Agents E&O Standard of Care Project

Ohio 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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Duty of Ohio Insurance Agent

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I. Insurance Agent/Customer Relationship

In Ohio, the courts typically hold that the relationship between an insurance agent and a customer is an ordinary business relationship. While Ohio law has recognized a public interest in creating certain fiduciary relationships, such as attorney-client and doctor-patient, it does not typically recognize an insurance agent-customer relationship to be more than an ordinary one. The customer frequently attempts to broaden the liability of an insurance agent by claiming that a fiduciary relationship existed between he or she and the agent. If the customer can establish the existence of a fiduciary relationship with the insurance agent, then an Ohio court will impose a heightened duty, or standard of care, upon the agent.

II. Agent's General Duty

The general duty of care which an insurance agent in Ohio owes to his or her customer is the duty to exercise good faith and reasonable diligence in procuring insurance for his or her customer. Ohio courts typically hold that an insurance agent is not liable to his or her customer on the contract of insurance between the customer and the insurer. Moreover, Ohio law recognizes the principal of agency law that an agent for a fully disclosed principal who acts within the scope of his or her authority is not liable on the contracts which he or she makes.

III. Agent's Duty to Procure

The customer bears the responsibility under Ohio law to request from the insurance agent the specific coverages which he or she desires. The insurance agent need only acquire those policies and coverages which the customer specifically requests. The insurance agent-customer relationship is not generally recognized as a relationship wherein the agent has a continuing duty to advise, guide, or direct a customer to procure coverages beyond those that the customer specifically requests. Ohio does not recognize the "reasonable expectation doctrine"which provides that coverage may be imposed in line with the reasonable expectations or intentions of the insurance applicant or insured.

IV. Agent's Duty to Advise

Ohio courts imposes no duty upon an insurance agent to advise a customer as to coverages or policy limits in the absence of a direct request or inquiry by the customer. The insurance agent need not determine the needs of his customer, nor ensure that the customer's property is properly valued. The insurance agent is under no duty to make yearly inspections of the customer's property to ensure that the value of the property has not changed. Rather, it is the duty of the customer to adequately insure his or her property. In the absence of a direct inquiry, the agent is under no duty to provide specific advice about an insured's policy or to explain the terms of a customer's insurance policy.

V. Agent's Fiduciary Duty

A fiduciary is a person having a duty, created by his undertaking, to act primarily for the benefit of another. Under Ohio law, a fiduciary relationship is one in which there is a special confidence or trust imposed in another which results in a position of superiority or influence. A customer's reliance on his or her insurance agent is not sufficient, by itself, to establish a fiduciary relationship. An ongoing business relationship in which the customer merely relies upon his or her insurance agent's advice and expertise is not a fiduciary relationship. Nor will the mere disclosure of personal or confidential information create such a relationship. These events describe an ordinary business relationship, not a relationship in which a special trust and confidence exists. Further, while a fiduciary relationship may arise informally, it cannot be unilateral; both parties must understand that a relationship of special trust and confidence has been created.

VI. Customer's Duty

While an insurance agent in Ohio owes a general duty of care to his or her customer, an insurance agent in Ohio is not liable to his or her customer when the loss is due to the customer's own act or omission. The customer has a duty to exercise ordinary, reasonable care for his or her own protection. The customer is under a duty to examine the coverages in the insurance policy to ensure that they meet his or her needs, and to notify the insurance agent of any deficiencies in the coverages. The customer's failure to read and know the contents of his or her insurance policy can defeat the claim that the insurance agent failed to properly advise or failed to obtain the proper coverages. Several Ohio courts have held that the customer is barred from recovering for failing to read the policy. However, several Ohio courts refuse to apply this complete defense and, instead, hold that the customer's failure to read the policy does not bar a claim as a matter of law, but raises a question of comparative negligence for trial. While the Ohio Supreme Court has not yet directly ruled upon this conflict between Ohio courts, the Ohio Supreme Court has held that an insured has a duty to examine the coverages in his or her policy and is charged with knowledge of the contents. The issue which the Ohio Supreme Court decided, however, did not include whether the insured's failure to read his or her policy constitutes a total bar to recovery.

VII. Landmark Ohio Cases

1. *Stuart v. National Indemnity Co.,* 7 Ohio App.3d 63, 454 N.E.2d 158 (8th Dist. 1982)
   The court held that an insurance agent may be liable to his or her customer for negligently failing to procure insurance coverage. The court further held that an insurance agent acting for an openly identified principal is ordinarily not liable for the principal's breach of contract, however, both the principal and the agent would be liable for the tortuous misconduct of the agent committed within the scope of his employment. The insurance agent bound coverage immediately for his customer even though the agent was not authorized to do so. As a result, the insurance agent bore the risk of loss and was responsible to his customer for any supposedly covered loss from the moment he delivered the unauthorized binder until coverage was actually obtained.

2. *First Catholic Slovak Union v. Buckeye Union Insurance Co.,* 27 Ohio App.3d 169, 499 N.E.2d 1303 (8th Dist. 1986)
   The customer argued that the insurance agent should have provided the coverages as specified in the customer's by-laws. The court disagreed, holding that an insurance agent only needed to procure the coverages specifically requested by the customer. The court further noted that since the customer had held the same policies and coverages for several years, and the customer made no complaint about the coverages during such time, the customer could not now complain that the insurance policy did not comply with its by-laws.

3. *Nielsen Enterprises, Inc. v. Insurance Unlimited Agency, Inc*., 10th Dist. No. 85AP-781, 1986 WL 5411 (May 8, 1986)
   The legal issue for the court was whether an insurance agent had a duty, during the term of an existing policy, to be apprised of new insurance offerings, to provide interim reviews of an insured's coverage, and to offer the customer newly available coverage that might have closed existing gaps in coverage. The court held that, as a matter of law, there was no continuing duty by the agent to offer new insurance endorsements that became available during the term of the customer's policy and, further, that there was no special relationship between an insurance agent and the customer that would impose such a duty. The court found that the relationship between the parties was an ordinary insurance agent-customer business relationship, and, as such, the agent was to have only acted with the knowledge and skill expected of one engaged in the business of procuring insurance.

4. *Craggett v. Adell Ins. Agency*, 92 Ohio App.3d 443, 635 N.E.2d 1326 (8th Dist. 1993)

The customer sued the insurance agent for negligence. The customer alleged the agent failed to advise her and misrepresented the status of her annuity policy. She contended she was unaware that the agent had used the dividends from her annuity policy to purchase life insurance policies for her son and grandchildren. She further alleged the agent knew she had purchased the annuity policy to fund her retirement. The agent contended the customer executed the necessary forms for the purchase of the life insurance policies. The customer admitted she had executed the forms. The court found that the evidence demonstrated that the customer had also relied upon the advice of her husband in purchasing the insurance policies. The court, therefore, held that a fiduciary relationship cannot be unilateral as the fiduciary must be aware of the extraordinary nature of the relationship. In order to establish a fiduciary relationship, the customer must demonstrate more than reliance upon the expertise and advice of the agent.

5. *Lu-An-Do, Inc. v. Kloots*, 131 Ohio App.3d 71, 75, 721 N.E.2d 507 (5th Dist. 1999)

The vendor of a restaurant, having retained a security interest in the restaurant's contents, sued the insurance agent for professional negligence and negligent misrepresentation. The vendor contended the agent failed to assist the purchaser fulfill its contractual obligation to procure coverage for the vendor and misrepresented its status as an additional insured. The agent issued a certificate of insurance to the vendor which indicated the vendor was a loss payee in the policy; however, the vendor was never named as a loss payee in the policy. The court held: 1) the issuance of the certificate of insurance created no duty of care between and agent and the vendor; and 2) the vendor's reliance on the certificate for "loss payee" status was unforeseeable and unjustified as a matter of law since there were warnings and disclaimers on the certificate and only the insurance policy set forth the actual coverages.

6. *Fry v. Walters & Peck Agency, Inc.*, 141 Ohio App.3d 303, 750 N.E.2d 1194 (6th Dist. 2001)

The court held that an insurance agent owed no duty to explain to the customer the co-insurance clause found in the insurance policy since the evidence was that the customer did not specifically request the agent to explain the co-insurance clause. The court also held that the customer had a duty to examine the coverages in the policy and was charged with knowing the contents.

7. *Island House Inn, Inc. v. State Auto Ins.*, 150 Ohio App.3d 522, 2002-Ohio-7107, 782 N.E.2d 156 (6th Dist. 2002)
The customer made a claim for boiler failure and the insurer denied the claim. The customer sued the agent, alleging the agent breached his duty to advise the customer of its insurance needs. The customer did not request "boiler coverage", and the agent did not recommend such coverage. . While the court found that such a duty may exist if the insurance agent knows that the customer is relying upon the agent's expertise, the court held in favor of the agent. The customer was barred from recovery for breaching its duty to examine the insurance policy. An examination of the policy would have clearly revealed that no boiler coverage existed.

VIII. Case Studies

1. *Chmielewski v. American States Inc. Co.,* Case No. CV-398, Ashtabula County Court of Common Pleas, Ohio, unreported, 1994
   a) Liability Coverage
   b) Agent
   c) Personal Lines
   d) Homeowner's Coverage
   e) Knowledge Based Error
   f) Negligent Failure to Procure
   g) Summary Judgment for Agent
   h) Failure to Procure Coverage
   i) The agency should discuss with the customer those activities of the customer which could affect coverage and the agent should place in writing to the customer any concern which he or she may have during his or her review of the coverages with the customer.
   j) The customer's pole barn and contents were destroyed in a fire. The insurer paid for only those damaged/destroyed items which were not business related. The customer sued the agent for failing to advise and explain to them what constituted the operation of a business and for failing to procure coverage for their business activity. The customer denied that the agent had provided them with the policy. The agent contended he inquired several times throughout the years as to whether the customer was operating a business and the customer denied such activity. The court held that there was no evidence of a fiduciary relationship between the agent and the customer and, therefore, the general duty of care of an insurance agent did not include a duty to advise or explain.

2. *Javitch v. Todd Associates, Inc.* Case No. 3:03 CV 972, United States District Court, Northern District of Ohio, Eastern Division, unreported, 2003
   a) Liability and Crime Coverage
   b) Agent
   c) Commercial Lines
   d) Professional Liability and Dishonesty Coverage
   e) Knowledge Based Error
   f) Negligent Failure to Procure
   g) Settlement
   h) Failure to Procure Coverage
   i) The agency should have a clear understanding of the specific coverage desired by the customer and the agent should clearly document any and all coverage requests by the customer.
   j) The receiver of the customer sued the insurance agent for failing to procure for the customer the proper insurance to protect against theft, dishonesty, or misappropriation of escrow funds by the customer. The court determined that a genuine issue of material fact existed for trial with respect to whether the customer had requested insurance to protect the escrow monies from theft or dishonesty.

3. *Progressive Preferred Ins. Co. v. Hammerlein Helton Ins*., 170 Ohio App.3d 154, 866 N.E.2d 521 (8th Dist. 2006)
   a) Liability Coverage
   b) Agent's CSR
   c) Personal Lines
   d) Automobile Coverage
   e) Procedural Based Error
   f) Agent Breached Duty to Principal by Backdating Coverage Limit
   g) Trial
   h) Agent Requested Coverage Limit be Backdated
   i) The agent should not backdate coverage limit without consent of insurer and agency's voice-mail should include a disclaimer for binding coverage effective immediately.
   j) The customer telephoned the insurance agency during non-business hours (Friday evening) and left a voice message requesting an increase in coverage limits for the customer's automobile policy. The following day (Saturday), the customer's vehicle was involved in serious motor vehicle accident. The other vehicle's driver was seriously injured. The customer was liable for the accident. On Monday morning, the agent's CSR retrieved the customer's voice-message and called in the request to the insurer. The agent's CSR requested that the increase in coverage be effective that prior Friday. The insurer, unaware of the motor vehicle accident, processed the request and increased the coverage limit. The insurer later learned of the accident and filed a declaratory judgment action. The trial court granted summary judgment against the insurer. The insurer paid the

liability claim and filed suit against the agent for indemnification, claiming the agent breached the insurer's producer's agreement and the insurer's online guide. The trial court denied summary judgment to the agent and trial occurred. The agent was found liable at trial to the insurer for the difference between the customer's prior coverage limit and the increased coverage limit. The trial court further found that there had been no meeting of the minds between the customer and agent concerning the effective date for the customer's request to increase the coverage limit, and as such, the agent had no authority to request the insurer to have the effective date be Friday for the increased coverage limit.