Agents E&O Standard of Care Project

New York 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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THE STANDARD OF CARE FOR NEW YORK INSURANCE AGENTS AND BROKERS

Procurement Duties

Under New York law insurance agents and brokers "have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage." Murphy v. Kuhn, 90 N.Y.2d 266, 270 (1997). In Murphy, however, the Court explained that there may be exceptional situations in which additional advisement duties are created, such as where (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.

In the Murphy case, the insurance broker had been procuring insurance coverage for the plaintiff for almost 20 years for both his personal needs as well as for his business. Among the insurance policies which the broker had procured was an automobile policy for the customer's son, which contained liability coverage with limits of $250,000/$500,000. The policy had been renewed with these limits for approximately 7 years before the loss. When the son was involved in an accident, the liability limits were insufficient to satisfy all of the claims. The customer, therefore, brought a lawsuit against the broker, arguing that the broker had procured insufficient coverage. The Court explained that "the record in the instant case presents only the standard consumer-agent insurance placement relationship, albeit over an extended period of time." 90 N.Y.2d at 271. The Court also noted that "there is no indication that Murphy ever inquired or discussed with Kuhn any issues involving the liability limits of the automobile policy. Such lack of initiative or personal indifference cannot qualify as legally recognizable or justifiable reliance." 90 N.Y.2d at 271. As a result, the Court found that the broker did not owe its customer any duty to recommend or procure any particular limits of coverage.

Other New York courts have similarly found that, where there have been no discussions between the broker and the customer regarding the limits, the broker is under no duty to procure any particular level of coverage. Where the insured does not request a particular type of coverage, the broker is not obligated to recommend or procure such coverage. Maxwell Plumb Mech. Corp. v. Nationwide Prop. & Cas. Ins. Co., 2014 WL 1377722 (2d Dep't 2014) (where insured did not specifically request automobile insurance, the broker could not be found liable for failing to procure such coverage); Tappan Wire & Cable, Inc. v. Cnty. of Rockland, 305 A.D.2d 665, 666 (2d Dep't 2003) (broker owed no duty to procure flood coverage where the

customer made no specific request for such coverage). The New York courts have also found that where the request is simply a broad request for "the best" or "appropriate" coverage, such requests are insufficient to trigger a duty for the broker to procure a specific type or amount of coverage. See, e.g., Transportation Ins. Co. v. AARK Const. Group, Ltd., 526 F.Supp.2d 350, 359-60 (2007) (broker's alleged representation to contractor that he was "fully covered" in connection with a construction project was insufficient to impose liability upon the broker where the policy did not cover completed operations); A&B Furniture, Inc. v. Pitrock Realty Corp., 16 Misc. 3d 1131(A), 847 N.Y.S.2d 900 (Sup. Ct. 2007) (broker was not liable for procuring named perils policy rather than "all perils coverage" where insured asked to be "fully covered"); Storybook Farms v. Ruchman Associates, Inc., 284 A.D.2d 450 (2d Dept. 2001) (a request for Athe best, maximum, appropriate coverage that we could obtain" was insufficient to trigger an obligation on the part of the broker to purchase any particular level of property coverage); Madhvani v. Sheehan, 234 A.D.2d 652, 654 (2d Dept. 1996) (a customer's request for Afull coverage@ was insufficient to trigger a duty on the part of the broker to procure a higher limit of coverage for plaintiff=s automobile); L.C.E.L. Collectibles, Inc. v. Amer. Ins. Co., 228 A.D.2d 196, 197 (1st Dept. 1996) (request for the "best and most comprehensive coverage" is not considered a specific request and therefore does not trigger a duty to advise); Chaim v. Benedict, 216 A.D.2d 347 (2d Dep't 1995) (request for a "top of the line" policy that would cover plaintiffs "fully" did not constitute a specific request for underinsurance coverage, and thus, defendants had no duty to recommend different coverage even though defendants were made aware by the insured that the motorist would be driving out of state and needed "good coverage"). But, see also, Axis Const. Corp. v. O'Brien Agency, Inc., 87 A.D.3d 1092 (1st Dep't 2011) (although customer did not specifically request construction management professional liability insurance, the court found that there was an issue of fact as to whether there was a course of dealing between the parties which might create a special relationship and, therefore, a duty to advise); IDW Grp., LLC v. Levine Ins. Risk Mgmt. Servs., Inc., 40 Misc. 3d 368, 375 (N.Y. Sup. Ct. 2013) (court found broker was negligent as a matter of law when the carrier did not issue the requested policy because the broker sent the premium check to the wrong address for the wholesale broker, explaining that "[a] reasonable broker would have taken one of myriad steps to ensure that coverage was in effect, including confirming receipt of the check with [the wholesale broker], reviewing its bank records to see that the check was never deposited, and taking corrective measures … when [the customer] had serious concerns (which it articulated to [the wholesale broker]) that a 2007/2008 policy was never issued.").

Additional duties may also be imposed upon an insurance broker where the broker has undertaken such additional duties. In such cases, the broker is obligated to act with a reasonable degree of care and accuracy to satisfy those additional duties. Stevens v. Hickey-Finn & Co., Inc., 261 A.D.2d 300, 301 (1st Dep't 1999); see also, Ambroselli v. C.S. Burrall & Son, Inc., 932 F. Supp. 2d 431, 435 (W.D.N.Y. 2013) (in which the Court noted that the broker may have

undertaken a duty to properly estimate the replacement value of the customer's premises by "using a computer program and his visual inspection of the property to assist him.").

In Stevens v. Hickey Finn, the customer went into the broker's office to purchase property insurance for his house. The customer did not request any particular coverage limit, requesting only "proper and adequate coverage." The broker was also an agent for the insurance carrier through whom coverage was going to be placed. As part of the carrier's requirements, the agent ran an estimator program provided by the carrier to determine the replacement value of the premises. This, however, was done in the presence of the customer. A loss later occurred and it was determined that the coverage purchased was insufficient. The customer sued the broker claiming that the broker owed and breached a duty to determine the correct replacement value for the premises. The Court found that "once the agent, in response to plaintiff's request for "proper and adequate" coverage, undertook to estimate the replacement value of the property to be insured, she owed plaintiff a duty to perform that estimation with a reasonable degree of care and accuracy (citations omitted)."

The New York Court of Appeals has held that an insured's receipt of the policy is not a complete defense to a broker's liability, but the insured may be comparatively liable for any loss. American Building Supply Corp. v. Petrocelli Group, Inc., 19 N.Y.3d 730, 736-37 (2012) reargument denied, 20 N.Y.3d 1044 (2013).

In American Building Supply, the plaintiff maintained liability insurance for its two buildings through an excess surplus lines carrier. Plaintiff decided to change brokers and renewed the policy through the defendant broker. One of plaintiff's employees suffered injuries at one of the premises. The carrier denied coverage pursuant to a "cross-liability" exclusion, which excluded coverage for injuries to employees of the insured. Plaintiff brought two separate lawsuits – one against the carrier seeking to declare coverage and one against the broker who renewed the policy, claiming that the broker had failed to procure sufficient coverage. Plaintiff's principal testified during his deposition that he had a meeting with the defendant broker during which they discussed plaintiff's insurance needs. He claimed to have told the broker that he needed "general liability for the employees and for the, you know, customers in Manhattan if anybody was to trip and fall or get injured in any way." The Court found that "issues of fact exist as to whether plaintiff specifically requested coverage for its employees in case of accidental injury and defendant, being aware of such request, failed to procure the requested coverage." Although plaintiff was in possession of his policy before the accident and had not requested any changes to the coverage, the Court found that this did not constitute a complete defense. The Court explained that "[w]hile it is certainly the better practice for an insured to read its policy, an insured should have a right to 'look to the expertise of its broker with respect to insurance matters' (citation omitted)."

Notice of Claim/Occurrence

New York recognizes a duty on behalf of a broker to exercise reasonable care in notifying the appropriate carrier of any claim reported to it by the insured where the insured and the broker have a special relationship. See, Pulte Group, Inc. v. Frank Crystal & Co., Inc., 2012 WL 1372158 (S.D.N.Y. 2012) (broker did not owe any duty to provide notice of an occurrence to insurance carrier on behalf of former customer); Abetta Boiler & Welding Serv., Inc. v. Am. Int'l Specialty Lines Ins. Co., 76 A.D.3d 412, 413 (1st Dep't 2010) (special relationship sufficient to create a duty of notice was established); Philadelphia Indem. Ins. Co. v. Horowitz, Greener & Stengel, LLP, 379 F. Supp. 2d 442, 460 (S.D.N.Y. 2005) (no special relationship existed and, as a result, the broker did not owe or breach a duty to provide notice to the carrier, despite the broker's knowledge of the potential claim).

In Abbetta Boiler, the insured brought a lawsuit against its insurance broker claiming that the broker owed and breached a duty to provide timely notice of a claim to the insurance carrier. The broker had received notice of the claim, and had forwarded the notice to the wholesale broker. It appears that the wholesale broker failed to timely forward the notice to the insurance carrier. The insured presented evidence demonstrating that it had referred all questions regarding its insurance claims to the retail broker, and that the retail broker had handled all such needs, including referring its claims to insurers. The Court found that this was sufficient to establish the existence of a special relationship, imposing a duty upon the broker to "exercise a reasonable degree of care in notifying the appropriate primary or excess insurer of any claim reported to it by" the insured. More importantly, the Court found that the retail broker had "failed to follow up either with [the wholesale broker or the insurer], to ascertain that [the insurer] actually received notice of the claim and the action, as required by the policy to invoke coverage. [The retail broker] thereby breached its duty to [the customer], and its attempt to shift the blame onto [the wholesale broker] on the ground that ultimately it was [the wholesale broker] that failed to pass the claim on to the insurer is unavailing."

Citing to Abetta, a similar result ensued in Homestead Vill. Assoc., L.P. v. Diamond State Ins. Co., 818 F. Supp. 2d 642, 653 (E.D.N.Y. 2011). In that case, the broker testified that it was their "practice and procedure to evaluate the claims of its various insureds and forward them to the appropriate carrier." The Court found that this was sufficient to create a special relationship and that there was an issue of fact as to whether the broker had breached a duty of reasonable care in forwarding notice of the claim to the insurer. The Court also found in this case that a broker might create a contractual obligation where it has promised to provide such notice. In particular, the plaintiff in that case alleged that the broker had "orally agreed to handle all of [the customer]'s insurance-related matters, apparently 'including reporting claims to the

appropriate carriers.'" The Court found that this created an issue of fact as to whether the broker had contractually undertaken the duty to provide such notice.

CASE STUDIES

CASE 1:

Line of Coverage: Builder's Risk

Position of Person in the Agency Involved: Principal

Personal or Commercial Lines: Commercial

Type of Coverage Involved: Builder's Risk

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Broker failed to notify builder's risk carrier of a claim resulting in loss of coverage.

Settlement or Trial: Settlement

Description of Error: Broker failed to memorialize insured's instruction not to provide notice

Tip to Avoid Claim: If your insured instructs you to do something or makes a request that may result in the insured being left without coverage, be sure to memorialize that instruction or request in writing to the insured.

Summary of Case: Insured owned a hotel in Queens, New York, which was undergoing substantial renovations. During the course of these renovations, the hotel suffered substantial damage due to a water infiltration. At the time of the loss, the insured had coverage under both a commercial property policy and a builder's risk policy through separate carriers. The insured initially instructed the broker to report the claim only to the commercial property carrier and not to report the claim under the builder's risk policy. The broker did not memorialize this instruction in any way.

After the commercial property carrier denied coverage for the claim, the insured instructed the broker to report the claim to the builder's risk carrier, which in turn denied coverage based upon late notice. The insured then brought an action claiming that the broker

breached its duty by failing to immediately notify the builder's risk carrier, denying that he ever instructed the broker not to do so. Since there was no written documentation confirming the insured's instructions, the broker was left to face a "swearing contest" with the insured. Had the broker sent a letter to the insured confirming the insured's instructions to report the claim only to the commercial property carrier and not the builder's risk carrier, the broker likely could have obtained summary judgment or, at the very least, settled the claim for a nominal sum.

CASE 2:

Line of Coverage: Commercial General Liability

Position of Person in the Agency Involved: Principal

Personal or Commercial Lines: Commercial

Type of Coverage Involved: Commercial General Liability

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Broker failed to add insured onto policy as requested.

Settlement or Trial: Settlement

Description of Error: Broker failed to keep the insured advised of efforts to obtain requested coverage or its inability to do so.

Tip to Avoid Claim: Always keep your insured informed regarding your activities. Additionally, it is important to follow up with the insurer if you do not receive an actual endorsement providing the agreed-upon coverage. Further, a broker should not issue a certificate of insurance specifying the existence of coverage before the coverage is actually issued by way of policy form or endorsement.

Summary of Case: The insured requested that the broker obtain a commercial general liability policy naming both it and a Joint Venture of which it was part as insureds. The broker obtained the requested policy, but it did not include the Joint Venture. The broker contacted the carrier to request that the policy be corrected to add the Joint Venture as an insured and, while the carrier indicated it would do so, it never processed the request and, in fact, the policy for the subsequent year was again issued without the Joint Venture. The broker continued to try to correct this issue, but never succeeded in doing so. The broker also failed to advise the insured that coverage for the Joint Venture was not in place and, in fact, issued a certificate of insurance indicating that the Joint Venture was a named insured on the policy.

Ultimately two injuries occurred at a construction site being managed by the Joint Venture and the Joint Venture was named as a defendant in resulting personal injury suits. The carrier denied coverage to the Joint Venture on the basis that it was not an insured under the policy. The insured sued the broker for failing to obtain the requested coverage for the Joint Venture. In response to a motion for summary judgment, the Court commented that the broker could be found liable for failing to advise the insured that the broker had not yet obtained an endorsement providing the promised coverage.

The broker could likely have avoided any potential liability by keeping the customer apprised of the broker's efforts and the carrier's responses (particularly since the carrier had only represented that it was still attempting to confirm approval to add the Joint Venture) and by not issuing a certificate of insurance representing the existence of coverage which had not actually be issued. Although a carrier may advise that insurance coverage is forthcoming or even agree to provide the coverage, courts will generally refuse to enforce such coverage unless there is an actual endorsement or a mutual mistake in the failure to issue such endorsement.

CASE 3:

Line of Coverage: Homeowners Insurance

Position of Person in the Agency Involved: Personal Lines Customer Service Representative

Personal or Commercial Lines: Personal

Type of Coverage Involved: Homeowners Insurance

Procedural or Knowledge-Based: Procedural

Claimant Allegation: Broker failed to notice substantial decrease in policy limits

Settlement or Trial: Settlement

Description of Error: Broker failed to review policy to ensure it provided requested coverage.

Tip to Avoid Claim: Always review policy documents to ensure that they provide the coverage expected.

Summary of Case: The retail broker assisted its customer in procuring a homeowners policy covering both the primary dwelling and a separate garage, subject to separate limits. The policy was procured through a wholesale broker. When the carrier renewed the policy, it substantially reduced the limits for the separate garage. Neither the retail broker nor the wholesale broker noticed this change and neither took steps to correct it.

When the garage was damage in a fire, the lower limit was insufficient to cover the loss and the insured brought suit against the carrier and the retail broker; the retail broker asserted a claim against the wholesale broker. Although the Court found that the retail broker did not have a special relationship with the customer, and, therefore, did not have a duty to advise the insured that the coverage was insufficient, the Court refused to dismiss the claims alleging that the broker had failed to procure the requested coverage (i.e. the same coverage as had been included on the prior policy) or to advise the insured of its inability to do so. The Court also found that the wholesale broker owed a similar duty to the retail broker.

This summary of the standard of care for New York insurance agents and brokers was prepared by the law firm of Keidel, Weldon & Cunningham, LLP. The KWC law firm concentrates its practice in the defense of insurance agents and brokers errors and omissions claims and litigation; errors and omissions loss control, counsel and education; insurance coverage analysis and litigation; and, insurance regulatory matters. The KWC law firm maintains offices in White Plains, NY; Syracuse, NY; New York, NY; Wilton, CT; Warwick, RI; Fair Lawn, NJ; and, Wyncote, PA. Please direct any questions to James C. Keidel, Esq. or Christopher B. Weldon, Esq., by mail at the KWC's main office at 925 Westchester Avenue, Suite 400, White Plains, NY 101604, or by telephone at 914-948-7000, or by email at jkeidel@kwcllp.com and cweldon@kwcllp.com