Agents E&O Standard of Care Project

Colorado 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
FOR INSURANCE PRODUCERS IN COLORADO

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I. Standard of Care

A. Duty "To Obtain Coverage As Promised"

Colorado was one of the first states to define the duties of an insurance producer.[1] In *Mayhew v. Glazier,* 68 Colo. 350, 189 P. 843 (1920), the Court established the rule that an insurance producer who agrees to obtain a particular form of coverage for a client has a duty to obtain such coverage or else timely notify the client of the producer's failure or inability to obtain the coverage. This obligation originated as a contract duty. However, the rule was subsequently expanded to give rise to a tort claim for negligence: "[W]here an insurance agency undertakes to secure specific coverage or leads a policyholder to believe certain coverage has been obtained, if the coverage is not included in the policy, it is liable for its negligence. *Pete's Satire, Inc. v. Commercial Union Insurance Co.*, 698 P.2d 1388, 1390 (Colo.App.1985), *affirmed sub nom. Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc.*, 739 P.2d 239 (Colo. 1987).

The Colorado Court of Appeals, in *DC-10 Entertainment, LLC v. Manor Insurance Agency, Inc*, 2013 CA 14, ¶19-20 (Colo. App. 2013), reaffirmed the viability of negligence claims against producers for failing to procure promised coverage:

> Insureds enter into a relationship with an insurance broker or agent to obtain a particular form of insurance coverage [citations omitted]. For example, "[t]here is no question that an insurance broker or agent who agrees to obtain a particular form of insurance coverage for the person seeking such insurance has a legal duty to obtain such coverage or to notify the person of his failure or inability to do so...In procuring insurance for a client, an insurance broker engages in an activity properly characterized as a commercial and business transaction.

Consistent with the *Pete's Satire* case, the *DC-10* court also held that a producer can be liable for negligent misrepresentation as to the coverage being procured. Lastly, the *DC-10* court held that claims against an insurance producer are assignable to third persons, who may then

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[1]Prior to 1993, Colorado law distinguished between insurance brokers and insurance agents. Under current law, all licensees are designated as "insurance producers." C.R.S. §10-2-103(6).

pursue those claims. This is a new issue that could be a matter of concern to insurance producers because it is a newly-crafted exception to the general rule that claims for breach of duty involving personal services are not assignable, *e.g., Regency Realty Investors, LLC v. Cleary Fire Protection, Inc.*, 260 P.3d 1, 5 (Colo. App. 2009), *cert. dismissed*, (Colo. 2010).

B. Duty to "Counsel and Advise"

a. Adequacy of Coverage

The Court in *Golting v. Hartford Accident and Indemnity Co,* 43 Colo. App. 337, 603 P.2d 972 (1979), held that absent "special circumstances", such as a long-term course of dealing whereby the producer regularly provides advice and the insured regularly accepts such advice, or a specific agreement by the producer to counsel the insured, there is no duty on the part of an insurance producer to counsel the insured as to specific matters regarding coverage or the adequacy of the insured's coverage. This principle was reaffirmed in *Kaercher v. Sater,* 155 P.3d 437, 441 (Colo.App. 2006): "[A]gents have no continuing duty to advise, guide, or direct a client to obtain additional coverage." In *Apodaca v. Allstate Insurance Company,* 232 P.3d 253 (Colo.App. 2009), the Court said: " Colorado follows the general rule that insurance producers have a duty to act with reasonable care toward their insureds, but, absent a special relationship between the insured and the insurer's agent, that agent has no affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy."

The common law duty of reasonable care is essentially limited to a duty to procure the coverage the producer agrees to procure or, in the alternative, to advise the insured that the coverage has not been procured. Considerations as to whether there has been a breach of that duty can include: whether the producer made reasonable efforts to procure the requested insurance; whether the producer made reasonable efforts to notify the insured that the coverage could not be procured; and whether the producer exercised reasonable care in the process of completing the insurance application, *e.g., Golden Rule Insurance Corporation v. Greenfield,* 786 P.2d 914 (D. Colo. 1992). The"reasonableness test" is one of "fairness under contemporary standards–whether reasonable persons would recognize a duty and agree that it exists." *Id., citing, Taco Bell, Inc. v. Lannon,* 744 P.2d 43, 46 (Colo. 1987) [fast food restaurant owed duty to take reasonable measures to protect its patrons from criminal acts by third persons, where restaurant had a history of ten armed robberies in past three years]. This issue is often left to the jury to decide.

b. Expiration of Coverage

In *Burns v. Ramsey,* 520 P.2d 137 (Colo.App. 1979) [Not Selected For Official Publication], the insured alleged "an implied contract between the agent and the insured to notify the insured of the expiration of the policy, and that the failure to so notify them constituted a

breach of contract and negligence." The Court rejected this argument. The policy was a one year policy, and there was "no express or implied contract between the parties that Wheeler would or should renew the policy on its expiration." As to the negligence claim, the Court held: "No duty rests upon the insurer[2] to notify the insured of the time when a premium falls due, unless such notice be required by statutory enactment or by agreement of the parties or unless, according to some courts, the insurer has by custom or course of dealing with the particular insured led him to believe that a notice of premium due will be sent."

c. Assumed Duties

In addition to the "reasonable care" duties normally imposed by law upon insurance producers, Colorado embraces the doctrine of "assumed duty." Virtually anyone can be held responsible for any duty he or she assumes, but fails to fulfill. *See, e.g., Leppke v. Segura*, 632 P.2d 1057 (Colo. App. 1981) [foreseeability test; aiding a visibly intoxicated motorist by jump-starting his car could give rise to liability for an accident later caused by that motorist]. Although not supported by specific case authority, this "assumed duty" doctrine implicitly applies to insurance producers. Indeed, to a large extent, the liability of any insurance producer is determined on a case-by-case basis, based upon the duties the evidence demonstrates the producer assumed.

II. Case Studies

Case No. 1

a. Line of coverage: Automobile
b. Position of person in agency: Customer Service Representative ("CSR")
c. Personal or Commercial Lines: Commercial
d. Type of Coverage: Business Auto
e. Procedural or knowledge-based error: Procedural
f. Claimant Allegation: Insurance Claimant contended the CSR promised that coverage would be reinstated for a driver who was excluded by the carrier under a Named Driver Exclusion
g. Settlement or Trial: Settlement
h. Description of Alleged Error: Failure to reinstate coverage for a driver who was excluded under Named Driver Exclusion, despite alleged promise to reinstate
i. Tip To Avoid Claim: The agency should maintain written documentation of every communication with the client. Here, the absence of the claimed conversation would have

[2]The older Colorado cases often treated the insurer and the producer as being indistinguishable, because the producer in those cases was typically a captive agent of the carrier.

provided indirect proof that it never occurred.

j. Summary of Case: The agency procured insurance for a company that sold pet shop supplies. One of the company's drivers accumulated a poor driving record and the carrier elected to issue a Named Driver Exclusion. The Insurance Claimant contended that the CSR promised the exclusion would be rescinded, and the driver would be covered. The agency denied this. The alleged damages included the cost of defending the automobile liability suit and any amount awarded to the injured Automobile Claimant against the Insurance Claimant.

Case No. 2

a. Line of coverage: Property and Casualty
b. Position of person in agency: Producer
c. Personal or Commercial Lines: Commercial
d. Type of Coverage: Comprehensive General Liability and Builder's Risk
e. Procedural or knowledge-based error: Procedural and Knowledge-based
f. Claimant Allegation: Failure to include additional Named Insureds and providing incorrect advice to terminate the coverage
g. Settlement or Trial: Settlement
h. Description of Alleged Error: Failure to add additional Named Insureds and incorrect advice as to cancellation of the policy
I. Tip To Avoid Claim: Proper documentation of the file and better knowledge of the products being sold
J. Summary of Case: The Claimant, an LLC, requested coverage for a new home construction project in which the Claimant was the general contractor. The producer procured the requested coverage but failed to add the members of the LLC as additional Named Insureds. When the home was being sold, the producer allegedly advised the insured to terminate the CGL coverage. The buyer of the home subsequently sued the contractor for defective construction, and the carrier declined to defend or indemnify.

Case No. 3

a. Line of coverage: Health and Life Insurance
b. Position of person in agency: Producer
c. Personal or Commercial Lines: Personal
d. Type of Coverage: Medical/Health Insurance
e. Procedural or knowledge-based error: Procedural
f. Claimant Allegation: Improper advice regarding disclosure of past medical condition
g. Settlement or Trial: Settlement
h. Description of Alleged Error: Incorrect advice
i. Tip To Avoid Claim: Never advise the applicant not to disclose any past medical condition.

Provide applicants with a written reminder of the need to complete the application fully and accurately.

j. Summary of Case: The Claimant applied for individual health insurance coverage, but failed to inform the carrier of pre-existing back injuries. After the policy was issued, the Claimant was injured in a ski accident. The insurer refused to cover the claim, including the claimant's surgeries. The Claimant contended that the producer had advised him there was no need to disclose the pre-existing injury.