

Independent Agency Ownership of Expirations: Assessment of Current Challenges, and Considerations for Continuing Action

PIA National’s Executive Summary February 2008

This report and its contents are not provided, intended and/or to be used as a substitute for specific legal counsel concerning any of the matters addressed. The report examines many of the issues affecting PIA member agencies’ ownership and control of their agency’s main asset, their insurance book of business, including related data, files, records and agency unique practices in conducting their business of insurance. Like the issues it addresses, this content is dynamic and subject to differences between and among states’ laws, the specific nature of the agency operations and the particular circumstance being addressed at the time. PIA will add to, expand the scope of, continue to perfect the information contained; include/reference related subjects; and provide tools needed to support effective advocacy. Trade Mark protects this report and its content and no replication of this information in any form is permitted without the prior written consent from PIA National.

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Section I – Executive Summary

Overview

The Task Force has confirmed that PIA members currently are confronting an increased number of challenges in the area of agency ownership rights. These challenges are also widening in their individual, as well as collective, scope of adverse impact to the fundamentals of agency ownership rights such as recognition and management of ownership interests.

In evaluating these challenges, the Task Force has come across market data demonstrating that too many critical groups:

- Are unclear that and as to how property law applies to and affects agency ownership rights.
- Are unclear, and thus unable (or sometimes unwilling) to form a consensus as to what constitutes the entire “expirations” asset that belongs to the independent agency.
- Do not recognize “control” as a critical element of agency ownership rights.

Also among the “critical groups” is PIA agency owners themselves. Too often, independent agencies shy away from or overlook regular, public, assertive, and/or effective demonstration of their ownership rights.

This report divides these challenges and threats into five major “issue segments.” Each issue segment discusses major topics of interest as to what the issue is; why and how it is affecting ownership; the complications caused by; and, in many cases, what steps can be taken to

improve or better manage these circumstances. A number of specific illustrations are used (made available in the final report). The full final report was released at the end of September 2007, at which time the Task Force was dissolved.

Executive Summary Conclusions

The scale, scope and number of challenges that agencies owners face in this area will continue to increase in the near future. This creates a potential for material adverse effects and interferences with PIA Agency Ownership Rights.

The core nature of how these threats press agency interests and the people involved have greatly changed and present much more complex and sophisticated challenges, that are somewhat similar to playing a multi-dimensional chess game.

Advocacy for and of Agency Ownership Interests of PIA members continues to be the fundamental stewardship responsibility of the PIA organization.

Agencies need to develop better internal *commercial* business entity and *insurance* agency operation practices consistent with, comprehensive of, and that better consideration and underscore the agency's ownership and control of its insurance agency business assets.

To best support independent agency interests in this ever evolving and active area, the PIA organization and PIA members must share the same knowledge base, legal presentations and goals for outcomes in a coordinated and deliberate effort to protect PIA members

Executive Summary of Ongoing Actions

With the publication of this final report, the Task Force believes it has completed its assignment and automatically dissolved as of September 30, 2007.

In fiscal year 2008, PIA National President and Board should decide what course of action PIA National will take to further develop this core value of and for independent insurance agencies and PIA.

PIA National should assign continuing activities to a working group (perhaps Business Issues Committee (BIC)) that includes PIA National standing policy committee and representatives from among the State Presidents and State Executives (staff) groups to assist in further vetting the report and shaping the additional PIA commitments.

It is best if all in PIA have access to the same legal grounding and presentations of PIA agencies' ownership interests, and mutually maintain an up-to-date comprehensive information archive from which their coordinated, complementary actions stem, and in which all victories repose.

PIA National should undertake a public education campaign to reach critical audiences (i.e. insurers, wholesalers, regulators, and PIA members), making it clear that PIA National will continue to press for the respect and consideration of these rights of and for PIA members.

The report provides the basis for a PIA National information series in *PIA Connection* as well as other publications. It also suggests how PIA National should modify its agency review service, thus providing a more useful final product for members' reference. A suggested first-step implementation action follows the report.

Synopsis of the Issue Areas

1 – Legal Fundamentals of Agency Ownership

An overarching challenge is the increased lack of sufficient understanding regarding the fundamental principles of why agencies own, what they own, and what is expected because they own. As earlier stated in the report, these challenges arise in the most fundamental aspects of and throughout agency ownership interests. These concepts are essential to the successful continuation of the independent agency system, and serve as the basis for the discussion and illustrations in this report.

Illustrations:

- Property Law and Agency Ownership
- History of Agency Ownership Interests
- Historical Case Law Matrix

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2 – Agency Agreements

The courts expect drafters of contracts, especially those with greater power and leverage in the marketplace over the other party know, to comply with, and comport with existing laws and obligations, as well as to state clearly and completely the provisions in the agreement, especially those that impose obligations on the agency (i.e., the other party).

However, an increased number of carrier contracting *fail to meet these basic tenets of contract law and are, instead, grossly impaired.*

A. Increased Number in the Types of Agreements

In recent years, there has been a dramatic increase in the variety of agreements that agencies are signing. A number of these insurance entities (especially those moving from captive to independent agency appointments) had never heard of these issues when contracting with “agents,” used counsel that was not aware of these issues, or were new at using a contract for the insurance transactions taking place between themselves and independent insurance agencies. The end result for PIA agencies has been a jumbled mess of confusing, yet executed agreements.

B. Multiple Agreements

Additionally, carriers (and other insuring entities) are executing multiple agreements with individual agencies to segregate and define their operative sub-entities and outline their insuring programs. These multi-agreements often are issued and executed independently of each other.

With each additional agreement that an agency signs, there is the chance that the agency's ownership rights will be defined more narrowly or in a way that conflicts with a preceding agreement, even when these agreements are issued by or under the same parent entity.

C. Body of the Main Agency Agreement

Expressed recognition and treatment of agency ownership rights are no longer confined within a single provision in an agency-carrier agreement. Although most agreements still include a provision titled "ownership rights," it is neither exhaustive nor may it be superior to other areas of the agreement. Listed below are the provisions that typically address agency ownership rights:

- Ownership
- Control of Records
- Right to Sell
- Indemnification
- Jurisdiction
- Termination of the Agreement

D. Addenda and Standard Operating Procedures

Carriers are executing a growing number of addenda to their agency agreements. These addenda address a wide range of topics. Currently, basic information that was traditionally included and detailed in the main body of the agreement is being extracted and exported from it.

Both the rules themselves, as well as penalties for infractions, have the potential to threaten agency ownership rights. The following subjects are among the list of topics that currently appear in and are modified by addenda or "business rules."

- Underwriting
- Business Practice
- Technology Processing
- Accounting
- Compliance

E. Related Contracts

Unless it is made expressly clear in the master and subsequent "subagreements" (or made clear by argument), courts treat these contracts as self-contained agreements instead of reading them as a collective governance of all the specific terms and conditions outlined within the four corners of the "main master controlling" agency agreement. Even when courts attempt to bring the collection together and consider matters as a whole, questions may arise because of varying issuance dates – and the presumption that the latest agreement's provisions and practices trump previous understandings unless otherwise specifically stated. The following topics are likely to be dealt with in a related contract format:

- Profit Sharing
- Service Centers
- Technology Processing

- Technology Purchasing Agreement
- Admitted vs. E&S vs. Life and Health Specialty Lines
- Special Joint Marketing
- Data Security and Breach Compliance Procedures

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Illustrations:

Effects on Ownership Provisions
Modified PIA Agency Review Service

3 – Agency Operations

The way PIA members structure their agencies and classify their relationships with internal agency staff can have a tremendous impact on ownership rights. Independent agency owners (and their lawyers) need to know how the following apply or may apply to their agency and ownership interests, as well as how to handle:

- Member Knowledge
- Quality of Guidelines
- Employee Manuals, Position, Practices
- Employee-Producer Agreements
- Independent Contractor Agreement
- Changes/Classification in lines

Illustrations:

To Use or NOT to Use Employee Producer Contracts
Agency Issued Producer Contracts
Use of AORs/BORs

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4 – Law and Government Interference

A. Government Actions

Government authorities seem not to be aware of our members' ownership and asset rights, issue mandates that greatly distort, interfere with, and threaten the PIA agency and its ownership and control of its agency assets.

B. All Advocacy Efforts Aren't Equal

Some have advocated directly legislating expressed protection of agency ownership rights in a straightforward, *per se* manner. Some efforts have been undertaken by other producer organizations. Most often the final legislative results, while unintended, nonetheless have created potential for confusion and can be used to try and undermine what is otherwise extraordinary strong, solid common law standing of PIA members' rights.

C. Consistency in Advocacy

Legislative and regulatory efforts must maximize the possibility of good outcomes that support ownership rights and complement the strong common law foundation. The Task Force found that positive changes to problematic laws or official interpretations could be accomplished by acting early on in clearly defined and narrow circumstances. Members have better success with smaller issues when our advocacy position is consistent with the documented legal basis for agency ownership.

Illustrations:

FCC Do-Not-Call Rule

Surety Bond Producers in Protecting Their Agency Ownership Rights

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5 – Carrier-Agency Relationship

The sum concern of this trend is that carriers need to remember that independent insurance agencies' book of business and records do not become the property of the insurer just to ease a carrier compliance program.

Destroy Agency Assets: No matter what the compliance requirement imposed by law on the insurer, a carrier may not instruct an agency or agent to destroy files of any sort, much less control how and when. As their owned and controlled asset agencies legally cannot destroy their owned and controlled asset at the command of a third party.

Protect MY Records: Too often carriers require in their agency agreements or issue “business rules and instructions” that agencies retain records belonging to the insurer as a part of the carrier’s compliance procedures under the insurer’s record-keeping requirements.

Taking Agency Property: In another example, a carrier openly competed with its terminating agencies by complying with a state’s requirement that a carrier issue notice to policyholders of agency termination.

What Ownership? As a direct result of the new privacy law and public policy discussions, agencies weren’t even considered an interested party to be notified if their customers’ data was breached. Insurers explained to agents that under these breach regulations, such information can be provided directly only to those “that own” the data or are the subject of the data possibly in peril. Therefore, the carrier *could not share these details* with its agents.

No Agency Agreements: It is common practice for life and health insurers to appoint and contract only with the individual licensed and selling the products. This contracting practice sidesteps the agency and requires the individual to sign an agreement that makes clear the insurer “owns” the business.

Illustrations:

Carrier HIPAA Imposed Compliance

Carrier Control of Records

Carrier Notices to Policyholders Regarding Terminating Agency

Carrier Notice of Breach Laws

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Life or Health Insurer Agency Agreement Practices

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