The Road Ahead in 2017

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This article identifies emerging trends in civil litigation errors and omissions (E&O) claims against insurance agents and brokers, with a quick look at a claim trend involving claims by carriers against agencies.

Duties owed are being expanded

The rule that an insurance agent or broker is under a duty to exercise reasonable care is the traditional standard, but a heightened standard is more frequently applied, if not expressly then implicitly, in the evolving case law. For years, courts relied on the principal that if the broker fails to exercise reasonable care and, if such care is the direct cause of loss to his customer, then he is liable for such loss. *Mondesir v Delva,* 851 So. 2d 187, 189 (Fla. 3d DCA 2003); *Industrial Valley Bank and Trust Co. v. The Dilks Agency, et. al.*, 751 F.2d 637 (3rd Cir., 1985); *see also Al's Cafe v. Sanders Ins. Agency*, 820 A.2d 745, 751 (Pa. Super. Ct. 2003). In other words, the agent has a duty to use that degree of care as would be expected of a reasonably competent agent under the same or similar circumstances.

Under a duty to procure standard, the broker's role is more passive, serving as one who fulfills coverage requested by the insured, with a concomitant duty to notify clients of an inability to obtain the coverage or secure renewal. This duty is largely limited after binding of a policy absent affirmative misrepresentations during the policy term. A growing number of courts in several states have held that a "special relationship" between a broker and customer may trigger a heightened "duty to advise" that more closely resembles a fiduciary relationship and a duty to safeguard the insured's interest or to suggest coverages or make recommendations even in the absence of specific requests. The struggle comes as courts have inconsistently identified a variety of factors that may give rise to a special relationship and court's are divide on how far or broad is the duty owed. Apart from payment in addition to commission, many of the following factors used to define "special relationships" are common to ordinary "duty to procure" relationships:

- Advertisements by agent suggesting expertise/reliance by client: e.g., hospitality, aviation, marine, schools, condominium exposures, etc. *Williams v. Hilb, Rogal & Hobbs Ins. Servs. of Cal., Inc.*, 98 Cal. Rptr. 3d 910, 919 (Ct. App. 2009)(recognizing that holding oneself out as having expertise is important factor in determining existence of special relationship);

- Agent provides advice on specific coverage issue;

- Longstanding or exclusive relationship between broker and client;

- Purchasing decisions and coverage selections made by agent;
- Engagement letter/contract language;
- Client pays "broker fee" for services beyond standard commission.

Agencies should understand that additional fees charged for services that go beyond mere "procurement" functions will prompt claimants to argue for and court's to easily hold that a broader duty is owed. Engagement agreements are helpful if they contain language to the effect that "nothing in this agreement creates a special or fiduciary relationship."

Declaratory judgment actions and suits by carriers

Turning away from the special relationship analysis, other litigation trends include insurance carriers as the plaintiff pursuing the broker on E&O claims. A carrier may claim it would never have issued the policy or charged a higher premium had application questions been answered accurately. A carrier may sue an agency for fraud or misrepresentation while simultaneously seeking to rescind the policy in the same suit against the insured. In such cases, the carrier claims that, if coverage is owed on the policy for underlying loss, then the agent is liable in damages for the underlying defense costs and indemnity payments incurred by the carrier (up to policy limits) in connection with the underlying claims.

There are a host of defenses to these rescission/tort claim cases pled in the alternative. A plaintiff's declaratory action against a policyholder is an *equitable* claim seeking policy rescission and should be adjudicated separately as a threshold issue. If the carrier prevails on rescission and the court rules that the carrier owes no coverage under the policy, the plaintiff's tort claims against the broker are extinguished and moot because the plaintiff arguably has no damages. However, some authority supports the notion there are wrongful act damages equal to the legal fees and costs seeking to rescind the policy that are recoverable if they would not have been procured but for the agent's wrongdoing.

Second, the carrier's tort claims against the agent should normally fail because the agent or broker owed no tort duties to the carrier (i.e., agent's tort duties flow to the policyholder/customer). The argument goes that if the agent is the agent of the insured it is unreasonable to effectively render the agent a dual agent and impose a duty running from the agent to the carrier much less to permit reasonable reliance by the carrier on the insured's agent. Alternatively if there is an agency agreement, whatever duties exist are memorialized in the agency contract and the economic loss rule should preclude the imposition of extra-contractual duties in tort. The rationale being that whatever obligations that parties sought to impose and reduced to writing should be memorialized in the agreement and unwritten obligations were either assumed or could not be negotiated. Carriers argue there is a fiduciary duty between it and the appointed agent that extends beyond the four corners of the contract.

(e.g., the agency agreement does not expressly prohibit the agent from binding a burning building – but carrier argue fiduciary standards should apply to fraudulent or reckless conduct).

Third, the carrier and its Managing General Agent ("MGA") may have been comparatively negligent for failing to perform their due diligence in underwriting and binding the policy by not adequately inspecting the commercial property and reviewing information/documents provided by the broker in the application process and before the loss (e.g., loss runs from prior carrier).

Fourth, the defendant agent may argue that as a retail broker it had no duty to conduct an independent investigation into the truthfulness and accuracy of information supplied by the policyholder in the application, and the broker had no actual knowledge of the alleged misrepresentations. Lastly, one can argue that if the carrier or MGA *still* would have issued the policy and incurred the loss albeit at a higher premium, and the carrier's damages recoverable against the broker should be limited to the difference in charged premium. Claims by carriers against agencies are not as common as traditional policyholder claims, but what they lack in frequency they make up for in severity.

Litigation in this arena often comes at predictable times. We see claims against agencies that have "one-off" relationships with wholesalers or carriers, claims when the agency-company or MGA relationship is winding down or already strained, claims when carriers have withdrawn from the state or where underwriters suspect collusion by the insured and the agent to defraud the company at inception typically by withholding material information. Claims by carriers are an often overlooked but important piece of the E&O claims spectrum. Make sure your E&O policy adequately addresses this exposure.

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