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PURCHASE TICKETS

Advocate's View: When contract requires you to procure insurance, having the right policy is key

By: Stacey A. Trien October 17, 2018 0

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This situation is all too familiar: Your client knew her contract required her to procure insurance, but she assumed her existing insurance policy was fine and never provided the procurement clause to her insurance agent to add the extra coverage required. When the time came to file a claim, the insurance company denied coverage. The client is surprised and outraged. "I thought I had insurance coverage!"

This situation occurs repeatedly in the context of commercial landlord/tenant disputes, construction contracts, and licensing agreements, to name a few. Usually the client has a general commercial insurance policy but it lacks the specific type of coverage or the correct named insureds required by the lease, construction contract or other agreement. The cost to increase coverage before the covered event is, of course, generally far less than the consequences of failing to procure the required coverage.

There may be an avalanche of financial consequences for violating an insurance procurement clause. The non-covered insured may not only be directly liable for indemnification of a non-covered accident or claim, but also be liable to the other contracting party for damages faced by that person or business arising out of the failure to procure the proper policy, including attorney's fees and costs incurred in an underlying lawsuit (such as a personal injury lawsuit). *See, e.g.*, *Spector v. Cushman & Wakefield, Inc.*, 100 A.D.3d 575, 575 (1st Dept 2012) (where snowplow company/promisor failed to procure the contractually agreed-upon level of liability insurance coverage, it was liable for actual damages to promisee Citibank in connection with a slip-and-fall accident at Citibank premises, including Citibank's defense costs in the personal injury action, because Citibank did not have any insurance coverage for those costs).

It is noteworthy that if the contracting party has its own insurance that covers the defense and liability claims in the underlying lawsuit, its recovery is limited to its out-of-pocket expenses in maintaining such insurance. *See Lima v. NAB Constr. Corp.*, 59 A.D.3d 395 (2d Dept 2009).

Under New York law, insurance procurement clauses are strictly construed as to the policy limits, parties covered and the scope of coverage. In one recent example, a contractor entered into an agreement to rent a boom lift from a rental company to repair the Whitestone Bridge in New York City. The rental agreement stated that the contractor agreed to maintain insurance "to cover any damage or liability arising from the handling, transportation, maintenance, operation, possession or use of the equipment during the entire rental period."

The contractor procured insurance covering the use of the equipment during the project; however, the insurance policy was limited to coverage for liability caused by the contractor. When the contractor's employee was injured while using the lift, among the resulting lawsuits was an action by the rental company against the contractor for failure to procure insurance. The Court agreed with the rental company and found that the contractor failed to procure the correct type of insurance because of the limiting language as to liability. *See United Rentals (N. Am.), Inc. v. Conti Enterps., Inc.*, 293 F.Supp.3d 447 (S.D.N.Y. 2018).

In the snowplow removal case cited above, the contract required the snowplow company to procure an insurance policy with limits of $1 million per occurrence. The company procured a policy with a per occurrence limit of $1.5 million, but with a $500,000.00 self-insured retention (essentially a deductible). The Court held that the snowplow company breached the contract to procure insurance by failing to maintain a policy with the required policy limits, giving rise to damages payable by the snow plow company to the promisee. *Spector*, 100 A.D.3d at 575-76.

"But wait," says your client, "I received a certificate of insurance saying that I have coverage, doesn't this protect me?" The short answer is no. An insurance carrier, or its agent or broker, may issue a Certificate of Insurance indicating that the insured procured the required amount of coverage. Under New York law, the Certificate of Insurance alone does not confer coverage because it is generally not binding and is not the same thing as the actual insurance policy, which is a binding contract. Also note that the actual insurance policy language, which is not in the Certificate of Insurance, may contain conditions or exclusions that do not comport with the contractually-obligated coverage. *See Landsman Dev. Corp. v. RLI Ins. Co.*, 149 AD3d 1489 (4th Dept 2017).

If you are drafting a lease or other contract that contains an insurance procurement clause, make sure to highlight that language to your client and advise your client to provide the clause to their agent or broker. An experienced insurance agent or broker should be able to procure the correct policy based on the contract language.

If it is not clear whether there is insurance coverage under the policy, or if an insurance company has denied your client's claim and you or the client believes that the decision was incorrect and there should be coverage, hiring a coverage attorney at the outset to sort through the policy and communicate with the insurance company (and in some instances file a declaratory judgment action) may be advisable.

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