

Open Letter to Texas Independent Insurance Agents

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I am an attorney who specializes in insurance coverage and bad faith. Over this past year, I have been engaged in presenting educational webinars and disseminating information regarding newly enacted law SB1567. I have issued three previous Open Letters to Texas Insurance Agents that are posted at cooperscully.com.

This Open Letter responds to a request I received to expand upon an earlier comment made that SB1567 disclosure requirements increased an agent's exposure to violating Insurance Code related to misrepresentations and similar acts.

Agents issuing Named Driver policies beware:

- **Failure to comply with the disclosure and signature requirements of SB1567 dramatically increases your exposure to misrepresentation under Chapter 541 of the Insurance Code, most notably:**

Sec. 541.061. MISREPRESENTATION OF INSURANCE POLICY, subparagraph (5):

“ It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by: (5) failing to disclose a matter required by law to be disclosed, including failing to make a disclosure in accordance with another provision of this code.”

(underlined emphasis added).

- **Misrepresentation can be the basis for suits brought against an agent in the event of a denied Named Driver policy claim. It can also be the basis for financial penalty, loss of license, and other corrective actions administered by the TDI.**

In the State of Texas, it is mandatory for auto owners to purchase automobile insurance or provide evidence of financial responsibility. Insurance policies can be extremely complex and difficult to understand. Applicants often need professional help from a licensed insurance agent professional. An applicant who approaches a licensed agent is relying upon the agent to understand their coverage needs and sell them the appropriate policy that meets those needs. As a licensed agent of the state, insurance agents have a responsibility to accurately educate and inform their applicants about the products they are purchasing by *representing* and explaining the material conditions of the insurance policy being sold to the applicant; including but not limited to, **who will be covered under the policy and who will not be covered under the policy**.

The responsibilities of an agent to properly educate the applicant about the policy are dramatically heightened when selling a Named Driver policy because of its significant coverage limitations. In contrast to a standard policy which insures all household members (unless specifically excluded), a Named Driver policy only covers household members who are specifically named on the policy. There is no coverage for household members who are not named on the policy. This is a very material fact that needs to be clearly represented by the agent and communicated to the applicant.

In recent years, the rapid growth of the Named Driver policy sales has led to a dramatic increase in the number of unnamed household drivers without coverage at time of accident and innocent victims without compensation. The Texas Legislature tried to prohibit Named Driver policies in the 2013 session in an attempt to remedy the situation but fell short a few

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votes. Instead, the Legislature unanimously passed SB1567 (effective January 1, 2014), a tough-minded law which requires the agent or insurer to accomplish an extraordinarily onerous disclosure and signature confirmation process on every new and renewal Named Driver policy written. This was done in an attempt to effectively guarantee that policyholders know exactly what they are purchasing and to put police officers and interested third-party lienholders on alert that only particular drivers listed on the policy are insured.

In passing SB1567, the Legislature raised the legal requirements and performance threshold so high as to what constitutes *proper representation* when educating applicants about Named Driver policies that an agent now needs to be *virtually "mistake free"* to avoid potential allegations of *misrepresentation* when making and receiving the compliance procedures put into law by SB1567. These include:

- Making the prescribed oral disclosure
- Receiving the contemporaneous written confirmation that the oral disclosure was issued
- Making the written disclosure
- Receiving a signed copy of the written disclosure

To be "mistake free", agents must successfully navigate these prescribed procedures every time they sell a new or renew a Named Driver policy. This became more complicated recently when the TDI more clearly defined SB1567 by releasing a set of interpretations in a TDI bulletin. The bulletin discusses specific activities that are prohibited and can be found here.

Agents should be aware that the issue of *misrepresentation* is specifically addressed in statutory code, chapter 541. There is one particular provision in the code that has become particularly magnified in importance with the passage of SB1567.

Sec. 541.061. MISREPRESENTATION OF INSURANCE POLICY, subparagraph (5):

"It is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance to misrepresent an insurance policy by: (5) **failing to disclose a matter required by law to be disclosed**, including failing to make a disclosure in accordance with another provision of this code."
(underlined emphasis added).

In effect, this provision is saying that that the very act of *failing to disclose the policy limitations* of the Named Driver policy as required under the law may itself *constitute a misrepresentation of an Insurance Policy*.

- This leaves agents significantly exposed to lawsuits brought on the basis of misrepresentation which, as discussed in a previous Open Letter, will likely not be covered under an agent's Errors and Omissions policy due to exclusions for illegal acts, intentional acts, statutory violations, and the like.
- Misrepresentation is also the basis for financial penalty, loss of license, and other corrective actions administered by the TDI.

The above is a brief but certainly not exhaustive discussion of an agent's significant exposure to Chapter 541 code violations in selling Named Driver policies. I urge all licensed agents to review their compliance practices very carefully and to consider that a potentially wiser course for them to take may be to choose a broader coverage product to sell and eliminate the risks and burdens associated with Named Driver policies.

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>

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