Agents E&O Standard of Care Project

Vermont 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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SENT VIA E-MAIL ONLY

John Nesbitt
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5200 Metcalf Avenue
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Dear John:

RE: Liability of insurance agents and brokers in Vermont

This analysis follows the outline suggested in Robin LaFollette's April 3, 2014 letter.

In Vermont, the general standard of care applicable to insurance agents requires the use of reasonable care and diligence to procure insurance that will meet the needs and wishes of the prospective insured as stated by the insured. *Rocque v. Co-Operative Fire Ins. Ass'n*, 140 Vt. 321, 326, 438 A.2d 383, 386 (1981); *Booska v. Hubbard Ins. Agency, Inc., et al.*, 160 Vt. 305, 309, 627 A.2d 333 (1993). The agent is to be generally fair and truthful in explaining the nature of the policy, but the agent is not expected to warn the customer about necessarily complex contract language on every eventuality. As long as the agent does the foregoing without negligence, then as between the agent and customer, the task of reading and understanding the policy of the text is that of the customer. An agent also may point out the advantages of additional coverage and may ferret out additional facts from the customer applicable to such additional coverage, but the agent is under no obligation to do so, nor is the customer under any obligation to respond.

In *Booska*, the prospective insured purchased a two family house. He met with the Defendant insurance agent and explained that he would be changing the house into a one apartment house and that he would be doing "a little cosmetic work" such as opening up doors, but there would be no plaster work. The agent suggested insuring the house to 80 per cent of replacement value to avoid a coinsurance penalty in the event of a partial loss, so the dwelling was insured for $95,000 and the contents for $47,500. The Supreme Court decision describes in detail the substantial and extensive work the insured actually did throughout the house, and the Court summarizes that work as a partial demolition. Several months after the inception of the policy, and in the midst of this partial demolition, the house burned in a fire. The insurer advised the

insured of their right to replacement cost of the house upon replacement of the structure, but the insured never attempted to replace the house. A public adjuster estimated the replacement cost at $103,300. As the loss was evaluated and adjusted, the insured accepted without prejudice to subsequent claims approximately $49,000 for the structure and $22,000 for the contents. The insured then commenced suit seeking $95,000, the full face amount of the policy and asserted various claims against the insurer and the agent. The insured alleged the agent breached duties to advise and to explain the relevant details of the policy in light of the renovation plan. By virtue of their twelve year relationship, the insured alleged, there was a special relationship that required the agent to explain the effect of a loss before completion of remodeling. The trial court granted summary judgment to the agent and the insured appealed. The Supreme Court affirmed the trial court decision. With respect to the duty to advise, the Court noted the agent was never provided any information about the extent or progress of renovations or the manner in which the renovations were being conducted that would have allowed the agent to assess actual cash value during those activities. And, the Court described the duty of care as stated above in this paragraph and observed that the circumstances described above, even if for a period of twelve years, would not support the imposition of a "higher duty." The Court said that the task of reading and understanding the text of the policy is that of the insured and under the circumstances of this case, the insured could have understood from the text of the policy the likely result of a fire occurring in the midst of renovation when the value of the house would likely be reduced by what was "essentially a partial demolition."

List of representative Vermont cases:

Booska v. Hubbard Ins. Agency, Inc., et al., 160 Vt. 305, 309, 627 A.2d 333 (1993).
Rocque v. Co-Operative Fire Ins. Ass'n, 140 Vt. 321, 326, 438 A.2d 383, 386 (1981).
Hill v. Grandey, 132 Vt. 460, 321 A.2d 28 (1974).
Dodge v. Aetna Cas. & Sur. Co et al., 127 Vt. 409.

Example case 1.

a. Homeowners.
b. Producer.
c. Personal.
d. Homeowners.
e. Knowledge.
f. Allegation that agent failed to make an inventory and determine the value of the insured's personal property.

g. Motion for Summary Judgment granted.
h. See f.
i. Agent should make it clear that personal property has not been inventoried or appraised, and how policy limit was determined.
j. Agent procured coverage for homeowner at the request of intermediary agent who provided initial values to secure a quotation and later to procure the coverage. The intermediary specified the limit of coverage for the dwelling. Coverage was procured and the content limit was a percentage of the dwelling limit. The written policy was sent to the insured with a cover letter suggesting they review the policy "to be sure you are adequately protected." The dwelling burned and the insured claimed the building was underinsured. The Court found that the agent procured coverage based on a reasonable interpretation of the information he had, and that to provide additional coverage the agent would have required information he did not have and could not have known short of an inventory or appraisal of the property itself. The Court ruled that the alleged facts did not create a basis to find a "special relationship" that could have created a duty to advise. So, the Court held the agent had no duty to inspect the insured's property or to otherwise make certain that the insured was fully insured. In the end, the Court observed, the insured was sent the written insurance policy and was well aware of the insurance limits and were themselves in a far better position to question any particular level of coverage or to ask to extend those limits. By accepting the policy and paying the premium, and then renewing, the insured effectively ratified the dollar level for insurance coverage.

Example case 2.

a. Personal lines.
b. Producer - owner.
c. Personal lines.
d. Homeowners.
e. Knowledge based.
f. Plaintiff alleged agent knew or should have know that Plaintiff had a detached "other structure" in which Plaintiff operated his business as a professional fine artist.
g. Settlement.
h. Alleged failure to be familiar with insured's home premises and risks. HO insurer also was sued.
i. Annual questionnaire, periodic newsletters or personal contacts could raise this issue.

j. Plaintiff was a local fine painting artist who purchased an old farmhouse and 10 or so acres with a garage and a couple of old farm buildings. Insurance agent procured homeowners insurance for the property and personal auto insurance. Agent had no relationship with insured other than incidental casual local contacts, but knew the insured was an artist who shared gallery space in town (not at the insured premises) with another artist. The HO policy contained coverage for "other structures" but also contained an exclusion for business pursuits conducted in structures detached from the dwelling. After the insurance policy was procured, the insured converted an old uninsulated machine shed to serve as a small, insulated, nicely appointed artist's study. The agent was never informed of the change and never inspected the premises, and the agent said there never was a discussion of what other structures existed on the property. The insurer's coverage for other structures was automatically 20% of the coverage for the dwelling. The policy had been continually renewed for a period of approximately 10 years. The garage and studio were destroyed by fire. The insurer denied coverage for the loss of the studio and its contents, but paid for the loss of a nearby garage and its contents. In mediation, the insurer paid a compromise settlement largely based on contents of the small building that were personal, rather than business, in nature. The agent contributed a relatively small amount. Insured and wife, both college educated, had problems with admissions that they hadn't either read the policy or asked questions. This case is an example of a commonly recurring claim in Vermont – the detached "other structure" used in whole or in part for business purposes.

Example case 3.

a. Commercial lines.
b. Producer.
c. Commercial lines – spectator liability policy.
d. Spectator liability policy.
e. Complex mix of fact and procedures.
f. Plaintiff alleged agent had duty to inquire about indemnification agreements in the insured's lease of premises for sporting event.
g. Settlement.
h. See f.

i. When interactions with customers become unusual, step back, take an intermission and raise the red flag. When procuring a surplus lines policy, become familiar with the fine print because it frequently varies from standard policy coverage. Furthermore, surplus lines general agents will issue policies that vary from the substantive coverage content and limits requested. Caveat emptor!

j. For several years, agent procured two-day spectator liability coverage for an annual state-wide amateur athletic event. The event was held at various venues often associated with a college. Usually the insurance was arranged several weeks in advance. During the year in question, the event organizers did not call the agent until an hour before the start of the event. The event was being held in a totally different venue with a different landlord. An application was taken over the phone and submitted to the agent for the same surplus lines insurer that previously insured the event. The application shows "no" to a question about additional insureds or indemnification agreements; however, there were indemnification agreements in the lease. A spectator was badly injured, and it so happened that an employee of the property owner's insurer was present at the time of the accident and she became involved in discussions with the event organizers. The agent mailed an informational Certificate of Insurance as requested to the property owner during the application process describing the coverage, but it didn't arrive before the event. A couple of days after the event, and without reporting the accident, an unidentified person called the producer's office and said that the property owner needed a new Certificate of Insurance. The producer transferred the call to his secretary and asked that the secretary prepare and send out a Certificate that the caller would dictate to her. The caller asked that the Certificate contain this statement: "The 'property owner' [name omitted for this report] is an additional Named Insured." The secretary signed the agent's name and sent it out. So now there were two different Certificates of Insurance. When the policy came in weeks later, it contained an endorsement, Contractual Liability Limitation, that changed the definition of an insured contract and added the following exclusion that became the subject of much debate and litigation: "An 'insured contract' does not include that part of any contract or agreement that indemnifies any person or organization for bodily injury arising from an occurrence caused by the sole negligence of said person or organization." Eventually multiple lawsuits were filed by the injured spectator against the property owner and the event organizer, by the property owner against the lessee and the insurer and by the event organizer against the agent. The injured spectator's claims were settled by the property owner's liability insurer.

The agent settled with the its customer and with the property owner's subrogated liability insurer for a fraction of what the property owner paid the spectator. The spectator liability insurer itself also settled with the property owner and its insured. In the end, the property owner's insurer "owned" the lion's share of the loss as was appropriate under the circumstances.

Sincerely,

Glen L. Yates, Jr.

GLY:cah