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Technical Advisory

TA 284 **June 11, 2010**

Subject: Certificates of Insurance and Notice of Cancellation

Background: Currently, no ACORD certificates and evidences of insurance include a notice of cancellation. They simply refer the certificate holder to the policy form(s) to determine who is contractually entitled to notice and how much. The purpose of this article is to explore the reasons for this change and how to address this new market reality.

In September 2009, ACORD made significant changes to the ACORD 24 and ACORD 25. Big "I" members can review all 39 of those changes, including several in great detail, here:

http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/Wilson2009ACORD2425.htm

However, the main change involved essentially removing notice of cancellation from these certificate forms. This same change was made to all of the other ACORD certificate and evidence forms (ACORD 20, 21, 22, 23, 27, and 28) in December 2009.

Why was this change made? It began with ACORD being pressured by state regulators who had taken the position that notice of cancellation is a policy right, not a voluntary service, and should be governed by the policy. Only filed policy forms can grant policy rights, not certificates.

Throughout this article, reference will be made to state laws, regulations, and insurance department directives. For detail on all of these state-specific legal issues that we are aware of, go to this public web page:

http://www.iiaba.net/VU/NonMember/WilsonCertLawsRegs.htm

We are just now starting to see some push-back from third parties on this change similar to that seen when the ACORD 27 and ACORD 28 were revised in 2006. The push-back from lenders on the ACORD 27 and 28 resulted in the following article in the public section of our Virtual University web site (scroll down the article to download a one-page explanatory form Big "I" members can give to lenders to explain why they cannot use the older forms):

http://www.iiaba.net/VU/NonMember/WilsonCertificatesLenders.htm

As a result, we anticipate that agents will begin receiving demands from certificate requestors to: (1) use older ACORD forms, (2) amend the newer forms (or add addenda) to include cancellation notice, (3) complete proprietary certificate forms, or (4) warrant coverages or rights via an "agent affidavit" or "compliance checklist." The purpose of this article is to explore the reasons for the removal of cancellation notice from the ACORD certificates and to suggest how agents can respond to requests as just outlined.

Anticipated marketplace response

"It's going to get worse before it gets better." — Dalton, in the movie Road House.

In each of the following instances, compliance with these requests or demands can create both contractual and regulatory problems for agents, not to mention dramatically increasing the likelihood of litigation.

1. **Requests to use older ACORD forms.** Under ACORD's licensing agreement, the prior editions of superseded forms can be used for one year from the time the new forms are introduced. For example, the latest ACORD 25 is dated September 2009. The prior edition was January 2009. Therefore, under ACORD's licensing agreement, the January 2009 edition can continue to be used until the September 2009 version has been in use for one year. That is, the January 2009 form can be used until at least September 2010. After that time, agents issuing earlier editions of the September 2009 ACORD 25 would be in violation of ACORD's licensing agreement prohibiting the use of those copyrighted forms. To confirm this, check out this "Certificates FAQs" document from ACORD:

   http://www.iiaba.net/VU/NonMember/ACORDCertificatesFAQs.pdf

   In addition, some states require all certificates (or non-ACORD or non-ISO certificates) to be filed and approved and would not permit the issuance of older editions.

2. **Requests to amend the newer forms (or add addendums) to include cancellation notice.** Many, if not most, agency/company agreements prohibit the issuance of modified ACORD forms without the insurer's express consent. Therefore, contractually, the agency may be unable to issue such amended certificates and must refer them to insurers.

   In addition, ACORD's Forms Instruction Guide says, "The ACORD Certificate should be issued only in compliance with company instructions. ACORD recommends that the Certificate NOT be used in the following situations...To waive rights...To quote wording from a contract...To quote any wording which amends a policy unless the policy itself has been amended."

3. **Requests to complete proprietary certificate forms.** In addition to the agency/company agreement issues discussed in #2 above, proprietary certificate forms may not comply with insurance laws or regulations regarding filing or content. Some states require all certificates (or non-ACORD or non-ISO certificates) to be filed and approved and would not permit the issuance of unfiled proprietary certificates. Many states now require specific language be shown on certificates.

   At least nineteen states mandate the "does not amend, extend or alter" language on the certificate…pretty much all others implicitly prohibit it since the certificate would effectively become a policy form, and an illegal unfiled form at that.

Also, proprietary forms often omit disclaimers and use vague or ambiguous language that can create the potential for claims of breach of contract, misrepresentation or fraud, or otherwise result in adverse litigation. On top of that, nonstandard forms may imply that the certificate grants policy rights that don't exist. As a result, the agent may be accused of executing a nonfiled policy form, resulting in loss of license or other penalties.

4. **Requests to warrant coverages or rights via an "agent affidavit" or "compliance checklist."** Sometimes a certificate requestor may require some sort of warranty that the policy forms being provided comply with the contract the insured has signed. This "affidavit," "compliance checklist," “opinion letter,” or whatever name it is called is often an attempt to circumvent restrictions on what can or should be shown on a certificate and to establish a legally actionable document.

   Typically these contracts include an indemnity agreement for which no insurance program in the world can fully comply. Often the questions or required statements on these documents are so broad, vague, or ambiguous that the resulting completed document may end up being accused of being a misrepresentation or fraudulent insurance document. At least four states explicitly prohibit issuing an agent “opinion letter” that misrepresents policy coverages.

   While a state may not have certificate-specific laws or regulations, all states have laws against the issuance of fraudulent documents. For example, indicating that a certain notice of cancellation may or will be provided to a certificate holder is more often than subject to being challenged as a misrepresentation or fraudulent statement. For more information on this issue, please read this article on the Virtual University:

http://www.iiaba.net/VU/Lib/Bus/AM/Procedures/WilsonAffidavits.htm

Main Point: Why certificate notice of cancellation is illegal, impractical, and/or impossible

For years, agents have included entries on the ACORD 25 such as “30” days notice of cancellation, even though such notice may not have been granted by the policy. None of the ISO CGL additional insured endorsements provide for cancellation notice. The only ISO cancellation notice endorsements we’re aware of are restricted to the state of Texas:

- CG 02 05 12 04 -Texas Changes - Amendment of Cancellation Provisions or Coverage Change
- CA 02 44 06 04 - Texas Cancellation Provision or Coverage Change Endorsement

Some insurers will issue proprietary cancellation notices for certificate holders or additional insureds selectively, depending on the agent and/or the account.

Aside from these apparently relatively rare occurrences, the reality is that, when agents indicate that a specific notice of cancellation will be provided by the insurer on a certificate of insurance, this means one of two things.

First, there is no real expectation of the insurer providing notice. In such cases, the question of whether this makes the certificate a misrepresentation or fraudulent insurance document depends on state laws.

Second, the agency may very well intend to make a good faith effort to voluntarily provide notice to the certificate holder or additional insured. Many are diligent about this. However, the reality is that in many or

most cases, notice simply cannot be provided as required by the contract the insured has signed. This is one reason prior editions of the ACORD forms use the language "endeavor to," because, try as they might, in many instances it's simply impossible to provide the notice the contract requires.

For example, the most common provision is one similar to that in the AIA A201 contract:

> "[T]hese certificates and the insurance policies required by this Section 11.1 shall contain a provision that coverage afforded under the policy will not be cancelled or allowed to expire until at least 30 days prior written notice has been given to the owner."

The problem is that it is virtually impossible to comply with this requirement. Even insurers who do issue notice endorsements rarely if ever fully comply with this. Here's why....

The AIA language applies to policies that are "cancelled or allowed to expire." It does not distinguish between cancellation by the insurer or insured and, presumably, "allowed to expire" refers to nonrenewal. In addition, consider that many contracts also require notice of "material change" (always undefined) or reductions in coverage (which might be interpreted as partial cancellations under contracts that simply refer to "cancellation."

We've already established that the reality of the marketplace is that the insurer is probably not going to provide notice to a certificate holder, or an additional insured for that matter. In fact, for certificate holder, many insurers become ill-tempered if the agency copies them on certificates and most have advised agents not to copy them. At best, the agent has voluntarily assumed that notice in states where it is still legal to do so. So, what happens if the insured cancels immediately by written notice or surrendering the policy? How can the agent give 30 days notice unless either s/he or the certificate holder is willing to pay for an extra 30 days of coverage (which the insurer is unlikely to accept since they are not a party to the insurance contract)? What if the policy is cancelled by the insurer for nonpayment, fraud, misrepresentation, or criminal conviction? How can the agent possibly give 30 days notice to the certificate holder? The answer is simple: It can't be done. And, again, if the agent is aware of this, there is the very real risk of a claim that s/he issued a fraudulent or misleading document.

As blanket additional insured endorsements are being increasingly used due to the proliferation of AI requests, additional notice problems are created. Over the course of a year, an insured may have dozens or hundreds of additional insured requests. The insured is signing contracts requiring notice of cancellation and the agency is not even aware of who these additional insureds are because of the automatic status granted by written contract. It’s impossible to provide the 30 days notice many of these contracts require when other party is unknown.

Also consider that many of these nonpayment cancellations involve missing installment premiums and coverage is subsequently reinstated. So the agency issues a certificate, then sends a cancellation notice, then sends a new certificate following reinstatement.

What one certificate requestor is now doing

Some third parties have recognized the realities of the marketplace and discontinued requiring notice of cancellation. A good example is the City of Atlanta, Georgia, as outlined in this presentation by their legal department at a 2008 conference:

http://www.aci-na.org/static/entransit/Caput--Legal%20Aspects%20of%20Airport%20Insurance.pdf

Originally, the city required 30 days notice of cancellation for any reason other than nonpayment (10 days required) and material change in insurance. How this was usually effected, if at all, was by using an ACORD 25 and striking the "endeavor to" and "but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives" language.

The city indicated that they routinely faced contractors, agents, and insurers that refused to provide certificates or endorsements complying with the city's notice of cancellation requirements.

The city discovered that these disagreements caused significant problems and delays in contract execution while the issues were being resolved or debated. For example, 5% of certificates had already expired, 20% had missing information, 50% were not backed up by additional insured endorsements, and 75% did not include the requested cancellation notice. These problems, on average, took several weeks to resolve.

The City of Atlanta found that, in the last 15 years, there had been no known incidents linked to cancelled contractor insurance and that at least 16 hours every week in the legal department were dedicated just to resolving cancellation notice issues. As a result of this study, the City no longer requires direct notice of cancellation by the agent or insurer, but does require the contractor to fax a copy of the insurer's cancellation notice within 2 business days of receipt.

Necessary Action: **So, what should agencies do?**

We suggest not providing ANY notice of cancellation not supported by the policy. We agree with the emerging stance being taken by regulators that notice of cancellation is a contractual policy right and should be governed by the policy and state law. In those states, agents would be required by law to comply with insurance department directives and other applicable state laws.

Even where there is not a specific legal requirement in place, we believe that if you show that 30 days notice of cancellation will be provided, knowing that it is possible that the insured can cancel without advance notice and that the insurer is only required to give 10-20 days notice for nonpayment, you have issued a misleading document. This could quite possibly be a violation of fraud, unfair trade practices, or other state laws.

Given that, the alternative is to provide for such notice via endorsement to the policy(ies). Many insurers have dumped the entire certificate mess in the laps of agents and left them twisting in the wind to fend for themselves. However, we believe that a policy right such as notice of cancellation is an insurer issue, not an agency issue. The parties to the insurance contract are insurers and insureds and only they can resolve this issue. This requires recognizing the realities and necessities of the marketplace. No doubt, some -- perhaps many -- carriers will continue to refuse to provide notice to anyone other than a First Named Insured, mortgagee, or loss payee. These carriers and their agents will lose business to those who are willing to do this.

Closing with another quote from the legendary philosopher, Dalton, "Nobody ever wins a fight." It's time to end the conflict and reach an agreement that all parties can live with that is reasonable, fair, and cost effective.