Open Letter to Texas Independent Insurance Agents

From R. Brent Cooper, Attorney
Cooper & Scully, P.C.
www.cooperandscully.com

My previous two Open Letters to Texas Insurance Agents regarding SB1567 have triggered ongoing questions, particularly now that SB1567 is legally in effect. In response, I offer the following commentary in conjunction with the two previous Letters that are posted on my firm's above referenced website. All comments offered are subject to legal disclaimer referenced below.

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QUESTION 1:

One of my Companies is issuing a Renewal Billing with "new law wording" which I have copied in below. Does it satisfy the requirements of the new law in your opinion? A few of my other companies have similar wordings, too.

> This policy contains a named driver exclusion.
>
> **WARNING: NAMED DRIVER POLICY DOES NOT PROVIDE COVERAGE FOR INDIVIDUALS RESIDING IN THE INSURED'S HOUSEHOLD THAT ARE NOT NAMED ON THE POLICY.**
>
> Please call 1-XXX-XXX-XXXX and listen to the above statement. By making payment of your renewal you agree that you have read the above statement, heard it read to you orally exactly as it appears above and understand the warning. You may add or remove coverages by contacting your agent.

My Comments:

This renewal billing approach does not appear to satisfy the law. Agents should be concerned it exposes them legally in any future adverse litigation involving "no-coverage" claim denials. First, it appears there is no signature of the applicant or insured as specifically required in the law. It appears the Company is possibly seeking to find a substitute for a signature by using the phrase: "By making payment you agree that…" Given the law's precise requirement for a signature, this alternative approach does not appear defensible. Secondly, in the context of a full range of ways to effectively accomplish the required oral disclosure with proof that the disclosure actually occurred, a non-verifying "call 1-xxx-xxxx" approach that does not capture proof (such as caller identity, policy number, time and date of call) creates a weakened defense as well. Finally, if this seemingly legally deficient approach is systematically repeated across multiple policy holders generating multiple no-coverage denials of insurance, the agent is exposed to potential class action litigation as well.

QUESTION 2:

My agency doesn't control all the disclosure/signature process. My companies do a lot of the process, particularly on renewals. If one of my companies does not do the disclosure /signature process correctly and I get named on a suit along with the company claiming wrongful denial of coverage, can I get off the hook

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since I had absolutely nothing to do with my company's renewal disclosure/signature process nor the claim denial itself?

My Comments:

No, you, the agent, are not off the hook at all. In all likelihood, your agency is very exposed legally. First, you as the agent decided to sell the customer the "named driver" policy in the first place, knowing its significant limitations and the strict legal compliance requirements. Second, you recommended the specific company to the customer, knowing the company's renewal disclosure process since this is part of the product you sell. Third, you collected a commission for the policy in the absence of a disclosure/signature being accomplished and this is expressly prohibited in the new law. Unfortunately, the insurance company will likely not assume your liability as this type of indemnification is rarely found in any agency-company contract. You should also be concerned that your Agency E&O policy will deny coverage for reasons described in my second Letter to Agents on my website.

QUESTION 3:

One of my companies says in its Disclosure documents: "….you consent to the conditions of the named driver policy and that no additional or further oral or written notifications shall be supplied". My question is: do we need to only accomplish this disclosure/signature process just once for each of our customers?

My Comment:

No, the legislature specifically rejected that approach in the statute. For each renewal in the future you will need to make new written disclosures, new oral disclosures, and get the insured's signature before accepting any renewal or commission for that renewal policy. Said another way, the disclosures and signatures of the first policy can not be deemed to be the disclosures/signatures for all future renewal policies. Nor can signatures on the first policy be unilaterally reproduced by the agent/company onto future renewal policies.

QUESTION 4:

There are a few companies in my office who appear to be caught off guard by the law and have not yet started or completed their implementation processes for this new law. Thoughts from a legal perspective?

My Comment

You are very much exposed legally for any new or renewal named driver policies written with any of these companies on or after 1/1/2014. Per the provisions of SB 1567, it is non-compliant to collect any premiums or commissions from customers, whether new or renewing, if they have not been given the proper disclosures and if valid signatures have not been obtained. Failure to comply with these requirements will expose you and your agency to a wide range of potential litigation and possible administrative action by the Department of Insurance.

QUESTION 5:

I write a lot of monthly policies. My rep for one of my monthly companies indicates that his company is setting up the policy such that the application, disclosures and signatures on the original policy apply to

the future monthly policies, and it won't be necessary to go through the whole disclosure and signature process over and over again on future monthlies. Part of this seems to involve reproduction of signatures, etc. How do you see this?

My Comment

Monthly policies seem to present the greatest legal exposure to an agent due to the frequency with which the law's compliance requirements must be executed.

To set a context for this answer, the disclosure and signature requirements apply equally to each and every policy written on or after 1/1/2014, whether the policy is a new policy, a renewal policy, or a renewal of a renewal policy. The law does not provide for any lessening of the requirement over the course of a customer life cycle. Furthermore, there is no differentiation in the law's requirements between policies with different term durations. The compliance requirements for a monthly policy are as strict for a monthly as they are for a six month policy. Also, second and third monthly policies are not extensions of the first…they are legally separate policies. With all this in mind, the law clearly seems to indicate that the written and oral disclosures, and signatures, must be freshly updated with each successive policy. Referring specifically to the law's wording: (sec .b, in part), "Before accepting any premium or fee for a named driver policy, an agent or insurer….must make the following disclosure, orally in writing to the applicant or insured"….and (sec. e, in part)"the agent or insurer shall require the applicant or insured to confirm contemporaneously in writing the provision of the oral disclosure...". None of this seems to authorize a "once and done" approach as suggested in your question.

QUESTION 6:

I've received a letter from one of my companies which is directing me to sign an acknowledgment that I will comply with all their disclosure and signature procedures for all new and renewal customers that I write with this company. Should I sign this?

My Comment:

I think the better question is "should I write Named Driver Policies?" When you make the first decision to write limited Named Driver Policies, regardless of which company you place your business with, you are making a very sobering decision to undertake a rigorous set of compliance requirements under the statute for the foreseeable future. The fact that a company is requiring you to sign this type of acknowledgment should only reinforce in your mind the seriousness of the risk.

Best Regards,

R. Brent Cooper

Cooper & Scully, P.C.
www.cooperandscully.com

You can find a link to this information and a power point presentation regarding SB1567 at:
http://www.cooperscully.com/seminars/webinar-sb-1567-named-driver-policies-august-21-2013