



National Association of Professional Insurance Agents

March 7, 2006

TO: PIA Membership

FR: PIA National
Patricia Borowski,
PIA National Senior Vice President
<mailto:patbo@pianet.org>
(703)-518-1360

RE: *PIA Member Access to Consumer Databases for P&C*

**Law & Insurance Underwriting, CLUE, Insurance Scoring,
MVRS AND "Other" Uses -**

Dear Members:

Because this is an area in which PIA receives regular inquiries, we are attaching the following related information piece concerning agency database access for Motor Vehicle Records (MVR) purposes. While PIA issued several such pieces years ago, the topic is still applicable today. We encourage PIA members to refresh their understanding of this issue in light of the ChoicePoint form that they are being asked to sign.

Both the FCRA site mentioned in the ChoicePoint Notice and the PIA MVR article provide insurers these exceptions with modified obligations no matter which vendor provides the database, e.g. Trans Union, Equifax, State DMV.

Last, if there are other databases that PIA members are accessing from such vendors that relate to employment background checks and/or property owner modified CLUE for real estate sales, please remember to be guided by those additional, and sometimes different FCRA obligations, since in most circumstances, your access would not be authorized under the insurance underwriting exception provisions.

Should you have any questions, please contact Pat Borowski, Sr. VP of Government/Regulatory Affairs for PIA National, at (703) 518-1360 or <mailto:patbo@pianet.org>

Recent Problems

Lately there has been much discussion and some confusion about the circumstances under which insurance agents may obtain motor vehicle records and what, if any, MVR information the agents can share with their commercial clients. What's



National Association of Professional Insurance Agents

confusing is when an agent required to follow an insurance company's underwriting philosophy becomes a part of the employer's hiring or termination decisions.

The primary applicable authorities are:

- Federal Driver Privacy Protection Act (FDPPA, 18 U.S.C. 2721):
<http://www.pianet.com/doc/Issues/FederalDriverPrivacyProtectionAct.rtf>
- the Fair Credit Reporting Act (FCRA, 15 U.S.C. 1681):
<http://www.pianet.com/doc/Issues/FairCreditReportingAct.rtf>
- any similar or more restrictive state laws,
- and for agents, the contracts signed with MVR vendors and insurance carriers.

The recent attention on MVRs arose when the state of Pennsylvania terminated a contract with a vendor of MVRs because the state determined that the vendor had resold the MVRs without first obtaining signed releases from the persons to whom the records applied, a direct violation of FCRA. As a result, several MVR vendors reminded their clients (some of which are agents) that MVRs can only be used for “permissible” purposes and may not be shared with persons outside the agents’ offices. The state also found that improper “releases” were to employers, and that most of these employers were failing to meet FDPPA requirements.

In addition, PIA recently reported on a case in California outlined to us by an E&O consultant. In follow-up conversations with the consultant, we were advised that the matter was settled out of court to protect EPL and E&O sites. In this matter an insurance agent shared the MVR of a job applicant with the prospective employer, and based on the MVR, the employer decided not to hire the applicant. The applicant sued, joining the employer and agent as co-defendants, under FDPPA and FCRA.

The risks, responsibilities and penalties that commercial clients have under FCRA, FDPPA, and employer practices underscore the importance of PIA’s longstanding advise: agents need to have employer liability insurance markets and coverage available for their commercial clients, and we prefer that agents not engage in pulling MVRs for their client’s employment needs.

About FDPPA:

FDPPA addresses access and use of individual’s driving records in a broad context. As in FCRA, FDPPA permits MVR access by/disclosure to insurance agents for the purpose of underwriting insurance. When used **solely and directly** for this purpose, prior written consent from the consumer is not required.

About FCRA:



National Association of Professional Insurance Agents

Since its creation in 1970, and through all subsequent revisions of it, FCRA has granted insurance agents and carriers an exemption under its provisions so long as the information (MVRs, CLUE and Credit Reports) is being accessed lawfully and for the sole purpose of underwriting in a transaction of insurance. The FCRA exemption further requires agents (and carriers) to disclose the fact that they are securing these reports to the individual about whom the information pertains and that the report will be further shared with insurance carrier writing the policy. Last, if there is a question about the report, the agent is to advise the individual how to obtain his or her own copy from the appropriate reporting agency.

When an insurance agency follows this process, it does not need the permission of the individual to do this function (it just needs to disclose the practice) nor will it be considered a credit-reporting agency under FCRA.

However, if the procuring agent shares any particular information from MVRs (either verbally or in writing) with any other party (say, a commercial insured) the agent may be deemed to be acting as a consumer-reporting agency and therefore subject to the full requirements and restrictions of FCRA.

So Where Do MVRs for Hires Come IN?

Accessing or sharing a MVR at an employer-client's direction/request for hiring, firing, promotion, job change or job retention of the individual is not exclusively a per se insurance underwriting function (as protected and permitted under both FCRA and FDPPA). Rather, it can be viewed as an employment function of the employer/policyholder.

When triggered by an employment reason, the specific provisions of FDPPA and applicable state employment practice law apply, and the consumer's (employee or job applicant) prior written consent is required. Further, as it relates to state employment practice law, the employer must demonstrate reasonableness in this requirement and use it for the position in question.

Another Point for Agents:

Agents must take further caution that such entangled practices not cause them to be in violation of FCRA, FDPPA and/or the agent's contract with its own consumer reporting agency (such as DAC or Choice Pointe) or insurance carriers, or fall outside the scope of their protected activities under their E&O policies.

What is an agent to do?

PIA's role is to protect PIA members' interests and abilities to perform their insurance duties for all insureds and prospects over all types of insurance circumstances. In doing so there are exemptions that we have gained that allow you to pursue these



National Association of Professional Insurance Agents

activities in a relatively unencumbered fashion. However, they have limits and complications.

As a general practice for any and all circumstances:

- A. Consider having a written statement of agency practice noting that for purposes of underwriting an individual for auto insurance (whether for personal or commercial purposes), the agency will secure a copy of the individual's MVR. Should the agent be directed to proceed further with the transaction, this same MVR will be shared with the insurance carrier that is considering issuing the policy or endorsement requested. No further disclosure of this information will be made to any party by us (*The Agent*) unless we are legally directed to do so by authorities or legal order. This written agency policy can be disclosed to the individual verbally or in writing, but always in a consistent and uniform manner.
- B. As a regular ongoing practice, offer and remind ALL your commercial lines clients and prospects about the need for and availability of EPLI insurance coverage.
- C. Further, suggest to commercial clients/employers that they have a written employer practices manual that specifies the terms for hiring, continuing employment, changing jobs, or promoting and, if applicable, why a qualifying MVR is required.

But what about MVRs for CL?

PIA continues to support our traditional recommendation that employers who include MVRs in their employment decisions should do so by developing procedures and obtaining records on their own. However, for PIA member agencies that still wish to consider an alternative to this, we provide the following basic, prudent course of recommendations:

1. All of the earlier three suggestions (A-C) are in place and followed as regular practice.
2. Add to the end of point #A above - However, if permitted by written authorization of the individual about whom the information pertains, we may advise the individual's employer or perspective employer only if the individual is acceptable or not acceptable from an underwriting perspective v/v the requirements of the employer's commercial auto policy. Deliver this notice in writing.
3. If an agent and the employer client are considering using the agent for underwriting review of MVRs then in the employer's manual, it must be made emphatically clear that your role, as agent, is strictly for insurance underwriting purposes only and in no way is connected to, affected or controlled by the employment practices of that employer client.
4. PIA also suggests that there be no additional charge for this policyholder/client service beyond the earned commission from the commercial auto policy.



National Association of Professional Insurance Agents

5. The EP manual should be reviewed by the commercial client's/employer's lawyer to assure compliance with state and federal laws, and the indemnifying language as it pertains to you (the agent) and your role, reviewed by your attorney.
6. For additional protection of the agent, the employer should be prepared to properly indemnify the agent in the event of a lawsuit by the applicant/employee. In addition to the wording suggested in their EP manual, the employer should include the agent either as an additional insured or certificate holder under the employer's EPLI policy.
7. The employer's/client's job description should specify (and be supportable and defensible from a legal perspective) the driving requirements for the job and that MVRs will be obtained for underwriting purposes.
8. The employer should require applicants and employees to sign a written statement that:
 - a. authorizes the employer to ask the agent and for the agent to obtain the MVR solely to determine whether the applicant/employee is acceptable for underwriting purposes under the employer's commercial auto policy, and
 - b. assures the employee/applicant that the agent will not show or discuss the contents of the MVR with the employer but will merely state whether the record is acceptable or unacceptable from an underwriting perspective, as well as
 - c. written in a format and language structure that is legally acceptable for the individual in question.
9. If the nature of the record determines an underwriting denial, the employee/applicant and employer should be advised on how to obtain their own copies of the MVR.
10. In the advent that adverse action is taken (such as the employer does not hire the applicant because of the underwriting denial), the agent should be able to document that he/she was acting within the scope of an insurance agent (underwriting for a transaction of insurance) when obtaining and using the MVR so that the agent's E&O policy can fully respond, if needed.

Even when all these procedures and forms have been put in place, the agent has several more steps to follow before they may consider proceeding:

11. Under no circumstances should the agent obtain the MVR for employment purposes of the commercial insured or "resell" the MVR, either verbally or in writing, whether for a fee or as a free service. Very strict requirements, and harsh penalties for failure to meet those requirements, apply when MVRs are obtained for employment purposes or are resold. Furthermore, reselling places the agent in violation of their contract with their own consumer-reporting agency.
12. All this detail must be shared with the MVR vendor or consumer reporting agency (such as DEC or ChoicePointe) used by the agency, as well as ALL



National Association of Professional Insurance Agents

insurance carrier that will or could be affected v/v policies of insurance issued. These parties will review the detail to assure that these practices and forms do NOT violate any of the provisions of the agreements the agency has signed with them or inadvertently might enjoin them in any action.

13. As a final step, the agency should advise its E&O carrier (which will probably request a review of all procedures and forms).

Sincerely,

Patricia A. Borowski
PIA National Senior Vice President
<mailto:patbo@pianet.org>
(703) 518-1360

Tonio DeSorrento
Law Intern
<mailto:toniode@pianet.org>
(703) 518-1347