Are Carriers Facing a Paper Bias for Notices of Cancellation and Nonrenewal?

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The insurance industry has been notoriously slow to fully embrace electronic forms of commerce and there may be good reasons for the hesitation. Until recently, antiquated, prescriptive requirements in the insurance laws hobbled the industry’s ability to step with both feet into the greener world of e-commerce and digital platforms.

Executive Summary
Recently updated insurance laws may not be enough for the industry to confidently go forward with electronic delivery, according to Susan Stead and Holly Wallinger of Bailey Cavalieri LLC. Among the obstacles is the fact that insurance laws lack clarity and uniformity regarding what is satisfactory “proof of mailing” for delivery of electronic notices, they explain, providing examples of state-by-state variations. There is also a lack of certainty in litigation when a carrier must prove that the cancellation or nonrenewal was effective.

Despite the easing of those requirements and the fact that most people carry their electronic mailboxes with them, there is still a paper bias that creates regulatory and legal risks for carriers. Until recently, insurers were required to provide cancellation notices and nonrenewal notices via the U.S. Mail or similar service. E-delivery was not an accepted form. Although those statutory obstacles have been eliminated in two-thirds of the states, these recently updated insurance laws may not be enough for the industry to confidently go forward with electronic delivery—at least not yet.

All states have either enacted the Uniform Electronic Transactions Act (UETA) or are subject to the federal Electronic Signatures in Global and National Commerce Act (E-SIGN). While those laws provide a safe harbor for electronic delivery of required notices, the problem is that both laws preserve existing state law delivery requirements,
such as those requiring delivery by a specific method. For insurance, this means that insurers must continue to send required notices for cancellation and nonrenewal by “first-class U.S. mail,” “certified mail,” or by “U.S. mail,” depending on the state.

The delivery method is significant because in most states, and for most property/casualty lines, the cancellation or nonrenewal of a policy will not be effective until proper, statutorily required notice is given. Thus, to satisfy regulatory requirements, insurers deliver a batch of paper cancellation notices to the post office for delivery by U.S. first-class mail and rely upon a Certificate of Mailing from the U.S. Postal Service (USPS) to show the notices were properly mailed, although some have taken the small technological stride to recognize the “USPS Intelligent Mail” system which uses barcode technology to sort and track mail. Not only do courts rely upon these conventional “proof of mailing” processes, the processes have been codified in state insurance laws. Carriers can cancel a policy by issuing a paper notice, establish proof of mailing, and be confident that the cancellation was compliant and likely to be upheld by the courts.

During the past few years, the insurance industry has worked with regulators and state legislatures to change the restrictive U.S. mail delivery methods to permit electronic delivery of all insurance documents, including required cancellation and nonrenewal notices. The insurance laws in many states—notably, not all states—now allow electronic delivery of those notices. Despite these efforts, there is great uncertainty and risk in relying on a solely electronic delivery platform due to still unanswered questions about what is required for compliance and how courts will react.

The lack of consistent guidance in the law may mean that carriers will learn what is expected only when the regulators come to visit during a market conduct examination or when a court is left to set its own standards.

The insurance laws lack clarity and uniformity regarding what is satisfactory “proof of mailing” for delivery of electronic notices. For example, in Virginia, a carrier may demonstrate “proof of mailing” of paper notices by using registered mail, certified mail, or a similar first-class mail-tracking method used or approved by the USPS. With respect to electronically delivered notices, Virginia law requires carriers to retain
“evidence of electronic transmittal or receipt of the notification,” but the law fails to provide any guidance about what constitutes satisfactory evidence. Similarly, Illinois and other states allow electronic delivery of notices, but fail to provide guidance about how to establish proof.

New Hampshire, on the other hand, provides clear direction for delivery of notices of cancellation and nonrenewal: electronic delivery is specifically prohibited.

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Some states have been more thoughtful and detailed in providing guidance, but, in doing so, have created particular requirements for e-delivery that effectively negate any parity with paper notice. For example, Iowa treats notices of cancellation and nonrenewal differently from other types of required notices when it comes to electronic delivery. In addition to complying with the requirements of Iowa’s UETA, a carrier’s electronic delivery method for cancellation or nonrenewal notices must be done in a manner that is “verifiable and approved by the commissioner.” What this means in practice is that a carrier must obtain the commissioner’s prior approval of the carrier’s specific electronic process. Among the criteria for approval is the requirement that the proposed method allow for verification of receipt of the notice by the recipient. Traditionally, proof of mailing is all that must be shown.

To some extent, the Iowa regulation seems to reflect questions that tend to arise when comparisons between email and the U.S. mail system are made. For example, it is understood that the USPS will forward mail to a person’s new physical address and that senders can request to be notified of a person’s new address. To the extent there may be comparable safeguards in the electronic world, either insurance regulators may not be aware of them or may not be comfortable that such safeguards offer the same reliability and protection for policyholders. This bias in favor of mailing paper notices is a bit troubling since UETA, E-SIGN and the insurance laws all require carriers to obtain the policyholder’s consent to electronic delivery.

A second—and perhaps more critical challenge—is the lack of certainty in litigation when a carrier must prove that the cancellation or nonrenewal of a policy was effective. Claimants and insureds often challenge a cancellation or nonrenewal on the grounds that the process was somehow defective and, thus, claim coverage for a loss that occurred after the purported cancellation or nonrenewal. Although electronic delivery may be sanctioned in the insurance laws, the well-established body of case law on the subject deals with paper notices delivered by the USPS. The risk for carriers is the uncertainty about how courts will expect carriers to prove a valid cancellation or nonrenewal when it is done by electronic means.

The good news is that courts across the country have looked favorably upon and have upheld the use of electronic signatures and electronic records. Various courts have
acknowledged that settlements may be conducted by email, that consumers may waive insurance coverages online, and that policyholders may change beneficiaries through electronic means.

But because of the delay in changing insurance laws and the uncertainty, carriers continue to issue paper notices. Therefore, it may be some time before courts are faced with a cancellation or nonrenewal notice that was delivered electronically.

Recently, in Layman v. 21st Century N. American Ins. Co., a Washington state court considered whether a carrier had complied with the state’s requirements for notice of nonrenewal. The renewal notice and billing statements were delivered electronically following the insured’s consent to receive information in that manner. The court found that there was a question of fact regarding which insurance documents the insured had agreed to receive electronically. The insured testified that she had consented to receive correspondence electronically, but not policy or billing documents.

One red flag, possibly missed by the carrier in the Layman case, was the fact that the insured had never accessed her online records despite several emails to her indicating that the documents were ready for review. Iowa addressed this specific issue in a regulation that requires an insurer to mail paper copies of cancellation and nonrenewal notices to the last known physical address when policyholders do not log into their account within seven days after the insurer sent the notification link by email—although that safeguard is yet another hurdle for a carrier to clear when designing an electronic delivery method.

Another hard lesson for the Layman carrier was authentication. The carrier provided testimony about the company’s procedures, and produced templates of forms but it did not produce evidence of the actual consent forms that the insured had signed electronically.

So how is a carrier to provide “proof” of electronic delivery?

If the industry would develop an acceptable standard for “proof of mailing” for electronic notices, that could go a long way towards improving uniformity in process and in mitigating the regulatory and litigation risks of electronic delivery.

Under UETA (and the laws of 47 states), an electronic record is deemed “sent” when it is addressed properly to an information processing system that the recipient designates or uses, is in a form capable of being processed by such system, and enters that
processing system outside of the control of the sender. This is consistent with how insurers have established proof that proper notice of cancellation or nonrenewal was provided via the U.S. mail—by providing proof simply that the carrier had delivered a proper notice to the USPS without needing to prove actual receipt of the notice. Courts have accepted and continue to accept such proof of mailing of paper notices as sufficient notice of cancellation or nonrenewal. But it could be a slow journey to such acceptance for electronic delivery.

Although the electronic delivery of cancellation and nonrenewal notices is now acceptable in a significant number of states, it may be some time before regulators fully embrace electronic delivery of such notices and even longer before the courts consistently uphold particular electronic delivery and proof of mailing methods. The bias in favor of mailed paper notices ignores the reality that people tend to carry their electronic mailboxes with them wherever they go.

The industry may have some more work ahead to create defensible electronic platforms and to educate both regulators and courts about electronic delivery technology. If the industry would develop an acceptable standard for “proof of mailing” for electronic notices, that could go a long way towards improving uniformity in process and in mitigating the regulatory and litigation risks of electronic delivery.

Contributors

**Susan T. Stead, Bailey Cavilieri LLC**

Susan T. Stead is Of Counsel for Bailey Cavilieri LLC in Columbus, Ohio. With long and varied experience in insurance regulation, including 15 years with the Ohio Department of Insurance, she counsels insurers on developing compliant business practices, the regulatory impact of emerging issues in insurance, market conduct, product innovation, alternative distribution channels, electronic transactions, and legislative and regulatory developments. Reach her at sue.stead@baileycavalieri.com.

**Holly W. Wallinger, Bailey Cavilieri LLC**

Holly W. Wallinger is an associate for Bailey Cavilieri LLC. As part of the insurance practice group, Holly represents insurance and other financial service companies, health care, and general business clients on regulatory and general corporate matters. Holly’s practice also includes a focus on unclaimed property audit defense of life insurance companies addressing potential death claims, and she also helps health insurance and managed care companies to comply with state and federal health insurance laws, including the Affordable Health Care Act. Reach her at holly.wallinger@baileycavalieri.com.