Agents E&O Standard of Care Project

Missouri 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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Standard of Care Applicable to Insurance Agents and Brokers in Missouri

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Current State of the Law on the Standard of Care Applicable to Insurance Agents and Brokers in the State of Missouri

I. Summary of the Standard of Care Applicable to Insurance Agents and Brokers

The longstanding rule in Missouri is that an insurance agent or broker who undertakes to procure insurance for a party, in exchange for compensation, owes a duty to that party to act with reasonable care, skill and diligence in procuring the requested insurance. If the broker does not or cannot obtain the requested insurance, he has a duty to timely notify the customer. There is no general duty to explain provisions of a policy and there is no duty to inform a potential insured of the significance of a provision in another insurance policy already held by him. The duty owed by an insurance broker is a "fiduciary duty", but the duty is generally limited to obtaining the insurance requested by the insured. An insured's request for "full coverage" does not give rise to liability on the part of the agent when the insured later has an uncovered loss. An insurance agent or broker has no duty to advise the insured about what types of insurance he needs or the amount of insurance he should purchase, unless the agent or broker specifically undertakes to do so by agreement or course of conduct, or a special relationship is found to exist.

II. Duties of Insurance Broker to Procure Insurance Coverage

The particular duties of an insurance broker in procuring insurance coverage for a customer are set out in the following cases:

- *Zeff Dist. Co. v. Aetna Casualty & Surety Co.*, 389 S.W.2d 789 (Mo. 1965)
  - Broker is under a duty to exercise good faith and reasonable diligence to procure the insurance on the "best terms" he can obtain; if the broker does not or cannot obtain the requested insurance, the broker has a duty to timely notify the client that he cannot obtain the requested insurance;

- "Best terms" does not mean lowest price, according to more recent case law;
- Broker has a "duty of loyalty" to the insured;

- *Barnes v. Metropolitan Life Ins. Co.*, 612 S.W.2d 786 (Mo. App. 1981)
  - Broker who undertakes to procure insurance for a party in exchange for compensation, owes a duty to the party to act with reasonable care, skill and diligence in procuring the requested insurance;
  - No duty to inform potential insureds of significance of provision in another insurance policy already held by them;
- *Wilmering v. Lexington Insurance Co.*, 678 S.W.2d 865 (Mo. App. 1984)
  - No general duty to explain provisions of policy;
- *Farmers Ins. Co., Inc. v. McCarthy,* 871 S.W.2d 82 (Mo. App. 1994)
  - Insurance agent has no duty to inform insured of existence of optional coverage such as underinsured motorist coverage;
- *Banes v. Martin,* 965 S.W.2d 383, 385 (Mo. App. 1998)
  - Insured's request for "full coverage" automobile insurance is insufficient to result in liability on the part of the insurance agent for failure to obtain sufficient limits to cover the insured's loss;
- *Manzella v. Gilbert-Magill Co.,* 965 S.W.2d 221(Mo. App. 1998)
  - Insurance agent has no duty to advise insured of types or amount of insurance necessary to cover all potential losses;
  - It was insured's responsibility to inform agent of the type of insurance they desired as well as the limits of that coverage for their delicatessen;

- Insurance agent's duties to the insured may expand if there is "a special relationship or extended agency agreement" between them;

- *A.G. Edwards & Sons, Inc. v. Drew*, 978 S.W.2d 386 (Mo. App. 1998)
  - Broker owes a "fiduciary duty" to perform its duties with reasonable care, skill and diligence;
- *Jones v. Kennedy,* 108 S.W.3d 203 (Mo. App. 2003)
  - Reaffirming that an agent has no duty to inform the insured of the availability and advisability of obtaining particular types of insurance coverage;
- *Busey Truck Equip., Inc. v. Am. Family Ins. Co.,* 299 S.W.3d 735 (Mo. App. 2009)
  - Petition alleged that agent agreed to obtain sufficient contents coverage for trucking equipment company and failed to do so;
  - Court noted that scope of the agency of either an agent or a broker normally is limited to procuring the insurance requested by the insured but found that plaintiff sufficiently alleged that agent agreed to obtain sufficient contents coverage so case did not involve alleged failure to inform of type or amount of coverage.
- *Emerson Electric Co. v. Marsh & McLennan Cos*., 362 S.W.3d 7 (Mo. 2012)
  - Missouri Supreme Court's most recent pronouncement on the issue of the duties of an insurance agent or broker - Missouri Supreme Court took the opportunity to discuss and effectively confirm nearly 50 years of case law relating to the duties of insurance brokers and agents;
  - Emerson sued its broker, Marsh & McLennan, the largest broker in the world, asserting that the broker's desire to earn contingent commissions and

its undisclosed deposit of premiums in an interest bearing account amounted to self-dealing;

- Emerson argued that its broker had a duty to obtain insurance at the lowest possible cost;
- Court confirmed that the broker has a fiduciary duty to perform its duties with reasonable care, skill and diligence;
- Court confirmed that the scope of the agency of either an agent or a broker normally is limited to procuring the insurance requested by the insured;
- Court confirmed that neither agents nor brokers have a duty to advise the insured on its insurance needs or on the availability of particular coverage, unless they specifically agree to do so;
- Court confirmed that there is no duty to procure "an adequate amount" of insurance for the customer's business or to advise the insured of the types and amounts of coverage needed for insured's business. Rather, it is the customer's responsibility to inform the broker of the type of insurance desired as well as the limits of that coverage;
- Court confirmed that "duty of loyalty" owed by the broker is an inherent part of the principal-agent relationship;
- Neither duty of loyalty nor duty of reasonable care gave rise to duty to obtain the lowest cost insurance;
- Additional duties may be assumed by brokers through "contract" or "course of conduct over an extended period of time," or a combination of both; such contract or course of conduct might give rise to additional obligations,

beyond the normal duty of all insurance brokers to use reasonable care, skill and diligence in procuring insurance on behalf of insureds.

III. No Continuing Duty

Another aspect of the insurance broker's duty which often arises is the question of "when does the duty end?" Generally, under Missouri law, the duty owed by an insurance broker is not continuing, rather, it ceases upon "execution and delivery" of the policy to the insured.

- *Matthews v. Schumacher*, 660 S.W.2d 357 (Mo. App. 1983)
    - No duty to maintain insurance for an insured from year to year or to advise the customer to pay an overdue premium.
- *Hecker v. Missouri Property Ins. Placement Facility*, 891 S.W.2d 813 (Mo. 1995)
    - Insurance agent has no duty to notify insured of decision not to submit renewal application on their behalf;
- *Haynes v. Edgerson*, 240 S.W.3d 189 (Mo. App. 2007)
    - Where insured asked agent to renew policy with same coverage as prior policy, which included assault and battery coverage and new policy did not have such coverage, agent had a duty to procure a policy with assault and battery coverage or explain to the insured that he cannot obtain renewal coverage on the same terms;
    - Court made clear that duty arose from a new agreement, and was not a continuing duty stemming from the first policy;
- *Zubres v. Providers Insurance Consultants*, 276 S.W.3d 335 (Mo. App. 2009)

- Broker had no duty to monitor the financial condition or notify insured of insurance company's financial downgrade by A.M.Best after the insurance policy was procured;
- After obtaining and delivering the policy to the insured, the agency relationship and the corresponding duty no longer existed;

- *Ted Elliott d/b/a Green Meadows Residential Care v. Columbia Mutual Insurance Company et al*, (Mo. App. SD 32147, affirming summary judgment in favor of broker, unpublished opinion, 7-1-13)
    - Broker's duty to the insured normally ends once it has "procured" or "obtained" the requested insurance, that is, once the insurance is in full force and effect, even absent "delivery" of a policy;

IV. Expanded Duty

Under the general rule in Missouri, an insurance broker cannot be liable for failure to procure additional insurance coverage it was never asked to obtain, and has no continuing duty to advise the insured on its insurance needs. An insurance broker generally has no duty to advise, guide or direct a customer on obtaining insurance coverage absent a showing of special circumstances. While the *Emerson* Court specifically mentioned "contract" and "course of conduct over an extended period of time," it should be noted that courts in other states have set forth other factors that may give rise to an enhanced duty:

- representations by the broker about its expertise;
- the extent of the broker's involvement in the client's decision making about its insurance needs;
- information volunteered by the broker about the client's insurance needs; and

- payment of additional compensation for advisory services.

Insurance brokers should be cognizant of the representations made on their website and in promotional materials, as it is possible that representations of expertise or the breadth of services offered, could give rise to a special relationship and resulting enhanced duty to advise the insured on its insurance coverage needs.

V. Case Studies

Our law firm has handled numerous cases involving the standard of care and legal duties of insurance brokers and agents. A sampling of those cases is attached.

Case Study #1

A. Line of Coverage Involved – Commercial Flood

B. Position of person in the agency involved – Broker/Producer and principal of the agency

C. Personal or commercial lines – Commercial

D. Type of coverage involved – Commercial Flood

E. Procedural or knowledge based error – knowledge based error

F. Claimant allegations – Insured alleged that his broker failed to provide commercial flood insurance coverage which was requested by insured for his property including docks on the Mississippi River.

G. Settlement or Trial – The case went to trial and the jury returned a verdict in favor of the insured in the amount of $400,000, about half of the insured's alleged damages.

H. Description of alleged error – Broker/producer told insured that a commercial flood policy was not available at the same time his own agency, through another broker/producer, offered such commercial flood coverage to another client of the agency whose business was also on the Mississippi River in close proximity to insured's business.

I. Tip to avoid claim – It is key that an agency has a central system which shows all available insurance coverages and the identity of each insurance carrier who will write such coverages for the use of all brokers/producers in the agency. If the client requests a particular type of coverage, the broker should not advise a client that such specific coverage is not available unless he is absolutely certain that such coverage is not available in the marketplace.

J. Summary of Case – This case involves the situation where an insured asked for a specific type of coverage and the broker advised that it was not available when in fact it was available. In this case, the broker advised the insured that he was unaware of any company that offered commercial flood coverage for insured's business which was located on the river and included docks, buildings, etc. Broker told the insured that he was limited to the flood insurance that had been obtained through the National Flood Insurance Program. The NFIP coverage is offered by the federal government and coverage is very limited. Insured suffered a flood loss and recovered only a minimal amount under his NFIP policy. It turned out that insured's business was underinsured by approximately $750,000. Insured brought suit against his broker, alleging that broker's own insurance agency had recently offered commercial flood insurance to another business located in close proximity to insured's business. Insured alleged that had the broker offered this commercial flood coverage, he would have obtained commercial flood insurance coverage with limits that would have fully insured his business.

Case Study #2

A. Line of Coverage Involved – Employee theft, employee dishonest, embezzlement

B. Position of person in the agency involved – Broker/Producer and principal of the agency

C. Personal or commercial lines – Commercial

D. Type of coverage involved – Employee theft, employee dishonest, embezzlement

E. Procedural or knowledge based error – knowledge based error

F. Claimant allegations – The broker had visited the insured's payday loan and check cashing business on numerous occasions. Insured alleged that broker should have been aware that insured needed coverage for employee theft, employee dishonesty and embezzlement. If such coverage had been obtained, it would have covered the insured for losses he sustained as a result of employee theft. The insured admitted that he never requested these types of coverage.

G. Settlement or Trial – Motion for Summary Judgment in favor of broker was granted and affirmed on appeal.

H. Description of alleged error – Insured alleged that broker/producer should have offered particular insurance coverage to insured based on his general knowledge of the insured's business. However, insured admitted that he never asked for employee theft, employee dishonesty or embezzlement coverage.

I. Tip to avoid claim – Agents should be aware that they have a limited fiduciary duty to use reasonable skill and diligence to obtain the coverage requested by a client, but there is no affirmative duty to advise clients about higher limits or additional coverage absent an agreement to provide such advice. Agents should be cognizant of representations in their brochures, written materials and website which could be construed as creating a special

relationship or agreement to provide advice with respect to types of coverage that may be appropriate for the client's business.

J. Summary of Case – This case involves the typical situation where an insured fails to purchase a specific type of coverage and then when a loss occurs which is not covered, he alleges that the broker should have offered such insurance coverage and that he would have bought it. Insured brought suit against his broker, alleging that he should have been offered coverage for employee theft, dishonesty and embezzlement and that if he had been offered such coverage he would have purchased it. The insured admitted that he never specifically requested coverage for employee theft, dishonesty or embezzlement and there was no evidence of a "special relationship" or any additional compensation paid to the broker beyond his normal commission. Absent a special relationship or additional compensation, the broker had no duty to offer insurance coverage that was not requested.

Case Study #3

A. Line of Coverage Involved – Fire and Extended Coverage and "Mechanical, Electrical or Pressure Systems Breakdown" endorsement

B. Position of person in the agency involved – Broker/Producer

C. Personal or commercial lines – Commercial

D. Type of coverage involved – Fire and Extended Coverage and "Mechanical, Electrical or Pressure Systems Breakdown" endorsement

E. Procedural or knowledge based error – knowledge based error

F. Claimant allegations – The insured alleged that the broker failed to procure a sufficient amount of insurance coverage for his restaurant and bar. The insured's restaurant and bar was totally destroyed by fire and the insurance company paid the full amount of the policy, $1.6 million. However, the policy contained an endorsement for "equipment breakdown coverage." There was a dispute as to whether the endorsement insured an additional cause of loss, or whether the endorsement actually provided an additional $1.6 million limit for fire.

G. Settlement or Trial – The broker settled with the insured; subsequently the trial court granted summary judgment in favor of insurance company but Missouri Court of Appeals reversed and found that as a matter of law, the endorsement provided additional coverage for fire damage.

H. Description of alleged error – The "error" in this case in fact came after the policy was procured. The broker wrote a letter to the insurance company adjuster that was poorly worded and which could be interpreted to support the insured's position that the Policy

provided $3.2 million in coverage (the $1.6 million under the unendorsed policy and an additional $1.6 million under the endorsement). The producer became a strong advocate for his client's claim, which ultimately contributed to him becoming a defendant when the insurance company denied the claim for the additional $1.6 million.

I. Tip to avoid claim – Broker should not become involved in "claims handling" or in determining coverage for a claim but should simply assist the insured in providing the insurance company's adjuster with the information requested. The broker should never give an opinion, especially in writing, as to coverage, or the amount of coverage for any claim.

J. Summary of Case – The insured had purchased a commercial insurance policy and endorsement for his restaurant and bar business through broker. The policy provided building coverage with a limit of $1.2 million and business personal property coverage with a limit of $400,000. The insured also purchased an endorsement entitled "Mechanical, Electrical or Pressure Systems Breakdown" which was described on the declarations page as "Equipment Breakdown Coverage with a limit of $1,600,000." Following a fire which totally destroyed the insured's restaurant and bar, the insurance company paid the insured $1.6 million for building and personal property lost in the fire. The insured sought payment of an additional $1.6 million under the Equipment Breakdown endorsement. The insurance company denied that portion of the claim. Insured brought suit against both the insurance company and the broker who procured the policy. The insured alleged that he was entitled to recover both the $1.6 million under the Policy for building and personal property and the $1.6 million under the endorsement. The insurance company took the position that the endorsement did not provide any

additional coverage for the fire damage suffered, but instead "put back" coverage for certain excluded causes of loss, including mechanical, electrical or pressure systems breakdown. The insured relied heavily on correspondence that the broker wrote to the insurance company taking the position that there was an additional $1.6 million in coverage under the Equipment Breakdown endorsement.

Case Study #4

A. Line of Coverage Involved – Commercial General Liability

B. Position of person in the agency involved – Customer Service Representative

C. Personal or commercial lines – Commercial

D. Type of coverage involved – Commercial General Liability

E. Procedural or knowledge based error – procedural

F. Claimant allegations – Insured's suit, which was filed just prior to the expiration of the five year statute of limitations, alleged that broker breached a duty to him because broker failed to administer the policy appropriately, determine premiums, and provide notifications of premiums not paid prior to the loss.

G. Settlement or Trial – Motion for summary judgment granted and affirmed on appeal.

H. Description of alleged error –Failure to remind insured to pay additional premium after policy has been obtained by broker.

I. Tip to avoid claim – This was a well-documented file by the broker, and that was the key to the successful handling of this case. Claims are often made years after the "incident" and after broker's employees have gone to other jobs. Insureds often say they "didn't get _____," or "you didn't tell me _____." Therefore, it is key to make and keep accurate records. If something is being mailed to an insured, include cover correspondence that describes the enclosure (e.g., "enclosed is policy #_____"). Don't just throw things into envelopes. If documents are being hand delivered to the insured, include the same cover correspondence describing enclosures and note "hand delivered" on correspondence. Fax cover sheets should state clearly what is being

transmitted and the confirmation page must be kept. Email must clearly identify the attachment. Statements of substance by the insured should be documented. If a statement is against the interest of the insured, or the advice of the broker, it should be noted and then confirmed in writing, such as was done in this case.

J. Summary of Case – Broker obtained insurance coverage for plaintiff's residential care facility. The policy permitted the insurer to inspect the facility, and then adjust the initial premium. The insurer did an inspection and adjusted the premium upward by approximately $3,000. The insurer then sent a notice directly to insured, who failed to pay the additional premium by the due date. The insurer cancelled the policy based on the failure to pay the additional premium. There was a destructive fire thirty days later, after the cancellation. After the cancellation, but before the fire, insured told the broker's CSR that he was not going to pay the additional premium because the building was already paid for. The CSR confirmed that statement in a facsimile to the insured, prior to the fire. The trial court granted summary judgment to broker and the appeals court held that the broker's duty ended once it has procured the policy. The court of appeals cited cases which rejected arguments that a broker must provide follow-up notifications, or reminders to pay the premium. There was no evidence that broker had undertaken any additional duties. The duty was limited to procuring what the insured requested and the broker's duty was fulfilled.

GOFFSTEIN, RASKAS, POMERANTZ, KRAUS & SHERMAN, LLC PROFILE

Since 1960, the law firm of Goffstein, Raskas, Pomerantz, Kraus & Sherman, LLC has served the legal needs of individuals, small and middle market businesses and publicly traded corporations, and is one of the leading insurance defense firms in the St. Louis area. Our attorneys and areas of practice are equally divided between the broad categories of litigation, business services and estate planning.

The Litigation Group handles cases involving errors and omissions defense, professional negligence defense, insurance coverage issues, title insurance defense, personal injury litigation, general commercial litigation, domestic relations and regulatory matters. The Litigation Group practices in state and federal courts in Missouri and Illinois and our attorneys have also been retained by insurance companies to handle complex cases throughout the United States.

The Business Services Group assists business clients with general corporate and tax matters, contracts, real estate matters, as well as human resources and employee benefit issues.

The Estate Planning Group practices in the areas of wills and trusts, probate administration and business succession planning and implementation.

Goffstein, Raskas, Pomerantz, Kraus & Sherman, LLC is large enough to handle a wide variety of legal matters, but small enough to provide the personal service and attention to detail that leads to long term relationships with clients. We always strive to treat clients as we want to be treated, and to explain complex legal matters so that clients fully understand our strategies and efforts on their behalf. Our goal is to have experienced attorneys handling each file and devoting the appropriate time and resources consistent with fulfilling the needs of each of our clients in a thorough and innovative manner.