

## Workshop H1

Thursday, October 30, 8:30 a.m.-11:15 a.m.

### **“CERTIFICATES OF INSURANCE: SURE BET OR BLUFF?”**

Presented by



**Terry J. Galganski, J.D.**  
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The Weitz Company, LLC



**Bill Wilson, CPCU, ARM**  
Director  
IIABA's Virtual University  
Independent Insurance Agents & Brokers of  
America

Certificates of insurance present challenges for both those who request them as evidence of compliance with contract insurance requirements and for the agents and brokers who issue them. Unfortunately, the interests of certificate holders are often in direct contradiction to the interests of certificate issuers. In this workshop hear the perspective of representatives from each side of the construction insurance poker table.

- Reviews the concerns of agents and brokers in issuing certificates of insurance other than a standard, unmodified certificate.
- Outlines certificate holders' concerns with standard certificates of insurance and the rationale behind commonly requested modifications.
- Provides an overview of key statutory, regulatory, or legal views regarding certificates of insurance.



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**Terry J. Galganski, J.D.**  
**Director of Insurance & Risk Programs**  
**The Weitz Company, LLC**

Mr. Galganski is copresenting Workshop H1, "Certificates of Insurance: Sure Bet or Bluff?" on Thursday. He is Director of Insurance & Risk Programs at the Des Moines, Iowa, corporate headquarters of The Weitz Company, LLC, a company with over 2,500 employees and annual revenues exceeding \$1.6 billion. It provides technical, construction management, and construction services in the United States and Guam.

In this position, his responsibilities include:

- Developing and establishing a corporate risk management philosophy.
- Providing the appropriate focus and tools and processes to promote and emulate that philosophy.
- Planning, managing, and coordinating all insurance and risk programs and claims to control risks and losses at the project, business unit, and company levels.
- Overseeing the company's corporate insurance programs: property, casualty, workers' compensation, umbrella/excess, builder's risk, automobile, pollution, professional liability, contractor-controlled insurance, and contractor default insurance.
- Overseeing any project-specific insurance demands.
- Providing training to project personnel and management on risk management and insurance tools, processes, and issues.
- Managing the personnel that make up the Weitz Risk Management department.

These responsibilities require working extensively with the company's corporate legal, financial, operations, and safety levels and with its core business units.

Mr. Galganski has been involved in the construction industry for nearly 25 years, providing legal advice, transactional work, claim and litigation management, and risk management and insurance guidance. He is an active member of the ABA, Forum on the Construction Industry, its past Chair of its Division 7, Insurance, Surety & Liens, and a past steering committee member of its Division 4, Construction Management, Design Build & Related Concepts, and a past member of the Construction Committee of the Missouri Bar.

During these years, he has been given the opportunity to speak about construction insurance and related topics on several occasions, including at IRMI's Construction Risk Conference, and has written several articles involving these topics, including "Colorado's New Anti-Indemnity Statute: Mere Splash or Next Wave?" in the Forum's newsletter, *Under Construction*, Vol. 10, No. 1 (December 2007); "Illinois' Targeted Tender 'Paramount Right': Is it Being Extinguished by the Narrowing of Available Additional Insured Coverage?" Illinois Association of Defense Council and the Society of Illinois Construction Attorney's Insurance Symposium, Additional Insureds & Targeted Tenders session (September 2007); "Agreements to Procure Insurance: What's the Right Balance?" with Donald S. Malecki, CPCU (ABA Forum on the Construction Industry, 2005); Chapter 4, "Construction Insurance" of *MISSOURI Construction Law*, Second Edition, Volumes I and II (Mo. Bar CLE 2004); "Additional Insureds in Landlord-Tenant Relationships: The 'Landscape of Risks,'" *The Risk Report* (International Risk Management Institute, Inc., March 2004); "Insurance Excep-

tions of the Missouri Anti-Indemnity Statute, Part 1 of 2," *The Journal of the Missouri Bar* (March/April 2002); "Insurance Exceptions of the Missouri Anti-Indemnity Statute, Part 2 of 2," *The Journal of the Missouri Bar* (May/June 2002); and "Owners and Contractors Protective Liability: An Insurance Tool in Construction" in *The Construction Lawyer*, Volume 15, No. 1 (Jan. 1995).

He is a graduate of St. Louis University Law School and Northwestern University. He is also a member of the Missouri and Illinois Bar (presently inactive).

**Bill Wilson**  
**Director, IIABA's Virtual University**  
**Independent Insurance Agents & Brokers of America**

Mr. Wilson is copresenting Workshop H1, "Certificates of Insurance: Sure Bet or Bluff?" on Thursday. He is the Director of the Independent Insurance Agents & Brokers of America's Virtual University and Associate VP of Education and Research. He is the former Director of Education and Technical Affairs for the Insurers of Tennessee and, prior to that time, he was employed by Insurance Services Office, Inc. Mr. Wilson is a graduate of the Illinois Institute of Technology with a B.S. degree in Fire Protection & Safety Engineering.

He is a licensed insurance and surplus lines agent, and his professional affiliations have included past president of the Middle Tennessee Chapter of CPCU, member of the board of directors of the national CPCU society, PMLG of the Honorable Order of Blue Goose, International, member of the Independent Insurance Agents & Brokers of America (IIABA) National Education Committee, member of the Certified Insurance Service Representative (CISR) National Advisory Committee, member of the *National Underwriter FC&S* editorial board, member of the Society of Insurance Trainers and Educators (SITE) and its SITE Journal editorial committee, chairman of the Tennessee Insurance Commissioner's Education Advisory Committee, member of the Middle Tennessee State University Insurance Liaison Committee, and member of the Nashville State Technical Institute's Business Management Advisory Committee.

Mr. Wilson has served as a trainer and speaker for various organizations, including the Independent Insurance Agents & Brokers of America (IIABA national conventions and convention programs and seminars in 29 states), the CPCU Society national convention and chapter programs, the National Association of Insurance Women (NAIW), the Southern Agents Conference (SAC), the Risk & Insurance Managers Society (RIMS), and the Society of Risk Management Consultants (SRMC).

He has conducted hundreds of technical seminars, workshops, and convention presentations—from Hawaii to Rhode Island—as well as programs on time management, presentation and public speaking skills, seminar development, and many others. He is a past recipient of the L.P. McCord National Education Award for having the #1 ranked IIABA insurance education program in America and has won four other national education awards.

His "Presentation Skills for the 'Unprofessional' Speaker" program was the top-rated presentation at two consecutive CPCU National Conventions and he has been a regular presenter at the CPCU Society's semi-annual Leadership Conference. His "Making Yourself A(t) Home on the Internet" seminar was the top-rated program at the CPCU National Convention and he has had several other highly rated programs at the convention. His seminar "How to Win Friends ... and Influence Adjusters" won IIABA's Best New Seminar award.

Mr. Wilson has researched, developed, written, and published hundreds of technical articles, manuals, and CDs/audiotapes, and has authored articles in business and industry trade periodicals such as *Presentations* magazine, *American Agent & Broker* magazine, *Independent Agent* magazine, *Tennessee Insuror* magazine, *Tennessee Business* magazine, the *CPCU Journal*, and the *SITE Journal*. He has also written on insurance issues for several construction industry magazines, ranging from utility contractors and concrete companies to the transportation industry.

He has been quoted as an expert in a number of mainstream publications, including *Readers Digest*, *Kiplinger's*, and *Money* magazines, and he has been cited as an expert resource/interviewee for local television and radio media. He has also served as an expert witness in litigation.

Mr. Wilson is the author of the book *Successful Personal Management* and is currently negotiating the publication of his first trade book—the first installment in his Speakers & Writers NoteBook™ Series—titled “Quote”Notes™...*The Ultimate Quotational Reference System and Authoring Tool for Professional Speakers and Writers*, a work that has received the endorsement of Zig Ziglar, Brian Tracy, and other prominent authorities.

## **Notes**

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.



# Certificates of Insurance: Sure Bet or Bluff?

## Certificate Holder Perspective

Presented By:

Terry J. Galganski, J.D.

Director of Insurance & Risk Programs

The Weitz Company, LLC

Des Moines, Iowa

## COI Poker: The Players



- The Establishment:  
THE STATE
- Dealer: THE BROKER
- Players: Owner,  
Contractors,  
Designers,  
Subcontractors
- Others: LAWYERS

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## Certificate Holder's Wants

- A "Real" Pat Hand:  
*Insurance Requirements Are Met!*



- In REALITY: ALL KINDS OF BLUFFING



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## Certificate Holder's Dilemma

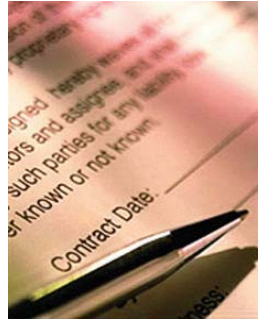
- INGREDIENTS
  - Insurance Requirements
  - Certify
  - State Approaches
  - Caselaw
  - COI Forms
  - Policy Standards
  - Certificate Holder Abilities
  - Risk Transfer Evolution
  - Vertical/Horizontal Exhaustion



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# Insurance Requirements

- Global
  - Coverage
  - Limits
  - Waivers
  - Notices
  - Insurer Financial Standing
  - Deductibles
- General Liability
  - Additional Insured
  - Primary
  - Completed Operations



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# Certify



- Non-Legal Definition
  - To attest as certain
  - To confirm formally as true, accurate or genuine
- Legal Definition
  - To warrant

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## State Approaches

- Disclaimer Mandated
  - California
  - Illinois
- COI = Policy Forms
  - New York
  - Oklahoma
- Modified COIs → License Revocation
  - Wisconsin
  - Iowa



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## Caselaw



**MAJORITY VIEW:**

**COI DOES *NOT*  
ALTER POLICY  
TERMS**

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# Case Law

- *Taylor* (1984)
  - Majority View
- *Sumitomo Marine* (2004)
  - Agency
- *Mountain Fuel Supply* (1991)
  - Manuscript COI and Constant Vigilance
- *Geier* (1992)
  - Waiver



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# COI FORMS

ACORD CERTIFICATE OF LIABILITY INSURANCE		COI NO.	DATE		
Insured: <b>Thomas Gray &amp; Associates, Inc.</b> 111 West Ocean Blvd. #1500 Santa Monica, CA 90401-4003 Tel: 542-901-4000 Fax: 542-901-4001		03/04/06	03/04/06		
Insured: <b>Thomas Gray and Associates, Inc.</b> 111 West Ocean Blvd. #1500 Santa Monica, CA 90401-4003		THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY. COVERAGE IS SUBJECT TO THE CERTIFICATE AND UNDERLYING POLICY. THIS CERTIFICATE DOES NOT ALTER, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.			
Insured: <b>Thomas Gray and Associates, Inc.</b> 111 West Ocean Blvd. #1500 Santa Monica, CA 90401-4003		INSURERS AFFORDING COVERAGE: American Int'l Specialty Lines Commerce & Industry Ins. Co. State Compensation Ins. Fund			
<b>COVERAGES</b> THE POLICIES OF INSURANCE LISTED BELOW ARE SUBJECT TO THE INSURED'S OBLIGATION TO PAY THE POLICY PREMIUMS AND TO MAINTAIN THE POLICIES IN FULL FORCE AND EFFECT. THE COVERAGE IS SUBJECT TO THE POLICY TERMS, CONDITIONS AND EXCLUSIONS. THE INSURED'S OBLIGATION TO MAINTAIN THE POLICIES IS NOT ALTERED BY THIS CERTIFICATE.					
NO.	Type of Insurance	Policy Number	Policy Dates	Amount	Other Information
A	Commercial General Liability	09 195-68-77	03/04/05 03/04/06	\$1,000,000	Auto Damage \$1,000,000 Fire \$1,000,000 Fidelity & Bond \$1,000,000 General Aggregate \$1,000,000 Products/Completed Ops \$1,000,000
B	Automobile Liability	CA 195-68-79	03/04/05 03/04/06	\$1,000,000	Bodily Injury Liability Property Damage Liability Medical Payments Uninsured Motorist Underinsured Motorist
A	Marine Liability	800 195-68-78	03/04/05 03/04/06	\$4,000,000	General Aggregate \$4,000,000 Products/Completed Ops \$4,000,000
C	Professional Services Liability	1435443-04	05/02/04 05/02/05	\$1,000,000	General Aggregate \$1,000,000 Products/Completed Ops \$1,000,000
A	Pollution Liab.	EO 195-68-77	03/04/05 03/04/06	Per Claim 1,000,000 Aggregate 7,000,000	
CLAIMS MADE *Receipt 10 days for nonpayment of premium					
CERTIFICATE HOLDER: <b>Thomas Gray &amp; Associates, Inc.</b> 111 West Ocean Blvd. #1500 Santa Monica, CA 90401-4003		CANCELLATION THIS POLICY IS SUBJECT TO THE POLICY TERMS AND CONDITIONS. THE POLICY IS SUBJECT TO THE POLICY TERMS AND CONDITIONS. THE POLICY IS SUBJECT TO THE POLICY TERMS AND CONDITIONS.			

- ACORD 25 (2001/08) **SIX** Disclaimers
  - Information only
  - Does not amend policy
  - Policy terms control, not parties' contract
  - AI: Need endorsement
  - Subrogation waiver: Need endorsement
  - COI not contract with certificate holder
- NON-ACORD

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## Policy Standards

- Built-In Waivers
- Notice
- Contractual Liability
- Primary
- Completed Operations



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## Certificate Holder Abilities



- Knowledge Lacking
- Depends on Insurance Requirements
- COI Service Providers

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## Risk Transfer Evolution

- Additional Insured
- Anti-Indemnity Statutes
- Limited Contractual



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## Vertical/Horizontal Exhaustion

- Vertical
  - New Jersey
- Horizontal
  - Majority
- Combination
  - California



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## What To Do?

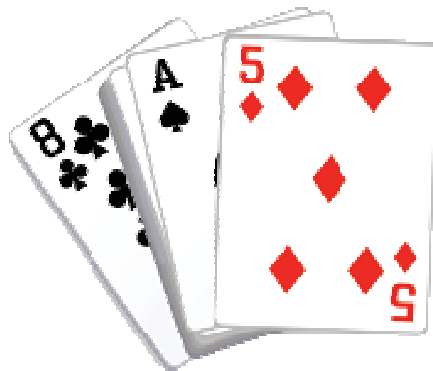
- **Balanced Approach**
  - **Reflected in Insurance Requirements**
  - Based on Quality of Staff
  - Driven by Uniformity
- **Certificates of Insurance**
  - **Form**
  - Attach Endorsement(s)
  - Authorized Agent



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# Certificates of Insurance:

## *Sure Bet or Bluff?*



28<sup>th</sup> IRMI Construction Risk Conference  
Las Vegas, NV  
October 30, 2008

This portion presented by:

**Bill Wilson, CPCU, ARM, AIM, AAM**

Assoc. VP, Education & Research  
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Director  
Big "I" Virtual University

## **Disclaimer**

The purpose of this program is to assist participants in considering sometimes divergent issues and positions relevant to certificates of insurance. This document includes only general information, and is not intended to provide advice tailored to any specific insurance situations. It was prepared solely as a guide, and is not a substitute for agents, brokers or others independently evaluating any relevant business, legal or other issues, and is not a recommendation that a particular course of action be adopted. If specific advice is required or desired, the services of an appropriate, competent professional should be sought.

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## **Use of this Material**

This program was developed as part of a comprehensive education and public relations initiative that has evolved from our original January 2007 white paper “Certificates of Insurance: Issues and Answers,” the position statement adopted by our board of state national directors in the fall of 2007, and subsequent articles and related materials. For additional information about these resources and their terms of use, please refer to the last page in this document.

# Introduction

The trend in risk management is to try to transfer all liability (or as much as is legally possible), whether insurable or not, to the party best and most appropriately able to manage it. This section provides an overview of the insurance agency perspectives on certificates of insurance, including inherent limitations on what most agencies can do and the impact of certificate issues on agency liability and business practices.

## Caveats

This document is only one part of this workshop...its content is significantly supplemented by a PowerPoint show and oral presentation by the author, not to mention the presentation of the co-presenter. The perspective presented in this portion of the program is that of the author and does not necessarily reflect the views and official positions of the Independent Insurance Agents & Brokers of America. The agency universe is a diverse one and not all agencies will agree with the premises set forth in this document and presentation, though the author believes that they are representative of the core constituency of independent agents. No position on these issues is necessarily right or wrong, and the goal of this program is to present a balanced view of all perspectives in order to gain a better understanding of each party's interests and limitations.

## What Is (and Isn't) 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. The most common type of certificate is that provided for informational purposes to advise a third party of the existence and amount of insurance issued to the named insured.”* – Allan D. Windt, *Insurance Claims and Disputes*, 4th ed., 2001

*“A document acknowledging that an insurance policy has been written, and setting forth in general terms what the policy covers.”* – Black's Law Dictionary

The ACORD 25 Certificate of Liability Insurance provides the following disclaimers:

1. “This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.”
2. “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.”
3. “The Certificate of Insurance on the reverse side of this form does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the certificate holder, nor does it affirmatively or negatively amend, extend or alter the coverage afforded by the policies listed thereon.”

Problems sometimes arise when certificate or contractual demands are made that most insurance agents are unable to comply with—legally, ethically, or from a business practices standpoint—or where compliance could create potentially catastrophic liabilities for the insurance agency. This may be referred to, from the agent's perspective, as “Rolling Stone Syndrome.”

## Agents Liability, Procedural and Business Issues

Agents frequently weigh their professional liability exposures with the business risks they must necessarily assume. As a result, there is a need to constantly balance E&O and business decisions and adjust procedures accordingly.

### E&O Statistics

- Claim frequency involving certificates up \_\_\_\_%.
- \_\_\_\_% of E&O claims.
- \_\_\_\_% of claims from CGL line and \_\_\_\_% from workers compensation.
- \_\_\_\_% of claims involve failure to provide AI coverage or improperly identifying AIs.
- \_\_\_\_% of claims involve misrepresenting coverage that doesn't actually exist.
- CSRs are responsible over half the time and certificates issued on lapsed coverage are more common in large agencies.

### E&O Case Studies

Case #1: Blanket AI endorsement

Settlement cost: \$ \_\_\_\_\_

Case #2: Failure to add AI

Settlement cost: \$ \_\_\_\_\_

Case #3: 4,000 certificates, a favor, and insolvency

Settlement cost: \$ \_\_\_\_\_

### Business Issues

Issuing certificates of insurance and additional insured endorsements is time consuming and relatively expensive. These are costs agents in many states have no way of passing on to the beneficiaries of these services. On the other hand, certificates of insurance have an upside to both agent and insurer in some respects. The difficulty is in balancing the advantages and disadvantages of certificates while minimizing the unnecessary and redundant information and tasks too often required by the certificate process.

## **Scope of the Problem**

Agents are asked to become involved in hundreds or thousands of contracts every year that their clients enter into. These include construction contracts, real property and equipment leases, commercial loan agreements, and others. Some/many of these contracts are onerous in what they require of the agent and/or his or her insured. One of the major issues faced by agents includes requests to provide the certificate holder with notice of cancellation, nonrenewal, or material change in policy coverages or conditions. Finally, to complicate matters, some certificates are fraudulent or involve misrepresentation by the various parties involved.

## **Solutions to the Problem**

There is a need for continuing internal education within the insurance industry about the risks involved in issuing certificates of insurance and a need for the industry to engage in “invariable practices” when it comes to procedural issues. In addition, there is great opportunity to educate noninsurance industries as to what many or most agencies are able and unable to do...and why.

# **Overview of Agent Contract and Certificate Request Problems**

Often agents are put in a difficult position when their insured has entered into a contract that makes insurance demands that the agent is unable or unwilling to comply with. For the purposes of this program, we'll look at four types of requirements commonly found in contracts or certificate requests. When they occur, negotiated responses are sometimes indicated because of the potential repercussions of not complying with the contract or request.

## **IRMI Negotiation Parameters**

(from the CRIS® “Contractual Risk Transfer in Insurance” course)

- Wish list
- Fallback position
- Deal breaker

## **4 Types of Contract or Certificate Requests (discussed in detail later)**

- Uninsurable
- “Illegal”
- Inappropriate
- Impractical

## **Repercussions of Failure to Comply**

- The insured is prohibited from working.
- Payment is withheld from the insured.
- The insured defaults on the contract.
- The agent loses the account or faces potential charges of fraud or misrepresentation.

In the remainder of this program, we'll examine the four types of contract or certificate requests and why these present a problem for many/most agents.

## Uninsurable Requests

Sometimes a contract or certificate request demands coverages that don't exist, are unavailable from standard markets (or even E&S markets), are unavailable from the markets represented by the agent, are only partially available with limitations, or are available but unaffordable. Sometimes requests are made that are not understandable or for which there is no agreement between the parties as to meaning.

## Mismatch Between Indemnity Agreements and Coverage Requests

The insured is liable for “ANY negligent acts, errors or omissions” and “ANY and ALL liabilities” that result in “ANY claim, demand, cost, expense, liability, judgment, cause of action, penalty, or fine of every kind and character” with regard to the owner, officers, employees, agents, servants, subcontractors, suppliers, “as well as ANY other parties.”

## Sometimes Unavailable Coverages or Forms

- Completed operations
- Out-of-date coverage forms (also might be regulatorily “illegal” if nonfiled)
- Removal of exclusions for earth movement, mold, pollution, EIFS, etc.
- Coverage for punitive damages, fines, penalties, etc. (also might be “illegal”)
- Coverage for sole negligence (also might be statutorily “illegal” in states with anti-indemnity laws)

## Vague, Ambiguous and Undefined Terms

The most common example of this is a request for CGL coverage that is “primary and noncontributory.”

Whether the CGL policy on which the certificate holder is named an additional insured (AI) is primary actually depends on the wording of the AI's own CGL “Other Insurance” provision, not the policy on which the AI is named. Fortunately, if “ISO equivalent” language is used, providing primary coverage to the benefit of the AI is contemplated by the current ISO CGL.

“Noncontributory” is another matter. This is a term that is typically not defined in the contract, nor is it defined in the ISO CGL or ISO additional insured endorsements. There is probably an industry consensus for what this means but it might not compel a court. Some insurers issue AI endorsements that include a definition. For example:

*“Non-contributory” means that the other insurance available to the additional insured will apply as excess and will not contribute as primary to the insurance provided by this endorsement.*

In other words, in the term “primary and noncontributory,” the words “primary” and “noncontributory” are mutually supportive. However, some insurers will acknowledge that AI coverage is primary, but will not do so with regard to the term “noncontributory.”

## **“Illegal” Requests**

Often requests are made for coverages or conditions that cannot be legally complied with by the agent due to state laws. Or, compliance may be prohibited by the exercise of federal law or contracts to which the agent is a party.

### **State Statutes, Regulations and DOI Directives**

The NAIC model fraud law prohibits “preparing any information containing false representations as to a material fact” that involves documents such as “[t]he issuance of written evidence of insurance” that are false or misleading. Third-party claimants in at least two states have cited fraud laws in seeking recovery against agents.

In addition, all states have unfair trade practices laws that may apply to “false statements and entries” and “misrepresenting pertinent facts or insurance policy provisions relating to coverages at issue.” These and other laws typically prohibit agents from altering or waiving a term or condition of an insurance policy orally or in writing.

About 40% of states have specific laws, regulations, or insurance department directives that govern certificates of insurance. Many of these, most notably New York, North Carolina, Alabama, Kansas, and Georgia, restrict what agents can legally provide on a certificate or other document. Some states require certificates to be filed and not altered. For detailed information on all states that regulate certificate content and/or use, go to:

<http://www.iiaba.net/VU/NonMember/WilsonCertLawsRegs.htm>

### **Cancellation Notice**

Many contracts or certificate requests insist upon 30 days’ notice of cancellation to the certificate holder despite the fact that the (first) named insured may only get 10 days’ notice. No ISO additional insured endorsement provides for notice of cancellation to AIs, much less certificate holders, and some states could prohibit such notice unless prescribed by the policy. In addition, requests are sometimes made for notice due to nonrenewal or “material changes” in the policy. Finally, probably most common is the directive to strike the words “endeavor to” from the cancellation provision on the ACORD 25, something that may not be possible for legal and ethical reasons.

### **Copyright Issues**

ACORD forms can only be used within the confines of a licensing agreement and misuse may be subject to statutory copyright penalties ranging from \$200 to \$150,000 per violation. ACORD forms are designed to be completed, not altered by striking through and/or modifying language like the “endeavor to” cancellation language or disclaimers. In some states, certificates must be filed and modification is prohibited by state law, not just federal copyright law. Likewise, ACORD aggressively pursues proprietary “knockoffs” of their forms.

## **Contractual Issues and Non-ACORD Forms**

Many agency/company agreements govern what the agency can and cannot do when it comes to completing and disseminating certain ACORD and non-ACORD forms. E&S markets may be even more restrictive.

## **Inappropriate Requests**

There are some requests that many agents will not comply with because they are inappropriate for what they are licensed to do, they lack experience and/or expertise for the task, they are too risky or time-intensive to comply with given the lack of compensation, or they may be borderline “illegal.”

## **Reviewing Contracts for Insureds**

As mentioned in the Introduction section of this document, the trend in risk management is to try to transfer all liability (or as much as is legally possible), whether insurable or not. It takes an astute, well-trained, experienced, and qualified individual to undertake the scavenger hunt often necessary to identify exposures in lengthy or complex contracts. Agents should consider the legal issues involved in interpreting non-insurance contracts and what their qualifications are to do so. They then need to balance their E&O exposure with the assumption of a business risk, with due consideration of proper disclaimers.

## **Agent “Opinion” or “Compliance” Letters and Affidavits**

Agents are often asked to provide coverage summaries or complete coverage questionnaires and, in some cases, to effectively warrant that the insured’s insurance program is in compliance with contractual insurance or indemnity requirements between the insured and third parties. Some of these contracts involve future promises such as maintaining coverage or providing certified copies of policies for “X” years.

## **Removal or Modification of Disclaimer Language**

Agents are often asked to remove or modify certificate of insurance disclaimer language. This should never be done and may be prohibited by states that require the filing of certificates and possibly others. This may also violate ACORD’s copyright, depending on the insurer’s licensing agreement and discretion delegated to the agent.

## **Extraneous Contract Wording on Certificates**

Agents are often called upon to add certain statements on certificates. Certificate completion is largely governed by the ACORD Forms Instruction Guide which, among other caveats, advises that certificates should not be used to incorporate contract language.

## **Requests for Blank or Sample Certificates**

On occasion, agents are asked to provide “blank” certificates that insureds can complete and distribute or to provide “sample” certificates they can use.

## Impractical Requests

Sometimes certificate requests are made that are legal and appropriate but simply not practical because affordable coverage is lacking in the marketplace or terms are impossible to meet. In addition, agents may face certain dilemmas where the appropriate response is not clear.

## Unavailable Coverages Redux

As discussed earlier, the contract may specify that certain coverages (e.g., completed operations on an EIFS installation) be provided or that certain exclusions (e.g., pollution liability, mold, etc.) be removed. Certain coverages may not be available or they may be available only from E&S markets at prohibitive prices. And, again, indemnity agreements often make a party responsible for punitive damages, fines, penalties, etc. Insurance recovery for these “losses” may be prohibited by law or unavailable in most insurance contracts because, for example, they don’t meet the definition of “property damage.”

## Impossible Terms

Sometimes terms are used that might be appropriate for one kind of coverage but not another. For example, it may be feasible to provide CGL coverage on a “primary and noncontributory” basis, but not for other types of policies.

## More Cancellation Issues

A contract requirement of 30 days’ notice to the certificate holder for policy cancellation is common, but impossible for many insurers to provide when the (first) named insured is only entitled to 10 days’ notice. Sometimes notice is required to be provided by registered or certified mail. Other issues that arise for agents are whether to copy insurers when certificates are issued since the certificate typically says that the “issuing insurer” *will endeavor to* provide notice of cancellation, how to handle certificate requests when cancellations are pending, and how to issue certificates or notice requests when there are mid-term limit reductions.

## Limits Dilemmas...request \$1M/\$1M vs. has \$5M/\$10M

A contract requires a subcontractor to have a CGL policy with occurrence/aggregate limits of at least \$1M/\$1M. The subcontractor’s policy actually has limits of \$5M/\$10M. Which limits are shown on the certificate...\$1/\$1 or \$5/\$10?

## Summary

The trend in risk management is to try to transfer all liability (or as much as is legally possible), whether insurable or not, to a downstream party. This is typically accomplished via a combination of contractual and insurance transfer. In this zeal to tap into as many insurance resources as possible, requests are often made of insurance agents to perform tasks that they are unable to do because of legal, practical, or financial reasons. The inability to meet many of these demands and burdens is evidenced by the increasing incidence of professional liability claims.

Contracts insureds enter into sometimes have indemnity agreements that include coverage provisions that are uninsurable, unavailable, or unaffordable. Undefined contract terminology is too often vague and ambiguous for anyone to know if the insurance program truly complies with insurance or indemnity requirements.

What an agent can legally do with regard to certificates of insurance is rapidly evolving as states increasingly pass legislation, implement regulations, or issue regulatory directives governing certificates of insurance. Agents are also bound by copyright law and contractual issues between the agency and insurer that restrict how they can issue certificates that comply with third-party requests.

In addition to these restrictions, agents are often asked to assume tasks for which they may not be qualified (e.g., complex contract review) and are rarely compensated for. They may also be asked to provide coverage summaries, “opinion” or “compliance” letters, or affidavits that are effectively warranties of coverage.

It is important that the parties involved, from agent to insured to certificate holder, improve their understanding of each other’s needs and, more importantly, limitations in carrying out the necessary requirements of contracts.

## Certificate Resources

Go to [www.independentagent.com/VU](http://www.independentagent.com/VU).

Click on “Certificates of Insurance Resource Section” link.

### Resources include:

- Certificates of insurance white paper
- Certificates of insurance best practices guide
- Certificates of insurance state laws and regulations
- Certificates of insurance case law
- Certificates of insurance Q&A
- Certificates of insurance podcast
- **A copy of this handout and PowerPoint presentation**
- Even more....

Unless indicated on the Certificates Resource web page, you are free to disseminate all of the information in this public area of our web site as long as our copyright notice is retained and proper attribution is made.

Questions? Comments? Advice? War stories? Email [bill.wilson@iiaba.net](mailto:bill.wilson@iiaba.net).

## **Notes**

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.