

Insurance Matters!

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A Newsletter of the **Real Property and Liability Insurance and Surety Committee**
of the Real Property Probate and Trust Law Section of The Florida Bar

Conflicts in Representing Insureds and Insurers

By: Christine M. Hoke,

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Tripartite Relationship

There are potential conflicts that arise in the tripartite relationship in representing insureds and insurers. The tripartite relationship exists between the insurer, the insured, and the attorney hired to defend the claim. The attorney represents either the interest of the insured or the dual interests of the insurer and insured. The tripartite relationship is governed by the (1) insurance policy, (2) the representation arrangement, and (3) duties owed by their common attorney to both clients under the ethics rules. In 1999, the Insurance Practices Special Study Committee (IPSSC) issued a disclosure statement to provide guidance to the defense attorneys and disclose information about representation to the insureds. This is known as the Statement of Insured Client's Rights which is now required by the Florida Bar in Rule 4-1.8 of the Rules Regulating the Florida Bar.

Under the Insurance Contract or Policy **between the insurer and the insured**, typically the policy requires the insurer to provide a broad duty to defend any covered claim filed against an in-

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Recent Changes to ACORD's Certificates of Insurance

By: Scott P. Pence,

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The Association for Cooperative Operations Research and Development, or "ACORD" as it is more commonly referred to in the insurance industry, recently updated its family of forms known as Certificates. This paper addresses some of the practical effects of the most significant change made to some of the more commonly used certificate forms ("Forms").

What is a Certificate of Insurance? A certificate of insurance is a document that summarizes a policy holder's insurance coverage. It is typically requested by the policy holder to provide evidence as proof of compliance with contractual insurance requirements. For example, a mortgagor of a building may request evidence of property insurance coverage upon closing; or a construction contractor may need to provide evidence to a developer that it has workers' compensation/employer's liability and appropriate liabil-

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ity insurance coverage in place.

A certificate holder, the party to whom the certificate of insurance is provided, often mistakenly believes it can rely upon the information in the certificate of insurance in the same way it could rely upon the information within the actual insurance policies. However, the Forms contain numerous disclaimers that effectively limit a certificate holder's ability to rely upon the information within them. For example, the Forms generally state: (1) the certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder; (2) the certificate of insurance does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies identified within it; (3) the certificate of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder; (4) the certificate of insurance certifies that the policies identified within it have been issued to the insured for the policy period indicated; and (5) notwithstanding any contract or other document for which the certificate of insurance is issued, the insurance afforded by the policies identified within the certificate is subject to all of the terms, exclusions and conditions of such policies.

Generally speaking, a certificate of insurance is merely evidence that the policies identified within it are in force at the time the certificate is issued. It should be viewed as a snapshot in time, with no assurance that the coverage identified within it will not be or has not already been modified or cancelled.

Recent Change to Notice Language. The most significant recent change to the Forms relates to the insurer's requirement to provide notice in the event any of the policies identified within the certificate are cancelled before the expiration date noted therein.

Previous versions of the Forms contained language stating that if any policy was cancelled before its expiration date, the issuing company would "endeavor to mail ___ days written notice to the certificate holder." Certificate holders frequently required the removal of the words "endeavor to." But virtually every state does not allow a change in a certificate that attempts to modify a policy unless the certificate is filed with and approved by the state as a policy form. Because most insurance policies only require the insurer to provide notice to the primary insured, removal of the words "endeavor to" raised questions as to whether or not doing so constituted an attempt to modify the policy.

Driven by Certificate of Insurance Bulletins issued by the South Dakota Insurance Department, ACORD replaced the "endeavor to" language in the new forms with language stating if any policy is cancelled before the expiration date of that policy, "notice will be delivered in accordance with the policy provisions." As mentioned above, the standard insurance policy requires the insurer to provide notice only to the primary insured, so this new language is problematic for a certificate holder.

Possible Solutions. What can the certificate holder do to address this issue? Following are a few options (and potential associated drawbacks), to consider:

- Require the insured's agent to issue the old version of the ACORD form, without the "endeavor to" language. However, agents are generally not authorized to use any forms other than the most recent versions and doing so would likely be a violation of the ACORD licensing agreement.
- Require the insured's agent to issue a "non-ACORD" certificate of insurance. However, this raises copyright concerns if a specific form substantially similar to the ACORD form is used. In addition, if the terms of the certificate are construed as an attempt to modify the policy, the state might require that the certificate be filed and approved as a policy form.
- Require the insured contractually to provide notice of any cancellation, non-renewal or modification of the insurance policies directly to the certificate holder. Of course, this comes with the usual risk that the insured may not live up to its contractual obligation.
- Require an updated certificate of insurance to be provided according to an established schedule or established milestones (e.g. with each payment application or on a quarterly basis). Each time the

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sured. Doe v. Allstate Ins. Co., 653 So.2d 371 (Fla. 1995). Insurers typically provide a good faith defense to the insured in exchange for the insured to relinquish control of the defense to the insurer and agree to cooperate in that defense. Schuster v. S. Broward Hosp. Dist. Physicians Prof'l Liab. Ins. Trust, 591 So.2d 174 (Fla. 1992). Under the insurance contract, the insurer protects its interests and the interests of the insured by assuming control of the defense and related costs. Doe v. Allstate Ins. Co., 653 So.2d 371 (Fla. 1995). Insurers' obligations are not just merely to fund the insured's defense, and instead insurers are required to protect the interest of the policy holders in the same degree that they protect their own interests. Schuster v. S. Broward Hosp. Dist. Physicians Prof'l Liab. Ins. Trust, 591 So.2d 174 (Fla. 1992).

The retainer agreement or representation agreement creates contractual rights and obligations **between the Insurer and defense attorney** all of which arise at the time the insurer retains the attorney. The representation agreement or retainer agreement outlines the terms and conditions under which the attorney will provide representation. The terms and conditions include billing guidelines, litigation guidelines, audits, all of which control the quality of representation and defense costs. In most jurisdictions, the retainer agreement is a dual representation agreement which represents the common interests of **both** the insured and the insurer so long as those interests are not in conflict.

Further, the **Rules Regulating the Florida Bar** provide for ethical rules to the tripartite relationship to ensure that neither the policy obligations nor the retainer agreement violate the attorney's duty to maintain confidentiality and to remain free of conflicting interests. A lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. Rule 4-1.7. A lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. The duty is on every lawyer at the inception of the representation to clarify its representation to avoid confusion. IM

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certificate holder receives a new certificate of insurance, the certificate holder would get a fresh "snapshot." However, this does not provide for notice of changes or cancellation in between milestones.

- Require the insured to obtain a policy endorsement requiring the insurer to provide the notice. This is probably the best solution for the certificate holder, but not all endorsements are the same. There are two different types of endorsements the insurer might be willing to provide:
 - **Blanket Endorsement:** Under a blanket endorsement, the insurer agrees to provide notice to the certificate holder if the insured has agreed to do so contractually. This is a good solution, if the insurer is advised to whom it is required to provide notice. The insured must first notify its agent if it enters into a contract requiring such notice. Then, the agent must notify the insurer. If either of these parties fails to notify the next in line, the insurer will not know that it is required to provide cancellation notice to the insured and the certificate holder will not receive the benefit of the endorsement.
 - **Scheduled Endorsement:** Under a scheduled endorsement, the insurer agrees to provide notice to the specific entity named as the certificate holder and the insurer adds that entity's name and contact information to the policy itself. This is much better than a blanket endorsement because it eliminates the risk of a breakdown in communication.

Conclusion. Accepting a standard ACORD form certificate of insurance at the onset of a project as the sole form of evidence that another party is in compliance with specified insurance requirements does not provide adequate assurances to the certificate holder of continued compliance with insurance requirements. Certificate holders have options though, and should explore those options early in the negotiation process because they take time and, if started too late, have the potential of delaying finalizing a deal. IM

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Committee Mission Statement

The Purpose of the Real Property and Liability Insurance and Surety Committee is to educate the Bar on insurance, surety and risk management issues. The ultimate goal is to grow the Committee to the point it can seek Board Certification in Insurance and Risk Management.

Leadership & Subcommittees

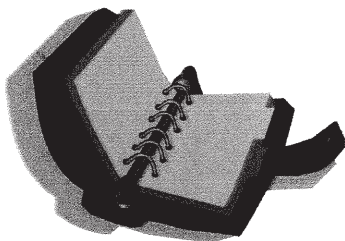
To get involved, contact the appropriate person below:

Co-Chair - Wm. Cary Wright (cwright@carltonfields.com)
 Co-Chair - Andrea Northrop (andrea.northrop@loausa.com)
 Website - Christine Hoke (cmhoke@caseyciklin.com)
 Newsletter - Scott Pence (spence@carltonfields.com)

Schedule of Upcoming Committee Meetings

When: 12:00-1:00 ET on the third Monday of every month.
 Where: Via Teleconference
 How: Dial-in number: **888-376-5050**
 Participate Code: **8425484201#**

The first part of each teleconference is devoted to Committee business, followed by an insurance/surety-related CLE presentation that typically lasts approximately 50 minutes.



Dates of Upcoming Committee Meetings:

May 21, 2012
 June 18, 2012
 July 16, 2012
 August 20, 2012

Schedule of Upcoming RPPTL Section Meetings

May 31-June 3, 2012
 Executive Council Meeting/
 RPPTL Convention
 Don CeSar Beach Resort
 St. Petersburg, Florida

July 25-28, 2012
 Executive Council Meeting
 The Breakers
 Palm Beach, Florida

September 13-15, 2012
 Executive Council Meeting
 Ritz-Carlton Key Biscayne
 Key Biscayne, Florida

Committee Members

Adele I. Stone
 Arthur J. Menor
 Andrea Northrop
 Brian A. Wolf
 Ben Dachepli
 Beth-Ann Schulman
 Brian Cross
 Bruce Alexander
 Bruce Partington
 Christine Hoke
 Claire Bailey Carraway
 Daniel Zorrilla
 Diane Perera
 David D. Eastman
 Eileen Jacobs
 Fred Dudley
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 Giselle Leonardo
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 Jason J. Stango
 Jay Mussman
 Jim Martin
 Joanna B. Ozkaya
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 Joel McTague
 Kenneth S. Direktor
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