

MARKS & WEINBERG, P.C.

**Insurance and Proof of Coverage: are your
Certificates of Insurance are worth the paper they are printed on?**

I. The Importance of Insurance in Leasing Transactions

a. Protecting the Collateral

Provisions in the lease documents, the filing of financing statements and, in some circumstances, appraisals are all used by lessors to protect their interests in the equipment. These precautions are virtually worthless if the equipment is uninsured and is destroyed. As a result, lease documents generally contain strong insurance provisions which (i) require the lessee to maintain insurance that is acceptable to the lessor, (ii) assure that the lessor is covered by those policies (the magic words "additional insured" and "loss payee" are essential), and (c) require the insurance company to notify the lessor before canceling or substantially changing the policy.

b. Avoiding Lessor Liability

Certain types of equipment may result in damage to persons or property. Lessors, who often are the "owners" of the equipment, can be targeted by plaintiff's lawyers looking to find compensation for people who are



injured by (or have their property damaged by) the equipment. Although a good contract requires the lessee to indemnify the lessor from any such suits, those provisions rely on the lessee's continued creditworthiness and lessors protect themselves from these risks by making sure that the lessee has liability insurance that covers the lessor. The lessor needs to be an "additional insured" in this case.

II. Why do you need Proof of Insurance?

It is important to understand that all of the strong contractual language which requires the lessee to maintain the types of insurance discussed above is of little use to the lessor once the equipment is destroyed or the damage that triggers the liability suit is done. The language in the lease is a *tool used by lessors to force lessees* to obtain and maintain the insurance. If the insurance is not in effect when the equipment is destroyed or the person/property is injured, the lease language merely provides lessor with a claim for "breach of contract" against the lessee.

Since lessors really need to be sure the insurance is in effect, lessors should always obtain *evidence of insurance* from the insurance company and a *promise from the insurance company* that the company will provide the lessors with prior written notice before canceling or making substantial changes to the insurance. Some lessors require a minimum 30-day notice, while others are willing to accept a 10-day notice.

III. What Generally Constitutes Proof of Insurance?



Most lessors know to obtain a certificate of insurance from the insurance company prior to funding the deal. Unfortunately, the content of the certificates vary widely and many of the certificates are inadequate.

All insurance certificates should:

- a. contain language broad enough to assure that the leased equipment is covered by the policy,
- b. list coverage amounts that are adequate,
- c. explicitly list lessor as "loss payee" (this means that the *lessor* will be the party paid by the insurance company if the equipment is destroyed),
- d. explicitly list lessor as "additional insured" (this means that the *lessor* will be able to bring a claim and take other actions under the policy), and
- e. contain explicit language that the company will notify lessor at least 10 [or 30] days prior to canceling or substantially changing the policy.

In addition, if there is any risk that the equipment could injure a person or some property, the insurance certificate **MUST**

- a. also cover liability, and
- b. explicitly list lessor as "additional insured" (this means that *lessor* will be covered by the insurance if a third party sues lessor because damage caused by the equipment).



IV. The Details of what Constitutes Proof (making sure you are getting the right forms)

A. General Forms

More than 90% of the insurance certificates issued are promulgated by the ACORD, which is a nonprofit association of insurers, agents and other professionals in the insurance industry. Although there are multiple forms, lessors usually receive one of the following:

1. **ACORD 24.** This certificate says “*Certificate of Property Insurance*” across the top;
2. **ACORD 25-S.** This certificate says “*Certificate of Liability Insurance*” across the top; and
3. **ACORD 27.** This certificate says “*Evidence of Property Insurance*” across the top.

B. More Detail on the ACORD 24 and ACORD 25-S

1. Type of Insurance

There are some differences in these certificates since one was created for liability insurance and the other for property insurance. For example, the first “type of insurance” on the ACORD 25-S is “General Liability” whereas the first “type of insurance” on the ACORD 24 is “Property.” These distinctions are fairly unimportant and insurance companies frequently use the ACORD 25-S to show both liability and property



coverage by noting the property insurance coverage in the box marked "Other" (under the type of insurance).

2. Disclaimers.

The most important language on these certificates from a legal standpoint is identical:

a. Upper Right Hand Corner.

"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."

b. Under the Name of Insured (1/3 of way down the page).

"This is to certify that the policies of insurance listed below have been issued to the insured named above from the policy period indicated. 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. Limits shown may have been reduced by paid claims."

c. Bottom Right (under "Cancellation")



Should any of the above described policies be cancelled before the date thereof, the issuing company *will endeavor* to mail ___ days written notice to the certificate holder named to the left. *But failure to mail such notice shall impose no obligation or liability of any kind upon the company, its agents or representatives.*

d. No Spot for “Additional Insured” or “Loss Payee”

These certificates contain no explicit place for the certificate holder to be designated as “additional insured” and/or “loss payee.” When present, such terms are often placed in the box that describes the collateral or in the box listing the certificate holder’s name.

The aforementioned disclaimers effectively gut any protection lessor was hoping to obtain through an insurance certificate. Courts ruling analyzing these certificates have routinely held that (a) ACORD 24 and ACORD 25-S forms create no insurance coverage in favor of the holder unless such insurance coverage is provided for in the underlying policy, and (b) that insurance companies have no liability for failure to provide notice of cancellation to the certificate holder.

Indeed, the ACORD Forms Instruction Guide (1994 ed.) which was promulgated by the drafters of these forms explicitly states that these types of certificates are designed to evidence *the existence* of insurance and *should not be used to satisfy lienholders.*

For these reasons, the value of an unaltered ACORD 24 or ACORD 25-S certificate form is highly questionable. While the forms confirm that the



lessee, at closing, maintains the required insurance, those forms convey little or no rights to the lessor. At a minimum, new certificates must be obtained annually to ensure that the insurance is still in place. Even with these annual checks, the equipment may be uninsured for a large portion of the year. A better option would be to obtain an ACORD 27 certificate (described below) or to at least require the insurance agent to amend the certificate (also as described below).

C. Evidence of Property Insurance

1. Made for Lien Holders.

The ACORD 27 form is much more suited for lessors. Compare the following language (from the ACORD 27) to the above quoted language (from the ACORD 24 and 25-S forms):

a. Top of Certificate.

öThis is evidence that insurance as identified below has been issued, is in force and *conveys all the rights and privileges* afforded under the policyö

b. Near Bottom of Page (under “Cancellation”)

öThe policy is subject to the premiums, forms, and rules in effect for each period. Should the policy be terminated, the company *will give* the additional interest identified below _____ days written notice, and *will send notification of any changes* to the policy that



would affect that interest, in accordance with the policy provisions or in accordance with law.

c. Explicit Spot of “Additional Insured” and “Loss Payee”

There are boxes in the lower left hand corner where lessor can be explicitly designated as “Loss Payee” and/or “Additional Insured” by the mere marking of a box.

2. What about Liability Coverage?

The title “Evidence of Property Insurance” appears to be limited to property insurance and insurance companies often resist using that certificate for liability insurance. However, the ACORD Instruction Guide contains no such limitation. As such, there is no reason an insurance agent cannot modify this certificate to provide notice of liability coverage in the same way agencies often modify the Liability Certificate to include statements regarding property insurance coverage.

V. Recommendations

As described below, we recommend first trying to obtain an ACORD 27 as evidence of property insurance. If the ACORD 27 cannot be obtained, and ACORD 24 and/or 25-S can only be used if certain modifications are made.

Also, as discussed below we also recommend using an Insurance Requirement Form to advise the lessee and its insurance company of the lessor’s requirements. This form will help clarify the insurance requirements and lessen the possibility of error.



A. The Better Alternative (ACORD 27)

The better alternative is to insist on the ACORD 27. This type of insurance certificate says “Evidence of Property Insurance” and was designed by the ACORD to be used by lienholders such as lessors.

The following insertions and procedures should be followed:

1. Additional Interest.

The certificate should list the lessor’s name and address in the lower left hand corner (in the box marked “Additional Interest”).

2. Additional Insured/ Loss Payee.

The boxes “Additional Insured” and “Loss Payee” should be checked in the lower right hand corner (in the box marked “Nature of Interest”).

Note: Although some insurance companies and lawyers will argue that the term “loss payee” applies to property coverage and that the term “additional insured” applies to liability coverage, lessors should try for both designations on property coverage.

Loss payee is technically the entity to which the insurance company will write, and deliver, the check in the event payment is required under the policy. However, the loss payee arguably has no other rights.



An Additional Insured is not necessarily the payee of a check that covers a loss of the equipment but has other rights under the policy--- such as the right make a claim. In order to cover all basis, lessors should be designated as both.

3. Other Descriptions.

Lessor should also verify that: (a) the lessee's name and address are correct (in the box marked "Insured"), (b) that the property description is broad enough to cover the property being leased, and (c) that the amount of the insurance is satisfactory.

4. Liability Insurance

If there is any possibility that the equipment being leased will harm a person or property, proof of liability coverage must also be obtained. The liability insurance should be noted in the box labeled "Coverage Information."

B. Minimal Alternative (Amend ACORD 24 and/or 25-S)

The minimal alternative is to amend the ACORD 24 or ACORD 25-S certificates. We recommend the following modifications, procedures and insertions.

1. Deletion of Disclaimer in Upper Right Hand Corner.



The disclaimer in the upper right hand corner must be crossed out and initialed. Prior to such deletion, that language reads:

“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. Deletion of Disclaimer under “Coverages”.

The disclaimer immediately under the box marked “Coverages” must be crossed out and initialed. Prior to such deletion, that language reads:

“This is to certify that the policies of insurance listed below have been issued to the insured named above from the policy period indicated. 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. Limits shown may have been reduced by paid claims.”

3. Modification of “Cancellation Box”.

The language in the bottom right hand corner under the box labeled “Cancellation” must be modified as follows: (i) delete “endeavor to”, and



(ii) delete “But failure to mail such notice shall impose no obligation or liability of any kind upon the Company, its agents or representatives.” Each deletion must be initialed.

4. Added Language to “Description of Operations Box.”

The box for description of operations must (a) include a description of the equipment covered, and (b) contain the following language “This is evidence that insurance as identified in this certificate has been issued, is in force and conveys all the rights and privileges afforded under the policy.”

5. Liability Coverage (and Amounts).

The box marked “Other” under the “Type of Insurance” must list “special form replacement cost insurance for damage to the Equipment” or provide a similar description of satisfactory property insurance coverage.

6. Description of Equipment.

The box for description of operations must include a description of the equipment covered.

7. Additional Insured/Loss Payee.

The “Certificate Holder” must list the lessor and its address and state that the Certificate Holder is “an Additional Insured and Loss Payee with respect to all coverage.”



Note however that the some of the modifications made to these forms may be ineffective under state insurance statutes. *See, e.g.* NY Ins. Law §2307(b) (modifications to insurance certificates which expand or alter the terms of the policy must be approved by the Superintendent).

C. Inform the Lessee and its Insurance Agent of Your Specific Requirements

We recommend that each lessee be given, prior to closing, a short description of the lessor's expectations. This "Insurance Requirement Form" should state the policy limits and the lessor's proper legal name and address, as well as giving telephone and e-mail contact information.

The form should also: (1) state that ACORD 27 is the proper form; (2) list all required ACORD 27 insertions; (3) state that any use of the ACORD 24 or ACORD 25-S forms require specific modifications; and (4) outline those modifications. It should be in a form which the lessee can deliver directly to its agent for prompt attention.

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