[INSIGHT] By Peter H. Bickford

Certificates of Reliability

There is an interesting dilemma that the NY regulators have been facing for literally decades now. It involves a well-defined and acknowledged violation of the insurance law and regulations that has defied any viable enforcement solution. The subject is the issuance of insurance certificates that improperly expand or provide coverages not intended or included in the policy itself, or which are not properly filed with the regulators.

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This is a problem that was first formally recognized in 1995 when the Insurance Department issued a circular letter to all licensed p/c companies noting that "some cities, counties, and other organizations" have been insisting on receiving certificates of insurance that "appear to alter the terms of the actual policy," including the addition of "hold harmless" provisions. The circular letters pointed out that certificates of insurance should only reflect the actual terms of the policy, and if they expand on or add terms, then they are "policy forms" requiring filing. Seems pretty straight-forward, right? Well, apparently not.

In 1997 the Department issued a second circular letter on the issue, this time broadcast not just to p/c companies, but also to all licensed producers and "City, State and Municipal Agencies and other Public Authorities and Corporations." In addition to reiterating the problem of insureds demanding expanded certificates, the letter confronted the developing practice of public agencies requiring the producer to execute the agencies' own forms of certificates, or that modify the terms of the standard ACORD form, to include "terms or clauses that the public entity requires but are not contained in the insurance policy." Additionally, these forms often provided that in the event of conflict or inconsistency with the policy, the terms of the certificate controlled.

Unfortunately, the focus of enforcement has been on the producer caught between the proverbial rock and a hard place by being pressured to issue the certificate or agency imposed form or lose a major account to another producer willing to do the public agency's bidding.

Over the next fifteen years or so the Department issued numerous opinions on various aspects of the issue—at least seven opinions issued by the office of general counsel from 2000 though January 2011 (none, of course, have been issued by the Department of Financial Services since taking over in October 2011—the DFS simply does not issue opinion letters). All of these opinions repeat the mantra that certificates issued to or forms generated by public entities that expand terms of coverage, or add terms that have not been approved by the carrier or filed with the Department, violate the insurance law and are prohibited. These rulings also repeatedly warn producers—the only licensed entity the Department has direct control over in these scenarios—of the consequences of issuing such improper certificates that expand coverage. Apparently, however, going after the little guy (the producers) has not stopped the big guys (the public agencies and other entities) from continuing to defy the law and ignore the repeated lines in the sand drawn by the regulators.

Enter the Legislature. For the third consecutive year, the NY Legislature has considered a bill to address the certificate issue. The approach is to make it a violation of law for any person or governmental entity to "prepare, issue, request, or require the issuance of a certificate" that expands, adds or alters terms of coverage, or knowingly requests the issuance of a certificate of insurance that contains false or misleading information. In other words, the legislation targets the end-user of certificates and not just the producer stuck in the middle.

The proposed legislation also expands enforcement. In addition to the usual investigative and enforcement authority to the superintendent of financial services, the proposed legislation also empowers the state inspector general to investigate and enforce the provisions of the law against "any governmental entity that is considered a covered agency" under the State's Executive Law. It is noted that while the definition of "covered agency" is broad, it includes an interesting exclusion—"multi-state or multi-national authorities"—that may prove problematic down the road (i.e., does that mean that a public entity such as the NY-NJ Port Authority is beyond the reach of the legislation?).

The legislation was passed in both houses of the NY Legislature in June 2013, but—as is often the case—it was not delivered to the Governor until December 2013 as part of a year-end bundle of legislation, and was one of 32 pieces of legislation vetoed by the Governor before year-end. What may have seemed to be a logical piece of legislation from an insurance perspective apparently was not so logical to certain public entities—particularly those with their own forms of certificates.

The legislation was reintroduced in the 2014 term and again passed both houses. The only difference I could find in its current form over last-year's vetoed version is the addition of an exception if "the certificate is a form promulgated by a govern-

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mental entity that is considered a covered agency under section fifty-one of the executive law, provided such form has been approved for use by the superintendent." As of this writing, the newly passed bill has not been forwarded to the Governor, and we'll have to wait and see whether it will be done soon or held and forwarded as part of a year-end bundle (the practice of delaying presentation of passed bills to the Governor is a time-honored way to give the Governor's office sufficient opportunity to consider the numerous "non-essential" bills passed by the Legislature so they do not become law by unintended neglect).

I do not know if the current legislation will satisfy the Governor's office or the public entities that have opposed the prior attempts to address the expansive certificate issue. I also do not know whether the new legislation, if signed into law, will be any more successful in ending the issuance of improperly expansive certificates than the past efforts of the insurance regulators under the seemingly clear terms of the current laws and regulations. One would hope, however, that at the very least a dialogue among carriers, public entities and the regulators has developed throughout this process to address the underlying needs and problems of each.

The only successful long-term solution may be the ability of the parties themselves, through dialogue and compromise, to balance the insurance needs of the public entities with the underwriting needs of the carriers and the enforcement obligations of the regulators – and, of course, to get the producers out of the line of fire![IA]

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