *11 (Tex. App.—Houston [1st Dist.], Mar. 20, 2008, no pet. h.).

However, the president admitted not reading the insurance policy in effect.

Omni's bank required Omni to request certificates of insurance from Port Metal's agent. The certificate issued contained the incorrect statement that Port Metal's insurance coverage "INCLUDES PROPERTY OF OTHERS IN CUSTODY OF INSURED." The certificate further stated that it was for information purposes only.

Port Metal's warehouse burned down, and Omni lost \$2.6 million in steel. Transcontinental denied coverage. Omni settled with Port Metal, but pursued suit against Transcontinental and Brown & Brown. The court held that Omni chose to rely on oral representations, something even a party to a contract cannot do if it directly contradicts the express, unambiguous terms of the written contract. Further, following the reasoning of *Via Net* - those who rely on certificates of insurance "do so at their own risk"- the court found that Omni could not detrimentally rely on certificates of insurance.

Majority of other states' courts also adhere to the general rule.⁴ For example, the Illinois Court of Appeals also held that certificates of insurance do not confer any special rights to its holders in *Nat'l Union Fire Ins. Co. v. Glenview Park Dist.*⁵ In *Nat'l Union Fire Ins. Co.*, a public owner sought coverage under a contractor's general liability policy on which it was named an additional insured. It sought

⁴ See *Broderick Inv. Co. v. Strand Nordstrom Stailey Parker, Inc.*, 794 P.2d 264 (Colo. Ct. App. 1990) (court stated it concurred with other appellate decisions which have found certificates of insurance to be informational documents only, which are subject to the terms of the policy); *Bradley Real Estate Trust, et al. v. Plummer & Rowe Ins. Agency*, 609 A.2d 1233 (N.H. 1992) (New Hampshire's Supreme Court stated the "certificate is a worthless document; it does no more than certify that insurance existed on the day the certificate was issued"); *Glynn v. United House of Prayer for All People*, 741 N.Y.S2d 499 (N.Y. App. Div. 2002) (finding that "a certificate of insurance, by itself, is insufficient to raise a factual issue as to the existence of coverage").

⁵ *Nat'l Union Fire Ins. Co. v. Glenview Park Dist.*, 594 N.E.2d 1300 (Ill. App. Ct. 1992), *aff'd in part, modified in part*, 632 N.E.2d 1039 (1994).

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

coverage when one of the contractor's employees sued it after being injured in a scaffolding accident. The insurer denied coverage on the ground that the contractor's policy excluded coverage for damages arising from the negligence of the additional insured.

The owner argued that coverage should be extended in this case because the certificate of insurance delivered to it by the contractor did not contain the exclusionary language. The court ruled against the owner, noting that the language of the certificate made it clear that the document was issued for information only and did not amend, extend, or alter the coverage afforded under the policy.

B. Certificate Cannot Limit the Policy

Since a certificate of insurance does not amend or extend the language of the policy, it cannot limit the policy, as well. In *Dryden Central School District v. Dryden Aquatic Racing Team*⁶, the school district entered into an agreement with the team granting the team permission to use the district's pool for its program. In exchange, the team agreed to provide a CGL policy to the school district. The insurance broker issued a certificate of insurance on March 20, 1990.

On February 13, 1990, a little over a month before the insurance certificate was issued, a minor sustained injuries when diving into the shallow end of the pool. The district first received written notice of the claim for damages and medical expenses on April 23, 1990. The parents of the minor sued the school district and the team, and the school district sought coverage as an additional insured under the CGL policy obtained by the team.

The insurer denied indemnity and defense based on an affidavit of the broker, who said that it was not the insurer's intention to have the certificate of insurance extend coverage retroactively for the accident on February 13, 1990. However, the court disagreed with the insurer stating that the certificate referenced the policy number, and the policy was in effect on

both the day of the accident and when the claim was first filed.

C. No Obligation to Notify of Changes or Cancellation

The ACORD form contains language that the insurer will "endeavor" to send notice to the certificate holder if any of the policies are canceled. However, adhering to the general rule that the certificate does not modify the policy, courts have held that the insurer is under no obligation to notify of changes or cancellation unless stated in the policy. For example, in *Scottsdale Insurance Co. v. Shahinpour*⁷, the court determined whether the "will endeavor" language requires an insured to provide notice of cancellation to the certificate holder. The court held that the language provides that the insurer, not the insured, "will endeavor," but it is not obligated to give notice.

Additionally, in *Mountain Fuel Supply v. Reliance Ins. Co.*⁸, the owner of a gas-sweetening plant obtained a certificate of insurance from its general contractor, which named it as an additional insured in its policy starting June 9, 1979. The certificate indicated that the policy was expiring on June 9, 1980, and that the owner was to receive 60 day notice prior to the cancellation of the policy. On June 9, 1980, a new policy was issued, but the policy did not name the owner as an additional insured, and the certificate of insurance did not create any additional insured status. Further, neither the general contractor nor its insurer sent notice of the cancellation of the prior policy to the owner.

On January 26, 1981, a worker fell off stairs at the plant and obtained a settlement against the owner. The owner then filed suit against the general contractor's insurer for coverage of the claim. The owner argued that since it was a named insured under the policy ending June 9, 1980, its coverage could not be reduced in the renewal policy without the insurer first providing it with specific notification of the reduction. The court held that "absent a policy

⁶ *Dryden Central Sch. Dist. v. Dryden Aquatic Racing Team*, 600 N.Y.S.2d 388 (N.Y. App. Div. 1993).

⁷ *Scottsdale Ins. Co. v. Shahinpour*, 2006 U.S. Dist. LEXIS 23299 (S.D. Tex. March 14, 2006).

⁸ *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991)

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

or statutory provision to the contrary, an insurer is under no duty to give notice of a policy's expiration date."

The bottom line is that the terms of the policy control. The standard ACORD form includes the below language in an attempt to make this intent clear:

This certificate is given 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 listed below.

This language is not a legal requirement, and therefore non-ACORD forms may not provide this information to its holders. Thus, insurers should educate their insureds that, despite the language of the certificate, the terms of the policy control.

D. Exceptions to the General Rule.

While Texas courts appear to strictly apply the general rule, insurers and agents relying on this strict application may be doing so at their own risk because courts have ruled in favor of the certificate holder in some disputes. For instance, in *Bucon, Inc. v. Pennsylvanis Man. Assoc. Ins. Co.*⁹, a property owner contracted with a general contractor to supply the materials and erect the roof of a building. The general contractor hired a subcontractor to erect the roof system at the site, and the contract required the subcontractor to hold harmless and indemnify the general contractor and owner for all claims arising out of the subcontractor's performance of the work. The contract also required the subcontractor to furnish and maintain evidence to the general contractor of comprehensive general liability insurance, including coverage for the products and completed operations hazard, naming the general contractor as an additional insured.

The subcontractor sent a certificate of insurance to the general contractor. It stated that the insurance had been issued to the subcontractor and summarized the types of coverages and limits. But the certificate did not

state that the general contractor was an additional insured, so the general contractor rejected the certificate. The subcontractor notified its insurer, and the insurer issued a new certificate, just like the one before, only adding that the general contractor was an additional insured.

During construction, one of the subcontractor's employees was injured, and he sued both the general contractor and the property owner, and both sought protection under the certificate of insurance. The insurer denied coverage because the policy was never amended to include the general contractor as an additional insured. The insurer said the designation of the general contractor as an additional insured on the certificate of insurance was clerical error.

The court ruled that by issuing the certificate, the insurer was estopped from denying coverage for the general contractor. The evidence established that the insurer was informed that the general contractor had required a revised certificate, and the general contractor relied on it to permit the work. Unlike *Omni Metals Inc.*, the court found the general contractor's reliance on the certificate was reasonable, despite clear form language that the certificate did not "amend, extend or otherwise alter the terms and conditions of insurance coverage contained in the policy."

One notable difference between *Omni Metals, Inc.* and *Bucon, Inc.* is that in *Bucon, Inc.*, the actual insurance company that issued the policy also prepared and executed the certificate of insurance. In *Omni Metals, Inc.*, a separate insurance agent who the insured purchased the policy through issued the certificate. Thus, there may be argument that the insured is estopped from denying coverage in *Bucon, Inc.* because they actually issued the certificates, unlike in *Omni, Inc.*

Another case where the court found the certificate of insurance controlled over the policy is *B.T.R. East Greenbush v. General Accident Co.*¹⁰ In *B.T.R. East Greenbush.*, a steel fabricator issued a certificate of insurance on June 18, 1988, naming a general contractor and a property owner as additional insureds on a

⁹ *Bucon, Inc. v. Penn. Manuf. Assoc. Ins. Co.*, 547 N.Y.S.2d 925 (N.Y. App. Div. 1989)

¹⁰ *B.T.R. East Greenbush v. Gen. Accident Co.*, 615 N.Y.S2d 120 (N.Y. App. Div. 1994)

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

policy issued by General Accident Company. The policy was for a one year period starting December 23, 1987. However, the policy was not endorsed to provide additional insured status.

One of the steel fabricator's employees was injured at the construction site on July 16, 1988, the day before the certificate was issued. The general contractor and property owner commenced a declaratory judgment action against the steel fabricator and its insurer seeking a declaration that they are insured under the policy. The trial court granted coverage sought.

On appeal, the defendants argued that the certificate did not confer any rights on the certificate holders and, in fact, it clearly stated that it did not "amend, extend, or alter the coverage" provided by the policies. The defendants further argued that the date of the certificate evidences its claim that the property owner and general contractor were not insureds under the policy on the injury date. However, the court found that the insurer failed to offer any extrinsic evidence of its intent that the issuance date of the certificate was controlling or that the general language of the certificate superseded the designation of the project owner and general contractor as additional insureds.

The court of appeals ruled in favor of the property owner and general contractor stating that the "only reasonable interpretation to be given to the phrase 'ADDITIONAL INSURED' on the certificate of insurance, followed by plaintiffs' names is that General Accident meant to extend coverage to them under terms of the policy"

Further, in *John Bader Ins. Co. v. Employers Ins. of Wausau*¹¹, a property owner leased its building to a company that agreed to provide liability coverage for the owner with respect to the owner. The property owner received a certificate of insurance that provided that in the event of cancellation, ten days written notice of cancellation was to be provided to the insured. Rather than specifying an expiration date and occurrences which would terminate

coverage, the certificate stated that coverage was effective until cancelled.

The property owner was later sued by a person who was injured when a wall of the property fell on him. The owner tendered a defense to the tenant's insurance company, who declined coverage. The property owner sought a declaratory judgment action against the insurance company. The trial found that the insurance policy was in full force and effect on the date of the accident and based this finding primarily on insurance company's failure to notify the property owner of cancellation of the policy as required by the certificate of insurance.

The insurance company appealed. The appellate court found that notice was required by the terms of the certificate. Further, the court found that the insurance company cannot resort to provisions of the master policy to support its contention because the property owner was never issued a copy of this policy. Therefore, the policy was effective on the date of the accident.

As we have seen, there are unusual cases where the certificate of insurance controls over the policy. We also have seen situations where the court will rule that the insurer is estopped from denying coverage because the insurer's conduct created justifiable reliance upon the coverage it stated it would issue. These cases illustrate that while there is a general consensus that the language of the policy controls, there are exceptions based upon unique circumstances. Therefore, agents must be careful not to frivolously issue certificates of insurance relying on the general rule.

E. Agents' Liability

On September 8, 2006, the Texas Department of Insurance issued the following bulletin¹²:

The Department reminds all carriers and agents that a certificate of insurance must clearly and accurately state the insurance coverage provided. A certificate of insurance that obscures or misrepresents the insurance coverage provided under the insurance policy is a violation of the

¹¹ *John Bader Ins. Co. v. Employers Ins. of Wausau*, 441 N.E.2d 1306 (Ill. App. Ct. 1982).

¹² Commissioner's Bulletin #B-0035-06.

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

Insurance Code, including §§541.051, 541.061, and 4005.101(b)(5) and (6). Additionally, agents are reminded that they are prohibited from altering the terms or conditions of a policy under Insurance Code §§4001.051(c) and 4001.052(b). Violation of the provisions of Chapter 541, 4001, or 4005 may result in administrative penalties and/or license revocation.

Texas courts have been hard-pressed to find an agent liable for misrepresenting the insurance coverage in a certificate of insurance. Courts have made it clear that a party cannot detrimentally rely upon either certificates of insurance or oral representations when they contradict the express, unambiguous terms of the policy. However, Texas' judicial landscape and political environment has been changing, and this could mean less favorable results for insurance carriers.

For example, *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.*¹³ demonstrates that agents and brokers who rely on the premise that certificates are not contracts and cannot result in agency liability may be doing so at their own risk. In *Binyan Shel Chessed, Inc.*, a property owner contracted with a builder to perform renovations. The builder's insurance broker sent the owner a certificate of insurance that said the builder had liability insurance with Colonial and that the owner was named as an additional insured. Shortly thereafter, a worker for one of the builder's subcontractors was injured. In this action, the owner, builder and the broker sought coverage from Colonial.

Colonial moved for summary judgment claiming they do not have a policy covering the builder nor the owner. The broker separately moved for summary judgment on the grounds that there was no privity of contract between it and the plaintiff, and the certificate of insurance contained a disclaimer that it conferred no rights on the certificate holder. The court held that further discovery would yield no basis to impose liability upon Colonial, which did not issue an insurance policy. However, with regard to the

broker, the court found that summary judgment at this juncture would be premature. Because the certificate was issued over six months after the policy purportedly went into effect, a question arises as to why the broker was not aware that the policy had not been paid for at the time the certificate was issued. Further, a question arises as to how the broker came to use a policy number with a prefix which was never a policy prefix in existence for this carrier. The court found that depositions should therefore be held.

While this case was decided in New York, it illustrates that it is often difficult to predict the outcome when disputes over certificates of insurance go before the courts. Agents and brokers must be mindful to accurately represent the policy on the certificate. Further, insurers should make no promise to do anything based upon the certificate.

III. COMMON ISSUES THAT ARISE WITH THE ISSUANCE OF CERTIFICATES OF INSURANCE AND HOW TO AVOID THEM

As we have seen by the cases above, there are a myriad of problems that can arise surrounding the issuance and reliance on certificates of insurance, which all parties need to be aware of and know how to avoid, if possible. This section will focus on the common issues that arise when working with certificates of insurance and ways that carriers, agents and brokers who are issuing these certificates and contractors who are relying upon them can attempt to avoid these issues.

A. Addition Insured Status

One of the most common problems with certificates of insurance is when certificate holders are listed as additional insureds on certificates without the policy actually reflecting that. As the above cases illustrate, a contractor or property owner is not added to the policy as an additional insured just because the certificate lists them as an additional insured. Often times, certificate holders do not realize they are not listed as additional insureds on the policy until litigation has ensued and they seek a defense from the insured's general liability policy and are denied.

¹³ *Binyan Shel Chessed, Inc. v. Goldberger Ins. Brokerage, Inc.*, 795 N.Y.S.2d 619 (N.Y. App. Div. 2005).

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

To avoid any potential liability, the obvious solution is that insurers and brokers should not list the holder as an additional insured unless the policy is endorsed to that effect. However, they should further educate the insured that the terms of the policy control – not the language on the certificate.

Certificate holders should be aware that some insurance agents may mistakenly or intentionally issue certificates that do not accurately reflect coverages and policy terms. Contractors should not rely upon certificates of insurance in determining whether they are properly insured. The only way for contractors to know whether they are properly covered is to review the insurance policy. In fact, contractors can include a provision in their contracts that require their subcontractors to produce the desired insurance policy for their review.

B. Impossible or Impractical Requests

Agents are sometimes asked to produce certificates that comply with impossible or impractical requests. For example, a contractor may need coverage for an uninsurable request, and they may need it immediately. When refusing to do so, agents are often faced with the claim from the insured that they know of agents that can and will provide such certificates. In an attempt to not lose a client, these impossible or difficult requests often lead to the issuance of fraudulent certificates by insurers.

To avoid this problem, insurers and their agents need to educate policyholders and certificate holders that certificates of insurance issued by the agency, and the policies described thereon, cannot always satisfy their requests. Further, insurers should make no promise to do anything based upon the certificate.

Insureds need to know that all their requests cannot be satisfied by the policy. Further, insureds should give agents ample time to search for the coverages required by the construction contract. If coverage is available, include the premium costs in the contract bid. If coverages are not available, negotiate such requirements from the contract or pursue another source of coverage. It is important to know the costs before bidding on a contract.

Insureds should also consult an attorney to review the contracts on their behalf, in addition

to having their insurance agent review the insurance specifications. Both can advise what requirements may be impossible or difficult to insure and what coverage is actually sought and provided.

C. Notice of Cancellation or Changes in the Policy

As we previously discussed, the ACORD form contains language that the insurer will “endeavor” to send notice to the certificate holder if any of the policies are canceled. However, contractors or property owners often will try to negotiate around this and require the subcontractor to send notice of cancellation. The problem is that “ISO standard” additional insured endorsements make no provision for cancellation, much less change, notice to be sent to an additional insured. Thus, while the certificate may be altered to require notice, the insurer is usually under no contractual obligation to provide such notice.

Further compounding this problem is that even if the certificate is left with the “we will endeavor language,” many insurers fail to take the necessary steps to insure the contractor or property owner is provided notice. Therefore, insurers should implement procedures to see that certificate holders are properly notified of policy cancellations. Certificate holders need to be aware that the terms of the policy control.

D. Reviewing Contracts

In some instances, insureds will ask their agents to review the insurance requirements in their construction contracts in order to determine what types of insurance are needed to comply with the contract requirements. However, these construction contracts are often huge and complex. If agents and brokers with no legal training or experience are taking on the obligation of reading and interpreting these complex documents, this increases the chance of errors and exposes the agents and brokers, as well as the contractors, to liability. To avoid any potential exposure to liability, insurers should consult with their attorney before taking on this onerous task and advise their insured to consult with his or her attorney.

CERTIFICATES OF INSURANCE: COMMON PROBLEMS THAT ARISE AND WHAT YOU CAN DO TO AVOID THEM

E. Certificate vs. Policy Limits

There are situations where a contractor is awarded a job where the insurance requirements include “not less than” \$1,000,000 in CGL coverage. However, the contractor has a \$2,000,000 CGL occurrence limit, but wants the certificate of insurance to show only a \$1,000,000 limit. While Texas courts have not addressed this issue, given today’s litigious environment and the fact that the policy limits would control, care should be taken to accurately reflect the current policy limits in accordance with the instructions of the certificate.

determining what insurance is necessary, consult an attorney and involve your insurance agent in the process.

IV. CONCLUSION

The Texas Supreme Court has taken a strict approach that those who rely upon certificates of insurance do so at their own risk. This is why certificates of insurance can be such dangerous documents and both insurers and insureds need to develop methods to protect themselves from liability.

In order to avoid liability while keeping your clients happy, insurers should establish written procedures for agency staff to follow when processing certificates of insurance. If using the ACORD Form, follow the instruction guide when preparing the certificate. Never make a promise to do anything based on the certificate. Designate someone to double-check each certificate before it is delivered, and document this process. Also, educate your clients of the limitations of the certificate and their requests.

Contractors should not depend on certificates of insurance to evidence a subcontractor is insured. Contractors should verify the accuracy of the certificates with the policy. However, contractors should go a step further and require the subcontractor to submit its policy by including a clause to this effect in the contract. While this may seem like a daunting task, this is the only way to be assured your subcontractor has the desired coverage.

Further, if you are requesting a certificate of insurance from your agent in order to bid or get paid on a job, give your agent or broker time to process your request, and realize that not all of your requests may be satisfied. If you are having difficulty interpreting your contract or