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# **ACORD BUT NO SATISFACTION: WHY CONTRACTORS ARE CHALLENGED BY THE NEW ACORD CERTIFICATES OF INSURANCE**

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During the past thirty years, the construction industry has relied on standard “certificates of insurance” as the most timely and efficient way to verify the existence and terms of a project participant’s insurance coverage before, and during, work on a construction project. The use of these standard certificates, which are produced by an insurance industry association named ACORD (Association for Cooperative Operations Research and Development) <http://www.acord.org/Pages/default.aspx> , is so widespread and accepted in the construction industry that the certificates have almost come to be viewed as operative legal documents that confer rights upon the certificate holder, especially regarding the issue of who is entitled to notice of cancellation of the project participant’s insurance coverage. In reality, however, the certificates are not operative legal documents. Instead, they are merely a snapshot of a particular insurance policy’s existence and terms as of the date that the certificate is issued.

To address the ambiguity about the legal significance of the certificates of insurance, ACORD recently made a change to its “ACORD 25 – Certificate of Liability Insurance,” specifically to clarify a misconception regarding the certificate holder’s right to receive advanced notice of cancellation of the insurance policy. The old ACORD 25 certificate contained express language stating that a certificate holder would receive such notice. This wording suggested that the certificate holder was

entitled to notice of cancellation of the insurance policy—even if the policy itself did not provide that right to the certificate holder. In contrast, the new, updated ACORD 25 certificate clarifies that notice of cancellation is governed purely by the terms of the insurance policy itself – which, in most instances, has no provision granting such rights to the certificate holder. Not surprisingly, this change to the ACORD 25 certificate has caused a considerable stir in the construction industry for all players involved.

While certificates of insurance play an important role for informational purposes, they have inherent limitations. First, a certificate of insurance is not a full recitation of a particular insurance policy's terms and conditions. Second, and more importantly, a certificate of insurance does not alter the terms and conditions of the applicable insurance; neither does it confer any rights or responsibilities on the certificate holder. In other words, a certificate of insurance does not amend, extend, or alter the coverage afforded by the insurance policy to which it pertains.

Because construction contracts usually include obligations for one party to the contract – such as the general contractor or subcontractor – to maintain adequate insurance coverage, and because that insurance coverage often provides protection to the other party (e.g., additional insured coverage for the owner), a common provision in construction contracts is a requirement that the party obligated to maintain the insurance coverage also provide some period of advance notice to the other party before the insurance coverage is cancelled, or otherwise allowed to expire.

In an apparent effort to bring its certificates of insurance within the requirements of standard contractual provisions, ACORD included a provision in the pre-2009 versions of its certificates that stated:

*SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL \_\_\_\_\_ 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.*

See ACORD 25 – Certificate of Liability Insurance, (2001/08). In order to have a certificate comply with the terms of their clients' construction contracts, insurance producers issuing these certificates would often insert the number "30" in the blank field quoted above regarding the number of days for written notice.

The problem with the old approach used by ACORD and the insurance producer community, however, was two-fold. First, a typical liability policy obligates an insurer to notify **only the first named insured** of policy cancellation, **but no one else**. For example, the standard commercial general liability policy issued by Insurance Services Office, Inc. (the creator of the standard ISO insurance forms) provides that the only party entitled to receive notice of cancellation is the first Named Insured. See CG 00 01 12 04, Commercial General Liability Coverage Form, ISO Properties, Inc., 2007.

The purpose of a certificate of insurance is limited to providing evidence of insurance coverage by summarizing information regarding the applicable insurance policy; the certificate is not intended to confer on a certificate holder new or additional rights beyond what the policy provides. The provision in the old ACORD certificate quoted above extends beyond the policy provisions regarding the right to receive notice of cancellation, by purporting to create a right in a certificate holder to receive notice of cancellation.

The second problem is that, even if a certificate could be used to alter, expand or modify the terms of the applicable policy, compliance with the requirement to provide a certificate holder with a thirty-day notice of cancellation can often be a practical impossibility. For example, many states' insurance regulations allow an insurance carrier to cancel an insurance policy with only a ten-day notice for failure to pay the required premium. Moreover, an insured can cancel its own insurance policy effective immediately whenever it opts to do so.

Over the course of the past few years, the Insurance Departments of over thirty states have issued Bulletins or otherwise promulgated regulations addressing the subject of insurance certificates that do not accurately represent the terms or conditions of a particular insurance policy. In fact, the Insurance Departments in several states have specifically addressed the issue of the notice of cancellation issue presented by the pre-2009 versions of the ACORD certificates; they have concluded that the notice of cancellation issue is a policy right and, therefore, is governed strictly by the policy.

During the summer of 2009, ACORD's Certificate Forms Working Group reviewed ACORD's various certificates. The Group recommended that the following text regarding the issue of notice of cancellation be substituted for the language contained in the pre-2009 certificates:

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

See ACORD Certificates Frequently Asked Questions, July 20, 2010, [http://www.acord.org/standards/forms/Documents/ACORDCertificatesFAQ\\_201004.pdf](http://www.acord.org/standards/forms/Documents/ACORDCertificatesFAQ_201004.pdf). The word "endeavor" was removed "because policy cancellation provisions generally don't use the word endeavor," and "[o]nly a policy can obligate an insurer to provide notice of cancellation." In other words, ACORD explained, "[u]nless a policy's provisions explicitly provide for notice to a party also listed as the certificate holder on the certificate of insurance, the insurer is not obligated to notify that party."

This proposed amendment was approved by ACORD's membership, and new versions of ACORD's certificates were published by ACORD in October 2009, with the new notice of cancellation language incorporated. In effect, the new notice of cancellation language makes it clear that there is no duty on anyone's part to warn of the potential cancellation of an insurance policy, except as provided for in the insurance policy, which is usually only to the first Named Insured in a typical liability policy.

Following the publishing of ACORD's new certificates in October 2009, at least three state insurance departments (Kansas, North Carolina, and South Dakota) issued directives to all interested parties instructing them that they were required to use only the new versions of the certificates. See, e.g., Kansas Insurance Department Bulletin 2010-2, dated August 30, 2010; North Carolina Department of Insurance Bulletin No. 10-B-01, dated February 1, 2010; and South Dakota Department of Insurance Bulletin No. 10-01, dated January 13, 2010. Despite these directives, the insurance and construction industries' willingness to embrace the new certificates was anything but prompt.

Many insurance producers issuing certificates found themselves in a difficult position, because municipalities, large contractors, and other types of certificate holders refused to accept the new certificates due to the elimination of the old ACORD form's cancellation provision. As a result, insurance producers continued to issue the old versions of the certificates through the end of 2009 and most of 2010 in order to comply with their clients' instructions and, presumably, out of a fear of losing important clients.

This issue was brought to a head in October 2010 because, under ACORD's licensing agreement with users of its forms, the prior edition of superseded forms can only be used for one year from the time that the new forms are introduced. Therefore, as of October 1, 2010, licensed ACORD form users (*i.e.*, the insurance producers issuing ACORD certificates) were required by the terms of their license agreement to use only the new version of the ACORD 25 – Certificate of Liability Insurance. Doing otherwise would be a violation of ACORD's licensing agreement and, therefore, an unlawful use of ACORD's copyrighted documents.

Now that insurance producers are prohibited from using the old versions of ACORD's certificates, an interesting dynamic is occurring in the insurance and construction industries. Some insurance carriers have developed endorsements that can be added to liability policies to comply with certificate holder notice requirements in construction contracts. By obtaining such an endorsement, insurance producers can help their clients attempt to remain compliant with contractual obligations regarding cancellation notice provisions.

Other insurance carriers have taken the view that the most logical solution to this problem is for the insurance producer to send notice of cancellation to any affected certificate holders. The insurance carrier may include such an express provision in the insurance producer's licensing agreement with the insurance carrier, or may seek to add an endorsement to the insurance policy that memorializes the client's authorization for the insurance producer to send notice of cancellation or non-renewal to a certificate holder or other third-party.

The differing views on the part of insurance carriers regarding who is responsible for dealing with the notice of cancellation issue may leave insurance producers and insureds in an uncomfortable position. Any insured whose insurance carrier wants to delegate the cancellation notice responsibility to the insurance producer is going to expect the insurance producer to fulfill that role, so that the insured can stay in compliance with cancellation notice obligations in its construction contract. The insurance producer, however, may not be willing to undertake that role because, by doing so, it exposes itself to potential liability in the event that a cancellation notice is accidentally overlooked, and a claim occurs. Therefore, insurance carriers, insurance producers, and insureds need to work together to develop a uniform way to address the current disconnect between the notice of cancellation provisions in construction contracts, the corresponding provisions in insurance policies, and the recently revised insurance certificate provisions.

The first, and best, opportunity to properly deal with the notice of cancellation issue is in the negotiation of the construction contract. Instead of blindly using standardized language often found in construction contracts, parties need to realize that there is often a major disconnect between the parties' respective contractual obligations and the actual terms of the insurance coverage that comes into play. Failing to properly recognize this issue before a claim occurs often results in an uncovered breach of contract claim against the party obligated to provide insurance coverage, as well as inadequate insurance coverage for the party expecting protection.'

Parties to a construction contract should have their producer (or other insurance advisor) involved in the negotiation process before the construction contract is signed. A producer can review the insurance-related provisions of the contract so that it can advise its client of any areas in which the contract might conflict with the client's specific insurance coverage. The client can try to tailor the contract language to meet the terms and conditions of its own insurance coverage and reduce the risk of an uninsured loss, or, at the very least, can make a business decision as to whether to enter into the contract with a full understanding of the potential risk that it is undertaking.

Second, parties to a construction contract could consider including a provision in the contract that requires the party obligated to obtain insurance coverage itself to provide notice of cancellation of the coverage, in addition to its insurance carrier. In that way, a party to a construction contract that suffers a loss occasioned by a failure to receive adequate notice of cancellation of the insured's coverage might be able to pursue an alternative remedy through a claim on the insured's performance bond, if one is in place.

Third, depending on the circumstances of a particular construction project or a specific insured, parties to a construction contract could consider a provision requiring that certificates of insurance be provided by an insured at intervals that are more frequent than the customary practice of requiring them annually. By doing so, the other party to the construction contract would gain a heightened sense of security that the requisite coverage remains in place.

Insurance carriers have taken differing approaches to the notice of cancellation issue. Some insurance carriers have tried to place the responsibility on the producer. For example, in response to the changes to the ACORD certificates, one insurance carrier released a proposed endorsement that unilaterally shifted the notice of cancellation responsibility to the producer. The proposed endorsement also included a representation that the insured and the producer affirmatively agreed that the producer would take on the responsibility, yet included a complete waiver of liability for both the insurance carrier and the producer if the notice of cancellation was not

handled properly. Not surprisingly, many producers and insureds were unwilling to accept this proposed endorsement.

Other insurance carriers have taken the approach that they are unable to shoulder the responsibility to provide notice of cancellation to certificate holders due to technological limitations. Based on the fact that their software systems are designed to automatically produce a notice of cancellation or non-renewal only to the first named insured and producer, these carriers are not inclined to expend the cost and resources necessary to remedy a problem which, essentially, they view as the insureds', and not their own.

Some carriers, however, have been able to implement a resolution to the problem for insureds. These carriers have created endorsements that they will add to their policies, under certain circumstances, whereby they take on the responsibility to provide written notice of cancellation to any person or organization listed in the endorsement.

In fact, as far back as 2004, ISO issued a version of this type of endorsement, but it has only been adopted and approved for use in Texas. See CG 02 05 12 04, Texas Changes –Amendment of Cancellation Provisions or Coverage Change, ISO Properties, Inc., 2004. Based on all of the recent focus on this issue, it is possible that ISO will take the steps necessary to have its version of this endorsement approved in all – or many – states so that its member carriers have the endorsement at their disposal should they decide to undertake the responsibility to provide notice of cancellation to certificate holders or others.

While an endorsement to address the issue is a positive development for insureds that have contractual obligations to provide notice of cancellation to other parties, there are certain limitations posed by this approach. First, insurance carriers are unable to provide these endorsements on a true “blanket” basis because of the very nature of the issue. If an insurance carrier is obligated to provide notice of cancellation of the insurance policy to certain parties, the carrier must first be informed of those parties' identities, so that the carrier knows where to direct the



notice. Therefore, a “blanket” notice of cancellation endorsement is really not a “blanket” endorsement, because the insured retains the administrative burden of properly informing the insurance carrier who is supposed to receive notice. Similarly, an insurance carrier may require that a new endorsement – individually listing the name and address of each party who is supposed to get notice of the cancellation – be issued and attached to the insured’s policy each time a new contract is signed . For insureds that have to execute a significant volume of contracts, either of these scenarios poses an increased risk of mistakes being made.

Second, insurance carriers have indicated an unwillingness to issue these endorsements when construction contracts are bid, rather only when a construction contract has been awarded. Third, insurance carriers have cautioned that they will not be able to complete and issue the endorsements with a 1-day turnaround time, as producers often do for insurance certificates. These limitations in availability and timing of the endorsements may result in difficulties for insureds in their usual course of operations.

Once contracts have been signed, and the construction project gets underway, parties need to have the proper administrative controls in place to make sure that contractual obligations are being fulfilled. For the notice of cancellation issue, this can be accomplished in several different ways.

First, a trend that seems to be on the rise in the construction industry is an effort to verify the specific terms of an insured’s policy, as opposed to merely relying on the generalized language contained on a certificate of insurance. This trend seems to have been driven in large part by the insurance industry’s handling of additional insured endorsements. As recently as 25 years ago, there were only a handful of standard additional insured endorsements put out by ISO. Over time, however, courts have interpreted these endorsements broadly and, in response, insurance carriers have worked to limit the coverage for additional insureds by significantly modifying existing endorsements or creating new ones that are narrowly tailored. As a result, today there are dozens of different endorsements pertaining to additional insured coverage put out by ISO, all of which provide varying levels of protection for the additionally insured.

With the availability of all of these different additional insured endorsements, some parties to construction contracts are not satisfied accepting just a certificate of insurance that indicates that additional insured coverage is being provided by an insured's policy. Instead, they are requiring that they be provided with an actual copy of the additional insured endorsement so that they can verify the scope and terms of the coverage first hand. Similarly, a copy of the notice of cancellation endorsement could be requested and reviewed to ensure that adequate notice will be provided in the event of cancellation.

Second, if circumstances surrounding a particular project or participant warrant, a party to a construction contract could require that another party provide a certificate of insurance more often than the industry standard of once a year, when the insurance policy renews. The more frequent the intervals, the less likely the chance that the insurance coverage will be cancelled and, therefore, lead to a problem. With the increased sense of security, however, comes a corresponding administrative burden of keeping on top of the review process.

Third, the process of reviewing certificates of insurance can also be managed through specialized software or online resources. For example, software packages or web-based applications allow certificates to be received via fax, email or postal service and can then be scanned into a database and stored as an image along with any other key contractual information. Information included on certificates of insurance can then be tracked and specific reports can be generated, along with necessary correspondence required to address an issue or concern, including the notice of cancellation issue.

Fourth, a more comprehensive approach to dealing with this management aspect of project administration is to outsource the entire insurance certificate review process. In this approach, the vendor, instead of the certificate holder, is responsible for the necessary follow-up to make sure that parties to a construction contract are fulfilling their obligation to maintain and show evidence of required insurance coverages.

Despite the displeasure that many of the players in the construction industry may have with it, the new ACORD notice of cancellation language is here to stay. Instead of attempting to make insureds – and their insurance producers – use the old version of the certificate, or modify the new one, parties to construction contracts will need to work together to achieve a collaborative solution that properly addresses the parties' respective contractual obligations and the corresponding insurance coverage. In order to do so, they need to be careful that they fully understand not only the terms of the contract relative to insurance requirements, but also the scope of, and limitations in, their respective insurance policies, and the corresponding administrative burdens involved in overseeing that contractual obligations are fulfilled.