



PROFESSIONAL INSURANCE AGENTS

25 CHAMBERLAIN ST.
P. O. BOX 997
GLENMONT, NY 12077-0997
(800) 424-4244
FAX: (888) 225-6935
WEB: www.pia.org
E-MAIL: pia@pia.org

PIANH clarifies certificate of insurance issue for agents, brokers

PIANH, in a continuing effort to offer the most accurate and reliable information to its members, recently contacted the New Hampshire Insurance Department to gain clarification regarding an issue that may have been recently brought to your attention. We are pleased to be able to offer guidance on this issue for our members.

The issue surrounds certificates of insurance. It has been alleged that some agents are being asked to issue certificates which include or change language that amends or alters the terms of insurance policies issued to their clients. It is the opinion of PIANH that this is improper and could result in serious implications for agents, because, among other considerations, any modification of the underlying policy must be approved by the department. It is important to note, however, that a modification of a 10-day notice to a 30-day notice of cancellation for nonpayment of premium in and of itself would not be violative of NH 417-C:2, because the statute requires at least 10 days' notice, and 30 days is at least 10 days.

A different set of circumstances arise, however, if the certificate attempts to create an obligation to persons other than the policyholder and does not attempt to change the terms of the underlying policy. For example, if an agent modifies a certificate by adding a clause stating that the insurance company will "endeavor to" notify the certificate holder (not the insured) if the policy is cancelled, is that an illegal act? Presumably, the certificate also should include a provision stating that "any failure to do so will not impose any obligation or liability on the company, its agents or representatives."

First off, the act doesn't modify the terms of the policy, because there exists no statutory obligation to provide notice to persons other than the policyholder and the policy does not incorporate any provisions of this type. Moreover, courts have determined that, when there is a discrepancy between the terms of the insurance policy and the certificate of insurance, the general rule is that the language of the policy takes precedence. (See *In McKenzie v. New Jersey Transit*, 772 F. Supp. 146 (1991)). Additionally, a U.S. District Court described "for information only" language on the certificate and stated, "as 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."

Interestingly, however, there are exceptions where the policy terms do not control, but the certificate controls over the policy. For example, in the case of *Bucon v. PMA*, 547 NYS 2d 925 (1989), the certificate of insurance was held to be controlling over the policy. In this case, the insurer (who issued the certificate) noted that the policy was never amended to include an additional named insured and that the designation of the contractor as an additional insured in a certificate of insurance was "due to clerical error." Nonetheless, even though the court recognized that the certificate of insurance was not, in and of itself, a contract to insure the contractor, it did find that by issuing the certificate of insurance which named the contractor as an additional insured, the carrier was estopped from denying coverage for the contractor.

But does creating this obligation on the certificate raise other legal issues for agents? From the outset, courts around the country have generally held that a certificate holder (who is not the policyholder) has no legal recourse against an agency or insurer because of a lack of privity of contract, specifically that no consideration has been made on the part of the certificate holder so, therefore, no contract exists. For example, in *United States Pipe & Foundry Co. v. United States Fidelity & Guaranty Co.*, 505 F.2d 88 (5th Cir. 1974), the court ruled that the certificate did not grant contractual rights since there had not been any exchange of consideration as required to effect a valid, enforceable contract. And our very own Supreme Court held in *Bradley Real Estate Trust, et al. v. Plummer & Rowe Insurance Agency Inc.*, 609 A2d 1233 (Sup. Ct. NH, 1992), that "...the certificate is a worthless document; it does no more than to certify that insurance existed on the day the certificate was issued. We leave it to the Legislature or to the future bargaining of the parties to rectify inequities in the notification process."

A decision particularly on point regarding this practice resulted from the case *Nazami v. Patrons Mutual Insurance Co.*, Nos. 17537, 17539, Atlantic Reporter 2d 209, Dec. 5, 2006. This case specifically explored the issue of "will endeavor to" language and whether that language creates any rights to notice of cancellation for a certificate holder. In *Nazami*, the Connecticut Supreme Court ruled that failure to provide notice of cancellation under the ACORD certificate did **not** constitute fraud or negligence. The fraud allegation was dismissed largely because of the disclaimer language on the form and the negligence allegation was dismissed because the certificate holder was owed no duty of care and the certificate issued "as a matter of information only," conferred no rights on the holder and did not constitute a contract between the holder and agent, again largely because of the disclaimer language.

One should be aware, however, that where there is an implication that the certificate might be a part of the policy or controlling thereof, several courts have ruled in favor of the certificate holder. (See *Sumitomo Marine and Fire Ins. Co. v. Southern Guaranty Ins. Co. and Columbia National Ins. Co.*, 337 Fed. Supp. 2d 1339 (U.S. Dist. Ct. No. Dist. Georgia 2004).

Of course, regardless of these decisions, agents should never unilaterally revise certificate wording or issue proprietary certificates that have not been tested in court. Attorneys and risk managers will often counsel their employers or clients to reword certificates to clearly state that they are part of the contract and that they grant an enforceable interest in the policy to the certificate holder. While there is general legal consensus that certificates do not create contractual obligations or rights, there are exceptions based on unique circumstances.

In addition, a certificate holder could conceivably seek redress based on other legal grounds when certificates are inaccurate or imply rights due to their proprietary nature or diversion from "standard" wording. Finally, and most importantly, where the certificate of insurance does not contain a disclaimer (or where the agent/broker modifies the standard disclaimer in such a way as to eliminate the operative language), the insurer cannot rely on policy provisions inconsistent with the terms of the certificate of insurance. (See *Handley v. Providence Mutual Fire Insurance Co.*, 898 A.2d 492 (NH Sup. Ct., 2006). According to the court in *Handley*, "[T]he certificate here did not clearly indicate that it was issued for 'information only' or that it 'confers no rights upon the certificate holder.' But where the certificate refers to the policy and expressly disclaims any coverage other than that contained in the policy itself, the courts found that the policy should govern the extent and terms of the coverage.