CERTIFICATES OF INSURANCE -- SO YOU HAVE ONE -- NOW WHAT?

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I.

A TYPICAL FACTUAL SCENARIO

The following hypothetical closely resembles the actual facts of a case that the author recently settled for an insurance company client.

Mega Contractor Inc. ("Mega") contracted with Dave Developer ("Developer") to act as the general contractor in connection with the construction of a new building. Mega, in turn, entered into various subcontracts with numerous subcontractors hired to do portions of the work, including Fly by Night Construction ("Fly by Night") and Radical Roofing ("Radical"). Mega's standard subcontract form that it requires all of its subs to sign requires that the subs carry at least $1 million in general liability insurance and that the policy name Mega as an additional insured. Before any sub can start work, Mega requires that the sub provide Mega's risk manager with a certificate of insurance confirming compliance with the contract requirements.

Fly by Night, after signing its subcontract with Mega, went to its insurance agent, Sloppy Sam's Insurance and Bonding ("Sloppy") and requested the insurance certificate. Sloppy verified that Fly by Night's policy with Always Fair Mutual ("Always Fair") afforded CGL coverage to Fly By Night of $1 million per occurrence as required by the subcontract. Sloppy says that he can issue the additional insured endorsement naming Mega for only $20 in additional premium along with the required certificate of insurance "pronto" on Monday morning when "my girl that handles all of the certificates and stuff like that gets back from her vacation." Fly by Night's president leaves a check for the $20 in additional premium and leaves. Sloppy then leaves a note for his assistant to handle everything on Monday morning.

Radical's CEO, likewise, calls her insurance broker to make sure that her policy with We Are Cheap Insurance Co. ("Cheap Insurance") complies with the requirements of Radical's subcontract. The broker, after reviewing Radical's policy advises Radical's CEO that the policy affords $1 million in coverage as required and already contained a "blanket as required by contract" additional insured endorsement that automatically covered Mega to the extent that Radical was contractually obligated to cover Mega by virtue of its contract with Mega. Accordingly, the broker tells Radical's CEO that a certificate of insurance would be faxed shortly directly to Mega's risk manager so that Radical could begin work on Monday as well.

On the following Monday, Sloppy's assistant, still hung over from the all night casino party on her vacation cruise Saturday night, arrives at Sloppy's office, sees Sloppy's note and types up a certificate of insurance showing that Fly by Night had $1 million in coverage through Always Fair under policy no. 1234567-G and showing Mega as the "certificate holder" and stating that Mega is an "additional insured". She forgets, however, to do anything to have Always Fair issue the additional insured endorsement.

She then faxes the certificate to Mega's risk manager who quickly looks at it and then puts it in his file drawer where he keeps all of the insurance certificates. He then checks off "insurance verified" on his checklist for Fly by Night and tells Fly by Night that they can begin work.

Likewise, on Monday, the broker for Radical, issues a certificate of insurance to Mega that confirms the coverage amount and specifically provides that Mega is the certificate holder and further that Mega is an "additional insured" on Radical's policy with Cheap Insurance. Mega then gives Radical the go ahead to start work.

Several weeks into the job, an employee of a third subcontractor, Dan Dead, falls to his death when he is overcome by fumes from the hot tar/glue roofing membranes being installed by Radical's crew. He had borrowed a safety harness from one of Fly by Night's guys but it was broken and did not work properly.

The following day, when Fly by Night reports the accident to Sloppy, Sloppy realizes his assistant's mistake in failing to get Mega insured as an additional insured and quickly types up a new back dated certificate that states that Mega has been added to the policy as an additional insured and faxes it to Fly by Night to give it to Mega. Sloppy tells Fly by Night that someone in his office had requested the additional insured endorsement from the beginning and that he does not know why Always Fair never got around to issuing the endorsement.

Dead's family eventually sues Mega, Radical and Fly by Night. Mega immediately demands that Always Fair and Cheap Insurance take over Mega's defense as an additional insured as required by the subcontracts, and points to the fact that Mega had certificates of insurance from both Radical and Fly by Night.

Always Fair denies defense to Mega on the grounds that Mega had never been added to its policy as an additional insured and points out that the original certificate of insurance issued by Sloppy did not say that Mega was an additional insured. Cheap Insurance likewise denies defense to Mega. It admits that Mega was an additional insured but points out that its policy issued to Radical contains a special endorsement that excludes coverage for any claims that arise out of the application of hot tar membrane roofs or the use of an open flame.

II.

THE TYPICAL QUESTIONS THAT ARISE

1. What is a certificate of insurance?

A certificate of insurance is a document issued by or on behalf of an insurance company to a third party, who has not contracted with the insurer to purchase an insurance policy, that acknowledges that the insurance policy has been written and setting forth in general terms what the policy covers. The most common type of certificate of

insurance is one that is issued for informational purposes to advise a third party of the existence and amount of coverage issued to the named insured, usually in conjunction with some sort of contractual relationship between the named insured and the third party that requires the named insured to carry a certain type and amount of insurance. In addition to describing the insurance available to the named insured, the certificate may also purport to confirm that the third party, also called the "certificate holder", is an additional insured under the policy issued to the named insured. *TIG Ins. Co. v. Via Net,* 178 S.W.3d 10, 18-19 (Tex. App.—Houston [1rst Dist.] 2005), *reversed*, 211 S.W.3d 310 (Tex. 2006); 1 Allan D. Windt, *Insurance Claims and Disputes* Sec. 6.37A at 809-10 (4th ed. 2001); *Blacks Law Dictionary* 240 (8th ed. 2004).

2. Can Mega rely on the certificate of insurance issued by Sloppy to argue that Mega is covered on the Always Fair policy issued to Fly by Night as an additional insured?

No.

In *Granite Const. Co. v. Bituminous Ins. Cos., 832 S.W.2d 427 (Tex. App.—Amarillo 1992, no writ)*, Granite had a contract with the State of Texas for road work and, in turn, contracted with Brown to perform some aspects of the work and required Brown to name Granite as an additional insured on Brown's liability insurance. The insurance agent issued a certificate of insurance to Granite that provided that ***"Certificate holder is added as an additional named insured for all Granite Construction Company's work in the State of Texas".*** The certificate also provided, in the preprinted form fine print, that ***"Notwithstanding any requirement, term or condition of any contract or other document with respect to which this certificate may be issued or may pertain, the insurance afforded by the policies described herein is subject to all the terms, exclusions and conditions of such policies."*** However, the actual "additional insured" endorsement on the policy was more restrictive in that it extended additional insured coverage to Granite "but only with respect to liability arising out of operations performed for such insured [Granite] by or on behalf of the named insured [Brown]." Bituminous denied defense to Granite on the basis that the claims against Granite did not involve operations performed for Granite by or on behalf of Brown.

The Amarillo Court of Appeals rejected Granite's argument that, even if it was not covered by the terms of the endorsement, it was entitled to coverage under the broad terms of the certificate of insurance which purported to extend coverage to Granite for all of its work in Texas without any restriction. The court held that "the certificate itself did not manifest the insurance coverage afforded Granite as the insured" but rather the certificate merely "evidenced Granite's status as an insured and, by its very language, specified that the insurance coverage was that provided by, but subject to the terms, exclusions and conditions of , the named insurance policies." *Granite*, 832 S.W.2d at 429. The court then went on to address whether the allegations against Granite triggered a defense under the terms of the additional insured endorsement and held that they did not.

In *C &W Well Service v. Sebasta,* 1994 WL 95680 (Tex. App.—Houston [14th Dist. 1994, no writ)(unpublished) the court, relying on Granite, similarly held that a certificate of insurance containing similar "disclaimer" language could not be relied upon to argue that the policy covered the certificate holder as an additional insured for a claim that in fact was excluded from coverage by the terms of the policy. See also, *Amoco Prod. Co. v. Hydoblast Corp.,* 90 F.Supp.2d 727, 734 (N.D. Tex. 1999) (same).

In *Sabine Towing & Transportation Co. v. Holliday Ins. Agency, Inc.*, 54 S.W. 3d 57 (Tex. App.—Texarkana 2001, rev. denied) Sabine received a certificate of insurance confirming coverage for SuperIn, with whom Sabine had contracted. The certificate stated that Sabine was an additional insured on the policy but contained the same standard "disclaimer" language stating that the certificate did not amend or otherwise change the policy terms. Nine months after Sabine authorized SuperIn to commence work under the contract, Sabine sent a letter to the insurer attempting to get confirmation of its additional insured status on the policy and only then learned that, in fact, it had never been added as an additional insured on the policy.

The issue on appeal was whether the "discovery rule" applied to toll limitations in Sabine's suit **against the agent**, Holliday, that had issued the incorrect certificate. In the course of that discussion the court concluded that Sabine had failed to exercise reasonable diligence in that it had failed for 9 months to make any inquiries of the insurer to verify coverage beyond just the certificate when the certificate itself specifically put Sabine on notice that the certificate did not change the policy and that, therefore, Sabine needed to review the policy itself. Thus the court held that limitations began to run when Sabine received the certificate of insurance and not a year later when it received the denial of coverage from the insurer.! *Sabine*, 54 S.W.3d at 62. The court distinguished other cases holding that limitations did not start running until the denial of coverage on the basis that each of those cases involved a denial of coverage to the direct insured on the policy rather than to a third party that had no direct relationship with the insurer. *Id.* at 64-5.

Thus, under *Sabine*, not only does the disclaimer language in the certificate of insurance not allow the certificate holder to rely on the certificate as any assurance that it is actually covered as an additional insured, the disclaimer language may actually create an affirmative duty on the part of the certificate holder to find out what the policy actually covers and may trigger the immediate running of limitations with respect to any inaccuracy in the certificate.

The Texas Supreme Court seems to have most recently eliminated any doubts about whether a certificate holder can rely on the certificate as an assurance that it is covered in *Via Net v. TIG Insurance Co., 211 S.W.3d 310 (Tex. 2006).* In *Via Net*, the court held that a certificate of insurance that represented that the certificate holder was an additional insured but also containing the standard disclaimer language stating that the certificate did not modify or alter the policy, did not give rise to the "discovery rule" exception to the statute of limitations. The *Via Net* court, instead held that limitations began to run on the certificate holder's breach of contract claim against the named

insured for not naming the certificate holder as an additional insured on the policy almost immediately after the contract was signed and no additional insured endorsement was added. The court held that limitations barred the breach of contract claim even though the suit was filed less than 4 years from the insurer's denial letter. In other words, a certificate holder cannot even wait to get the denial from the insurer before being charged with an obligation to review the actual policy to see if the named insured has complied with its contractual duty to name the certificate holder as an additional insured.

a. Does the answer depend on whether Sloppy is a local recording agent or otherwise has binding authority on behalf of Always Fair?

Possibly, but it is not at all clear that the status of the agent necessarily affects the outcome.

The *TIG v. Via Net* case discussed supra was the suit by the certificate holder and TIG, its own carrier (via subrogation) against the agent that issued the incorrect certificate (as well as the other party to the contract that was required to cover the certificate holder as an additional insured). *TIG v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002) (Tex. Law) involved the certificate holder's initial suit against Kemper and the broker/agent to get coverage under the terms of the Kemper policy as an additional insured.

The *TIG v. Sedgwick* court did examine the nature of the agency contract between Kemper and Sedgwick and the Sedgwick's level of binding authority and held that Sedgwick was a soliciting agent authorized to solicit insurance and issue certificates of insurance on behalf of Kemper and to bind coverage but not to modify the terms of the policies. *Sedgwick*, 276 F. 3d at 760. The court looked to the terms of the agency agreement that did allow Sedgwick to bind coverage but not to modify the policies. The court then held that under those circumstances, the certificate of insurance issued by Sedgwick that purported to make the certificate holder an additional insured was controlled by the disclaimer language and thus could not modify the terms of the actual policy. Thus the certificate holder was not an additional insured. *Id.* at 760. The court then went on to examine apparent authority and held that the disclaimer language negated any apparent authority that Sedgwick had to modify the terms of the policy. *Id.* at 760-1.

In short, *TIG v. Sedgwick* arguably would support a different result if the agent issuing the certificate of insurance had blanket authority to bind in the sense of a true local recording agent. In that case, if the agent issues a certificate of insurance that incorrectly states that the certificate holder is an additional insured, then the certificate holder has a decent argument that the certificate of insurance operates to extend additional insured coverage even if the policy by its own terms does not.

As a caveat, there is perhaps an equally valid and strong argument that if the certificate of insurance contains disclaimer language, then that language is part and parcel of what any local recording agent "bound" by issuing the certificate of insurance and that, at least as to the coverage of the policy itself vis a vis the insurer, even a certificate issued

by a local recording agent cannot modify the terms of the policy, even if the agent is subject to suit for misrepresentation.

3. Can Mega argue that it is covered for this claim on the Cheap Insurance policy notwithstanding the hot tar/membrane roofing exclusion on the Cheap Insurance policy in light of the certificate of insurance?

No. See discussion above.

4. Can Mega argue that the Always Fair policy is subject to reformation to make it an additional insured on the grounds of mutual mistake?

Possibly, but only if Sloppy, the agent had authority to bind Always Fair to coverage for additional insureds.

The court in *TIG v. Sedgwick* addressed a similar argument. The court held that in order to establish reformation based on mutual mistake, the evidence must show that there was an antecedent agreement that the certificate holder be added as an additional insured by and among all parties, including the insurer, and that there was a subsequent mutual mistake in reducing the agreement to writing. TIG v. *Sedgwick*, 276 F.3d at 761-2. The court noted, however, that there was no evidence that either Lumbermans also intended that the certificate holder be added as an additional insured or that Sedgwick had the actual, statutory or apparent authority to alter the terms of the underlying policy. *Sedgwick*, 276 F. 3d at 762. Accordingly, the court rejected the reformation argument.

5. Does Mega have viable cause of action against either of the agents for issuing certificates of insurance if, in fact, Mega is not covered on either policy?

Possibly as against Sloppy, but probably not against the other agent. See *Sabine*, discussed above for possible causes of action.

6. Does Mega have viable causes of a action against Fly by Night or Radical if Mega is not covered as an additional insured?

Yes for at least breach of contract, if the subcontracts required Fly by Night and Radical to provide specific amounts and types of insurance to Mega that were not, in fact, provided.

As a caveat, if the Defendants could show that the certificates of insurance that were in fact issued did not conform to the contract requirements but that Mega allowed the subs to begin work anyway, then the Defendants could possibly have a waiver argument. In this connection, in *Bott v. J.F. Shea Co., Inc.*, 388 F.3d 530 (5th Cir. 2004) the applicable contract required that a joint venture be named as an additional insured but due to sloppy administration by the contract administrator for the joint venture, a form was used to request the certificate of insurance that only required that one member of the joint venture be covered. The additional insured endorsement was issued in response to

this request and a certificate issued confirming the coverage for the member of the venture but not for the joint venture itself.

In the later suit against the named insured that was supposed to procure coverage for the joint venture, the defendant argued waiver and the court agreed that by allowing the work to commence and never requiring a certificate that complied with the terms of the contract to be issued, the plaintiff joint venture waived its contract claims.

7. When does limitations start to run on claims that Mega may have against the insurers, brokers or subcontractors?

Probably almost immediately after the obligation to name Mega as an additional insured arose.

As already discussed, in *Sabine Towing & Transportation Co. v. Holliday Ins. Agency, Inc.*, 54 S.W. 3d 57 (Tex. App.—Texarkana 2001, rev.denied) Sabine received a certificate of insurance confirming coverage for SuperIn, with whom Sabine had contracted. The certificate stated that Sabine was an additional insured on the policy but contained the same standard "disclaimer" language stating that the certificate did not amend or otherwise change the policy terms. Nine months after Sabine authorized SuperIn to commence work under the contract, Sabine sent a letter to the insurer attempting to get confirmation of its additional insured status on the policy and only then learned that, in fact, it had never been added as an additional insured on the policy.

The issue on appeal was whether the "discovery rule" applied to toll limitations in Sabine's suit against the agent, Holliday, that had issued the incorrect certificate. In the course of that discussion the court concluded that Sabine had failed to exercise reasonable diligence in that it had failed for 9 months to make any inquiries of the insurer to verify coverage beyond just the certificate when the certificate itself specifically put Sabine on notice that the certificate did not change the policy and that, therefore, Sabine needed to review the policy itself. Thus the court held that limitations began to run when Sabine received the certificate of insurance and not a year later when it received the denial of coverage from the insurer. *Sabine*, 54 S.W.3d at 62. The court distinguished other cases holding that limitations did not start running until the denial of coverage on the basis that each of those cases involved a denial of coverage to the direct insured on the policy rather than to a third party that had no direct relationship with the insurer. *Id.* at 64-5.

Thus, under *Sabine*, the disclaimer language may actually create an affirmative duty on the part of the certificate holder to find out what the policy actually covers and may trigger the immediate running of limitations with respect to any inaccuracy in the certificate.

According to the Texas Supreme Court in *Via Net,* the "discovery rule" is inapplicable to a breach of contract case by the certificate holder against the other party based on the other party not taking steps to add the certificate holder as an additional

insured to the policy. The court held that limitations begins to run on a breach of contract claim from the moment of breach and suggests that this means that limitations begins almost immediately upon the obligation to name the additional insured. Under *Via Net*, waiting till the accident happens or the certificate holder receives a denial letter from the carrier informing it that no additional insured endorsement naming it on the policy is dangerous.

8. What is the effect of the certificate of insurance issued by Sloppy after the accident?

None under the facts of the hypothetical. A certificate of insurance, like an insurance policy, issued after a loss has already occurred is *generally* of no effect under basic principals of insurance such as the lack of fortuity and the "known loss" rule as well as under the common sence notion that no one could have relied on a certificate of insurance that was not issued until the accident occurred to believe that there was insurance for that accident. See, Certain *Underwriters at Lloyds v. Oryx Energy Co.*, 957 F. Supp. 930, 936-7 (S.D. Tex. 1997).

Note however, that if the facts had been different such that it was clear that there was not any "after the fact" attempt to manufacture insurance coverage for the accident and the delay in requesting the certificate had been merely a few days in the normal course and the accident had happened before the certificate actually got requested or issued, the result could be different. In *Atofina Petrochemicals Inc. v. Continental Casualty Co.*, 185 S.W.3d 440 (Tex. 2005) the contract terms between the general and subcontractor were orally agreed to on August 12 and the certificate of insurance was requested that very day and work begin on August 14. The certificate of insurance required by the terms of the contract was not actually issued however until August 18, and the accident happened on August 14, i.e. the very first day of work. Under these circumstances, the court held that while the more prudent practice is to obtain a certificate of insurance before allowing the work to begin, here it was clear that no one was trying to manufacture insurance after the fact so that the delay in issuing the certificate was of no consequence, particularly since it contained the required disclaimer language establishing that it did not affect the coverage under the policy any way.

III.

PRACTICAL POINTERS

1. Never completely rely on a mere certificate of insurance as assurance that you are in fact covered as an additional insured. At a minimum, require a copy of the additional insured endorsement as issued by the carrier showing the policy number etc.

2. Understand that a certificate of insurance generally is construed as not affecting any exclusions or other limitations on coverage contained in the policy; therefore, if it is

important that the policy extend coverage for any particular factual scenario, then you better review the actual insurance policy.

3. Similarly, understand that just because you have received a certificate of insurance that purports to confirm coverage does not mean that you are not still under a duty to investigate or discover what coverage is actually afforded before the statute of limitations runs on any suit that you may need to bring.

4. Understand the difference between receiving a certificate of insurance that merely purports to confirm the coverage available to the insured and receiving a certificate of insurance that purports to confirm that, in addition, you are an additional insured on the policy.

5. Finally, understand that not all additional insured endorsements by which you may be covered as an additional insured are created equal; on the contrary some are very broad and others severely restrict additional insured coverage to fairly narrow ranges of circumstance and may not, for example, depending on the wording, cover the additional insured for its own direct negligence.