

INSURANCE

Pete Ricketts

Governor

Bruce R. Rame

Director

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A Message from the Director....

Responding to the Outbreak of COVID-19



Bruce R. Rame
Director of Insurance

The Nebraska Department of Insurance (NDOI) has heard from numerous insurance companies that have responded to the outbreak of COVID-19. During this pandemic, many insurers have made decisions to accommodate policyholders in various different ways. Enabling telehealth, assisting the medical community, extending cancellation and non-renewals, providing premium refunds, enhancing consumer facing websites, and supporting local social service organizations are a few of the ways that insurers have demonstrated their leadership in responding to this difficult situation.

These measures have come at the same time that insurers have dealt with protecting the health of their own team members through such measures as work from home. I believe I can speak for fellow Nebraskans that such measures are much appreciated, and I thank you.

Please know that the NDOI is here and open for business. Many of our teammates may be working from home. The NDOI is dedicated to keeping everyone informed on how COVID-19 impacts consumers and insurance companies. The NDOI team is working to provide as much flexibility as is possible. Several consumer alerts and industry guidelines have been issued and posted to our website as a result of the pandemic. The consumer alerts and industry guidelines can be found on the NDOI website under the **doi.nebraska.gov/coronavirus-covid-19-information**. To receive an alert when a new posting has been made to the NDOI website, sign up to choose one or all of the categories shown at **doi.nebraska.gov/get-update-notices**.

The current situation and how it will unfold is uncertain. I echo Governor Ricketts in urging everyone to stay home, stay healthy, and stay connected until there is a resolution to this crisis.

Martin Swanson has been appointed by Director Ramge to the position of Deputy Director & General Counsel, effective April 13, 2020.

New Deputy Director/General Counsel Named

Director Bruce Ramge has appointed Martin Swanson to the position of Deputy Director and General Counsel, effective April 13, 2020. Martin began his employment with the Department of Insurance as health policy counsel in 2003 and has served as Health Policy Administrator since 2013.

Martin holds a Bachelor of Arts degree in Political Science and History and a Juris Doctorate from Creighton University. Martin can be reached at martin.swanson@nebraska.gov.

LIFE & HEALTH DIVISION

Guidance has been issued that allows states the option to extend transitional policies for individual and small group health insurance plans.

Extension of Transitional Policies

On January 31, 2020, the Center for Consumer Information and Insurance Oversight (CCIIO) issued guidance that allows the states the option to extend transitional policies for individual and small group health insurance plans to policy years beginning on or before October 1, 2021 provided that all policies end by January 1, 2022. The bulletin from CCIIO can be viewed at <https://www.cms.gov/files/document/extension-limited-non-enforcement-policy-through-calendar-year-2021.pdf>.

Nebraska will allow transitional policies for both the individual and small group health insurance markets to continue until January 1, 2022.

Pursuant to the option provided to the states by CCIIO, the State of Nebraska will allow transitional policies, for both the individual and small group health insurance markets, to continue until January 1, 2022. A carrier is not required to continue to offer the transitional policies and may discontinue them, subject to state and federal rules on discontinuance, at their discretion. The Department would advise insurers to continue to monitor CCIIO's website for any subsequent guidance that may be issued on this subject and to follow it accordingly.

As a reminder, all other plans issued after January 1, 2014 must be compliant with the Affordable Care Act (ACA).

Any questions concerning this notice may be directed to Martin Swanson at martin.swanson@nebraska.gov, or Laura Arp at laura.arp@nebraska.gov. Both Swanson and Arp may also be reached by calling 402-471-2201.

The NDOI and DHHS read the exception to apply so long as Governor Ricketts' declared state of emergency related to COVID-19 is in effect.

Amendatory filings and prior approvals for accommodation practices will not be required by the Department at this time, however it is requested that an informational email be sent to the division.

Health insurers have responded to COVID-19 by voluntarily expanding coverage beyond what is mandated by the federal government.

The amended bulletin provides dates and corresponding actions that relate to plan year 2021.

Telehealth Requirement, Exception for Emergencies

The Nebraska Telehealth Act requires that a written statement be signed by a patient prior to an initial telehealth consultation. There is an exception to the written statement requirement for an emergency situation in which the patient is unable to sign the written statement prior to an initial consultation.

The Department of Insurance (NDOI) and Department of Health and Human Services (DHHS) read this exception to apply so long as Governor Ricketts' declared state of emergency related to COVID-19 is in effect. Click [here](#) for a copy of the Notice issued by Director Ramage on March 23 regarding this matter.

Insurer Accommodations to Policyholders

If an insurer administers accommodations on a consistent and fair basis, the Department does not consider them to be violations of the Nebraska Unfair Trade Practices Act, the Nebraska Unfair Claims Settlement Practices Act nor associated regulations. Amendatory filings and prior approvals for accommodation practices will not be required by the Department at this time, however it is requested that an informational **email** be sent to the Department's life and health division. A full copy of Director Ramage's Notice to insurers can be found [here](#).

Telehealth Questions and Responses

Health insurers have responded to COVID-19 by voluntarily expanding coverage beyond what is mandated by the federal government. Insurers' expansion of telehealth coverage encourages people to stay home, stay safe, and stay connected to their health care providers, whenever telehealth is medically appropriate. The Department received several inquiries from providers regarding insurers' expanded telehealth coverage, and facilitated this survey to provide clarity. A full copy of the **Telehealth Questions and Responses** can be found on the Department's website.

CB-130 (Amended)

CB-130 (Amended) was issued to provide guidance for filers of individual, small group and stand-alone dental plans (SADP), offered on and off the Federal Facilitated Marketplace, that wish to issue or renew plans in Plan Year 2021. The amended bulletin provides dates and corresponding actions that relate to plan year 2021. A copy of **CB-130 (Amended)**, dated April 2, 2020, can be found on the Department's website at doi.nebraska.gov.

PRODUCER LICENSING DIVISION

Remotely-Proctored Insurance Exams

The Nebraska Department of Insurance is now offering remotely-proctored producer insurance exams through a new Prometric program called ProProctor™.

ProProctor™ offers candidates a secure, remotely proctored, online testing option that can be utilized in the convenience of their home or office. ProProctor™ provides 24/7 access, allowing candidates to test wherever and whenever is most convenient.

In combination with our traditional testing centers, this new remotely-proctored option gives Nebraska insurance candidates more choices on how, when and where they would like to complete their exam. More information on the program can be found on Prometric's Nebraska Insurance **website page**.

Please note that there is currently an influx of candidates, and capacity is limited. Prometric is in the process of onboarding new proctors and ramping up testing capacity as quickly as possible.

Questions regarding exams may be directed to Kevin Schlautman, at kevin.schlautman@nebraska.gov.

2020 Appointment Renewal Process

The appointment renewal date begins on May 1, 2020 and ends on July 31, 2020. All appointment renewals must be filed electronically through the National Insurance Producer Registry (NIPR) at www.nipr.com/renWelcome.htm.

Invoices will be available through 4:00 PM CDT on July 31, 2019.

The NIPR has posted details on key information, payments, transaction fees, and fees charged by other states for retaliatory purposes. Specific Nebraska renewal information can be found on the NIPR website by clicking **here**.

Questions regarding the renewal process may be directed to NIPR Customer Service at customerservice@nipr.com or by calling 855-674-6477. Questions can also be sent to the Department of Insurance at doi.licensing@nebraska.gov or by calling the Licensing Division at 402-471-4913.

Remotely-proctored producer insurance exams are now being offered 24/7 through a new Prometric program called ProProctor™.

ProProctor™ gives Nebraska insurance candidates more choices on how, when and where they would like to complete their exam.

The appointment renewal date begins on May 1, 2020 and ends on July 31, 2020.

All appointment renewals must be filed electronically through the NIPR.

PROPERTY & CASUALTY DIVISION

Crime Form and Rate Filing Guidance

The division's quarterly guidance documents can be found on the Department's website under the dropdown for Insurers.

The division has posted its first quarter guidance document, "Crime Form and Rate Filing Requirements." Quarterly guidance documents are posted on the **Department's website** under "Insurers/Property and Casualty Information/Filing Guidance." Any questions concerning the guidance documents may be directed to Connie Van Slyke at connie.vanslyke@nebraska.gov.

Notice Issued Regarding Insurer Accommodations

At this time, amendatory filings and prior approvals for accommodation practices will not be required by the Department, however, an informational email to the division is requested.

If an insurer administers accommodations on a consistent and fair basis, the Department does not consider them to be violations of the Nebraska Unfair Trade Practices Act, the Nebraska Unfair Claims Settlement Practices Act nor associated regulations. Amendatory filings and prior approvals for accommodation practices will not be required by the Department at this time, however, an informational **email** to the property and casualty division is requested.

A full copy of the Director Ramage's **March 27 Notice** to insurers can be found on the NDOI website.

FRAUD DIVISION

Annual Insurance Fraud Conference

Due to COVID-19, there is still uncertainty as to whether the annual fraud conference hosted by the Insurance Fraud Prevention Division (IFPD) will continue as planned on August 5. The IFPD hopes to make a decision by the end of May.

Roofing Scam Reported Following Recent Hailstorms

Parts of Southeast Nebraska sustained a hailstorm in April resulting in substantial property damage to some home and business owners.

The Insurance Fraud Prevention Division (IFPD) recently received information from an insurer regarding a roofing company marketing the Lincoln area. Adjusters from the company are alleging roofs have been totaled because of the storm. Similar activity has been reported in the past following storms. Homeowners and insurers are finding that no damage has occurred. The IFPD recommends due diligence on the part of homeowners and insurers in reviewing these claims. Report insurance fraud to DOI.FraudPrevention@Nebraska.gov.

Help Fight Fraud—Stop the Spread

Insurance scams are especially fast spreading—and dangerous, as recently noted by the Coalition Against Insurance Fraud. The IFPD has been working hard at trying to get the message out to Nebraskans through the use of consumer alerts. In addition to the following top five COVID-19 scams, the Coalition has valuable information for policymakers, fraud fighters, and many others on its website at www.insurancefraud.org/COVID-19.htm.

Don't Let COVID-19 Infect You With Insurance Fraud

TOP FIVE COVID-19 SCAMS

1 Fake “corona” insurance

Watch for fake health-insurance agents selling low-priced insurance to cover coronavirus “treatment.” Scammers may try to sell low-cost “corona insurance” or health policies that claim to have a coverage provision. Simply hang up on robocalls.

2 Cancelled health insurance

Beware of bogus calls warning you that your health insurance was “cancelled.” You may be given a toll-free line to call, or urged to click a link that installs malware. Most of these are attempts to steal your personal information.

3 Corona medicines, tests

Scammers are peddling fake vaccines, drugs, “all-natural” or “organic” medicines — all “insured and paid for” by your health policy. But the novel coronavirus is exactly that — new — and there is no known cure yet.

4 Senior scams

Beware of free virus “tests” at senior centers, health fairs or in your home. Scammers might ask for your Medicare number, SSN and other information to steal your medical identity. Talk to your doctor if you need a test. Call your insurer directly to answer your coverage questions.

5 Bogus travel insurance

Be wary of pitches for travel insurance that claim to cover coronavirus related trip cancellations. Most standard travel insurance policies may not cover viral outbreaks or pandemics. Know what your policy does and doesn't cover.

LEGAL DIVISION

Regulation Updates

Amended Company Bulletins

CB-130 (AMENDED) - FILING GUIDANCE FOR INDIVIDUAL AND SMALL EMPLOYER HEALTH AND STAND-ALONE DENTAL PLANS IN NEBRASKA

CB-130 (Amended) was issued to provide guidance for filers of individual, small group and stand-alone dental plans (SADP), offered on and off the Federal Facilitated Marketplace, that wish to issue or renew plans in Plan Year 2021. The amended bulletin provides dates and corresponding actions that relate to plan year 2021. A copy of **CB-130 (Amended)**, dated April 2, 2020, can be found on the Department's website at doi.nebraska.gov.

Proposed Amended Regulations

210 Neb. Admin. Code § 59—RULE IMPLEMENTING MANAGING GENERAL AGENTS ACT

The proposed amendments to Chapter 59 remove superfluous and repetitive language and attempt to eliminate especially troubling restrictive words, thereby easing the overall regulatory burden that may be experienced by the public and citizens of Nebraska. A public hearing on the proposed amendments to Chapter 59 was held on March 26, 2020. A full copy of the proposed amendments to Chapter 59 can be found on the Department's website at doi.nebraska.gov.

210 Neb. Admin. Code § 82—MILITARY SALES PRACTICES

The proposed amendments to Chapter 82 remove superfluous and repetitive language and attempt to eliminate especially troubling restrictive words, thereby easing the overall regulatory burden that may be experienced by the public and citizens of Nebraska. A public hearing on the proposed amendments to Chapter 82 was held on March 26, 2020. A full copy of the proposed amendments to Chapter 82 can be found on the Department's website at doi.nebraska.gov.

Actions Taken Against Companies

CAUSE NO.	ALLEGATION	DISPOSITION
C-2567 Elite Integrated Benefits Administrator, LLC Omaha, NE	Violated Neb. Rev. Stat. §§ 44-5814(1) and 44-5814(3). Failed to file the required annual report; failed to pay required fees; violated previous Orders of Director.	Order Revoked Certificate of Authority 2/11/2020

Actions Taken Against Producers & Agencies

CAUSE NO.	ALLEGATION	DISPOSITION
A-2194 Osmund Marcellin Charlotte, NC NPN# 8423820	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(h), and 44-1525(11)</u> . Violated any insurance law; used fraudulent, coercive, or dishonest practices; failed to respond to Department inquiry.	Order License Revoked 1/22/2020
A-2198 Sharon Hartshorn Utica, NE NPN# 8685534	Violated <u>Neb. Rev. Stat. §§ 44-1525(11), 44-4059(1)(b), and 44-4059(1)(h)</u> . Violated any insurance law; used fraudulent, coercive, or dishonest practices; failed to respond to Department inquiry.	Consent Order \$1,000 fine; cease & desist gene swabs 1/7/2020
A-2199 Tara Rohan Sioux Falls, SD NPN# 17897966	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(g), 44-4059(1)(h) and 44-4059(1)(o)</u> . Violated any Insurance law; having admitted or found to have committed fraud; used fraudulent, coercive, or dishonest practices; failed to maintain license in home state.	Order License Revoked 1/3/2020
A-2200 Cynthia K. Card Lincoln, NE NPN# 3519393	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(g), and 44-4059(1)(h)</u> . Violated any insurance law; having admitted or found to have committed fraud; used fraudulent, coercive, or dishonest practices.	Consent Order \$1,000 fine; cease & desist gene swabs 2/4/2020
A-2201 Sondra S. Westenburg Auburn, NE NPN# 17850970	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(g), and 44-4059(1)(h)</u> . Violated any insurance law; having admitted or found to have committed fraud; used fraudulent, coercive, or dishonest practices.	Consent Order \$1,000 fine; cease & desist gene swabs 1/16/2020
A-2202 Kristi E. Jetton Lincoln, NE NPN# 16627156	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(g), and 44-4059(1)(h)</u> . Violated any insurance law; having admitted or found to have committed fraud; used fraudulent, coercive, or dishonest practices.	Consent Order \$1,000 fine; cease & desist gene swabs 1/21/2020
A-2204 Emmanuel Perez Lincoln, NE NPN# 18840994	Violated <u>Neb. Rev. Stat. §§ 44-3716(2)(b), and 44-3717</u> . Motor club representative shall be a trust-worthy person of good repute; Violated or failed to comply with any provision of the Motor Club Services Act.	Order License Revoked 3/17/2020

Actions Taken Against Producers & Agencies (cont.)

CAUSE NO.	ALLEGATION	DISPOSITION
A-2205 Amogh Karney Omaha, NE NPN# 18000011	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b), 44-4059(1)(d), 44-4059(1)(e), 44-1525(1)(f), 44-4059(1)(g), 44-4059(1)(h), 44-1525 (10), and 44-1525(11)</u> . Violated any insurance law; misappropriated funds; intentional misrepresentation of an insurance contract; unfair trade practices; used fraudulent, coercive or dishonest practices; made false or fraudulent statement(s) on an application policy; failed to respond to department inquiry.	Order License Revoked 3/27/2020
A2206 Eric Luebbe Omaha, NE NPN# 9135805	Violated <u>Neb. Rev. Stat. §§ 44-4059(1)(b); 44-4059(1)(e); 44-4059(1)(g); 44-4059(1)(h); and 44-1525(1)(f)</u> . Violated any insurance law; intentional misrepresentation of an insurance contract; committed unfair trade practices; used fraudulent, coercive, or dishonest practices; misrepresented to induce insurance policy sales.	Consent Order \$2,000 fine 1/13/2020

Case Summaries

Gage County v. Employers Mut. Cas. Co., 304 Neb. 926 (January 31, 2020)

Gage County appealed a ruling from the District Court of Lancaster County that granted the Employers Mutual Casualty Company (“EMC”) summary judgment motion related to insurance coverage in effect at the time members of the Beatrice Six pled guilty, entered a no contest plea or were convicted of Helen Wilson’s murder in 1989. Following the district court’s decision, Gage County appealed and petitioned to bypass the Nebraska Court of Appeals. The petition was granted. The district court decision was reversed and remanded.

In 1989, the Gage County Sheriff and his deputies, one of which was a psychologist, reopened Helen Wilson’s murder investigation and, in that same year, the Gage County Attorney charged the Beatrice Six (“Six”) with crimes related to Ms. Wilson’s death. Pleas and a trial led to the prison sentences for the Six. The Six were exonerated and granted full pardons in 2009. A subsequent civil action brought by the Beatrice Six included, but was not limited to, claims of malicious prosecution, false arrest and conspiracy. Gage County was ordered to pay damages of over 28 million and that judgement was subsequently upheld.

Gage County held three insurance policies from EMC effective February 2, 1989 through February 2, 1990. The policies included a commercial general liability (CGL) policy, a linebacker policy and an umbrella policy. All three policies defined personal injury as “injury, other than ‘bodily injury’ arising

out of one or more of the following offenses: ... [f]alse arrest, detention or imprisonment [or] [m]alicious prosecution.” The CGL policy endorsement excluded coverage for personal injury if the injury was due to rendering or failing to render any professional service. While the CGL policy did not define professional service, however, the linebacker and umbrella policies contained a definition.

Professional services was defined as “anyone employed in any of the following professions while performing their duties as such: 1) the practice of medicine, such as (but not limited to) physician, surgeon, osteopath, chiropractor, anesthesiologist, dentist, psychiatrist, psychologist, nurse, paramedic, EMT, pharmacist, etc....” Law enforcement was not included in professional services. The excluded occupations liability exception in the umbrella policy included law enforcement.

In July 2009, Gage County “tendered defense” of the first five Beatrice Six lawsuits to EMC. Later that year, EMC denied coverage because of the CGL’s professional services exclusion. The umbrella policy was denied because of exclusions for professional liability, including practice of law and psychology, and excluded occupations liability for law enforcement. Both parties agreed that coverage could not be provided under the linebacker policy as it was out of time.

In January 2017, Gage County filed a complaint for declaratory judgment alleging EMC had a duty to defend Gage County during the litigation, and a duty to indemnify under the CGL policy up to the \$2 million aggregate policy limit. EMC’s answer included an affirmative defense related to the professional services exclusion, and coverage was not provided through the linebacker and umbrella policies. EMC’s motion for summary judgment on all claims was granted. The district court denied Gage County’s motion for partial summary judgment on the question “[f]or purposes of [Gage County’s] coverages with [EMC], law enforcement was an occupation and not a profession.” The court ruled the professional services exclusion applied for the CGL policy and there was no coverage under the other policies. In addition, the court found that the professional services exclusion in Marx v. Hartford Acc. & Ind. Co., 183 Neb. 12, 157 N.W.2d 870 (1968) applied because the allegations concerned law enforcement decision making. The claims in the Beatrice Six matter included acts of the county attorney, the county sheriff and the deputies, including deputy who was a psychologist, and the professional services exclusion applied.

On appeal, the Nebraska Supreme Court determined that an insurance contract will be construed like other contracts, “according to the meaning of the terms that the parties used,” and “the court must give effect to the instrument as a whole and, if possible, to every part thereof.” After a stipulation entered between the parties, the final question on appeal was the applicability of the professional services exclusion. The parties’ argued the court should look at case law and statutes for the definition of professional services. EMC argued for the Marx definition and Gage County argued for the application of profession from cases related to Neb. Rev. Stat. § 25-222. The Court decided that importing definitions from case law was not necessary because “the unambiguous terms of the insurance policies are controlling.”

The court found the insurance policies dictated the definition of professional services and law enforcement was not included in the list of excluded professions. Therefore, the CGL and, potentially, the umbrella policy could provide coverage since the professional services exclusion did not apply to law enforcement. The deputy psychologist worked as a sheriff’s deputy during the investigation and not as a psychologist therefore the professional services exclusion did not apply to him. The court determined that injuries occurring from professional and nonprofessional services “does not negate the insured’s claim.” Gage County conceded the county attorney’s actions were covered by the professional services exclusion. The matter was reversed and remanded for further proceedings.

Sawo v. Battle Creek Mut. Ins. Co., an unpublished opinion from the Nebraska Court of Appeals, February 18, 2020

This unpublished opinion from the Nebraska Court of Appeals, meaning the case may not be cited by other courts or tribunals, provides clarity related to uninsured motorist coverage policy provisions.

Dorbor Sawo's (Sawo) requested recovery for injuries under a personal auto policy held by Battle Creek Mutual Insurance Company ("Battle Creek"). Sawo claimed benefits under the uninsured motorist coverage provision of his policy. The injuries were incurred when Sawo's personal vehicle was carjacked. The carjacker subsequently struck Sawo causing severe injuries. Battle Creek denied coverage and Sawo brought an action against Battle Creek. Battle Creek moved for and was granted summary judgment in the county court of Lancaster County. The Nebraska Court of Appeals affirmed the district court order.

Sawo requested recovery under the uninsured motor vehicle provision of his personal auto policy in place with Battle Creek at the time of the incident. Battle Creek denied recovery because the vehicle was not uninsured. Sawo's policy stated, "[Battle Creek] will pay damages for 'bodily injury' an 'insured' is legally entitled to collect from the owner or driver of an 'uninsured motor vehicle.' The 'bodily injury' must be caused by accident arising out of the operation, maintenance or use of an 'uninsured motor vehicle.'" A vehicle that was "insured under the liability coverage of this policy" was specifically excluded from the definition of uninsured motor vehicle. Sawo's vehicle was insured for liability coverage under the policy therefore Sawo was not eligible for benefits under the uninsured/underinsured motorist provision.

Sawo raised several arguments. Sawo argued that because the individual who operated the vehicle was not insured the policy should cover injuries under the uninsured motorist coverage. The Appellate Court rejected this argument. The court noted that Sawo's policy stated injuries must be caused by an uninsured motor vehicle, not an uninsured person [emphasis added]. The Uninsured and Underinsured Motorist Coverage Act, at Neb. Rev. Stat. §§ 44-6401 to 44-6414 (Reissue 2016), requires auto liability policies to provide protection against uninsured and underinsured motor vehicles. The court specifically noted that Neb. Rev. Stat. § 44-6407, codifies that an uninsured or underinsured motor vehicle "shall not include a motor vehicle: (1) Insured under the liability coverage of the same policy of which the uninsured or underinsured motorist coverage is a part." Battle Creek's policy exclusion is consistent with the Uninsured and Underinsured Motorist Insurance Act.

Another argument related to Sawo's State Farm Insurance policy and a named driver exclusion. The argument was not clear, however, the court determined the excluded driver was not responsible for or seeking coverage for damages related to the incident. The Battle Creek policy held the same exclusion. Sawo argued that the exclusion was against public policy.

In the public policy argument, Sawo cited *Hood v. AAA Motor Club Ins. Assn.*, 259 Neb. 63, 607 N.W.2d 814 (2000). In *Hood*, an insured was a passenger while her husband was driving, he was an excluded driver under the policy. The vehicle was struck by an underinsured driver and caused injury to the insured. The insurer denied her claim because the husband was driving. The Supreme Court "held that it was against public policy to deny the insured person uninsured or underinsured motorist coverage under the named driver exclusion when that driver was not responsible for the injury and was not seeking coverage." The court rejected this argument because the named driver exclusion was not at issue.

Finally, Sawo argued that Neb. Rev. Stat. § 44-6407 did not apply because the carjackers were not named insureds under his policy and to find otherwise was against public policy. The court rejected this argument based on the 2011 Nebraska Supreme Court case, *Alsidez v. American Family Mut. Ins. Co.*, 282 Neb. 890, 807 N.W. 2d 184. This case stated that it does not violate public policy when denying underinsured motor vehicle coverage because the vehicle was insured and driven by person to whom it was furnished for regular use. The order of the district court was affirmed.

Shelter Mut. Ins. Co. v. Freudenburg, 938 N.W.2d 92, 304 Neb. 1015 (2020)

On February 7, 2020, the Nebraska Supreme Court issued a decision in the Shelter Mutual Insurance Company v. Larry Freudenburg action. The decision provided guidance to the Department of Insurance on the on the applicability of what is commonly referred to as “partial household exclusion clauses” in Nebraska automobile insurance policies.

The facts of the case were undisputed. Mr. Freudenburg was traveling as a passenger in a car covered by an automobile liability policy that Mr. Freudenburg and his wife had purchased from Shelter. Unfortunately, that car was involved in an accident, causing Mr. Freudenburg to suffer various injuries. Freudenburg submitted a claim for injuries under the Shelter policy because his injuries were not covered under any other policies. The amount incurred to treat Mr. Freudenburg’s injuries exceeded \$100,000.

The coverage limits of the Shelter were 100/300/100, meaning that it contained limits on bodily injury coverage of \$100,000 for one person in one accident, \$300,000 for the injury of two or more persons in any one accident and \$100,000 for injury to or destruction of property of others in any one accident.

After receiving Freudenburg’s claim in excess of \$100,000, Shelter paid only \$25,000 based upon a partial household exclusion clause in Freudenburg’s policy. The partial household exclusion clause specifically called for a reduction in bodily injury coverage for “damages owed to any insured, relative, or resident of an insured’s household.” Citing this partial household exclusion clause, Shelter asserted that the \$100,000 policy for bodily injury was properly reduced to the Nebraska minimum coverage amount of \$25,000.

In an effort to resolve the controversy, Shelter filed a declaratory judgment lawsuit in Lancaster District Court, seeking an order declaring that partial household exclusions are permissible under Nebraska law.

After the Lancaster District Court ruled in Shelter’s favor, Freudenburg appealed. The case was allowed to skip over the Nebraska Court of Appeals and proceed directly to the Nebraska Supreme Court. The Supreme Court overturned the District Court by succinctly holding, “Simply put, an automobile liability policy in any coverage amount is not permitted to exclude or reduce liability coverage under the policy solely on the ground the claimant is a named insured or resident in the named insured’s household.” The net result is that any partial household exclusions falling within the description set forth by the Supreme Court are void as a matter of law; the remainder of the underlying automobile policies do remain in full force and effect.

Because of the Supreme Court’s decision in the Freudenburg case, the Department of Insurance will no longer approve any automobile policies containing improper partial household exclusion clauses. Any questions regarding the case may be directed to Thomas Green, Counsel, at (402) 471-4650 or Thomas.Green@nebraska.gov.

Merrick v. Fischer, Rounds & Assocs., 305 Neb. 230 (2020)

Jerald Merrick (Merrick) was employed by Western Hay Services, Inc. (Western) and received a settlement after an on the job injury. Merrick brought action an action against Fisher, Rounds and Associates, Inc. (Fischer) and Great West Casualty Company (Great West) to obtain payment. This action appealed a ruling from the District Court of Scotts Bluff County that granted summary judgment to Fischer and Great West. The Nebraska Supreme Court affirmed the district court's ruling.

Merrick's employer, Western, did not carry workers' compensation when Merrick was injured during his employment on March 31, 2009. Western requested a quote for workers' compensation from Fischer in February 2009. In order to obtain a quote, Fischer requested current payroll records. Western provided the records on April 1, 2009, the day after Merrick's injury occurred. After the quote was provided on April 8, 2009, Western did not obtain the coverage due to expense. Fischer was the broker for Western when a commercial lines policy issued by Great West was placed.

The commercial lines policy included in the appeal was effective September 2008 to September 2009. The policy provided commercial auto coverage, commercial inland marine coverage and commercial general liability coverage. The commercial auto policy and commercial general liability coverages, A and C, included exclusions for obligations which any insured may be held liable under workers compensation or similar laws.

Merrick filed an action, in 2012, against Western for medical expenses. The action alleged Western was negligent and that Western was required to carry workers' compensation insurance according to Neb. Rev. Stat. § 48-106. While Fisher was not notified of the lawsuit, Western requested provide a defense and indemnity. Great West denied the request as the claim was not covered under the policy as it did not provide coverage for workers' compensation, injury to an employee of the insured or coverage for potential liability for failing to provide workers' compensation.

In 2016, a stipulated agreement was entered in favor of Merrick and against Western in the amount of \$800,000. Western assigned its claims against Fisher and Great West to Merrick. Fischer and Great West were not notified of the settlement. Merrick subsequently brought actions against Fischer and Great West for the settlement amount. The action alleged Fischer was negligent for failing to obtain workers' compensation; failing to notify Western of the Nebraska statutory requirement for workers' compensation; and failing to warn that the coverage in place did not apply to employee injuries while in scope of employment. The action against Great West alleged bad faith for denying Western's request for defense.

In the decision, the Supreme Court noted Merrick's primary argument was based on the distinction of the insurance broker versus the insurance agents duty to advise. In *Broad v. Randy Bauer Ins. Agency*, 275 Neb. 788, 740 M.W.2d 478 (2008), the Court acknowledged that the term "insurance agent" is used loosely in the courts but "recognized the need to consider how agency principles affect an insurance intermediary's contract liability." While *Broad* recognized agency principles may dictate causes of action available against brokers or agents, an agent act is imputable to the insurer and a broker act is imputable to the insured. That decision did not

suggest that “agency principles affect the scope of the general duty” an insured is owed by the insurance intermediary to act with reasonable care. Merrick’s argument assumes that the *Broad* decision on agency principles affects the scope of the general duty an insurance intermediary owes to an insured to act with reasonable care. That is an incorrect assumption.

The Court applied *Hansmeier v. Hansmeier*, 25 Neb. App. 742, 912 N.W.2d 268 (2018) decision to resolve Merrick’s claim against Fischer. The employer/farmer in *Hansmeier* did not provide workers’ compensation for its one full-time employee. Under Neb. Rev. Stat. § 48-106(7), the employer must provide an employee written notice that workers’ compensation was not available and the employee had to sign the notice. Notice was not provided so the employer was liable for the injuries incurred when employee’s thumb was injured in an auger. When the farmer brought a suit against the insurance agent for failing to properly advise about the workers’ compensation availability or necessity, the court found the farmer “elected” to not purchase the coverage. No false information was provided and there was no further responsibility on the part of the agent to inform the farmer of their obligation under the Nebraska Workers’ Compensation Act.

The *Hansmeier* decision articulated that the “Nebraska Workers’ Compensation Act governs employers, not insurance agents.” Agents and brokers under the Nebraska Workers’ Compensation Act have a duty to act with reasonable care. Absent evidence to the contrary, failing to volunteer information does not constitute negligence for which the agent or broker must provide damages.

Merrick cited an Eighth Circuit Court decision, *Bell v. O’Leary*, 744 F.2d 1370 (8th Cir. 1984) to show that a broker owes an insured a duty to act with reasonable care, skill and diligence. The Court distinguished that opinion because the broker in *Bell* failed to determine the purchased flood insurance was ineligible because the insureds were located in a non-covered area. The broker failed to discover this and failed to notify the insureds so he was negligent. In this case, the broker did not fail to obtain coverage nor did it provide false information. Western failed to provide information timely and it request workers’ compensation insurance prior to February 2009. Fischer was not negligent.

Merrick argued that Great West acted in bad faith for not defending the 2012 action. Merrick also argued that the exclusion for workers’ compensation did not apply because the action took place in the district court not the workers’ compensation court. The Court noted that an insurance contract will be construed like other contracts. If the terms are clear, i.e. exclusionary language, they will be given plain and ordinary meaning. *Federated Serv. Ins. Co. v. Alliance Constr.*, 282 Neb. 638, 805 N.W.2d 468 (2011).

While an insurer is bound to defend an action if (1) allegations of the complaint, if true, obligate the insurer to indemnify, or (2) a reasonable investigation of the facts by the insurer discloses facts that obligate the insurer to indemnify, there is no obligation if facts show no potential liability. Because the policy exclusion language was clear and unambiguous, it does not make a difference where the action is taken. Great West had no obligation to defend the action. The Supreme Court affirmed the order of the District Court of Scotts Bluff County for Fischer and Great West.

EXAMINATION DIVISION

Complying with Regulatory Requirements During COVID-19

On April 8, 2020, Director Ramage issued a Notice to all insurance companies licensed to write business in Nebraska advising of compliance with regulatory requirements during the COVID-19 public health emergency. Flexibility is being provided in part to recognize that Nebraska and other states anticipate using additional targeted information requests to gather more specific information.

A copy of the **Notice** outlining the specific requirements can be found on the Department's website. Questions concerning the Notice may be sent to Justin Schrader at justin.schrader@nebraska.gov.

Pre-Need Examinations Completed During First Quarter, 2020

Jolliffe Funeral Home

Financial Examinations Completed During First Quarter, 2020

Capitol Casualty Company
Employers Mutual Acceptance Company
First Landmark Life Insurance Company
Scandinavian Mutual Insurance Company of Axtell, NE
Woodmen of the World

Financial examination reports become public documents once they have been placed on official file by the Department. The most current report of financial examination can now be found on the Department's website at www.doi.nebraska.gov. Copies can be obtained from the Department at a cost of \$.50 per page.

Congratulations



NDOI Employees of the Quarter

- ☆ Laura Arp, Administrator, Life & Health Division
- ☆ Connie Drake, Administrative Assistant, Fraud Division

2019 Excellence in Leadership Awards

- ☆ Robin Edwards, Accounting & Finance Manager
- ☆ John Koenig, Consumer Affairs Investigator



Department Calendar

- May 25: Department Closed - Memorial Day
- July 3: Department Closed - Independence Day Observed
- August 5: Annual Fraud Conference (pending due to COVID-19)
Mahoney State Park—registration required