

## Real Estate Title Insurance & *Construction Law*

### The Demise of the Certificate of Insurance?

This familiar document may not be all it's purported to be

By Katherine A. Czech

Insurance is required in a vast number of contractual and financing scenarios, including mortgage lending, leases and construction contracts, among others. Most times, a third party requires the named insured to maintain certain types and/or amounts of insurance. Historically, the issuance of a "certificate of insurance" has served as proof that this requirement has been met. But is this enough?

According to *Black's Law Dictionary* (9<sup>th</sup> ed. 2009), a certificate of insurance is a "document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers." While, on the surface, such a document would appear to satisfy the requirement for proof of insurance, the insurance industry's standard forms of insurance certificates render them virtually worthless as reliable evidence of the existence or terms of coverage.

*Czech is an associate with Wilentz, Goldman & Spitzer in Woodbridge, concentrating her practice in the areas of commercial and residential real estate.*

The most commonly utilized forms are the ACORD® certificates. ACORD stands for the Association for Cooperative Operations Research and Development, which is a standards development organization serving the insurance industry and related financial-services industries.

The so-called "certificate of insurance" in most transactions is actually two distinct documents: a "certificate of liability insurance" (ACORD 25) for liability coverage; and the "evidence of commercial property insurance" (ACORD 28) for property coverage. Both certificates show (among other things) the name and address of the named insured, policy number, type and amount of coverages, effective dates of the policies, and the name and address of the certificate holder. The property insurance certificate also shows if there is a mortgagee or loss payee separate from the named insured. One issue that surrounds the use of certificates of insurance is the disclaimer that appears on both the property and liability forms which states:

*This [evidence of property insurance/Certificate] is issued*

*as a matter of information only and confers no rights upon the [additional interest (on the Evidence of Property Insurance) or certificate holder (on the Certificate of Liability Insurance)] named below. This [evidence of property insurance/Certificate] does not amend, extend or alter the coverage afforded by the policies below.*

The disclaimer language makes it impossible for a party to determine with certainty what the coverage terms are, without actually looking at the policy itself. Prior to changes in 2003, the property insurance certificates actually stated that they conveyed "all the rights and privileges under the policy."

Another disclaimer on both certificates makes clear that the aggregate limits provided "may have been reduced by paid claims." Thus, even though a party may request a particular amount of insurance, and the certificate may show that amount, in reality, a dramatically reduced amount may remain available. Therefore, even the policy limit on the certificates cannot be relied on as correct.

Given the limitations of the disclaimer

er, there is a serious problem in relying on insurance certificates for confirmation of a third party's status under the applicable policy(ies). Most times the certificate holder's status is shown on the certificate by the insurance broker adding a sentence to the ACORD 25 (liability) form, stating that "the certificate holder is an additional insured." At first blush, this would appear sufficient. Looking more closely, however, one will find it is not. Frequently, certificates are sent via fax by an agent or broker. Often, just the front page is sent to the recipient, leaving the second page, which contains additional disclaimers, unseen. There is a clear disclaimer on page two of the ACORD 25 that states, "If the certificate holder is an ADDITIONAL INSURED, the policy(ies) must be endorsed. A statement on this certificate does not confer rights to the certificate holder in lieu of such endorsement(s)." Thus, even though the certificate indicates additional-insured coverage, the certificate holder is not necessarily actually covered. Similarly, with regard to property insurance certificates, lenders often require that they be listed as "mortgagee" or "loss payee," but what they really need is to see the actual underlying policy endorsement that confers this coverage. Thus, the certificate is basically worthless.

In terms of endorsements, there are several kinds, which cover a wide range of transactions as to who is covered and under what circumstances. While the endorsements are often cryptic (providing coverage only for such coverage to be taken away under certain exclusions), discussion of several examples of these endorsements is significant to the issue at hand.

Certain endorsements exclude coverage for property damage that occurs after

all work to be performed by a specifically named entity has been completed. Other endorsement forms do not require the insured to list each additional insured by name, but instead would include any person or organization that the insured has agreed, in a written contract, to name as an additional insured. Since the certificate confers no rights on the certificate holder, it is essential to review the endorsement. It also is a good idea, if not a requisite, to request a copy of the insurance policy declarations to get an understanding of the policy without actually having to read through the entire document. On very large, costly deals, it may be critical to request and review the actual policy.

Knowing that the certificates are not proof of the actual details of the policy, there is some temptation for agents to comply with whatever an organization requests be listed on the certificate. This, for example, leads to certificates stating someone is an additional insured when neither the policy nor an endorsement provides this coverage. Various states have enacted legislation in order to discourage agents from appeasing organizations that are requesting certificates of insurance which go beyond what the underlying policy calls for. In New Jersey, material misrepresentation of the terms and conditions of insurance contracts or policies to any person is prohibited by N.J.S.A. 17:22A-17a(7). An act such as providing a certificate of insurance that misrepresents policy terms or conditions would violate that statute and subject a producer to penalties. Such penalties may include suspension or revocation of the producer's license.

In addition to insurance, another way of allocating risk is through contractual indemnification. Contractual liability

coverage occurs when one party seeking indemnity (the indemnitee) contractually requires another party (the indemnitor) to assume the tort liability to pay for bodily injury or property damage to a third party. This is important because if the additional-insured coverage turns out not to be available because of the lack of an endorsement, the third party seeking coverage may be able to obtain coverage under the contractual liability insurance provision of the liability policy. Another benefit to having such a provision in a contract is that it will act as an incentive to the indemnitor to make sure it has adequate insurance in place and also that the party it is contracting with is covered as an additional insured.

In response to the problem of the need to verify coverage, and because the tracking of insurance certificates over the life of a contract or transaction has been an ongoing burden for all involved, the need to obtain insurance certificates may eventually be eliminated. Recently, Safeway, the U.S. and Canadian grocery store chain, sent notices to inform insurance agents that the company is no longer requiring certificates of insurance. This was the result of a determination by Safeway that a signed contract with a proper indemnification clause, not an insurance certificate, is the critical document they need in order to pursue third-party coverage and aid in subrogation recovery in instances when Safeway's insurance program was called on to defend and pay claims. If this policy is emulated by others in dealing with financially sound counterparties, there is a potential that it could lead to more corporations and government entities abandoning their insurance-certificate requirements and focusing instead on the creation of solid indemnification clauses in contracts. ■