

Agents E&O Standard of Care Project Virginia 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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THE STANDARD OF CARE IN VIRGINIA

The Economic Loss Rule

Virginia is an unusual jurisdiction in that there is not a common law standard of care that agents owe to their customers. With the exception of actual fraud, recent Supreme Court of Virginia cases have made it clear that agents owe strictly **contractual** duties to their customers. As a result, errors and omissions claims that are based on negligence, breach of fiduciary duty or constructive fraud should be dismissed on Demurrer with the assertion of the economic loss rule. See Filak v. George, 267 Va. 612 (2004) (noting that the law of torts is to be used in connection with personal injury and property damage, but not solely for “disappointed economic expectations”).

This principle even applies in cases in which an insurance company sues an insurance agency for alleged torts. Augusta Mutual Company v. Mason, 274 Va. 199 (2007) (holding that an insurer’s claims that an agency violated its agency agreement must be a contract claim). This principle is consistent with the Supreme Court of Virginia’s decision in Cox v. Geary, 271 Va. 141 (2006), that legal malpractice claims in Virginia sound in contract and not in tort.

In short, the economic loss rule is alive, well and expanding in Virginia, to the benefit of all professionals defending errors and omissions claims.

Duty to Read Policy

Nearly twenty years ago, in General Insurance of Roanoke v. Page, 250 Va. 109 (1995), the Supreme Court of Virginia held that policyholders have a duty to read in negligence and contract cases. Trial courts, however, have often found ways to distinguish this holding. In light of the recent expansion of the economic loss rule, however, Page is of less value than before in defending errors and omissions cases.

Summary Judgment is Extremely Rare

Virginia is the only jurisdiction in the country in which, unless all parties consent, deposition testimony may not be used to support a Motion for Summary Judgment. Thus,

summary judgment is extremely rare and cases that do not settle proceed to trial. This procedural feature of Virginia law puts a great deal of pressure on defense counsel.

Punitive Damages

A significant defense advantage, however, is Virginia's punitive damages cap. The statutory cap for all defendants combined is \$350,000. This cap has long since withstood constitutional challenges and is a great defense tool in potentially high-exposure cases.

Case Studies

Case Study Number One

Line of coverage involved: P & C

Position of person in the agency involved: Agency principal

Personal or commercial lines: Commercial

Type of coverage involved: Farm Liability

Procedural or knowledge-based error: Both

Claimant allegation: Failure to explain to elderly farm owners that their farm liability policy would exclude claims by third parties for injuries to persons caused by horses boarded at the farm.

Settlement or trial: Settlement

Description of alleged error: Please see "Claimant allegation," above

Tip to avoid claim: DOCUMENT explanation to customers of highly significant policy exclusions

Summary of case: Owners of a large farm sued the agency after retired thoroughbred horses, which were boarded at the farm, escaped and caused a series of auto accidents. There were two serious personal injuries from those accidents. The underlying carrier denied defense or indemnity based on the policy exclusion for boarded horses. The case was settled through a mediation with a retired Chief Judge of the Circuit Court for the City of Norfolk, Virginia.

Case Study Number Two

Line of coverage involved: P & C

Position of person in the agency involved: Agency principal

Personal or commercial lines: Commercial

Type of coverage involved: Workers' compensation

Procedural or knowledge-based error: Both

Claimant allegation: The workers compensation carrier alleged that the agent bound and back-dated workers compensation coverage for a contractor who had an employee who had just been killed on the job.

Settlement or trial: Neither. The claimant voluntarily dismissed the case.

Description of alleged error: Please see "Claimant allegations," above.

Tip to avoid error: Despite having binding authority, never back-date coverage without explicit underwriting approval.

Summary of case: The agent back-dated workers compensation coverage in order to coordinate inception dates of several insurance policies for his customer. Coincidentally, the day that the agent bound the workers compensation coverage, he was notified that an employee had just been killed on the job. The workers compensation carrier incorrectly believed that the agent knew of the death before binding the coverage and sued the agent, alleged breach of the applicable agency agreement and numerous torts. Through a series of hearings, I was able to have most of the case dismissed and the workers compensation carrier ultimately voluntarily dismissed the remainder of the case. There was no settlement payment.

Case Study Number Three

Line of coverage involved: P & C

Position of person in the agency involved: Agency principal

Personal or commercial lines: Commercial

Procedural or knowledge-based error: Procedural

Claimant allegation: Claimant alleges that the umbrella coverage procured by the agent is invalid because there is a gap between the underlying limits and the umbrella coverage.

Settlement or trial: This is a current claim and the parties are planning on mediating the dispute.

Description of alleged error: Please see Claimant allegation, above.

Tip to avoid error: Always review policy contents, especially limits, to be sure that the requested policy matches the policy for which the application was submitted.

Summary of case: The claimant is a trust for which the agent procured a primary liability policy and an umbrella policy. Unfortunately, the agent did not check the umbrella policy generated by the umbrella carrier. It turns out that there is a \$500,000 gap in limits and the umbrella carrier has declined coverage for a large underlying bodily injury claim, which will exceed the primary policy limits.