Agents E&O Standard of Care Project

Utah 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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DUTIES OF UTAH INSURANCE AGENTS

Utah insurance agents owe various legal duties to their clients. Most generally, an agent has a duty to exercise reasonable care in procuring insurance for an insured. Reasonable care is the care another similarly-situated insurance agent would exercise in the same situation. For example, reasonable care would require an agent to follow a client's instructions when choosing an insurance policy or gathering information a client needs to determine what insurance to buy, in performing any obligations an agent might have under a contract he or she enters into with a client, or in fulfilling any promises an agent makes to a client. These general duties are similar throughout the United States, and are not unique to Utah.

In addition, Utah courts have defined specific duties for Utah insurance agents. These include the duty to procure insurance according to the client's instructions, as well as a duty to accurately communicate the contents of an insurance policy to an insured. In *Asael Farr & Sons Co. v. Truck Insurance Exchange*, a reported case handled by our firm, the Utah Court of Appeals held a Utah insurance agent has a duty to procure insurance according to a client's instructions, but also noted that this "duty . . . is limited to either the information the insured provides to the agent or to the information the agent obtains when given express authority to do so." 2008 UT App 315, ¶ 31, 193 P.3d 650. Accordingly, when an "insurance agent . . . acts in an authorized . . . manner, [the agent] is not personally liable to the insured for his or her acts or for any contract which he or she makes on behalf of the disclosed principal." *Id.*

Further, a Utah insurance agent has a duty to accurately communicate the contents of a policy to an insured. Thus, if an insurance agent makes material misrepresentations to the insured and the insured reasonably relies on those misrepresentations, the agent may be held liable for any injury the insured suffers as a result. *Youngblood v. Auto-Owners*, 2005 UT App 154, ¶ 21, 111 P.3d 829, *aff'd* 2007 UT 28, 158 P.3d 1088. This duty is, however, limited in that such misrepresentations must be "clear and material" and "made in an attempt to induce the potential insured to enter into the contract . . . ." *Id.*, ¶ 27. It is therefore not enough that a client fails to properly read or understand a contract, or even that an insurance agent fails to point out a key

contractual term a client may have missed or misread. Instead, an insured must "justifiably rely on positive assertions of fact without independent investigation" before an insurance agent's misrepresentations will be found to constitute a breach of duty. *Id.*, ¶ 25.

SUMMARY OF LANDMARK UTAH CASES

1. In *Asael Farr & Sons Co. v. Truck Insurance Exchange*, an ice cream company (Farr) sued its agent after an equipment malfunction caused inventory losses significantly higher than those covered by Farr's insurance policy limits. 2008 UT App 315, ¶¶ 2-8. Farr claimed the agent had failed to work diligently and professionally in procuring a policy with the levels of coverage required to provide a satisfactory level of insurance protection. *Id.*, ¶ 27. In deciding the agent had not acted negligently in procuring coverage, the Utah Supreme Court first noted that:

> [a] duty to procure insurance may arise when an agent accepts an application; makes a bare acknowledgment of a contract covering a specific kind of casualty; lulls the other party into believing a contract has been effected through promises; and has taken care of the insured's needs without consultation in the past.

Id., ¶ 29 (quoting *Harris v. Albrecht*, 2004 UT 13, ¶ 30, 86 P.3d 728). The court then went on to note that no such duty arose between the company and agent in this case because:

> [Farr] did not explicitly instruct [the agent] to ensure [Farr's] inventory was adequately covered for spoilage, but rather he rejected [the agent's] suggestion that the spoilage limit be increased. [The agent] had never before written property or liability insurance for [Farr] and did not have an independent understanding of the company's needs. Likewise, [Farr] did not ask [the agent] to familiarize himself with the business so as to determine appropriate limits for [the agent] or provide [the agent] with information from which he could competently make those assessments for [Farr]. Instead, [Farr's witness] testified that he maintained control of coverage increases because [the agent] would not be privy to the information that one would need to make that assessment.

Id., ¶ 30.

2. In *Harris v. Albrecht*, an architect (Harris) sued his insurance agent (Albrecht) after a fire destroyed Harris' office. 2004 UT 13, ¶¶ 6-7. Harris claimed Albrecht breached both his contractual duty to obtain insurance for Harris, as well as his general duty to procure insurance.

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Id. In finding Albrecht did not breach any duty to Harris, the Utah Supreme Court found that:

> A contract to procure insurance may arise when the agent has definite directions from the insured to consummate a final contract; when the scope, subject matter, duration, and other elements can be found by implication; and when the insured gives the agent authority to ascertain some of the essential facts. A duty to procure insurance may arise when an agent accepts an application; makes a bare acknowledgment of a contract covering a specific kind of casualty; lulls the other party into believing a contract has been effected through promises; and has taken care of the insured's needs without consultation in the past.

Id., ¶ 30. The court then noted that, while Harris and Albrecht had discussed insuring the office against fire, Albrecht was neither contractually obligated nor duty bound to obtain an insurance policy because "Harris [had] merely requested insurance and expressed a desire to procure insurance." *Id.*, ¶ 29.

3. In *Youngblood v. Auto-Owners Insurance Co.*, a pedestrian (Youngblood) was injured when he was struck by a car while walking across a parking lot. 2007 UT 28, ¶ 3, 158 P.3d 1088. After settling with the driver for the full limit of the driver's policy, Youngblood brought a lawsuit seeking UIM compensation from his own insurer. *Id.* The insurance company contended Youngblood was not entitled to UIM coverage because he had not purchased the policy personally but instead in the name of his corporation. *Id.* ¶ 5. Thus, because the policy language explicitly provided UIM insurance extended only to *individuals* listed on the policy, the company claimed Youngblood was not covered by any UIM coverage. *Id.*

Youngblood admitted he was not personally listed as required by the language of the policy, but insisted he should be covered anyway because his agent had orally promised he would be covered by UIM insurance in the event he was injured. *Id.*, ¶ 7. In finding a question of fact existed as to whether Youngblood's agent represented that the policy would cover individual injury, the Utah Supreme Court recognized that an agent's promise is sometimes sufficient to extend coverage despite written policy language providing otherwise, but only if:

> (1) an agent makes material misrepresentations to the prospective insured as to the scope of coverage or other important policy benefits, (2) the insured acts with prudence and in reasonable reliance on those misrepresentations, and (3) that reliance results in injury to the insured.

Id., ¶ 25. The court then went on to find that Youngblood's agent may have made statements on which Youngblood reasonably relied. *Id.*, ¶ 39. Accordingly, the Utah Supreme Court remanded the case for determination as to whether Youngblood had relied to his detriment on a promise his agent had made when he sold him the policy. *Id.*

CASE STUDIES

1. Kipp and Christian, P.C. defended an agent and his agency against the claims of an insurance carrier with respect to alleged negligent/intentional misrepresentations in connection with an insurance application. Years previous to the suit, the agent had secured commercial general liability insurance for an insured selling consumer goods. The carrier had never taken any steps to investigate the insured's business operations or otherwise conduct any meaningful underwriting. Subsequent to a large loss which required payment of the policy limits, the carrier investigated the agent's files in order to determine whether there was any wrongdoing in connection with the insurance application. Researching multiple files going back nearly a decade, the insurance carrier located documents which arguably indicated the subject application was not properly submitted. Conveniently, the carrier retained no information regarding the electronically submitted insurance application, underwriting documents, or notes regarding conversations with the agent.

Throughout the course of the litigation, it became clear the agent had contacted the carrier and discussed the insured's business operations, as well as any issues concerning the subject insurance application. However, because there was no written correspondence or notes concerning those conversations, there was very little evidence supporting the agent's defense. As the dispute neared trial, the case finally settled for a substantial sum. The key takeaway from the foregoing case is the importance of written correspondence and notes in connection with an insurance application, both in terms of conversations with the insured as well as the carrier. It is also important to analyze

old file materials in order to determine whether the insured is being forthright during the insurance application process. Finally, this case serves as a reminder that even long-standing relationships with an insurance carrier may be jeopardized when a large loss occurs.

2. Kipp and Christian, P.C. recently represented an insurance agent and his agency in connection with the procurement of a business owner's policy. The insured suffered a substantial loss due to property damage at his place of business. After the loss, the insured was surprised to learn certain policy exclusions precluded him from fully replacing all business property and otherwise repairing damaged portions of the building. In addition to bringing suit against the insurance carrier, the insured also asserted claims against the agent, stating he had made a blanket request for and received a promise of total coverage for all potential losses. Rather than relying on any written correspondence to that effect, the insured relied solely on an alleged verbal exchange which took place at the time the subject policy was renewed.

An insured will always have the ability to fabricate a verbal conversation. Oftentimes, claims alleging insurance agent malpractice revolve around alleged conversations of this nature. To successfully avoid such claims, and to present a good defense when a lawsuit is filed, the agent should always make clear, in writing, the coverages and exclusions set forth in the policy. Any conversations regarding coverage and exclusions should be well-documented. Finally, the agent should provide written correspondence to the insured, putting the onus on the insured to request any additional coverage not set forth in the insurance proposal.

3. Kipp and Christian recently represented a small-town agent in a matter involving coverage for consequential damages caused by an insured's well drilling operations. The insured purchased a commercial liability policy for damages associated with its water well drilling business. In preparing the policy, the agent failed to document a conversation between the insurer's field underwriter and the insured, in which the underwriter allegedly stated the insured would be covered for losses related to certain drilling accidents. Subsequent to purchasing the policy, the insured's drilling equipment failed and caused nearly $100,000 in damages to a subdivision's water system. The insured applied for coverage, only to learn that its commercial liability policy

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excluded coverage for the damages. The case settled before trial when investigation revealed that the insured believed it had coverage because of representations the insurance underwriter had made regarding drilling accident coverage, as opposed to any representations made by the agent. The eventual settlement included a contribution from both the insurer and the agent's E&O policy, although the agent contributed a smaller portion of the settlement, in part because the agent remained friendly with the insured throughout the course of the investigation and settlement negotiations.

The alleged error on the part of the agent related to the agent's failure to procure appropriate coverage for the insured. This alleged error was diffused by deflecting blame on the insurer, where the insurer's field underwriter met with the agent and the insured, and allegedly represented the insured would be covered for the type of loss at issue. Nevertheless, the error likely could have been avoided entirely had the agent documented the interaction between the insurance underwriter and the insured. To avoid such an error, an agent should steer clear of providing coverage advice or, if such advice is sought, involve the insurer's underwriting team to provide input, preferably directly to the insured so as to avoid the agent being charged with having given any form of opinion regarding scope of coverage. As noted, an insured will always have the ability to fabricate a verbal conversation. Thus, at a minimum, any conversations regarding coverage and exclusions should be well-documented.