# FOLLOW UP LETTER TO TEXAS INDEPENDENT INSURANCE AGENTS

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**Future SB1567 Suits Against Agents Might Not Be Recoverable Under Agency Errors and Omissions Policies**

A month ago I issued an Open Letter to Texas Independent Agents entitled: "Effective 1/1/14 Restrictive Named Driver Policies Pose Significant Risks to Insurance Agents". In that letter I stated that Named Driver agents will likely become the target of much litigation and that the nature of suit allegations could lead to denials of coverage under Agents Errors and Omissions contracts. This comment has generated interest and I have been asked to expand upon this perspective.

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To set the stage for this discussion, it is important to understand the groundbreaking new reality intended by the Texas legislature in passing SB 1567. The Legislature's goal is to dramatically reduce, if not eliminate, the Named Driver Policy segment of the Auto industry. Legislative sentiment against Named Driver policies was and is exceptionally strong: SB1567 passed unanimously in both chambers without one dissenting vote. Some Legislators wanted to eliminate the policies altogether. The new law places arduous and exacting burdens on agents for policies that typically can only be profitable from an agent's standpoint if they are sold in high volumes. The exacting requirements along with the high volume create an extreme likelihood that an agent will find himself with claims against him for failure to comply with the recordkeeping requirements of the legislation. Agents selling Named Driver policies must fulfill these requirements on each and every new and renewal policy indefinitely into the future, including renewals of renewals, before ever accepting a premium or a fee. All agents have now been given notice of this law. Lack of knowledge of the law is not a defense to an Agent. Given this knowledge, any agent who continues to write Named Driver policies and fails to implement the law's requirements in all its aspects on each and every policy will, in essence, be willfully violating the law.

For many years there have been provisions similar to these in connection with the rejection of UM/UIM coverage. If there was a failure to comply with the requirements, then coverage was afforded even though none was purchased. However, the burden under the UM/UIM statute is only on the insurer. SB 1567 puts the burden not only on the insurer, but on the agent as well. Assuming the agent fails to comply with the law, the agent may find him or herself liable for coverage under a policy that was never purchased. This no doubt will impact the rates charged for Errors & Omissions insurance for agents who issue this type of coverage.

What are some of the possible missteps? Here are a few to consider:

- No oral or written disclosure was ever made and no signature was ever achieved
- Or, if the disclosures were made and signature achieved, they could not be retrieved as proof
- Disclosures/signatures achieved on preceding policy, but not on subsequent renewal

- Disclosures/signatures achieved on cancelled policy, but not on a reinstated or rewritten policy
- Disclosures/signatures not achieved on innumerable monthly policy renewals
- A certain electronic signature method is challenged as invalid under law
- The disclosure was not given in the proper language and the insured did not understand
- The agency individual giving the disclosure was not licensed to provide the disclosure
- The person to whom the disclosure was given was actually not the named insured, but another member of the household dropping off the premium
- The disclosure was given after collecting the premium, not before.
- The customer was played an electronic recording and could not hear it (or understand it)
- The electronic recording disclosure statement was played in the absence of a licensed agent present and the customer could not ask questions
- A customer denies his own signature and proves it with his "real" signature
- A customer said he/she disclosed all the household members and thought in disclosing those members that coverage was being provided
- Or more broadly, a customer simply changes his/her story to "whatever needs to be said"

As you can see, the requirements for compliance are extremely high. The agent needs to be 100% flawless in execution on all named driver policies throughout the entire lifecycle of a policy forever into the future. Any missteps by your Agency can expose your agency to litigation.

Unfortunately, the lawsuit is only the start of the problem for the agent. The consumer litigation against the agent will likely allege the agent did not follow state statute SB1567 and knowingly broke the law, a law that is purposefully designed to protect the consumer. Additionally, the suit will likely allege that the product was improperly explained, represented, promoted, and advertised by the agent; that the product failed to perform as intended or reasonably expected; and that the agent, along with the company, operated in bad faith for failure to pay or delay a claim or obligation. These allegations directly implicate the Agent as a responsible party.

Even though the agent may be paying higher E&O premiums, won't there still be coverage? Well, now the news gets really bad. According to a senior officer of a leading brokerage house specializing in Agency E&O insurance:

***When the agent submits the suit to the Agency Errors and Omissions insurer, the agent will very likely receive in a very short matter of time a Reservation of Rights letter from the Agency E&O insurer that highlights several key policy exclusions that the Insurer says it will need to investigate before validating or denying coverage. What are those policy exclusions? While every Agency Errors and Omissions policy is different, certain exclusions tend to appear in most. They are:***

- ***Willful violation of statute, rule or law***
- ***Violations of consumer protection laws***
- ***Inaccurate, inadequate, or incomplete description of the product, price, etc.***
- ***False or unfair business practices***
- ***Breach of express warranty or representation***
- ***Intentional refusal or failure to pay or delay in paying any claim or obligation***

***Very importantly, each of the above exclusions directly pertains to the allegations that will likely be made in the suit against the agent. If in their investigation the E&O carrier determines the facts line up with the exclusion(s), this will likely to lead to an eventual coverage denial by the E&O Insurer, leaving the Agency having to defend itself and potentially indemnify the claim with its own resources. And, beyond this claim, the agent might find themselves included in a class action lawsuit claiming systemic breach of law across an entire class of customers.***

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In conclusion, if you plan to continue selling "Named Driver" policies after 1/1/2014 and beyond, hopefully this letter will serve to prepare you for this particular, significant risk you will be incurring. I would encourage you to check your own Agents Errors and Omissions policy and see whether the exclusions contained in it are similar. On balance, a wiser course may be to choose a broader coverage product that does not trigger SB1567 notification requirements.

Respectfully submitted,

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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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