Agents E&O Standard of Care Project

Oklahoma 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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Summary of Insurance Producer's Standard of Care

In Oklahoma, insurance producers owe a limited duty of care to customers. More specifically, an agency has a duty to exercise reasonable care and skill in performing its tasks, *i.e.*, procuring insurance and making requested adjustments after a policy is issued. A producer need only offer to a customer those coverages required by law, or those which address the disclosed needs of the customer. Absent a special or fiduciary relationship, a producer has no duty to "advise" a customer or to act as a type of risk manager for a customer. Further, requests by a customer for "adequate" or "full" coverage are insufficient to broaden the standard of care, or to create a special relationship.

The following is a summary of some of the reported decisions which have helped shape the applicable standard in Oklahoma:

1. ***Swickey v. Silvey Companies*, 979 P.2d 266 (Okla. Ct. App. 1999).**

- Agency has duty "to exercise reasonable care and skill in performing its tasks, *i.e.*, procuring insurance and making any necessary corrections and adjustments after a policy is issued."
- Agent has "duty to act in good faith and use reasonable care, skill, and diligence in the procurement of insurance and an agent is liable to the insured if, by the agent's fault, insurance is not procured as promised and the insured suffers a loss."
- Court also hinted that, if a "special relationship" could be shown between an agent and the customer, "fiduciary duty" might be created.

2. ***Mueggenborg v. Ellis*, 55 P.3d 425 (Ok. Ct. App. 2002)**

- Court recognized that "public policy considerations" are <u>against</u> imposing duty upon agent to advise of coverage needs because:
- Imposing liability would remove all burden from the insured to <u>take care of his/her own financial needs</u> and expectations.
- Would transform insurance companies from competitive marketplace into <u>personal financial counselors</u> or guardians of the insured.
- Insureds know their personal assets and abilities to pay better than an insurance agent. (Agents – Don't advertise your way around this!)

- By creating such a duty, insureds would have opportunity to seek coverage for a loss after it occurred merely by asserting that they would have bought additional coverage if it had been offered. According to the court, this would "turn the entire theory of insurance on its ear."

- Plaintiffs' allegation that they instructed agent to provide them with "adequate protection" could not be the basis of liability, reasoning:

> "To permit a conversation such as this to serve as the basis for an issue of fact leading to a finding of an expanded principal-agent relationship would in substance make the agent a blanket insurer for his principal.

***3. Rotan v. Farmers Ins. Group*, 83 P.2d 894 (Okla.Ct.App. 2003).**

Court granted summary judgment in favor of agent. Upheld on appeal, reasoning:

- Insurance companies and their agents do not have a duty to advise an insured with respect to his insurance needs.

- General request for "adequate protection" and the like does not change this duty.

- To properly discharge duty, agents need only offer:

    1. Coverage mandated by law, and

    2. Coverage for needs that are disclosed by the insured, and this duty is not expanded by general requests for "full coverage" or "adequate protection."

***4. Cosper v. Farmers Ins. Co.*, 309 P.3d 147 (Okla. Ct. App. 2013).**

Plaintiffs sued agent and insurer for issuing a homeowners' policy with a replacement value that exceeded the property's actual cash value, causing them to pay higher premiums than what was necessary. Court dismissed agent, who had no involvement in setting or choosing the particular replacement cost figure. Court held:

- Insurance companies and their agents do not have a duty to advise an insured with respect to insurance needs.

- Agent would be potentially liable if customer requested a specific amount of coverage and the policy that was issued was in some other amount.

- As long as agent-customer relationship is at "arm's length," there is no argument that the agent has a "fiduciary" relationship with the customer. In fact, thus far there are no Oklahoma cases holding that an insurance agent owes a fiduciary duty to a prospective insured, or to an established customer, with respect to procurement of coverage.

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Case Studies

	Case Study 1	Case Study 2	Case Study 3
a. Line of coverage	Property/Casualty	Property/Casualty	Property/Casualty
b. Position of person at agency	New producer	CSR	CSR
c. Personal or Commercial Lines	Commercial	Commercial	Commercial
d. Type of coverage	Employee Dishonesty	Commercial Auto	Commercial Property (Inland Marine)
e. Procedural or Knowledge-based error	Both (see Summary of Claim, below)	Procedural (see Summary of Claim, below)	Both (see Summary of Claim, below)
f. Claimant Allegation	Customer alleged that producer should have known more about how customer's business operated and should have recommended purchasing employee dishonesty coverage.	Customer alleged that agency should have followed up to ensure that policy change request regarding change to named insured was properly made.	Non-customer alleged that it relied to its detriment on Certificate of Coverage issued/created by agency and sent to non-customer.
g. Settlement or Trial	Settlement	Trial against both insurer and agency. Large verdict against insurer. Nominal verdict against agency.	Settlement
h. Description of alleged error	Producer promised, in his first/introductory correspondence to the customer, to be the customer's "personal risk manager."	Agency failed to "catch" error made by insurer relating to named insured.	Agency issued erroneous cert of coverage to non-customer pertaining to coverage for certain mobile equipment.
i. Tip to avoid claim	Do not promise, or otherwise represent, that you will advise the customer or will serve as a "risk manager." Otherwise, producer is taking on more than the law requires.	Do not assume insurer is going to properly process endorsements or other post-procurement activities. And, if there is a purported procedure in place at the agency for double-checking endorsements, make certain that the CSR doing the work is property trained.	Make certain CSR's understand significance of Certificates of Coverage, as well as significance of dealing directly with third parties (non-customers), to whom agency typically owes no duty of care. Erroneous information given to a non-customer can create exposure for the agency where it otherwise would not exist.
j. Summary	Successful commercial agency hired, as a producer, a person who formerly served as a risk manager for a large company. No one bothered to tell the new producer that, under normal circumstances, producers do not serve as risk managers. So, from management's position, error was procedural (management knew better). From new producer's position, error was knowledge-based (he had not yet learned the applicable, and limited, standard of care).	Insured requested a minor change to commercial auto policy, and sent policy change request form to insurer. Insurer not only made the change that was requested, but went a step further and amended named insured in a way that significantly narrowed coverage. Agency failed to catch the insurer's error, notwithstanding having a procedure for checking endorsements. Agency was forced to admit in deposition that insurer's error was obvious and should have been noticed.	As a courtesy to customer, agency began dealing directly with vendors of the customer, who needed Certificates of Coverage. One vendor was rather pushy with the (new) CSR, who issued a Certificate of Coverage in favor of the vendor without clearing it with anyone else at the agency. The Certificate was wrong (represented there was coverage for certain equipment when that was not the case). Non-customer sued agency after uncovered loss.