CALLING A CEASE FIRE IN THE CERTIFICATE OF INSURANCE WARS

ACEC Risk Management Committee*

In war, events of importance are the result of trivial causes. – Julius Caesar

Battles about certificates of insurance can sour relationships and sow the seeds of discord with clients at the very beginning of a project. And they are becoming more and more common.

Here is a short history of a typical certificate war: The design firm is awarded a new project. Corks pop. The team assembles. Spirits and expectations are high. The first sign of trouble is a call or an email from the project owner's certificate checker: *Your certificate of insurance is not in compliance with the insurance requirements set forth in our contract. Please reissue.* The design firm calls its broker, confident that this little paperwork glitch will be simple to fix. But there is bad news. This is not a case of a misspelled name or a typo. The certificate checker is correct: The design firm's insurance program does not, in fact, comply with the contract requirements.

This is never a good moment, but the design firm rallies and asks how much it will cost to purchase compliant coverage. But then comes an even worse moment, when the broker explains that the contract requirements are impossible to satisfy. The coverage the owner wants is no longer available, is not available from a stable and financially-sound carrier, or, all too often, never was available at all. The design firm tries to make the owner see reason, but sometimes this drama ends with calls and emails to the design firm, its broker, or both, threatening to award the job to another firm if a compliant certificate is not produced *today*.

Even if the problem is eventually resolved, the bad impression created by this conflict can tarnish a design firm's relationship with the owner before it ever gets a chance to shine.

How did we get here? How did a one-page summary of insurance coverage that, by its very terms, does not "amend, extend or alter" any insurance policy become the source of so much trouble? And what can design professionals do to avoid certificate rejections and the problems they cause?

A change in certificate language touches off a new round of skirmishes

A recent change in the certificate of insurance form has sparked new conflicts between design professionals and their clients. To understand why, you need to understand not just what certificates of insurance are now, but what they were in the past.

Today, we understand certificates of insurance as mere "snapshots" of coverage[1]—summaries with no ability to affect the underlying policies. But decades ago, they were functional legal documents with the power to modify or amend the underlying insurance policies, much as endorsements would do.

[1] It is worth noting that this "snapshot" is especially blurry when it comes to professional liability insurance, which typically has limits that are reduced by sums spent on defense and indemnity for claims made in a particular policy year. A certificate may show that the insured has a $1 million professional liability insurance policy in force – even if on that day, only $500,000 in limits remains available. The certificate reflects the limits shown on the face of the policy, not the remaining policy limits.

This changed in 1976, when insurers banded together to form ACORD,[2] the Association for Cooperative Operations Research and Development, to develop standard forms for the insurance industry. The certificate of insurance form they created, ACORD 25, stated right on its face that it did not "amend, extend, or alter" the insurance policy. The form included a statement that the insurer would "endeavor to" provide notice of policy cancellation to the certificate holder. It became common for contracts to call for the deletion of the words "endeavor to" in order to state a more absolute requirement. Of course, none of this changed underlying coverage, but it did allow certificate checkers to tick the "notice of cancellation" box on their checklist.

But things changed in September 2010, when a new version of ACORD 25 was issued. ACORD deleted the paragraph saying that the insurer would endeavor to provide notice, and replaced it with a paragraph that made no promises at all:

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

In other words: Read the policy.

And it turned out that certificate checkers everywhere wanted to do just that. They started rejecting certificates and demanding evidence, in the form of endorsements or other policy language, that policies provided for notice of cancellation to certificate holders. In fact, some contracts required notice not just of cancellation, but of "material change" to policies, non-payment of premium, reduction in aggregate limits, and other conditions. The certificate checkers wanted to see those endorsements, too.

For many design professionals, the unhappy surprise was that their policies did not, and in some cases ***could not*** comply with contract requirements. This sent brokers scrambling to try to convince insurers to produce compliant endorsements lest their design professional clients lose hard-won projects. Some acquiesced, others didn't.[3] Some design professionals were forced to change insurance carriers, thus disrupting carefully planned insurance programs. Some brokers resorted to issuing certificates that did not accurately reflect policy coverage; some even provided endorsements that were not part of the insured's policy.

And the background music to all of this madness was (and still is), "If we don't get a compliant endorsement, we won't pay/will throw the design professional off the jobsite/move on to the next compliant bidder…"

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[2] Practice Note: One clue that a contract has been drafted by someone who doesn't understand insurance is the misspelling of this acronym as "ACCORD" – although this error could, of course, also be caused by careless use of spell check.

[3] For example, many insurers balked at providing notice of "material change," stating, with some validity, that they couldn't know what changes would be "material" to certificate holders. Would the auto liability insurer have to provide notice every time a new auto is added? Would the Commercial General Liability (CGL) insurer have to let the certificate holders know every time an Additional Insured is scheduled? Insurers want no part of these quandaries, and certainly don't want to issue the torrent of notices that a literal interpretation of "material change" would require.

GUEST ESSAYS

Battles over impossible insurance requirements continue

Although the revised ACORD 25 touched off a fierce round of certificate fighting, this war was raging long before September 2010.

The ugly truth is that contracts often set forth insurance requirements that cannot be satisfied. Insurance, particularly construction insurance, is a complex and specialized field, and becomes more so all the time. Even the best lawyers, and, for that matter, sophisticated project owners, may lack the insurance knowledge needed to draft attainable, appropriate insurance requirements. This is a powerful argument for involving insurance professionals early in the drafting process, but too often they are never consulted at all.

And, though it pains insurance people to admit it, "Insurance Requirements" typically is not the contract section that excites keen interest amongst project participants. (At least, that is the state of affairs before things go wrong.) Surprisingly often, insurance requirements are copied from an old contract for similar (or not so similar) services. So, for example, contracts often include requirements for certain policy endorsements that were needed in 1973, but are no longer available today, because they have been incorporated into the CGL policy and are no longer necessary.

And when insurance requirements are "recycled" from other agreements, the resulting contracts often call for coverages that are obtainable, but have absolutely no relationship to the project or the design professional's services. So, for example, we see a requirement for stand-alone pollution coverage imposed upon a design professional who will be performing a feasibility study for a new bike path. Yes, the design professional probably could obtain the coverage, but it will have little or no value in this context, and will cost many times what the design professional will earn on the job.

But once unobtainable or inappropriate requirements are in the contract, it is very difficult to convince owners—let alone their certificate checkers—that the coverages called for are unavailable or unnecessary.

Certificate fights can be prevented

Many things can go wrong on a project. Insurance should not be one of them.

The first and most important step in avoiding the Battle of Certificates sounds simple, but may require nagging on your part: Identify the owner's insurance requirements as early as possible in the negotiations process. It can be hard to make owners focus on insurance when there are so many more exciting terms to discuss, but be persistent. Ideally, you will discover the owner's requirements before providing any services, but you must know them before you sign a contract. Once you have inked the deal, you have little or no leverage to negotiate about unreasonable or unattainable insurance requirements.

The second rule is a corollary to the first: Have your insurance broker review the requirements as soon as possible. Your broker can tell you if your current insurance program is (or can be) compliant, as well as any additional costs that may be associated with compliance. There is no point in pursuing a project if its profits will be consumed by additional insurance expense. Your broker can help you plan your negotiations by identifying requirements that are unreasonable or unattainable in today's insurance market and suggesting reasonable alternatives. Another reason to start this process early is the fact that some

coverages, like project-specific insurance or higher limits for professional liability insurance, may take some time to obtain.

Your protocol for requesting certificates of insurance can help you avoid problems and disputes. Veterans of the certificate wars suggest the following tips for managing the certificate of insurance process:

- Request certificates early; do not wait until the last minute.
- Use a standardized certificate request form. This helps ensure that complete information is provided every time.
- Provide the complete name, address, and email address of the certificate holder(s).
- Provide a project number with your request, and, if appropriate, the project name.
- Include a copy of the part of the contract that sets forth the insurance requirements.

Timely attention to the owner's insurance requirements and a sound protocol for requesting certificates of insurance will help minimize battles about insurance coverage, avoid unanticipated insurance expense, and, most importantly, preserve good relationships with clients. Peace – especially with clients – is a beautiful thing.

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