Agents E&O Standard of Care Project

Survey New Hampshire

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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New Hampshire

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Standard of Care

General duty to use skill, care and diligence to procure insurance requested. No duty to advise absent special circumstances. *Sintros v. Hamon*, 810 A.2d 553 (N.H. 2002). Such special circumstances include agent's express agreement to advise, agent holding self out as expert plus the client's reliance on same, reliance on agent's answer to a specific coverage question, or agent giving and client relying on advice as a course of dealing in a long-established relationship. *Id.* A client's request for "full coverage" or the "best policy" is not the same as the client requesting particular coverage or a specific policy limit. Therefore, the agent's alleged failure to obtain "full coverage" is not actionable as a failure to obtain the requested coverage. Nor does the request for "full coverage" place a duty on the agent to advise the insured about coverage, or use his expertise and discretion to determine what coverage the insured should buy. *DeWyngaerdt v. Bean Ins. Agency*, 855 A.2d 1267 (N.H. 2004).

The actual example of a special circumstance that might create an affirmative duty to advise is stated by the court as "long-established relationships of entrustment in which the agent clearly appreciates the duty of giving advice." The court also phrased it as "where there is a course of dealing over time putting the agent on notice that his advice is being sought and relied upon."

These notions of the agent clearly appreciating and being on notice are important limitations on the nature of the special circumstances that might give rise to the heightened duty.

Representative Cases

GRAND CHINA, INC. & a. v. UNITED NATIONAL INSURANCE COMPANY, 156 N.H. 429; 938 A.2d 905; 2007 N.H. LEXIS 199

Line of coverage involved – insurance agents and brokers errors and omissions

Position of person in the agency involved – producer or CSR

Personal or commercial lines – commercial lines

Type of coverage involved – liquor liability

Procedural or knowledge-based error – procedural

Claimant allegation – the agency failed to forward loss runs to a new carrier, resulting in a cancellation of the policy

Settlement or trial – the case went off on summary judgment, finding that the cancellation was not proper; affirmed by the NH Supreme Court

Description of alleged error – the agency had procured liquor liability coverage for a restaurant and lounge, and the coverage was bound subject to receipt of loss runs. The agency failed to forward the loss runs, and the carrier canceled the policy.

In the meantime, a catastrophic motor vehicle accident had occurred resulting in two deaths, and claims against the customer of the agency.

Tip to avoid claim – obviously, here, there was a failure follow through on providing the necessary loss runs to the new carrier.

Summary of case – the legal issue was whether or not the liquor liability carrier could give such a short cancellation notice for a reason such as failure to provide the loss runs. The agency intervened in the litigation between the carrier and restaurant, succeeding on summary judgment, and in affirmance by the New Hampshire Supreme Court that the cancellation was improper, even though the carrier was a surplus lines company.

STATELINE STEEL ERECTORS, INC. v. WILLIAM SHIELDS & a., 150 N.H. 332; 837 A.2d 285; 2003 N.H. LEXIS 193

Line of coverage involved – insurance agents and brokers errors and omissions

Position of person in the agency involved – producer

Personal or commercial lines – commercial lines

Type of coverage involved -- commercial general liability

Procedural or knowledge-based error – some aspects of both

Claimant allegation – The claimant, who had taken an assignment of the customer's claim against the agency, alleged that the agency was at fault for providing commercial general liability insurance coverage to this steel erection contractor that excluded coverage for insured contracts.

Settlement or trial – originally, the agent was awarded summary judgment in the claim because it had resulted from a settlement between the customer and the third-party that absolved the customer of any liability. The New Hampshire Supreme Court reversed, indicating that so long as such a settlement was reached in good faith, it could be enforced through an assignment of the claim against the agent. The case was thereafter settled.

Description of alleged error – the alleged error was in procuring liability coverage in the surplus market that had a manuscripted endorsement excluding coverage for insured contracts, something that is routinely provided in the standard market. Given the steel erector's exposure to such claims, it was alleged that the agent should have either procured coverage about this restriction, or made it clear to the customer that such coverage was excluded.

Tip to avoid claim – exercise extreme care given the nature of the customer's business, and clearly communicate and document any unusual exclusions in the coverage obtained.

Summary of case – The error resulted because the agent was not aware of the manuscripted endorsement in the surplus lines policy. If he had been, he would have advised the insured of its existence, or sought alternative coverage that did not exclude this common type of claim.

A.J. CAMERON SOD FARMS, INC. v. CONTINENTAL INSURANCE COMPANY & a., 142 N.H. 275; 700 A.2d 290; 1997 N.H. LEXIS 91

Line of coverage involved – insurance agents and brokers errors and omissions

Position of person in the agency involved – producer and CSR

Personal or commercial lines – commercial lines

Type of coverage involved -- business auto liability

Procedural or knowledge-based error – some aspects of both

Claimant allegation – The claimant alleged that the agency made an error in following instructions to coordinate an underlying business auto policy with an umbrella policy.

Settlement or trial – the case was tried, the agent found to be partially at fault, and this finding was upheld on appeal

Description of alleged error – The customer maintained business auto coverage with the insured agent, and an umbrella policy with a different agent. When the BA policy was replaced, the limit dropped from $1.5 million to $500,000. The agent advised the insured of this, and also told the insured to "increase the umbrella coverage by $1 million." The customer did so, but the attachment point of the umbrella was not dropped to $500,000.

A catastrophic loss resulted, and the customer had a $1M gap in coverage above the underlying BA policy, and below the attachment point of the umbrella.

Tip to avoid claim – particularly when coverage is divided between agencies, the need for careful communication and coordination is heightened. Here, a clear instruction with respect to dropping the attachment point to the new lower limit of the underlying BA policy was essential, and did not occur. Testimony at trial indicated that agents were reluctant to communicate with each other, and tried to communicate through the customer. In this circumstance, communication between the agents would have been preferable.

Summary of case – An agent cannot rely upon the customer to carry out an instruction that involves such a potential of misunderstanding.

HILLSIDE ASSOCIATES OF HOLLIS, INC. & A. v. MAINE BONDING & CASUALTY COMPANY, , 135 N.H. 325; 605 A.2d 1026; 1992 N.H. LEXIS 40

Line of coverage involved – insurance agents and brokers errors and omissions

Position of person in the agents involved – producer

Personal or commercial lines – commercial

Type of coverage involved – commercial general liability

Procedural or knowledge-based error – procedural

Claimant allegation – the injured employee claimed that the employer in fact had two general liability policies at the time of the accident

Settlement or trial – the case was tried, and ultimately appealed to the New Hampshire Supreme Court

Description of alleged error – The producer had placed general liability coverage with Aetna at the time a project was ongoing, and had issued a certificate indicating that Aetna was the carrier in the amount of $500,000. In order to synchronize the customer's policies with its fiscal year, the producer asked Aetna to extend the policy for approximately two months, at which time it was going to be replaced by an identical policy issued by Maine Bonding. Ultimately, the Aetna policy was extended another two weeks, and the Maine Bonding policy came into effect at its expiration. In the meantime, the producer had issued a certificate indicating that the Maine Bonding policy had come into being on the earlier planned inception date.

In the middle of this, an employee of a subcontractor was severely injured on the job. Ultimately, he claimed that both the Aetna and Maine Bonding policies were in effect at the time of the accident, and the trial court agreed.

The New Hampshire Supreme Court reversed this finding, concluding that the clear intention at all times was that there be one $500,000 policy in effect continuously, and that the indication of Maine Bonding on the prematurely issued certificate was a mistake.

Tip to avoid claim – obviously, in this circumstance, the producer needs to exercise extreme care that certificates as issued are accurate, and do not assume facts that may not come to be.

Summary of case – a mistake in the issued certificate may create coverage, notwithstanding the

disclaimers that exist on all certificate forms. Here, because the intention of all parties was clear, and the certificate was obviously a mistake, the court did not permit a finding of additional coverage that was never intended to exist.