

## Check and Double-Check

by Joshua Gold

Major advances over the past decade have been embraced by businesses in virtually every sector, except one—the insurance industry. The insurance industry has been slow to change its business practices and nowhere is this more noticeable than in preparation and delivery to policyholders of their property/casualty insurance policies.

One common problem for policyholders is that insurance policies are frequently finalized and delivered by insurers months after policy inception—if they are delivered at all. Another problem is that insurance coverage documents may be riddled with errors. It is not uncommon for an insurance broker to check a policy after issuance and discover significant errors, assuming the broker even reviews the policy in the first place. Many brokers do not, and even among those that do, the process of checking the policy is often delegated to people within the brokerage who have limited knowledge of what coverage is required by the policyholder and what some of the critical negotiations over coverage may have involved during the purchase phase.

Unfortunately, this problem is made worse by the first problem. The longer it takes the insurer to deliver the policy, the more likely it is that the policy will contain errors that are not identified early enough in the process—say, before a claim takes place. This can be devastating. If the broker does not catch the problem, the policyholder is left trying to match up the coverage they thought they purchased months ago on the basis of often confusing and complicated policy language.

Additionally, if the policy contains errors, it can be difficult to bring proof of those errors to a court's attention should a claim dispute evolve in the interim. Insurance company lawyers and lobbyists have done a very good job over the past several decades of convincing courts and regulators that insurance policies are ordinary commercial contracts. As such, insurers regularly argue to courts

that the court should not consider parol-type evidence (evidence outside of the policy form itself) to determine the coverage or intent of the parties.

This means that there is an inconsistency in the insurance policy with the insurance binder, cover note, placing slip, etc. over even fundamental coverage terms, the insurer will likely argue that the erroneous policy controls. While a number of courts have rightly rejected these arguments, others, unfortunately, have condoned these positions.

In one situation involving a large pharmaceutical firm, an insurer agreed to sell a product-recall policy with a special endorsement for certain recall situations not found under the main insuring grants. When the policy was prepared and delivered months after coverage was bound and inception, the special endorsement was nowhere to be found. The policy error was brought to the attention of the insurer, but the first thing the insurer did was deny that the coverage had been offered and paid for. When the insurance binder was brought to the insurer's attention, the insurer then acknowledged the coverage but did not want to re-issue the policy. It was only after another few weeks of insisting upon policy re-issuance that the insurer finally conceded. Had an insurance claim interceded during this wrangling, it is likely that the policyholder would have been in an even more precarious spot.

As such, it is important that policyholders and insurance brokers do some careful checking when the policies arrive to avoid some of the nightmare claim scenarios that many policyholders have had to endure. This lesson is not only important for reviewing primary property/casualty policies. Rather, it applies just as much to those policyholders that have to buy large amounts of insurance coverage. Despite the familiar label of follow form insurance policies, a careful study of many layered insurance programs reveals that these so-called follow form policies actually contain their own insuring provisions, endorsements, conditions and exclusions. Accordingly, no matter how tedious, it is wise for policyholders and brokers to review each and every policy that comprises the insurance program. It can almost be guaranteed that there will be some unpleasant surprises embedded in these insurance policy forms.

The business of insurance needs to become more customer-friendly. Right now, many policyholders feel that when they purchase insurance to protect their businesses, often they are buying nothing more than a future coverage litigation. Some insurance problems, however, begin long before the claim. Being proactive in reviewing and checking the documentation when it finally arrives is worth the effort. ■

