Addressing Cooperation in Non-Standard Insurance Relationships

INTRODUCTION

The non-standard auto insurance sector is historically defined as the highest risk sector of the overall auto insurance industry. Highest risk generally means that an insured falls into one or more of the following categories: a new driver, a driver with previous moving violations, and/or a driver with a rare or unusual type of vehicle. The sector has evolved to include drivers who purchase insurance policies with state mandated minimum limits, typically lower income drivers or recent immigrants to the United States.

The customer base is also characterized as one that typically pays for an insurance policy on a monthly basis, makes purchasing decisions based primarily on the cost of the initial down payment for the policy, and has a high cancellation or non-renewal rate. Higher rates of insurance fraud and staged accidents are also more prevalent among the non-standard base than among the standard or preferred auto insurance base.

GROWTH DRIVEN BY CHANGING CUSTOMER DEMOGRAPHICS

The Hispanic sector represents approximately 16 percent of the U.S. population, or 50.5 million people. This sector is one of the fastest growing segments of the overall population, having increased by approximately 43 percent from 2000 to 2010. Census experts expect the Hispanic population in the U.S. to double to over 100 million people by the year 2050. Given the growth in the population in the U.S. and their continued growing share of the non-standard auto sector, most industry observers expect continued growth in the non-standard auto market.

THE BASICS OF COOPERATION

Most non-standard auto policies have, as most liability policies do, a provision requiring the insured to cooperate with the insurer in the handling of an accident or occurrence that is insured under the policy.

In short, it is the contractual duty of an insured to make a full, fair and complete disclosure of the facts related to the accident in order to enable the company to determine whether a claim should be contested. Not all policy provisions requiring cooperation of the insured in the handling of a claim or occurrence are identical. Yet, the effect of such provisions is substantially the same: the insured promises to help the insurer handle the matter in the claims stage as well as in the defense of any resulting litigation.

Cooperation serves to advance the goals of both the insured and insurer. It permits the insurer to act quickly and accurately assess potential liability and settle meritorious claims before they snowball into massive losses. Conversely, if a fraudulent or unmeritorious claim is brought, the insurer and insured can begin to mount a vigorous defense. The insured can help to mitigate the risk by providing crucial testimony or producing exculpatory evidence. All of these actions further the interests of both insurer and insured in settling or defeating a given claim.

LEGAL PRINCIPLES

Before an insurer can avoid coverage on the basis of the failure of the insured to cooperate, the acts of non-cooperation must be material and substantial resulting in actual prejudice to the insurer.

The majority jurisdictional rule is clear that when an insurer asserts the failure of the insured to comply with the conditions of the policy or relies on an exclusion, it must plead and prove the failure of the insured to comply. Most cases, however, hold that whether the insured breached the duty to cooperate with the insurer is a question of fact.

The insured who fails to satisfy his or her obligations under the cooperation clause obviously risks losing the benefit of the coverage since the insurer is totally relieved of both the duty to defend and the duty to indemnify. Because the breach of a cooperation clause precludes coverage and releases the insurer from its obligations under the policy, same also affects third parties who have been injured by the insured's conduct and who may have expected to be compensated through insurance proceeds.

In respect to bringing about an insured's cooperation, the general inferential rule is that an insurer must use reasonable diligence in doing so. The level of judicial scrutiny of the insured's and insurer's conduct varies depending upon the circumstances surrounding the claim.

Where a third-party claim is involved, courts may establish a higher threshold before finding a material breach of the cooperation cause and more closely scrutinize the insurer's conduct before depriving an innocent claimant of possible compensation. In contrast, courts will more often than not hold the insured to a higher standard of conduct in a first-party claim. For example, most courts have found that the duty to cooperate will override an insured's Fifth Amendment rights.

Although most states embrace the actual prejudice test, none set forth any clear definition of what acts and/or failures to act on the part of the insured amount to the same. Generally speaking, courts have found prejudice from the insured's breach where the purposes of the cooperation requirement have been defeated.

For instance, if the insurer is unable to properly investigate a claim, to prepare an adequate defense, or to pursue a subrogation action, the insurer may be deemed prejudiced. But if the insurer cannot demonstrate that it utilized its best efforts to gain the insured's cooperation and, when necessary protect the insured's interests, the courts will be reluctant to find that the insured's actions constituted a substantial breach or actual prejudice.

PRACTICAL MEASURES

Now that we have discussed the legal standards applicable to cooperation issues as well as the general characteristics of non-standard auto insurance, let's look at practical measures to gain cooperation and backstop measures to guard against adverse actions when non-cooperation is declared.

A standard insured is more likely to fully engage and cooperate in the adjustment of a claim or defense of a lawsuit for the reversed reasons that a non-standard insured may be less likely to do so. For example, a standard insured may not have shopped for insurance at the lowest price point; may have a longstanding relationship with the insurer and its agent or broker in terms of policies across multiple lines and products; is more worried about the effect of the occurrence on policy cancellation or premium; and has level of income that is at risk in an excess or high severity claim.

The non-standard insured has few, if any, of these incentives to cooperate and participate in the adjustment and defense of the claim. The risk profile is simply different, and the challenge for the insurer is to incentivize the insured's cooperation.

Seek to build a trust relationship

From the outset, the claim adjuster should approach the insured in a manner that builds a foundation for a partnership in resolving the claim that includes his or her time, effort and commitment.

In the non-standard environment, an insured who speaks English as a second language can be no less committed to the process. Employing an interpreter from the first contact should be a valuable opportunity to establish a trust relationship – and certainly claim assignments should be made to those adjusters who are proficient in the first language of the insured if at all possible.

Establish rapport

The claim professional should establish a rapport with the insured at the first opportunity so that the insured recognizes that she and the adjuster must work together as a team.

Establishing rapport requires time and patience. It is accomplished in large measure at the outset by expressing an honest curiosity and interest in the insured as a person before getting to the details of the loss and claim. This can be done by simple personal inquiries about the insured's family, background and profession.

The claims adjuster will usually find at least one thing she has in common with the insured to help create a relationship of trust and confidence – certainly, the average person will be more open and helpful to an adjuster he knows and trusts. As in sales, people buy from people they like. And, for the most part, people like other people who are similar to themselves. But even if the claims professional is willing to spend all of the time in the world getting to know the insured, the insured is probably not willing to spend the time it takes to build the level of mutual understanding that leads to real trust.

So, the adjuster must short circuit the process by quickly conveying their trustworthiness to the insured. There is an aspect of manipulation in this kind of rapport building, but it is necessary – the object of the process is to create an environment for cooperation.

Give an overview of the process

The first step in any explanation of the claim process is the purpose. Insureds are listeners and need to know why you, the claim adjuster, are explaining something. Generally, the purpose is to define the source of the problem – a claim or lawsuit – and the way – adjusting the claim or assigning the lawsuit to defense counsel – to achieve the desired outcome. But keep it simple and precise.

Psychologists have studied how people learn from explanations, giving different kinds of descriptions of an apartment to different groups. One version involved a "step-by-step" description such as this:

"You enter the apartment from the first door on the right of the elevator, and then you turn right, which will get you into the kitchen. It has all the appliances you'd need, and if you go through the door on your left, you'll enter the dining room, which has a table that can seat six easily enough. The door on the far side of the dining room leads out into the hall."

Participants who heard this kind of explanation were not as able to draw the layout of the apartment as well as those who got an "overview first" type: *"This two-bedroom apartment is a rectangle split down the middle by a hall that leads to a large living room overlooking the patio. Two bedrooms and the bath are on the left of the hall. A kitchen and dining room are on the right."*

The lesson to be remembered is that a simple process overview orients the insured and sets up expectations, a set of mental "hooks" on which you can provide greater detail later on. Using our example, an insured as a listener can more easily add the information that the dining room "contains a table that can seat six easily enough" if he or she knows where the dining room is located in the overall layout first.

Intercultural explanations require special sensitivity to the listener's needs. If the claim adjuster and insured don't share a common vocabulary, the adjuster needs to be resourceful. On the other hand, you shouldn't assume the insured is unintelligent. Think about the challenge of explaining a device as a kind of mutual search for a common path. Build an explanation through research or through trial and error. Talk informally at first to find an explanation that fits the culture or environment; slowly modify this explanation by pulling from local examples or language or ways of thinking.

Document everything and create a paper trail

One of the most powerful tools you can use for getting what you want or need is through the use of written letters. Letters, particularly those sent by certified mail, are hard to make disappear. When you put your request to an insured in writing, you have created a piece of evidence that can be held in the hands and reviewed months or years down the road.

Why are letters so important? Emails can be purged by accident, fax machines can lose power or ink, and telephone calls are even less effective if you are met with an insured who will tell you anything you want to hear just to get you off the phone – and the moment you hang up, you have no real way to prove the call even existed. While it is not possible to conduct a claim investigation without making a certain number of phone calls, it is always best if you follow up with each call by using a letter to outline and confirm the content of the same. This way, if anyone claims to find no record of your having called, you are armed with all the information you need to prove the call existed in the first place.

Involve the agent, broker or field adjuster

It is quite probably the rule, rather than the exception, that the claim professional is located in another city or state than the insured during the investigation and handling of the claim. This makes it substantially more difficult to build a trust relationship and establish rapport than it would otherwise be if the two participants could have a face-to-face encounter. If cooperation issues arise, the non-standard insured is more likely to be positively influenced by personal contact as opposed to verbal or written contact.

Non-standard insurers generally underwrite from independent agency relationships, and the agent is, for practical purposes, the face of the ongoing relationship between the insurer and its insured. Involving the agent – or alternatively an independent field adjuster – in explaining the facts of life in respect to cooperation may be much more effective than any other method the insurer could employ.

One simple five minute conversation could eliminate 15 back and forth telephone calls, emails or letters.

Reservation of rights

A reservation of rights letter is a unilateral declaration from the insurer to the insured that it accepts the defense of the tendered claim or lawsuit and maintains control of same but reserves its right to later deny or contest coverage on certain specified grounds or to raise policy defenses. It is a means by which the insurer seeks to prevent the operation of waiver or estoppel prior to determination of the liability of the insured.

A reservation of rights letter is not sufficient if it simply states that the insurer reserves its rights to later deny coverage. The insured must be fully advised of every reason known to the insurer why coverage may be endangered – particularly in respect to cooperation, every reason or instance of non-cooperation must be delineated and defined. The success of the reservation on this point is going to depend on the insurer's demonstration of its efforts to obtain the insured's cooperation and is fact specific. So be prepared to cite to specific letters, documents, contacts and requests in order to be successful.

CONCLUSION

While insurers are certainly entitled to cooperation from the insured in the defense of liability claims, courts are, as we have seen, generally wary of efforts to avoid coverage on this basis.

Policyholders purchase insurance for peace of mind. They may lack a sophisticated understanding of the claim and litigation process, but it is reasonable for them to expect that the front line claim professional and attorneys who are retained to represent them will lead them through the process and impress upon them the importance of their role in the adjustment of the claim or defense of the lawsuit.

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