

THE POLICYHOLDER ADVOCATE/IP COUNSELOR

NEWSLETTER

Volume 10, Issue 2: Spring 2006

PITFALLS AND OPPORTUNITIES IN OBTAINING HOMEOWNERS INSURANCE ON HIGH-ASSET-VALUE RESIDENTIAL PROPERTY “Part 2”

I. INTRODUCTION

Issues spawned by this complex inter-weaving of elements, as well as by underwriters' attempts to migrate restrictive language recently developed from commercial liability policies to homeowners policies, has created the need for vigilance in homeowner renewals. Brokers, who are typically a policyholder's agent, not an insurer's, may be incapable of appreciating the complexities involved, when advising on the likely impact of policy language.

Again, policy procuring counsel may be the only appropriate resource to clarify these issues.

II. MUST HOMEOWNERS SEEK REVALUATIONS OF REBUILDING COSTS ANNUALLY TO ASSURE THAT THEY PROCURE THE HOMEOWNERS INSURANCE PROMISED THEM?

A. Initial Valuation Followed by Insurer Inspection and Periodic Revaluation Gauged to the Insurer's Internal Formula Is the Norm

The standard practice in the personal lines industry is that once an initial value is obtained and inspection conducted to assure that it is an appropriate amount, thereafter increases in home valuation are tied to the inflation rate that each individual carrier uses. That rate may be far less than the building replacement cost in light of market conditions.

B. Types of Homeowners Policies Available in California

California attempts to gauge what form of homeowners insurance is being provided by using general categories to describe same.

Pursuant to California Insurance Code § 10102, a disclosure is required by homeowners insurance issuers for policies issued in California. Various forms of coverage for dwellings are offered, but the best available coverage is **limited replacement cost coverage with an additional percentage**. It pays replacement cost up to a specified amount above the policy limit. This coverage is often combined with **Building Code upgrade**. It requires the insurer to pay up to the limit specified in the policy, as well as the additional costs required to bring the dwelling “up to Code.”

Critically, the explication of that coverage [California Residential Property Disclosure Policy Form Reference PCHO-

PDISCEXT-CA (12/04)] states:

To be eligible for this coverage, you must insure the dwelling to its full replacement cost at the time the policy is issued, with possible periodical increases in the amount of coverage to adjust for inflation; you must permit an inspection of the dwelling by the insurance company; and you must notify the insurance company about any alterations that increase the value of the insured dwelling by a certain amount (see your policy for that amount).

The question remains whether this provision is both a “shield” protecting the consumer policyholder as well as a “sword” detrimentally impacting a policyholder who has failed to update, as this provision would appear to require, the real rebuilding cost of the residence each year.

C. Underwriters for Homeowners Carriers Are Loath to Clarify in Writing the Meaning or Effect of Their Policies

The practical solution to this problem is to obtain a written advice from an underwriter in such circumstances, which may be readily provided if the carrier, even though it knows that the rebuilding value is higher than the CPI adjustment, will issue the policy including up to 100% replacement cost by endorsement without reference to the actual building cost and that the owner need not comply with this provision as it is not part of the policy.

Arguably a different result would attend as to § 10102 since it is simply a disclosure form for the benefit of policyholders under the California Residential Property Insurance Disclosure. However, absent case law clarifying that issue, a policyholder is still at risk unless the policyholder receives clarification from the insurer on this point.

III. FLAT CANCELLATION IS NOT REQUIRED WHEN A POLICY IS NOT RENEWED

A form entitled “Cancellation Request/Policy Release,” typically issued for homeowners policies by ACORD (Association for Cooperative Operations Research and Development), purports to describe the legal effect of changing from one insurer to another and asks the insured to sign a “Policy Release Statement,” which states:

The above-referenced policy is lost, destroyed or being retained. No claims of any type will be made against the insurance company, its agents or its representatives, under this policy for losses which occur after the date of cancellation shown above. Any premium adjustment will also be made in accordance with the terms and conditions of the policy.

While on its face an apparently innocuous statement, a homeowners policy issued on an “occurrence” basis provides the right to a defense for a claim first incepting after the policy’s termination for conduct during its policy term. Injury or damage may arise after the policy’s termination date, resulting in what the carrier might describe as a “loss,” yet nevertheless trigger coverage. While the statement in the Cancellation Request is an accurate one for “bodily injury and property damage” exposures, it is not so for personal injury coverage, which includes defamation, libel/slander or, in some variant policy forms, invasion of privacy, malicious prosecution/abuse of process, or invasion of the right of private occupancy of another.

For these latter coverages, this Policy Release Statement could in effect negate coverage even though the insured had completely paid all premiums and maintained the policy in force during the pertinent period. *See Atlantic Mut. Ins. Co. v. Granite State Ins. Co.*, 100 Cal. App. 4th 1017, 1032 (2002): “Coverage for personal injury is not determined by the nature of the damages sought in the action against the insured, but by *the nature of the claims* made against the insured in that action. . . . [c]overage ... is triggered by the *offense*, not the injury or damage which a plaintiff suffers.’ ”

So long as the expiring carrier is notified that no renewal is intended and thus no premium can properly accrue, and insurance is replaced with a different carrier, there is no reason to execute the Policy Release Statement unless it is

redrafted to clarify that it will not have the effect noted above.

IV. A HOMEOWNERS POLICY MAY NOT PROTECT A HOME-BASED BUSINESS

There is typically limited coverage available for on-premises business equipment and even less for off-premises equipment. Moreover, the policy is unlikely to contain any liability coverage for business-related occurrences. Supplementing this insurance is critical.

First, where websites are an active part of business activity, cyberspace/multimedia insurance should be procured. A number of products are available at the following websites:

www.libertymutual.com; www.thehartford.com; www.euclidmanagers.com; www.Insuretrust.com; www.Marsh.com; www.Steadfast.com.au; www.stpaultravelers.com/business_insurance/specialty/products/internet_liability; www.mediaprof.com; www.zurichna.com/safe/erisk.nsf.

Second, endorsements can add liability insurance for a business operated out of the home, but must be specific in stating what policy provisions apply in this context. These endorsements are often limited themselves and are more useful for businesses with a small amount of equipment and space, that don't get visitors or home deliveries.

Third, a business owner's package policy functions like a commercial general liability policy. It provides separate coverage from the homeowners policy, including liability on- and off-premises and coverage for business property, loss of income, and injury. Home-based day care, bakeries, and ventures that involve large amounts of off-site work typically benefit from these forms of policies. Key questions to analyze are:

- How much property will be dedicated to the business;
- Whether it will be in-home or in a separate structure; and
- Whether the policyholder's automobile is used for business purposes. (In the latter instance, a commercial auto policy may be needed.)

Further, home businesses that have employees may be required to carry workers compensation insurance, especially in states such as California, and especially where the person works at a regular salary and works at the policyholder's direction.

V. CONCLUSION

Homeowners policies typically sold through retail personal lines brokers are rarely negotiated, and their scope and effect may not be fully understood by the agents who sell these policies. Coverage counsel can clarify the real-world issues posed by these policies, which require definite answers that an insurer's agent may not be able to provide. ■

PUBLICATIONS BY DAVID A. GAUNTLETT

David A. Gauntlett is the author of *Insurance Coverage of Intellectual Property Assets* published by Aspen Law & Business. The book and supplements are available for \$160.00 plus tax where applicable; shipping and handling are free when full payment is enclosed with the order. To order, call Aspen Law & Business at **1-800-638-8437**.

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- **May 22-23, 2006** – *47th Annual Antitrust Law Institute, PLI Conference* – San Francisco, CA.
- **May 24, 2006** – Presentation at Woodruff-Sawyer, entitled: *Successful Procurement and Use of Insurance to Litigate Intellectual Property Lawsuits*, San Francisco, CA
- **May 25-26, 2006** – *Insurance Coverage 2006, Claim Trends & Litigation, PLI Conference* – New York City, NY.
- **June 21-25, 2006** – *Summer IPL Conference* – Boston, Massachusetts.
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For more information, contact our **Director of Business Development, John S. Keffalas**, at (949) 553-1010 x 208
Email: marketing@gauntlettlaw.com to be added to our newsletter circulation list, or to be removed from that list.

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If you have a topic you would like to see addressed in future issues, please feel free to contact us with your suggestions.

DAVID A. GAUNTLETT	Editor
NAJWA TARZI KARZAI	Asst. Editor
TELEPHONE	(949) 553-1010
EMAIL	marketing@gauntlettlaw.com

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