

City of Atlanta

Department of Law

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**Legal Aspects of Airport Insurance;
What Every Good Airport Lawyer
Should Know**

Robert B. Caput
Senior Assistant City Attorney
Aviation Practice Group

Topic for Discussion:

City of Atlanta; Case Study; Additional Insured/Notice of Cancellation Issues

Additional Insured/Notice of Cancellation Issues:

An Airport owner, engaged in a multitude of contractual relationships, usually requires those entities with which it contracts to provide various insurance coverages. Coverages can include:

- **Workers' compensation**
- **Commercial general liability**
- **Builder's risk**
- **Professional liability**

Additional Insured/Notice of Cancellation Issues:

Contractually provided insurance is usually synched up with 2 additional transactional requirements to protect the owner:

- **A contractual indemnity from the contractor***
- **Designation of the Owner as an additional insured on certain of the insurance coverages (does not apply to workers' compensation insurance or professional liability insurance)**

***Anti-indemnity statutes may exist in some jurisdictions prohibiting an owner from being indemnified for certain levels of its own negligence (e.g. sole and concurrent)**

Additional Insured/Notice of Cancellation Issues:

Case Study; City of Atlanta: Considerations:

- **City's additional insured/notice of cancellation requirements; Acord Certificates of Insurance/Endorsements**
- **Insurance companies'/brokers'/agents' willingness to comply with City requirements**
- **Law Department's approval of contract as to form requirements**
- **Georgia law; statutory/case law**
- **Georgia Insurance Commissioner's directives and opinions**
- **City's internal review process**
- **Law Department recommendations**
- **Resolution**

Additional Insured/Notice of Cancellation Issues:

For years, the City of Atlanta's Division of Risk Management issued insurance requirements that, among other things, provided:

- 1. Mandatory 30-Day Notice of Cancellation or Material Change.** The City shall, without exception, be given not less than thirty (30) days notice prior to cancellation for other than non-payment of premium or for material change of any Insurance...required by this Agreement. Non-payment of premium shall require ten (10) days notice of cancellation. Confirmation of this mandatory 30 days notice of cancellation shall appear on the Acord Certificate of Insurance and on any and all...Insurance policies required by this Agreement.
- 2. City of Atlanta as Additional Insured.** The City shall be covered as Additional Insured under any and all Insurance...required by this Agreement, and such insurance shall be primary with respect to the Additional Insured. Confirmation of this shall appear on the Additional Insured Endorsement, and on any and all applicable...Insurance policies ...

Additional Insured/Notice of Cancellation Issues:

The dilemma:

Notwithstanding the City's explicit requirements, 99% of the time it was provided with a cord certificates of insurance that contained the following language:

“Should any of the above-described policies be cancelled before the expiration date thereof, the issuing insurer will endeavor to mail ____ days written notice to the certificate holder named to the left, but failure to do so shall impose no obligation or liability of any kind upon the insurer, its agents or representatives.”

Correcting this by obtaining a clean, complying certificate, a redacted certificate or complying endorsement became a nightmare.

Additional Insured/Notice of Cancellation Issues:

The City routinely faced contractors, insurers, brokers and agents that refused to issue clean certificates of insurance, redacted certificates of insurance or policy endorsements complying with the City's notice of cancellation requirements

The litany of reasons for refusing to comply was often very creative

Additional Insured/Notice of Cancellation Issues: What do the Contractors/Agents Say?

The contract is between contractor and City, not City and insurance company

The insurance company wants to charge an arm and a leg for a conforming policy

We are a non-profit company and don't have much money for premiums

Justifications

*Can't change the Insurance Form:
[i] It is copyrighted
[ii] It is against the law*

Insurance Commissioner's Directives prohibit change

The contract involves very few dollars; the chance of something bad happening requiring insurance is slim

The City is not directly insured; it is not entitled to same treatment as an insured

The insurance company will not do it; if it does, it will be subject to sanctions from Insurance Commissioner

We've executed other contracts where it was a requirement that City did not enforce

Additional Insured/Notice of Cancellation Issues:

Potential reasons why an insurer would not want to provide an additional notice of proposed cancellation to the Additional Insured/Notice of Cancellation:

- **Expands its contractual obligations for notice of cancellation and increases liability exposure for failing to comply with obligations**
- **Insurance policy may contain an omnibus clause allowing the named insured and its broker or insurance agent to issue certificates naming additional insureds without the requirement of a concomitant policy endorsement; Insurer would not necessarily be in a position to know the identity of additional insureds or where cancellation notices should be directed**

Additional Insured/Notice of Cancellation Issues:

- **The City of Atlanta's Law Department is required to approve Contracts as to form, which involves, among other things, determining whether there are any conflicts in the various components of a contract**
- **A contract containing an insurance certificate with the "endeavor to" language contained in it conflicted with the City's Additional Insured/Notice of Cancellation requirements**
- **Such an accord certificate would further potentially conflict with requirements to be set forth in policy/endorsement to policy**
- **Accordingly, these problematic contracts were not able to be approved as to form, causing significant delays in final contract execution while issues were resolved**

Additional Insured/Notice of Cancellation Issues:

Statutes:

O.C.G.A. Section 33-24-47 provides:

- (a) ...Cancellation of a policy for failure of the named insured to discharge when due any obligations in connection with the payment of premiums or cancellation for any reason of a policy that has been in effect for less than 60 days shall be governed by the provisions of **Code Section 33-24-44**.*
- ...(b) A notice of termination, including a notice of cancellation or nonrenewal, by the insurer, a notice of an increase in premiums, other than an increase in premiums due to a change in risk or exposure, including a change in experience modification or resulting from an audit of auditable coverages, which exceeds 15 percent of the current policy's premium, or a notice of change in any policy provision which limits or restricts coverage shall be delivered to the insured in person or by depositing the notice in the United States mail, to be dispatched by at least first-class mail to the last address of record of the insured, at least 45 days prior to the termination date of such policy;...*

Additional Insured/Notice of Cancellation Issues:

Statutes:

O.C.G.A. Section 33-24-44 provides:

(d) When a policy is canceled for failure of the named insured to discharge when due any of his obligations in connection with the payment of premiums for a policy or any installment of premiums due, whether payable directly to the insurer or indirectly to the agent, or when a policy that has been in effect for less than 60 days is canceled for any reason, the notice requirements of this Code section may be satisfied by delivering or mailing written notice to the named insured and any lienholder, where applicable, at least ten days prior to the effective date of cancellation in lieu of the number of days' notice otherwise required by this Code section.

Additional Insured/Notice of Cancellation Issues:

Case law:

- **Powell v. Lititz Mutual Insurance Co., 419 F.2d 62 (1969)-** Construed the notice requirements in an earlier version of Georgia Insurance Code as not precluding insurers from agreeing to notice requirements more stringent than those that were statutorily required
- **American Home Assurance Co. v. Smith, 218 Ga.App.536, 462 S.E.2d 441 (1995)-**Unless prohibited by statute or public policy, parties are free to contract on any terms and about any subject matter in which they have an interest, and any impairment of that right must be specifically expressed or necessarily implied by the legislature in a statutory prohibition and not left to speculation. Insurance policies are not excepted from the general principle of freedom to contract*

***11th Circuit has adopted 5th Circuit precedent as binding. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981)**

Additional Insured/Notice of Cancellation Issues:

Additional legal considerations:

- ***Acord certificates of insurance are informational only and do not provide or alter the terms of coverage (language included on standard acord form)***
- ***Georgia Insurance Commissioner Directive No. 88-R-1:***

“It is the opinion of this Department that when an insurance company executes such a ‘Certificate’ which contains more than a synopsis of the actual insurance contract in existence, it is going beyond the scope of its filings and is, therefore, in violation of the Georgia Insurance Code. Therefore no insurer or agent should issue or sign a certificate of insurance that contains language that would alter any policy coverage, exclusion, provision or condition.”

Additional Insured/Notice of Cancellation Issues:

Additional legal considerations:

- ***Directive No. 88-R-1 noted certain concerns with Certificates of Insurance that appeared to violate this fundamental principal when it stated:***

“Our examination of several of these forms indicates that, in some instances, an “Indemnity Agreement” tantamount to a complete “hold harmless” agreement is incorporated within the body of these “Certificates of Insurance” forms. Additionally, some forms appear to have been designed to broaden policy coverages.”

- ***A Memorandum issued by Allan Hayes, Deputy Commissioner of Insurance, to Jerry Duke, PIA, GA, dated July 15, 2005, concerning Certificates of Insurance reiterates this policy by providing: “...[A]ltering the terms of a policy through a Certificate of Coverage violates Georgia Law.”***

Additional Insured/Notice of Cancellation Issues:

The City's Law Department, after a complaint was filed with the Georgia Insurance Commissioner's Office, engaged in lengthy correspondence with that office, contending that Georgia law supported allowing an insurer to contractually agree to provide direct notice of cancellation to an additional insured

Additional Insured/Notice of Cancellation Issues:

Georgia Insurance Commissioner subsequently opined that it construes O.C.G.A. Section 33-24-47 in tandem with its approval of the current Acord Certificate of Insurance form to mean that an insurer cannot agree in its policy to deliver advance notice of cancellation to an additional insured. By letter dated 9-4-07, the City was advised:

I refer to page four of your letter and to the section entitled MANDATORY CANCELLATION NOTICES. This section imposes obligations...that conflict with and...violate...Georgia statute 33-24-47 as well as 33-24-44. ...[n]either of these statutes recognizes “additional insured.” ...I don’t see how an insurer can agree to such terms as to do so would constitute Code violation(s) and the consequence of administrative discipline...[i]n my experience most of these certificates are issued by insurance agents rather than insurance companies...

An “additional insured” is not an “insured” within the meaning of the current Georgia Insurance Code. See generally O.C.G.A. Sections 33-1-1 to 33-61-2

Additional Insured/Notice of Cancellation Issues:

The City then undertook an internal investigation to determine an appropriate solution to this problem. That investigation involved:

- **Identifying statistically the scope of the problem in terms of City contracting and delays caused by additional insured/notice of cancellation issues**
- **Identifying the sources of the problem and ramifications of City requirements for notice of cancellation**
- **Researching what other jurisdictions require**
- **Proposing solutions to the problem, after consultation with the City's various using agencies and Law Department**

Additional Insured/Notice of Cancellation Issues: What were the Problems Identified?

- ***5% of proposed City Contracts are Accompanied with Expired Insurance Certificates***
- ***20% have Insufficient Coverages (e.g., missing automobile, worker's comp coverage)***
- ***50% are lacking "Additional Insured" Endorsements***
- ***75% are lacking the appropriate "Cancellation Language"***

Additional Insured/Notice of Cancellation Issues: How Long Do Issues Normally Take to Resolve?

- ***Expired Insurance Certificates on average take up to one week to resolve***
- ***Insufficient Coverages are resolved within approximately three weeks***
- ***“Additionally Insured” Endorsements are usually obtained within one week of notification***
- ***“Cancellation Language” issues generally take more than an entire month to resolve***

Additional Insured/Notice of Cancellation Issues: What are the Assumptions Considered?

- ***Contractors/ brokers and agents can fraudulently alter cancellation language***
- ***In the last 15 years, there have been no known incidents linked to cancelled contractor insurance***
- ***Out of 14 municipalities/Airports benchmarked, 6 in Georgia, requirements differed significantly***
- ***Based upon case law, industry standards and professional opinion, a certificate provides evidence of coverage only and nothing more-no legal protection***
- ***75% of contracts are lacking redacted cancellation language***
- ***Every week, at least 16 hours are dedicated to resolving cancellation issues***

Additional Insured/Notice of Cancellation Issues:

Airport	Stand. Certif.	Redaction Required	Endorsement Required	Contract Requirement	Other Cancel. Language	Comments
Port of Portland	X					Does not require redaction or endorsement for cancellation notice
Raleigh-Durham Airport Authority					X	Requires the following language, but no endorsement: "That the policy cannot be cancelled, reduced in amount or coverage eliminated in less than 30 days after notice sent by certified mail."
Salt Lake City				X		For many years did not require modification. However, because certificate modification does not actually change the policy and brokers were striking language with this knowledge, modification requirement was eliminated. Contract contains strong 30 day notice of cancellation requirement.

Additional Insured/Notice of Cancellation Issues:

Airport	Standard Certif.	Redaction Required	Endorsement Required	Contract Requirement	Other Cancellation Language	Comments
San Francisco			X		X	Any changes to coverages must be by policy endorsement. If policy already has 30 days notice to additional insured requirement, copy of policy required. If broker will assume notice responsibility, must send a letter to Airport stating this.
John Wayne Airport		X	X			For those insurance companies that will not modify the cancellation clause under any circumstance, such as Zurich and Hartford, a cancellation endorsement must be submitted on Airport's or insurer's form.

Additional Insured/Notice of Cancellation Issues:

Airport	Standard Certif.	Redaction Required	Endorsement Required	Contract Requirement	Other Cancellation Language	Comments
Springfield Branson Airport, Michigan	X					Requires 30 cancellation notice, but not an endorsement.
DFW	X					Requires 30 days notice, but does not require an endorsement.
Gainesville, Georgia		X				Requires redaction, but no endorsement.
Cobb County, Georgia	X					No redaction required.
Clayton County, Georgia	X					No redaction required.
Gwinnett County, Georgia	X			X		No redaction required. Contract requires 30 days notice of cancellation.

Additional Insured/Notice of Cancellation Issues:

Airport	Standard Certif.	Redaction Required	Endorsement Required	Contract Requirement	Other Cancellation Language	Comments
Fulton County, Georgia	X					Redaction not required.
Marietta, Georgia	X					Redaction not required. Does require 90 day notice either in the contract or on the certificate.
Fulton County Schools	X					Redaction not required.

Additional Insured/Notice of Cancellation Issues:

Possible solutions considered by City:

- **Obtain a blanket excess policy in the event a contractor's policy is cancelled**
- **Approach Insurance Commissioner's office requesting a reconsideration of position based upon applicable law**
- **File declaratory judgment action seeking formal determination of notice to additional insured issue**
- **Seek relief from Georgia legislature**
- **No longer insist on insurers providing direct notice of cancellation to City as additional insured and modify contract documents to provide additional protections to City:**
 - **Provision requiring pre-payment of premiums and certification from contractor and insurer that pre-payment has occurred**
 - **Quarterly (or more often) reporting by contractor of insurance status; more frequent provision of certificates of insurance**
 - **Provision requiring contractor to provide notice to City within 2 business days of receipt of proposed cancellation notice; provision allowing City to pay premium and backcharge contractor for costs**
 - **Include heightened default provisions in contract documents for failure to maintain insurance**
- **Convert to Owner's Controlled Insurance Program**

Additional Insured/Notice of Cancellation Issues:

City's decision:

- **City no longer requires direct notice of cancellation; accordingly, no conforming certificate or endorsement required**
- **City requires contractor to fax copy of insurer's cancellation notice within 2 business days of receipt**