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EXPLORATION OF POLICYHOLDER INFORMATION OWNERSHIP RIGHTS UNDER THE THREE EXISTING INSURANCE AGENCY SYSTEMS IN THE UNITED STATES

DEBORAH S. FREEMAN
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INTRODUCTION

An insurance agent's traditional role in the sale of insurance products to potential policyholders is changing. Historically, an insurance agent was the customer's first and only point of contact, and customers rarely interacted directly with the insurance company. However, due to a maturing market's slower growth in the property and casualty insurance areas, and the impact of increasing costs in doing business through agents, insurance companies are now seeking new ways to spur profitability. In response, insurance companies have begun to provide consumers with additional access points for sales, such as the Internet. They are also trying to expand their direct insurance sales through toll-free telephone numbers. As a result of these actions by the insurance companies, litigation between insurance companies and insurance agents over ownership rights to policyholder information has increased.1 Policyholder in-

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1. For example, a recent order of the Judicial Panel on Multidistrict Litigation involved five actions in the District of Connecticut, two actions in the Southern District of New York, and one action each in the Eastern District of New York and the Eastern and Western Districts of Pennsylvania. Nine of these cases involved Nationwide Insurance Company's suing former agents for various violations of their Agent's Agreements. The tenth case involved an agent attempting to hold Nationwide liable for certain conduct that he claimed had caused him injury. These cases illustrate the increasing acrimony in relationships between the insurance company and its agents. In re
formation is the particular customer information that is vital to both insurance companies and insurance agents because it provides, among other things, the details of a policyholder's past transactions and possible future needs. This customer information is a valuable asset that both the insurance company and the insurance agent need in order to market their products and services. This information becomes even more valuable given a shrinking market for insurance sales. Knowing and anticipating customer needs are vital marketing and sales tools for both insurance companies and insurance agents. It is, therefore, over this information that agents and companies contest ownership.

This Article explores the three different insurance agency systems—the Independent Agency System, the Exclusive Agency System, and the Direct Response Agency System—that have evolved in America over the last seventy to eighty years, and the impact each such system has upon these ownership rights. In addition, this Article provides the guidance necessary to determine the particular


2. Within the insurance business, policyholder information has become a term of art often expressed by the shorthand term “expiremrs” or “book of business.” V.L. Phillips & Co. v. Pa. Threshermen & Farmers’ Mut. Cas. Ins. Co., 199 F.2d 244, 246 (4th Cir. 1952) (“‘Expirations’ in the insurance field has a definite and well recognized meaning . . . .”); see also In re Estate of Corning, 488 N.Y.S.2d 477, 479 (App. Div. 1985) (“This internal bookkeeping system consisted of separate records or ledgers, commonly called a ‘book of business’ or ‘expirations’ . . . .”); Kerr & Elliott v. Green Mountain Mut. Fire Ins. Co., 18 A.2d 164, 168 (Vt. 1941) (“In the insurance field the term ‘expirations’ has a definite meaning.”).

3. This policyholder information includes a copy of the policy issued to the insured or records containing the date of the issuance of the insurance policy, the name(s) of the insured, the date of the policy’s expiration, the amount of coverage, the premiums to be paid, the property covered, and all of the other terms of an insurance policy. V.L. Phillips, 199 F.2d at 246; see also F.B. Miller Agency, Inc. v. Home Ins. Co., 276 Ill. App. 418, 425 (1934) (“The record known in insurance circles as expirations is in effect a copy of the policy issued to the insured, which contains the date of issuance, name of the insured, expiration, amount, premiums, property covered and terms of insurance.”); White v. Universal Underwriters Ins. Co., 197 N.E.2d 868, 871 (Mass. 1964) (defining “expirations” as “the exclusive right to use, in soliciting renewals, the information in the records . . . such as the initial and termination dates of each policy and the name of the broker”).

4. Alliance Ins. Co. v. City Realty Co., 52 F.2d 271, 272 (M.D. Ga. 1931) (“The well-known disposition of policyholders to accept policies offered to them in renewal of, or in lieu of, expiring policies renders valuable the expiration data or ‘expirations’ of an agency which ceases business.”); Hollister v. Fiedler, 92 A.2d 52, 55 (N.J. Super. Ct. App. Div. 1952) (“In the conduct of an insurance business, aside from the ability of the salesmen to obtain customers to purchase insurance contracts, perhaps the most valuable asset is information as to who may be in the market for insurance protection and when the most likely time would be to solicit them.”).
type of relationship that exists between an agent and the insurance company and, based upon that relationship, the means to decide who holds the superior ownership rights to this vital policyholder information. While the three agency systems are not new classifications, these types of lawsuits are increasing because insurance companies have failed to clearly define, through either contract or usage, the requirements of the agency systems used by them.

Part I of this Article discusses the evolution of the three distinct insurance agency systems and the method necessary to categorize a particular relationship. Part II examines how insurance companies contractually use the three system definitions to detail who owns the policyholder information. Part III looks at how courts classify the insurance company-agent relationship absent contractual provisions, and how they decide who owns the vital policyholder information.

I. BACKGROUND

To understand the contest between an insurance company and its (present or former) insurance agent with respect to policyholder information ownership, it is necessary to first examine the development of the three distinct insurance agency systems in the United States and to identify each system’s essential elements. From this examination, the components of each agency system emerge and can aid in determining the type of agent relationship existing between a particular agent and his insurance company. The first section of this Article details this development and the specific characteristics of each of the three separate agency systems.

A. History and Development of Insurance Agency Systems

Early in the development of the American insurance business, courts routinely applied the standard principles of agency law in determining the ownership of policyholder information or files.\(^5\) Then, an insurance agent acted only on behalf of a single insurance

\(^5\) See Arrant v. Ga. Cas. Co., 102 So. 447, 449 (Ala. 1924) (holding that under the general principles of law which regulated the relationship of agency, a list or compilation of policyholder information belonged to the principal, and not to the agent); Fid. & Cas. Co. v. Downing, 88 Pa. Super. 133, 136 (1926) (holding that information obtained by the agent for the insurance company becomes the property of the insurance company under the law of principal and agent); see also Wenneby v. Time Ins. Co., 197 N.W. 173, 175-76 (Wis. 1924) (holding that the insurance agent had no right of possession to an office as against the insurance company where the agent's role was that of agent or servant, and not one of principal or master).
company and all of that agent’s insurance activity and loyalty belonged to and was dedicated to that single company.\(^6\) Under traditional agency law at that time, the insurance company was the master and owned the policyholder files in the possession of its servant, the insurance agent.\(^7\) “In the law of principal and agent, nothing is better settled than that the agent is disqualified from dealing with the property of the principal for his own advantage.”\(^8\) Thus, the earliest standard rule in America was that insurance information gathered on behalf of the principal belonged to the principal.\(^9\)

“As the American insurance industry grew . . . , the relationship between agents and the insurance company was altered.”\(^10\) Instead of soliciting business for a single insurance company, “the agent solicited business on behalf of itself, at its own expense, and placed the policies with whichever affiliated company it desired much the same as an independent distributor places orders for direct shipment with different manufacturers.”\(^11\) Contrary to the historically accepted principles of agency law, an independent insurance agent who worked for several separate insurance companies owned the applicable policyholder records upon the termination of the agent’s relationship with a specific insurance company.\(^12\) This principle was followed unless the agent’s agreement with that

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9. See In re Roy A. Dart Ins. Agency, Inc., 5 B.R. at 210 (discussing the policy change which resulted in ownership vesting in the agent who collects the information).

10. Id. at 209.

11. Id.

12. See In re Estate of Corning, 488 N.Y.S.2d 477, 481 (App. Div. 1985) (noting that “[c]ontrary to the operation of normal agency principles, whereby the principal has ownership rights in the lists of customers . . . , it is the custom and practice in the insurance field that . . . the independent insurance agent owns the expirations at the termination of his agency”); see also Spier v. Home Ins. Co., 404 F.2d 896, 898 (7th Cir. 1968) (“Basically, the [American Agency] System provides . . . [t]he ‘expirations’ belong to the agent.”); Port Inv. Co. v. Or. Mut. Fire Ins. Co., 94 P.2d 734, 739 (Or. 1939) (“[T]his rule [of principal and agent] has not been applied to agents for fire insurance companies, but it has been held that, in the absence of an agreement to the contrary, the agent has a property right in the expiration information which he compiles and keeps as a part of his records.”).
company provided differently.\textsuperscript{13}

As this relationship changed, the right to ownership of the policyholder information was reformulated and became dependent upon the type of relationship that existed between a particular agent and a particular insurance company.\textsuperscript{14} Common law agency principles were no longer applied on a universal basis. As disputes between an agent and an insurance company arose, courts began to categorize the parties' relationships into one of three possible insurance agent "systems": (1) the independent agency system; (2) the exclusive agency system; or (3) the direct response agency system.\textsuperscript{15}

B. Independent Agents

At the very beginning of the American insurance industry, fire insurance companies sold their insurance products exclusively from a single home office location through employees.\textsuperscript{16} These fire insurance companies initially did business in several eastern colonial cities, including Charleston, Philadelphia, Baltimore, and New York.\textsuperscript{17} The actual fire insurance business conducted by these early companies was limited to insurance sold to walk-in customers at a single location by the companies' employees.\textsuperscript{18} This limited walk-in practice created a geographic concentration of the properties insured, which was typically comprised of only those properties located within walking distance of the fire insurance company's office.\textsuperscript{19} If a fire were to occur in that area, that single conflagration might, on its own, destroy an entire fire insurance company's

\textsuperscript{13} See In re Corning, 488 N.Y.S.2d at 481.
\textsuperscript{14} See Hardin County Farm Bureau v. Farm Bureau Mut. Ins. Co., 341 S.W.2d 62, 63 (Ky. 1960) (recognizing that ownership of records depends on whether agent serves a direct writing insurance company or an insurance company operating under the American Agency System); Kezdi v. Nationwide Ins. Co., No. 35683, 1977 Ohio App. LEXIS 9397, at *14 (Ohio Ct. App. Aug. 11, 1977) (holding that an agent's right to renewal commissions is determined by the terms of his contract).
\textsuperscript{15} See Jeffrey M. Yates, Independent Agents Urge GEICO to Take the High Road on Advertising, NAT'L UNDERWRITER, Aug. 31, 1998, at 31 (discussing the percentage of business generated from the three insurance systems in that 32.7% of premiums generated by property and casualty insurance came from independent agent companies, 59.5% from exclusive agent companies and only 7.9% from direct response companies).
\textsuperscript{16} See Daniel, supra note 6, at 37.
\textsuperscript{17} See Robert J. Gibbons et al., Insurance Perspectives 14-18 (1st ed. 1992).
\textsuperscript{18} See Daniel, supra note 6, at 37.
\textsuperscript{19} See id.
business. The history of the earliest known fire insurance company in America, the Friendly Society for the Mutual Insuring of Houses Against Fire, organized in Charleston, South Carolina in 1735, illustrates this particular sort of unfortunate calamity. On November 18, 1740, a single fire destroyed three hundred houses, a number then equaling over one-half of the houses in the town of Charleston. The Friendly Society subsequently folded due to the losses it sustained from fire insurance claims arising out of that single fire.

After the Civil War, the need for fire insurance companies to diversify their risks over larger geographic areas intensified. The impetus arose from growing urbanization and factory development in those American cities where fire insurance companies had traditionally been located. Fire insurance companies, therefore, began appointing distant agents to maximize their geographic risk.

For example, when the Insurance Company of North America chose to expand its operations southward from its home in Philadelphia to Baltimore, the company sought out people in Baltimore to ensure that its new southern applications for fire insurance were properly completed, were accompanied by a sketch of the property to be insured as well as any neighboring buildings, and included a description of any extra hazards. For this work, the application handler received a fee of $2.00. Through this risk assessment process and by the appointment of distant agents, the Insurance Company of North America was able to expand its business into Ohio, Kentucky, Virginia, and Tennessee. The risk spreading in the fire insurance business is also evidenced by the appointment of a distant agent in New York by the Hartford Fire Company in 1821.

Over the years, the number of companies with similar distant

20. For example, in 1838, only local insurance companies were allowed to operate in Charleston, South Carolina; and after numerous claims, every one of those insurance companies failed. For some period of time, not a single fire insurance company was in operation in that entire state. See DANIEL, supra note 6, at 103.


22. Id.

23. Id.

24. See DANIEL, supra note 6, at 132-33.

25. See id.

26. JAMES, supra note 6, at 86-104.

27. Id. at 97.

28. Id. at 104.

29. DANIEL, supra note 16, at 61-75.
fire insurance agents multiplied. These distant agents began the practice of obtaining agency appointments with more than one fire insurance company and started conducting business on behalf of all of the various fire insurance companies from which they had received appointments. As a result of representing several companies, agents’ loyalties changed, and the agents began to view themselves as independent contractors rather than employees of the insurance company. In light of this change, the agents developed a belief that they, and not the insurance company, owned any policyholder information.

Due to the great distances between established communities as well as the slow means of transportation and communication existing in America at the time, these early fire insurance companies delegated broad authority to their distant agents. In the late nineteenth century, these distant insurance agents performed almost all of the insurance functions, such as selling, policy issuance, bookkeeping, and claims adjustment, that today’s insurance companies usually perform internally.

This type of insurance agent-insurance company relationship is now known as the “American Agency System.” Under the American Agency System, as it exists today, insurance agents are “free to sell insurance products through more than one company.” As well, an independent agent contracts with several different insurance companies and maintains his own office to conduct the business for those insurance companies at his own expense.

30. See In re Chapman, 50 F.2d 252, 253 (W.D. Ky. 1931) (“[A] general fire insurance agent, in soliciting fire insurance business, makes such solicitation, not in behalf of any particular company, but in reality in behalf of the agency . . . .”).

31. See Port Inv. Co. v. Or. Mut. Fire Ins. Co., 94 P.2d 734, 740 (Or. 1939) (explaining that a fire insurance agent expects that he owns the policy information because a fire insurance agent ordinarily solicits business on behalf of his own agency).

32. See Romac Res., Inc. v. Hartford Accident & Indem. Co., 378 F. Supp. 543, 550 (D. Conn. 1974) (outlining the difference between agents for direct-writing insurance company and nonexclusive agents), aff’d, 513 F.2d 102 (2d Cir. 1975); Ballagh v. Polk-Warren Mut. Ins. Ass'n, 136 N.W.2d 496, 497-98 (Iowa 1965) (“American Agency System is the term applied to the principle agreed upon generally by insurance companies and independent agents relating to the ownership of expirations. It provides that upon termination of an agency agreement, . . . his records . . . shall remain his property . . . otherwise the records and use and control of expirations shall be vested in the company.”).


The insurance company has no direct contact with the insured; the policy is issued by the agent and countersigned by him; the agent has the power to cancel or amend the policy; he collects the premiums and makes remittance on his own to the company; he may switch companies upon the expiration of the policy or he may cancel it during its term and place the risk in another company.\textsuperscript{35}

By definition, an independent insurance agent is

an "insurance agent" who is not owned or controlled by any insurer or group of insurers and whose agency agreement does not prohibit the representation of other insurers... and which provides that upon termination of the agreement the agent’s records and use and control of expirations remain the property of the agent.\textsuperscript{36}

The essential element of such an insurance agent-insurance company relationship is an independent businessperson (the agent) acting under a contractual relationship for the sale of the insurance products made available to him for sale by several different insurance companies.\textsuperscript{37} The bylaws of a typical state organization of independent insurance agents describe its members as agents

who represent property and casualty insurance companies licensed by the [state’s insurance department] and who are independent agents with the legal ability to represent more than one such insurance company, and...[who] operate principally on a commission basis as independent contractors of property and casualty insurance companies and which, by provisions of their agency contracts, wholly own their expirations...\textsuperscript{38}

The American Agency System continues to flourish today, and

\textsuperscript{35} Hedlund v. Farmers Mut. Auto. Ins. Co., 139 F. Supp. 535, 537 (D. Minn. 1956) (holding that an agent who did not directly issue policies and had no authority to cancel policies or collect premiums, was not operating under the American Agency System and had no property right in renewals).

\textsuperscript{36} In re Estate of Corning, 488 N.Y.S.2d 477, 481 (App. Div. 1985) (holding that as between corporate insurance agency (an independent insurance agent) and estate of shareholder (a sublicensee), the corporate insurance agency owned the "book of business"); see supra note 2 and accompanying text.

\textsuperscript{37} See Pierce v. Northwestern Mut. Life Ins. Co., 444 F. Supp. 1098, 1104 (D.S.C. 1978) (holding that the relationship between insurance company and agent was that of independent contractor because contract between them so provided and practices of agent were those of independent contractor).

\textsuperscript{38} Bylaws, Art. IV. Membership, Sec. 4.1, Independent Insurance Agents of Georgia, Inc., Rev. June 18, 1999, a member of the National Independent Insurance Agents of America, Inc., 127 South Peyton Street, P.O. Box 1497, Alexandria, Virginia 22314.
many insurance agents and their agencies prefer to employ this agency system. The next section of this Article discusses the growth of the exclusive agency relationship and how this relationship operates today.

C. Exclusive Agents

The fire insurance business existing in nineteenth century America used a rigidly standardized system of premium rates and underwriting considerations. Consequently, significant portions of American society, which did not neatly fit into these categories, were both excluded and neglected.\(^{39}\) This exclusion led to the creation of "niche" insurance companies to satisfy the unmet needs of potential policyholders.\(^ {40}\) These uninsured individuals banded together to create their own "niche" insurance companies and to sell the insurance they desired at prices they believed reflected their own particular risks and circumstances.\(^ {41}\)

For example, farmers had difficulty obtaining fire insurance at a reasonable cost because the only rates available from the traditional fire insurance companies were established for the high-density dwellings in a crowded city environment.\(^ {42}\) The farmers, however, were not the only group experiencing difficulty obtaining insurance at a reasonable cost. Any group or individual wishing to insure a risk considered too uncertain or unprofitable by the insurance companies encountered problems. One such group, individuals who could not get insurance for any buildings with trees growing in the front yards, formed the Mutual Assurance Company, later known as the Green Tree Mutual because of its willingness to provide fire insurance for these properties.\(^ {43}\)

Since these niche insurance companies generally only insured one type of risk, they naturally evolved, in many instances, into an exclusive agency relationship. Most of the insurance companies presently using exclusive insurance agents began as niche insurance companies.\(^ {44}\) These companies include Nationwide Mutual Insurance Company ("Nationwide"), State Farm Mutual Automobile In-

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40. Id.
41. Id.
42. Id. at 13.
43. GIBBONS ET AL., supra note 17, at 14-18.
44. STEWART ET AL., supra note 39, at 1-2.
surance Company ("State Farm"), and Farmers Insurance Group. The exclusive agent for these companies is not free to choose among several different insurance companies with respect to where he would like to place insurance coverage for a potential policyholder.

In Hedlund v. Farmers Mutual Automobile Insurance Co., a former insurance agent for Farmers Mutual brought an action against Farmers Mutual alleging that upon his termination as an agent, Farmers Mutual had impermissibly taken his property rights in the expirations of the insurance policies he had written for Farmers Mutual. The district court examined the agent's role and determined that he was an exclusive agent and not an agent under the American Agency System. As such, the court determined that the agent did not possess a property right in the expirations. The determining factors were that the "policy is issued directly by the insurance company and not by the agent. The agent has no authority to cancel it; he usually does not collect the premiums; the policy is written on a continuous basis, and each 6 months the company bills the insured directly for future premium ...." In contrast, the court described the American Agency System as follows:

[T]he insurance company has no direct contact with the insured; the policy is issued by the agent and countersigned by him; the agent has the power to cancel or amend the policy; he collects the premiums and makes remittance on his own to the company; he may switch companies upon the expiration of the policy or he may cancel it during its term and place the risk in another company.

Later, when called upon to determine whether such exclusive agents were actually insurance company employees, the courts began their analysis by applying the principles of traditional American agency law. In Nationwide Mutual Insurance Co. v. Darden, the Supreme Court adopted a common law test for determining whether an insurance agent was an employee for purposes of the

45. Id. at 11-27.
46. See id.
47. 139 F. Supp. 535, 536 (D. Minn. 1956).
48. Id. at 537.
49. Id.
50. Id.
Employee Retirement Income Security Act of 1974. The Court summarized the applicable test as follows:

In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party's right to control the manner and means by which the product is accomplished. Among the other factors relevant to this inquiry are the skill[s] required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party's discretion over when and how long to work; the method of payment; the hired party's role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Regarding expirations and policyholder information, the insurance company, usually by contract, "maintains title to the records which come into the hands of the [exclusive] agency serving it." The exclusive agent's agreement with the single insurance company details that agent's responsibilities to the insurance company. The exclusive agency is prevalent today and can be found in some of the largest American property and casualty insurers, including Nationwide and Allstate Insurance Group ("Allstate").

D. Direct Response Agents

The third type of agency system, known as the direct response agency system, also evolved from the "niche" insurance companies. In this type of agency system, while the agent can only sell the insurance from the company he represents, the agent is considered an employee.

52. Id.
53. Id. (quoting Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 751-52 (1989)).
54. Hardin County Farm Bureau v. Farm Bureau Mut. Ins. Co., 341 S.W.2d 62, 63 (Ky. 1960) (discussing the role of the exclusive agent). In Hardin, where appellant had purchased an insurance policy from an agent who had entered into a contract with a direct writing insurance company, the court held that "[b]y contract, as well as by recognized custom, the seller had no authority to transfer the expirations, title of which remained in the Insurance Company." Id. at 64.
55. "It is agreed and understood that you will represent us exclusively in the sale and service of insurance. Such exclusive representation shall mean that you will not solicit or write policies of insurance in companies other than those parties to this Agreement, either directly or indirectly . . . ." Nationwide Mutual Insurance Company, Agent's Agreement § 2 (May 25, 1988) (on file with author).
In the direct response agency system, insurance companies solicit insurance sales directly through the efforts of the company's own employees. These insurance company employees perform the sales and service functions of both the independent and the exclusive agent. They are in no manner independent businesspersons, and most of their compensation comes through salary. With the development of the Internet and e-commerce, many insurance companies anticipate soliciting potential policyholders online directly through their properly licensed employees, as order-takers only, with virtually no efforts on the part of those employees to generate that business.

As insurance company employees, there is little doubt as to who owns the policyholder information. A look at the factors listed in *Darden* classifies the agent in this relationship as an employee; therefore, the company owns the policyholder information. No individual relationship develops between the employee and the customer and rarely does the employee even solicit the customer. When a customer contacts a direct response agent, it is unlikely that the agent is one the customer has dealt with previously. This situation occurs because customer telephone inquiries are often routed through a central 1-800 telephone number operation.

The two best known direct response agency system property and casualty insurers in America today are United Services Automobile Association (known as USAA) and Government Employees Insurance Company (known as GEICO). These two insurance companies also began as niche insurance companies who were able to take competitive advantage of their access to a specific popula-

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58. *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992); *see also Hardin County Farm Bureau*, 341 S.W.2d at 63-64.

tion and, therefore, did not ever really need independent or exclusive insurance agents to obtain their customers.

II. Contractual Terms Involving Ownership of Policyholder Information

Ownership of policyholder information depends mainly upon how an insurance company characterizes its relationship with the insurance agent. In addition to some of the factors previously discussed, custom and contract provisions help to clarify this relationship. It is also important to look at whether the particular jurisdiction adheres to the general principles of American agency law. This section examines some of the contracts used by insurance companies, which not only define the agent relationship but also state who owns the policyholder information.

A. Exclusive Agency and Contractual Definitions of Ownership Rights

In 1960, Kentucky’s highest court found that “[u]sually by contract a direct writing company [meaning exclusive agent company] maintains title to the records which come into the hands of the agency serving it.” This section discusses the use of exclusive agents by four of the largest property and casualty insurance companies and how these companies contractually define the ownership rights to policyholder information.

Today, Nationwide continues its custom of servicing its policyholders through a specially trained agent force of more than 4,000 exclusive insurance agents. Nationwide has claimed proprietary rights to its policyholder information over the course of its history. Since its inception, Nationwide has always carved out a distinct structure and operated under an exclusive agency system that

60. See supra Part I.
61. Hardin County Farm Bureau, 341 S.W.2d at 63 (discussing ownership of policy records by direct writing company).
62. In 1999, the top five property and casualty insurers ranked by net premiums written were State Farm Group, Allstate Insurance Group, Farmers Insurance Group, American International Group, and Nationwide Group. Leslie Werstein Hann, The Top 250, BEST’S REV., July 2000, at 51-52.
64. See generally Nationwide Company Profile, available at http://www.nationwide.com/about_us/profile/index.htm (discussing the life of Murray D. Lincoln, one of Nationwide’s founders, who headed company operations for the first thirty-eight years).
is materially different from the agency structure of the American Agency System.\textsuperscript{65}

Nationwide impresses upon its agents its superior ownership rights to policyholder information through the contracts, policies, manuals, and guidelines with and for its agents. Nationwide's "Agent's Agreement" and "Corporate Agency Agreement" provide: "All such property [manual, forms, records, and such other material and supplies as are necessary] furnished to [the agent] by Nationwide or on behalf of Nationwide shall remain the property of Nationwide."\textsuperscript{66} Nationwide also states in its Agent's Agreement that the agent represents Nationwide exclusively and shall not solicit insurance for any other insurance company without the written consent of Nationwide.\textsuperscript{67} For these reasons, if an insurance agent terminates his insurance business relationship with Nationwide, any policyholder information obtained by that agent while he was under contract to act as an exclusive insurance agent for Nationwide belongs to Nationwide.

State Farm has a large exclusive agency force, numbering approximately 16,200.\textsuperscript{68} Although State Farm provides training and works closely with its agent force on underwriting, claims, rating, and other issues, because its agents are independent contractors, State Farm does not actively control the day-to-day work of these agents.\textsuperscript{69} State Farm's standard exclusive agency contract states in part:

\begin{quote}
Payment to the Agent . . . to be made within 90 days following the date of termination provided all records and files used by the Agent in his representation of the Company and all unused materials and supplies furnished to him by the Company have been surrendered to the Company or its authorized representative and provided the Agent has agreed in writing not to service policyholders of the Company or to compete with the Company or interfere with its business for one full year from the date of termination.\textsuperscript{70}
\end{quote}

\begin{itemize}
\item\textsuperscript{65} Nationwide Mut. Ins. Co., 491 N.E.2d at 1063 (distinguishing Nationwide's exclusive agency system from the System under which agents are free to sell insurance products for more than one insurance company); see also supra Part I.A and Part I.B.
\item\textsuperscript{66} Nationwide Mutual Insurance Company, Corporate Agency Agreement § 1 (May 25, 1988) (emphasis added) (on file with author).
\item\textsuperscript{67} Nationwide Mutual Insurance Company, Agent's Agreement § 4 (May 25, 1988) (on file with author).
\item\textsuperscript{68} 1999 BEST'S INSURANCE REPORTS - PROPERTY-CASUALTY at 172.
\item\textsuperscript{69} See id; see also supra Part I.B.
\item\textsuperscript{70} State Farm Mut. Auto. Ins. Co. v. Hedberg, 236 F. Supp. 797, 800 (D. Minn.
Allstate also distributes its insurance products through an agency force of 15,200 full-time exclusive agents. Allstate's Agent Compensation Agreement requires "the agents to work exclusively for Allstate, set the compensation rates, and include[s] a non-competition period of two years following the termination of employment with Allstate." Allstate also states in its contract that "[a]ny confidential information or trade secrets . . . is the exclusive property of the Company . . . ." Allstate defines confidential information to include

information regarding the names, addresses, and ages of policyholders of the Company; types of policies; amounts of insurance; premium amounts; the description and location of insured property; the expiration or renewal dates of policies; policyholder listings and any policyholder information subject to any privacy law; claim information; certain information and material identified by the Company as confidential . . . . All such confidential information is wholly owned by the Company.

Allstate makes it clear by the language that Allstate owns the policyholder information.

Similarly, Farmers Insurance Group produces personal and commercial lines business through still another large exclusive agency force of more than 14,000 agents. Farmers Insurance Group's standard agent's agreement provides that:

[In exchange for contract value] [t]he Agent acknowledges that all manuals, lists and records of any kind (including information pertaining to policyholders and expirations) are the confidential property of the Companies and agrees they shall not be used or divulged in any way detrimental to the Companies and shall be

1964 (granting an injunction to prevent a terminated agent from soliciting or servicing State Farm policyholders), aff'd, 350 F.2d 924 (8th Cir. 1965); see also State Farm Mut. Auto. Ins. Co. v. Dempster, 344 P.2d 821, 825 (Cal. Ct. App. 1959) (allowing contract that prohibited terminated agent from interfering in any way with existing policies and policyholders that agent serviced).

71. See 1999 Best's Insurance Reports - Property-Casualty at 173; see also Russ Banham, Testing the Waters, Captive Agency Giants Are Investing in Independent Agents, INDEP. AGENT, Sept. 1999, at 71 ("When you go to an Allstate agent, you know you're talking about Allstate insurance. You don't expect the agent to be talking about five other different insurance companies.").


73. Allstate's R3001C Exclusive Agency Agreement, § IV.E (on file with author).

74. Id. § IV.D.

Nationwide, State Farm, Allstate, and Farmers Insurance Group continue to operate with exclusive agents. These insurance companies ensure their ownership of policyholder information by contractually defining those ownership rights in their agreements with their agents as well as clearly stating that the relationship is that of an exclusive agency.

A review of the contracts between insurance companies and independent agents further defines the differences in ownership of policyholder information rights depending upon the categorization of the insurance agent-insurance company relationship. Again, not only do the contracts make clear what type of relationship exists, they also explicitly state who owns the valuable policyholder information.77

B. **Independent Agency and Contractual Definitions of Ownership Rights**

Where the insurance agent-insurance company relationship falls within the American Agency System, courts have most often found that the insurance agent owns the policyholder information.

The reason underlying this exception to the general rule is that a fire insurance agent ordinarily does not represent merely one company, but several, and solicits business, not on behalf of a particular company, but on behalf of his agency, and, when he has obtained the business, uses his own judgment in placing the insurance with one or more of the companies which he represents.78

While several courts have found that an insurance company operates under the American Agency System by evidence of custom and usage, resulting in the finding that the agent owns the expli-

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77. Id. at 415 (holding that agent had option of refusing contract value and maintaining his insurance agency, including the policyholder information).
increasingly, some insurance companies have found it helpful to express such ownership rights to expirations in the written agent's contract. In the case of the independent insurance agent, the contracts examined specifically allocate the policyholder information ownership rights to the agent. For example, the Hanover Insurance Company ("Hanover") uses independent insurance agents under the American Agency System. In contrast to the contract language contained within the exclusive agent contracts examined above, Hanover's agreement with its independent agents, specifically states:

The use and control of all expirations, and all records pertaining to insurance which was written pursuant to this Agreement shall be your property and left in your undisputed possession, provided that you have paid and you continue to pay to us on a timely basis any and all premiums due to us in accordance with this Agreement.\(^{80}\)

Progressive Insurance Company, in its Producer's Agreement, declares that the agents own the policyholder information: "[s]ubject to the provisions of Section VI(C) [providing for Progressive ownership where the agent fails to pay all amounts due], you [the agent] will own all rights in the Expiration Information."\(^{81}\) The Producer's Agreement defines "Expiration Information" as "business records and information originating with you regarding any applicant or insured under a Policy or Renewal, including the name and address of the applicant or insured, and the date of expiration and policy limits of any Policy or Renewal."\(^{82}\)

Peerless Insurance, in its "Agent-Company Agreement," similarly provides for "Ownership of Expirations." Peerless' Agreement states that "[e]xcept as provided in subsection B, the use and control of expirations, including those on direct-billed business, the records thereof, and Agent's work product, shall remain in the undisputed possession and ownership of Agent and Company shall

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79. See Woodruff v. Auto. Owners Ins. Co., 1 N.W.2d 450, 453 (Mich. 1942) (holding that one of the main purposes for the American Agency System was to preserve the "clientele or established business of an insurance agent . . . as far as possible upon the termination of his agency").


81. Progressive Insurance Company, Progressive Producers Agreement art. 1(c) (on file with author).

82. Id.
not use its records . . . .” 83 Subsection B states:

In the event of termination of this Agreement, if Agent has paid all money due to Company under this Agreement, the records of Agent and the use and control of all renewals and/or expirations of all policies shall remain the property of Agent. However, if (i) Agent has not paid all money due Company or (ii) Agent has not paid all money due to any policyholder or premium finance company to whom Company may be liable as the result of such non-payment, all of Agent’s rights with respect to all policies, their expirations and renewals shall terminate immediately. 84

The Hartford Insurance Group also provides in its Agency Agreement under Section VIII, “Ownership of Expirations,” that “[i]f upon termination . . . the Agent has promptly accounted for and paid to the Company all premiums and other monies . . . the use and control of expirations . . . shall remain the property of the Agent . . . otherwise . . . ownership of expirations shall be vested in the Company.” 85 The Royal & SunAlliance “Agency-Company Agreement” 86 and The Patrons Group’s agency contract also provide that the agent owns the expirations unless he is in arrears for the payment of all company premiums and any other monies due the insurance company.

In all of these independent agent contracts, the insurance companies also state that the agent is an independent contractor, relieving the insurance company of any liability and making the agent responsible for his everyday expenses. By stating explicitly in the contract that the relationship between the agent and the insurance company is that of an independent agent, each party knows its rights and the courts will enforce the contract as written. 88

C. Direct Response Agent

While litigation abounds concerning ownership rights when the insurance agent-insurance company relationship is exclusive or in-

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84. Id. § 2(B).
85. Hartford Insurance Group, Agency Agreement § VIII (on file with author).
86. Royal & SunAlliance, Agency Agreement § 10(A)(1) (on file with author).
87. The Patrons Group, Agent Contract § 15(a) (on file with author).
88. See State Farm Mut. Auto. Ins. Co. v. Hedberg, 236 F. Supp. 797, 799 (D. Minn. 1964) (holding that insurer, by contract, had superior rights to the policyholder files and granting injunction in favor of mutual insurance company because exclusive agent not within the American Agency System), aff’d, 350 F.2d 924 (8th Cir. 1965).
dependent, little litigation exists when an agent is a direct response agent. As previously discussed, a direct response agent is an employee of the insurance company and generally does not establish any long-term relationship with the customer. As such, the direct response agent provides neither the same service nor develops a personal rapport with the customers, as agents in the exclusive and independent agency systems do.

Although contract language makes it easier for a court to determine who owns policyholder information, not all agents' contracts are clear. When the contracts do not specifically state who owns the information or are found to be ambiguous, the court must rely on other factors to determine who owns the policyholder information. Here, the traditional principles and customs discussed in Part I come into play.

III. Custom and Deference to Agency Interpretation

As discussed above, numerous insurance companies and agents protect their rights by delineating the ownership of policyholder information in the contracts governing their relationships. Absent these defining contractual provisions, courts will attempt to classify the relationships into one of the three agency systems previously discussed and determine the policyholder information ownership rights based on the principles and customs of the three agency systems. All courts, however, note that not every insurance agent-insurance company relationship neatly falls within any one of the three agency systems.89 An examination of some ways that courts classify these relationships follows.

Again, under the American Agency System, independent insurance agents operate within a distinct structure, one that contrasts starkly with the structure of the Exclusive Agency System. Specifically, independent insurance agents within the American Agency System usually work for stock insurance companies where an insurance agent's policyholder sales and service activities are not exclusive to any one insurance company, and the agent writes policies for several different insurance companies. The independent agent usu-

ally issues the insurance policy directly to his policyholder with the
insurance company having no personal contact with the agent's pol-
icyholder. The independent agent often has the power to cancel or
amend the insurance policy issued, and the independent agent often
collects the policy premium himself and makes the remittance of
the premium to the insurance company involved.90

Some courts have also addressed (albeit obliquely) the differ-
ence between mutual insurance companies and stock insurance
companies in the context of their agency systems. In Hedlund v.
Farmers Mutual Automobile Insurance Co.,91 the court explained
that an agent for a stock company is, in essence, an independent
agent. Under such circumstances, the stock company has no direct
contact with the insured.92 The independent agent takes on the pri-
mary role of servicing the insured, issuing and countersigning the
policy, collecting the premiums from the insured directly, and can-
celing the policy and placing it with another insurance company
with the policyholder's consent.93 Thus, consistent with the Ameri-
can Agency System, many American courts have found that an
agent for a stock insurance company possesses an ownership right
in his "expirations."94 Conversely, a mutual insurance company,
such as State Farm or Nationwide, still owns the policyholder infor-
mation because it holds all such information for the owners of the
mutual company, the policyholders, although the exclusive agent
may be the sole point of contact for the customer.95 While State
Farm does not specifically use the word "expirations" in its con-
tract, the contract does provide that "records and materials fur-
nished" to the agent "by the insurer shall remain the property of
the insurer."96

Even in those cases in which an insurance company's agent op-
erates as an independent agent, courts have found that if the agent
owes funds to any particular insurance company for a policy-

Minn. 1956) (listing all the essential elements of an agency governed by the American
Agency System); cf. Hedberg, 236 F. Supp. at 801 (finding that insurer had superior
rights to the policyholder files and granting injunction in favor of mutual insurance
company because exclusive agent not within the System).
91. 139 F. Supp. at 537.
92. Id.
93. Id.
94. Id.
1965).
96. Id.
holder's premium payments or has engaged in fraudulent practices, he or she may lose ownership rights to policyholder information in favor of the insurance company. Thus, the insurance company gains an exclusive ownership right for the policyholder information formerly associated with its customers through the services of that particular independent agent when that agent has engaged in such insurance misconduct. 97

In deciding the ownership of policy information, courts also consider the interpretations or opinions by state agencies, giving some deference to an agency opinion or interpretation in its own particular area of expertise. "It is a well-settled principle of law that a Court should defer to the construction given to applicable statutes and its own regulations by the agency or agencies responsible for its sound and practical administration. Such will be sustained unless irrational or unreasonable." 98 The New York Department of Insurance's General Counsel issued an opinion on July 2, 1990 discussing ownership rights to policyholder information existing between agents and companies. 99 In the opinion, the General Counsel stated: "The exclusive representation exception is premised upon the fact that, pursuant to such an arrangement, the business written is the property of the insurer and not the agent. Therefore, upon termination of the agreement, all rights and responsibilities relating to that business revert to the insurer." 100 Given this opinion, absent extraordinary circumstances, one could reasonably expect New York courts to adhere to the principle articulated in the General Counsel's opinion and award any ownership rights over policyholder information to the insurer where the relationship is that of exclusive agency. Such an opinion makes the

97. See In re Roy A. Dart Ins. Agency, Inc., 5 B.R. 207, 216-17 (Bankr. D. Mass. 1980) (holding that although the insurer retained the security interest in its expirations as a result of the agent's failure to pay premiums, the insurer's failure to file subordinated its interest); Alliance Ins. Co. v. City Realty Co., 52 F.2d 271, 277 (M.D. Ga. 1931) (holding that the insurance company, under the custom governing the disposition of expirations, was entitled to dispose of the policy information where the agent was in arrears in remission of balances).


99. New York Insurance Bulletins and Related Material, General Counsel Opinions, General Counsel Opinion 7-2-90 (#1).

100. Id.
proper identification and classification of the insurance agent-insurance company relationship even more critical.

Similarly, in reviewing Nationwide's Agent's Agreement, the Insurance Department of the Commonwealth of Pennsylvania stated:

These two [Exclusive Representation and Service to Customer Upon Cancellation] contractual provisions make it abundantly clear that Nationwide and not the agent owns and controls the business . . . . Exclusive representation is the hallmark of a captive agency . . . . Nationwide retains a right in those policyholders serviced by the terminated agent . . . . Nationwide owns the business since its agents are not permitted to place the business elsewhere and Nationwide retains the right to continue the business upon termination.101

Pennsylvania also adheres to the principle that "an administrative agency's interpretation of a statute or its regulations is entitled to great weight and should not be disregarded or overturned except for cogent reasons and unless it is clear that such construction is erroneous."102

These opinions of the General Counsel for the New York Department of Insurance and the Pennsylvania Insurance Department again serve to underscore the importance of properly classifying, through contract and custom, the desired relationship between an insurance agent and an insurance company.

CONCLUSION

Policyholder information is the most valuable business asset for both agents and insurance companies. When disputes arise over its ownership, determining what type of a relationship—exclusive, independent, or direct response—exists between an agent and an insurance company is key. Categorizing that relationship and then properly assigning the agent to one of the three agency systems provide for both a consistent method of analysis and some ease in determining whether the individual policyholder information belongs to the agent or the insurance company.