Exploring Equitable Estoppel

By Kyle M. Heisner

This Certificate Does Not Amend, Extend or Alter the Coverage Afforded… Or Does It?

Courts throughout the country hold that certificates of insurance with disclaimers, by their own terms, cannot change the coverage that is provided under the policies they reference. Yet somehow, many of these same courts caused insurers to pay for bodily injury and property damage not covered by the policies, based on erroneous certificates drafted by independent agents and brokers. This article will explore that "somehow"—namely, the doctrine of equitable estoppel.

It is important to understand what certificates of insurance can and cannot do. Courts largely agree with insurers that a certificate of insurance does not and cannot change the terms of the insurance policy when the standard ACORD disclaimer is present:

> This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This certificate does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder.

The purpose of a certificate of insurance is instead merely informational—it provides a snapshot of coverage and the basic information for the policy as of the time the certificate was issued, usually by an independent insurance agent or broker. An independent agent or broker acts on behalf of the insured, not the insurer. Neverthe-

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less, many courts hold, under the legal doctrine of estoppel, that coverage may be owed by the insurer based on representations in the certificate, even though it was not issued by the insurer and does not conform to the terms of the referenced policy.

Background

In the context of insurance coverage disputes, the doctrine of equitable estoppel can be applied to preclude an insurer from disclaiming coverage where its employees or agents acted in such a way as to induce reasonable reliance by a putative additional insured. Applying this doctrine to language found on a certificate of insurance poses two unique issues when a certificate holder claims that they are entitled to the coverage identified on the certificate (or their interpretation of it) that does not match what is found in the policy. The first issue, discussed in more detail below, is whether a broker who acts on behalf of the named insured can also be treated as an agent of the insurer through express, implied, or apparent authority.

If sufficient support for an agency relationship can be established, the next issue is whether the putative insured can "reasonably" rely upon a certificate of insurance that clearly states it "confers no rights" and does not "amend, extend or alter" the terms of the policy. Differing approaches have been taken among courts in the United States, with some finding that the disclaimer language on certificates of insurance precludes the doctrine of estoppel from being applied because no certificate holder could reasonably rely on the certificate to confer coverage. Others, however, find that such reliance may be warranted under certain circumstances and form the basis for estoppel.

Many courts address claims by certificate holders that they are entitled to the coverage identified in the certificates, which were either inaccurate or limited by additional terms, conditions, and/or exclusions of the policy that were not identified in the certificates. This article reviews the holdings of a few cases where courts conclude that the certificates, by their own terms, and particularly when issued by someone other than the insurer, do not create or amend the coverage afforded by the policy. As addressed below, however, there is less agreement among various jurisdictions as to whether erroneous or incomplete information on a certificate can form the basis for estoppel.

Certificates of Insurance Do Not Create Coverage

As previously stated, courts throughout the country have made clear that a certificate of insurance cannot change the terms of the policy. Regardless of whether issued by the insurer or a broker, courts routinely hold that language in a certificate does not affect the coverage afforded by the policy. This is particularly the case with regard to certificates issued by brokers, who are agents of the insureds, rather than the insurers.

Independent insurance agents and brokers work on behalf of the insured and not for the insurance company. This relationship is even codified in some states, such as §2101 of the New York Insurance Law. As explained in *Wimberg v. Chandler*, 986 F. Supp. 1447, 1453 (M.D. Fla. 1997), the general rule is that "an independent agent or broker acts on behalf of the insured rather than the insurer. In the absence of special circumstances, the broker will be considered the agent of the insured as to matters connected with the application and the procurement of the insurance, despite the fact that the broker receives his or her compensation from the insurer." By contrast, a captive agent is one that is licensed to sell coverage for only one carrier and is generally considered to be an agent of the insurer due to this relationship. Even where it is an agent of the insurer who issues the certificate, however, it holds true that language in the certificate does not create or amend coverage provided by the policy.

For instance, in *Taylor v. Kinsella*, 742 F.2d 709, 711 (2d Cir. 1984), the Second Circuit held that "[a]s a general rule, where a certificate or endorsement states expressly that it is subject to the terms and conditions of the policy, the language of the policy controls." In *Taylor*, an employee of the *New York Post* was injured by a Hertz rental truck being driven by the plaintiff's co-worker. The *New York Post* was immune from a claim by its employee because of the exclusivity bar of the workers' compensation law, but Hertz filed a third-party lawsuit against it and its insurer, seeking additional insured coverage.

Notably, the *Taylor* case is an example of a situation in which the insurer itself issued the certificate of insurance to the certificate holder. The certificate issued to Hertz explicitly named them as an additional insured for all vehicles leased by Hertz to the *New York Post*. The insurance policy, however, contained an exclusion for faulty workmanship that was not mentioned in the certificate. Inevitably, an accident occurred that was found to be the result of faulty workmanship on the vehicle, and Hertz sought coverage based upon the certificate language naming it as an additional insured and its lease agreement with the *New York Post* requiring the procurement of this coverage. The trial court agreed with Hertz, but the appellate court reversed. The court quoted the standard ACORD language cited earlier in this article and indicated that the certificate clearly stated that it was for informational purposes only and did not amend, extend, or alter the coverage of the policies. Finding that no coverage was owed, the Second Circuit explained, "[w]here a certificate or endorsement states expressly that it is subject to the terms and conditions of the policy, the language of the policy controls."

The Tenth Circuit ruled similarly in *True Oil Co. v. Mid-Continent Cas. Co.*, 173 Fed. Appx. 645 (10th Cir. 2006), where the plaintiff, True Oil, contracted with Pennant Service Company to perform work on one of its wells in Wyoming. The contract included an indemnification clause to hold True Oil harmless, despite violating a state law prohibiting contractual indemnification in the mineral industry. Additionally, Pennant was required under the contract to obtain insurance naming True Oil as an additional insured. Pennant's insurance agent issued two certificates of insurance to True Oil, both stating that they were for informational purposes only and did not amend, extend, or otherwise alter the coverage under the policies. When an employee of Pennant was injured while working, True Oil was sued for negligent supervision and sought additional insured coverage from Pennant's insurer under a blanket endorsement that extended coverage to "any person or organization…

whom [Pennant] has agreed by written 'insured contract' to designate as an additional insured."

The insurer in *True Oil* disclaimed coverage, and because the contract was unenforceable under Wyoming law, the Tenth Circuit agreed. Because there was no valid contract between Pennant and Mid-Continent for indemnification, it held that the policy language quoted above was not satisfied. True Oil argued, alternatively, that the insurer's motion for summary judgment should be denied because the certificates of insurance created a question of fact as to whether the insurer agreed to provide additional insured coverage. The Tenth Circuit rejected this argument, noting that the disclaimers on the certificates specifically stated that they did not amend, extend, or alter the coverage and that when a putative additional insured "was not made an additional insured under the policy, a contrary certificate of insurance does not extend coverage."

In *T.H.E. Ins. Co. v. City of Alton*, 227 F.3d 802, 806 (7th Cir. 2000), the Seventh Circuit reiterated that a certificate of insurance cannot confer coverage. In this case, the City of Alton hired FPI, a fireworks company, to produce a Fourth of July fireworks display. FPI's insurance through T.H.E. Insurance specifically excluded coverage for shooters (the employees who set off the fireworks display on the barge). The City of Alton was named as an additional insured under FPI's policy, and the certificate included a disclaimer that it did not alter, amend, or extend the policy in any way. An explosion on the barge killed three of the shooters and injured a fourth, and a lawsuit ensued. Alton sought indemnification from the FPI policy, arguing that it did not know about the exclusion in coverage for bodily injuries to the shooters because it relied upon the certificate of insurance it was provided and never read the policy. The Southern District of Illinois ruled, and the Seventh Circuit affirmed, that the City of Alton could not rely on the general language of the certificate when it contained a disclaimer and the policy specifically excluded the bodily injury coverage being requested. Thus, Alton's argument that the disclaimer language was inadequate failed, and the Seventh Circuit affirmed the declaratory judgment ruling that no coverage was owed.

Finally, in *Am. Hardware Mut. Ins. Co. v. BIM, Inc.*, 885 F.2d 132, 139 (4th Cir. 1989), the Fourth Circuit addressed whether a certificate of insurance could form the basis for coverage if a binder policy was not in effect due to non-payment of the premium. In this case, BIM, a West Virginia real estate company, sought coverage for a shopping center. The application included a binder, and a check was presented as a premium to deposit to ensure that the binder would be "bound over" until the coverage was established. After this, the insurance representative from American Hardware Mutual Insurance Company sent a copy of the binder with a certificate of insurance, including standard ACORD disclaimer language. The check covering the premium deposit was twice dishonored, but the insured was not notified until a month later. The insurance agent warned the insured that there would be a "Notice of Cancellation," but the agent agreed to allow the insured more time to correct the funding issues. Just a few days later, the shopping center was destroyed by a fire. The court held that, since the disclaimer on the certificate of insurance was effective, the insurance company could not rely on the certificate as independent evidence of interim coverage under the binder policy.

Even when there are no inaccuracies, however, certificates can be problematic in situations such as when the certificate states that the certificate holder is an additional insured but omits various terms, limitations, and exclusions that are set forth in the insurance policy.

So What Is It Good For?

In practice, certificates of insurance are useful to insureds when they are asked to provide evidence to customers and contractors who request proof of insurance prior to hiring the insured. Typically, the insured will contact their broker and request that a certificate be issued to the requesting party, who will be identified as a certificate holder on the certificate. Often, however, the certificate holder is unaware that the document they received is only a "snapshot" of coverage and may no longer be accurate days, weeks, or months after it is placed in their file—or possibly that it was never accurate.

Even when there are no inaccuracies, however, certificates can be problematic in situations such as when the certificate states that the certificate holder is an additional insured but omits various terms, limitations, and exclusions that are set forth in the insurance policy. In the context of a CGL policy issued to a contractor, for example, the certificate will typically not identify exclusions for mold, pollution, exterior insulation and finish systems, or other exclusions that may be relevant to the certificate holder. Nor will a certificate identify whether aggregate policy limits have been eroded by other claims or if there is a large deductible or self-insured retention.

Additionally, some states require that exclusions be clearly communicated to the insured in writing, which can be accomplished via a certificate of insurance. Thus, even where the certificate provides that the policy will control, exclusions that do not appear on the certificate are effective only if the policy itself is provided to the additional insured. In such cases, the certificates do serve a useful role beyond merely providing a snapshot of coverage. For the most part, however, putative additional insureds should be wary of the very limited role that certificates of insurance play, and they should verify that the additional insured coverage they seek is reflected in the policy language itself.

Equitable Estoppel

A claim for estoppel is generally present when a party's misleading words, conduct, or silence causes another party to reasonably rely upon that conduct to his or her detriment. To argue successfully that insurance benefits are owed based upon this doctrine, however, the party claiming coverage must demonstrate that the misleading words, conduct, or silence were those of either the insurer or its agent. This can be a challenge given the general assumption that a broker acts as an agent of the insured and not the insurer. Even when this hurdle is overcome, the putative insured must establish that its reliance was reasonable. This "reasonableness" requirement is a significant issue when the certificate that is central to the estoppel argument contains a prominent warning that it should not be relied upon as a substitute for the policy.

The first element, the existence of an agency relationship, is clearly satisfied when the entity issuing the certificate of insurance alleged to contain inaccurate or incomplete information has express authority to act on behalf of the insurer. As explained by the court in *Donegal Mut. Ins. Co. v. Grossman*, 195 F. Supp. 2d 657, 666 (M.D. Pa. 2001), in states such as Pennsylvania, "merely acting as a broker in seeking insurance which is assigned pursuant to an assigned risk plan does not constitute an agency relationship between the insurance agency and the carrier to whom the policy is assigned." Nevertheless, the court noted that, in the absence of an agency relationship, a party may argue apparent authority. In the context of an insurer-broker relationship, apparent authority would exist when the insurer somehow leads clients of the broker to believe that the broker possesses certain powers that it has not actually been granted. In *Apex Financial Corp. v. Decker*, 245 Pa. Super. 439 (Pa. Super. 1976), the test for such authority was described as "whether a man of ordinary prudence, diligence and discretion would have a right to believe and actually believe that the agent possessed the authority he purported to exercise."

Even where there is express or apparent authority, some courts have held that an insurer cannot be estopped based on the language in a certificate of insurance because the disclaimer prevents a party from reasonably relying upon it to verify that certain coverage is in place, while others have deemed the doctrine applicable. For example, the court in *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co. of Ga.*, 337 F. Supp. 2d 1339, 1355 (N.D. Ga. 2004), held that "[w]here there is an affirmative manifestation of intent to incorporate the certificate of insurance (adding an insured) into an insurer's policy, the third party becomes a named insured by virtue of the certificate even though the certificate contains a disclaimer." In *Blackburn, Nickels & Smith v. Nat'l Farmers Union*, 482 N.W.2d 600, 604 (N.D. 1992), the North Dakota Supreme Court affirmed the decision that the insured relied upon the certificate of insurance in good faith in believing he had coverage through the independent agent's relationship with the insurance company. Of note to brokers, however, the court also affirmed that the insurance company was indemnified by the independent agent because the agent's failure to keep the insurance company informed was a material breach of their agency contract. And, in *Marlin v. Wetzel Cnty. Bd. of Educ.*, 212 W. Va. 215, 569 S.E.2d 462, 472–73 (W. Va. 2002), the Supreme Court of Appeals of West Virginia held that "a certificate of insurance is evidence of insurance coverage" and that, because a certificate of insurance is an insurance company's written representation that a policyholder has certain insurance coverage in effect at the time the certificate is issued, the insurance company may be estopped from later denying the existence of that coverage when the policyholder or the recipient of a certificate has reasonably relied to their detriment upon a misrepresentation in the certificate.

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A majority of courts, however, hold that a certificate of insurance expressly stating that it does not alter the coverage of the underlying policy will not be deemed to change the policy. In such states, therefore, a party may not rely on estoppel to assert that it is entitled to benefits under the policy. For example, in *Mountain Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991), the Tenth Circuit held that the "majority view is that where a certificate of insurance, such as the ACORD certificate, expressly indicates it is not to alter the coverage of the underlying policy, the requisite intent is not shown and the certificate will not effect a change in the policy." In *TIG Ins. Co. v. Sedgwick James of Washington*, 184 F. Supp. 2d 591, 597–98 (S.D. Tex. 2001), the court found that no coverage was owed based upon its ruling that the insurance agent could not unilaterally add an additional insured to a certificate of insurance to create coverage that did not exist in the underlying policy. Finally, in *G.E. Tignall & Co., Inc. v. Reliance Nat. Ins. Co.*, 102 F. Supp. 2d 300, 304 (D. Md. 2000), the court found that any additional statement on the certificate of insurance to an "additional insured" was not binding and that coverage

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for the plaintiff was not required because the independent agent was acting as a broker for the insured and not the insurer.

Conclusion

Unfortunately, inaccuracies in certificates of insurance are not an uncommon occurrence. In fact, many states have enacted statutes or regulations that provide the potential for penalties when an agent or broker issues a certificate of insurance containing inaccurate information to address this issue. As such, insurers and brokers should not blindly rely upon the disclaimer in standard ACORD certificates. Even so, an inaccurate certificate of insurance will not change the coverage afforded by the policy and may result in insurance benefits not being received at all unless the elements of estoppel can be proven. For this reason, certificate holders should take extra precaution to ensure that the coverage they believe is in place has actually been secured by the named insured.

Being added as an additional insured to a policy requires either that the policy be amended to name the additional insured or that the requirements of a blanket endorsement be met. Under either scenario, it is important to review the relevant language of the policy itself and not rely upon what some cynical commentators have referred to as a "worthless piece of paper." While admittedly time consuming, particularly when an entity such as a general contractor is relying upon numerous subcontractors to provide it with additional insured coverage, failure to do so could result in a costly gap in or lack of coverage. Moreover, many insurers may refuse to turn over their insured's policy information due to privacy concerns. In such cases, the best course of action is to seek the requisite policy information from the insured directly, who is entitled to receive such information from its insurer upon request.

Once the policy documents are received, the putative additional insured should verify that the policy language conforms to the requirements of its contract with the named insured. This involves first confirming that the requirements to be entitled to additional insured coverage under the policy have been satisfied. Assuming they are, the policy should be analyzed to determine that the coverage provided is adequate to cover the risk associated with the putative additional insured's relationship with the named insured.