

No. 4621

OFFICIAL ORDER
of the
TEXAS COMMISSIONER OF INSURANCE

Date: AUG 09 2016

Subject Considered:

NEW YORK MARINE AND GENERAL INSURANCE COMPANY
412 Mt. Kemble Ave., Suite 300C
Morristown, NJ 07960

CONSENT ORDER
TDI ENFORCEMENT FILE NO. 10036

General remarks and official action taken:

The commissioner of insurance considers whether disciplinary action should be taken against New York Marine and General Insurance Company (New York Marine).

WAIVER

New York Marine acknowledges that the Texas Insurance Code and other applicable law provide certain rights. New York Marine 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), New York Marine agrees to this consent order with the express reservation that it does not admit to a violation of the code or of a rule and that the existence of a violation is in dispute.

FINDINGS OF FACT

1. New York Marine is a fire and casualty company currently holding a certificate of authority to transact business in the state of Texas.
2. In both 2011 and 2013, the department's biennial inspections and evaluations to determine the adequacy of New York Marine's loss control program resulted in adequate ratings. However, the department's reports resulting from those evaluations described some concerns and provided New York Marine with recommendations for improvement.
3. On August 26, 2015, the department concluded its biennial inspection and evaluation of New York Marine to determine the adequacy of its loss control program for commercial automobile liability insurance, general liability insurance, and professional liability insurance for insureds other than hospitals. The department's review of the loss control program included, but was not limited to, a thorough inspection of a sampling of New York Marine's policyholder loss control files.

4. The 2015 inspection and evaluation resulted in an inadequate rating for New York Marine's loss control program. The department provided New York Marine with a copy of its September 11, 2015, report detailing the department's findings from the evaluation of the program, and notifying New York Marine of the inadequate rating.
5. The 2015 inspection and evaluation revealed, among other things, that certain concerns and recommendations described in the 2011 and 2013 evaluations had not been addressed or corrected by New York Marine.
6. New York Marine did not have or maintain loss data that was uniformly accurate and accessible to both the department and those responsible for monitoring loss activity.
7. The loss information (claim counts) often did not match the policyholder list, worksheets, or loss runs provided to the department. There were discrepancies and a lack of continuity in the claim count information that could not be accounted for as a result of additional losses occurring after New York Marine provided the department with initial policy and loss information.
8. Based upon a review of the worksheets and loss runs, documentation of service for selected policyholder files was absent. Each policyholder account file requested by the department was missing documentation to demonstrate service, or revealed trending or frequency issues not addressed or documented in the file.
9. When documentation was included in the selected files, it primarily included confirmation letters, surveys, and current loss runs. The content of confirmation letters for site visits was very general and did not include specific findings. None of the confirmation letters that were reviewed by the department included recommendations to the policyholder, and no follow up by New York Marine had been performed on those files.
10. Information provided on the worksheets lacked detail and New York Marine did not always provide complete answers.
11. New York Marine's written loss control procedures lacked key components, including, but not limited to:
 - adequate frequency of review for service needs,
 - adequate quality control reviews of service or service providers, and
 - triggers for review and service consideration.
12. During the inspection and evaluation, New York Marine submitted some items late, including worksheets, policyholder account files, and the presentation outline. In addition, New York Marine belatedly submitted a professional liability insurance resource, and the sample annual notices of loss control availability for its general liability and professional liability policyholders.

13. Two employees of New York Marine resigned immediately before the inspection and evaluation. The two employees included: an underwriting staff member, and a person who New York Marine previously informed the department was responsible for loss control. At the time of the inspection and evaluation, the underwriting staff member had been replaced, but the person responsible for loss control had not.
14. During the inspection and evaluation, New York Marine's loss control representative was unable to answer certain questions about the loss control program.
15. At the conclusion of the inspection and evaluation, but before the department issued the 2015 report, the department granted New York Marine an extension of time to submit additional policyholder account documentation to demonstrate loss control service considerations and service provided. Very few relevant, non-duplicative documents were additionally submitted.
16. After the department informed New York Marine of its inadequate rating, New York Marine provided the department with the following documents on November 9, 2015:
 - (a) new loss control guidelines, which combined its three formerly separate guides and three separate presentation outlines into a single document;
 - (b) a continuing legal education article for its lawyer professional liability policyholders;
 - (c) a Harmonie Group flier regarding access to services provided to lawyer professional liability policyholders; and,
 - (d) information about its SecureFleet® program for its eligible, subscribing commercial automobile policyholders.
17. On November 9, 2015, New York Marine also informed the department that it intends to provide an online library resource portal then identified as "IRIS" and now referred to as the "ProSight Loss Control portal," to all policyholders. Although the department was given access to the online portal at that time, the website was under construction, not operational, and did not have sufficient substantive content for the department to review and evaluate.
18. On November 9, 2015, New York Marine also represented that it was in the process of designing a policy insert letter separate from its filed loss control notice, which would explain to policyholders how to access the online portal.
19. On January 8, 2016, New York Marine submitted a second, updated version of its loss control guidelines to the department. The second version did not fully address all findings and recommendations in the 2015 report, or the department's continuing concerns. Most importantly, the second version did not identify specific triggers for loss control service consideration, does not explain whether existing (in force) and renewal policyholders will be provided with any loss control services, and did not include all information necessary to meet and address all considerations in the department's *Outline of a Minimum Plan for a Loss Control Program* (TDI Form PC392 | 0707).
20. On January 8, 2016, New York Marine represented that it increased its information technology staffing in order to improve its loss data integrity.

21. On January 8, 2016, New York Marine represented that the online portal was in production and would be available to all policyholders by February 1, 2016. New York Marine represented that policyholders would be informed of the availability of the online portal by either an insert in their policy jacket, or by a separate mailing for existing (in force) policyholders.
22. On January 11, 2016, New York Marine provided the department with a spreadsheet listing of article titles and brief descriptions of the articles that it represented would be available in the online portal once operational. In addition, New York Marine provided the department with a sample, blank flier from Professional Safety Consulting (PSC), without explanation.
23. On April 8, 2016, New York Marine notified the department that it hired a new director for its loss control program to begin working in that position on April 27, 2016. The new director has been tasked with updating of New York Marine's loss control guidelines.
24. On April 8, 2016, New York Marine notified the department that its online portal was in production and had a target completion date of May 1, 2016, for providing policyholders with access to that resource.
25. On April 8, 2016, New York Marine submitted to the department a sample of a policy insert letter that New York Marine proposed to send to policyholders to notify them of the future availability of the online portal.
26. On April 8, 2016, New York Marine represented that some of the data discrepancies, lack of continuity, and other data integrity issues evident during the 2015 inspection and evaluation were due to New York Marine's failure to include what it refers to and identifies as "shell claims." According to New York Marine, a "shell claim" is a claim reported to New York Marine, but which is not immediately assigned to a policy because the applicable policy is new business that does not yet exist in New York Marine's claims system. New York Marine represents that the "shell claim" data is ultimately reconciled with the appropriate policy, but when it is initially matched to the policy, the lag in inputting of policy data can result in different claim counts.
27. On May 26, 2016, New York Marine informed the department that it designated a second staff person to be additionally responsible for the administration and oversight of its loss control program in Texas. New York Marine represents that this second staff person will serve as a back-up in the event of staff turnover in the loss control director's position.
28. Sometime in May 2016, New York Marine's online portal became operational and fully functional with respect to both line of coverage and by policyholder industry needs.
29. On May 31, 2016, New York Marine informed its existing (in force) policyholders of the availability of loss control resources within its online portal and provided the policyholders with registration instructions.

30. On July 15, 2016, New York Marine provided the department with Form PN 04 99 40 0716, a notice to policyholders regarding the availability of loss control resources within its loss control portal. New York Marine represents that it provides this notice to all new and renewal policyholders either at the time the applicant or insured's policy is delivered, issued for delivery, or renewed, or within 60 days of the policy's effective date. This notice automatically attaches to new and renewal commercial automobile liability and general liability policies that New York Marine directly writes. New York Marine represents that it is implementing a system change to automatically attach the notice to new and renewal professional liability insurance for insureds other than hospitals, and any for any policies issued by managing general agents (MGAs). Until the system change is implemented, New York Marine will continue to deliver the notice by mail within 60 days of the policy's effective date for policyholders with professional liability insurance, and for any policies delivered, issued for delivery, or renewed by MGAs.

31. On July 15, 2016, New York Marine informed the department of its efforts to prioritize and improve the accuracy and availability of all loss data for use in identifying loss control service needs, and making that data easily accessible to both the department during future loss control inspections and evaluations, and to those responsible for monitoring loss activity at New York Marine. New York Marine created a report to capture data points to more effectively monitor loss control service needs. New York Marine represents that it will run this report at least on a quarterly basis for a rolling 12-month period to assist its loss control department in documenting its review of accounts for loss control service needs, and in providing service, as needed and appropriate, to policyholders.

32. New York Marine agrees to bring its loss control program into compliance with Texas law. To achieve compliance, New York Marine agrees to the following compliance plan:
 - a. New York Marine must ensure continuity of the loss control program in the event of future staff turnover.

 - b. Not later than 45 days from the date of this order, New York Marine must amend its written loss control guidelines to include all information necessary to meet the department's *Outline of a Minimum Plan for a Loss Control Program* (TDI Form PC392 | 0416). The amended guidelines must use consistent and defined terminology with respect to employee titles, internal (in-house) departments or divisions, vendors, and external third parties, so as to make clear to the reader which persons are responsible for acting in each defined role. In addition, at a minimum, the amended guidelines must contain, clarify, identify, and otherwise clearly describe:
 - i. specific triggers for loss control services, as described in subparagraph (c) below;
 - ii. which loss control services are available for free to policyholders, and if policyholders are tiered it must identify free services within each tier;
 - iii. which loss control services are available at a fee to policyholders;
 - iv. which class or tier of policyholders are eligible to subscribe to loss control services for a fee;

- v. the audit process, in detail, for agents or third parties to whom New York Marine entrusts or delegates the provision of any loss control services to policyholders;
 - vi. the work flow, in detail, between the loss control program manager and its MGAs; and
 - vii. a listing of all of MGAs by name, specifying each one with underwriting authority.
- c. On a quarterly basis, at a minimum, New York Marine must monitor and review for loss control service considerations all of its accounts providing commercial automobile liability insurance, general liability insurance, and professional liability insurance for insureds other than hospitals. During the quarterly reviews, New York Marine must consider providing loss control services if an account has three or more liability losses and/or a loss ratio of 100 percent or greater within a 12 month period. New York Marine must amend its written loss control guidelines to reflect the minimum quarterly review and these minimum individual account triggers, accordingly.
- d. New York Marine must directly deliver any recommendations related to loss control to policyholders, and must contemporaneously document the delivery of such recommendations. New York Marine may also require that its MGA, agent, or third party send the recommendations to the insured, and follow-up on those recommendations. New York Marine must amend its loss control guidelines to reflect its direct delivery of the recommendations to the policyholder.
- e. New York Marine must conduct, at a minimum, an annual audit of each MGA, agent, or third party to whom it entrusts or delegates the provision of any loss control services to Texas policyholders during the review period. If the MGA, agent, or third party has not been entrusted with or delegated any accounts during the review period, an audit is not required for that period. However, New York Marine must continually monitor whether or not its MGAs, agents, or third parties have been entrusted with or delegated any accounts to ascertain its obligation to perform the annual audit during a given review period. In addition, New York Marine must amend its loss control guidelines to reflect this requirement to perform a minimum annual audit, accordingly.
- f. Not later than 45 days from the date of this order, New York Marine must provide to the department a complete copy of its loss control guidelines reflecting the amendments required pursuant to subparagraphs (b) – (e) above. A cover letter must accompany the revised guidelines which identifies the page(s) and sections of the guidelines that address subparagraphs (b) – (e) above.
- g. New York Marine must prepare and maintain supporting documentation to demonstrate its loss control efforts in the loss control file for each policyholder's account, as those efforts occur. Additional information and documentation from each account selected by the department in future biennial inspections and evaluations must be made available to the department, upon request, during the inspection and evaluation. The supporting documentation to demonstrate loss control efforts for an account may include, but is not limited to:

- documentation of a telephone call to the policyholder to offer assistance, such as specific resources or training on the issue
 - an email to the policyholder identifying the issue and including a specific risk management resource on the issue, such as a link to an article or appropriate classes or training on the subject matter
 - a letter to the policyholder regarding a site visit (with or without recommendations)
 - a copy of an onsite survey or visit (but must not include a survey for a new risk or a survey for a risk that is being given a quote)
 - a response letter from a policyholder regarding the status of compliance with any recommendations
 - a loss analysis, and/or
 - presentation material (e.g. power point) for training conducted.
- h. If no action is taken on an account subject to quarterly review, the loss control account file must contain documentation of a written explanation to support that decision.
- i. In future loss control inspections and evaluations, New York Marine must include and provide to the department for the relevant time period(s), all reported claims not immediately assigned or matched to an existing policy in New York Marine's claims system, i.e. what New York Marine refers to and identifies as "shell claims." In future loss control inspections and evaluations, New York Marine must identify and include "shell claims," by individual date of loss, policyholder's name, and all other requested data elements, in all documents and worksheets requested by the department, including, policyholder account lists, loss runs, and claim counts.
- j. New York Marine must send all submissions required under the terms of this order by email to: jeannie.center@tdi.texas.gov, rachel.cloyd@tdi.texas.gov, and catherine.bell@tdi.texas.gov, or their successors.

CONCLUSIONS OF LAW

1. The commissioner has jurisdiction over this matter pursuant to TEX. INS. CODE §§ 82.051 – 82.055, 84.021– 84.044, and 801.051-801.053.
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. New York Marine 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 intention to institute disciplinary action, notice of hearing, a public hearing, a proposal for decision, rehearing by the commissioner, and judicial review.
4. Pursuant to TEX. INS. CODE §§ 1903.051 – 1903.052, and 1952.058, providing policyholders with loss control information reasonably commensurate with the risks, exposures, and experience of each insured's business is a prerequisite to writing commercial automobile

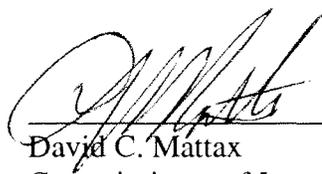
insurance, general liability insurance, and professional liability insurance for insureds other than hospitals.

5. New York Marine violated TEX. INS. CODE § 1903.051 and 28 TEX. ADMIN. CODE §§ 5.1721, 5.1722, 5.1723, and 5.1731 by failing to provide some of its policyholders with loss control information and failing to administer its loss control program for both general liability insurance, and for professional liability insurance for insureds other than hospitals in accord with Texas law.
6. New York Marine violated TEX. INS. CODE § 1952.058 and 28 TEX. ADMIN. CODE §§ 5.301, 5.302, 5.303, and 5.311 by failing to provide some of its policyholders with loss control information and failing to administer its loss control program for commercial automobile liability insurance in accord with Texas law.

The commissioner orders New York Marine to provide its policyholders with loss control information and to administer its loss control program in accord with Texas law.

The commissioner further orders New York Marine to comply with Finding of Fact No. 32(a) – (j).

The commissioner further orders New York Marine to pay an administrative penalty of \$50,000. 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: Compliance Division, Enforcement Section, Division 40111, MC 9999, P.O. Box 149104, Austin, Texas 78714-9104.

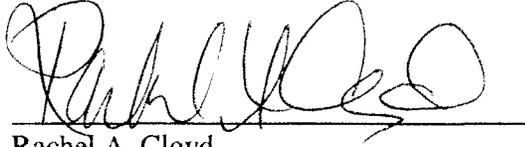


David C. Mattax
Commissioner of Insurance

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COMMISSIONER'S ORDER
New York Marine and General Insurance Company
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APPROVED AS TO FORM AND CONTENT:

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Rachel A. Cloyd
Staff Attorney, Enforcement Section
Texas Department of Insurance

COUNSEL FOR RESPONDENT:

A handwritten signature in black ink, appearing to read "Carolyn A. Rupprath", written over a horizontal line.

Carolyn A. Rupprath
Winstead, PC

