Proof of Insurance: Be Careful What You Ask For—You Don't Always Get What You Want[1]

By Jay L. Hack

Many business transactions require that one party maintain insurance for the benefit of another party. In a commercial mortgage loan, the borrower must maintain hazard insurance on the real estate collateral for the benefit of the mortgagee lender. Commercial tenants must provide liability insurance, and often hazard insurance, covering their landlord. Contractors must provide insurance benefitting owners before they commence construction and subcontractors must do likewise for general contractors. Owners of units in condominiums and cooperatives must provide insurance for the condo or coop before embarking upon the renovations of their units. Adjoining real estate owners insist on insurance when their neighbor seeks access to make improvements or repairs.[2] In matters not involving real estate, transport companies and automobile leasing companies are often on one side or the other of the need to provide insurance.[3]

Demanding insurance is easy. In a mortgage loan, the lender's commitment letter requires evidence or proof of hazard insurance, and often liability insurance, to protect the lender and the value of the collateral. Similarly, a lease may require liability insurance from even a minor tenant protecting the landlord if a customer or business invitee of the tenant is injured. Likewise, an owner seeking to improve real property will almost always include in the construction contract a requirement for liability insurance from the general contractor and the general contractor normally requires the same in contracts with subcontractors.

However, making certain that the insurance is in effect and that it covers the beneficiary is the difficult part of the process. The mistaken belief that insurance is in effect and covers a particular person when it isn't, or doesn't, has led to a surprising amount of litigation. The litigation often involves beneficiaries who claim to be insured and who present "evidence" of insurance but not quite "proof" of insurance. As stated by the Court of Appeals in *Consol. Edison Co. of New York, Inc. v Allstate Ins. Co.,* "Generally, it is for the insured to establish coverage and for the insurer to prove that an exclusion in the policy applies to defeat coverage."[4] Therefore, the supposed beneficiary must first establish that a policy exists and that the policy covers the beneficiary and the occurrence. A little bit of evidence of insurance does not go a long way.

Frequently, beneficiaries who request proof that there is insurance benefitting them accept a "Certificate of Insurance" or "Evidence of Insurance" on a form that is not part of the insurance policy. The forms almost universally used for this purpose are provided by ACORD Corporation.[5] Two common forms are the ACORD 25 Certificate of Liability Insurance and the ACORD 28 Evidence of Commercial Property Insurance.[6] ACORD is an insurance industry trade group that has created forms designed to standardize the insurance business for brokers, agents and carriers. However, the ACORD forms are standards that the insurance industry wants, not standards that insurance consumers want. As explained in an opinion of the general counsel to New York State Department of Financial Services (DFS), "[a]n ACORD certificate of insurance is a commercially created document that is often used by the insurance industry to summarize information about a person or entity's insurance coverage. It is not a contract…"[7]

We must first examine the text of the ACORD forms themselves. The forms include limiting language that disclaims that they create legal rights. The ACORD 28 Form, Evidence of Commercial Property Insurance, states:

> This evidence of commercial property insurance is issued as a matter of information only and *confers no rights upon the additional interest named below.* This evidence does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. This evidence of insurance does not constitute a contract between the issuing insurer(s), authorized representative or producer, and the additional interest. (emphasis added).

Similarly, the ACORD 25 Form, Certificate of Liability Insurance, states:

> This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not affirmatively or negatively amend, extend or alter the coverage afforded by the policies below. The certificate of insurance does not constitute a contract between the issuing insurer(s),

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> authorized representative or producer, and the certificate holder. *(emphasis added)*

Although ACORD certificates are in common use every day, they are a far cry from actual insurance. They are not even binders. In no way do they prove that insurance is in effect, let alone that a beneficiary is covered by that insurance. The language of the ACORD forms, as confirmed repeatedly by the courts in New York, establishes only one universal fact—if there is no insurance policy, or if the language of the insurance policy does not cover either the beneficiary making the claim or the claim itself—then an ACORD COI provides nothing except perhaps a fraud claim against the person preparing the certificate. Some courts have even held that a fraud or estoppel claim gets no traction because of limiting language on the face of the certificate. The legal irrelevancy of a COI was subsequently confirmed by statute in New York when the legislature created a new Article 5 of the Insurance Law in 2014,[8] at the behest of the insurance industry, which expressly provides that a certificate is not a policy and cannot vary the terms of the policy.

The courts in New York have time and again analyzed claims of coverage when there is no insurance policy covering the underlying claim but there is a COI evidencing coverage, but containing the ACORD limiting language. Not surprisingly, the courts in New York have consistently read the ACORD COIs as meaning exactly what they say. The Appellate Division, Fourth Department, made this clear as recently as 2017 *in Landsman Dev. Corp. v RLI Ins. Co.,*[9] a case in which a worker for a contractor doing work on the landowner's property was injured and sued the landowner. The landowner had a COI naming him as an additional insured, but due to an oft-repeated technicality, the landowner was not covered by the additional insured language in the insurance policy.[10] When the insurance carrier moved for summary judgment, the court noted:

> We also agree with [the insurance company] that the certificates of insurance in [the landowner's] possession in February 2010 did not confer additional insured status. It is well established that a certificate of insurance, by itself, does not confer insurance coverage, particularly [where, as here,] the certificate expressly provides that it 'is issued as a matter of information only and confers no rights upon the certificate holder [and] does not extend or alter the coverage afforded by the policies' (quoting from *Sevenson Envtl. Servs., Inc. v. Sirius Am. Ins. Co.,* 74 A.D.3d 1751, 1743, 902 N.Y.S.2d 279).[11]

A COI may constitute evidence of an intent by the carrier to issue an insurance policy, but it does not mean that there is a policy. In another injured workman case, the Appellate Division, First Department, commented in *Tribeca Broadway Assoc., LLC v. Mount Vernon Fire Ins. Co.*[12] that "[a] certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists."[13] The First Department expanded on this analysis and pointed out that the broker for the contractor was just that, a broker, without the authority to bind the insurance carrier as its agent.[14] The Fourth Department likewise confirmed that when the carrier established that neither it nor its duly authorized agent had issued the certificate, summary judgment for the carrier was appropriate.[15]

The Second Department in *Vikram Const., Inc. v. Everest Nat. Ins. Co.*[16] has held likewise, also in a construction case in which an employee of a subcontractor sued the general contractor for injuries on the job. There was no policy, so there was no insurance. "[The carrier] established its prima facie entitlement to judgment . . . by submitting evidence demonstrating that it did not issue a policy of insurance to [the worker's employer]."[17] The existence of a COI was irrelevant.

Although a certificate issued by a carrier or an agent does not itself establish that a policy exists, it may work as an estoppel against the carrier's denial of coverage. In *Sevenson Envtl. Services, Inc. v. Sirius Am. Ins. Co.*,[18] the Fourth Department reiterated the basic principle that a COI is not a policy, but then focused on the dichotomy between a certificate issued by a broker and a certificate issued by the carrier or its agent. Faced with a statement by an employee of the insured's broker that the broker was authorized by the carrier's agent to issue a COI, and a claim by the carrier that the alleged agent was not an agent, the court found an issue of fact and denied summary judgment. The court stated:

> Nevertheless, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment. For estoppel based upon the issuance of a certificate of insurance to apply, however, the certificate must have been issued by the insurer itself or by an agent of the insurer . . . .[19]

The Supreme Court, Niagara County, went one step further in *Allied World Natl. ASSI Co. v Peerless Ins. Co.*[20] when recently faced with this argument, which was upheld on appeal. The court first acknowledged that the COI did not create coverage, but then went on to comment, "Significantly, an insurance company that issues a certificate of insurance naming a particular party as an additional insured may be estopped from denying coverage to that party where the party reasonably relies on the certificate of insurance to its detriment, whereas here,

the certificate was issued by an agent of the insurer." The insurance carrier argued that the reliance on the certificate was unreasonable because the certificate included the magic words, "confers no rights upon the certificate holder." However, the court held that there were issues of fact on this and other issues in this case, precluding summary judgment and thereby holding that the "confers no rights" language did not automatically trump an estoppel argument.[21]

However, the First Department, in *Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd.*,[22] held that the limiting language in the certificate, at least when issued by a broker, was sufficient to defeat a cause of action against the broker for fraud or negligent misrepresentation. "Regardless of whether the broker acted recklessly, the causes of action for fraud and negligent misrepresentation, based on the inaccurate certificates, were properly dismissed because it was unreasonable to rely on them for coverage in the face of their disclaimer language and, with respect to the negligent misrepresentation claim, because of the absence of a relationship approximating privity." [23]

> "Although ACORD certificates are in common use every day, they are a far cry from actual insurance. "

Although claims based upon certificates of insurance seem to be predominantly those involving construction contracts and construction injuries, the principles set forth in these cases extend to other types of relationships as well. In *Cendant Car Rental Group v. Liberty Mut. Ins. Co.*,[24] the Second Department was faced with a dispute as to whether the insurance carrier was required to defend an auto accident claim involving a truck rented from Budget Rent-a-Car. The COI with the standard limiting language was the final nail in the coffin of the weak proof that was otherwise offered in support of coverage, when the court noted, "Moreover, the certificate of insurance proffered in support of their motion, which expressly stated that 'it is issued as a matter of information only and confers no rights upon the certificate holder,' was insufficient to support their contention that they were additional insureds under the Liberty Mutual policy." [25]

In another truck leasing case, the Second Department repeated this analysis, holding in *Penske Truck Leasing Co., L.P. v Home Ins. Co.*,[26] that "[t]he certificate of insurance also contained the disclaimer that it was 'issued as a matter of information only and confer[red] no rights upon the certificate holder' and that it did 'not amend, extend or alter the coverage' afforded by the policies named therein."[27]

Likewise, the Southern District addressed similar issues in *Chartis Seguros Mexico, S.A. de C. V. v HLI Rail & Rigging, LLC*,[28] when property was damaged in a train derailment. "Moreover, an insurer may be equitably estopped from denying coverage where the party for whose benefit the insurance was procured reasonably relied upon the provisions of an insurance certificate to that party's detriment."[29]

The New York Insurance Law has been in accord with the ACORD forms since the legislature adopted Article 5 of the Insurance Law in 2014, appearing to bury forever any claim that the ACORD forms created any contractual rights.[30] Article 5 starts by allowing an "insurance producer" (an agent, broker or carrier) to create a COI as "evidence" of property or casualty insurance coverage.[31] Since certificates of insurance had been issued for decades and the Department of Financial Services had approved the process, this grant of permission to issue certificates was unimportant. However, the statute went on to make it clear that such a certificate does not constitute a policy of insurance, even when issued by an agent or by the carrier itself.

Two provisions of the Insurance Law combine to reach this result. First, the definition of an insurance certificate expressly excludes an insurance policy or a binder.[32] If an insurance policy or binder cannot be a subset of the universe of insurance certificates, then an insurance certificate cannot constitute a policy or binder. The Insurance Law also, by implication, confirms the effect of the "confers no rights" language when it provides, in Section 502(c), that "A certificate of insurance shall further not confer to any person any rights beyond those expressly provided by the policy of insurance referenced therein."[33] If the policy actually exists and confers rights by its own terms, then the effect of a COI is irrelevant, but if the policy does not exist or does not name a particular party as covered by it, then the COI cannot create it. *Nemo dat quod non habet*.[34]

The insurance certificate may not, both by its customary terms and by statute, vary the coverage provided by the policy, when issued. The standard form ACORD 25 and ACORD 28 forms, as quoted above, expressly provide that they do not "amend, extend or alter" the policy. Likewise, Insurance Law Section 502 prohibits any person from willfully requiring that a certificate of insurance provide particular coverage or set forth the terms and conditions of the insurance unless the policy itself expressly includes such terms, conditions or language.[35]

Article 5 of the Insurance Law was adopted specifically with this result of completely neutering anything

inserted into a standard form COI. According to the legislative history of an amendment to Article 5 in 2015, it was not uncommon for the party that was required to provide insurance to request that the producer modify the COI to expand coverage beyond that provided, or expected to be provided, in the final policy.[36]Article 5 was added to give insurance brokers and agents a statute that they could point to as justification for their refusal to alter COIs to show non-existent coverage. DFS had already opined many times that such expansion was prohibited,[37] but pressuring insurance brokers was apparently still common.

This is further complicated by frequent confusion between an insurance binder and an insurance certificate. An insurance binder is a temporary or interim policy of insurance.[38] It is as effective as an insurance policy until the policy itself is issued. Once the insurance policy is issued, the binder disappears, and creates no rights other than for the period from the day the binder is issued until the day the policy is issued.[39]

To be effective, a binder must be issued by a duly authorized agent of the insurance company, or by the insurance company itself. An insurance broker, who acts as an agent of the insured to obtain a policy, is not authorized to issue a binder. The binder creates legal rights and responsibilities, albeit temporary ones, until the policy is issued. As stated by Judge Hellerstein of the Southern District in *In re September 11th Liab. Ins. Coverage Cases*,[40]

> Under New York law, the law that governs, an insurance binder is a separate contract that provides interim insurance until the final policy is issued or refused. *Springer v. Allstate*, 94 N.Y.2d 645, 710 N.Y.S.2d 298, 731 N.E.2d 1106, 1108 (2000). When a loss occurs prior to finalization of an insurance policy, the binder in effect at the time of the loss governs. World Trade Ctr. Props., 345 F.3d 154, 183 (2d Cir.2003). In the case at bar, the binder is the governing contract (footnote omitted).[41]

The party being asked to provide insurance often deals with an insurance broker rather than a duly authorized agent or with the carrier itself. In matters not involving buildings as significant as the World Trade Center, the beneficiary who demands a binder or other "proof' of insurance often instead receives only an ACORD COI from a broker.[42] The COI is far less than a binder, and should never be confused with it.

Since a binder is not itself a "permanent" policy of insurance, the DFS General Counsel issued an informal opinion to the effect that it is up to the beneficiary requiring the insurance whether it will accept a binder as proof.[43] However, an amendment of the New York Banking Law in 1990[44] requires that many lenders making mortgage loans on 1-4 family residential real properties accept a binder. At the instigation of independent insurance agents, the legislature remedied the difficulty they had in obtaining final policies by adding Banking Law Section 6-j [45] requiring lenders to accept binders, without saying anything about COIs.

Banking Law Section 6-j served the needs of independent, non-captive agents, who were authorized to issue binders, but did nothing for brokers. Brokers could not satisfy the Banking Law requirements for a binder, even for residential mortgage loans. The law provides that, for a bank to be required to accept a proffered binder, (a) it must temporarily obligate the insurer to provide the specified insurance coverage pending issuance of the insurance policy and (b) the binder must be issued either by an insurer or a duly authorized representative of the insurer.[46]

An insurance broker is the agent of the insured, not an agent for the insurance company except in limited circumstances.[47] Although insurance agents and insurance brokers are both occasionally referred to as "producers" of an insurance policy, their status, and their right to bind a carrier, are completely different. The broker cannot bind the insurance company to issue an insurance policy. In the rush to close a loan, to commence construction or to consummate some other transaction that no one believes, at the outset, is going to result in an insurance claim, getting an actual insurance policy, or a legally enforceable insurance binder issued by an agent, is often waived. Instead, the party requiring insurance accepts a meaningless COI.

"Wait a minute," your client says after accepting a COI against your advice, "don't I have a fraud claim against the broker?" The First Department hinted at this possibility in *St. George v. W.J. Barney Corp.*, when it commented, ". . . while [the insurance broker] may have arguably breached its duty to its client…."[48] Is the broker liable for knowingly providing an inaccurate certificate?[49] Is the alleged insured just out of luck because of a failure to read the document that said it conferred no rights? Or, although there is no case law on the subject, should the carrier be liable because the insurance industry knows this is going on and gladly turns a blind eye to the practice?[50]

Conclusion—Marching Orders

So what should a business do when it requires that a counterparty provide the insurance? The only way to be certain, based upon the statute and case law, is to insist upon a copy of a policy of insurance containing a declarations page or an endorsement expressly providing the required coverage to the party that is seeking it. A binder issued by a duly authorized agent of the carrier, or by the carrier itself, is only temporary insurance until the actual policy is issued, but temporary insurance from a binder is better than the empty pseudo-promise of a COI. A binder still presents the risk that once the insurance policy is issued, a variation between the binder and the policy is

decided in favor of the policy on events occurring after the policy is issued. The policy may not provide the same protection that the beneficiary required be stated in the binder, so even with a binder, a careful review of the full text of the policy is necessary.

The initial version of Article 5 of the Insurance Law prohibited persons and government entities from requiring an "opinion letter, warranty, statement, supplemental certificate or any other document or correspondence" in addition to the C0I.[51] The legislative history indicates that this provision had been included to protect brokers against being forced to certify, separate from the COI, that there was a policy in effect. Some government entities had imposed such a requirement as a condition of accepting a COI from a broker. Government entities objected to a prohibition on such separate certifications, notably including the New York State Department of Transportation,[52] which received hundreds of COIs every year as part of its capital improvement program. Ultimately, the prohibition was removed from the statute.[53]

The New York City Buildings Department, thus free to require an additional certification, created a new form PGLI [54] with the express purpose of making sure that "all major construction activity is properly insured."[55] The PGLI form, which is required to be submitted along with the ACORD certificate before a building permit may be issued, summarizes the general liability insurance coverage for a specific project. The insurance broker or agent must certify that the ACORD certificate to which it is attached "is accurate in all material respects." In addition, the broker or agent must set forth the per occurrence and per project limits of the insurance and must certify that the City of New York is an additional insured.

The PGLI certifications do not alter the statute and the case law regarding whether insurance is in effect. However, at a minimum, they create a claim against the broker or agent if the certification is false and may, depending on the facts, create criminal liability for making a false certification to a government agency. If the broker or agent has deep pockets or has satisfactory professional liability or errors and omissions insurance, the PGLI certification may provide redress for economic loss when there is no underlying policy directly protecting the Building Department.

Can an independent lender, property owner, developer, coop managing agent or other person seeking insurance protection create a certification form like the PGLI and use it in nongovernment business? Yes. But it still doesn't get the beneficiary any insurance. It only gets a claim against the broker signing the form. Better is to insist on a binder from a duly authorized agent, including confirmation of the payment of a year's premium and, whenever possible, a policy number. If the insurance policy is already in place (for example, a property owner who is refinancing a mortgage loan and already owns the property or a contractor who has an umbrella policy covering all jobs), insist on getting the policy with a binder covering the endorsement in favor of the party demanding the insurance. In my experience, even a broker can get what you want from an agent or the carrier once the broker understands that the deal won't go forward without it.

It Isn't Over 'til It's Over[56]

There is an additional trap for the unwary. Additional insured coverage is ineffective, even if there is a policy, unless there is a specific endorsement or policy language covering the additional insured. This may come in the form of an endorsement specifically naming the beneficiary and granting additional insured status or policy language insuring a class of additional insureds to which the beneficiary belongs. The ACORD 25 Certificate of Liability Insurance warns the beneficiary of this limitation with the following warning:

> Important: If the certificate holder is an additional insured, the policy(ies) must have additional insured provisions or be endorsed. . . . A statement on the certificate does not confer rights to the certificate holder in lieu of such endorsement(s).

Therefore, if the beneficiary seeks to become an additional insured, then not only must the policy actually exist, but there must be either a provision extending additional insured coverage generally or there must be an endorsement naming the additional insured. If your client wants additional insured protection, you must check the policy carefully to make sure that your client is covered by the additional insured provision because frequently the provision is not as broad as you think.[57]

Endnotes

1. With due apologies to the Rolling Stones (*Let It Bleed*, 1965).
2. New York Real Property Actions and Proceedings Law Section 881, a surprise to the uninitiated, allows an owner of real property to obtain a license allowing access to adjoining property when necessary to improve or repair the licensee's property, "upon such terms as justice requires." Those terms always includes providing insurance because Section 881 also provides, "[t]he licensee shall be liable to the adjoining owner or his lessee for actual damages occurring as a result of the entry."
3. After struggling with possible terms to use to keep the language concise and avoid wasting too much paper, I have settled on "insured" to refer to the primary insured who is asked to provide insurance and "beneficiary" to refer to the certificate holder, mortgagee, landowner, etc. who requires someone else to obtain insurance for her/him/it.
4. *Consol. Edison Co. of New York, Inc v. Allstate Ins. Co.*, 98 NY2d 2018, 218 (2002).
5. ACORD Corporation is a not-for-profit corporation consisting of members primarily from the insurance industry, either carriers, agents or brokers, created to standardize industry data and forms. ACORD can exist without violating anti-trust laws because insurance companies are substantially exempt from anti-trust

scrutiny under the McCarran-Ferguson Act to the extent that they are subject to state regulation. 15 U.S.C. §§ 1011-1015.

6. Although the Form 25 is a "Certificate" and Form 28 is "Evidence," this article will refer to both as a "Certificate of Insurance."

7. NYS Dep't. of Law OGC Op No. 10-11-16 (November 16, 2010).

8. Insurance Law Sections 501-505 (McKinney's).

9. *Landsman Dev. Corp. v RLI Ins. Co.*, 149 AD3d 1489 (4th Dept. 2017).

10. The insurance policy provided an additional insured endorsement that stated that it applied to "blanket, as required by written contract," but apparently, due to an affiliation between the contractor and the landowner, there was no "written" contract.

11. *Landsman Dev. Corp.* at 490-91.

12. *Tribeca Broadway Assoc., LLC v. Mount Vernon Fire Ins. Co.*, 5 A.D. 3d 198 (1st Dep't. 2004).)

13. *Id.* at 200.

14. *Id.*

15. *Landsman Development*, at 1491.

16. *Vikram Const. Inc. v. Everest Nat. Ins. Co., 139 A.D.3d 720* (2d Dep't 2016).

17. *Id.* at 721.

18. *Sevenson Envtl. Services, Inc. v. Sirius Am. Ins. Co.*, 74 A.D.3d 1751 (4th Dep't 2010).

19. *Id.* at 1753.

20. *Allied World Natl. Assur. Co. v. Peerless Ins. Co.*, 61 Misc., 3d 1222(A) (Sup.Ct, Niagara Co., 2017), *aff'd sub nom Allied World Natl. Assur. Co. v. Peerless Ins. Co. a Stock Co.*, 166 A.D.3d 1524 (4th Dep't 2018).

21. *Id.*

22. *Greater New York Mut. Ins. Co. v. White Knight Restoration, Ltd.*, 7 A.D.3d 292 (1st Dep't 2004).

23. *Id.* at 293. *See also Summit Const. Services Group, Inc. v. Act Abatement, LLC.*, 54 Misc. 3d 505 *(Sup. Ct., Westchester Co., 2016).*

24. *Cendant Car Rental Group v. Liberty Mut. Ins. Co.*, 48 A.D.3d 397 (2d Dep't 2008).

25. *Id*. at 398.

26. *Penske Truck Leasing co., L.P. v. Home Ins. Co.*, , 251 AD2d 478 (2nd Dep't 1998).

27. *Id.* at 479.

28. *Chartis Seguros Mexico, S.A., de C.V. v. HLI Rail & Rigging, LLC*, 11 CIV, 3238 ALC GWG, 2014 WL 988574 (S.D.N.Y. Mar 13, 2014).

29. *Id.* at *4.

30. Tort claims for fraud by a broker in issuing a knowingly false COI are not addressed in Article 5 of the Insurance Law.

31. McKinney's N.Y. Insurance Law Article V.

32. McKinney's N.Y. Insurance Law Section 501 (a).

33. McKinney's N.Y. Insurance Law Section 502(c).

34. "No one gives what they don't have." Sorry for the Latin phrase, but I offer it in honor of my mother, who passed away last year at age 96. She was raised in an Orthodox Jewish home and kept strictly kosher in her own house, but insisted to me as a young boy that if I wanted to grow up to be a lawyer, I needed to learn Latin. I did not, but I would occasionally sprinkle Latin phrases into communication with her.

35. This provision highlights a common problem when, for example, a COI is presented, although it adds nothing to the existing law that the COI could not vary the terms of the policy itself. See Note 37 and accompanying text.

36. Memorandum in Support of Legislation, New York Bill Jacket, 2015 A.B. 4616, Ch. 8.

37. *See, eg*, New York State Department of Financial Services General Counsel Opinion 5-20-2003 (#3), 2003 WL 24312408 (NY INS BUL), which states, "Therefore, licensed producers may not add terms or clauses to a Certificate of Insurance that alter, expand, or otherwise modify the terms of the actual policy. As stated in Circular Letter No. 15 (1997), the Department may seek disciplinary measures against producers who act in this manner."

38. New York State Department of Financial Services (formerly the NYS Insurance Department) General Counsel Opinion 11-2-2001 (#2), 2001 WL 36038789 (NY INS BUL).

39. *Springer v. Aetna Life Ins. Co. of New York*, 94 N.Y.2d 645, 649 (2000).

40. *In re* September 11th Liab. Ins. Coverage Cases, 333 F. Supp 2d 111(S.D.N.Y.2004).

41. *Id.* at 119-120.

42. In my experience representing banks in commercial mortgage lending, ACORD forms issued by brokers are provided more than 75% of the time. Insisting on a legally enforceable binder is often met by either "The ACORD form is the same as the binder," or "I can't get a binder or a policy or a policy number because it is not available yet." The response,"That means there's no insurance, right?" to the latter allegation usually causes great consternation in the broker.

43. New York State Department of Financial Services General Counsel Opinion 11-2-2001 (#2), 2001. WL 36028789 (NY INS BUL).

44. Banking Law Section 6-j, adopted 1990 N.Y. Sess. Law Serv. 445 (McKinney's).

45. My first foray into legislative lobbying was a failed attempt to defeat the legislation adding this provision. The legislation was proposed by independent insurance agents who had difficulty getting complete insurance policies fast enough to satisfy lenders. They argued successfully that a binder was just as good as a policy and we could find no case law at the time in which a lender had suffered a loss because it accepted a binder rather than insisting on a policy.

46. Banking Law Section 6-j (2) (McKinney's). It was over 25 years ago, but I am reasonably certain that these two requirements were the only concessions that Cliff Weber, a current member of the Business Law Section and then counsel to the savings banks trade association, and I were able to get from our lobbying efforts. He and I wrote these two requirements because we wanted to make sure that the lenders at least got something on which they could legally rely.

47. "A broker is the agent of the insured, but it customarily looks for compensation to the insurer, not the insured, and it is sometimes the insurer's agent also—for example, when collecting premiums." *People ex rel. Cuomo v. Wells Fargo Ins. Services, Inc.*, 16 NY3d 166, 171 (2011).

48. *St. George v. W.J. Barney Corp.*, 270 A.D.2d 171.172 (1st Dep't 2000).

49. The liability of a broker for providing a COI that is inaccurate is an issue outside the scope of this article. For information on that issue, the reader is directed to *Tucci v. Hartford Cas. Ins. Co.* 167 A.D.2d 387, 388.(2d Dep't 1990) and *Brian Foy Constr. v. Morstam Gen. Agency*, 90 A.D. 3d 796, 798 (2d Dep't 2011).

50. Food for thought, but a Hail Mary not otherwise discussed in this article or hinted at in any other source I could find.

51. As originally adopted, Section 502(d) stated, "(d) No person or governmental entity shall request or require either in addition to or in lieu of a certificate of insurance, an opinion letter, warranty, statement, supplemental certificate or any other document or correspondence that such person or governmental entity knows to be inconsistent with the prohibitions of this section. However, an insurer or insurance producer may prepare or issue an addendum to a certificate that clarifies and explains the coverage provided by a policy of insurance and otherwise complies with the requirements of this section, provided such authority is granted

to the producer by the insurer." NY LEGIS 552. (2014), 2014 Sess. Law News of N.Y. Ch. 552 (S. 6545-A) (McKinney's).

52. Letter from David M. Cherubin (Chicf Counscl and Assistance Commissioner of the DOT) to Seth H. Agata (Acting Counsel to the Governor), January 8, 2015.

53. See NY LEGIS 8 (2015), 2015 Sess. Law News of N.Y. Ch. 8 (A. 4616) (McKinney's) for the amendment deleting former Section 502(d).

54. The New York City Building Department regulations require that a COI must be "accompanied by a sworn statement in a form prescribed by the Department from a licensed insurance broker certifying that the insurance certificate may be relied upon as accurate in all respects and that the insurance certificate thereon is in force." New York City, N.Y., Rules, Tit. 1, 104-02 (b)(2)(iii).

55. The PGLI form is computer generated at https://a810-efiling.nyc.gov/Renewal/GeneralLiabilityInsurancePDF as part of the Building Department application process.

56. The immortal Yogi Berra; no citation required.

57. *See Landsman, supra,* and the discussion in Note 10 as an example of a technical defect that obviated coverage.