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Risk Management Tools for the Design Professional



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Endorsements, Certificates of Insurance, and Other Tools for Evidencing Coverage: Why You Can't Always Have It Your Way

by Abbey Brown

Design professionals are often asked by their clients to sign contracts that include comprehensive—sometimes unreasonable—insurance requirements and indemnification terms. These are usually drafted with the goal of protecting owners, clients, contractors, or other project participants. But how does this work when the required coverages aren't found in the commercial insurance marketplace?

Certificates of insurance (COIs)—which are also often requested in those professional service contracts—provide summaries or verification of current coverage, including policy effective dates, insurers, and certain policy limits. A certificate gives a snapshot to the requestor (usually known as the certificate holder) for informational purposes. It's important to understand that in no way does a certificate endorse, amend, alter, or extend coverage; nor does it act as a contract. Certificates are often provided using a set of industry standard forms produced by ACORD (formally known as the Association for Cooperative Operations Research and Development), which indicate:

THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS ON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE REPORTED BY THE POLICIES DESCRIBED BELOW.

Issuers of COIs generally strive to accurately reflect the insurance policies that are in effect, but those who are relying on the forms need to keep in mind that it's virtually impossible to summarize an insurance policy of over a hundred pages in a form that contains a few boxes. Adding to this, those who are issuing insurance certificates often struggle as they try to confirm in a COI that specific and detailed contractual requirements are—or aren't—being met.

One common challenge is meeting a request that an insurer provide notice of a policy's cancellation to the insured's clients. To do so, the insurer would need to track all such

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requirements for all insureds for the duration of each contractual requirement—which may even be unspecified. With this in mind, ACORD made changes in 2010 to clarify that insurers' notification duties are as defined in the insurance policy, not in the professional services contract.

Generally, courts agree that a certificate of insurance is not a contract. One fundamental reason is that no consideration—or payment—is given by the certificate holder to the issuer. However, there is a duty to make accurate representations within the confines of the overall system. To consider this, we'll review a few recent cases interpreting the obligations for COIs and their issuers.

Case 1: Premier Health Partners v. NBBJ, L.L.C. 2015-Ohio-128

When certificates of insurance are issued, whose obligation is it to consider all policy exclusions and contract definitions that directly impact the scope of services being performed? If we start with the premise that a COI is solely intend to confirm—but not change—coverage, then is it enough to simply review the insurance sections of a contract prior to issuance? Consider the findings of an Ohio court in January 2015.

Architect NBBJ was contracted to provide design and construction phase services on a new 12-story Heart Patient Tower for the Miami Valley Hospital [MVH]. The professional services agreement required NBBJ to maintain commercial general liability (GL) insurance, to add MVH as an additional insured to the extent of contractual liability assumed by NBBJ, and to hold MVH, its officers, employees, and successors harmless from and against NBBJ's negligent acts or omissions.

In 2011, Legionella disease broke out in the tower. The outbreak was subsequently traced back to the plumbing system in the new tower. Various lawsuits were filed against the hospital arising out of at least one death and ten others who contracted the disease. MVH, its insurer, and the construction firms involved all called upon NBBJ to defend them, citing a contractual requirement to do so. NBBJ declined to provide the defense, so MVH sued, alleging that NBBJ not only failed to secure an insurance policy protecting against bodily injury claims caused by the outbreak but also breached its contract by failing to provide a defense.

NBBJ responded that they did, in fact, have a policy, and MVH had been added as an additional insured. However, that policy included an exclusion for bodily injury that was caused by a biological agent or bacteria. Since Legionella is a bacteria, there was no coverage. In its motion for summary judgment, NBBJ justified its denial by noting that the contract included the following:

Unless otherwise provided in this Agreement, the Architect and Architect's consultants shall have no responsibility for the discovery, presence, handling, removal or disposal of or exposure of persons to hazardous materials or toxic substances in any form at the Project site.

The trial court noted the contract never defined "hazardous materials" or "toxic waste." Relying on a dictionary definition, the court found that biological agents didn't fit the definition of either term and therefore couldn't be excluded. NBBJ appealed. The appellate court noted that while NBBJ's GL policy had a "pollution" and "biological agents" exclusion, the contract

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with MVH only allowed NBBJ to exclude pollution from its scope of services. *The appellate judge confirmed that NBBJ was not allowed by contract to purchase an insurance policy which excluded injuries resulting from biological agents and that the effects of said agents were within the scope of liability assumed by the architectural firm.*

In other words, even if NBBJ's insurer(s) denied the claims, based on obligations assumed by contract, MVH could look to NBBJ to satisfy those claims.

Case 2: Cleveland Indians Baseball Co., L.P. v. New Hampshire Insurance Company

In March 2014, the Sixth Circuit Court of Appeals found that a certificate holder could assert a legitimate negligence claim against the issuing party if that party failed to obtain the correct coverage requested by the insured.

National Pastime Sports jointly hosted a Kids Fun Day with the Cleveland Indians during a home baseball game. National Pastime purchased a commercial general liability policy through their broker and named the Cleveland Indians as an additional insured. On the application submitted, National Pastime indicated that inflatable slides would be used at the event. Even before copies of the policy were provided, the event was held, and injuries occurred. Upon filing the claim, National Pastime learned that there was an exclusion on the policy for "amusement devices," including inflatables like the slide.

The injured parties sued National Pastime and the Cleveland Indians. National Pastime's GL insurer denied coverage based on the exclusion. Coverage lawsuits followed, including one against the insurance broker, alleging negligence in failing to procure the proper coverage. The trial court initially dismissed the claims, noting there was no duty owed to the Cleveland Indians by the broker. The appellate court then heard and reversed the trial court decision, finding that courts have imposed "an independent duty of care" on those who provide professional services "towards third parties where the harm was foreseeable and where the defendant had specific knowledge that its actions might harm a specific third party."

While it is reasonable that the law not provide unlimited responsibility on the part of the broker to anyone who makes claims against them, it is not unreasonable to assert, as the Court did here, that a broker can be held liable to uncontracted third parties if harm was foreseeable. Therefore, it was ruled that the Cleveland Indians, as an additional insured, could be harmed in the event an agency failed to procure the necessary coverage, just as the primary named insured would be harmed.

Conclusions

- In obtaining insurance coverage, it's important for design firms to:
- Communicate their needs clearly;
- Recognize that not all contractual demands can be met;
- Understand that insurance policies dictate the coverage provided, not the professional service contracts;
- Consider that regardless of what is written on a certificate of insurance, insurance policy terms and conditions prevail; and
- Know that if contractually-assumed insurance requirements are not met, clients may seek recovery from the design firms themselves or their brokers.

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It's estimated that almost 40-50% of all certificates indicating additional insured status are incorrect. Relying solely on a certificate of insurance may mean that coverage is illusory. A better approach is to understand what insurance coverage is available (and affordable) and contractually allocate the risks for which insurance is not obtained.

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I understood, as the traditional casebooks teach in law school, that appellate decisions in commercial cases tend to focus on determining where something went wrong and deciding who should be blamed. Liability was the proverbial 'hot potato', something to be avoided at all cost. As a result, lawyers teach and are trained to concentrate on anticipating potential liability and finding ways to avoid or transfer it so their clients are not caught in its web.

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