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Legal update

Is a certificate holder an additional insured?

By Sari Gabay-Rafiy, with Anne Marie Bowler

You are asked by a policyholder to obtain a certificate of liability insurance, which evidences the fact that an insurance policy has been written. You may even be asked to designate another party as an additional insured. In your capacity as broker or agent, you issue the certificate. But, then the certificate holder suffers a loss, submits a claim to the insurance company, and learns that it is not actually covered under the policy as an additional insured. You are now a defendant in a lawsuit for, among other things, failing to adequately procure insurance.

Beware of disclaimer language

After you dig out the certificate of insurance from the file and scan its contents, you see the identity of the insured, the insurers affording coverage, the type of insurance, policy limits, the name of the certificate holder, and so on. A closer review of the certificate may reveal a variation on the following language in fine print: THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW. It also may state that "Certificate Holders are included as Additional Insureds subject to all policy conditions and exclusions."

Frequently, insurers rely on such form disclaimer language in denying insurance coverage to the certificate holder. The trend in New York state courts is to rely upon such disclaimer language in upholding the denial of insurance coverage to certificate holders. Despite the existence of the certificate of insurance, a certificate holder is not necessarily considered an additional insured under the subject policy because the certificate, standing alone, is generally not considered a contract to insure.

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Legal update (cont.)

A review of New York state cases in this area is illustrative. For instance, in *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171 (1st Dep't 2000), the insurance broker, the Schaefer Agency Inc., issued a certificate of insurance designating a subcontractor as an additional insured. After a loss occurred at a construction site and a claim was submitted on behalf of the certificate holder, the insurance company disclaimed coverage on the grounds that the subcontractor was never actually added to the policy. The court examined the certificate of insurance which stated that "it was issued for information only, that it did not confer any rights on the certificate holder and that it did not extend or amend the policy's coverage." The certificate also stated that the insurance afforded by the policies listed on the certificate is "subject to all the terms, exclusions and conditions of such policies." The existence of this disclaimer language led the court to dismiss the action against the insurance broker because the certificate, standing alone, was not conclusive proof that a contract to insure the additional insured existed.

In another case, *Greater N.Y. Mutual Insurance Co. v. White Knight Restoration Ltd.*, 7 A.D. 3d 292, 293 (1st Dep't 2004), a property owner and contractor sued a subcontractor's insurance broker—Levitt-Fuirst Associates—seeking damages for the broker's alleged failure to procure coverage naming them as additional insureds, and for producing certificates of insurance that incorrectly indicated they had been so named. The court upheld the dismissal of the claims against the insurance broker in finding that it was unreasonable to rely on the certificates for coverage in the face of their disclaimer language.

In one case, where it does not appear that a broker was involved in procuring the insurance policy at issue, the court viewed the certificate holder as an additional insured even though it contained typical form disclaimer language. The court found "[t]he only reasonable interpretation to be given the phrase "ADDITIONAL INSURED" followed by plaintiffs' names is that [the insurer] meant to extend coverage to them under the terms of its policy." See *B.T.R. East Greenbush Inc. v. General Accident Co.*, 206 A.D.2d 791 (3rd Dep't 1994). This decision, and others in this area, may be influenced by the insurance company's intent in issuing a certificate and knowledge of the existence of the additional insured prior to notice of a claim.

How a case will play out likely will turn on the set of facts presented. Of key importance is whether the policy contains an additional insured endorsement and if so, what the endorsement covers. It may specifically name another entity as an additional insured or it may contain a Blanket Additional Insured Endorsement extending the definition of an "Insured." The endorsement may include as an insured any person or organization whom the insured is required to name as an additional insured on the policy under a written contract or written agreement that is in effect during the term of the policy. Even if such an additional insured endorsement exists, the terms of the endorsement should be reviewed to determine whom and exactly what is covered under the policy.

The status of the additional insured

If you are a broker or agent and find yourself a defendant in a lawsuit brought by an additional insured based upon negligence or breach of contract it is likely a court will find you are not properly named as a defendant. In New York state, the general rule is that an additional insured cannot maintain a claim against you because of the absence of a relationship of privity giving rise to a duty. In other words, "the duty of an insurance broker runs to its customer and not to any additional insureds since there is no privity of contract for the imposition of liability." *Arredondo v. City of New York*, 6 A.D.3d 328, 329 (1st Dep't 2004).

For this reason, in *Benjamin Shapiro Realty Co., LLC v. Kemper National Insurance*, 303 A.D.2d 245, 246 (1st Dep't 2003), the court held that because the insurance broker, Tanenbaum-Harber Co., was under no duty to and had no contractual relationship with the purported additional insured, it could not be held liable to the purported additional because of its issuance of certificates of insurance.

Similarly, in *Glynn v. United House of Prayer,* 292 A.D.2d 319, 323 (1st Dep't 2002), the insurance broker, RBL Associates Inc., issued certificates of insurance to the general contractor naming the owner as an additional insured. The owner, however, was not considered an additional insured under certain policies at issue and coverage was disclaimed. After the owner asserted claims against the broker and the insurers, the court affirmed the dismissal of the negligent misrepresentation against the broker, explaining, "since RBL, having had no contractual relationship with [the additional insured], and not having otherwise been in privity with it, was under no duty to [the additional insured] that might serve as a predicate for [the additional insured's] claim." Notably, though an additional insured endorsement was included in one of the policies in which the broker was apparently not involved in procuring, the court examined the language of the endorsement and determined that the claim was outside the scope of coverage.

Though the factual circumstances will dictate whether an insured or purported additional insured can maintain a negligence or breach of contract claim against you, to avoid litigation, it is important to not merely issue certificates naming additional insureds, but to request copies of and review the actual additional insured endorsements. If the policy is not properly amended to extend coverage to additional insureds, you may be tangled in a litigation involving whether a certificate holder is or is not an additional insured.

This article is for informational purposes only and is not intended to give legal advice. For more information, please contact Gabay-Rafiy & Bowler LLP, (212) 941-5025, gabay@gabaybowler.com or bowler@gabaybowler.com.