Agents E&O Standard of Care Project

Survey Alaska

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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Standard of Care Project
Prepared for Swiss Re Corporate Solutions

1. Summary of Standard of Care in Alaska

A. General Rule

As a general matter, an insurance agent or broker owes a duty to an insured or prospective insured to exercise reasonable care, skill, and diligence in procuring insurance. Insurance agents have an obligation to obtain the requested coverage for their clients within a reasonable time or inform the client of the inability to do so.[1]

In the absence of an established or "special relationship," a broker fulfills his or her duty to a prospective insured by providing the requested coverage and ordinarily has no duty to advise a client to obtain different or additional coverage.[2] It is generally the responsibility of the prospective insured to advise the broker of the insurance that the client wants.[3] Similarly, a broker is not liable to a prospective insured if she informs the insured the requested coverage is unavailable, or cannot be obtained on the terms requested.[4]

An insurance agent or broker who agrees to procure insurance for a client, but fails to do so, may be liable for damages resulting from his omission. Liability may be based on legal theories of breach of contract or negligence or misrepresentation.[5]

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1 *Peter v. Schumacher Enter., Inc.*, 22 P.3d 481, 485 (Alaska 2001).
2 *Id. at 486.*
3 *Id.*
4 *Id.*
5 *Johnson & Higgins of Alaska, Inc. v. Blomfield*, 907 P.2d 1371 (Alaska 1995).

The liability of a broker or agent typically arises under two sets of circumstances: 1) failure to obtain coverage; and 2) negligent or intentional misrepresentation of coverage. But an agent or broker is only liable to an insured if, by the agent's fault, insurance is not procured as promised and the insured suffers a loss.[6] A broker need only use reasonable efforts to procure insurance, unless he or she commits to using more than reasonable efforts or his conduct misleads the insured to the insured's detriment.[7] If a broker misstates the presence or amount of coverage, the insured reasonably relies upon such statement, and the insured suffers a loss, the broker may be liable to the insured.[8]

A claim for breach of the contract to procure insurance may lie when the broker makes a promise of certain coverage and fails to obtain it. Under contract theories, an insured's claim against a broker for failure to obtain insurance compensates the insured for the difference between the coverage expected and the coverage obtained.[9]

Because the prospective insured typically knows the extent of its personal assets and its ability to pay better than the broker, it is generally the responsibility of the insured to advise the broker of the insurance it actually wants, including policy limits. However, exceptions to this no-duty rule may arise if a "special relationship" exists between the insured and the insurance broker.[10] For example, an insurance broker may voluntarily assume the responsibility for selecting appropriate insurance coverage for the insured.[11] Most cases involve a regular debate about whether a "special relationship" exists. Typically, it is a question for the jury to decide.

B. Key Defenses

1. Coverage Availability

There is an open question under Alaska law as to whether it is the Plaintiffs' affirmative burden to prove that coverage requested was available. In some states, the absence of commercially available coverage is treated as an affirmative defense rather than an element of the Plaintiffs' case. The Alaska Supreme Court has noted the issue, but never explicitly decided it.[12] A necessary extension of this question is whether the Plaintiff must prove the claims would have been covered, or whether the Defendant must demonstrate the absence of coverage as an affirmative defense.

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6 *Jefferson v. Alaska 100 Ins., Inc.*, 717 P.2d 360, 364 (Alaska 1986).
7 *Id.*
8 *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 201 (Alaska 1980); *Howarth*, 443 P.2d at 42.
9 *Johnson*, 907 P.2d at 1376.
10 *Id.*
11 *Id.* at 487.
12*Johnson & Higgins of Alaska vs. Blomfield*, 907 P.2d 1371, 1374 (Alaska 1995).

2. Statute of Limitations

Alaska applies a hybrid three year statute of limitations to professional malpractice actions because they typically involve elements of both tort and contract.[13] A statute of limitations usually begins to run upon the occurrence of the last element essential to the cause of action. But Alaska has adopted the discovery rule, which can affect when the applicable statute begins to run. "Under the discovery rule, a cause of action accrues when the plaintiff has information sufficient to alert a reasonable person to the fact he has a potential cause of action."[14] At that point, "he should begin an inquiry to protect his . . . rights and he is 'deemed to have notice of all facts which reasonable inquiry would disclose.'"[15]

3. No General Damages Available

General damages, such as emotional distress, are not properly recoverable in a commercial tort claim.[16] A plaintiff who is neither involved in nor witnesses an accident can sue to recover for emotional distress only under limited circumstances when a defendant owes a "pre-existing" duty.[17] A pre-existing duty may arise from a contractual relationship. "However, ordinary contracts do not give rise to such a duty; the only contract that will are those that are 'highly personal and laden with emotion. . . .'"[18] While it is currently an open question under Alaska law, I do not believe that a broker's negligent failure or breach of a contract to procure insurance will not support recovery of emotional distress damages.

2. A Brief Summary of Key Decisions

Peter v. Schumacher Enter., Inc., 22 P.3d 481 (Alaska 2001).

This case involves issues arising under an auto policy. It is a critical case in Alaska because it sets out the basic standard of care when addressing whether the Agent has a duty to advise. Peter outlines the general rule that the Agent has no duty to advise in the absence of a "special relationship."

Johnson & Higgins of Alaska vs. Blomfield, 907 P.2d 1371, 1374 (Alaska 1995).

The *Blomfield* case involved mold contamination of a building. The insured reported the claim to his Agent who provided assurances the claim should be covered.

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13 *Christianson v Conrad Houston Ins*., 318 P3d 390 (Alaska 2014).
14 *Christianson*, 318 P3d 396-397.
15 *Preblich v Zorea,* 996 P.2d 730, 734 (Alaska 2000) (quoting *Pedersen vs. Zielski*, 822 P.2d 903, 908 (Alaska 1991)).
16 *Nome Commercial Co. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453 (Alaska 1997).
17 *Chizmar v. Mackie,* 896 P.2d 196, 203 (Alaska 1995).
18 *Nome*, 948 P.2d at 453; *Chizmar*, 896 P.2d at 203.

However, the Agent did not timely pass on the claim to the Insurer, who later denied coverage. The case is significant for its discussion of agents duty to give correct advice when he speaks. It is also significant for its discussion of the potential damages recoverable against the agent under various theories. In particular, Blomfield stands for the proposition that the Agent's liability is usually limited to the policy limit of the requested policy.

Christianson v Conrad Houston Ins., 318 P2d 390 (Alaska 2014).

This case is significant for its discussion of statute of limitations in professional malpractice cases. The Court re-affirms the statute of limitations to be applied in Alaska is three (3) years, and the use of the "discovery rule" to determine when a cause of action accrues. Notice to the insured by the insurer that it was denying coverage coupled with the insured's expenditure of money to defend himself was sufficient to trigger the statute of limitations.

Gudenau & Co. v. Sweeney Ins., 736 P.2d 763 (Alaska 1987).

Gudenau is significant for its application of equitable estoppel to a broker malpractice case. The case involved application of an exclusion following a crane collapse. The insured and his broker disputed whether a conversation occurred in which the broker promised to help the insured seek reconsideration from the insurer. Despite the untimely assertion of the claim, the Supreme Court recognized that equitable estoppel might salvage the claim.

Clary Insurance Agency v Doyle, 620 P2d 194 (Alaska 1980).

This case involves an insurance agency's failure to obtain workers' compensation insurance, and a later failure to notify the prospective insured of its error. In addition to ordering the insurance agency to assume the position of insurer for a loss suffered by the proposed insured during a time when it was not covered, the court approved an award of punitive damages against the agency for its outrageous behavior. It is a classic example of how not to do things.

3. Case Studies

Bergman (Failure to advise of higher UIM limits; Failure to obtain insured signature on application).

a. Line of coverage involved.

Under Insured Motorist.

b. Position of person in the agency involved.

Agency Principal.

c. Personal or Commercial Lines.

Commercial Lines.

d. Type of Coverage involved.

Business Auto – UIM.

e. Procedural or knowledge-based error.

Procedural Error – failure to obtain insured's signature on waiver form.

f. Claimant Allegation.

Claimant alleged that Agency Principal failed to follow statutory requirement to obtain insured's written selection / rejection of higher UIM limits.

g. Settlement of Trial.

Settlement.

h. Description of alleged error.

Failure to properly advise the insured that higher limits of UIM insurance were available.

i. Tip to avoid claim.

"Unless you have it in writing, you cannot prove it happened." Keep a complete copy of everything, and get the insured's signature on everything.

j. Summary of case.

This case involved an agency doing business with customers in a remote part of the state, so face to face interaction was not possible. The agent said he went over the statutorily required limit selections with the insured on the telephone, and the insured selected "minimum limits." The insured claimed the agent never offered limits up to $1 Million/ person as required by statute. The agent's file did reflect a signed copy of the main application form, but nothing showing the insured had made a specific selection or rejection of UIM limits. There was a separate form in the agents file documenting the availability of higher limits, and it appeared this form normally would have appeared on the reverse side of the Application. Unfortunately, the agent did not keep a copy of the form as sent to the insured, and as returned by the insured. It appeared most likely that the Agency was photocopying the application form as needed and failed to make sure it

was a single 2-sided form that was sent to the insured for signature. Most importantly, the Agent had nothing in writing signed by the insured documenting the coverage selection.

Park Place (failure to obtain waiver of co-insurance)

a. Line of coverage involved.

Property - Condominium.

b. Position of person in the agency involved.

Agency producer.

c. Personal or Commercial Lines.

Commercial Lines.

d. Type of Coverage involved.

Fire / property.

e. Procedural or knowledge-based error.

Knowledge based.

f. Claimant Allegation.

Claimant argued insured failed to procure appropriate coverage after being advised that insured did not want a policy with a co-insurance provision.

g. Settlement of Trial.

Settlement.

h. Description of alleged error.

Agent was aware of potential co-insured penalty for condominium complex if it failed to adequately insure. Agent placed insured in less expensive policy with co-insurance clause when the policy was inappropriate for the building given the true value.

i. Tip to avoid claim.

Know the coverage you are selling, and don't get out of your comfort zone. Make sure you can document the insured's selection of coverage.

j. Summary of case.

This case involved a very large fire in a condo complex. The broker had shopped the account multiple times over the years without success. After finally landing the account, the insured advised the agency client that it was substantially underinsured, but then placed the insured in a policy with a co-insurance penalty. While the agency had good documentation showing its explanation of co-insurance and the fact that the building was substantially underinsured, the agency lacked critical documentation to show the insured actually made a selection of coverage containing a co-insurance penalty. The client had coverage the prior year with no co-insurance clause.

This was a complicated insured with a high dollar property and inconsistent decision makers. The agent needed to be more pro-active in following up on his own advice to make sure it was being followed. There were also too many hands in the file and significant actions delegated to clerical staff.

Francis Sur (failure to explain)

a. Line of coverage involved.

Marine

b. Position of person in the agency involved.

Agency Principal.

c. Personal or Commercial Lines.

Commercial Lines.

d. Type of Coverage involved.

Marine – both Protection & Indemnity and Hull coverage

e. Procedural or knowledge-based error.

Procedure and Knowledge

f. Claimant Allegation.

Claimant alleged that insured should have explained “indemnity” insurance to new fisherman.

g. Settlement of Trial.

Settlement after partial summary judgment ruling.

h. Description of alleged error.

Agency procured marine coverage for a new client under a time crunch. Agency did not explain the nuances of marine insurance to the client.

i. Tip to avoid claim.

Learn to say no. When the client comes in with limited time, money and experience, and you have no history with the client at all, learn to say no. Trust your instincts.

j. Summary of case.

The case involved a host of different claims arising under different types of marine coverage. The agency client was swindled and convinced to invest in a fishing boat in Alaska when he had no experience whatsoever. He came to the agency at the recommendation of the broker who sold the boat because he was told "he had to have insurance." He had only a couple of hours before catching his plane. The agent had no history with the client and he obviously didn't know anything about marine insurance. When the venture went sour, the client lost all his money in the adventure and then sued everyone who touched it.

The court held that if you are selling unique or specialized insurance, and you have reason to know that your client is not an experienced consumer, you have a duty to explain the basics.

Jackson (no duty to determine claims settlement practices of insurer)

a. Line of coverage involved.

Business Auto Liability.

b. Position of person in the agency involved.

Agency Principal.

c. Personal or Commercial Lines.

Commercial Lines.

d. Type of Coverage involved.

Auto liability.

e. Procedural or knowledge-based error.

Knowledge based.

f. Claimant Allegation.

Claimant alleged that agent should have investigated Insurer's solvency and Claims handling practices and advised the insured that Insurer would not properly defend any liability claims against him.

g. Settlement of Trial.

Partial Summary judgment and trial.

h. Description of alleged error.

Failure to investigate insurer before placing coverage in the surplus lines market and failure to advise about insurer's claims handling practices.

i. Tip to avoid claim.

Provide options for insured to select different insurers when dealing with surplus lines.

j. Summary of case.

This case was unique because the allegation dealt not with an absence of coverage, but with the insurer's claims handling of a claim that was within coverage. The insured was convinced by the Injured parties' counsel that he was getting a raw deal and that his insurer was not "properly" defending him and considering his interests. The insured ultimately confessed judgment and assigned rights against both the insurer and the broker. Both the insurer and the broker were cleared of any potential responsibility – the insurer because it did not breach a duty to defend and the broker because he did not have a duty to investigate and advise about the particular claims handling practices of the insurer.