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Are You Covered?—Change to ACORD Certificate of Insurance Form Affects Education Owners on Their Construction Projects

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In September of 2009, the Association of Cooperative Operations Research and Development (ACORD), the insurance industry organization that issues many standard insurance forms, altered the ACORD 25 certificate of insurance. The ACORD 25 is familiar to most construction stakeholders because it identifies the various insurance coverage types (i.e. commercial general liability, auto, umbrella, and workers' compensation) and limits maintained by contractors. It is the industry standard certificate.

THE CHANGE

Although there were various changes to the ACORD 25 in 2009, the most noteworthy relates to notice of cancellation. Prior to 2009, the ACORD 25 contained language whereby insurers were required to "endeavor to" provide certificate holders with notice of cancellation of a policy represented by a certificate. The new ACORD form eliminates that requirement and instead simply states that "notice will be delivered in accordance with the policy provisions."

At first glance this may seem like a minor change. The fact of the matter is, however, most (if not all) liability policies do not contain provisions requiring notice of cancellation. As such, certificate holders have no assurance whatsoever that they will receive notice of cancellation of a potentially critical policy.

THE IMPACT

In essence, a certificate is a statement of what policy parts and coverage limits are in place at the time it is issued. It is an informational device only and does not extend coverage or serve as a guarantee that coverage exists even the day after the certificate is issued.

For institutional owners such as educational institutions, a lack of cancellation notice could

result in an unwitting coverage gap in the event of a loss occasioned by a member of the construction or design team. For instance, owners are exposed to coverage gaps for property damage and injury claims that would normally be covered by their contractor's commercial general liability (CGL) policy. Contractors and their subcontractors are required to hold CGL coverage in place throughout the course of a project. If a contractor allows its insurance to lapse for any period of time, and an occurrence giving rise to a claim takes place during that "gap" in coverage, the owner may find itself without any insurance from which to recover for a loss arising from personal bodily injury or property damage.

In addition to the risk associated with an unwitting termination of general liability policies (which are normally occurrence based), an even greater risk may arise from claims-made policies, such as professional liability policies typically carried by design professionals. An occurrence policy covers claims when a loss occurs regardless of when it is reported. For example, if a person had coverage under an occurrence policy in 2010 and the covered loss was not discovered until 2011, the claim is covered—regardless of whether the policy is still active, because the policy was in place when the event occurred. On the contrary, a claims-made policy covers claims during the actual policy term only. Thus, a certificate holder who does not receive a notice of cancellation of a claims-made policy could be found to be without coverage when a viable claim arises years after project completion and the applicable coverage has lapsed.

Another issue arises in that many construction and design contracts may contain language that does not coincide with the new ACORD language. This creates an administrative burden, especially for those who repeatedly rely on their own custom forms or even standard forms. For example, the current version of the Article 11 of AIA A201 General Conditions of the Contract for Construction states that:

"[C]ertificates and the insurance policies required by this Section 11.1 shall contain a provision that coverages afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner."

Clearly, the former ACORD language did not create an affirmative obligation for an insurer to provide notice of cancellation. It is easy to imagine what the term "endeavor to" meant in light of what was surely an administrative burden for insurers. Nevertheless, the new ACORD 25 makes it virtually certain that a certificate holder will not be notified of cancellation of a policy unless it takes a proactive approach to confirming coverage.

POSSIBLE PROACTIVE SOLUTIONS

Avoiding the potential disaster that can arise from a coverage gap caused by a phantom cancellation has been a longtime issue. Even before the most recent ACORD language change, many certificate holders were blissfully unaware, until it mattered most, that the certificate they held did not represent the actual coverage in place. Agency agreements with insurers normally prohibit agents from altering ACORD forms or issuing out-of-date forms. Accordingly, restoring the former notice language is not a viable option. Regardless, one can address the notice issue proactively.

One solution is to contractually require insureds themselves, rather than carriers, to provide direct notice of cancellation or reduction of coverages within a contractual timeframe. Of course, the insured can simply ignore the obligation and gamble that a claim may not arise and its breach will never be discovered. Further, a judgment against an insured for failure to

maintain coverage is likely a pyrrhic victory in any event. Most contractors or design professionals do not have sufficient assets from which to recover from any losses that were to have been covered by insurance.

A second solution is to contractually require an insured to provide periodic updates to its certificates of insurance. While this solution is practical for the certificate holder, it may represent an increase in contract price from the insured to cover additional administrative expenses. Additionally, even from the certificate holder's perspective, few certificate holders want to expend the effort in tracking whether they have received the updated certificates, especially on claims-made policies, on which there are likely contractual requirements to keep insurance in place for years after project completion.

The most effective solution may be the most difficult solution to secure—a change in the policy language or an endorsement requiring the insurer to directly notify a certificate holder of a coverage change. As one might expect, insurers will be reticent to change policy language or may seek additional fees that will necessarily be passed through to the requesting party. Nonetheless, the endorsements are available, albeit potentially for added cost. Given the potential for catastrophic loss, it may very well be worth the inquiry.

Regardless of the possible solution, education institutions should be aware that, without proactive steps, coverage gaps resulting from a policy cancellation may go unnoticed. This now even thornier issue requires close attention and discussion regarding solutions with counsel and insurance consultants about possible solutions.

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