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Effectively obtaining additional insured status in Illinois

After returning from lunch on a slow Wednesday, the blinking red voicemail light on your phone signals the troubling message that awaits: "Tom, this is Ray from XYZ Retailer. We have a new personal injury claim being brought against us relating to one of your products which we sold through our Oak Brook store. As per our contract, we'll be tendering this matter to your company for defense and indemnity. It looks pretty serious. Call me as soon as you get in." To state the obvious, this is not a message that any manufacturer wants to receive. Nevertheless, surely XYZ Retailer will be covered by your liability insurance policy, right? Let's see. Was there a certificate of insurance issued? Check. Was an indemnity agreement signed? Check. But is XYZ Retailer covered by your liability policy? Maybe, maybe not. Do you have the insurance policy? Hmm, it must be here somewhere. This article will examine the perils of relying on anything but the actual insurance policy to ensure that you or another party qualifies as an additional insured on a policy of insurance.

Certificates of insurance

For better or worse, manufacturers and their distributors and retailers often rely on certificates of insurance to verify proper insurance. A certificate of insurance is a document usually issued by an insurance broker or agent to a third party who has not purchased a policy from the insurer. Certificates show basic information about a policy: the fact of its existence, the name of the insured, the type of insurance, the policy period, limits of liability, etc. It is common practice for a retailer, for example, to ask a product manufacturer to provide a certificate of insurance showing that the retailer has been included as an additional insured on the manufacturer's insurance policy. Indeed, in many transactions or business relationships, the issuance of a certificate of insurance is the full extent of the parties' investigation into whether the manufacturer or retailer actually qualifies as an additional insured on their contractor's or supplier's policy.

The problem with certificates of insurance is that they are not a particularly reliable indicator of whether a party has been included as an additional insured. As mentioned above, certificates are usually issued by an insurance broker or agent, not directly by the insurance company itself. Thus, the information on these certificates is often not consistent with the actual terms of the insurance policy. Indeed, certificates of insurance typically state that they are informational only and contain a disclaimer that directs the certificate holder to review the actual policy in order to determine the coverage afforded. When certificates of insurance contain these types of disclaimers, Illinois courts generally hold that insurers are not bound by any information set forth on the certificate. If the statements on the certificate are inconsistent with the actual terms of the insurance policy, therefore, the terms of the policy will govern. Because most certificates of insurance issued today contain these disclaimers, it is simply not a wise practice to rely on a certificate to determine if a manufacturer, distributor or retailer has been added as an insured on another party's insurance policy. Only the insurance policy itself will show who has effectively been added as an additional insured.

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Indemnity agreements

In addition to requiring certificates of insurance, manufacturers and their distributors and retailers also try to protect against future liability by having another party, such as their contractor or supplier, agree to indemnify them against future claims. Without question, such indemnity agreements have their benefits. Coverage under another party's liability insurance policy, however, is usually not one of them. Under a well-crafted indemnity provision, a contractor may have to pay to defend and indemnify a manufacturer against certain claims that are brought against the manufacturer, such as bodily injury claims that arise out of the contractor's work. Nevertheless, just because the contractor may have to indemnify the manufacturer does not necessarily mean that the contractor's liability insurer will have to provide coverage to that contractor for that indemnity obligation. Without such coverage, the indemnity obligation may be worthless, particularly when the contractor has little or no money.

In fact, in most cases the insurer will not provide coverage for such an indemnity obligation. Commercial General Liability (CGL) policies typically have a provision which excludes coverage for liability assumed by the insured in a contract or agreement (i.e. the "Contractual Liability" exclusion). On its face, this exclusion eliminates coverage for any indemnity obligation assumed by the insured contractor or supplier. The exclusion does not apply to liability assumed by the named insured in an "insured contract," however, which is an agreement where the named insured assumes the tort liability of another party to pay for bodily injury or property damage to a third person. The problem is that either by design, lack of specificity or operation of law, many indemnity agreements do not require the named insured to indemnify another party for claims arising out of the other party's own negligence, but instead only require indemnity for claims arising out of the named insured's negligence. The result is that many indemnity agreements do not qualify as "insured contracts" and any such required indemnity owed to a manufacturer is therefore excluded from the insurance policy.

Even if coverage for a particular indemnity agreement is not excluded by the policy, the party being indemnified still may not receive any direct benefit from the contractor's or supplier's liability insurance policy. Specifically, the indemnity agreement usually does not transform the indemnified party, such as the manufacturer or retailer, into an additional insured on the contractor's or supplier's policy. Instead, application of this exception usually means only that the insurer will provide coverage to its named insureds for claims brought against them for their failure to honor their indemnity agreements. It generally does not provide the indemnified manufacturer or retailer with direct coverage under the contractor's or supplier's policy.

Additional insured endorsements

The most reliable manner in which a party can become an additional insured on another's liability policy is the one that often receives the least attention during contract negotiations: the additional insured endorsement. Quite simply, an additional insured endorsement is an insurance policy form which can add a stranger to the policy as an insured. These endorsements can expressly name certain parties as additional insured, or they can identify unnamed parties who meet certain conditions as additional insured on a blanket basis. Either way, the endorsements will typically limit the scope of coverage provided to the additional insured. Because these endorsements will vary, the only way to ensure that all conditions are met and that the scope of coverage is understood is to actually review the policy. As discussed earlier,

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those who rely solely on certificates of insurance do so at their peril.

One of the conditions that is common to becoming an additional insured under a blanket additional insured endorsement of another's policy is the requirement that the named insured agree in a written contract to make the other party an additional insured. These endorsements usually require that such a written agreement already be in place prior to any incident for which the additional insured is requesting coverage. Thus, if a contractor's policy contains such an endorsement, the best way for a manufacturer to become an additional insured on that policy is for the contractor to agree in writing either to make the manufacturer an additional insured or to otherwise provide the manufacturer with insurance. Simply put, the time and attention parties usually spend focusing on certificates of insurance and indemnity provisions is much better spent reviewing the named insured's additional insured endorsement and drafting a written agreement to provide insurance that complies with that endorsement.

Indeed, reviewing these endorsements also will reveal the scope of insurance that the carrier may provide in the event of a claim. Modern additional insured endorsements have attempted to limit the scope of coverage in various ways. Some of these endorsements do not provide coverage for "completed operations." Others try to limit coverage for "ongoing operations." Older additional insured endorsements provide broad coverage for claims, including those that merely "arise" out of the named insured's work, operations or products. Illinois courts have oftentimes interpreted this language to provide coverage for an additional insured even if the additional insured is the only negligent party. In recognition of this broader coverage, more recent additional insured endorsements have attempted to limit coverage to only claims "caused in whole or in part" by the named insured's "acts or omissions." In short, regardless of any promise made by a contractor or supplier about the insurance protection it will provide, the scope of coverage actually provided to a manufacturer or retailer can only be determined by reviewing the operative policy language.

Conclusion

When parties engage in a commercial transaction, they reflexively require certificates of insurance and indemnity agreements. Both of these protective devices have their value. To ensure that the parties' insurance expectations are met, however, one needs to review and comply with the terms of the applicable insurance policy. For a party seeking to become an additional insured on that policy, compliance typically requires obtaining a written agreement from the named insured to make that party an additional insured. All parties should exercise care to ensure that these insurance requirements are met before a claim for bodily injury or property damage arises. Waiting to check on these insurance matters until after you receive an urgent phone call reporting a new claim can be a dangerous practice. ■

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