Agents E&O Standard of Care Project

South Carolina Survey

To gain a deeper understanding of the differing agent duties and standard of care by state, the Big "I" Professional Liability Program and Swiss Re Corporate Solutions surveyed their panel counsel attorneys. Each attorney was asked to draft a brief synopsis outlining the agents' standard of care in their state. They were also asked to identify and include a short summary of the landmark cases. In addition, many of the summaries include sample case studies emphasizing how legal duties and issues with standard of care effected the outcome. Finally, recent trends in errors in the state may also be included.

This risk management information is a value-added service of the Big "I" Professional Liability Program and Swiss Re Corporate Solutions. For more risk management information and tools visit www.iiaba.net/EOHappens. On the specific topic of agents' standard of care check out this article from the Hassett Law firm, our E&O seminar module, and this risk management webinar.

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INSURANCE AGENTS AND THE STANDARD OF CARE IN SOUTH CAROLINA

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Like many other licensed industries, insurance agencies are increasingly subject to lawsuits brought by dissatisfied customers. Whether the agent made an error in placing the coverage, or the agent failed to check the right box on an application, or the customer is just displeased with an insurance adjuster's determination regarding the customer's claim, insurance customers are more frequently looking to the agents to make up for their uncovered loss. Consumers have also heightened their expectation regarding agents' responsibilities to them as to procuring coverage that will cover any loss. Consumers are also now more likely to view the agent as a professional, similar to a doctor or engineer. In South Carolina, insurance agents are still generally treated as salesmen, merely providing customers with the policy that they request; however, this may be changing.

In South Carolina the general rule regarding and agent's duties to a customer is that insurance agents must exercise good faith, reasonable skill, care, and diligence when placing

insurance. Agents will only be liable to their customer for any breach of that duty that causes damage to the customer. If due to the agent's fault or neglect, the agent does not procure the insurance requested, does not follow the customer's instructions, or if the policy issued is void or materially deficient, or does not provide the coverage that the agent undertook to supply, the agent may be liable to his customer.

In order to establish the liability of an insurance agent, the customer must show that the agents owed a legal duty of due care to the customer. In South Carolina, "generally an insurer and its agents owe no duty to advise an insured." Trotter v. State Farm, 377 S.E.2d 343, 347 (S.C. Ct. App. 1988). "As a general rule, an insurance agent has no duty to advise an insured at the point of application, absent an express or implied undertaking to do so." (Houck v. State Farm, 620 S.E.2d 326, 329 (S.C. 2005). A duty may be imposed if the agent expressly undertakes to advise the insured. In other words, a duty may be imposed if the customer can be establish that the agent gave specific advice about purchasing a particular type of coverage that turned out to be incorrect. Id. Additionally, a duty can be "impliedly created" if "1) the agent received consideration beyond a mere payment of the premium, 2) the insured made a clear request for advice, or 3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice was being sought or relied on." Houck. Importantly, the request for advice must be specific. A request for "full coverage" or the "best coverage" is not sufficient to establish a duty by implication. The course of dealing requirement would likely include the agent giving advice or procuring insurance over a number

of years where the agent was relied upon to regularly purchase insurance to suit a personal or commercial customer's needs.

Below are a few leading cases in South Carolina that address an agent's duties to his customers.

A. Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486 (S.C. 1969) - Agents will be held liable for affirmative representations of specific coverages if they are mistaken.

In this case, the customer contacted the agent for premises liability insurance. The customer operated a home and auto appliance business. The agent inspected the property and was shown an elevator that was used as a hoist lift and occasionally to carry people. The customer specifically requested coverage for the use of the elevator. The agent assured the customer that the policy procured provided coverage for the elevator, even after the customer reviewed the policy and questioned whether or not the elevator was covered. The customer constantly kept the agent informed of changes to the business and the purchase of new equipment. An injury occurred on the elevator, but the carrier denied coverage finding that the elevator was not insured to carry passengers. Apparently, the agent should have requested an elevator endorsement to insure the elevator for passengers.

The court found that insurance agents are required to exercise due care in placing insurance and are personally liable to the customer for the neglect of that duty. The agent was liable for the loss because there was direct evidence that the customer requested a particular coverage and was assured by the agent that he was covered for a particular loss, which proved to be incorrect. The court ruled that it is the insured's burden to show "with reasonable

certainty the terms and conditions" of the particular agreement between the customer and the agent. The customer was entitled to rely upon the representations of the agent as to coverage despite the wording of the policy. Therefore even if it is possible for the customer to discern from the wording of the policy that there may be an issue with coverage, that possibility can be trumped by assurances from the agent.

B. Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d 343 (S.C. Ct. App. 1988) – Agents can assume a duty to a customer through an express or an implied undertaking, but requests for "full coverage" or "the best coverage" are inadequate to impose a duty.

Trotter owned an upholstery business and used a pick-up truck to deliver furniture for the business. Trotter was referred by friends to a local State Farm Agent, Ledford. Trotter told Ledford that he wanted "full protection" for his delivery truck. Ledford procured a commercial policy for the truck, which included a standard exclusion for injuries to employees, which are ordinarily covered by workers' compensation insurance. Ledford did not review the policy or the exclusion with Trotter. Ledford did not ask Trotter about workers' compensation, nor did Trotter ask any questions about the policies or inquire as to coverage for employees. Trotter's relationship with Ledford was routine – he only spoke with Ledford on two occasions over eight years, but otherwise only contacted the office to make changes to his auto policies or to pay premiums. Trotter insured other risks through other agencies.

After having the policy for some time, Trotter and an employee were injured in an accident while driving the company truck. State Farm denied coverage for the employee's injuries. Trotter sued Ledford for $620,000.00, which was the judgment the employee had

obtained against Trotter. In this suit, Trotter claimed that Ledford had a duty to advise him that the truck's policy excluded injuries to employees.

The court reiterated that generally agents have no duty to advise a customer regarding insurance purchases. However, an agent may assume a duty by expressly undertaking to advise the insured or by impliedly undertaking to advise the insured. In this matter, there was no evidence that Ledford expressly advised the insured regarding the employee coverage.

The court found that an implied undertaking can be shown if (1) the agent received compensation beyond a mere payment of the premium, (2) the insured made a clear request for advice, or (3) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on. The court ruled that there was no evidence of an express or implied undertaking to advise Trotter on Ledford's part and that a request for "full coverage" or the "best policy" or similar expressions do not place an agent under a duty to "determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase."

C. <u>Sullivan Co., Inc. v. New Swirl, Inc.</u>, 437 S.E.2d 30 (S.C. 1993) – Agent does not have a duty to procure insurance at the best possible terms.

The agency (Sullivan) sued its customer, New Swirl, for premiums advanced by Sullivan. New Swirl denied it owed the premiums and counterclaimed for damages, charging that Sullivan failed to procure insurance at the lowest possible cost. The court ruled that an

insurance agent must exercise good faith, reasonable skill, care, and diligence in procuring insurance for its customer. "If, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide coverage he undertook to supply, the agent is liable to the principal." However, the court found that the duty of the agent to procure the represented coverage does not "create a duty to secure insurance at the best possible terms."

D. Houck v. State Farm Fire and Casualty Ins. Co., 620 S.E.2d 326 (S.C. 2005) – No duty to sell best policy at the lowest possible price.

A coastal resident purchased Standard Flood Insurance Policies through a State Farm agent when Preferred Risk Policies were available at a lower cost. The customer claimed that agency had a duty to inform her of the lower cost policies when they became available. The court found that they agent did not owe a duty to sell the Plaintiff the best policy at the lowest available price by analyzing the facts under the Trotter factors above.

E. Fowler v. Hunter, 668 S.E.2d 803 (S.C. Ct. App.) (affd. by 697 S.E.2d 531 (S.C. 2010)). – South Carolina courts may begin to analyze agency liability under a professional negligence standard.

Motorcyclists brought an action against the driver of a car for severe injuries suffered in a crash where the car's driver was at fault. The car was insured through the driver's husband's medical practice. The motorcyclists' injuries were severe; and the damages reached excess

coverage. The medical practice carried auto on the vehicle and had purchased an umbrella policy through the same agent. However, the umbrella carrier, Selective, denied coverage because it asserted the insured had not selected auto coverage under the commercial umbrella policy. The agency admitted that it inadvertently failed to check a box on the umbrella's online application that indicated that auto coverage was requested. The agent and the insured agreed that it was intended that the company's autos would be covered by the umbrella. Despite the agent's and insured's agreement as to the mutual mistake, Selective Insurance refused to reform the policy. Selective and the medical practice settled with the motorcyclists. Selective paid its limits on an underlying auto policy and the medial practice assigned its rights against the agency to the motorcyclists. As part of the settlement, Selective and the motorcyclists agreed to split any recovery received from the agency. This was remarkable because the agent's principal, Selective, elected to turn on its agency when everyone agreed that the agent committed a clerical error in the application process, with little doubt that the policy would have been issued with auto coverage if the box had been checked.

Alarmingly, the Court of Appeals referred to the claim against the insurance agency as "professional negligence." As shown in the landmark cases above, the courts have never applied a professional standard to an insurance agent's conduct. In South Carolina, the professional standard of care is breached when the professional failed to conform to the generally recognized and accepted practices in his profession. Doe v. Am. Red Cross Blood Servs., S.C. Region, 297 S.C. 430, 435, 377 S.E.2d 323, 326 (1989). This case went up to the South Carolina Supreme Court on appeal of matters unrelated to the agency issues. However,

this case is important because it hints at the possibility that the courts may start viewing claims against agents in a fashion more akin to professional negligence which would make it easier to establish a duty on the part of the agent in procuring insurance. This would also begin the use of expert witnesses to establish at trial what are considered the standard practices of the profession. This is a much higher standard than presently exists.

Below are three cases studies representing actual cases that have been resolved over the past few years.

CASE STUDES

Case Study #1 – Duty to Advise

A. Line of coverage involved - Automobile

B. Position of Person in the Agency Involved – Agent/Clerical Staff

C. Personal or Commercial Lines - Personal

D. Type of Coverage Involved – Underinsured Auto Coverage

E. Procedural or knowledge-based error – Procedural improvement could prevent claim

F. Claimant Allegation – Agent did not advise customer of particular exclusion on underinsured coverage and did not deliver policy

G. Settlement or Trial – Dismissed through a dispositive motion

H. Description of Alleged Error - Customer moved coverage of adult son's auto coverage to another agency for a lower premium. All of customer's other auto policies remained with current agent. The other policies contained an exclusion that stated that stacking was only

allowed with policies issued through that carrier. Customer also alleged that she was never given a copy of the policy.

i. Tip to Avoid Claim - A standard letter confirming cancellation with your agency that warns customer that the customer should review their auto coverage if splitting their coverage between agencies and carriers and how the different policies could work together. Also, it is important to maintain proof of delivery of the policy in the agency file.

j. Summary of Case

The court dismissed the claim against the agency where the court found that the agent had no duty to warn the customer regarding stacking limitations in the policies that it sold. Ultimately, the exclusion was found to be invalid under South Carolina law and the carrier paid the claim.

The customer purchased all of their personal and business auto policies through the same agency for a few years. The agent placed all of the customer's vehicles with the same carrier. The customer insured their adult son's vehicle with the agency. The son resided in the household. The customer elected to move the son's policy to another agency for a lower premium. Thereafter, the son was involved in a horrific accident while driving his car, which resulted in multiple fatalities and left the son a paraplegic. The son's policy paid its limits. The son then attempted to stack the parent's policies from the other carrier that were purchased through the original agent. The original carrier denied the son's claim because its policy contained an anti-stacking provision that only allowed stacking of policies issued from that carrier.

The customer claimed that the agency should have advised them of the stacking limitation when the policy was offered and when they moved their son's policy to another agency. The customer also claimed that they never received a copy of the policy to review and were therefore unaware of the stacking limitation. Neither the agency nor the carrier could provide definitive proof of delivery of the policy. .

The court dismissed the agency from the case finding that the agent did not have a duty to advise the customer regarding the stacking limitation contained in the policy that it sold and there was no evidence of a clear request for advice, regardless of the issue of having the policy delivered. The court placed the responsibility of understanding the policies and the problems that may result from being insured by more than one carrier on the customer. The evidence showed that the agent merely sold the customer the basic policies that the customer requested without a specific request for advice. The customer testified that she had requested "full coverage.". Ultimately, the stacking limitation was found unenforceable and the carrier paid the claim. The claim against the agency could have been dismissed more quickly and with less expense with a departing letter from the agency stating that it is the customer's responsibility to review their policies and to contact the carrier with any questions regarding coverage. Also, the issue of policy delivery would have been easily dealt with through a simple form letter kept in the agency

Case Study #2 – Agent Undertaking/Implied Duty/Text Communication

A. Line of coverage involved - Homeowners

B. Position of Person in the Agency Involved – Owner/Agent

C. Personal or Commercial Lines – Personal

D. Type of Coverage Involved - Fire

E. Procedural or knowledge-based error - Procedural

F. Claimant Allegation – Agent failed to ensure that customer's corrective actions necessary to reinstate the policy were communicated to the carrier.

G. Settlement or Trial – Settled at mediation

H. Description of Alleged Error – Agent failed to forward photographs to the carrier demonstrating corrective actions by customer to her home as required by the carrier to reinstate the policy. Arguably the agent undertook a duty to help the customer to get the policy reinstated, despite being under no obligation to do so previously.

I. Tip to Avoid Claim – Do not deal with a customer via text message. There is no permanent record of the texts after they are deleted from the device and the phone carriers do not keep any records of the texts after a few months. Also, this was clearly a problem account and continuing to intervene with the carrier for this type of customer is full of peril and likely to end up with the customer pointing a finger at the agent when things go poorly.

j. Summary of Case

The customer was referred to the insurance agency through a real estate agent to obtain homeowners' insurance on the purchase of her first home. The policy was bound

subject to inspection of the property. The property was inspected and several issues were noted, including a building code violation related to health and safety. The carrier required that the homeowner correct the issues within thirty days or it would cancel the policy. The customer agreed to fix the problems and the carrier required photographs of the improvements as proof. The customer failed to provide the photographs in the required time and the policy was cancelled. The agent intervened on the customer's behalf and the carrier agreed to reinstate the policy if the photos of the improvements were provided. The agent received photos of some, but not all of the improvements, from the customer via text message on his mobile phone. The agent also went by the property and took some photos himself. He recognized the work was not complete and informed the customer that it must finish. All of the communication between the customer and the agent was over the phone or through text messages.

Before the policy could be reinstated, the house caught fire and was a complete loss. The carrier denied the claim, as the policy had been cancelled. The customer instituted an action against the carrier and the agent, claiming, among other things, that she provided all of the necessary photographs to the agent via text message, but the agent did not forward them to the carrier. The agent claimed that he did not receive the texts. The carrier testified that it would have reinstated the policy if it had been given the photos. By the time the customer filed suit, the agent had purchased a new phone and there were no records of the texts to confirm or disprove that the photos were sent. The case was settled at mediation with the agency paying for half of the settlement amount.

There are several things that could have been done to prevent this loss. The first was to allow the customer to deal directly with the insurance company. The second would have been to not to allow communication with the customer by text. The contents of texts are not stored by the carriers and the record of the sending and receiving of texts are deleted after a few months. An alternative would be to forward any texts to an email account. However, the best practice would be not conduct substantive business by text message. Finally, as this was clearly a problem account from the beginning, it would be wise to not become directly involved with so many issues between the carrier and insured.

CASE STUDY #3 – Issues with the application/confirmation by applicant

A. Line of coverage involved: Home

B. Position of Person in the Agency Involved: Owner/Agent

C. Personal or Commercial Lines: Personal

D. Type of Coverage Involved: Fire

E. Procedural or knowledge-based error: Procedural

F. Claimant Allegation: Agent incorrectly filled out application

G. Settlement or Trial: Settlement through subrogation of carrier's claim against agent

G. Description of Alleged Error: Agent incorrectly represented that the customer was employed on the online application for homeowners insurance. The agent arguably was on notice that the customer was unemployed due to previous applications for other lines.

I. Tip to Avoid Claim: Verify employment and/or have customer sign and initial printed application. A stamp for the printout that states that the customer has read and approved the facts set forth in the online application with a signature block would be helpful.

J. Summary of Case

The customer asked to purchase homeowners insurance. The agent was aware that the customer had credit issues, so the agent searched for a policy from a carrier that did not require a credit report in order to bind coverage. The agent found such a carrier and then completed the online application with the customer in the office. The application included a question that verified that the applicant was currently employed. The agent stated that he reviewed the application with the customer before submitting it online. The customer denied that he reviewed the application. The application was accepted and the policy was bound.

Subsequently, the home was destroyed in a fire. The customer made a claim under the policy and the carrier denied the claim for several reasons, including misrepresentation on the application regarding employment. During its investigation, the carrier found that the customer had not been employed at the time of the application, or at any time during the policy period. The carrier took the position that the applicant's employment status was material to the risk, and the policy would not have been issued if the response had been accurate. Therefore, the policy was therefore void *ab initio*.

The customer then sued the carrier, but not the agency. Ultimately the carrier paid the claim in full and then made a demand through subrogation against the agency alleging that the agent had breached the agency agreement by not filling out the application with due care. The

carrier demanded arbitration pursuant to the agency agreement asserting that the agency must reimburse the carrier for the full amount of the claim paid, plus all of the carrier's attorney's fees spent defending the customer's lawsuit against the carrier. The agency agreement required that the arbitration be held halfway across the country and before a panel of insurance executives.

The agency's files revealed that the agency may have been on notice of the customer's employment status through previous applications for auto insurance. Although it was questionable that the applicant's employment status was material to the risk, the agency was unable to produce any verification regarding the online application and the customer's verification of the responses to the questions. A printed application initialed and signed by the customer would have negated the customer's claims of ignorance. A simple stamp for printed online applications indicating that the customer has reviewed and verified the accuracy of the responses which is signed by the applicant would also be helpful. If the application is taken over the phone, then it should be verified by the customer via email for fax. With the rise in online applications, providing a record of the application and verification by the applicant is an increasing problem. Often neither the carrier nor the agent can provide a record of the actual responses nor can they verify that the customer approved the responses. Ultimately, the subrogation claim was settled with the agency paying a portion of the underlying settlement amount back to the carrier.