

## Certificates of Insurance Forms & News

CERTIFICATE OF LIABILITY INSURANCE	
PRODUCER	THIS CERTIFICATE IS ISSUED AS A MATTER OF COURSE AND CONFERS NO CONTRACT. THE POLICYHOLDER MUST READ THE POLICY TO UNDERSTAND THE COVERAGE. THIS CERTIFICATE DOES NOT ALTER THE COVERAGE.
	INSURERS
	INSURER A:
INSURED	INSURER B:

Some important information regarding certificates of insurance.

### Senate Bill 425

The Texas Legislature passed and Governor Perry signed Senate Bill 425 to become effective January 1, 2012. This law will require all certificate of insurance forms to be filed with and approved by the Texas Department of Insurance before they can be used after the effective date of the law. In addition, the law codifies current Texas Department of Insurance rules that a certificate of insurance must not obscure or misrepresent the coverage provided by the insurance policies.

An insurance agency could incur significant penalties under those rules and the new law, including the revocation of the agency's insurance license, if a certificate were issued exactly as the certificate holder requested.

For this reason, agents may not be able to comply with some of the items requested by the certificate holder. Agents will explain the reasons to certificate holders and agents may need to offer to send a complete copy of the insured's policy to the certificate holder, subject to the insured's approval.

If your business is involved with certificates of insurance, please take a moment to take a look at the overview information below regarding these important changes effective January 1, 2012.

Please give us a call if you have any questions or comments.

### Senate Bill 425

#### Overview. The law:

- Defines "certificates of insurance" and describes the types of documents that are regulated.
- Requires the Texas Department of Insurance to accept filings for and approve certificates of insurance to be used for risks located in the state. ACORD and other standard forms must be filed with TDI but are deemed approved on the date the forms are filed.
- Prohibits agents and insurers from issuing a certificate of insurance or any similar document unless the form has been filed with and approved by TDI.
- Prohibits agents and insurers from issuing a certificate or similar document that alters, amends or extends the coverage or terms and conditions provided by the insurance policy referenced on the certificate or document.
- Prohibits certificate holders from requiring an agent or insurer or policyholder to issue a certificate or document that has not been approved by TDI or that contains any false or misleading information concerning the insurance policy to which it refers.
- Gives TDI the power to investigate complaints and allegations of specific violations of the law, and requires insurers, agents, policyholders, or certificate holders to immediately provide information requested by TDI.

- Gives TDI the power to enforce violations of the law and regulations against agents and insurers by issuing a cease and desist order, seeking an injunction, or imposing fines up to \$1,000 for each violation and other penalties including license revocation.
- Gives the Commissioner of Insurance the power to enforce violations of the law against certificate holders by asking the attorney general to bring a civil suit for injunctive relief to restrain a person from continuing a violation or threat of violation.

**Definition of Certificate of Insurance.** A document (including an electronic record) that is executed by an insurer or agent and issued to a third party as a statement or summary of property or casualty insurance coverage. The term does not include an insurance binder or policy form.

**Applicability of the Law.** The law **applies to** certificates of insurance issued on property or casualty operations or a risk located in Texas, regardless of where the certificate holder, policyholder, insurer, or agent is located. (Note: If a Texas agent issues a certificate of insurance on operations or a risk located in another state, that state may have its own law regulating certificates of insurance and the agent will need to verify the specific state laws and regulations.) The law **does not apply to:**

- Evidence of property insurance required by a lender
- Certificates issued under group or individual life or health insurance policies
- Standard proof of motor vehicle liability insurance

**Prohibitions in the Law – Agents and Insurers.** Under the law, agents and insurers **may not:**

- Issue a certificate unless the form has been filed with and approved by TDI.
- Alter or modify a certificate form approved by TDI unless the alteration or modification is approved by TDI.
- Issue a certificate that alters, amends or extends the coverage or terms and conditions provided by the insurance policy referenced on the certificate.

**Prohibitions in the Law – Certificate Holders and Others.** Under the law, certificate holders and others may not:

- Require the issuance of a certificate unless the form has been filed with and approved by TDI.
- Require the issuance of a certificate that contains any false or misleading information concerning the insurance policy to which the certificate refers.
- Require an agent or insurer, either in addition to or in lieu of an approved certificate form, to issue any other document or correspondence that is inconsistent with the law.

**Certificate Filing and Approval Requirements.** The law contains specific requirements for certificates and forms filed for TDI approval, including:

- An ACORD form or standard certificate form promulgated by ISO or AAIS must be filed but is deemed approved on the date the form is filed.
- The form must contain the phrase “for information purposes only” or similar language. If the form does not contain that phrase, TDI may approve the form if the form states that the form does not confer any rights or obligations other than the rights and obligations conveyed by the policy referenced in the form, and that the terms of the policy control over the terms of the certificate.
- A filed form is deemed approved 60 days after the date the form is filed unless TDI approves or disapproves the form during the 60-day period. TDI may extend by not more than 10 days the 60-day period.

- TDI must disapprove a form or withdraw approval of a form if the form (1) contains a misleading or deceptive provision, title or heading, (2) violates public policy, (3) violates state law, (4) requires an agent or insurer to certify insurance coverage that is not available in the line or type of insurance coverage referenced in the form, or (5) requires TDI to make a coverage determination.

**Effect of Approved Form.** The law contains the following statements regarding the effect of approved forms:

- A certificate is not a policy of insurance and does not amend, extend, or alter the coverage afforded by the referenced insurance policy.
- A certificate shall not confer to a certificate holder new or additional rights beyond what the referenced policy or any executed endorsement provides.
- A certificate may not contain a reference to a legal or insurance requirement contained in a contract other than the underlying contract of insurance or endorsement to the insurance policy.
- A person may have a legal right to notice of cancellation, nonrenewal or material change or any similar notice only if (1) the person is named within the policy or an endorsement to the policy, and (2) the policy or endorsement, or a state law or rule, requires notice to be provided.

**Fair Warning to Certificate Holders.** The law makes the following statement regarding certificates issued in violation of the law: **“A certificate of insurance that is executed, issued, or required and that is in violation of this chapter is void and has no effect.”** Certificate holders are thus given fair warning that statements on a certificate that prove to be contrary to the coverage or conditions actually provided by the insurance policy are not enforceable against the agent or insurer who issued the certificate. Certificate holders must perform their own due diligence when requesting or requiring specific coverages or conditions, even if that means they should request and review complete copies of insurance policies; and agents should be happy to provide them.

### **Other Challenges**

Today and after January 1, 2012 there will be challenges even if every certificate holder accepts a standard ACORD certificate of insurance, because there may be limitations in how much information is inserted into the section of the certificate of insurance labeled “Description of Operations/Locations/Vehicle” and the whether it is appropriate to check the Additional Insured and Waiver of Subrogation boxes.

We want to share additional information that may assist in better understanding the issues facing insured’s, certificate holders and agents regarding certificates of insurance, notices of cancellation and the problems that may arise because of requests that are received that require inappropriate certificate wording be inserted on the certificate of insurance form.

#### **Certificates of Insurance**

Why is your agency declining to issue a certificate of insurance that provides for notice of cancellation to the certificate holder?

#### **Certificates of Insurance**

You Can’t Always Get What You Want

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## Certificates of Insurance

### **Why is your agency declining to issue a certificate of insurance that provides for notice of cancellation to the certificate holder?**

In September 2009, ACORD revised the ACORD 25 Certificate of Insurance form. One of the major changes was the removal of the cancellation notice provision. We are unable to issue an older edition of this form, modify the current form, or complete a proprietary form you provide.

Notice of cancellation is a policy right, not an unregulated service. No insurer shown on this certificate is able to provide the cancellation notice you desire by endorsement. For example, the insured can cancel immediately, so it would be impossible for the insurer to give you the notice you request. State law also grants the insurer the right to cancel for reasons such as nonpayment with less notice than you require.

For the reason just cited, if our agency were to issue a certificate that provides the cancellation notice you request, we would do so with the full knowledge that it would be impossible to actually give that amount of notice under certain circumstances. As such, the certificate could be alleged to constitute a misrepresentation or fraud which could subject our agency and staff to serious civil and criminal penalties.

If a certificate purports to provide a policy right different from that provided by the policy itself, then the certificate effectively purports to be a policy form. Policy forms must be filed and approved by our state department of insurance. Use of non-filed policy forms is illegal and could result in legal sanctions distinct from the assertion that the certificate is fraudulent.

We cannot use an older edition of the ACORD 25. Under the ACORD Corporation's licensing agreement, the prior editions of superseded forms can be used for one year from the time the new forms are introduced. Using a prior edition would violate ACORD's licensing agreement and, as a copyrighted document, federal copyright law.

Likewise, we are unable to modify the new certificate to add a notice of cancellation. ACORD forms are designed to be completed, not altered. Our insurance company contracts only allow us to issue unaltered ACORD forms.

We are often asked to issue proprietary certificates provided by the certificate holder. Again, our insurance company contracts only allow us to issue unaltered ACORD forms. Many proprietary certificates include broad, vague or ambiguous language that may or may not be in compliance with state laws, regulations, and insurance department directives.

You may be interested in how the City of Atlanta, Georgia, is now reportedly dealing with this issue based on a very detailed study they conducted in 2008.

<http://tinyurl.com/26guax8>

We appreciate your understanding of the legal restrictions on our ability to fully comply with your request.

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## Certificates of Insurance You Can't Always Get What You Want

by David Surles, CPCU, AAI

A certificate of insurance is an informational document issued by or on behalf of an insurance company. The certificate indicates that an insurance policy exists of a certain type and limits. Certificates are simply snapshots of basic policy coverages and limits at the time of issuance of the certificate. Certificates are not intended to modify coverages or change the terms of the insurance contract and they convey no contractual rights to the certificate holder.

The futility of depending on certificates of insurance was highlighted by the Texas Supreme Court in its recent decision in *Via Net, et al v. TIG Insurance Company, et al.*, wherein the Court said: "Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk."

As a utility contractor, you are no doubt often asked to sign construction or service contracts that include certain insurance requirements that must be evidenced by a certificate of insurance. If the certificate holder desires status as an additional insured under a policy, this can only be done by endorsement to the policy, not by issuance of the certificate alone.

Problems often arise when a contract makes demands that are, for all practical purposes, virtually impossible to meet. Examples include requests for insurance for losses or damages that are uninsurable, requests that agents cannot legally comply with, requests that require inappropriate certificate wording, and requests that are impractical from a market standpoint.

As a result, insurance agents are sometimes asked to provide a certificate of insurance that cannot comply with the contract you may have already signed. In fact, you may have already completed the job and need the certificate in order to get paid. The purpose of this article is to illustrate how such problems can arise and what solutions are available, if any, to address the most common problems.

### UNINSURABLE REQUESTS

Sometimes contracts will attempt to transfer risks and liabilities that are largely uninsurable. For example, the contract may require you to be responsible for "ANY negligent acts, errors or omissions" or "any and all liabilities" that result in "ANY claim, cost, expense, liability, penalty, or fine." A commercial general liability (CGL) policy typically does not cover "errors and omissions" or fines and penalties, nor will it pay for damages other than those arising from bodily injury, property damage, and personal and advertising injury liability. In addition, the word "any" implies there are no exclusions when, in fact, the policy has many exclusions ranging from pollution liability to faulty workmanship.

Needless to say, it is advisable to have an attorney review contracts on your behalf. In addition, prior to signing any contract, have your insurance agent review the insurance specifications, preferably in conjunction with your attorney. He or she can advise what requirements may be impossible or difficult to insure. It is important to know the costs before bidding on the contract and it's possible that truly onerous insurance requirements can be deleted from the contract.

Often contracts will require your insurance to be "primary and noncontributory." The "ISO standard" CGL policy does say that it is primary with regard to the certificate holder's general liability policy IF the certificate holder is an additional insured on your policy. So, the first order of business is to make sure that the appropriate additional insured endorsement is attached to your CGL policy.

However, the undefined term "noncontributory" is meaningless on its own. The term may just be used to reemphasize that your insurance is primary, which is fine. Or the intended meaning may be that a waiver of subrogation endorsement is desired. However, often it means that the certificate holder's CGL policy will not

contribute in any way to a loss even if that policy otherwise covers it. This means that you will have to pay out of your own pocket any claim that exceeds the limit of your CGL policy without contribution from the certificate holder's CGL policy.

It is in your best interest to attempt to clarify and, if necessary, strike the "noncontributory" wording from the contract. If that's impossible, consider increasing your own policy limits or be prepared to assume a potentially large uninsured loss.

## ILLEGAL REQUESTS

Construction contracts sometimes require that the certificate holder be given additional insured status under a specific endorsement number and edition date. It is not uncommon for a contract to request an "ISO standard" policy form such as the CG 20 10 11 85 additional insured endorsement. Note that "11 85" refers to the November 1985 edition of this form. These forms typically must be filed with and approved by the Texas Department of Insurance before they can be used. Since later editions may have superseded earlier editions, it could be impossible for the insurer to provide a form that is 20+ years old and is no longer approved by the Texas Department of Insurance. This is also the case in most other states where you might be working.

Your insurance agent can often provide a later edition form with comparable coverage. In some cases, two endorsements might be necessary to replace a single older form, one providing ongoing operations coverage and the other completed operations coverage.

The latter form, however, might not be available or only available at significant cost. Your insurance agent may represent more than one insurance company, making it more likely that your account can be shopped to another insurer who is better able to meet your needs. In any event, you will want to price this coverage before submitting your bid since completed operations insurance, if available, can be substantial in price.

Also, contracts frequently mandate that coverage be extended to the additional insured's sole negligence. In some states, sole negligence cannot legally be transferred to another party. Increasingly, even where insurance transfer is permitted, insurers are using additional insured endorsements that prohibit assuming the additional insured's sole negligence. The current "ISO standard" endorsements do just that.

If you are working in a state that has anti-indemnity statutes or case law, then this should not be an issue. Otherwise, you will want your insurance agent to determine if the insurer is still willing to assume sole negligence under an additional insured endorsement. If not, the contract will need to be modified or compliance will be impossible.

## INAPPROPRIATE REQUESTS

Contracts often specify that the certificate of insurance provide for notice of cancellation to the certificate holder. The problem is that all "ISO standard" additional insured endorsements make no provision for cancellation notice to an additional insured. Perhaps acknowledging this, some contracts settle for the more hopeful "endeavor to" provide notice of cancellation provision.

Keep in mind that, unless the policy specifically provides for cancellation notice to the additional insured, the insurer is usually under no contractual obligation to provide such notice. Even if an attempt is voluntarily made, mistakes happen. In some cases, due to regulatory decree by the state department of insurance (New York is an example), a certificate of insurance cannot make a promise of notification unless notice of cancellation is provided for in the policy or endorsement.

Some organizations and government entities use their own certificates of insurance instead of the more standardized ACORD 25 - Certificate of Liability Insurance form. These may create problems for insurance

agents because some states have laws or regulations prohibiting the use of such forms unless approved by the state department of insurance.

These forms may include wording implying coverages or rights that don't actually exist under the policy, again violating the law in many states. These certificates may sometimes be almost exact duplicates of the "ACORD standard" form(s), creating copyright violation possibilities. They may also lack disclaimers designed to protect you and the issuer.

Be very wary of these non-ACORD certificates of insurance. Rely on your insurance agent for guidance on how to handle these forms. In many cases, they can be issued, but require referral to the insurance company which can cause delays. Again, it is important to involve your insurance agent in the process as soon as possible.

### IMPRACTICAL REQUESTS

The construction contract may specify that certain coverages (e.g., completed operations) be provided or that certain exclusions (e.g., pollution liability) be removed. Because of the proliferation of defective workmanship claims in the construction industry, completed operations coverage may be difficult to procure at a reasonable cost. Most insurers are unwilling to remove certain exclusions such as pollution liability and the cost to purchase the coverage separately may be prohibitive.

Be sure to give your insurance agent ample time to search for the coverages required by your construction contracts. If coverage is available, you will want to include the premium costs in your contract bid. If coverages are not available, you may be able to negotiate such requirements from the contract or pursue another source of coverage.

It is not uncommon for your insurance agent to be unable to meet every requirement of the contract you're being asked to sign, from the standpoint of coverages, policy rights, or completion of a certificate of insurance. The other party to the contract may then inform you that they can provide a list of agents who claim they can comply with the contractual requirements in full.

While it's possible that the person requesting the certificate is aware of agents who are better able to comply with their requests, be cognizant that fraud and misrepresentation with regard to certificates is not unheard of. If you are requiring certificates from subcontractors, be aware that bogus certificates do exist.

While it is rare, there are unfortunately some insurance agents who will issue certificates that do not accurately reflect coverages and policy terms just to allow a contractor to get a job and for them to keep their business. Since certificates are rarely legally enforceable against insurers or agents, you may be incurring significant liability if an inaccurate certificate is issued. It is important that you do business with insurance professionals in which you have great trust or that you verify the accuracy of the certificate.

As outlined in this discussion, the single best thing you can do in dealing with certificate of insurance requirements is to involve your insurance agent in the process as soon as possible. He or she can counsel you on how to best meet your insurance requirements and, if not possible in some instances, provide an explanation as to why something is difficult or impossible, often to the satisfaction of the requestor.

David Surlis, CPCU, AAI is the Director of Professional Liability for the Independent Insurance Agents of Texas (IIAT), representing a network of more than 1,600 independent insurance agencies in Texas, and affiliated with the Independent Insurance Agents & Brokers of America (IIBA). This article was condensed from an IIBA white paper entitled "Certificates of Insurance: Issues and Answers." To obtain a copy of this report, contact an independent agency member of IIAT. Copyright 2007 by the Independent Insurance Agents of Texas. All rights reserved.

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