

No. 2018 - 5596

**OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF INSURANCE**

Date: AUG 01 2018

Subject Considered:

AMERICAN ACCESS CASUALTY COMPANY
2211 Butterfield Road, Suite 200
Downers Grove, Illinois 60515-1493

CONSENT ORDER
TDI ENFORCEMENT FILE NOS. 11647 and 13856

General remarks and official action taken:

The subject of this order is whether disciplinary action should be taken against American Access Casualty Company (American Access).

WAIVER

American Access acknowledges that the Texas Insurance Code and other applicable law provide certain rights. American Access waives all of these rights, and any other applicable procedural rights, in consideration of the entry of this consent order. Pursuant to TEX. INS. CODE § 82.055(b), American Access agrees to this consent order with the express reservation that it does not admit to a violation of the Texas Insurance Code or of a rule and that the existence of a violation is in dispute.

FINDINGS OF FACT

1. American Access is a general casualty company holding a certificate of authority to transact business in the state of Texas.

Laws Applicable to Named Driver Policies

2. Section 1952.0545 of the Insurance Code [S.B. 1567 (83rd Leg. R.S., Davis), eff. Sept. 1, 2013], requires insurers and agents to make written and oral disclosures to the applicant or insured, and obtain contemporaneous written confirmation of the oral disclosure, of the nature and limitations of named driver automobile insurance policies. Disclosures must be made before accepting any premium or fee for the named driver policy. S.B. 1567 applies only to named driver policies delivered, issued for delivery, or renewed on or after January 1, 2014.
3. On May 18, 2014, the department adopted amendments to 28 TEX. ADMIN. CODE § 5.204, to partially implement provisions of S.B. 1567 requiring that liability insurers writing a named

driver policy must include the named driver disclosure in the standard proof of motor vehicle liability insurance form, i.e., the "Texas Liability Insurance Card."

4. On January 28, 2015, the department adopted 28 TEX. ADMIN. CODE § 5.208, implementing disclosure requirements in S.B. 1567 applicable to both new and renewal named driver policies.

Named Driver Underwriting Practices

5. On February 25, 2014, the department approved American Access' form TXPOL032014, which is a named driver personal automobile insurance policy, and which form contains the named driver disclosure required by TEX. INS. CODE § 1952.0545.
6. On and after January 28, 2015, American Access delivered, issued for delivery, and renewed named driver policies in six-month and 12-month terms using its approved policy form.
7. American Access collects premium and fees for its new and renewal named driver policies in person, by telephone, and online through its website. American Access collects premium and fees by cash, check, money order, and credit card. For online transactions, American Access only accepts credit card payment.
8. For renewal named driver policies, American Access also collects premium and fees through automatic payment plans, including automatic withdrawal from the insured's bank account, and automatic, recurring payments made by credit or debit card.
9. American Access' policies, procedures, and practices with respect to renewals of named driver policies are or were as follows:
 - a. Approximately fifteen days before the named driver policy expires, American Access sends the insured a renewal packet containing:
 - i. a renewal offer page;
 - ii. a summary of coverage limitations and named driver disclosure acknowledgement form (the acknowledgement);
 - iii. a customer letter describing changes to the insured's coverage under the named driver policy as compared to its previous version;¹
 - iv. an invoice for premium at the named driver premium rate;
 - v. the insured's future declarations page; and,
 - vi. the Texas Liability Insurance Card for each insured vehicle showing the named driver disclosure.
 - b. Between January 28, 2015 and March 1, 2018, the listed policy form numbers in its renewal offers and declarations pages were incorrect and inconsistent with the actual policy form numbers attached to and forming American Access' named driver policies. American Access

¹ American Access began using this customer letter with policies expiring on and after December 4, 2013, and which were written under form TXPOL052013. Usage of the customer letter began prior to the department's approval of the policy form's replacement, form TXPOL032014, on February 25, 2014.

represents that the correct named driver policy forms were correctly programmed within its policy delivery system as the actual deliverable content to named driver insureds.

- c. Neither the invoice, nor anything else in the renewal packet, instructs the insured on how the insurer will make the oral disclosure to the insured, when to return the signed acknowledgement, or how to return it.
- d. American Access represents that a checkbox must be ticked by the agent on the payment screen in its point-of-sale system before the system will accept payment for or issue a named driver policy.
- e. Beginning March 2, 2016, language was added to the checkbox to indicate the agent's provision of the written and oral disclosures. At that time, American Access' system was also updated to link the signed copy of the acknowledgement to the payment screen. When the signed acknowledgment is not processed in the system, the words "Missing Limited Liability" are shown in red text.
- f. Beginning March 24, 2016, electronic signature capability was added to American Access' system to allow insureds to electronically confirm the provision of the written and oral disclosures in person or by email. With this capability, American Access may seek to have the insured: electronically sign the acknowledgement in person; electronically sign and return the acknowledgment by email; or provide wet signatures for submission of the acknowledgement by fax, either immediately or at a later time.
- g. If the insured appears in person to pay for the renewal, the agent makes the oral disclosure live and the insured electronically signs the acknowledgment.
- h. If the insured pays for the renewal by mail, there is no method contemplated for the agent to make the oral disclosure should the insured sign and return the acknowledgment without an agent's prompting.
- i. If the insured pays for the renewal by telephone, American Access instructs its agents to make the oral disclosure to the insured, to email the acknowledgment to the insured, and to ask the insured to sign and return it as soon as possible. American Access instructs its agents to accept payment after the email has been sent, but before receipt of the signed acknowledgement.
- j. If the insured pays for the renewal online, the oral disclosure is delivered as a recording, and the insured may choose to sign and return the acknowledgment received in the renewal packet by mail.
- k. If the insured either submits the signed acknowledgement electronically or later provides it by hard copy, fax, or mail, the signed form is uploaded in American Access' system, and the "Missing Limited Liability" text disappears from the payment screen.

- l. Beginning August 18, 2016, American Access began generating reports for its agents to list renewal policies which are missing the signed acknowledgment for the current policy term. In addition, the report lists upcoming renewal policies which are enrolled in an automatic payment plan so that agents can attempt to secure a signed acknowledgment for the new term before renewal.
 - m. Even if the insured does not return a signed copy of the acknowledgment, American Access accepts payment of premium and fees from the insured and renews the policy, on its face, as a named driver policy.
 - n. For purposes of handling and processing claims under policies where the insured has not returned a signed acknowledgment, American Access contends it treats the policy as if it is not a named driver policy, i.e., as if it is a policy that provides coverage to all household residents not named on the policy.
 - o. Moreover, American Access does not deliver or issue for delivery to the insured a new non-named driver policy, or a new Texas Liability Insurance Card not showing the named driver disclosure warning. In other words, when renewing the named driver policy, American Access does not also inform the named insured that should the insured fail to return the signed acknowledgment, the terms of the insured's contract change to include broader coverage for household residents that are not named on the policy. Thus, first and third party claimants may be misled as to the actual terms of coverage.
10. Based upon these policies, procedures, and practices, American Access is unilaterally, of its own volition, and without a request from the insured, treating a named driver policy as a non-named driver policy (i.e., one with broader coverage for household residents not named on the policy), and accepting premium or fees for the named driver policies when it has not made the oral disclosure, received the signed copy of the written disclosure, and confirmed contemporaneously in writing the provision of the oral disclosure.
11. The department contends American Access does not properly renew named driver policies with terms of less than one year so as to allow them to accrue 12 months of continuous coverage.
12. The department contends that on and after January 28, 2015, American Access' practices, as applied to any six-month named driver policy which had or has not yet reached any 12 month anniversary of the original effective date of the policy, constitute a "non-renewal" of those named driver policies.
13. The Texas Liability Insurance Cards provided to named insureds of American Access' named driver policies includes the requisite disclosure on the front of the card. However, the department contends that disclosure was not "conspicuous," as that term is defined in TEX. BUS. & COM. CODE § 1.201(b)(10), because the disclosure's font was smaller in size than the surrounding text, did not contrast with surrounding text, and was not set off by symbols or other marks that called attention to the language. American Access voluntarily revised the disclosure in its Texas Liability Insurance Cards beginning on or about May 16, 2018, setting the disclosure in larger type size and in contrast with the surrounding text.

14. As of January 31, 2017, American Access had 103,418 named driver policies in force, of which 77% were six-month terms, and 23% were 12-month terms.
15. On or about March 6, 2017, American Access began programming an internal system update to reconcile form numbers in the fields used in its renewal offers and declarations pages to correctly show the form numbers delivered and forming its named driver policies.
16. Beginning January 1, 2018, American Access voluntarily ceased writing new named driver policies with terms of less than one year, and began to transition all in force named driver policies with six-month terms to 12-month terms when each such policy reached any 12-month anniversary of its original effective date.
17. On or before March 1, 2018, American Access completed all necessary programming corrections and began to print the correct form numbers in its renewal offers and declaration pages for its named driver policies regardless of term length.
18. In an effort to settle the named driver allegations, to avoid the expense and uncertainty of litigation, and to otherwise achieve compliance, American Access proposes and voluntarily agrees that to the extent it has not already done so, on and after March 1, 2018, it will make renewal offers of only 12-month terms upon any 12-month anniversary of the original effective date of any named driver policy.
19. As of May 1, 2018, American Access had 135,260 named driver policies in force, of which 41% were six-month terms, and 59% were 12-month terms.
20. American Access expressly consents to the terms of this order on the condition that it reserves the right to change its business model for named driver policies in the event that the Texas Legislature enacts any changes to TEX. INS. CODE § 1952.0545, and/or if the department adopts any changes to its rules related to named driver policies. Should American Access exercise this right, it also expressly agrees and understands that any such revisions to its named driver business model must conform and comply with all applicable Texas insurance laws.

Steering Claimants to Contracted Repair Facilities

21. In 2017, the department received complaints that American Access was informing both first and third party claimants that it would not pay the labor and/or refinishing rates being charged by the claimant's chosen repair facility.
22. American Access provides all claimants with a list of five of its contracted "direct repair facilities." The list identifies the name and address of each body shop, together with the distance of the body shop from the claimant's zip code. American Access contends that its direct repair facilities offer guaranteed work on vehicles insured by American Access, and on vehicles belonging to persons with third-party claims against American Access' policyholders.
23. Notices that American Access provides to first and third party claimants state that although the claimant has the right to select a repair facility of their choice, it contracts with several repair

- facilities in the area that will repair the vehicle pursuant to American Access' contracted rates and estimates. American Access further informs the claimants they will be responsible for paying the difference if the claimant chooses a body shop that charges rates higher than American Access' contracted "direct repair facilities."
24. American Access has contracted with approximately 40 different vehicle repair shops or facilities in Texas since 2012, and memorializes "rules and rates" of payment for labor and materials in those contracts. All but three of 42 contracts provided to the department have identical labor rates for both body work and paint.
 25. Complaints made to the department allege that the labor and refinishing rates for the claimants' chosen repair facilities are higher than the rates set by American Access in its contracts with its "direct repair facilities."
 26. The department contends American Access engages in steering by contractually setting an artificial "market rate" for the claimant's area, and informing claimants that if they choose a repair shop that does not honor American Access' contracted rate, that the claimant must pay the difference.
 27. American Access disagrees with the department's contentions that it has engaged in steering. Nevertheless, in March 2018, American Access voluntarily revised its first and third party claimant notices regarding the availability of its "direct repair facilities" to specifically remove the language stating that claimants must pay the difference if they choose a repair shop that does not honor American Access' contracted rates.

Betterment Deductions Taken in First Party Claims

28. In 2017, the department received complaints showing that when American Access paid first party claims settlements it deducted amounts for the "betterment" of the covered vehicle.
29. When the repair or replacement of "wear and tear" items (specifically tires, batteries, and convertible tops), resulted in the value of a covered vehicle being increased or enhanced to an amount above that of its pre-loss value, American Access deducted certain percentages from its claim payments which it believed represented the difference between the fair market value of the vehicle after such repairs and its pre-loss value.
30. To estimate betterment deductions, American Access provided its adjusters with a written schedule identifying the percentages to be deducted from the cost of the "wear and tear" items based upon the original part's remaining life, tread depth, or age at the time of the loss, and identifying a maximum betterment deduction of 75% applicable to the "wear and tear" items.
31. Between January 1, 2015 and October 4, 2017, American Access represents it took betterment deductions in 1,072 first party claims payments, which deductions totaled \$103,502.87.
32. American Access has informed the department that it voluntarily ceased taking betterment deductions in first party claims payments in October 2017. Further, American Access represents

it has instructed its adjusters to cease the practice, and coached its supervisors to perform additional quality checks to ensure that such deductions will not be taken in the future.

33. American Access also notified the department that it has taken action to compensate all policyholders and beneficiaries affected by the betterment deductions. Specifically, American Access identified all of its first party automobile insurance policy claims payments in Texas on or after January 1, 2015 through October 4, 2017 (the "Review Period"), from which payments it deducted any amount for "betterment" of the covered vehicle. Any such amount deducted as betterment from a first party claim settlement within the Review Period constituted an "Underpayment"; and in February 2018, American Access made restitution payments, in the form of a company check or account credit to each such policyholder or their beneficiary identified within the Review Period as having an Underpayment (the "Qualifying Policyholders"). The restitution payments included the dollar amount of Underpayment, plus simple interest in the amount of five percent per annum.

Unfair Claims Settlement Practice

34. In 2017, the department received one complaint showing that after American Access had accepted liability for a third party claim, it did not issue any payment on the claim until nearly four months after its preliminary repair estimate was written on the claimant's vehicle. Specifically, American Access refused to issue payment until it had received a W-9 tax form signed by the claimant's chosen body shop.

CONCLUSIONS OF LAW

1. The commissioner has jurisdiction over this matter pursuant to TEX. INS. CODE §§ 82.051 – 82.055, 84.021 – 84.044, 801.051 – 801.053, and 861.101 – 861.102.
2. The commissioner has the authority to informally dispose of this matter as set forth in TEX. GOV'T CODE § 2001.056, TEX. INS. CODE § 82.055, and 28 TEX. ADMIN. CODE § 1.47.
3. American Access has knowingly and voluntarily waived all procedural rights to which it may have been entitled regarding the entry of this order, including, but not limited to, issuance and service of notice of intent to institute disciplinary action, notice of hearing, a public hearing, a proposal for decision, rehearing by the commissioner, and judicial review.
4. American Access violated TEX. INS. CODE § 1952.0545, and 28 TEX. ADMIN. CODE § 5.208 by: accepting a premium or fee for renewals of named driver policies without making the oral disclosure, without receiving the signed copy of the written disclosure, and failing to confirm contemporaneously in writing the provision of the oral disclosure, on and after January 28, 2015; and, by unilaterally expanding insureds' coverage at renewal without the insureds' request or consent when those insureds' policies had not yet reached any 12-month anniversary of the original effective date of the named driver policy.
5. American Access violated TEX. INS. CODE § 525.002(a)(1)(A) and 28 TEX. ADMIN. CODE § 5.204(b)-(c) on and after September 1, 2015, by failing to timely deliver or issue for delivery a non-named driver policy and a Texas Liability Insurance Card not showing the named driver

disclosure to insureds when it did not receive the signed copy of the written disclosure and the contemporaneous confirmation of the oral disclosure, where those insureds had already reached any 12-month anniversary of the original effective date of their named driver policy.

6. American Access violated TEX. INS. CODE § 1952.0545(d) and 28 TEX. ADMIN. CODE §§ 5.204(c)(9) and 5.208(c)(5) by failing to conspicuously identify the required disclosure on the front of its Texas Liability Insurance Cards.
7. American Access violated TEX. INS. CODE §§ 1952.301(a)(2) and (b), and 1952.302(2)-(3), by interfering in the policy beneficiary or third party claimant's right to choose a repair person or facility.
8. American Access violated TEX. INS. CODE §§ 1952.301(a)(1) and 542.003(b)(3)-(b)(4) by taking betterment deductions when settling first party personal automobile claims.
9. American Access violated TEX. INS. CODE § 542.003(b)(4) by not attempting in good faith to effect a prompt, fair, and equitable settlement of a third party claim in which liability was reasonably clear.
10. Pursuant to TEX. INS. CODE § 82.053, the commissioner is authorized to direct American Access to make complete restitution to each policyholder harmed by the violations.

It is ordered that American Access Casualty Company comply with the following:

- a. American Access Casualty Company must comply with its voluntary agreement described in Finding of Fact No. 18.
- b. Not later than April 1, 2019, American Access must provide the department with:
 - i. the date when its last named driver policy with a six-month term non-renews or expires; and,
 - ii. the number of named driver policies in force on March 1, 2019, including a count of those with term lengths other than 12-months, if any.
- c. On and after March 1, 2019, American Access must renew, at the request or option of the insured, all named driver personal automobile insurance policies in accord with Texas law, so as to allow each insured to accumulate a minimum of 12 months of continuous coverage.
- d. On and after March 1, 2019, American Access must cease and desist at renewal the practice of unilaterally and of its own volition, treating named driver policies as non-named driver policies with broader coverage for household residents not named on the policy, and must cease and desist accepting premium or fees for named driver policies when it has not made the oral disclosure, received the signed copy of the written disclosure, and confirmed contemporaneously in writing the provision of the oral disclosure.

- e. To the extent it has not already done so, American Access must cease and desist from the practice of deducting betterment in first party claims payments.

It is further ordered that American Access pay restitution as outlined in Finding of Fact No. 33 and comply with the following:

- a. Any restitution checks that are returned to American Access with an address correction must be promptly resent to the correct address. Funds from any restitution checks that are returned thereafter for incorrect addresses and from checks that are not negotiated must be delivered to the comptroller pursuant to the procedures set forth in TEX. PROP. CODE §§ 72.001 *et. seq.* American Access must copy the department on any correspondence pertaining to abandoned funds that is sent to the comptroller.
- b. On or before the date of this order, American Access must report the restitution paid to the Qualifying Policyholders, if it has not already done so, by submitting a complete and sortable electronic spreadsheet to the department. The spreadsheet must contain the following information:
 - i. policy number;
 - ii. policyholder name;
 - iii. policyholder address;
 - iv. effective date of the policy;
 - v. expiration date of the policy;
 - vi. date of loss;
 - vii. claim number;
 - viii. total amount of original claim payment(s);
 - ix. amount of Underpayment;
 - x. dollar amount of simple interest;
 - xi. amount of Underpayment plus interest;
 - xii. date(s) of mailing of restitution check or issuance of credit;
 - xiii. the total sum of all Underpayments;
 - xiv. the total sum of all simple interest; and,
 - xv. the total sum of all restitution paid (total Underpayments plus the total of all simple interest).
- c. All information agreed and required to be submitted to the department under the terms of this order must be sent electronically to both: rachel.cloyd@tdi.texas.gov and catherine.bell@tdi.texas.gov, or their successors.

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COMMISSIONER'S ORDER
American Access Casualty Company
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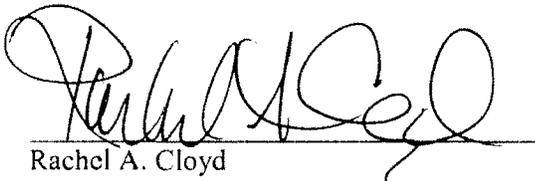
It is further ordered that American Access must pay an administrative penalty of \$320,000. The penalty payment is due on or before 30 days from the date of this order. The payment must be paid by cashier's check or money order made payable to the "State of Texas" and transmitted to the Texas Department of Insurance, Attn: Enforcement Section, Division 60851, MC 9999, P.O. Box 149104, Austin, Texas 78714-9104.

It is further ordered that if it is found after a public hearing that American Access has failed to comply with any of the terms of this Order, American Access may be subject to further action by the commissioner under the provisions of TEX. INS. CODE § 82.054.



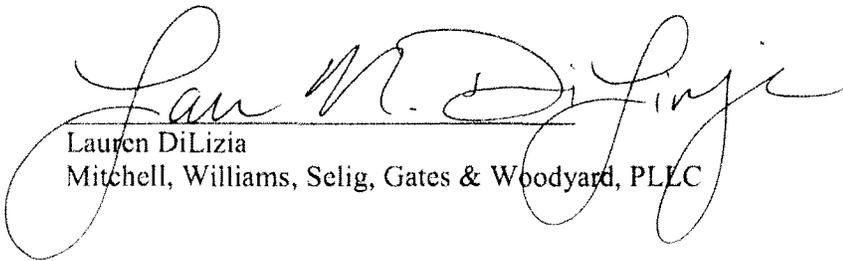
Kent C. Sullivan
Commissioner of Insurance

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