Agents E&O Standard of Care Project

Survey Illinois

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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INSURANCE PRODUCER DUTY: STATE OF ILLINOIS

In the State of Illinois the duty of an insurance producer has been codified since January 1, 1997. The Insurance Placement Liability Act, found at 735 ILCS 5/2-2201 sets forth the duty of an insurance producer and limits the liability of an insurance producer from claims alleging fiduciary duty.

5/2-2201 states as follows: Ordinary care; civil liability

“(a) An insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured.

(b) No cause of action brought by any person or entity against any insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance shall subject the insurance producer, registered firm, or limited insurance representative to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer, registered firm or limited insurance representative of any money that was received as premiums, as a premium deposit, or as payment of a claim.

(c) The provisions of this Section are not meant to impair or invalidate any of the terms or conditions of a contractual agreement between an insurance producer, registered firm, or limited insurance representative and a company that has authority to transact the kinds of insurance defined in Class 1 or clause (a), (b), (c), (d), (e), (f), (h), (i), or (k) of Class 2 of Section 4 of the Illinois Insurance Code.

(d) While limiting the scope of liability of an insurance producer, registered firm, or limited insurance representative under standards governing the conduct of a fiduciary or a fiduciary relationship, the provisions of this Section do not limit or release an insurance producer, registered firm, or limited insurance representative from liability for negligence concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance.”

For many years prior to the enactment of the Insurance Placement Liability Act, Illinois Common Law had evolved to the point that the language contained within the statute relating to ordinary care was almost taken from existing case law. For example, in 1997, the Illinois Appellate Court issued an Opinion in the case of Pittway Corp., v. American Motorist Insurance Co., at 56 Ill. App. 3d 338, 13 Ill. Dec. 244 (1977) wherein the court stated that: In the context of an insurance broker procuring insurance on behalf of the plaintiff, “the primary function of an insurance broker as it relates to an insured is to faithfully negotiate and procure an insurance policy according to the wishes and requirements of his client.” Further refinement of the scope of an insurance producer’s duty took place in the ensuing years prior to enactment of the statute. In the case of Schults v. Griffen-Rahn Insurance Agency, 193 Ill. App. 3d 453 (1990), the
Appellate Court held that Illinois Law imposes no duty upon the insurance producer to advise its customer to consider higher coverage limits and a failure to do so did not support a claim for negligence against the broker. The court went on to state that: “The insured is in the better position to understand its business and thus better understand its risks.” Obviously, in the Schults v. Griffen-Rahn case, the insured suffered a loss, for which the limits of its coverage were inadequate to fully compensate the insured. The insured sought to impose upon the agency the duty of advising them as to the appropriate limits of coverage. The Appellate Court refused to extend the producer’s duty in that fashion.

These are many Appellate decisions issued, subsequent to the enactment of the Insurance Placement Liability Act that have further defined and limited the scope of an insurance producer’s duty. In the case of Industrial Enclosure Corporation v. Glenview Insurance Agency, Inc., 379 Ill. App. 3d. 434 (2008), the First District of the Illinois Appellate Court refused to impose upon insurance brokers the duty to advise their customers of the import and meaning of the provisions of the insurance policies which have previously been faithfully procured according to the customer’s requirements.

I handled both the trial and appeal of the Industrial Enclosure v. Glenview case. Industrial Enclosure Corporation manufactured electrical boxes at a plant in Aurora, Illinois. Glenview Insurance Agency replaced IEC’s expiring Chubb policy with a policy issued by Maryland Casualty. The owner of IEC informed the producer at Glenview that he wanted coverage limits on the Maryland policy to be comparable to or better than those of the Chubb policy.

The Maryland policy incepted on June 1, 1996 and, thereafter, on July 17th and 18th the Aurora area experienced rain fall measuring more than 17 inches. Maryland Casualty’s adjuster, after examining the site determined the occurrence to be the result of general flooding, caused directly or indirectly by flood waters from a nearby creek and surface runoff that accumulated from surrounding property on higher ground. Since IEC had specifically refused to purchase flood insurance, Maryland declined the claim.

IEC, on the other hand, hired an outside adjuster, who hired an expert witness to support their theory that the damage to the building occurred as the result of the backup of sewer and drains, prior to the additional water caused by the flood waters from a nearby creek and surface runoff. The Maryland policy had a specific endorsement that extended full coverage for damage for backup of sewers and drains.

IEC, sued Maryland Casualty in federal court and simultaneously sued Glenview in state court. The state court proceedings were stayed pending resolution of the federal court action. IEC prevailed in the federal court action receiving a verdict of $1.1 million in damages with $167,000.00 of that sum designated as lost profits. Maryland did not appeal the verdict.

Thereafter, IEC moved the court to reinstate its stayed action against Glenview, and that case went forward. Our Motion for Summary Judgment was denied and the case went to trial before a jury.
The damages sought by IEC in the case against Glenview were the attorney’s fees, expert witness fees and related costs of litigating against Maryland, and certain items of damages that the federal court jury did not return in favor of IEC. Upon the conclusion of the jury trial, IEC was awarded a judgment in its favor and against Glenview in the sum of $567,162.00.

Following the jury’s verdict, we filed a Motion for Judgment Notwithstanding the Verdict arguing that the court erred in denying our Motion for Directed Verdict, and alleging that Glenview owed no duty to IEC to interpret the Maryland Insurance policy as to the term “surface water.” The trial court granted our post-trial motion, vacated the jury’s award, and entered judgment in favor of Glenview. IEC appealed.

The Appellate Court upheld the trial court’s granting of judgment notwithstanding the verdict and found that as a matter of law: “The primary function of an insurance broker as it relates to an insured is to faithfully negotiate and procure insurance policy according to the wishes and requirements of his client.” (citing Pittway) In the appeal, IEC argued that Glenview failed to adequately explain to IEC how the surface water exclusion in the Maryland policy could act to extinguish coverage under the sewer backup provision. The court stated that IEC essentially seeks to impose upon insurance brokers the duty to advise their customers of the import and meaning of the provisions of the insurance policies which have previously been faithfully procured according to the customers’ requirements. No such duty exists under Illinois law. The burden was on plaintiff to know the import and meaning of the insurance contract which it accepted. As such, the court found that the trial court properly entered judgment for Glenview notwithstanding the jury’s verdict as to the duty claim.

Later cases decided under the Insurance Liability Placement Act have further limited the scope of an insurance producer’s duty, and have basically made Illinois an “order taker” state as it relates to the duty of an insurance producer. The case that most clearly defines that position is Melrose Park Sundries, Inc. v. Don Carlini, 399 Ill. App. 3d 915(2010). In that case, the insured and the insurance producer had a long time business relationship. Fay Allport was the owner of a certain building located in Melrose Park, and was the sole officer, director and shareholder of Melrose Park Sundries, which was a package liquor and sundries store that opened in February of 2004. Constantino Taddeo was the general manager of the store and was responsible for overseeing all of its day-to-day operations from the date of its opening in February of 2004 until it ceased operation in January of 2008. Don Carlini was a licensed insurance producer who had provided insurance for many different businesses that had been operated by Ms. Allport’s husband and Ms. Allport for many years.

Fay Allport and Constantino Taddeo met with Don Carlini prior to the opening of their business and discussed with him the various forms of insurance coverage they desired to have in place prior to the opening of the business. The insurance coverage provided by Carlini for Melrose Park included liquor liability, general liability, property and business personal property coverage, among others, but did not include workers’ compensation insurance coverage. The policies procured by Carlini were issued with an effective date of January 23, 2004 and were subsequently renewed in 2005 for the period expiring January 23, 2006. On October 9, 2005, an employee at the store was injured and filed a claim for workers’ compensation. Having no workers’ compensation insurance coverage, Melrose Park Sundries was ultimately responsible for paying the injured employee’s claim and Melrose Park Sundries then sued Don Carlini.
During the pendency of the suit, Fay Allport testified that her husband had been doing business with Carlini for more than 20 years and Carlini obtained the insurance for a prior business, Mel-Park Drugs and Liquors as well as for the family’s other businesses and several commercial properties owned by the Allport’s.

Although Ms. Allport testified that at the meeting with Carlini prior to opening the business, she asked Carlini to “make sure that all of the requirements for insurance [were] taken out, including the building, the liquor, and any type of liability policy.” According to Allport, Carlini said he would handle it and she did not have any further discussion with him about the insurance policies that he obtained for Melrose Park Sundries.

Both Allport and Taddeo admitted that at no time during the meeting with Carlini did either of them specifically request that Carlini procure workers’ compensation insurance for the business, nor did she inquire as to whether workers’ compensation insurance was needed. Interestingly, Ms. Allport owned a jewelry store located in the building adjacent to Melrose Park Sundries, and testified that in 2003 she specifically requested that Carlini procure workers’ compensation insurance for the jewelry store, and he did so.

Melrose Park Sundries’ suit alleged that Carlini was negligent in failing to obtain or offer to obtain workers’ compensation insurance for the business and in failing to advise them that such insurance was required by law. After discovery, Carlini moved for Summary Judgment, contending that Melrose Park had failed to present evidence establishing a duty to procure workers’ compensation insurance. The Circuit Court granted that motion and the First District Appellate court affirmed.

The Appellate Court Opinion cited the provisions of the insurance placement liability act, and concluded that pursuant to the clear and unambiguous language of Section 2-2201(a), Carlini had a duty to exercise ordinary care and skill in procuring the coverage requested by Melrose Park. Since the evidence adduced in the lower court established that neither Allport nor Taddeo ever requested that Carlini obtain workers’ compensation insurance for Melrose Park, the duty imposed by Section 2-2201 does not obligate an insurance producer to procure a policy for the insured which had not been requested. The court stated “consequently, we concluded that Carlini did not have a duty to procure workers’ compensation insurance for Melrose Park nor was he obligated to offer advice regarding the need for such insurance where neither Allport nor Taddeo ever inquired as to that need.” The Melrose Park Sundries Opinion is still good law in the State of Illinois.

The First District Illinois Appellate Court issued a decision in July of 2012 in the case of *Hoover v. Country Mutual Insurance Company*; 975 N.E. 2d 638, 363 Ill. Dec. 612 (2012) that is most note worthy for its holding with regard to the accrual date for causes of action brought against insurance producers with regard to the Statute of Limitations; however, in the first portion of that opinion, the Hoover court dealt with the question of an insurance producer’s duty in the face of a negligent misrepresentation claim. The court stated that: “In order to state a cause of action for negligent misrepresentation, a Complaint must first allege facts establishing that the defendants owed the plaintiff a duty to communicate accurate information.” The Hoover
court noted that the Illinois Supreme Court has recognized a duty to communicate accurate information in only two circumstances; first, the court has imposed a duty to avoid negligently conveying false information where the information results in physical injury to a person or harm to property. Second, the court has imposed a duty to avoid negligently conveying false information where one is in the business of supplying information for the guidance of others in their business transactions.” (citations omitted)

In analyzing those two factors in the light of an insurance producer’s duties and obligations, the court found that the first test a court uses to determine whether to impose a duty on a defendant to communicate accurate information does not apply in this case; since the alleged error of the insurance producer did not cause physical harm to the Hoover’s nor did the Hoover’s reliance on the alleged inaccurate information cause the damage to their home and property. The court then noted that both Country Mutual and the insurance producer were in the business of selling homeowners’ insurance to members of the general public, including the plaintiff. The defendant sold the Hoover’s homeowners’ insurance, but at no time were they engaged in the business of providing information to the plaintiff for guidance in business transactions. The court further found that there is no negligent misrepresentation where the information supplied is merely ancillary to the sale of a product. Here the product was a homeowners’ insurance policy, and the alleged misrepresentation as to whether the policy would be written on a replacement cost, actual cash value, or stated value basis were statements ancillary to the sale of a product, and therefore, not actionable.

**FIDUCIARY DUTY**

The question of whether an insurance producer in Illinois owes a fiduciary duty to an insured with regard to the renewing, procuring, binding or placement of the coverage requested by the insured or proposed insured has been the subject of several Appellate Court decisions. This is true even though the Insurance Placement Liability Act, at 5/2-2201(b) states that: “No cause of action brought by any person or entity against any insurance producer...concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance shall subject the insurance producer...to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer...of any money that was received as premiums, as a premium deposit, or as payment of a claim.” Section (d) of 5/2-2201 in summary states that while the act limits the scope of liability of an insurance producer under standards governing the conduct of a fiduciary or a fiduciary relationship, the provisions of this section do not limit or release an insurance producer from liability for negligence concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure any policy of insurance. Several recently decided cases, years subsequent to the enactment of 5/2-2201, still struggle with the subject of fiduciary duty and insurance producers.

In the case of *DOD Technologies v. Mesirow Insurance Services, Inc*. The First District of the Illinois Appellate Court considered a Count of a Complaint alleged that
plaintiff had provided defendant with confidential and proprietary information with the expectation that defendant would seek the desired insurance at the lowest possible price. The Complaint alleged that contrary to seeking the lowest possible price, the defendant directed plaintiff’s insurance to the Hartford Insurance Company, with whom the defendant had a contingent commission agreement. The Complaint alleges that the defendant failed to disclose its contingent commission agreement to the plaintiff and that the contingent commissions (referred to as kickbacks in the Opinion) inflated the cost of insurance to consumers and created a conflict preventing brokers from acting in the customer’s best interest.

The Appellate Court noted that historically, Illinois has recognized that the relationship between an insured and his broker, acting as the insured’s agent, is a fiduciary one. The court cited two post 1997 cases for that proposition. However, the court then went on to address Section 2-2201 and took note of the exception, stating that when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer...of any money that was received as premiums, as a premium deposit or as payment of a claim, the insurance producer is subject to fiduciary duty liability. The court further stated that since the enactment of Section 2-2201 the relationship between an insured and its broker continues to be a fiduciary one. The court stated “rather than eliminate the fiduciary relationship between the insured and the producer, the plain language of Section 2-2201 protects the insurance producer from civil liability arising out of the fiduciary relationship.”

In deciding the DOD v. Mesirow appeal, the court stated that it has not found any case explaining what constitutes “wrongful retention or misappropriation” of premiums in Section 2-2201 (b). The court then concluded that the placement of policies with companies that were not the most advantageous for the consumers constitutes “the wrongful misappropriation” of money received as premiums. The court expanded upon its holding by stating: “An Illinois producer misappropriates premiums within the terms of Section 2-2201 when it directs a premium to an insurer, the price or coverage is not in the customer’s best interest, and the placement earns the producer undisclosed contingent incentives.”

Slightly more than five years after the DOD Technologies case, Mesirow Insurance Services was back before the Appellate Court in the case of Garrick v. Mesirow, 994 N.E. 2d 986 (2013). In that case, the First District Appellate Court restated its opinion that the relationship between an insured and his broker, or producer, acting as the insured’s agent, is a fiduciary one. However, they concluded that “an insurance broker owes no duty other than to act with ordinary care in renewing, procuring, binding or placing coverage of the requested type and for the requested time period.” Thereafter, the court went on to strongly affirm its decision in Melrose Park Sundries v. Carlini of 2010 and stated: “As did the trial court in this case, (Garrick v. Mesirow) we rejected the proposed expansion of the statutory duty in the Melrose Park Sundries v. Carlini Opinion.

In a recent (October 2013) Appellate Court decision from the Fourth District, the court reversed the holding by the Circuit Court of Champaign County that found a distinction between insurance agents and insurance brokers. The case, Skarpedas v. Country Casualty
and Tom Lassaris; 2013 IL App (4th) 120986, involved an automobile insurance policy. Without going into great detail, the Champaign County Court granted the motion of Country Casualty and Lassaris to dismiss the plaintiff’s Complaint, based on the premise that as a captive agent, Lassaris did not owe a duty of care to the insured, but rather only owed a duty of care to Country Mutual. The Champaign County Court relied on an old theory that insurance agents owe a duty only to the insurance carrier, and insurance brokers owe a duty only to the named insured.

Taking notice of the enactment of 5/2-2201 in 2010, the Fourth District held that the insurance agent-broker dichotomy no longer exists for purposes of duty of care. The Fourth District noted that although Section 5/2-2201 does not define insurance producer, the term is defined by the Illinois Insurance Code as: “A person required to be licensed under the laws of this State to sell, solicit, or negotiate insurance.” (215 ILCS 5/500-10 (2002). Since the enactment of 5/2-2201 Illinois no longer recognizes any distinction between insurance agents and insurance brokers, and defines all persons who are licensed to sell, solicit or negotiate insurance as insurance producers. Based on that analysis, the Fourth District reversed the Champaign County Circuit Court and remanded the case for further proceedings.

However the court went on to state, in dicta, that Section 5/2-2201(b) bars breach of fiduciary duty claims against insurance producers, even though, that issue was not before the court. Interestingly, the Skarpedas decision was issued on October 7, 2013 and was thereafter the subject of a Petition for Leave to Appeal to the Illinois Supreme Court. That petition was granted in January of 2014. I believe that our Illinois Supreme Court wants to clear up the competing language in these decisions with regard to the proper interpretation of the Ordinary Care Standard (2201 (a)) and the Fiduciary Duty Standard (2201 (b)). Such clarity will be welcomed by the bench and bar.
**CASE STUDY 1**

a. **Line of Coverage Involved:** Business Package Policy.

b. **Position of person in the agency involved:** Account Executive.

c. **Personal or Commercial Lines:** Commercial Lines.

d. **Type of coverage involved:** Worker’s Compensation.

e. **Knowledge-based error:** Failure to properly complete worker’s compensation application.

f. **Claimant Allegation:** Agent completed portions of workers compensation application without consulting insured, thereby failing to disclose to insurer the true nature of its business. As a result, insurer filed suit for Rescission and denied WC claim of an employee.

g. **Settlement or Trial:** Pending.

h. **Description of alleged error:** Failure to learn of and disclose full scope of insured’s business; failure to learn of and disclose to insurer multi state nature of ATM business and fact that insured also was engaged in interstate trucking operations.

i. **Tip to avoid claim:** Ask each and every question on the application. Take application in presence of insured, secure signature on completed application in the same meeting.

j. **Summary of Case:** Insured agent completed an Application for a Business Package Policy for Insured including an application for Worker’s Compensation coverage.

Insured’s primary business involves the installation, repair, maintenance and filling of ATM machines throughout Northern Illinois and Southern Wisconsin.

The worker’s compensation application, as completed by agent, failed to properly disclose the multistate nature of insured’s ATM business; failed to request proper multistate operations coverage; and, completely failed to disclose the insured’s separate trucking business.

Insured’s employee, after completing a service call on an ATM in Southern Wisconsin, and while using his personal motorcycle instead of the company car provided by his employer for such calls, was hit and severely injured by a truck as he was exiting the parking lot of the business where he completed the service call. A Worker’s compensation claim was filed in Wisconsin and the insurer denied coverage based on the failure to disclose the insured’s out of state operations on the application, the lack of other states coverage in the policy, and, based partially on the failure to disclose the
trucking business, the insurer filed a Declaratory Judgment Action seeking a declaration of no coverage for the worker’s compensation claim and rescission of the policy as *void ab initio* due to material misrepresentation in the application.

Thereafter, the insured filed a Third-Party Complaint against the agency and the individual agent, seeking contribution and indemnity.

The insured employee filed a Personal injury action against the trucking company and driver that caused the accident and that case just recently settled for several million dollars. An as yet undetermined portion of that settlement will be applied toward the worker’s compensation claim for a credit to the entity that ultimately owns the worker’s compensation lien; the insurer, the named insured or the Agency.
CASE STUDY 2

a. **Line of Coverage Involved:** Homeowners Policy.

b. **Position of person in the agency involved:** CSR.

c. **Personal or Commercial Lines:** Personal.

d. **Type of coverage involved:** Scheduled jewelry.

e. **Procedural or knowledge-based error:** Procedural.

f. **Claimant Allegation:** Agency, without the knowledge of the insured, changed the coverage for a $350,000.00 ring to “In Vault” only, requiring the insured to notify the company if the ring was to be worn or displayed and taken out of the vault in order for coverage to remain in force.

g. **Settlement or Trial:** Settled.

h. **Description of alleged error:** The ring was properly scheduled on the policy, but at renewal the CSR changed the coverage to “In Vault” since most of the other scheduled pieces were subject to the “In Vault” restriction.

i. **Tip to avoid claim:** the insured must always be notified when changes are made to the manner in which property is covered.

j. **Summary of Case:** Wealthy Commodities broker had been insured through agent and carrier for several years. Many items of insured’s scheduled jewelry had been scheduled as “In Vault” for many years.

However, the ring in question was not scheduled as “In Vault” until the policy renewal for the year of the loss. The agent did not notify the insured re the change in coverage status for the ring in question. The ring was lost and the insured filed a claim with the insurer. The insurer denied the claim when submitted based on the “In Vault” restriction and the insured then made a claim against the agency. We attempted to obtain the carrier’s involvement in pre suit mediation, but the carrier refused to participate.

Thereafter, suit was filed against both the insurer and the agency. After Motions to Dismiss were filed by both the insurer and the agency, and during the pendency of the briefing schedule, the insurer agreed to participate in settlement negotiations. After weeks of discussion the insurer finally agreed to our demand that they participate with our agency on a 50/50 basis to settle the claim.

We were then able to settle the case for just less than 60% of the stated value of the ring with the insurer and agency each paying slightly less than 30% of the ring’s value.
CASE STUDY 3

a. **Line of Coverage:** Commercial Package Policy.

b. **Position of person in the agency involved:** Producer.

c. **Personal or Commercial Lines:** Commercial.

d. **Type of coverage involved:** Business Property.

e. **Procedural or knowledge-based error:** Procedural.

f. **Claimant Allegation:** Agent failed to procure “sale price” replacement cost coverage as specifically requested by the insured.

g. **Settlement or Trial:** Pre suit mediation scheduled for July 30, 2014.

h. **Description of alleged error:** Agent failed to check the policy upon receipt and prior to delivery to insured to verify that policy contained proper form of “sale price” replacement cost coverage for Business Property.

i. **Tip to avoid claim:** Policy must be checked for accuracy and compared to application and representation of underwriter before being delivered to the insured.

j. **Summary of Case:** Insured is in the business of purchasing large quantities of discontinued fabric then re-cutting, altering and reconditioning the fabric for resale to end users. During the policy procurement process the insured gave the producer a competing proposal and emphasized the fact that he wanted “sales price” replacement cost coverage for all of his business property. That form of coverage was included in the competing proposal.

The producer spoke with his underwriter and requested that the policy be issued with an endorsement to provide the “sales price” replacement cost coverage required by the insured. The underwriter informed the producer that an endorsement would not be necessary because the “sales price” replacement cost coverage was available in the insurer’s policy form. The policy was ordered, produced and delivered to the insured.

Ten and a half months into the policy term the insured suffered a significant water damage loss at his California location. The claim was timely and properly submitted to the insurer, however, the insurer adjusted the loss on a replacement cost basis resulting in an approximate underpayment of $500,000.00 to the insured. The “sales price” replacement cost coverage in the policy, as produced, applied to manufactured goods, only. The insured did not manufacture any fabric. Neither the producer nor the CSR at the Agency detected the error prior to delivering the policy to the insured.
At renewal, two months after the loss, the insurer endorsed the renewal policy to provide “sales price” replacement cost coverage for all of the insured’s business personal property at no additional premium. However, they have steadfastly refused our request to reform the initial policy to accurately provide the coverage that was requested by the producer and promised by the underwriter during the policy procurement period. Pre-suit mediation is scheduled for July 30, 2014.
CASE STUDY 4

a. **Line of Coverage:** Commercial Package Policy.

b. **Position of person in the agency involved:** Account Executive.

c. **Personal or Commercial Lines:** Commercial Lines.

d. **Type of coverage involved:** Business Property, Business Personal Property and Business Interruption.

e. **Procedural or knowledge-based error:** Failure to determine that misrepresentations were made in the Property Portion of Commercial Package Application.

f. **Claimant Allegation:** Our insured agent had no market for insured’s renewal; referred insured to captive agent and sat in on meeting while application was completed by captive agent; insured alleged that our insured agent knew or should have known that information on the application regarding age and condition of the roof was not true.

g. **Settlement or Trial:** Case tried to verdict; plaintiff awarded $476,000.00 in damages; our post trial motion was granted; judgment in favor of insured entered notwithstanding the verdict; plaintiff has filed an appeal.

h. **Description of alleged error:** Failure to verify that the information on the application taken and completed by the captive agent was accurate.

i. **Tip to avoid claim:** In this case our agent did not make an error!

j. **Summary of Case:** Insured agent wrote Commercial Package Coverage for insured for seven years. As a result of claim history insurer properly notified insured of intention to non-renew the coverage at the end of the policy’s term.

Our insured marketed the account to all of the companies with whom the agency was contracted. Each of them declined to quote. Agent then contacted an acquaintance who was employed as a captive agent at an A+ rated insurer.

Insured submitted an ACORD application to the captive agent that contained no information about the age or condition of the roof. Captive agent advised our agent that his company’s underwriting guidelines required that he personally meet with the insured and complete an application on his insurer’s proprietary form.

Our agent arranged and attended the meeting between the captive agent, the President and the CFO of the proposed insured at the proposed insured’s place of business. The proposed insured was an office furniture wholesaler. The application was completed at the meeting and the policy was issued.
Seven weeks after the policy effective date, the insured’s business premises allegedly suffered severe roof damage during a rain, wind and ice storm (in January).

Insurer discovered during its claim investigation that the roof was in a state of complete disrepair at the time of the application; that the roof was at least twice as old as the five year age stated on the application; and that the insured, in the eighteen months prior to submitting the application, had hired three roofing contractors to inspect the roof and to offer estimates. All three roofers recommended a complete tear-off and replacement of the roof. The insured lied about the contractors in his Sworn Statement in Proof of Loss.

The insurer denied the roof damage claim, denied the damaged business inventory claim, but made a small payment on the Business Interruption Claim.

Plaintiff filed suit in Federal Court against the insurer and in State Court against the agent and agency. Plaintiff obtained a $1.1 million verdict against the insurer. That verdict was overturned on Post Trial Motion. However, in the Memorandum Opinion and Order the District Court Judge included a sentence that stated that the source of the erroneous information as to the age and condition of roof must have come from the ACORD application that our agent submitted to the captive to begin the underwriting process. Our agent did not testify in the Federal Court case and the ACORD application was not admitted into evidence in that case!

In the State Court proceeding, our Motion for Summary Judgment was denied based on the Federal Court Judge’s comment in his Memorandum Opinion regarding the source of the erroneous information on the captive agent’s application.

Plaintiff’s expert testified at trial, over objection and after our Motion in Limine was denied, that our insured agent had a continuing duty to the plaintiff, after turning the application and policy issuing obligation over to the captive agent. He based that opinion on the fact that our insured charged the plaintiff a service fee for finding coverage. Our agent received the policy from the captive agent and delivered the policy to the insured. Our agent also had endorsement requests and delivery flow to and form the insurer, through the captive agent and his office.

Our expert testified that our agent fulfilled all duties owed to the insured upon the insured’s acceptance of the captive insurance agent’s proposal. He testified that our insured agent had no duty to verify the information on the captive agent’s application.

After a jury verdict of $476,000.00 in favor of the plaintiff, we filed a post trial motion making the same argument as the duty opinion offered by our expert. That motion was granted. Following the court’s entry of judgment in favor of our insured, the plaintiff appealed and the case is pending in the Appellate Court.