

Agents E&O Standard of Care Project Connecticut 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 THE LAW

Procurement Duties

The standard of care in Connecticut is not defined with precision by the Connecticut Supreme Court. The last decisions to discuss the standard of an insurance producer in the procurement of insurance date back several decades to 1934. In Ursini v. Goldman, 118 Conn. 554 (1934), the Connecticut Supreme Court held that an insurance broker owes “a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance, and any negligence or other breach of duty on his part which defeats the insurance which he undertakes to secure will render him liable to his principal for the resulting loss. Where an insurance broker undertakes to procure a policy affording protection against a designated risk, the law imposes upon him an obligation to perform with reasonable care the duty he has assumed, and he may be held liable for loss properly attributable to his default. The principal may sue either for breach of the contract or in tort for breach of duty imposed by it.”

Using this language, it is typical for agents and brokers to claim that their obligations are very narrow, i.e., they must simply procure the insurance requested by the insured. Indeed, within Ursini, the Supreme Court discussed the duty of the insured to read the policy itself in order to understand its terms and conditions. Specifically, the Court held: “The general rule is that where a person of mature years, and who can read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it, and notice of its contents will be imputed to him if he negligently fails to do so; but this rule is subject to qualifications, including intervention of fraud or artifice, or mistake not due to negligence, and applies only if nothing has been said or done to mislead the person sought to be charged or to put a man of reasonable business prudence off his guard in the matter.”

By reading the policy, it can reasonable be inferred that the insured should be in the position to know and understand its coverage without any advice or explanation from its agent or broker. Indeed, as set forth in Ursini, it would seem that the broker might avoid liability unless he/she undertakes an obligation to advise the insured, and does so in a misleading manner. Thus, there is an argument that there is no duty to advise. However, in practice, Connecticut trial level courts have viewed the duty to read as a component of comparative negligence and they are unwilling to apply it as a complete bar to a procurement action by an insured..

A restrictive statement of the duties of an agent or broker has been stated in. Preston v. Chartkoff, Superior Court, judicial district of Ansonia-Milford, Docket No. 02 0071112, 2004 WL 304323 (January 30, 2004, *Lager, J.*). Specifically, the Court held: “[T]he duty imposed on an insurance broker to procure insurance ... simply requires the broker to act reasonably and without delay to try to obtain the requested coverage, but the broker cannot be held liable for the failure to obtain coverage as long as the client is informed of that fact.” The general idea is that plaintiffs are not entitled to insurance coverage that they did not seek and different from that

accepted. See Grossenbacher v. Patrons Mutual Ins. Co., Superior Court, 2000 WL 486948 (April 10, 2000, *DiPentima, J.*)

Toward this end, there is a separate statute for certified insurance consultants. Conn. Gen. Stat. § § 38a-731 provides in relevant part:

“No person shall, for a fee received or to be received, offer to examine, or examine or aid in examining, any policy of insurance or any annuity or pure endowment contract for the purpose of giving, or give or offer to give, any advice, counsel, recommendation or information in respect to the terms, conditions, benefits, coverage or premium of any such policy or contract, or in respect to the expediency or advisability of altering, changing, exchanging, converting, replacing, surrendering, continuing, renewing or rejecting any such policy or contract, or of accepting or procuring any such policy or contract from any company. . . .”

However, to date, the Connecticut courts have not made any efforts to distinguish between the duties of a typical insurance producer, and the duties of a certified insurance consultant. However, the duties by statute of a certified insurance consultant are more akin to the advisor role and an insurance producer’s duties are more akin to an order taker.

Unfortunately, the most recent decisions by the Connecticut Appellate Court seem to suggest that insurance producers may have a duty to recommend coverage to an insured in certain circumstances, not merely to accept an order for insurance and procure requested coverage. The Connecticut Supreme Court’s position on whether a producer owe such broad duties is debatable, though it has taken no steps to overturn the decisions of the Connecticut Appellate Court in this regard as it appears the Court has not agreed to hear a case on the issue beyond their 1934 decision. As such, the Connecticut Appellate Court decisions appear to have made some decision which contradict the order taker status the Connecticut Supreme Court had initially set down as the law on the issue. Based on the lack of action by the Connecticut Supreme Court on this issue, the Connecticut Appellate Court’s decisions on this issue are the controlling authority on state trial courts to the extent that they cannot be distinguished.

In Dimeo v. Burns Brooks & McNeil, Inc., 6 Conn. App. 241, *cert. denied*, 199 Conn. 805 (1986), the Connecticut Appellate Court held that certain jury instructions used by the trial court in that action that were “legally correct.” Unfortunately, those jury instructions, which the insurance producer had no motivation to challenge since the producer prevailed at trial,

embraced broad duties by insurance agents and brokers. In particular, in the Dimeo jury instructions, the Court instructed that “selling insurance is a specialized field with specialized knowledge and experience, and that an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client. The court instructed the jury that the client ordinarily looks to his agent and relies on the agent’s expertise in placing his insurance problems in the agent’s hands. . . . The court further instructed the jury . . . that an agent has the duty to explain [insurance] coverage, to explain the consequences of not having a sufficient amount of such coverage, to recommend the proper amount, and to attempt to procure that amount and offer it to the client.” Berlin Corp. v. Continental Casualty Co., Superior Court, Judicial District of Hartford at Hartford, Docket No. HHD-CV-06-4021653-S (Nov. 2, 2006 *Wiese, J.*) (quoting Dimeo, 6 Conn. App. at 244-45).

While the Connecticut Supreme Court has never discussed the Dimeo case, the New Hampshire Supreme Court has. The New Hampshire Supreme Court stated in relevant part:

“Although the court in *Dimeo* sustained a trial court’s jury instruction that imposed a duty to advise upon an insurance agent, *Dimeo*, 504 A.2d at 559, it is important to recognize the procedural posture of the case. In that case, the jury had returned a verdict for the defendant insurance agent, and the plaintiff’s appeal challenged the jury instructions. *Id.* At 558. Thus, the defendant, having prevailed below, had no incentive to challenge the content of the jury instructions. The court merely concluded that, based upon the facts in the record, the lower court’s jury instructions were ‘legally correct, adapted to the issues in the case, and clearly and fairly presented to the jury.’ *Id.* at 559.”

Sintros v. Hamon, 148 N.H. 478, 482, 810 A.2d 553 (2002). Ultimately, the New Hampshire Supreme Court concluded that Dimeo “[does] not persuade us to depart from the majority rule that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing duty to inform or advise an insured regarding the availability or sufficiency of insurance coverage.” Sintros, 148 N.H. at 482. Unfortunately, as it currently stands, Dimeo, not Sintros, appears to be the way that trial and appellate courts are leaning in the State of Connecticut.

However, In Byrd v. Ortiz, 136 Conn. App. 246, 256 (2012), the Connecticut Appellate Court went further and held the jury instructions contained in Dimeo were an “accurate statement of the duty of care that an insurance agent owes to his or her client with respect to uninsured/underinsured motorist coverage.” It is unknown whether the insurance producer’s counsel raised the procedural posture of Dimeo and the Sintros decision or the fact that there is a separate statute for certified insurance consultants in Connecticut because they are not mentioned in the decision. It also not clear from this decision why the Court did not address the Statutory Uninsured/Underinsured Consent Form which requires the insurance carriers to provide the very

option complained of in a Statutory Consent Form to be signed-off on by an insured. While an argument may be made that the Byrd holding should be limited to personal lines insurance, or insurance for uninsured/underinsured motorist coverage, it is likely that trial courts may attempt to apply it broadly in favor of insureds.

Furthermore, it seems likely that any challenge to Byrd will take years. With severe restrictions on being able to appeal a trial court decision before final judgment in Connecticut, any challenge to Byrd coming through the state court system will have to await a final judgment. Since most insurance agent and broker claims settle before or after trial, there will not be many opportunities for the Connecticut Appellate Court, or, more importantly, the Connecticut Supreme Court, to consider the issue and how these trial and appellate court decision may be inconsistent with their 1934 decision. Certainly, it is possible that a United States District Court, or the United States Court of Appeals, might pose a certified question to the Connecticut Supreme Court on whether an insurance producer has a duty to advise an insured about coverage, it has not done so to date. Indeed, as set forth below, at least one federal court shows what trial courts can do without specific guidance on the duties of an insurance agent and broker.

In O&G Industries, Inc. v. Aon Risk Services Northeast, Inc., 922 F.Supp.2d 257 (D. Conn. 2013), participants in a contractor controlled insurance program (“CCIP”) brought an action against an insurance broker. As part of the CCIP, O&G requested that the broker, Aon, procure the insurance coverage required by the engineering, procurement and construction agreement (“EPC Agreement”). O&G also entered into a services agreement with Aon to procure insurance for the project. The services agreement specifically provided that “There is no third-party beneficiaries to this agreement.” As such, when there was an explosion at the job site and several deaths, several layers of insurance coverage were exposed in the CCIP.

O&G and the subcontractors who participated in the CCIP made claims against Aon for negligence/professional malpractice, breach of contract and negligent misrepresentation. On a motion to dismiss by Aon, Judge Janet Hall denied the motion in its entirety except as to the breach of contract claim. In particular, despite the existence of language in the service agreement specifically providing that there were no third-party beneficiaries, Judge Hall held that based upon a review of the entire agreement which reflected an intention to benefit the participants in the CCIP and the placement of the provision related to third-party beneficiaries near provisions concerning the safety of the location and compliance with federal and state law, direct claims by the CCIP participants could be made against O&G’s broker. Judge Hall also rejected any claim that they failed to state a claim because O&G had the duty and last opportunity to review and correct the policies. The Court noted that the duty to read is no more than relevant to a defense of comparative negligence.

Duties After Procurement of Coverage

A more restrictive view of the duties of an insurance producer after the placement of coverage finds support in Lewis v. Michigan Millers Mutual Insurance Co., 154 Conn. 660 (1967) though the facts in Lewis are somewhat unusual. Specifically, in Lewis, an insurance broker assisted with the placement of liability insurance for a property owned by the insured at Dixwell Avenue in New Haven. Subsequently, the insured moved and sent a note to the insurance broker with her premium payment requesting that her mail be forwarded to her new home on Read Street. The broker interpreted the note from the insured as a request to transfer the liability coverage from Dixwell Avenue to her new home on Read Street. As such, the broker sought and received an endorsement from the insurance carrier transferring coverage to the Read Street location.

When informed on the endorsement, the insured objected to the transfer because she already had a separate liability policy for the Read property. In an effort to reinstitute coverage on Dixwell Avenue, an inspection of the Dixwell Avenue property was conducted and the insurer refused to retransfer coverage to Dixwell Avenue. Ultimately, the insured was sued by a guest at the Dixwell Avenue location who claimed that she was injured. The insurer refused to defend the action claiming a lack of coverage on the subject location and seeking to bind the actions of the broker on the insured.

The Connecticut Supreme Court held: “When procuring insurance for a person such as the plaintiff, a broker becomes the agent of that person for that purpose. . . . Once that purpose is accomplished, however, and the insurance is procured, the agency relationship between the insured and the broker terminates, and the broker is without any authority to do anything which further affects the insured unless expressly or impliedly authorized by the insured to do so.” Id. at 664. Therefore, the insurer was found to be in breach of its insurance contract for failing to defend the insured.

Certainly, it could be argued that the request to change the mailing address for the insured would clothe the broker with apparent authority to effect the change. Nevertheless, the Connecticut Supreme Court suggested that an insurance broker is a simply a “middleman” who places an order for the insurance for the insured and nothing more. Id. at 664. Again, the Connecticut Supreme Court appear to intimate in this decision that the insurance producer is an order taker who places orders of the insured.

The Lewis decision has not been addressed in any meaningful way in the context of insurance producers by the Connecticut Supreme Court since it was decided, except in Tolbert v. Connecticut General Life Insurance Co., 257 Conn. 118 (2001). In Tolbert, the Court used Lewis to state that the duties of the insurance producer ended for statute of limitations purposes at the point when allegedly inadequate insurance was procured. It is important to note that the Court stated that there was no allegation of a continuing duty that might have tolled the statute of limitations. Therefore, the Court did not foreclose the possibility that a producer may have

assumed duties after procurement, however, if the trial court were to follow the strict interpretation of Lewis, no continuing duty could exist once the order was fulfilled.

By 2008, a strict interpretation of the rule expressed in Lewis was undercut further by the Connecticut Appellate Court decision in Precision Mechanical Services, Inc. v. T.J. Pfund Associates, Inc., 109 Conn. App. 560, *cert. denied*, 289 Conn. 940 (2008). In Pfund, the insured claimed that the insurance producer did not inform the insured of a cancellation of coverage. The Court held:

“[i]nherent in the obligation to seek continuation of an insurance policy is the duty to notify the applicant if the insurer declines to continue [to insure] the risk, so the applicant may not be lulled into a feeling of security or put to prejudicial delay in seeking protections elsewhere.” (Internal quotation marks omitted.) *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 266 (7th Cir.1986); see also 12 E. Holmes, *supra*, § 86.6, at p. 497 (“[a]n agent or broker cannot sit idly with a cancellation notice or information, but must seasonably inform the insured client thereby giving the client sufficient time to obtain protect[ion] with another insurer”)

Therefore, it is clear that the Connecticut Appellate Court is trying to extend some of an insurance producer’s duties beyond the initial procurement even in the face that such notice is seasonably given by the insurance carrier under a strict statutory notice requirement for cancelation of insurance. With this decision, even pursuant to Lewis, a producer could have a duty following the procurement of insurance.

Duties Owed to Others (Certificate of Insurance)

While the standard of care for an insurance agent or broker in Connecticut may be broad based upon the Dimeo and Byrd decisions, and trial courts may seek to extend duties of producers beyond the customer as occurred in O&G, the Connecticut Supreme Court has limited liability based upon certificates of insurance.

The seminal case on this topic is Nazami v. Patrons Mutual Ins. Co., 280 Conn. 619 (2006). In Nazami, plaintiff alleged negligence, fraud, negligent misrepresentation and violation of the Connecticut Unfair Trade Practices Act against an insurance carrier and insurance agency arising from information in a certificate of insurance. In particular, an insurance producer issued a certificate of insurance informing a customer of the insured of the existence of a general liability policy. Subsequently, the policy cancelled for nonpayment of premium, but the third-party customer/certificate holder was never informed of the cancellation despite the provision in the standard Acord form that the “issuing insurer” would “endeavor to mail [ten] days written notice” if the policy is cancelled before the expiration of the stated term. Ultimately, the Connecticut Supreme Court held that no claim existed based upon alleged deception in a certificate of insurance or the negligence of the insurer or producer. Id. at 629. In that case, the

certificate was issued “as a matter of information only,” the certificate provided that it “confer[red] no rights upon” the certificate holder, did not constitute a contract between insurer, insurance agent and the certificate holder, and was subject to “all the terms, exclusions and conditions” of the policy. *Id.* at 622, 631. Essentially, since the certificate was the only source of a duty to third-party customer/certificate holder, there could be no liability.

In Prudential Property and Casualty Ins. Co. v. Anderson, 101 Conn. App. 438, *cert. denied*, 283 Conn. 911 (2007), it could be argued that the Appellate Court went even further. An agent for Zurich provided a certificate of insurance to a homeowner on behalf of a contractor the day before an alleged loss occurred. *Id.* at 440-441. Nevertheless, despite knowledge of cancellation by the insurer prior to issuance of the certificate of insurance by its agent, the Court held that the insurer could not be liable for coverage based upon the issuance of a certificate of insurance. *Id.* at 447. The Appellate Court reasoned that the customer knew that the policy would be cancelled if the premium due was not paid and the contractor “surely must have questioned the state of the risk policy given its tenuous financial situation and the cancellation notice that it had received from Zurich.” *Id.* at 447-48. Furthermore, the Court held that the insurer had no duty to the certificate holder to inform it of the cancellation.

It remains to be seen whether the Connecticut Appellate Court would extend Anderson to apply to the insurance producer who issued the certificate. In particular, the Court stated:

“Troublesome as it may be that Zurich permits its agents to issue certificates when it knows prior to the certificate's [sic] being issued that coverage was cancelled and lacks an identifiable procedure for notifying certificate holders that coverage has been cancelled, the allegations in the plaintiff's complaint do not state a cause of action against Zurich.”

Id. at 449. Clearly, this language suggests that the Connecticut Appellate Court found its own decision somewhat unpalatable. Nevertheless, the Court was compelled to follow Nazami as it was a case from the Connecticut Supreme Court leading one to believe that the Connecticut Supreme Court make take a different position on these issues if it were presented with a certified question.

It remains possible that the Connecticut Appellate Court and the Connecticut Supreme Court are at odds on the duty of an insurance agent or broker. Until this inconsistency is cleared up, insurance agents and brokers will need to be vigilant in providing information to insured on the policies they are procuring and, while there does not appear to be any clear duty to advise absent a special relationship, it is always important to be thorough in the options a producer provides to its insureds seeking insurance.

CASE STUDIES

CASE 1:

Line of Coverage: Commercial Property Coverage

Position of Person in the Agency Involved: Account Executive

Personal or Commercial Lines: Commercial

Type of Coverage Involved: Building coverage

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Broker allegedly failed to recommend the maintaining of full limits on a reduction request by the insured.

Settlement or Trial: Defense Verdict

Description of Error: No error found. **Tip to Avoid Claim:** . In some circumstances, there is no possible way to avoid the possibility of a claim. Nevertheless, this particular case presented an instance where the producer warned the insured, in writing, about the danger of a reduction in coverage, but the insured chose to ignore the advice.

Summary of Case: A representative for insured contacted an insurance producer for help in procuring an insurance policy for a building the partnership was preparing to purchase. This representative had done business with the producer for several years. The producer obtained an insurance binder. At the insured's request, that limit was lowered by about 50% and a new binder was issued. The producer warned the insured's representatives of the risks of lowering the limit on the policy. Nevertheless, a burst pipe in the building flooded the basement, resulting in significant damage. A claim was submitted to the insurer for the loss, but a coinsurance provision operated to minimize available coverage.

Ultimately, at trial, the producer prevailed. In this particular case, the jury was presented evidence of a letter detailing a warning not to reduce coverage. While the basis for the verdict was likely based upon numerous factors, this documentation likely helped the jury reach its conclusion.

CASE 2:

Line of Coverage: Commercial Property

Position of Person in the Agency Involved: Producer

Personal or Commercial Lines: Commercial

Type of Coverage Involved: Commercial Property

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Broker failed to properly explain limitations of coverage, and co-insurance.

Settlement or Trial: Settlement

Description of Error: Arguably, no error at all. Nevertheless, broker failed to memorialize any evidence that it explained the issue of co-insurance to the insured and the impact of a reduction of coverage in writing.

Tip to Avoid Claim: Always fully explain the effect of co-insurance when an insured is looking to reduce limits and provide a written caveat explaining why it is a mistake to decrease limits or to switch from agreed value to 80% co-insurance, especially if the replacement cost of the premises are undervalued.

Summary of Case:

In this instance, a business sustained a fire that destroyed a large portion of the premises. Furthermore, the property, which had been insured on an agreed value basis in the past, was switched to 80% co-insurance valuation. As such, when the premises sustained a loss, the premises were underinsured, and the full value of the loss was not covered. Indeed, the co-insurance provision limited coverage to about half of the loss sustained.

This is a pretty typical type of claim in Connecticut that can be much more easily defended if the discussion of limits is placed into writing and signed off by the insured. If the producer is not making any effort to value the premises, it would be best to obtain a signed statement of values from the insured and explain the effect of co-insurance. If that is not possible, it is also important to make clear, in writing that the producer is relying upon any valuations from the insured together with an accurate discussion. Reliance upon the insured to read the policy will not suffice.

A producer might also consider, with proper caveats, using a cost estimator for the insured as to the replacement cost value of the premises. However, when using any cost estimator, a proper disclaimer should be given to the insured which advises the insured to verify the values provided with a professional appraiser. Obviously, with a factory, only the business owner, or an expert in the field, will understand the value of specialized machinery. Nevertheless, if the structure is of a typical variety, providing a conservative range of potential limits with a disclaimer might help avoid the large type of loss that was sustained in this particular case.

CASE 3:

Line of Coverage: Commercial

Position of Person in the Agency Involved: Producer

Personal or Commercial Lines: Commercial

Type of Coverage Involved: Property

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Producer failed to point out existence of pollution exclusion that could impact the insured in the event of loss.

Settlement or Trial: Settlement

Description of Error: Producer failed to take account of potential risks and note important exclusions to the policy.

Tip to Avoid Claim: Always review policy documents to ensure that they provide the coverage requested, discuss the same with the insured and follow up the discussion in detail in writing. Also, you may want to consider discussing various key exclusions with the customer, or, at the very least, offer to discuss those exclusions.

Summary of Case: The producer provided a proposal to an insured in a competitive bid scenario where multiple producers marketed the risk, which was a factory with pollutants. The insured claimed that it would insist that the coverage match or exceed the coverage from the prior year. Nevertheless, as any producer knows, it is rare for coverage from one insurer to precisely match the coverage from another insurer's policy. Thus, an examination of the policies from year to year reveals that in some years, the insured had a total pollution exclusion, and in some years it had limited coverage for the same.

A water loss resulted in the spread of chemicals and a clean-up that resulted in thousands of dollars in expenses. On the date of the loss, the policy in place had a total pollution exclusion and the insured brought a claim against the producer as a result of the same.

Certainly, in the competitive bid situation, it is difficult to know the exact coverage that is being offered by other producers, and there is a strong desire to be able to sell the policy that you are offering. Nevertheless, it is important to note, in writing, preferably executed by the insured, that the coverage procured may deviate from prior coverage that existed and that any change from one insurance company to another is going to lead to some differences in coverage that the insured will have to understand. It is recommended that the broker discuss the new coverage in place with the insured and point out significant exclusions and coverages.

While pollution coverage might seem insignificant at the time of placement, it will be significant if the customer is forced to pay for clean-up of the same. An insured might not

understand that any factory that utilizes petroleum products has the potential for a spill that might be excluded from the coverage procured. In addition, while there may be a propensity to assume that the insured will not become a litigant and will testify truthfully under oath, it appears that insureds seem to forget many oral conversations related to coverage with their producers, especially when faced with a huge uncovered loss. Therefore, despite the possibility of later complaints that the summary is inadequate and does not mention important coverage and exclusions, it is generally preferable to follow up any communications with detailed written confirmation of the same.

Certainly, maintaining a written record is not always easy. Furthermore, any effort to maintain a written record might create scrutiny later of the inadequacy of the summary. Nevertheless, with a potential duty to advise and claimants with selective memories, a reasonable effort to document coverage offered and declined by the insured is a strong way to prevent future claims.

This summary of the standard of care for New York insurance agents and brokers was prepared by the law firm of Keidel, Weldon & Cunningham, LLP. The KWC law firm concentrates its practice in the defense of insurance agents and brokers errors and omissions claims and litigation; errors and omissions loss control, counsel and education; insurance coverage analysis and litigation; and, insurance regulatory matters. The KWC law firm maintains offices in White Plains, NY; Syracuse, NY; New York, NY; Wilton, CT; Warwick, RI; Fair Lawn, NJ; and, Wyncote, PA. Please direct any questions to James C. Keidel, Esq. or Christopher B. Weldon, Esq., by mail at the KWC's main office at 190 Old Ridgefield Road, Wilton, Connecticut 06897, or by telephone at 203-869-2200, or by email at jkeidel@kwcllp.com and cweldon@kwcllp.com