

Agents E&O Standard of Care Project Louisiana 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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A L A W C O R P O R A T I O N

April 25, 2014

Mr. John Nesbitt
Swiss Re
5200 Metcalf Avenue
Overland Park, KS 66202

VIA EMAIL John_Nesbitt@swissre.com

Dear John:

In this letter you will find my response to the Swiss Re Request for assistance on Standard of Care Project for the State of Louisiana. I am following the format provided in the April 3, 2014 letter.

I. Summary of standard of care of insurance agents in the State of Louisiana.

Insurance agents in Louisiana have a duty to use reasonable diligence in attempting to place the insurance requested and to promptly notify the client if he has failed to obtain the insurance requested. *Karam v. St. Paul Fire & Marine Ins. Co.*, 281 So.2d 728, 730 (La. 1973); *Dobson v. Allstate Ins. Co.*, 2006 WL 2078423 (E.D.La. 2006); *Southern Athletic Club, LLC v. Hanover Ins. Co.*, 2006 WL 2583406 (E.D.La. 2006).

In the landmark decision of *Isidore Newman School v. J. Everett Eaves Inc.* 42 So.3d 352 (La.2010) the Louisiana Supreme Court capped a marked trend in jurisprudence and affirmed that Louisiana law has never recognized a duty owed by an insurance agent to spontaneously advise or procure any specific type or amount of insurance coverage for a client. The court held that the responsibility rests with the insured to read his policy and request the required coverage. However, an exception arises when a client shows that “1) the insurance agent agreed to procure the insurance; 2) the agent failed to use ‘reasonable diligence’ in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain the requested insurance; and 3) the agent acted in such a way that the client could assume he was insured.” *Id.* at 356–57 (citing *Karam v. St. Paul Fire and Marine Insurance Co.*, 281 So.2d 728, 730–31 (La.1973)). The court thus recognizes this narrow exception only when an insured has specifically requested a certain type or amount of coverage and the agent has agreed to procure that coverage.

No court in Louisiana has found a duty on an agent to spontaneously identify a client's needs and advise him as to whether he is underinsured or carries the right type of insurance. *Dobson v. Allstate Ins. Co.*, 2006 WL 2078423 (E.D.La. 2006); *Chieh v. Colony Ins. Co.*, 2006 WL 3437502 (E.D.La. 2006); *Whitehead v. State Farra Ins. Co.*, 2006 WL 3747520 (E.D.La. 2006); *Vernon v. Talamo*, 2006 WL 3759561 (E.D.La. 2006); *Justrabo v. Allstate Ins. Co.*, 2007 WL 1010200 (E.D.La. 2007); *Bonomo v. State Farm Ins. Co.*, 2007 WL 625928 (E.D.La. 2007).

Insurance agents do not have a duty under Louisiana law to ensure that clients purchase "adequate coverage". *Marengo v. Allstate Ins. Co.*, C.A. No. 06-8275 (E.D. La. 2006) (citing *Parker v. Lexington Ins. Co.*, 2006 WL 3328041 (E.D. La. 2006); *Heidingsfelder v. Hibernia Insurance, L.L.C.*, 09-0753 (La. App. 4 Cir. 11/18/09), 25 So.3d 976).

Generally, insurance agents do not have a duty to advise clients as to a gap in their respective insurance policies, as the clients could have discovered any gaps in their policy by carefully reading the policy as they are legally presumed to have done, *Parker v. Lexington Ins. Co.*, 2006 WL 3328041 (E.D.La. 2006); *Fortier v. State Farm Fire & Cas. Co.*, 2007 WL 678990 (E.D.La. 2007); *Thomas v. Taylor*, 2007 WL 128840 (E.D.La. 2007) (Petition was devoid of any allegations that agent failed to use reasonable diligence in placing the insurance requested or did not promptly notify the client if he failed to obtain the insurance requested; there were no allegations that the agent undertook any greater duty to the plaintiffs); *Bonomo v. State Farm Ins. Co.*, 2007 WL 625928 (E.D.La. 2007); *Isaac v. Allstate Ins. Co.*, 2007 WL 1651974 (E.D.La. 2007).

However, some courts have found that in certain instances plaintiffs may be lulled into a sense of reliance on their agent by the agent's actions or inactions surrounding periodic policy increases. *Giardina v. Allstate Ins. Co.*, 2006 WL 3406743 (E.D. La.2006) (Agent failed to inform clients that the inflation protection increases in homeowner's coverage were automatic and not instituted by him; clients assumed agent was responsible for increases and would increase both homeowner's and flood); *Romero v. Travelers Indemnity Co.*, 2006 WL 3692773 (E.D.La. 2006) (Agent held himself out as an agent and/or broker with an expertise in analyzing risk and procuring insurance coverage).

An insurance agent's duty to his client can be greater than merely the procuring of requested insurance, depending on what services the agent holds himself out as performing and on the specific relationship and agreements between the particular agent and client. *Graves v. State Farm Mut. Auto Ins. Co.*, 821 So.2d 769, 773 (La. App. 3rd Cir. 2002); *Southern Athletic Club, LLC v. Hanover Ins. Co.*, 2006 WL 2583406 (E.D. La. 2006). On the other hand, it is unreasonable to assume that the agent is obligated to procure insurance that the client has not requested. *Dooley v. Wright*, 501 So.2d 980, 985 (La. App. 2nd Cir. 1987).

An insured may recover from insurance broker who places insurance in an insolvent company, or in a nonexistent company, where the actions of the broker were such as to warrant assumption on part of insured that he was covered by suitable insurance and thus protected from claims against which he desired to be insured. *Bordelon v. Herculean Risks, Inc.*, 241 So.2d 766 (La. App. 3rd Cir. 1970); *Durham v. McFarland, Gay and Clay Inc.*, 527 So.2d 403, 405 (La. App. 4 Cir. 1988); *Offshore Production Contractors, Inc. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 230 (5th Cir. 1990).

II. Case Studies.

1. Uninsured Motorist forms lost.

- | | |
|--|---|
| a. Line of coverage involved: | Automobile |
| b. Position of person involved: | Agent |
| c. Personal or Commercial Lines: | Personal |
| d. Type of coverage involved: | Uninsured Motorist |
| e. Procedural or Knowledge-based error: | Procedural |
| f. Clamant Allegation: | Agent's loss of form resulted in insurer's damages |
| g. Settlement or Trial: | Settlement |
| h. Description of alleged error: | Loss of UIM rejection form caused insurer to suffer damages |
| i. Tip to avoid claim: | |
| i) Ensure proper filing of hard copies of all insurance documents. | |
| ii) Ensure that insurer is provided complete copies of all documents signed by insured at time insurance is bound. | |
| iii) Scan into a computer all insurance documents signed by insured at time insurance is bound for maintenance of documents (and confirm that computer is properly backed up). | |
| j. Summary of case: | |

Agent and insured completed UIM form in which coverage was rejected. Insurer received documents reflecting that no premiums were charged for UIM coverage and none was bound. After insured suffered serious automobile accident underinsured motorist claim was made with insurer for UIM benefits. Insurer requested agent to produce the UIM rejection form. Agent lost/misplaced UIM rejection form. Since there was no UIM rejection form (required by the State of Louisiana) the insurer had to pay the limits of the automobile policy as if it had been included in the policy. The insurer sought reimbursement of this payment from the agent.

2. Lack of written communication resulting in claim for failure to advise that coverage requested was not included in the policy bound.

- | | |
|---|---|
| a. Line of coverage involved: | Commercial wind/hail/hurricane |
| b. Position of person involved: | Agent |
| c. Personal or Commercial Lines: | Commercial |
| d. Type of coverage involved: | Commercial wind/hail/hurricane |
| e. Procedural or Knowledge-based error: | Procedural |
| f. Clamant Allegation: | Business Interruption coverage omitted |
| g. Settlement or Trial: | Settled |
| h. Description of alleged error: | Failure to advise that Business Interruption not included |
| i. Tip to avoid claim: | Confirm conversations in writing |
| j. Summary of case: | |

Insured purchased wind/hail/hurricane coverage. The policy didn't include Business Interruption coverage. Insured had requested Business Interruption coverage. Agent claimed he told insured that the particular policy selected (based upon price) didn't include this coverage. No emails/writings confirmed this discussion. Suit was filed.

3. Failure to follow insurer's instructions on binding coverage.

- | | |
|---|---|
| a. Line of coverage involved: | Fire |
| b. Position of person involved: | Agent |
| c. Personal or Commercial Lines: | Commercial |
| d. Type of coverage involved: | Fire |
| e. Procedural or Knowledge-based error: | Procedural |
| f. Clamant Allegation: | Agent failed to notify Coverage not bound |
| g. Settlement or Trial: | Settlement |
| h. Description of alleged error: | Agent failed to follow Insurer guidelines |
| i. Tip to avoid claim: | Follow insurer guidelines |
| j. Summary of case: | |

Insurer required its agents to send applications for coverage certified mail. Coverage was to be bound from the date the application was sent *certified* mail. Agent sent application *regular* mail. Insurer denied receiving application. Fire occurred after

Mr. John Nesbitt
April 25, 2014
Page 5

the mailing. Insured sued both insurer and agent. Case settled after pretrial rulings pertaining to agent's failure to follow insurer's guidelines opened agent to liability to insured for amount of loss suffered by insured.

If you need anything further from me please do not hesitate to contact me.

With best wishes, I remain

Very truly yours,



James H. Gibson
Direct Dial # 337-291-1300
Direct Fax # 337-291-1305
Email: jimgibson@allengooch.com