Agents E&O Standard of Care Project

New Mexico 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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VIA EMAIL ONLY

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Re: Special Standard of Care Project – New Mexico Material

Dear Ms. LaFollette and Mr. Nesbitt:

Please consider this letter as the short article for the Independent Insurance Agents and Brokers of America project regarding the standard of care across the various states. The following is applicable to New Mexico. We are willing to present this material at a Big I seminar.

Summary of Standard of Care In New Mexico

An insurance agent's duty to an insured is first informed by the nature of the insured's request for coverage. The legal standard in New Mexico is that an insurance agent, who undertakes to procure insurance for others and, through his fault or neglect, fails to do so, may be held liable for damages. *Sanchez v. Martinez*, 99 N.M. 66, 70, 53 P.2d 897,901 (Ct. App. 1982). An agent who agrees to procure or renew an expired policy of insurance has a duty to obtain the insurance, renew or replace the policy, or seasonably notify the principal that he is unable to do so in order that the principal may obtain insurance elsewhere. *Id.* Liability may be predicated either upon a contract or tort theory. *Id.* New Mexico case law does not contemplate agent liability based on an insured's unilateral assumption of coverage and holds that an agent is only liable for failing to procure coverage that an insured requests. *Sanchez*, 99 N.M. at 70.

However, the Court will delve into the "dynamics of the insurance transaction" in order to determine an insured's "reasonable expectations" at the time the insurance was requested. *See Berlangieri v. Running Elk Corp.*, 132 N.M. 92, 96 (Ct. App. 2002). When an agent explains an insurance policy or provision, the agent must provide accurate information to the insured because

the agent's erroneous representations can inform an insured's reasonable expectation of coverage, even if different from the actual policy terms. *Bird v. State Farm*, 142 346, 165 P.3d 343 (NM App. 2007). Because the court's will delve into the "dynamics of the insurance transaction" independent agents likely fall somewhere in the middle of the spectrum between order takers and advisers.

In the personal lines automobile insurance policy context, there is an obligation by the insurance carrier to secure a signed written waiver of uninsured/underinsured motorist coverage. *Jordan v. Allstate Ins. Co.*, 2010-NMSC-051, 149 N.M. 162, 245 P.3d 1214. There is likely an obligation for independent agent to explain the availability of UM/UIM coverage and the impact of rejecting UM/UIM coverage. *See Vigil v. Rio Grande Insurance of Santa Fe*, 124 NM 323, 950 P.2d 297 (N.M. App. 1997). New Mexico appellate court's have very liberally construed UM/UIM waiver and often reform policies to include to provide UM/UIM coverage stacked across multiple vehicles. The default rule is to provide the maximum possible amount of UM/UIM coverage. *Curry v. Great Northwest Insurance Co.*, 2014-NMCA-031, ¶¶ 10-11. Any insured rejecting UM/UIM coverage should be well informed as to that decision. Id.

There have been recent efforts on to expand an insurance agent's duty into investigation and confirmation, essentially arguing that the independent agent should have confirmed some information an insured represents on the Accord application, i.e. the presence of an alarm system or whether certain commercial activities are done at a particular location. The trend utilizes the independent agent's website or brochure market and tends to focus on statements like: "comprehensive insurance solutions," assurance statements, and customer service oriented statements, in addition to the more obvious statements like "we are insurance experts," particularly when focused on a particular line of business or industry.

Independent agents are also subject to statutory claims under the New Mexico Unfair Practices Act (NMSA 1978, § 57-12-1 et seq) and New Mexico Insurance Code (NMSA 1978, § 59A-16-20) which require a misrepresentation of fact. This is most often seen with an allegation that the fact of insurance coverage was alleged to have been misrepresented by the independent agent. Often the statutory claims are raised alongside the negligence and breach of contract claims. The statutory claims include the potential for treble damages and attorney fee awards.

Case Studies

(1) The case of not fully understanding the insured's manufactured product.

A. Line of Coverage involved. *Commercial lines insurance with embedded manufactured or completed products coverage and an underground hazard exclusion.*
B. Position of person in the agency involved: *Experienced Commercial Lines Agent*
C. Personal or Commercial Lines: *Commercial*
D. Type of Coverage Involved: *Commercial General Insurance and Manufactured or completed products coverage.*
E. Procedural or knowledge-based error. *Both*
F. Claimant Allegation: *Failure to procure requested insurance. Statutory claims for misrepresentation of coverage.*
G. Settlement or Trial: *Settlement*
H. Description of Alleged Error: *Failure to understand the purpose and use of a manufactured product.*
I. Tip to Avoid Claim: *Fully understand the business seeking insurance and be careful of straying into highly specialized lines of coverage in which the agent or the agency have limited or no experience.*
J. Summary of case: *The insured had a history of placing insurance with the agent for other lines of business. The manufactured mobile oil field heavy equipment had specialized use in the oil field industry and also had "off specification" uses. The device was used in jarring actions to drive a pipe into the ground in order to clear an underground pipe. There was oil spill. The insurance carrier denied coverage on the grounds of underground and pollution exclusions. The manufacturer was sued, paid the damages out of pocket, and then sued the independent agent. The theory against the agent was that the exclusion of the underground hazards in the oil field setting essential gutted the policy and should have been caught when the agent reviewed the policy.*

(2) The case of if it looks too good to be true it probably is.

A. Line of Coverage involved. *Healthcare –type policies. Technically, the "policies" were defined as single employer trust designed to circumvent health regulations. The trusts were backed by a consortium of reinsurers.*
B. Position of person in the agency involved: *Agent.*
C. Personal or Commercial Lines: *Health Insurance (Surplus Lines)*
D. Type of Coverage Involved: *Health Insurance.*
E. Procedural or knowledge-based error. *Both in addition to bad insurance products that ultimately were taken in by a special receiver.*
F. Claimant Allegation: *Failure to procure appropriate insurance.*
G. Settlement or Trial: *Settlement. Claims were handled individually as opposed to in a class. A third-party claims administrator was retained to settle individual claims. Additionally, intervention into several collection actions instigated by healthcare providers was required.*

H. Description of Alleged Error: *The alleged error was failure to notify the insured that it was a new insurance-type product and also that the policy declaration page did not bear the statutory and regulation required surplus lines stamp.*
I. Tip to Avoid Claim: *Be careful with new or creative new insurance-type products. If it looks too good to be true it probably is. Also, be careful with surplus lines policies and fully comply with the disclosure statements and stamp requirements.*
J. Summary of case: *The Agent placed 16 business entities with a no-domestic insurance-like product that was marketed as a single employer trust designed to circumvent health regulations. It was backed by a consortium of re-insurers. Some of the re-insurers later withdrew and created a reinsurance crisis. The entity started to slow pay and then stopped all payments. The entity was taken into receivership. The declarations page failed to contained the required surplus lines stamps and it was unclear that Agent meaningfully understood the product. Essentially, the Agent bought into what was ultimately proven to be a sham product.*

(3.) **The case of the insolvent insurer.**

A. Line of Coverage involved. *Several, including commercial automobile, workers compensation, and commercial general lines insurance.*
B. Position of person in the agency involved: *Owner/Agent*
C. Personal or Commercial Lines: *Commercial (Surplus lines)*
D. Type of Coverage Involved: *Commercial General Lines*
E. Procedural or knowledge-based error. *Knowledge-based. The carrier was A- at the time the policy was procured and slipped to B before renewal. There was no domestically available carrier at time. The insurance carried was not placed into receivership until after the policy was renewed.*
F. Claimant Allegation: *Failure to procure insurance/Failure to conduct due diligence.*
G. Settlement or Trial: *Settlement, but only after we assisted the insured to secure insurance coverage under the commercial automobile policy. However, the 10th Circuit Court of Appeals later determined that no insurance coverage was afforded under the commercial automobile. Accordingly, the failure to procure an appropriate CGL claim against the independent agent became the primary negligence theory. A secondary question that came up was whether mobile oil field equipment was a vehicle or equipment when used in an operational context.*
H. Description of Alleged Error: *Lack of due diligence into the financial health and stability of an insurance carrier continuing after the policy was procured, but before renewal period.*
I. Tip to Avoid Claim: *Understand the dangers and risk inherent in the surplus lines market and placing insurance (particularly commercial insurance) with less known and poorly rated insurance carriers. Know the market you sell.*
J. Summary of case: *The case started off as a workers' compensation case for a contractor of the insured and later turned on several issues regarding the applicability of various lines of coverage. The CGL carrier became insolvent. The CGL policy was procured through the surplus lines market and there were no New Mexico guarantee funds*

available. The liability theory was that the insurance carrier was not an appropriate placement because its AM Best's rating had substantially slipped and that receivership was apparent at the time of renewal. There was no argument that the CGL policy covered the facts alleged.

As always, we value your work. Please feel free to contact me if the Narvaez Law Firm can be of further assistance.

Very truly yours,

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