

Packing Your Parachute

6,118 Insurers and 281,290 Insurance Salespersons in the U.S. Want Your Business

Which Ones Would Properly Pack Your Parachute?

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Key Principles from This Publication

- By its very nature, the insurance buying process is invariably one of asymmetrical information with the buyer usually being on the short-end of the transactional stick. This can lead to major problems for the executive in charge of buying the business insurance who may not know the precise details of what is being purchased yet is bound to the terms and conditions of the policy.
- Insurance is one of the only industries we know of where the product is usually purchased sight unseen and may not be received by the buyer for weeks or even months following the sale. This is often a set-up for misunderstandings and frustrated buyers unless there is a highly competent insurance agent selling the product.
- Largely designed with technical language and having been industry tested, many insurance policies are not suitable for framing. Even if they are read, it is unreasonable to expect most buyers to understand the fine print and complex nature of all aspects of the insurance contracts, much less the options which might be available to address the exclusions, conditions and terms and conditions.
- 281,290 insurance salespersons and 6,118 insurance carriers in the U.S., make the options available for policies, coverage forms, endorsements, notices, loss control requirements and claims handling procedures baffling to put it mildly. It is unlikely that even the most sophisticated executives could effectively compare all of the options, especially without having the policies which are being proposed. Hiring more than an order-taker insurance agent is key to the organization's risk management strategy.

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INTRODUCTION

“ **Not many people complain of parachutes failing. It’s usually too late. Like parachutes, inadequate insurance programs are often discovered post haste following a calamity, much to the surprise of many.**”

Not many people complain of parachutes failing. It’s usually too late. Like parachutes, inadequate insurance programs are often discovered post haste following a calamity, much to the surprise of many.

This publication makes the case that the insurance buying process inherently involves asymmetrical information with the buyer often on the short-end of the transactional stick. This can lead to major problems for the executive buying the insurance who may not know the precise details of what is being purchased yet is bound to the terms and conditions of that policy.

Of the 6,118 insurers and 281,290 insurance salespersons in the U.S., which ones would or could pack the parachute you would need in the event of a crisis?





ASYMMETRICAL INFORMATION

In Daniel H. Pink's *New York Times* Best Seller *To Sell is Human*,ⁱ in analyzing sales processes he refers to the concept of "asymmetrical available information" which he uses to explain that compared to the seller, the buyer is usually at an information disadvantage. Citing the example of the used car salesman, Pink points out that many times only the seller really knows whether the vehicle is a lemon or a peach with the buyer being at least partially in the dark, albeit marginally less so in the Information Age.

Buying business insurance is a classic scenario of asymmetrical information. We find that as the rule more so than the exception, by-and-large the insurance buyer is presumptively expected to compare coverage terms being offered by one insurer to a host of others with very little background or training in how to do so.

Business majors and MBA candidates are not routinely taken aside by professors and told the tricks of the trade of buying business insurance. The same is true for law schools which teach contracts yet pay little heed to the interplay between insurance policies and legal and business exposures.

The insurance agent may not be of much help either, and, in fact, may later claim that he or she was a mere order-taker not an insurance counselor and owed no duty to advise your company. Where does that leave the buyer? Many insureds are just plain left in the dark in this process, perhaps because their insurance agents, too, do not have a bright enough flashlight.

Unlike buying many other types of products or services, the Internet may have only exacerbated the problem when it comes to business insurance. Not anywhere in our online search did we find a way to competently compare the intricacies of business insurance policies being offered by a plethora of insurance companies through hundreds of thousands of agents.

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Specimen copies of policies containing language that the courts routinely hold policyholders to were conspicuously unavailable, at least in our search. An analysis of coverages to exposures was missing because in reality, only a professional, experienced and qualified insurance broker can pack that parachute.

In Googling "Comparing Business Insurance Quotes," one often advertised website we went to did not offer a simple online way to



buy commercial insurance despite its claims, instead only indicating after we entered some information that up to eight agents or partner companies would contact us:

“By clicking “Get My Quotes” I provide my signature, expressly authorizing up to eight insurance companies or their agents or partner companies to contact me at the number and address provided with insurance quotes or to obtain additional information for such purpose . . .”

This is more of a marketing lead generator than anything and does little to help the buyer. In fact, it might make things worse.

This site goes as far as to defer to the insurance buyer’s knowledge in insurance buying (albeit once again asymmetrical), stating:

“No one knows your business better than you. Before purchasing a business insurance policy, make a list of your major concerns (i.e. adequate limits of liability, loss of income, etc.). Review each policy to see how each addresses your primary concerns. By completing this process, you will be in a better position to review your options and choose the most suitable coverage.”

One direct insurance company website we visited was the closest we came to finding an actual online quote. As requested by that site, we clicked on “property insurance” and input some basic information. Arbitrarily chosen limits of \$500,000 for the building and \$100,000 in contents with \$1,000,000 in liability insurance were quoted by that carrier at \$116.50 per month, all based upon the limited information that was requested which did not include any loss history. More shocking to us were the terms

of the proposed coverage which were stated, in pertinent part, as follows:

Building property

Your ... building coverage includes the building structure, property used to maintain the building, indoor fixtures, and flooring.

Physical damage or loss

Your office building insurance protects you against risks like fire, lightning, explosion, windstorm, hail and smoke damage. Damage caused by vandalism is also covered.

Newly acquired property

We provide up to \$250,000 of temporary coverage for a newly acquired or constructed building that you own for up to 30 days. After this time, you need to inform us to continue your office building insurance on that newly acquired or constructed building.

Lost business income

Since we understand how devastating a disaster can be ... small business insurance will pay the income your business loses and extra expenses you incur for up to 12 months if you cannot operate your business as a result of damage to your insured building. This would include up to 60 days of ongoing payroll expenses for your employees.

No deductions for depreciation

Buildings protected under a business owner’s insurance policy are valued at replacement cost (not the market value). There is no deduction for depreciation. However, you must insure at least 80% of the value of your insured building or you may not be able to recover the full amount of any losses you incur.



“ In our experience, such broadened coverage options are generally not provided by the insurer unless requested by the insurance agent.”

If we had purchased this policy as quoted, we would have done so without knowing many things such as:

- Was the foundation of the building covered?
- What does “80% of the value of your insured building” mean?
- What is the time frame for continuing to collect loss of income after we were back in business and trying to regain our market share?
- Could we buy a period longer than 60 days to keep our staff employed while we re-built?
- Was any coverage provided to bring our building up to code following a fire? How about the cost to update the undamaged portion of the building? Demolition costs?
- The only listed exclusions were earthquakes, floods, volcanoes, utilities and computer testing. Are there others?

- If we owned our building in an LLC other than the business name, was that name included?
- Is property of others that may be on my premises covered?

It would be less than likely that the executive in charge of insurance buying would even know to ask about these areas or many others. Retaining a properly educated and experienced insurance professional is the only real answer—one who can properly pack the parachute.

MANY INSURANCE POLICIES ARE NOT SUITABLE FOR FRAMING

Most insurers are, by-and-large, not demur in claims handling when it comes to enforcing specific policy language. This is what adjusters

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are taught to do as a fair representation of the promise of the insurer in exchange for the premium paid. Yet policies are almost always written by insurers in conjunction with teams of attorneys and underwriters with the support of industry organizations such as the Insurance Services Office (ISO) which publishes standard policy language.

Many policyholders might think that such policies are a lot like terms and conditions found in the box of the newly purchased vacuum cleaner—take it or leave it. This may not always be the case when it comes to commercial insurance. Endorsements could be available to amend the policy language. In our experience, such broadened coverage options

are generally not provided by the insurer unless requested by the insurance agent.

The policyholder is at a disadvantage to start with in the insurance buying process, particularly in that the policies are purchased sight unseen in most cases. Insurance is one of the only industries we know of where the product is purchased without the buyer seeing or receiving the product for weeks and sometimes months. A lot can happen during that time.

The law in most states is that the reasonable expectations of the policyholder are not to be considered in interpreting policy language. Clear and unambiguous language is to be enforced as written. The plain meaning of policy terms is to be applied and strained meanings are to be avoided.ⁱⁱ

The parties to an insurance contract remain free to waive or modify the terms of the contract by mutual consent, but one party cannot demand enforcement of an insurance contract which is contrary to the mutually agreed terms, based upon that party's unilateral belief that the contract has a meaning different than what the mutually agreed terms actually provide.ⁱⁱⁱ

It is surprising to us how many insurance agents we have encountered who rely upon statements from underwriters such as "the intent is that this would be covered." Such statements do not amend the policy language.^{iv} Only a signature by an authorized agent of the insurer can do that. As noted, what the policyholder expected is usually not relevant. Of course, insureds must read their policies and even if they do not they are bound to the contract terms anyway, even if they do not understand them.^v

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The above lends credence to the argument that policyholders need an insurance professional who can properly pack their parachute amid transactions that invariably involve asymmetrical information.

THE INSURANCE AGENT AS PARACHUTE RIGGER

A. Levels of Parachute Packers

The Federal Aviation Administration (FAA) licenses civilian riggers to pack parachutes for others. There are three levels of competence: Entry-level, senior and master. ^{vi}

Entry-level riggers start by apprenticing under another licensed rigger, then test for the Graduate Senior Rigger rating. The Senior Rigger test involves three parts: written, oral and practical. ^{vii}

After three years of experience — including packing at least 200 reserves, 100 each of two different types - Senior Riggers can test for the Master Rigger rating which allows them to do most major repairs to parachutes before packing them.

The oral exam for the Master Rigger designation is extensive, including identifying dozens of material samples. The practical exam starts with both assembling and adjusting a sewing machine, then doing a major canopy repair that includes a seam, reinforcing tape and line attachments. This level requires considerable knowledge and experience.

B. Levels of Insurance Agents & Professionals

Although regulated at the state rather than the federal level, like parachute riggers, there

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are varying levels of insurance professionals such as solicitor, producer and counselor and these are further refined by types of coverage qualifications such as property and casualty, life, health and accident and securities based products. There are separate examinations for each type.

There are also certain “Master” levels of insurance agents including those who have obtained advanced nationally recognized certifications such as:

- Chartered Property and Casualty Underwriter (CPCU)
- Chartered Life Underwriter (CLU)
- Chartered Financial Consultant (ChFC)
- Certified Insurance Counselor (CIC)
- Accredited Advisor in Insurance (AAI)



Unlike Master Parachute Riggers, insurance agents are not required to take an oral exam. They are not required to write or interpret an insurance policy or lease agreement or settle a claim. Attending a number of day-long courses, some of which can be done online, then passing a standardized multiple choice exam are generally the only qualifications necessary to sell insurance in most states.

Each year we are retained by many attorneys in cases involving coverage disputes and agent errors and omissions. We also represent policyholders as consultants in the insurance buying process. These experiences, for us, make the case on why a competent “Master” level insurance advisor is critical to the proper packing of a business parachute.

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6,118 U.S. INSURERS AND 281,290 U.S. INSURANCE SALESPERSONS

According to the Bureau of Labor and Statistics, as of May of 2015 there were 281,290 insurance salespersons in the U.S. with the average hourly pay rate of \$31.07 and the average salary of \$64,630, selling on behalf of some 6,118 insurers.^{viii} This means that as a potential buyer you are likely inundated with regular opportunities to purchase insurance. With so many insurers and agents who would love to sell you insurance, do you know the product they are selling? Do they?

Adding further to this problem, according to the American Bar Association^x there were 1,300,705 attorneys in the U.S. in 2016, compared with 574,810 in 1980 and only 300,000 in 1965.^x Only a percentage of these attorneys understand the nuances of commercial

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insurance and the options available to address gaps yet many are regularly involved in drafting leases and contracts. It only follows that these documents end up containing ineffective insurance requirements provisions that either cannot be complied with or are inadequate to protect the client.

A seasoned and qualified insurance professional can help level the playing field with insurers and assist attorneys and other professionals in either complying with or the drafting of insurance requirements provisions.

EXAMPLES OF LAWSUITS AGAINST INSURANCE AGENTS

In over 20 years of working on insurance programs and insurance agent errors and omissions cases on behalf of both policyholders and insurance agents, we have seen plenty of insurance-related disasters. Here are some:

- Failure of the agent to place correct property coverage resulting in the bankruptcy of the company and its owner.
- Failure of the proposing agency to advise on additional coverage general liability exclusions in policy quoted, resulting in numerous uncovered lawsuits.
- Inadequate business interruption coverage resulting in catastrophic underinsured loss to insured.
- Failure to offer or obtain adequate limits for personal auto liability, resulting in a \$500,000 personal payout by policyholder.
- Failure to negotiate a proper extended period of indemnity on business interruption coverage.
- Improper writing of builder's risk coverage.
- Failure to list all named insureds that had insurable interest.
- Failure to address a coinsurance penalty provision in a property policy.
- Inadequate coverage after the agent moved the client from a commercial to personal policy with lower limits.
- Failure to blanket contents limits among contiguous buildings.
- Failure to blanket limits and/or obtain agreed amount to waive coinsurance.
- Inadequate property limits.
- Misrepresentation issue relating to application.
- Inadequate coverage for water damage claim.
- Failure of agent to properly insure de-attached structure and contents.
- Failure of agent to list correct named insureds.
- Failure of agent to obtain correct policy for non-owner occupied home.
- Failure to secure nonowned auto coverage for a pizza store.
- Failure to notify of the removal of a name from a named insured provision.
- Failure to obtain proper coverage for computer loss caused by lightning.
- Failure to negotiate adequate property limits for bar.
- Failure to negotiate water damage coverage.
- Failure to negotiate proper coverage for rebuilding in accordance with ordinances.
- Failure to secure coverage arising out of power failure / power surge.
- Inadequate crime coverages for auto dealer.



- Failure to obtain coverage for personal property of others.
- Inadequacy of limits on homeowners insurance policy.
- Inadequacy of homeowners coverage for dwelling, deck and stairway.
- Failure to negotiate umbrella policy that would have covered boat accident.
- Failure to obtain appropriate property coverage; failure to blanket limits.
- Driver not covered under auto insurance.
- Failure to provide notice of cancellation.
- Failure to list landlord as additional insured or lender's loss payable on tenant's property policy.

The above are only some of the examples. All-in-all, we have been involved in hundreds of such cases. We have reviewed even more insurance proposals which in some cases provide little more than a summary of proposed limits.

A list of some of the common gaps we find in business insurance programs can be found at *Appendix A* to this publication.

THE INDEPENDENT INSURANCE AGENT IS YOUR LEGAL AGENT

Many buyers do not know that when they go to an independent insurance agency which represents many insurers, that agent is ordinarily their legal agent not the agent of the insurer. The general rule in most states is that the independent agent ordinarily represents the insured.^{xi}

“**If your insurance agency fails to advise you, it may be difficult to recover from that agency which will, more often than not, be quick to hide behind the “order taker” badge to disclaim its duty to you.**”

This means that in most states, when you are hiring an insurance agent you are actually hiring someone to be your legal agent to do something for you. As your agent and not the insurer's agent for most purposes, anything that the agent tells you may not be binding upon the insurer that person is selling for.

If your agent tells you that you have coverage for a particular exposure and it turns out that you do not, the insurer which wrote the policy might be able to avoid liability for the misrepresentation unless the agent is an employee of the insurer or only sells for a single insurer.





IS YOUR AGENT AN ORDER-TAKER?

In some ways, the insurance agent can be more important than the insurance company. It is relatively uncommon for an insurer to voluntarily extend coverages and broadening endorsements where it is not requested to do so by the agent. Thus, executives in charge of buying insurance need more than an order-taker agent. They need an advisor.

An example of this is in the area of coinsurance, one of the most commonly misunderstood concepts in property insurance. Although this can be a dangerous penalty clause in property insurance policies, some agents do not attempt to negotiate with the insurer for its removal.

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Similar analogies can be made to the absence of blanket limits of insurance between multiple locations, the sprinkler guarantee penalty provision, among many others.

Courts such as the Michigan Supreme Court have held that insurance agents are to be differentiated from insurance consultants and generally have no duty to advise of anything. Although it varies, many states look to whether there was something more than an order-taker relationship between the agent and the client to determine duties.^{xii}

If your insurance agency fails to advise you, it may be difficult to recover from that agency which will, more often than not, be quick to hide behind the “order taker” badge to disclaim its duty to you. This is a travesty yet the general rule in the majority of jurisdictions is that the insurance agent has no duty to advise its client of coverage adequacy.^{xiii} There are exceptions.

The Wisconsin Court of Appeals has noted that anything other than the general “no advice” rule would ^{xiv}:

“remove any burden from the insured to take care of his or her own financial needs and expectation in entering the marketplace and choosing from the competitive products available” Id at 7-8.

The irony of this, however, is that it assumes that the buyer is knowledgeable enough to know the products available and that it has an insurance agent who can explain all of those options. In our experience these are tall orders.

It is interesting to note that some courts do not include insurance agents in the ranks of





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“professionals” for purposes of determining which statute of limitations applies—ordinary negligence or professional liability.

In Michigan, for example, the statute of limitations for a legal action against an independent insurance agent is three years, with courts theorizing that insurance agents are not learned professionals such as lawyers, doctors or others of higher learning.

The New York Court of Appeals has also concluded that insurance agents and brokers are not considered professionals ^{xvi} under a three-year statute of limitations applicable to non medical malpractice cases. ^{xvii}

While insurance agents may not be “professionals” for certain purposes in some states, their professionalism and competence are undeniably essential to the client’s management of risk in ways not fully dissimilar to that of the business lawyer.

WILL THE INSURANCE AGENT BECOME EXPENDABLE?

In an August 1, 2016 article in *The Atlantic* ^{xviii} entitled “The War on Stupid People,” author David H. Freedman presents the case that the bell is beginning to toll on workers from many industries often thought to have been the source of life-long jobs. He cites examples in the manufacturing sector (robots replacing humans) which he postures not too far in the future will be joined by industries such as delivery and drivers (taken over by drones and self-driving vehicles) and even restaurants (apps that allow you to arrange for a table, order and pay without the assistance of a human being).

We do not see the technological age as eliminating commercial insurance professionals any more than it will lawyers, doctors or CPAs. While optometrists are now allowed in many states to prescribe drugs as are some licensed physician assistants, and while some doctors will now see you via Skype, these trends do not appear to have expanded to insurance agents, at least not yet. The insurance professional’s job, when done properly, is just too complicated and requires too much knowledge and experience to be replaced by a machine or a website.

Business insurance is too often a jack-in-the-box purchase where the melody sung by the salesperson precedes the subsequent surprise pop. It’s asymmetrical information in the truest sense. Who is packing your parachute?



APPENDIX A

COMMON GAPS IN COMMERCIAL INSURANCE PROGRAMS

GENERAL

1. Named insureds inconsistent
2. Applications contain inaccurate information
3. Insurance does not track with insurance requirements of leases or contracts

PROPERTY

1. Building and BPP limits are inadequate
2. Personal property of others coverage is inadequate
3. Foundations of buildings not covered
4. Signs not covered or limits too low
5. Generators not covered
6. Fences and light poles not covered
7. Extended period of indemnity only 30 days following rebuilding
8. Coinsurance penalties apply
9. Ordinary payroll limitations apply
10. Blanket limits missing
11. Protective safeguards penalties apply
12. Pollution clean-up limits inadequate
13. Loss payees or additional insureds missing.

CRIME

1. Claims expense limit inadequate
2. Third party coverage missing
3. Computer fraud does not include social media
4. Employee dishonesty limit inadequate

GENERAL LIABILITY

1. Broadening endorsement missing
2. Aggregate per location or project endorsement missing
3. Contractual liability coverage limitations
4. Hostile fire and fumes from heating, cooling or dehumidifying equipment not covered
5. Employee benefit legal liability missing

BUSINESS AUTO

1. Broadening endorsement missing
2. Employee as additional insured missing
3. Supplementary PIP and UM / UIM other car missing
4. Titles, leases / ownership
5. HCPD including loss of use missing
6. Lease gap coverage missing
7. Liability limits do not match general liability

UMBRELLA

1. Named insureds inconsistent
2. Less broad than underlying
3. No pollution carve-backs
4. Cross suits exclusions
5. EBL and EL not scheduled

MANAGEMENT PRACTICES

1. Third party coverage missing
2. Wage and hour coverage missing
3. Immigration coverage missing
4. No fiduciary coverage
5. No carve back on D & O for insured v. insured
6. No cyber coverage included

PROFESSIONAL LIABILITY

1. Contingent bodily injury and property damage left-off
2. Named insureds inconsistent
3. Insured v. insured exclusion

Note: the above are sample checklist items only. They do not include all coverages or considerations and may not apply to your business. Seek professional advice on your particular circumstances.

ENDNOTES

- ⁱ *To Sell Is Human*, Daniel H. Pink, Riverhead Books, 2012.
- ⁱⁱ *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich 41 (2003); *Rory v Continental Ins. Co.*, 473 Mich 457 (2005).
- ⁱⁱⁱ *Wilkie, supra*.
- ^{iv} *Wilkie, supra*^{iv}; "Reasonable Expectation Doctrine Trumps Insured's Duty to Read Insurance Policy," Steven Plitt, June 10, 2013, *Claims Journal*; <http://www.claimsjournal.com/news/southeast/2013/06/10/230563.htm>
- ^v "Reasonable Expectation Doctrine Trumps Insured's Duty to Read Insurance Policy," Steven Plitt, June 10, 2013, *Claims Journal*; <http://www.claimsjournal.com/news/southeast/2013/06/10/230563.htm>
- ^{vi} FAA Regulations, AC 65.5B
https://www.faa.gov/regulations_policies/advisory_circulars/index.cfm/go/document.information/documentID/22910
- ^{vii} *Id.*
- ^{viii} <http://www.iii.org/fact-statistic/industry-overview>
<http://www.bls.gov/oes/current/oes413021.htm>
- ^{ix} http://www.americanbar.org/content/dam/aba/administrative/market_research/national-lawyer-population-by-state-2016.authcheckdam.pdf
- ^x http://www.americanbar.org/content/dam/aba/administrative/market_research/total-national-lawyer-population-1878-2016.authcheckdam.pdf
- ^{xi} See article at <http://www.bullivant.com/files/FTD-DRI-Whose-Agent-Are-You-Anyway.pdf>
- ^{xii} "The Special Relationship and the Insurance Producer," *The CPCU E-Journal*, June 2012, Stanley Lipschultz, J.D. CPCU; <http://www3.ambest.com/DPSDirectorySearch/MMSHOW.ashx?mmid=7352>
- ^{xiii} *Nelson v. Davidson*, 155 Wis2d 674 (1990); *Harts v. Farmers Ins Exchange*, 461 Mich 1 (1999).
- ^{xiv} *Nelson v. Davidson* 155 Wis 2d 674 (1990)
- ^{xv} *Stephens v Worden Ins. Agency, LLC*, 307 Mich App 220; (2014)
- ^{xvi} CVP § 214; New York Civil Practice Law and Rules 214
- ^{xvii} *Chase Scientific Research, Inc. v. NIA Group, Inc.*, 96 N.Y.2d 20 (2001).
- ^{xviii} *The Atlantic*, July / August 2016; www.TheAtlantic.com