Agents E&O Standard of Care Project

Survey Nevada

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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Swiss Re

Corporate Solutions

To: **SwissRe/Westport**

From: **Riley A. Clayton, Esq., Hall Jaffe & Clayton, LLP**

Date: **June 30, 2014**

Re: **Overview of Nevada Insurance Agency Law**

We have been asked by Swiss Re to provide an overview of Nevada law concerning the standard of care owed by insurance agents/brokers and the relevant legal authority concerning other related issues. As such, the following provides a brief overview of Nevada law in this regard, followed by a summary and analysis of three cases that we have handled to demonstrate the application of the law to a particular set of facts. We appreciate the opportunity to assist you in this matter and hope the following will assist Swiss Re and its subsidiaries in better understanding the current state of the law in Nevada on these issues.

I. SUMMARY OF STANDARD OF CARE IN NEVADA

In Nevada, an agent or broker has a duty "to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 420, (1978); *Havas v. Carter*, 89 Nev. 497, 499-500 (1973); *Lucini-Parish Ins., Inc. v. Buck*, 108 Nev. 617 (1992). In other words, an insurance agent or broker does not owe the insured any additional duties other than procuring the requested insurance. *Cf. Havas v. Carter*, 89 Nev. 497, 500 (1973). Although the Nevada Supreme Court has not issued a published opinion on this issue, the Nevada Supreme Court has held in an unpublished opinion that "'[i]nsurance companies and brokers have no affirmative duty to advise their insureds to procure particular or different kinds of coverage.'" *Flaherty v. Kelly*, 59582, 2013 WL 7155078 (Nev. 2013) (unpublished). In other words, Nevada insurance agents may be loosely described as "order takers," and we believe that if the Nevada Supreme Court were to issue a formal opinion on this issue, it would conclude as much.

Again, although not decided by the Nevada Supreme Court, the Nevada federal district court has held that insurance brokers may assume additional duties in special circumstances. *Flaherty*, 2013 WL 7155078 (citing Gary Knapp, *Annotation, Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 256–263 (1991); Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability, 25 The Brief, Summer 1996*, at 35–36; 44 *C.J.S. Insurance* § 309 (2007); 3 *Couch on Insurance* § 46:38 (3d ed.2011)). In other contexts, however, the Nevada Supreme Court has held that if a person assumes a duty that he may not have otherwise owed, that person must perform that assumed duty with reasonable care, or otherwise be held responsible for any breach. *Wright v. Schum*, 105 Nev. 611, 617-18 (1989). Thus, this general rule may apply to insurance agents who voluntarily assume/undertake duties that they do not otherwise owe in the insurance procurement process. *Id.*

Finally, Nevada statutory law requires agents to be competent, trustworthy and financially responsible, *see* NRS 683A.130; to hold premiums of the customers in a fiduciary capacity, *see* NRS 683A.400; and to require life insurance agents to warn of the risks of replacing policies. *See* NRS 686A.060; NAC 686A.555(1); NAC 686A.563.

Nevertheless, and although not squarely decided by the Nevada Supreme Court, the Nevada Federal District Court and the Ninth Circuit Court of Appeals, predicting what the Nevada Supreme Court would do, have reiterated that there is no fiduciary duty imposed on insurance agents in the insurance procurement context. *CBC Financial, Inc. v. Apex Insurance Managers, LLC,* 291 Fed. App. 30 (9th Cir. 2008) ("The district court correctly concluded that, while Nevada law imposes on insurance brokers the duty of ordinary care in procuring insurance coverage that could give rise to a claim for negligence, no Nevada court has imposed on insurance brokers a fiduciary duty toward insureds.")

It is important to note that under Nevada law, an insured also has a duty to read his/her insurance policy and is deemed to have constructive knowledge of the coverage it plainly provides. *See Farmers Ins. Exch. v. Young*, 108 Nev. 328, n. 2 (Nev.1992) ("Although we understand that many people may in fact not read their insurance policies, we conclude that the consumer has at least this responsibility. If we presume that consumers do not read policies, we would then force insurers to explain verbally every minute detail of a policy. We must assume that the insured party has at least read the policy and given a plain common-sense meaning to the policy's provisions.")

In cases involving insurance agents, there may be a question as to whether the agent is an agent of the insured or the insurer. To resolve that question, Nevada courts will evaluate the following factors:

> (1) the insured's reliance on the agent's judgment and discretion in procuring insurance coverage, (2) the general rule that an independent insurance agent is considered the agent of the insured, not the insurer, (3) in dealing with an insured, whether the agent selected which insurance company to use, (4) whether the agent reviewed the insured's financial records and made recommendations regarding coverage, (5) whether the agent knew that the insured was relying on him to explain the insurance policies he procured, and (6) the general rule that even if the agent acts in a "dual agency" capacity, he is still the agent for the insured, not the insurer.

Grand Hotel Gift Shop v. Granite State Ins. Co., 108 Nev. 811, 816, 839 P.2d 599, 603 (1992)

The unique thing about Nevada law is that the common law is still developing/evolving. Nevada only has one appellate court, i.e., the Nevada Supreme Court. Moreover, up until the 1990s, Nevada was a state with a very small population and little opportunity for the Nevada

Supreme Court to develop case law on many issues where the law in other jurisdictions appeared well-settled. There may be some tendency for Nevada courts to look to California for guidance in deciding unresolved issues, but the Nevada Supreme Court certainly does not follow California court decisions as a per se rule. The Nevada Supreme Court tends to look at developing trends and, in the recent past, seems to be more consumer/insured protective than business/insurance carrier protective.

II. CASE STUDIES

A. *Customer v. Insurance Agency*

Line of Coverage Involved:	Property Casualty
Position of Person in the Agency Involved:	Producing Agent
Personal or Commercial Lines:	Commercial
Type of Coverage Involved:	Trucking
Procedural or Knowledge Based Error	Knowledge Based
Claimant Allegation	Failure to procure "cargo" coverage to cover property of others being hauled
Settlement or Trial:	Summary judgment in favor of agent
Description of Alleged Error	Failure to procure "cargo" coverage to cover property of others being hauled.

Tips to Avoid Claim

- Document interaction and policy changes with the customer
- If the agent is not able to obtain the policy requested, confirm that fact in writing.

Summary of Case

Years before the subject loss, the owner of a mining supply company (referred to as "Customer") went to a local Nevada insurance agency (referred to as "Insurance Agency") to procure commercial automobile/trucking insurance for the business. Because of a poor driving record and in an effort to save money on the policy, Customer wanted to list himself as an "excluded driver" under the policy. In order to obtain that policy, Customer signed an "excluded driver" endorsement, which eliminated coverage if he was involved in an accident while driving one of the covered vehicles. Insurance Carrier No. 1 subsequently issued the policy, which contained the "excluded driver" endorsement.

Prior to the subject accident, Customer claimed that he went back to Insurance Agency to make certain changes to the commercial auto/truck policy. More specifically, Customer claimed that he requested Insurance Agency to add coverage (aka "cargo" coverage) that would cover the property of others that was being hauled by Customer. Of course, Insurance Agency denied that it was ever asked to procure "cargo" coverage.

On the date of the subject accident, Customer was driving a company truck and was hauling a "boom lift" that was owned by another company (referred to as "Smith Rentals"). Customer apparently lost control of his truck and the "boom lift" fell off the truck and was damaged. Smith Rental's insurance company, Insurance Carrier No. 2, paid Smith Rentals for the loss and then sought reimbursement from Customer. Customer then submitted a claim to the carrier that issued the commercial auto/truck policy, Insurance Carrier No. 1. Insurance Carrier No. 1 denied the claim based upon the fact that the policy did not have "cargo" coverage. Customer then brought suit against Insurance Agency for allegedly failing to procure the "cargo" coverage.

Insurance Agency moved for summary judgment, arguing that the "causation" element was lacking. In other words, Insurance Agency argued that even if it was true that Insurance Agency had failed to procure the "cargo" insurance, coverage was still not and would not have been provided for the loss to the boom lift in the first place since the accident occurred while Customer, an excluded driver, was driving the commercial vehicle.

The trial court agreed, holding that under Nevada law "the agreement to procure must be one for a policy of insurance which would have covered the loss incurred" otherwise there can be no liability against the agent. *Keddie v. Beneficial Ins. Co.* 94 Nev. 418, 420 (1978). The court concluded that because Customer had originally requested a policy that listed him as an "excluded driver," and because the policy had an "excluded driver" endorsement signed by Customer, and because Customer was driving the covered vehicle at the time the boom lift was damaged, the policy would not have covered the loss in the first place, even if "cargo" coverage was requested and should have been placed on the policy. As such, the court agreed that because Customer could not establish "causation," and Insurance Agency was entitled to summary judgment.

B. *Customer v. Insurance Agency*

Line of Coverage Involved:	Property Casualty
Position of Person in the Agency Involved:	Producing Agent
Personal or Commercial Lines:	Commercial
Type of Coverage Involved:	Boiler/Machinery Coverage
Procedural or Knowledge-Based Error:	Procedural
Claimant Allegation:	Failure to procure insurance to cover Coast's business operations and

	equipment
Settlement or Trial:	Settlement for a reasonable sum, although trial against the carrier resulted in a $9 million verdict.
Description of Alleged Error:	Failure to secure boiler/machinery coverage that was requested

Tips to Avoid Claim:

- Follow-up all oral discussions regarding coverage with a brief email/letter confirming the insured's position on purchasing/declining coverage

- Request that the insured/client express in writing the precise coverage that is wanted

Summary of Case:

Customer is a plastic bag manufacturer, which moved its primary production operations and facility from Los Angeles, California, to Nevada. In connection with that move, Customer wanted insurance for its Nevada operations and, in furtherance of that goal, contacted Insurance Agency, a local insurance agency. At the same time, however, since Customer still had some ongoing operations in California. Customer was also negotiating business insurance through its California insurance agent (referred to as "California Agency").

Customer, through California Agency, actually procured business insurance through Insurance Carrier No. 1, which included a $20 million "boiler and machinery" policy. Customer claimed that it wanted Insurance Agency to procure "the same coverage" for the Nevada operations that Customer had for its California operations, specifically including a "boiler and machinery" policy. Customer claimed that the two insurance agencies were to "work together" in "ramping up" coverages in Nevada as Customer transferred its equipment and personnel to Nevada, while it "ramped down" the corresponding coverages in California, a point which both agencies disputed.

As Customer was transferring its operations, Insurance Agency procured certain coverages, including a business operations policy and workers compensation coverage. Certain internal documentation in the agency file suggested that Insurance Agency had purportedly told Customer that "boiler and machinery" coverage had not been obtained for the Nevada operations. However, the documentation was not conclusive, and the case turned primarily into a "he said, she said" dispute between the officers of Customer and Insurance Agency. In any event, Customer sustained massive problems with its plastic-producing machinery once it was installed in the Nevada operations, which caused the plastic products to contain various defects/flaws, and the Nevada operations were shut down for extensive repairs. The loss to the inventory and

business income ranged between $2.5 to $5 million dollars. The commercial insurer, Insurance Carrier No. 2, who issued the Nevada commercial policy, declined coverage for the loss since the policy did not include "boiler and machinery" coverage.

As noted above, because the documentation was not clear regarding whether Insurance Agency had communicated to Customer that the Insurance Carrier No. 2 policy did not contain "boiler and machinery" coverage, the case developed into a massive "he said, she said" factual dispute regarding whether such coverage had been requested and should have been placed by Insurance Agency. Given the potential excess exposure to the agent if it were determined that it had failed to procure the "boiler and machinery" policy, a settlement was reached with Customer. As it turned out, the settlement was a fraction of the amount that the jury ultimately awarded against Insurance Carrier No. 2 at the subsequent trial.

C. *Customer v. Insurance Agency*

Line of Coverage Involved:	Property Casualty
Position of Person in the Agency Involved:	Producing Agent
Personal or Commercial Lines:	Commercial
Type of Coverage Involved:	Commercial General Liability
Procedural or Knowledge-Based Error:	Procedural
Claimant Allegation:	Misrepresenting the existence of coverage by issuing a Certificate of Insurance when the agent was not authorized to do so by the insurer
Settlement or Trial:	Settlement (nominal)
Description of Alleged Error:	Issuance of a Certificate of Insurance without authority to do so

Tips to Avoid Claim:

- Agents should read, and re-read, their Producer Agreements and have clear understanding of the scope of their principal-agent relationship with the insurer.

- Maintain complete and accurate files for all insureds. Assume that you will be sued by someone at some point in the future.

Summary of Case:

This case arose from plaintiff's, a real estate developer/builder's (referred to as "Developer's"), construction of a housing development in Nevada. Developer contracted with various subcontractors to complete the project, including a window and door subcontractor (referred to as "Customer"). Subsequently, some of the insurance agents for the subcontractors

issued certain certificates of insurance purportedly listing Developer as an "additional insured" under the various policies. Following the completion of the project, the project's home owners association ("HOA") discovered construction defects on the properties in the development. Consequently, the HOA sued Developer, and Developer, in response, tendered its defense to the various subcontractors claiming that it was an "additional insured" under the subcontractors' CGL policies as represented on the certificates of insurance.

Customer obtained a commercial general liability policy, which was issued by Insurance Company, and procured by a local Nevada agent, Insurance Agency. When presented with Developer's tender, Insurance Company rejected it claiming that Developer was not an "insured" under the subject policy issued to Customer. Thereafter, Developer sued multiple insurance carriers, including Insurance Company, for their alleged failure to defend/indemnify. In response, Insurance Company filed a motion for summary judgment arguing that Developer was not entitled to coverage as an additional insured because Insurance Company purportedly did not approve the certificates of insurance or endorsements naming Developer as an additional insured.

The court initially denied Insurance Company's motion, although it gave the parties 90 days to conduct discovery on whether the insurance agents, like Insurance Agency, had actual or apparent authority to issue the certificates. Developer subsequently filed an amended complaint adding claims against the insurance agencies, including Insurance Agency, claiming that the agencies acted negligently by issuing certificates of insurance and endorsements that were not approved by Insurance Company. Thus, Developer's claims against Insurance Agency were premised on the assumption that the certificates of insurance and endorsements were not authorized by Insurance Company.

The certificate of insurance issued by Insurance Agency, which did, in fact, list Developer as an additional insured included the following disclaimer:

> **THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.**

Accordingly, there was a question regarding whether Developer could have reasonably relied upon the certificates when the certificate expressly warned that it confers no rights upon the certificate holder.

Regarding Insurance Agency's authority to bind coverage or issue certificates under Insurance Company's policies, the "Producer Agreement" between Insurance Agency and Third Party Broker, stated, in pertinent part:

> **Section VI - Representation**
>
> The Producer shall not bind the Company as respects any insurance without the prior authorization of the Company in each case; nor shall he place any advertisement respecting the Company in any publication, or issue or distribute any circular or paper referring to the Company without the prior consent of the Company in writing. In case of unauthorized action of the Producer, the Producer agrees to pay all costs and damages arising therefrom.

Under the express terms of the Producer Agreement, Insurance Agency could bind coverage with authorization from Third Party Broker.

The documents in Insurance Agency's file showed that Third Party Broker issued an insurance binder for the CGL policy issued to Customer. The key fact driving the outcome of the litigation was that the binder included a "Blanket Additional Insured Endorsement." Because of this endorsement, Insurance Agency argued that it had authority to issue certificates and endorsements on Third Party Broker's (and Insurance Company's) behalf.

Insurance Agency filed a motion for summary judgment arguing that: (1) the certificate of insurance could not be relied upon by Developer as the basis of any potential coverage; and (2) even if Developer did, Insurance Agency was authorized to issue the certificate of coverage on Insurance Company's behalf. Although the potential legal effect of a certificate insurance has not been squarely addressed by the Nevada Supreme Court, the issue has been addressed by the Nevada federal district court predicting/construing Nevada law. *See Mont. Ref. Co. v. Nat'l Union Fire Ins. Co.*, 918 F.Supp. 1395, 1397 (D. Nev. 1996) (citing *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 839 P.2d 599, 602 (Nev.1992)). Agreeing with the courts in other jurisdictions, the Nevada federal district court held that when the certificate contains a disclaimer, the insured may not rely on the certificate, but must look to the policy to determine the scope of coverage. *See Empire Fire & Marine Ins. Co. v. Bell*, 55 Cal.App.4th 1410, 1423 n. 25 (1997) ("[a] certificate of insurance is merely evidence that a policy has been issued. It is not a contract between the insurer and the certificate holder"). Thus, summary judgment was granted in Insurance Agency's favor because Developer, as a matter of law, could not have relied upon what the certificate purportedly represented due to the fact that the same certificate included the appropriate disclaimer.

Even assuming that Developer could rely on the certificate, the court also determined that Insurance Agency was actually authorized to issue the certificate on Insurance Company's behalf. In reaching its decision, th court stated that under Nevada law, an agency relationship could be created in three different ways: (1) the agent and principal can agree that the agency exists, i.e., actual authority; (2) the principal may hold another out as its agent to a third party, i.e., apparent authority; and (3) the principal may agree to be bound by the previously unauthorized acts of another, i.e., ratification. Generally speaking, a principal will only be held liable for the acts of its agent if it has made its agent its representative and given the agent power to bind the principal.

The court found that Insurance Agency had entered a Producer Agreement with Third Party Broker in 1993. Thus, as the Producer under that agreement, Insurance Agency had actual authority to bind coverage on behalf of Third Party Broker upon receipt of Third Party Broker's authorization, and that issuing certificates of insurance was consistent with the extent of authority extended to Insurance Agency. Rather than incur the costs of an appeal, the case settled for a nominal amount in order to bring the matter to a final resolution.

III. CONCLUSION

We hope the foregoing provides you and the entire Swiss Re organization with a better understanding of the state of the law in Nevada concerning insurance agents/brokers and the general duties they owe to their customers. Please let us know if you have any questions or concerns, or if you would like us to expound on any additional issues.