BULLETIN 96-7

FREQUENT PROBLEMS FOUND IN FILINGS

Property and Casualty Lines

Over the years we have found that insurance companies consistently fail to make their forms and filings comply with well-established provisions of the Utah Insurance Code. These issues deal with provisions standard to many insurance policies and standard to rating processes. This listing is intended to provide you with a brief summary of the requirements of Utah law and the position of the Insurance Department in dealing with these provisions and issues.

Issues

GENERAL POLICY PROVISIONS

Arbitration - Notice to Insureds
Policies that contain a binding arbitration provision are permitted. However, mandatory binding arbitration may preempt an insured's access to some courts. Therefore, Department Rule R590-122, Permissible Arbitration Provisions, requires that a disclosure be made to the applicant of the arbitration provision before the applicant enters into the contract. Refer to subsection R590-122-4(5) for suggested wording of the disclosure. The disclosure must be provided in the application, or in an attachment to the application.

Cancellation - Notification Time (Except Workers' Compensation)
Utah Code Ann. §31A-21-303(2) provides for a minimum required notification

period of 10 days for cancellation for nonpayment of premium. For all other "grounds" for cancellation permitted by the code a minimum of 30 days notice is required. The minimum mailing time that must be allowed is three days. No exceptions will be made.

Cancellation - Permissible "Grounds"
The only acceptable grounds for midterm cancellation, as provided by §31A-21-303(2)(a) are as follows:
1. nonpayment of premium;
2. material misrepresentation;
3. substantial change in the risk assumed, unless the insurer should reasonably have foreseen the change or contemplated the risk when entering into the contract;
4. substantial breaches of contractual duties, conditions, or warranties;
5. in the case of auto insurance, revocation or suspension of the driver's license of the named insured or any other person who customarily drives the car;
6. attainment of the age specified as the terminal age for coverage.

Notice of Cancellation or Nonrenewal
With any notice of cancellation or nonrenewal, §§31A-21-303(6) and (7) require that the notice of cancellation or nonrenewal advise the insured:
1. of the insured's right to make written inquiry regarding the reason for the cancellation or nonrenewal, and
2. if auto insurance is involved, of the availability of coverage under the Assigned Risk Plan and instructions on how to apply.

Choice of Law
Utah Code Ann. §31A-21-313(3)(b) states that no insurance policy may "prescribe in what court an action may be brought on the policy." Section 31A-21-314 states that no insurance policy may contain any provisions:

> (1) requiring it to be construed according to the laws of another jurisdiction except as necessary to meet the requirements of compulsory insurance laws of other jurisdictions;
> (2) depriving Utah courts of jurisdiction over an action against the insurer . . .
>
> The proper forum for the resolution of a contract dispute is the place where the contract is made. No policy written for Utah insureds may contain provisions, or arbitration provisions, requiring resolution of disputes outside of the State of Utah or in a particular jurisdiction within the State of Utah.

Claim Payment (when loss is payable)
Our Unfair Claims Settlement Practices Rule (Rule R590-89), section R590-89-12(C), requires that claims payments be made within 30 days of a properly executed proof of loss. Once a claim has been adjusted and the properly executed proof of loss filed with the insurer, the claim is to be promptly settled. The only time allowed is time for the insurer to process the payment check.

Incorporation by Reference - Applications
Utah Code Ann. §31A-21-106 reads, in part:

> (1)(a) Except as provided in subsection (1)(b), an insurance policy may not contain any agreement or incorporate any provision not fully set forth in the policy or in an application or other document attached to and made a part of the policy at the time of its delivery unless the policy, application, or agreement accurately reflects the terms of the incorporated agreement, provision, or attached document.
>
> An insurance policy must include all the terms and conditions applicable to the coverage. Reference to another document or source to find the terms and provisions of coverage is not in compliance with the statute. The Utah Supreme Court, in the case CALLUM v. FARMERS INSURANCE EXCHANGE, 217 Utah Adv. Rep. 13 (Utah 1993), stated the following:
>
> . . . Section 31A-21-106 . . . directs that all provisions [of an insurance contract] must be physically present in the written contract itself or in other documents attached to the contract at the time of its delivery . . . Its aim is to ensure that the entire insurance contract is contained in one document so that the insured can determine from the policy exactly what coverage he or she has . . .
>
> Insurance forms may not contain provisions incorporating or "deeming attached as if physically attached" applications (or any other documents) into the policy unless the form also clearly states that such documents will be attached to the policy at the time of its delivery. Documents "on file with the insurer" cannot be considered part of the insurance policy.

Incorporation by Reference - Definitions and Terms
If key terms in an insurance contract are not clearly defined, the contract can be misleading, obscure and even deceptive. If terms are not defined other than by a general reference to a Federal or state law, an insured will not know the terms and conditions of coverage.

Insurance Company Name
Utah Code Ann. §31A-21-201(3)(a)(iii) provides for the commissioner to disapprove a form if, "in the case of the basic policy, though not applicable to riders and endorsements, it fails to provide the exact name of the insurer and its state of domicile." All policies must include the complete name and address of the insurer issuing the policy.

Limitation of Actions/Legal Action Against Us/Suit Provisions
Utah Code Ann. §31A-21-313 states:
(1) An action on a written policy or contract of first party insurance must be commenced within three years after the inception of loss . . . (3) An insurance policy may not: (a) limit the time for beginning an action on the policy to a time less than that authorized by statute.

Many policy forms providing coverages limit actions on the policy or contract to one or two years. Limitations of causes of action on the insurance policy or contract of less than three years after the inception of loss are in violation of the statute.

Notice and/or Proof of Loss

Utah Code Ann. §31A-21-312 states:

(1) Every insurance policy shall provide that:. . .(b) failure to give any notice or file any proof of loss required by the policy within the time specified in the policy does not invalidate a claim made by the insured, if the insured shows that it was not reasonably possible to give the notice or file the proof of loss within the prescribed time and that notice was given or proof of loss filed as soon as reasonably possible.

The Commissioner has determined that the phrase "every insurance policy shall provide" shall be interpreted to mean that every policy that does specify a time limit for the notice or proof of loss must also include a provision outlining the exception of the statute. This can be provided in the form itself or in a Utah amendatory endorsement. This statutory provision, in effect, allows an unlimited time period for filing notice and/or proof of loss - as long as the claimant shows it was not reasonably possible to file the claim within the time period. A policy can specify a time limit in which a claim is to be filed but it must also provide that failure to file the notice and/or proof of loss within the time specified does not invalidate the claim if the insured can show that it was not reasonably possible to file it within the prescribed time limit.

Punitive Damages

Utah Code Ann. §31A-20-10 prohibits insuring or the attempt to insure against punitive damages in Utah.

Subrogation

In the case HILL et.al. v. STATE FARM MUTUAL INSURANCE COMPANY, 765 P.2d 864 (Utah 1988), the Utah Supreme Court stated that ". . . in absence of specific contractual terms in either the release and settlement or the insurance policy, the insured must be made whole prior to any recovery by insurer against the tort-feasor . . . " Many insurers file to amend policy language to provide "express terms to the contrary", thus allowing the insurer to be reimbursed before the insured is made whole. It is not in the best interests of Utah insureds to allow language that limits their ability to be made whole. An insured must first be made whole before the insurance company subrogates. It is understood that the insured is not entitled to double recovery, but his initial recovery, to the fullest amount possible, should come before the insurer. The doctrine of subrogation is equitable. Utah law gives insurers subrogation rights and obligations. However, those rights are not unlimited and do not supersede the right of the insured to be made whole unless the insured contractually relinquishes the right. To allow a policyholder to believe that his insurer has an unconstrained right to unidentified (as to the element of damages) proceeds of a settlement would be inequitable and misleading. Policy provisions should include clear language reserving the right of subrogation to the extent that the insured actually receives a double recovery or relinquishes the benefit payment to the subrogated insurer. An

insured must receive his due before payment of amounts to which the insurer makes claim will be allowed.

AUTOMOBILE INSURANCE

Auto Liability Deductibles and Self Insured Retentions

The Utah Financial Responsibility Act and the motor vehicle liability insurance provisions of the Utah Code Ann. §31A- 22, Part III, permit the use of a deductible or self-insured retention in regard to motor vehicle liability insurance only if the deductible is applied to coverage limit amounts in excess of the minimum coverage mandated under §31A-22-304. Deductibles and SIRs may not be applied against the minimum statutory coverage.

Utah case law clearly indicates that under the financial responsibility acts and applicable automobile liability insurance statutes there is a minimum floor of coverage which must be provided and which cannot be reduced either by exclusions, endorsements, deductibles or self-insured retentions. If an insurer provides excess coverage over the minimum statutory limits under a motor vehicle liability policy, it can make the excess coverage subject to a deductible or self-insured retention.

Pursuant to this, we can allow automobile liability deductibles or self-insured retentions only if 1) the insured is a qualified self-insurer for the deductible or self-insured amount by the Utah Driver Control Bureau, or 2) the deductible is applied to that coverage which is excess of the minimum statutory limits ($25,000/$50,000/$15,000 or $65,000 CSL).

Definition of "Relative"

The definition of "relative" found in Utah Code Ann. §31A-22-305(1)(b) includes relatives who usually make their home in the same household but temporarily live elsewhere. Forms must make this clear.

Driver Exclusions (Named)

In general, driver exclusion endorsements are not permissible in Utah. Our Motor Vehicle Financial Responsibility Act requires minimum liability insurance. Utah case law, particularly the case of FARMERS INSURANCE EXCHANGE v. CALL 24 Utah Adv. Rep. 5 (Utah 1985), supports the premise that no driver can be excluded for the minimum limits of liability as established by the Motor Vehicle Financial Responsibility Act. Utah Code Ann. §31A-22-302 incorporates §41-12a-301 of the Motor Vehicle Financial Responsibility code and thereby mandates minimum liability coverages for all insurance policies used as security for the registration and operation of motor vehicles in Utah.

In 1988, legislation provided for an exception to the above. Section 31A-22-303(7) now states:

> A policy of motor vehicle liability coverage under Subsection 31A-22-302(1) may specifically exclude from coverage a person who is a resident of the named insured's household, including a person who usually makes his

> home in the same household but temporarily lives elsewhere, if each person excluded from coverage satisfies the owner's or operator's security requirement of § 41-12a-301 independently of the named insured's proof of owner's or operator's security.

An endorsement excluding specific drivers is permissible but only when accompanied by an underwriting or manual rule that limits its use to a member of the insured's household who has his or her own insurance coverage. This generally eliminates driver exclusions from Commercial Automobile Liability policies.

Family/Household Exclusions
Family or household exclusions which exclude coverage for liability of one family member against another family member follow the arguments outlined above under Auto Liability Deductibles and Self Insured Retentions and Named Driver Exclusions. Coverage must be provided for family members. The case cited, FARMERS INSURANCE EXCHANGE v. CALL 24 Utah Adv. Rep. 5 (Utah 1985), dealt with a claim by a son injured in an accident caused by the mother. The court rejected the family exclusion provision.

Incorporating Limits by Reference
All coverage limits, including references to coverage limits, must be spelled out in the policy. In the case CALLUM v. FARMERS INSURANCE EXCHANGE, 217 Utah Adv. Rep. 13 (Utah 1993), the Utah Supreme Court determined that simply referring to the "statutory minimum limits" constituted an "incorporation by reference", which is prohibited by Utah Code Ann. §31A-21-106. The court did not prohibit restricting the limits but stated that if the insurer did restrict limits, the policy must clearly state the actual limits of the coverage.

PIP Loss of Work
A Utah Court of Appeals decision, LARSEN v. ALLSTATE INSURANCE CO., 217 Utah Adv. Rep. 30 (Utah 1993), addressed the PIP Work Loss provision of Utah Code Ann. §31A-22- 307(1)(b)(i). The Court stated:

> Section 31A-22-307 provides coverage for the "lesser of $250 per week or 85% of any loss of gross income and loss of earning capacity per person from inability to work, for a maximum of 52 consecutive weeks after the loss . . . " Utah Code Ann. 31A-22-307(1)(b)(I) (Supp. 1992) (emphasis added). According to the plain language of that section, the fifty- two consecutive week period runs from the loss of gross income and loss of earning capacity, not from the date of the accident.

The case concerned a claimant whose inability to work didn't start until some months after the actual date of the injury. The court determined the "loss" started then, not the date of bodily injury. Thus, PIP forms cannot define "loss" as starting the date of the accident or bodily injury but rather must define "loss" as starting from the date of the loss.

PIP Motorcycle/Trailer Coverage - Definition of Motor Vehicle
We have found there has been some misunderstanding regarding the provisions of our law and the definition of "motor vehicle" that is used in some Utah Personal

Injury Protection coverage forms. Section 31A-22-302(2), excepts motorcycles, trailers and semitrailers from PIP coverage. This means that PIP coverage is not to be written on these types of vehicles. However, coverage is to be provided for the named insured and any relative of the insured when injured in an accident involving any motor vehicle (§31A-22-308). The definition of "motor vehicle" includes every self propelled vehicle designed for use on a highway and trailers and semitrailers. For example, if the named insured were to be struck by a motorcycle while walking down a street as a pedestrian, there should be coverage under the PIP form for the named insured. The problem we have found in excepting motorcycles, trailers and semitrailers in a PIP coverage definition of "motor vehicle" is that it can lead to the denial of a legitimate claim on the part of an insured. The exception in PIP coverage for motorcycles, trailers and semitrailers could be made in the definition of "Your insured car" or could be provided for in manual rules which would state that PIP coverage was not to be written on motorcycles, trailers and semitrailers.

PIP Territory
Some PIP forms limit coverage to accidents occurring in Utah. Utah Code Ann. §31A-22-308 prohibits limiting PIP coverage to Utah, except in the case of pedestrians (who are not the named insured or relatives).

PIP Deductibles
Utah Code Ann. §31A-22-307(6) specifically prohibits deductibles with respect to PIP coverage.

Prior Automobile Insurance (ref. transfer or responsible driver discounts)
Department Rule R590-128, Unfair Discrimination Based Solely on the Failure to Maintain Automobile Insurance, states:

> The following are hereby identified as acts or practices which constitute unfair discrimination among members of the same class: Refusing to insure or refusing to continue to insure or limiting the amount, extent or kinds of coverage available, or charging an individual a different rate for the same coverage, or charging a surcharge upon the usual premium, or placing the coverage with a different company, solely because of failure to maintain automobile insurance for a period of time prior to the issuance of a policy.

If the fact that an applicant did or did not have prior insurance coverages determines the acceptability of a risk or the rating of a risk, then that is a "sole" factor, and cannot be used by itself. If an application indicates there was no prior insurance, underwriters must determine the reason for no prior insurance. If the applicant's reason for not having insurance is legitimate and shows compliance with the financial responsibility law, he cannot be denied coverage or rated differently than a comparable applicant having prior insurance. If the underwriter finds evidence that an applicant was willfully driving for an extended period of time without proof of financial responsibility, in violation of the law, then violation of the law is a second factor and may be used in addition to no prior insurance in determining acceptability and rating.

Uninsured and Underinsured Motorist Coverages
Under Utah law, UM and UIM are separate and distinct coverages. Neither the

coverages nor their limits may be combined. Both coverages must be provided unless the insured rejects each coverage in writing. The coverages are not contingent upon each other. An insured may select or reject either or both coverages.

Uninsured Motorists - Definition
Utah Code Ann. §31A-22-305(5) provides that when an uninsured motor vehicle proximately causes an accident without touching the covered person or vehicle, and if there is convincing evidence of the existence of the uninsured vehicle and that that vehicle caused the accident, coverage is mandated. Policy forms may not restrict the definition of "uninsured motor vehicle" to actual, physical contact.

POLICY RATING PRINCIPLES

Experience Rating Plans
Department Rule R590-121, Rate Modification Plan Rule, requires a minimum experience period for the application of experience rating of three years. It is our position that less than three years of experience is not sufficient to justify experience rating.

Rate Modification Plans - Schedule Rating, IRPM plans, and Similar Plans Providing for Ranges of Rates
Department Rule R590-121, Rate Modification Plan Rule is still in effect and will be enforced. The rule establishes a maximum, total modification for any rating plans that fit the rules' definition of "Rate Modification Plans" to a **+/-25%**. No exceptions will be made. The rule also sets other parameters for the application of these rating plans. Insurers must comply with the various provisions of the rule.

Tiered Rating
Tiered rating is permitted in Utah. However, we require the filing of the underwriting guidelines which specify the criteria for placing a risk in a given tier. We also require actuarial data justifying the different tiers either by differences in expected losses and/or differences in expenses. This information is required to permit the Department to determine that the tiers are not unfairly discriminatory.

Unfair Discrimination
Utah Code Ann. §31A-19-201(4) states, "A rate is unfairly discriminatory in relation to another rate in the same class if it clearly fails to equitably reflect the differences in expected losses and expenses." Rating plans providing for such things as mass marketing discounts, tiered rating, association discounts **,** etc. must be based on differences in expected losses and/or expenses. Filings must demonstrate and explain these differences.

DATED this 23rd day of October, 1996

Insurance Commissioner

[Back to Top]