

CHANGES TO THE ACORD 25 CERTIFICATE OF LIABILITY INSURANCE

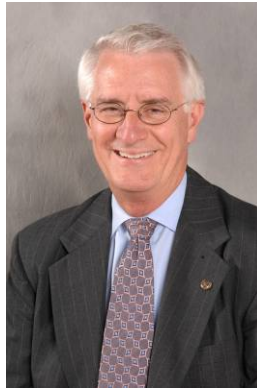
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Routinely, in commercial and real estate transactions, one party requires the other party to maintain liability insurance covering certain risks inherent in the transaction. The party obtaining the insurance is required to provide a “certificate of insurance” to the second party so that the second party will know that the insurance required by the contract is in place and that it will not be canceled or modified without the second party receiving notice of such. Standard provisions in contracts and leases covering this issue read something like the following:

“Tenant, at its sole cost and expense, shall procure liability insurance in an amount satisfactory to Landlord, shall name Landlord as an additional insured under said policy and shall provide to Landlord a certificate of insurance evidencing the existence of said policy which certificate shall certify that the policy shall not be canceled or altered without 30 days’ prior written notice to Landlord.”

“Contractor shall purchase and maintain such insurance as will protect it from claims for damages because of bodily injury or property damage. A certificate of insurance showing such coverage and naming Owner as an additional insured shall be filed with Owner prior to commencement of work. Said certificate of insurance shall contain a provision that the coverages afforded under the policy will not be canceled or non-renewed without at least 30 days’ prior written notice to Owner.”

“Borrower, at its sole cost and expense, will obtain and maintain public liability insurance covering the



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Property. Said policy of insurance shall name Lender as an additional insured, and Borrower shall provide to Lender a certificate of insurance evidencing the existence of such insurance and certifying that the policy shall not be canceled or altered without thirty (30) days’ prior written notice to Lender.”

Are you using lease forms, construction contract forms, financing forms or other forms with provisions similar to the above? If you are not aware of it yet, you should now know that such contract provisions are no longer acceptable for the reason that the Standard ACORD 25 Certificate of Liability Insurance has been modified such that brokers can no longer issue the type of certificates required by provisions like the above.

Historically, the standard language included in the ACORD Certificate of Liability Insurance Form 25 was as follows:

“Should any of the above-described policies be canceled before the expiration date thereof, the issuing company will endeavor to mail 30 days’ written notice to the certificate

holder named to the left. But failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives.”

Most brokers and carriers, when requested to do so, have been prepared to modify this standard provision historically so that it would then read as follows:

“Should any of the above-described policies be canceled before the expiration date thereof, the issuing company will mail 30 days’ written notice to the certificate holder named to the left.”

No more. In September 2009, ACORD revised the Form 25 Certificate of Liability Insurance, and effective September 2010, the old form may not be used. The new form simply reads:

“Should any of the above-described policies be canceled before the expiration date thereof, notice will be delivered in accordance with the policy provisions.”

In other words, under the new form, the certificate holder has no rights of any kind to receive notice of changes to, or cancellation of, the policy **unless such notice is required in the policy of insurance itself.**

What do you do going forward? First, brokers are not going to modify the certificate to provide that the certificate holder must receive notice of cancellation. If brokers do so, such a modification will be ineffective to bind an insurance company.

One possible solution is to include a provision in the lease, construction contract or loan documents requiring the tenant, contractor or borrower to obtain a policy of liability insurance

with an endorsement naming the landlord, owner or lender as an additional insured which endorsement must provide that if the insurance company elects to cancel or non-renew the coverage, the insurer will provide to the additional insured a 30-day notice (or a 10-day notice in the event of cancellation for non-payment of premium) of such cancellation or non-renewal. Understand, however, that the insurance industry is still trying to figure out exactly how it is going to deal with this issue, and most carriers at this time probably will balk at issuing such an endorsement.

At a minimum, the contract should require that the landlord, owner or lender be provided a certificate of insurance showing compliance with the insurance requirements of the contract, and the contract should further require that in the event the tenant, contractor or borrower receives any notification from its

insurance carrier of a change in coverage, cancellation or non-renewal, then the tenant, contractor or borrower must provide a copy of that notice forthwith to the landlord, owner or lender. Obviously, another option is for landlords, owners and lenders to develop and employ in-house procedures to more closely track with insurance companies expiration and renewal of insurance policies by their tenants, contractors and borrowers. However, even this step will not ensure that one receives notification of policy cancellations or changes in coverage prior to a scheduled policy expiration date.

Obviously, the change in the ACORD form has caused, is causing and will cause problems in many transactions. For example, what do you do with existing leases or other long-term contracts which require certificates of insurance containing the old language when those certificates will no longer be available? It is

anticipated that the insurance industry will sort out all of these issues over the course of 2011, so that hopefully by the end of the year we will have a better idea what insurance companies might be prepared to do in order to ensure that additional insureds receive some notification from someone, other than the party with which the additional insured is contracting, in the event of any cancellation or material change in the policy.

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