

If you're a lawyer, you don't need to read this.

But if not, please read this carefully.

By Richard F. Lund, J.D., Vice President,
Senior Underwriter, Swiss Re Corporate
Solutions*



Insurance agents and brokers should be wary of commercial insurance customers trying to impose unreasonable and potentially illegal heightened duties on them. Improvements to state laws have limited the ability for customers to ask agents to make changes to the standard ACORD 24 and 25 Certificate of Insurance forms. Instead, many commercial insurance customers are seeking "guarantees" from their agents and brokers that their insurance policies comply with insurance provisions of their contracts with third parties. These customers are looking to hold their agents responsible if a loss occurs that is not covered by those policies, regardless of whether the agent had any existing duty under state law.

Case in point: We have seen a recent trend of commercial insurance customers requiring that their agent sign a document stating that should any insurance policies procured by the agency not comply with insurance provisions of a contract to which the customer is a party, then the agent would be liable for any uncovered losses. While this may appear to be straightforward, it actually requires that the agent act as a lawyer without the benefit of having attended law school or passing the bar exam. Consider the following statement contained in a document that was recently presented to a Swiss Re Corporate Solutions E&O insured for them to sign:

"I agree that the above referenced policy/policies meet or exceed the insurance requirements set forth in the contract provided by (name of commercial insurance customer). In addition, I agree to provide written notice if and when the policy/policies ever change to the extent that it no longer meets your insurance requirements."

The first sentence requires that the agent: 1. review a written contract (the insurance policy/policies), 2. compare it to the contract between the customer and the third party, and 3. provide a legal opinion that the insurance meets all of the criteria set forth in the contract. In baseball terms, three strikes and you're out! Unless the agent is also a licensed attorney, they would not have the capacity to provide this legal opinion and, if they nonetheless attempt to do so, they could be subject to penalties for practicing law without a license.

The second sentence requires: 1. notice that is not required by an insurance policy, and 2. that the agent stay in constant contact with the customer to determine if any changes have taken place that would necessitate changes in the policies. This sentence is attempting to take the place of the ACORD Certificate of Insurance, and imposes duties that are not found on those certificates. If the customer attempted to require that they make the change to the certificate, they could be in violation of state law. The sentence is creating legal duties for the agent that they would not otherwise have.

So what should you do if you are presented with this or any similar type of document? If your customer presents you with a written contract that includes insurance provisions setting forth the types of coverages they are to obtain, you should review them with the customer, clarify any ambiguities, and attempt to obtain the coverages. The general obligation of agents is to provide those insurance coverages requested by their customer, or to notify them if they are unable to do so. While individual state laws may create greater or lesser duties, this is the agent's primary obligation. If you are unable to provide the coverages, you must notify them immediately so that they can take appropriate action as they are required under their contract. Remember, you are NOT a party to the contract between the customer and the third party. Your only obligation is to obtain those coverages that your customer has requested, except as otherwise required by state law. In no event should you ever agree to sign any document that would require you to make any legal interpretation about whether or not an insurance policy meets or exceeds a contractual provision.

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**Richard F. Lund, JD, is a Vice President and Senior Underwriter of Swiss Re Corporate Solutions, underwriting insurance agents errors and omissions coverage. He has also been an insurance agents E&O claims counsel and has written and presented numerous E&O risk management/ loss control seminars, mock trials and articles nationwide since 1992.*

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