News & Views
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Your Source for Arizona Insurance Industry News
July/August 2010

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ACORD Forms Changes Explained

ACORD staff and member relations continue to get many inquiries regarding the new ACORD 25—Certificate of Liability, which was revised and released in October 2009. We've heard from systems vendors and association partners that they too are fielding many inquiries.

Agents are feeling pressure to use the out-of-date language from the old ACORD 25, from the third parties who are asking for evidence of coverage from their policyholders. Additional remarks sections are available on the new version for agents to describe policy provisions providing cancellation notifications to third parties, but no longer contains the word "endeavor" because policy cancellation provisions generally don't use that word.

Any editions of ACORD forms that have been withdrawn from the forms library are not kept up-to-date as to regulatory requirements, and therefore should not be distributed for use. **It is imperative that all ACORD forms used are the most current versions of our forms.**

One of the more significant changes to the ACORD 25 was to the language referencing policy cancellation provisions. Here is a comparison of the old and new text:

Old Text	***New Text***
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.	SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, NOTICE WILL BE DELIVERED IN ACCORDANCE WITH THE POLICY PROVISIONS.

The word "endeavor" was removed because policy cancellation provisions generally don't use the word "endeavor". Only a policy can obligate an insurer to provide notice of cancellation. Unless a policy's provisions explicitly provide for notice to a party also listed as the certificate holder on the certificate of insurance, the insurer is not obliged to notify that party.

The new language is compliant with state insurance regulatory requirements in all states, and specifically responsive to bulletins issued last year by the South Dakota Insurance Department. Since the form is national, not state-specific and is filed where required, only the version of the form containing the new language should be used in all states.

Chapter Events & News

August 4-7, 2010
CIC Personal Lines Institute
Phoenix Hilton East—Mesa

August 19, 2010
National Flood Insurance Program Seminar
IIABAZ ITEC Classroom—Phoenix

September 29-30, 2010
76th Annual Convention & Trade Show
Arizona Grand Resort—Phoenix

October 1, 2010
IIABAZ Convention Golf Tournament
The Legacy Golf Course—Phoenix

October 20-23, 2010
CIC Agency Management Institute
Phoenix Hilton East—Mesa

Certificates of insurance may be viewed as a summarized reflection of an insurance policy and are only informational. The policy is the definitive source for its provisions, not the certificate. If any party in addition to the first name insured desires a copy of a cancellation notice in the event the policy is cancelled, that party should be expressly endorsed onto the policy as a cancellation notice recipient.

A Certificate of Insurance/Evidence of Insurance Additional Remarks Section, as well as the ACORD 101 Additional Remarks Form may be used to copy verbatim information in the policy such as the specific number of days of written notice. **Be aware that using a certificate or other form in an attempt to vary policy terms presents legal risks, including violation of insurance regulatory requirements, and should not be engaged in without prior consultation with insurance carriers, policies and legal counsel.**

Author: Marcia Berner— ACORD Program Director, Property & Casualty / Surety

Editor's note: ACORD Certificates FAQ can be found at: http://az.iiaa.org/AcordFAQ.pdf

Announcements

Independent Insurance Agents and Brokers of Arizona
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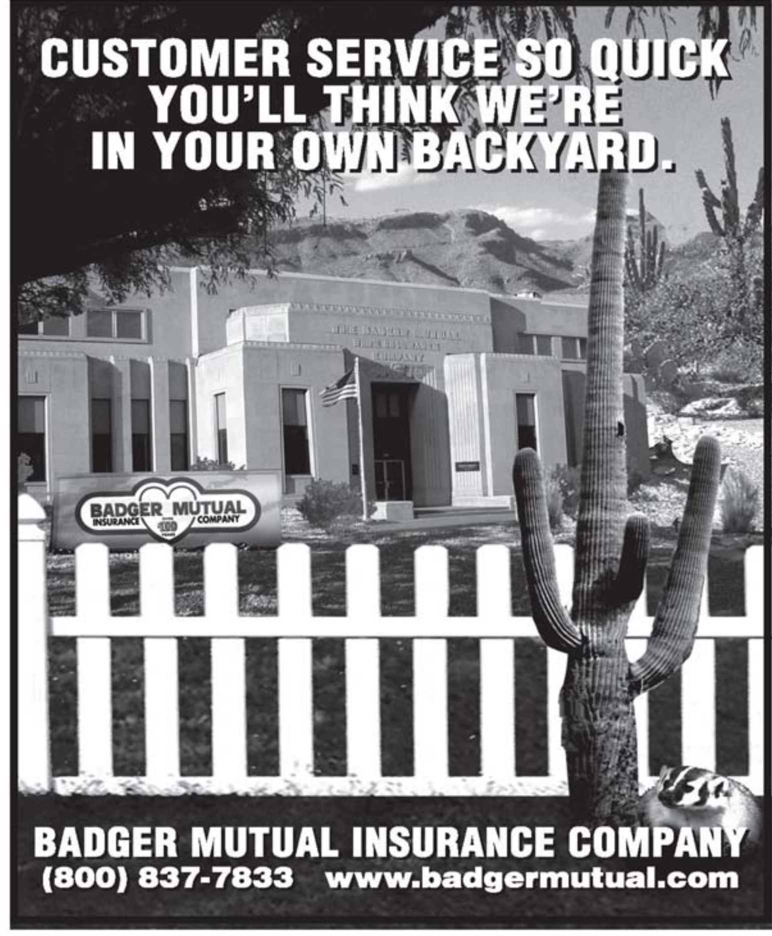

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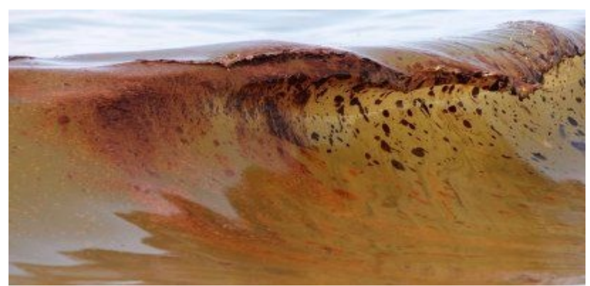

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Special Report:

"Hurricanes and Oil Don't Mix"

Insurance Implications of the Gulf Oil Spill

This article examines the basic coverage issues under ISO standard property forms that could arise if a hurricane distributes waterborne or windborne oil particles onto coastal properties from the Gulf oil spill.

Most times "*Oil and water don't mix*"…until now. With hurricane season just underway and oil still gushing into the Gulf of Mexico, it might only be a matter of time before oil and water *do* mix to create a potential insurance claim. So, if oil ends up in/on your insureds' property, is it covered?

First, it is important to note that insurance policies differ. Therefore, the discussions herein are restricted to standard ISO coverage forms. Insurance practitioners and policyholders must consult the specific policy which insures the damaged property in order to make a final determination as to whether or not there is coverage. Also, in many instances, coverage will be fact dependent and the necessary generalizations in a coverage discussion such as this may or may not apply to your insured's specific circumstances and policy forms.

Fundamental to any direct property damage claim is the requirement for *damage to covered property by a covered cause of loss.* (Note: Some indirect coverages such as business income may only require damage to property – not necessarily *covered* property – to trigger coverage.)

Numerous coverage provisions of the current ISO HO 00 03 Homeowners policy and the ISO CP 00 10 Commercial Property coverage form could come into play in a hurricane, such as direct property damage, loss arising from orders of civil authority, additional living expenses, business income and extra expenses, debris removal, and so forth.

However, all these coverage provisions require that there first be damage *by a covered cause of loss.* Therefore, the key to determining whether or not any of these various coverage provisions would apply to a hurricane-and-oil loss would hinge on what role the hurricane played in putting oil into or onto an insured's covered property.

Since damage by a hurricane has a water component and a windstorm component, each requires examination.

Coverage for direct damage caused by *waterborne* oil

This would be the result of the classic "storm surge" that every coastal resident is all too familiar with. During a press conference on the eve of the 2010 hurricane season, NOAA Administrator Jane Lubchenco commented that "*if there is a hurricane in the Gulf of Mexico, and it makes landfall someplace on the Gulf Coast, it is possible that some of the oil that's on the surface might be transported through the storm surge on the coastal area as high as the storm surge goes.*"

In addition, while a meteorologist would have to gauge its feasibility, it's conceivable that a hurricane could deposit oil farther inland in the form of heavy rains.

Coverage Under ISO HO and CP Forms. In the wake of litigation following Hurricane Katrina, ISO revised the water damage (so-called "flood") exclusions in the Homeowners, Dwelling, Commercial Property, and BOP coverage forms. The revised language is presently added to existing coverage forms by way of mandatory endorsements for each type of policy. In the future, the new language will be incorporated into the body of each policy at the next revision.

Below is the new water damage/flood exclusion (<u>emphasis</u> added for later discussion). This exhibit is from the HO 16 10 01 09 which is mandatory for the HO 00 03 and HO 00 05. There are different versions of this same Water Exclusion Endorsement promulgated for use with the other HO forms, as well as for Dwelling, CP, and BOP forms. The other versions differ only in the reference to specific provisions in the existing forms to which the exclusion applies. The essential scope of the new water damage exclusion is the same for all coverage forms.

WATER EXCLUSION ENDORSEMENT

SECTION I – EXCLUSIONS

A.3. Water Damage is replaced by the following:

3. Water

This means:

a. Flood, surface water, waves, including tidal wave and tsunami, tides, tidal water, overflow of any body of water, or spray from any of these, all whether or not driven by wind, including storm surge;

b. Water which:

(1) Backs up through sewers or drains; or

(2) Overflows or is otherwise discharged from a sump, sump pump or related equipment;

c. Water below the surface of the ground, including water which exerts pressure on, or seeps, leaks or flows through a building, sidewalk, driveway, patio, foundation, swimming pool or other structure; or

d. <u>Waterborne material carried or otherwise moved by any of the water referred to in A.3.a. through A.3.c. of this Exclusion.</u>

This Exclusion **(A.3.)** applies regardless of whether any of the above, in **A.3.a.** through **A.3.d.,** is caused by an act of nature <u>or is otherwise caused</u>.

Continued on page 4

Special Report: "Hurricanes and Oil Don't Mix" continued

This Exclusion **(A.3.)** applies to, but is not limited to, escape, overflow or discharge, for any reason, of water or waterborne material from a dam, levee, seawall or any other boundary or containment system.

However, direct loss by fire, explosion or theft resulting from any of the above, in **A.3.a.** through **A.3.d.,** is covered.

All other provisions of this policy apply.

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Regarding the issue of oil which has been deposited by the storm surge, section A.3.d. now clearly excludes damage by "*waterborne material carried or otherwise moved by any of the water….*" For insurers who have not adopted the revised water damage exclusionary wording related to "*waterborne material,*" damage done to covered property by the oil might be covered under the exception to the pollution exclusion – discussed in the next section below.

Otherwise, **this would appear to exclude claims arising from waterborne oil**. In addition, note that the exclusion applies whether caused by an act of nature *"or is otherwise caused"* (e.g., by an oil rig mishap). The exclusion goes on to say that it applies to discharge of waterborne material from any other boundary *"or containment system"* (e.g., an underwater well?). Finally, any resulting *"direct loss by fire, explosion"* is covered; however, in this case, the waterborne material, at best, resulted from fire or explosion, not vice versa.

It is important to note that the Water Damage exclusion is found in the so-called "anti-concurrent causation" (ACC) section of the policy exclusions. Therefore, where water has been pushed ashore by the force of the windstorm (as a "storm surge"), the damage done by the water is still excluded, as stated in the introduction to the ACC exclusions [emphasis added]: "*We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss. These exclusions apply whether or not the loss event results in widespread damage or affects a substantial area.*"

Coverage Under NFIP Flood Forms. Since the standard ISO policies exclude damage from both "water" ("flood") and "waterborne material," it is important to examine how the NFIP flood policies (Dwelling Form and General Property Form) address the issue of pollutants such as oil which are often present in a flood. In fact, flood waters are frequently a witch's brew of all sorts of pollutants, including sewage, household, lawn care and industrial chemicals, automotive fuels and lubricants, medical waste, garbage, and myriad other kinds of gunk.

In the Dwelling Form, the only exclusion in Section V – Exclusions that references pollution is the following:

> ***Exclusions. F.*** *We do not pay for the testing for or monitoring of pollutants unless required by law or ordinance.*

In Section III – Coverage D Increased Cost of Compliance, the following pollution-related exclusion is included, related to testing and monitoring, etc. of pollution:

> ***Exclusions. 5.b.*** *The cost associated with enforcement of any ordinance or law that requires any insured or others to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.*

In the General Property Form, there is no pollution exclusion in Section V – Exclusions. However, in Section III – Other Coverages, there is a sub limit of $10,000 for pollution damage, as follows:

> ***3. Pollution Damage***
> *We will pay for damage caused by **pollutants** to covered property if the discharge, seepage, migration, release, or escape of the **pollutants** is caused by or results from **flood**. The most we will pay under this coverage is $10,000. This coverage does not increase the Coverage **A** or Coverage **B** limits of liability. Any payment under this provision when combined with all other payments for the same loss cannot exceed the **replacement cost** or **actual cash value**, as appropriate, of the covered property. This coverage does not include the testing for or the monitoring of **pollutants** unless required by law or ordinance.*

As in the Dwelling Form, the General Property Form also has a pollution exclusion in Section III – Coverage D Increased Cost of Compliance, related to testing and monitoring, etc. of pollution that is identical to Exclusion 5.b. above.

In the Dwelling Form, damage to covered property from a flood that is otherwise covered by the flood policy is not impaired by the presence of pollutants such as oil from the oil spill in the Gulf. In addition, testing or monitoring of pollutants which is required by a law or ordinance is also covered. For claims covered under Coverage D Increased Cost of Compliance (ICC), the testing, monitoring, clean up, etc. that is required by ordinance or law is not covered. Note that ICC only has a limit of $30,000.

Under the General Property Form, there is no pollution exclusion for damage to covered property, but there is a sub limit of $10,000 for damage by a pollutant where a flood caused the discharge, seepage, migration, release, or escape of the pollutant – in this case, oil from the Gulf. It is unclear exactly how a claims-adjustment expense specifically related solely to damage by the pollutant (oil) can be determined in situations like a storm surge. However, to the degree that such costs can be isolated and assigned to the presence of a pollutant such as oil, the sub limit of $10,000 would apply.

Coverage for direct damage caused by *windborne* oil

It is plausible that a strong hurricane or a waterspout could pick up a quantity of oil and deposit it miles inland, onto or into a home or business. The coverage analysis now revolves around the pollution exclusion since windstorm itself is a covered peril in the ISO Homeowners, Dwelling, Commercial Property/Causes of Loss, and BOP forms. However, damage by pollution is excluded unless the release, escape, migration, etc. of the pollutant is caused by a specific named peril.

Continued on Page 7

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Special Report:

"Hurricanes and Oil Don't Mix"

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The Special Causes of Loss pollution exclusion in these coverage forms (e.g., HO 00 03 and CP 10 30) is essentially the same, with minor variations. The following policy excerpt incorporates the primary language of the Homeowners and Commercial Property pollution exclusions to illustrate the similarities and minor differences:

> **Exclusions.**
> *"Discharge, dispersal, seepage, migration, release or escape of pollutants unless the discharge, dispersal, seepage, migration, release or escape is itself caused by a Peril Insured Against named under Coverage C."* [HO 00 03]…or "*by any of the 'specified causes of loss'* ." [CP 10 30].

Therefore, it could be argued that fire, explosion or windstorm caused the pollutant (oil) to be released, escape, migrate, etc., and therefore any damage done by windstorm-deposited oil would be covered. Note, however, that this exception to the pollution exclusion would not apply to damage done by water (i.e., the storm surge), due to the "anti-concurrent causation" language in the water damage exclusion previously discussed. Also, keep in mind that, aside from the dispersal by windstorm, this presumes that the originating cause of the spill was explosion or fire.

And, while there is no pollution exclusion in any of the Named Peril coverage forms (HO 00 02, HO 00 04, etc., and CP 10 10 and CP 10 20), since these forms cover fire, explosion or windstorm, damage done by the oil which was deposited on the covered property as a result of fire, explosion or windstorm could be covered due to the doctrine of proximate cause. Since the pollution exclusion is not contained in the "anti-concurrent causation" section of the exclusions, the doctrine of proximate cause can be applied to loss situations.

Coverage for indirect or consequential losses

In the standard ISO property coverage provisions in personal lines and commercial lines, indirect or consequential losses such as business income and extra expense, additional living expenses, civil authority, debris removal, pollution cleanup, etc. are triggered if there is first *direct damage by a covered cause of loss.*

For example, there have already been reports of condo rental cancellations by vacationers and hotel cancellations by conventioneers. These cancellations arise from the uncertainty of future conditions, so the resulting loss of income is not due to direct damage on premises by a covered peril.

As discussed earlier, where the direct damage coverage form excludes such damage by oil related to the action of a hurricane, then there would also be no coverage for any indirect or consequential losses that might otherwise be afforded by a particular policy.

But, where a particular coverage form provides direct damage coverage for oil damage related to a hurricane, then the precondition of damage by a covered cause of loss has been met. At that point, the other conditions precedent to coverage can be analyzed as they normally would. For example, even if the cause of loss is covered, if a dwelling is still "fit to live in" or a hotel building is still "tenantable," there may still be no coverage.

This article is a collaborative effort of the VU faculty, lead by Mike Edwards, CPCU, AAI, and assisted by Bill Wilson, CPCU, ARM, John Eubank, CPCU, ARM, and David Thompson, CPCU, AAI.

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Changes in the Umbrella Market

Two recent news items have brought personal umbrella (PUP) market onto the radar screen. First, there was the news that Hulk Hogan was suing his agent for a lack of a personal umbrella protecting his assets. Then, there was a widely publicized $1 million settlement between the estate of deceased child in Connecticut and the insurer of a baby sitter in a drowning death.

These news stories highlight the E&O exposure that can arise from PUP placements or the lack thereof. Both situations are excellent examples of the high dollar losses that can result from everyday activities, such as baby-sitting. The wrong circumstances or a lapse in attention and a personal lines client can face a multi-million dollar judgment.

Recent insurer activities point to pending changes coming in the PUP marketplace. Navigators Insurance Company announced in February its exit from the personal umbrella market after nine years and $47 million in written premiums.

As carriers leave the umbrella market, the A+ Rated RLI Preferred PUP Market is available to IIABAZ members. For truly difficult to place risks, members can access the hard-to-place market with the specialty MGA A&M. Both of these markets are available through Big I Markets.

If you have any questions about the Big "I" Market program, please contact Joni Fairbrother at the IIABAZ office: Joni@iiabaz.com or telephone: 602-956-1851.

New Pre-Existing Condition Insurance Plan For Arizona

Affordable Care Act Program to Provide Temporary Coverage for Americans Without Insurance Due to Pre-Existing Conditions Now Through 2014 When the New Insurance Exchanges Are Established

The U.S. Department of Health and Human Services (HHS) announced on July 1, 2010 the establishment of a new Pre-existing Condition Insurance Plan (PCIP) that will offer coverage to uninsured Americans who have been unable to obtain health coverage because of a pre-existing health condition.

The Pre-Existing Condition Insurance Plan, which will be administered by the Department of Health and Human Services in Arizona, will provide a new health coverage option for Americans who have been uninsured for at least six months, have been unable to get health coverage because of a health condition, and are a U.S. citizen or are residing in the United States legally.

Created under the Affordable Care Act, the Pre-Existing Condition Insurance Plan is a transitional program until 2014, when insurers will be banned from discriminating against adults with pre-existing conditions, and individuals and small businesses will have access to more affordable private insurance choices through new competitive Exchanges. In 2014, Members of Congress will also purchase their insurance through Exchanges.

Starting July 1, 2010, the national Pre-Existing Condition Insurance Plan will be open to applicants in Arizona.

The Pre-Existing Condition Insurance Plan will cover a broad range of health benefits, including primary and specialty care, hospital care, and prescription drugs. The Pre-Existing Condition Insurance Plan does not base eligibility on income and does not charge a higher premium because of a medical condition. Participants will pay a premium that is not more than the standard individual health insurance premium in their state for insurance that covers major medical and prescription drug expenses with some cost-sharing.

Remember to be eligible the person must:

- be a citizen or national of the United States or lawfully present in the United States.
- have been uninsured for at least the last six months.
- have had a problem getting insurance due to a pre-existing condition.

The application, available online, must be printed, completed, and mailed. The applicant will then be notified if they qualify and the amount of the premium. There are NO rates on the website.

Here are some helpful links regarding this plan:

PreExisting Condition Plan Homepage http://www.pcip.gov/

PreExisting Condition Plan Application http://www.pcip.gov/PreExistingConditionPlan_EnrollmentForm_063010_508.pdf

PreExisting Conditon Application Homepage http://www.pcip.gov/Apply.html

An informational pamphlet on the Pre-Existing Condition Insurance Plan can be found at: http://www.healthcare.gov/center/brochures/pcip.pdf.

Dodd-Frank Wall Street Reform and Consumer Protection Act

The U.S. House of Representatives recently passed the “Dodd-Frank Wall Street Reform and Consumer Protection Act” conference report, the biggest piece of legislation to reform financial services regulation since the Great Depression.

“The Big ‘I’ believes Congress made the correct decision in the final financial services regulatory reform legislation by leaving day-to-day regulation of the insurance market at the state level,” said Robert Rusbuldt, Big “I” president & CEO. “Property & Casualty insurers were not to blame for the financial crisis and pose no systemic risk to the overall economy. While the current system no doubt needs more uniformity and modernization, state regulation of insurance has a proven track record of ensuring insurer solvency and consumer protection, and it’s encouraging that the House and Senate have both recognized the strength of the state regulatory system."

The bill also included legislation, strongly endorsed by the Big “I” to modernize the state-based regulatory system. This legislation, the “Non-admitted and Reinsurance Reform Act (NRRA),” would streamline the regulation of surplus lines and reinsurance products by making the insured’s home state the sole regulator in surplus lines transactions. As a strong proponent of state regulation of insurance, the Big “I” supports ways to improve the system through targeted reforms such as this NRRA provision.

“While the Big ‘I’ has not endorsed the legislation, we do appreciate the improvements made to the FIO during conference negotiations,” said Charles Symington, Big “I” senior vice president of government affairs. “We also commend Congress for including the ‘Non-admitted and Reinsurance Reform Act’ in the overall package. This is a perfect example of the proper way to modernize insurance regulation: targeted federal legislation to improve the state system without creating a federal regulator.”

The Senate is expected to vote on the report after the latest Congressional recess with the President signing it into law soon thereafter.

Author: Russell Reiten — IIABAZ Government Affairs

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IT IS HARD TO GET THE GENIE BACK INTO THE BOTTLE

Just as certain as night and day – I will get a phone call or contact from one of our member agencies wanting help on a situation caused by a provision in an agency agreement with one of their companies. This happens at least every four months.

I just became aware of an addendum to an agency-company agreement that most definitely deserves attention before you agree to its provisions. The addendum changes many of the rules you have come to expect within an agency agreement. The most important being the fact that the agency agrees to forfeit their book of business under a specialty program to the insurance company in the event any of the producers within the agency violate provisions within the agreement.

We are all accustomed to the ability of an insurance company to terminate the agency – company agreement in the event the agency violates a provision, or even in instances where the agency's book of business is unprofitable for the insurer. The uncommon aspect of this contract is that in several instances the agency will forfeit their book of business under that program and the insurance company will then own the book.

There is nothing wrong with an agency agreeing to this type of an arrangement if they feel the risk is worth the benefit from having access to a program, however, it is very important for the agency to be aware of what they are agreeing to and the consequences if they have a violation under the contract.

I've said it several hundred times before and I must say it again – "NEVER – EVER – NEVER – sign an agency-company agreement or an addendum to an agreement without first reading that document and understanding how it will impact your agency. One of the biggest benefits we provide our membership is a review of agency-company agreements performed by an attorney that specializes in this aspect of the law. It is FREE. It is available to all members. If the contract you are considering has not been reviewed by the Association yet, they will do their best to rush a review. I think you will find that most agency-company agreements have already been reviewed, and you will be very impressed with the honest – frank review of both the "good" and "no so good" aspects of the agreement. We cannot recommend that you should or should not sign a specific agreement, but we can equip you with the necessary facts so that you may make an informed decision.

Please – No, make that PLEASE use this service. There is very little I can do after you sign the contract and a situation arises – it is like trying to stuff the Genie back into the bottle.

Lanny L. Hair, CIC, ARM, AAI, RPLU—IIABAZ Executive Vice President

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Premiums Prop Up Homeowners Market

Despite a shaky housing market, agents are finding ways to stabilize battered homeowners

Independent agent Wayne Syrek lives and works in Mesa, Ariz., where the price of housing has swooned in the last three years, and immobile construction cranes are still decorated with ornaments from Christmas 2007. "We're in one of the trouble spots," sighs Syrek, a partner at The Adams Agency.

Like other agents in regions of the country where new home starts are a fading memory, foreclosures are frustratingly frequent and only the most financially distressed homeowners are selling their undervalued houses, Syrek says he is trying to weather the storm. "There's good news and bad news—the good news is that according to economists in Arizona we are officially at bottom," he says. "The bad news is no one knows how long we'll be there."

Robert Ludwig can relate to Syrek's woeful tale. His agency also conducts business in a part of the country decimated by the housing crisis—Sarasota, Fla. "Florida is such a mess," says Ludwig. "Housing has been hit hard—no new sales, construction all dried up and realtors calling to handle mostly foreclosures and short sales."

Renewals Steady, Premium Up

The two agents' stories are writ large across the nation, where the annual rate of new home construction starts is 72% below the early 2006 peak, when the speculative building boom began a steep descent that ended in June 2007, the acknowledged start of the recession. Still, not all regions are experiencing anything like the housing crisis in Arizona or Florida, not to mention Las Vegas, Detroit and parts of southern California. Many other regions are faring reasonably well, with home prices enjoying a measure of stability. Stable pricing affects the psychological willingness to sell a home and buy another, giving agents in these areas the opportunity to build their homeowners insurance book of business.

For agents like Syrek and Ludwig, however, selling insurance in places where "for sale" signs seem a permanent fixture, they're at least maintaining their policy renewals. Well, not entirely. "We're losing the business that happens to go through a foreclosure, which is then force-placed with another carrier," Syrek explains. "Other than that, we're holding steady."

There is a silver lining in the housing crisis for agents—homeowners insurance premiums have risen in the last couple years, making up some of the shortfall in new business. "Although the price of homes in many regions is plummeting, the price of homeowners insurance is not," says Robert Hartwig, president and chief economist at the New York-based Insurance Information Institute. "The market price is different than what it costs to repair or rebuild a home that is damaged—costs that are rising and are reflected in the premium for homeowners insurance."

Nationally, Hartwig estimates that homeowners premiums have increased 2.5% to 3% in the past year, and are continuing to rise in 2010.

All Housing Trends are Local

Not every region falls into that category, though. Bill Lafayette, an economist with the Columbus Chamber of Commerce, notes that in Phoenix, where home prices have fallen through the floor, area residents have the financial wherewithal to purchase a house but in Miami, where homes have equally cratered, residents generally can't afford them. "That tells me that the Phoenix market is in a better position to revive than the Miami market," he says. "Really, this is a regional housing crisis, if not a local one."

IA asked three independent agents in three different parts of Massachusetts to describe the housing market in their respective cities and regions, and the effect on their homeowners insurance book of business. The agents might have well lived on different planets—one agent is doing bullish business, another so-so and the third coping with a severe housing market downturn.

Bill Lapointe, president of Lapointe Insurance Agency in Fall Rivers, is agent number three. "There is no new construction activity in the south coast area to speak of," he says. "We're still in crisis mode here. Real estate values are quite depressed. It's a zero-sum game—no one is building and few people are selling, creating fewer opportunities for us to write new business. From an agency standpoint, we're definitely feeling the pinch."

In 2008 and 2009, Lapointe was able to write some new business through the state's residual market mechanism, but this has dried up. "There are some high-end homes moving along the coastline, but their location makes them an underwriting issue for a lot of carriers," he says. "In many states, the high-end market is a good place for agents to write new business because it's less price-sensitive, but here such homes tend to be on the water. Carriers are having trouble finding reinsurance to underwrite such homes, which is affecting their appetite to write coastal exposures."

Other problems adversely affecting his business include existing clients looking to save premium by taking larger deductibles and/or gutting coverages and limits; widespread declines in consumer credit scores forcing clients out of many carriers' "preferred" rating tiers and a pileup in agency work to satisfy customer endorsement requests to address new mortgage financing requirements.

Most of these migraines have bypassed Henry Risman, president of Risman Insurance Agency in Medford, about 10 miles north of Boston. Risman owns and runs another agency in Tewksbury. Both offices are faring quite well in the region's housing market.

"We've been fortunate here in eastern Massachusetts," he says. "The real estate market wasn't hit as hard as in many other parts of the country. Values have fallen a bit and there have been some foreclosures, but nowhere to the extent as Florida, Arizona and Las Vegas."

Continued Page 12

Premiums Prop Up Homeowners Market continued

Risman is cognizant that the sales volume of existing and new homes is lower in other regions of Massachusetts—"but not here," he says. "Homeowners insurance actually is one of our more profitable lines, given the softness in commercial lines. Premiums have risen, loss ratios are solid and commissions have been good. We're writing a lot of new homeowners business, and our book is growing."

Unlike Lapointe, he isn't receiving phone calls from existing customers looking to decrease coverages and insured limits, although he has fielded several requests for reduced deductibles. "It's much better anyway for them to take a lower deductible than lower limits or remove coverages," Risman says.

In between these stories is the tale told by Craig Thompson, president of the 110 year-old Sampson Insurance Agency in Weymouth. This suburban bedroom community south of Boston is beginning to feel some relief from the housing crisis. Not total relief, however. Foreclosures remain a thorny problem, the loan process is taking longer, more properties are vacant and homes priced at around $1 million aren't moving. Nevertheless, the Obama Administration's first-time homebuyer credit is spurring sales of lower to-mid-priced homes. As Thompson puts it "Things seem to be thawing." Thompson points to low mortgage rates as another factor giving the market some life. "It's a buyer's market here and people are taking notice," he says. "Still, many are waiting to see if prices fall even lower. And the mortgage loan process remains so difficult that many folks who might otherwise sell their homes are sitting tight. It's easier to get TARP money than get a loan done these days."

While policy volume growth in Thompson's traditional homeowners book of business has slowed, he is writing a greater volume of smaller homes being snapped up by the first-time buyers. He's also making up the shortfall in vacant-home policies written by the specialty insurance market. Although the latter requires additional agency work and less commission, it is somewhat balanced by higher premiums.

"It could be worse," he says.

Combating the Downturn

Even Syrek says he'd rather be writing personal lines in a housing crisis than be confined to writing purely commercial lines in the current soft market.

The agents also have some marketing strategies up their collective sleeves to build business. All of them are finding merit in marketing homeowners insurance with automobile insurance as a one-two punch, given the volume-based credits many carriers offer. "It's helped to drive new homeowners business here," Thompson says.

Ludwig concurs: "We've empowered our CSRs to do more account rounding, which has helped our new business a bit."

Lapointe has added to his policy volume by marketing the agency's "family branding" concept to prospective customers.

"What we've done is turn our backs on all but what we consider our core market—families with a primary residence and second home who have a need for insurance guidance," he explains. "Life for such families is tending to get complicated. They may have youthful (car) operators, and need an agent's trusted advice. They're not a good market for online applications and quotes because their risk exposures are too complicated for that platform." He estimates that the branding strategy has helped grow his homeowners policy count by 3% annually.

Carriers say account rounding and other strategies are smart moves in the current marketplace. "The more policies you have the more touch points with the consumer and thus a higher retention rate," says Jim Fiske, U.S. marketing manager at Chubb Personal Insurance.

To build business, Fiske advises agents to consider diversifying how the business gets in the front door. "As you document where your policyholders are coming from, consider additional referral sources like CPAs, real estate attorneys or financial planners," he explains.

ACE Private Risk Services, which focuses on the insurance needs of the affluent demographic, counsels agents to contemplate moving up the value chain to service higher net worth individuals. High-priced homes in many regions remain a robust market, outpacing the sales volume of less expensive houses, while retaining their greater market values. "In an economic downturn, affluent people in particular have the potential to become a target for frivolous lawsuits, such as those brought by uninsured and underinsured motorists," says John Paolini, the insurer's chief operating officer. "One driver out of six today is underinsured, requiring high net worth clients to consider higher coverage and umbrella limits. It's solid advice that an agent can provide."

While each of the agents profiled say the better-than-average pricing in the homeowners market has cushioned the impact of the housing crisis, they are acutely aware that the industry's market cycle is constantly grinding. "Things will change," says Ludwig. "I just hope not for the worst."

Author: Russ Banham (**Russ@RussBanham.com**) is a senior contributing writer for Independent Agent Magazine.

Tracking the Turnaround

Although predicting the end of the housing crisis is a tough call to make, Bill Lafayette, Ph.D., an economist with the Columbus Chamber of Commerce who reports regularly on the real estate market across the United States, is guardedly optimistic. "It certainly looks like it is getting better," says Lafayette. "While there was a downturn in sales of existing houses in the last couple months, we attribute that more to bad weather than anything else. It was pretty brutal out there in many places."

On the bright side, Lafayette says the "first inklings" of a revival in the housing market are apparent, which would guide a revival in consumer confidence. "For example, Pittsburgh has revived in terms of housing prices, as has Houston, Boston and San Diego," he says. "Scattered places in the Northeast have also come back, as have areas of the South outside Florida. The prices are higher than they were when the bubble burst in June 2007."

But what about sales? "We look at metrics indicating `housing affordability'— the ability of an individual household to purchase a home—and in the areas I mentioned people are able to buy, even with the higher prices," Lafayette says.

—R.B.

Do Agencies Need to Archive Policy Forms?

A recent issue of our IIABA "Insurance News & Views" email newsletter included an abbreviated version of a VU article entitled "Lost Policies…No Coverage?" The article included the statement that, "The agency, from both E&O and customer-service perspectives, should keep an archived copy of policies indefinitely." As one of our IN&V readers asked, "Why do agencies need to retain copies of policy forms when our insurers do that?"

Q. "In the IA Insurance News & Views article, "Lost Policies…No Coverage?," there was a statement made that, 'The agency, from both E&O and customer-service perspectives, should keep an archived copy of policies indefinitely.' We have not found anywhere that the agency has any responsibility to provide proof of coverage — the Insured and the carriers, yes, but not the agency. What is the effect then from an E&O side for agencies to maintain archived copies of policy forms?"

A. We agree that the insurance policy and its various endorsements and supporting documentation largely involve a contract between insurer and insured. However, that doesn't mean that an insurer will always be willing or able to come up with a policy form in the future. So, in order to best serve your clients and minimize your E&O exposure, we suggest the agency consider archiving at least one representative policy form of each type and edition, as explained by the VU faculty below.

Faculty Response:

My personal opinion and experience is that agencies should archive at least one copy of all policy forms used by their companies and that each customer account make some reference to them by form number. I'm not saying keep a copy of every policy of every insured, just one copy of the form used by many insureds for future reference. Otherwise, you are at the mercy of the insurer, or someone whose best interest is served by NOT being able to produce the policy form(s).

Speaking from experience, I had an agent contact me the first time a number of years ago. He had a druggist liability claim/suit on a policy written on an occurrence basis over 15 years ago. There was absolutely nothing in the customer file from 15 years ago other than a penciled reference as to who the insurer was at that time. The agent contacted the insurer and was allegedly advised [paraphrasing] that, "We don't keep records that far back...if you think we were the insurer of record, prove it."

[Note: Insurers have to be careful about this type of response. According to the Handbook on Insurance Coverage Disputes by Barry R. Ostrager and Thomas R. Newman, "If it can be shown that the insurer has deliberately withheld a copy of the policy from the insured, the insured might be entitled to punitive damages for breach of the covenant of good faith implicit in every contract." Henderson v. United States Fedelity & Casualty Co., 620 F.2d 530 (5th Cir. 1980).]

First of all, purely from the standpoint of customer service, wouldn't it be great to be able to have a notation in the file as to what policy form(s) that customer had and when, along with the ability to actually pull a paper or (better) electronic copy of the policy form(s)? Second, if an insurer disavows any knowledge of the account and is not cooperative, who do you think the insured is going to sue? So, from an E&O standpoint, this type of documentation may be critical.

Since that original incident, I've had this situation arise time and time again where a carrier is unable (or so they say) to produce a policy form.

Faculty Response:

My past experiences in testifying on behalf of my company was that the agents had better records than the company. We would ask the agents for their documentation because we couldn't always find what we needed in the company archives. Too many items got lost with so much paper at the company level.

Faculty Response:

I have been collecting insurance policy forms since 1967. Insurance

continued next page

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Do Agencies Need to Archive Policy Forms?

continued

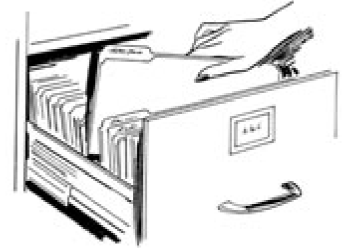
brokers should have available to them all of the policy wording used by their insurers. Without the wording, how can they advise their clients? I would suggest they keep a book or file of the forms, scan them, or subscribe to some service that provides forms on computer databases.

Faculty Response:
In 1980, I had occasion to locate liability policies going back to 1939. Within the past year, we pieced together the terms of coverage for policies back to the mid-1960s for a class action suit. In both instances, identification of the policies was invaluable to the insured.

An agent should not rely on insurance companies to maintain copies of old policies. In the absence of a policy number and policy form, the insured is up the creek. All workers compensation and liability policies, including claims-made policies, should be kept permanently.

Faculty Response:
From my hurricane duty experience, I can tell you that an agency should keep policy forms and endorsements from companies. Amazingly, adjusters don't have them at times. It just makes good business sense to do it.

Faculty Response:
It's important to have a copy of each form used by agency customers. According to SCA Disposal Services of New England, Inc. v. Central National Ins. Co. (Mass. Super. Ct. 1994), "[B]ecause insurance policies are often customized or manuscripted, the use of a standard form in



one policy is not by itself proof that it was included in a different policy.

Faculty Response:
How can an agent "advise" on coverages, limitations, conditions, or exclusions if they don't have the forms to READ?! If I were a plaintiff attorney in an E&O claim against an agency, I would definitely want to ask the agent how he/she can advise an insured properly if they don't have the forms to review.

Faculty Response:
Proper record retention is critical to minimizing E&O claims through documentation. Some records should be kept permanently for ALL insureds. When "records" are identical (such as policy forms used by a carrier for multiple insureds), you only need one copy on file as long as the client record indicates the form number.

For more information on agency records retention schedule go to http://www.iiaba.net/eprise/main/VU/Docs/PDF/EORecordRetention.pdf. When reviewing the information please note that Surplus Lines records should be kept for 6 years.

Discontinued Operations

A homebuilder decided to hang up his hammer and retire to Florida. He contacted his agent to see what he needed to do about his insurance, which was coming up for renewal. The CSR advised him that he needed to do nothing...he had a CGL occurrence form and the CSR told him that, unlike a claims-made form, he was protected "forever into the future" for claims. So, the contractor retired to Florida and enjoyed the good life...for two years.

At that time, the deck on a home he had built on a hillside collapsed during a party, sending 35 people snowboarding down the hill without snowboards...or snow. Luckily, no one was killed, but several people were injured enough to require medical attention. A claim was filed against the contractor who contacted his agent who contacted the carrier who advised that he had no coverage.

At this point, the CSR, producer and agency owner finally took the time to read the contractor's CGL policy. What they learned was that, while the CGL does indeed cover claims "forever into the future," the claim must arise out of an occurrence that takes place during the policy period. An all too common misconception is that the occurrence happens at the time of the negligence...in this case, when the deck was inadequately secured.

However, a careful reading of the CGL policy's Insuring Agreement reveals that "This insurance applies to "bodily injury" and "property damage" only if...[t]he "bodily injury" or "property damage" occurs during the policy period." So, no CGL coverage. Fortunately (for the contractor), the claim was covered...by the agency's E&O policy.

Discontinued operations coverage and discontinued products coverage is a necessity for most contractors, manufacturers and others with similar exposures. Unfortunately, not every company writes this coverage, so it may be necessary to provide it on a surplus lines basis. So, be wary of this often misunderstood exposure...or you may find that your agency's operations will be suspended.

REQUEST FOR INFORMATION: If you represent a carrier who sells discontinued operations or products coverage, please send an email to Bill.Wilson@iiaba.net advising of the company (if possible, include a form sample).

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August 31	CRIS Workers Compensation for Contractors	Phoenix
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September 9	Errors & Omissions Loss Control Seminar	Tucson
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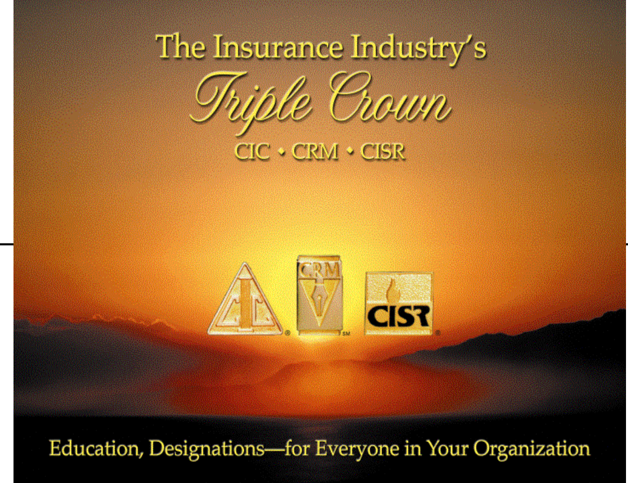

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A former agent stole more than $1.3 million from hospitals, colleges, small businesses and even a casino in the Poconos, Pennsylvania's AG charges. In one case, Scranton-based producer Brian James Murray was supposed to buy a directors and officers liability policy for the Mt. Airy Casino. The $233,118 policy was to cover four years. But Murray allegedly funded the policy for only 18 months. At least one insurer, PMA Group, has made clients whole by honoring their claims even though Murray allegedly didn't pay their premiums. Ironically, one of Murray's suspected victims — the University of Scranton — gave him an honorary degree in 2006. He faces up to 56 years in prison if convicted.

Hair-brained, hair-raising or just plain tragic? A staged accident turned fatal when a truck driver trying to ram his tractor-trailer cab into a highway bridge column jumped out of the cab and died when he hit his head on the pavement, Houston officials said this week. Paul Wayne Guillory died on a feeder road near North Loop 610 and the Eastex Freeway. His alleged cohort was following in an SUV. The suspected cohort jumped into the slowly moving Volvo truck and braked it after Guillory had leapt out. A longtime trucker, Guillory was a newlywed and recently had thrown a big party for his daughter's first birthday.

A Florida postmark convinced New York investigators that Kenneth Bullock was illegally working as a mechanic while collecting workers comp money. The St. Regis Falls, N.Y. man said he couldn't work after injuring his back as a truck driver. He collected $39,000 in comp money. But Bullock sent numerous work-activity reports to the New York State Insurance Fund, all with a Florida postmark. That made investigators suspicious. They allegedly discovered Bullock was working as a mechanic in Florida. He faces up to seven years in prison if convicted.

The *Trenton Times* has this to say about a recent law clamping down on New Jersey drivers who illegally register their vehicles in states with lower auto premiums: "Auto insurance deception...may seem like victimless crimes. The bottom line however, is that cheating the system costs the state, which passes those costs on to everyone. Even those who can easily slough the moral weight of their actions now face a much more pragmatic consequence: There is a good chance they will be caught."

To learn more about insurance fraud and simultaneously earn CE credits, visit the Big "I" VU Fraud Training Center for on-line courses, resources and daily news.
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Check Out VU's Flood Training Online
With the recent flooding in Nashville, are your employees up to date on flood policies? Check out the Virtual University's National Flood Insurance Program online course, which covers the policy, determining flood zones, general rules, eligibility, coverage, forms, rating and E&O issues of flood insurance and more. It presumes that the student has access to the most recent version of the NFIP Flood Insurance Manual. This course meets the required educational mandates of the NFIP to sell flood insurance.

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Go to http://www.iiaba.net/VU/NonMember/courses.htm#by_name to select your state and see what online course offerings are available and get started. In order to take advantage of the research or online courses, each VU user must have their own Big "I" Member login and password. For more information on how to obtain login and password, contact your local state association or you send an email to **logon@iiaba.net**.

Primary vs. Excess Liability Coverage on Garage Loaner Vehicles Beware!

Picture this scenario. For one reason or another, your car is in need of repair. You make an appointment to drop it off at the dealer or a reputable mechanic's shop. You get there early. Unfortunately, the repairs are going to take a bit longer than anticipated, and you really need to get to work. The dealer or mechanic offers you a "loaner" vehicle for the day. "You're a lifesaver!" you say appreciatively, and you're on your way.

Because this article is being written by attorneys, you don't get off that easy. Let's say at some point in the day, you are driving the loaner vehicle and you get in an accident. Who's insurance company covers the accident? Your insurance or the dealer/mechanic? Good question. Not many people know the answer. The good news is that there is a statute on precisely this issue. The bad news is that the statue is poorly written and confusing.

A.R.S. § 28-4010 states the following:

A. If two or more policies affording valid and collectible motor vehicle liability insurance apply to the same motor vehicle that is involved in an occurrence out of which a liability loss arises and one of the policies affords coverage to a named insured engaged in the business of selling, repairing, servicing, delivering, testing, road testing, parking or storing motor vehicles, both of the following are conclusively presumed:

1. If at the time of loss the motor vehicle is being operated by a person engaged in one of the businesses or by the person's employee or agent, the insurance afforded by the policy issued to the person engaged in the business is primary and the insurance afforded by any other policy is excess.

2. If at the time of loss the motor vehicle is being operated by a person other than a person described in this subsection, the insurance afforded by the policy issued to a person engaged in a business described in this subsection is excess over all other insurance available to the operator as a named insured or otherwise.

B. Except as provided in subsection A, if two or more policies affording valid and collectible liability insurance apply to the same motor vehicle that is involved in an occurrence out of which a liability loss arises, it is conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile is primary and the insurance afforded by any other policy or policies is excess.

C. The presumptions stated in subsection A may be modified or amended only by a written agreement signed by all insurers who have issued a policy or policies applicable to a loss described in subsection A and all named insureds under these policies.

That's great, but what does it mean? The statue is as clear as mud and is illustrative of one of the most fundamental problems in insurance. Insurance policies (and presumably insurance laws) should be readily understandable to those not trained in the law or the insurance industry. See, *Liristis v. American Family Mut. Ins. Co.,* 204 Ariz. 140, ¶ 13, 61 P.3d 22 25-26 (App. 2002). The trouble is most insurance policies and laws are written by people trained in either the law or insurance. Go figure.

What the legislature intended was for the insurer for the negligent driver be the primary carrier under most circumstances. See, *Nationwide Mutual Ins. v. CNA Ins. Co,* 159 Ariz. 368, 370, 767 P.2d 716, 718 (App. 1988). The statue therefore holds that if you are driving a "loaner" car and get involved in an accident, your insurance is primary and the dealer or mechanic's insurance is excess above and beyond your coverage. (See, A.R.S. § 28-4010 (A)(2)).

Now, let's say an employee of the dealer or a mechanic is test driving your vehicle and gets into accident. According to A.R.S. § 28-4010 (A)(1), the dealer or mechanic's insurance is primary and your insurance is excess.

Of course, the above analysis is thrown out when dealing with two insurance policies that apply to the same accident, and does not involve a person engaged in the business of selling, repairing, servicing, delivering, testing, road testing, parking or storing motor vehicles. Say you lend your car to your friend and he/she gets into an accident. According to subsection B of the statue, it is conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated is primary and the insurance afforded by any other policy or policies is excess.

This article is courtesy of **Les S. Tuskai** and **William G. Caravetta** from the law firm of **Jones, Skelton & Houchili**, and is used with their kind permission.

Analysis of Un-rated Carriers
Best Practices for Insurance Agencies

With the recent announcement that A.M. Best Company is withdrawing it's public data rating assignments on U.S. health insurers, agencies may be wondering how to evaluate the financial strength and claims paying ability of the health insurers with which they are placing their clients' coverages.

While there is no process guaranteed to predict the future performance of any company, agencies can establish a prudent procedure to help navigate the evaluation of carriers not rated by A.M. Best Company.

As a starting point, agencies may consider the following steps:

1. Consider using the current Moody's, Standard & Poor's, and/or Fitch Ratings (Insurance Group) in establishing minimum financial rating to develop a lost of approved carriers with which the agency will place business.
   For example:
   - Standard & Poor's: BBB, which as defined on the S&P website indicates an insurer has good financial security characteristics, but is somewhat more likely to be affected by adverse business conditions than are insurers with higher ratings. (http://standardandpoors.com)
   - Moody's: A, which is defined on the Moody's Rating website as being considered upper-medium grade and are subject to low credit risk (http://www.moodys.com)
   - Fitch Ratings: BBB, which is defined on the Fitch Ratings website as moderate credit risk (http://www.fitchratings.com)
2. Make the approved list part of the written agency procedures used by all agency staff. Reiterate to agency staff that these are the only carriers with which they are authorized to place business.
3. If the agency allows exceptions for placing business with carriers not on the approved list, make sure there is a written approval process in place. We recommend designating either an individual or a ratings committee to handle this process.
4. Verify the current standing of the carrier with the resident state Department of Insurance.
5. Determine if the carrier is protected by any applicable guaranty fund (http://www.nolhga.com).
6. Communicate the known financial criteria to the customer at the time the quote is presented, at renewal, and any time there is a significant change in financial condition mid-term.
7. Consider including disclaimer language in your proposals to clarify that while the financial rating of the company may indicate that it is financially stable at the time of placement, it is not a guarantee of future performance, and further, that the agency is not an expert in the financial analysis of insurance companies.
8. Review the approved carrier list at least semi-annually for changes in financial ratings, and update the list accordingly.
9. Review your agency E&O policy for any limitations for placing coverage with carriers rated below a certain level or that are not subject to state guaranty funds.

The financial environment in which agencies operate is constantly changing. By establishing a process, updating information, sharing the information with your clients, and documenting your customer files accordingly, your agency will be better prepared to proactively address the changes that are certain to come in the future. You can find sample customer letters regarding changing carrier rating on the Big "I" Risk Management Website – E&O Happens at http://www.iiaba.net/EOhappens.

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Ask an Expert Brief

Question:

"I insure an apartment building on the current ISO CP 00 10. The insured's office was burglarized and they took keys to all 18 apartments, so each lock had to be re-keyed. I have argued unsuccessfully (the claim was denied) that the locks were damaged as a result of the theft of the keys which essentially made the locks useless. I understand there was no direct physical loss to the locks, but what good is a lock if the key has been stolen?"

Answer:

Our consensus on similar claims has been, unfortunately, to agree with the insurer. "Direct physical loss" means just that. The cost to re-key the locks is a consequential loss. Many homeowners policies include an additional coverage for re-keying locks because it isn't covered otherwise. Your best bet to make a case for coverage would be the "Duties In The Event Of Loss Or Damage" provision, which says that you MUST "Take all reasonable steps to protect the Covered Property from further damage, and keep a record of your expenses necessary to protect the Covered Property, for consideration in the settlement of the claim."

Your argument would be that re-keying the locks was necessary to protect property from further damage. Without restricting the ability of the thieves to re-enter the premises and apartments repeatedly during the remainder of the term of the policy, theft and vandalism could continue unabated. One other possibility would be a claim based on the Extra Expenses coverage under a business income form. The problem with that could be the 72-hour waiting period and the "period of restoration".

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