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The Insurance Company – Agent Relationship and Liability, General Rules

A Primer for Presentation Session:

Navigating Issues Between Insurance Companies and Independent Agents

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The Insurance Company - Agent Relationship and Liability, General Rules

Agents continue to be a vital part of the insurance industry. They are subject to potential liability for their own negligence as it relates to their obligations to their clients, who are potential insureds. Moreover, the negligence of an agent can be imputed to insurance companies on whose behalf they market, sell and procure policies. The traditional relationship between an independent agent and broker, and an insurance company can be fraught with additional issues of indemnity and conflict as it relates to disputed claims and investigations on the coverage side. For this reason, this paper provides a brief summary of the general rules regarding the relationship between insurance companies and agents.

Agents– Basic Duties and Liability Considerations

When an insured does not have the coverage expected, one of the first places an insured turns is to the insurance agent, who was likely, until that point in time, a trusted business partner (dare we use the word "advisor" here?) to the insured. While it is difficult to say which mistakes most often lead to litigation, there are some commonly reoccurring themes that develop in coverage and professional liability litigation which have, at their geneses, an agent's alleged error. Chief among them, and perhaps the most frequent complaint regarding agent mistakes, is when an insured maintains she specifically asked for coverage that she now finds herself without.

In most states, insurance agents are held to the "order taker" standard of care. While the specific verbiage varies from jurisdiction to jurisdiction, the essence of this standard is that an agent is merely an "order taker," obligated to procure only the insurance specifically requested of clients.[i] Put another way:

> Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs. In addition, upon receiving the policy of insurance, the client has a duty to review the policy to ascertain that his or her needs are met. In addition, insurance agents generally are not liable for actions other than obtaining insurance coverage for their insureds unless a special relationship has been established between the parties.

Couch on Insurance §46:38 (3ded.2011) (footnotes omitted). *See also,* Annotation, *Liability of Insurer for Failure to Advise Insured as to Coverage Needs,* 88 A.L.R.4th 249, 257 (1991). In general, the agent has the duty to exercise reasonable care in procuring the insurance as requested by the insured. However, In 10 states and Washington, D.C., there is either a heightened duty of care or the duty is determined on a case by case basis.[ii]

Even in the 40 states adhering to the "order taker" standard, claims against agents are not

infrequent. That is because when the insured and the agent have a special relationship, courts will impose a heightened duty of care upon the agent regarding the procurement of appropriate insurance. In particular, the heightened duty of care arises when an agent:

1. Misrepresents the coverage being offered. (For example, telling the insured business interruption coverage is included in standard property policies);
2. Undertakes to assess the business needs of the insured and offers advice on additional coverage recommended but not requested;
3. Holds him/her/themselves out as an expert or specialist. (For example, representing to the insured that the agent is a specialist in commercial trucking insurance);
4. Has a long-standing, recurring relationship with the insured that involves the giving and receiving of advice regarding coverage needs, or separate payment for coverage recommendations, for example.

Summarizing, when an agent goes beyond mere "order-taking" and the interaction is more than the typical agent-insured purchasing transaction, a heightened duty of care can be found not just in the minority of U.S. jurisdictions, but in virtually all. The cases are fact specific and run the gamut regarding the conduct at issue, with most courts ultimately rejecting the attempt at liability at the dispositive motion phase of the litigation.

Finally, the above duty thresholds are considered in the context of when the coverage for a type of loss is not as anticipated by the insured. There are a whole host of other agent mistakes, administrative in nature, which are typically resolved under a traditional negligence standard. Among them are mistakes related to renewals, premiums, changes in coverage mid-policy term, reducing limits without permission, failure to implement changes to designated insureds, property addresses, vehicles, etc.

What Agent Mistakes Mean for the Insurance Company

Imputed Liability

Independent agents are independent contractors, not employees. In most instances, for insurance companies themselves, the potential liability is not a traditional vicarious liability, but rather one of agent-principal. *National Grange Mut. Ins. Co. v. Wyoming County Ins. Agency, Inc.*, 156 W. Va. 521, 195 S.E.2d 151 (1973) (relationship between an agent and his or her insurer is controlled by the law of agency). Within the parameters of the agent-principal relationship, there are several circumstances in which an agent can bind a principal, despite a mistake.

For example, when an insurance agent acts within the scope of his authority, despite making a mistake, that mistake can be binding on the principal, the insurance company. *See, e.g. Pressley v. Travelers Property Cas. Co.*, 817 A.2d 1131 (Pa. Super. 2003) (insured relied on representations of agent that mother would be added to automobile policy with same coverage as daughter received, and, thus, the insured was entitled to coverage as promised by the agent, even though the language in the policy clearly excluded a nonresident mother from coverage, where among other factors, agent had authority

to bind the insurer).

Next, when an agent acts with implied or apparent authority, he can bind the company. Accordingly, when an insurance company acts so as to create, in the mind of the insured, the impression that the agent acts on the carrier's behalf, the carrier will be bound by the agent's conduct. *Couch on Insurance*, 3d. § 48:12; *see also, Nehring v. Bast*, 103 N.W.2d 368, 376 (Minn. 1960). In a Georgia case, an insurance agent was deemed to have apparent authority to issue certificates of insurance naming the real estate developer as an additional insured, even if though the insurance companies' policies required that additional insureds be added only by endorsement, because the agent routinely signed policies, declaration pages, and certificates of insurance as the insurers' "authorized representative," the insurers expressly provided the agent with authority to countersign policies, the insured believed that the agent was the insurers' authorized representative, and the reliance on the apparent authority was reasonable. *Sumitomo Marine & Fire Ins. Co. of America v. Southern Guar. Ins. Co. of Georgia*, 337 F. Supp. 2d 1339, 1353 (N.D. Ga. 2004).

Agent Liability to the Insurance Company - Indemnity and E&O

First and generally, the insurance agent is a fiduciary to the carrier. *See, e.g. Evtex Co., Inc. v. Hartley Cooper Associates, Ltd.*, 911 F.Supp. 732 (S.D.N.Y. 1996). The "agent must exercise good faith and reasonable diligence in discharging the duties and trusts owed…. this being especially true when their instructions are not specific, but clothe them with discretion. This fiduciary duty also extends to officers in their capacity as agents of the insurer. In all transactions affecting the subject matter of the agency, it is the duty of the agent to act with utmost good faith and loyalty. In accepting the agency, the agent impliedly, if not expressly, undertakes to give his or her principal the agent's best judgment and decisions." *Couch on Insurance*, 3d. § 54:2 (citations and annotations omitted). So, for example, when a title insurance agent in a mortgage refinance transaction misquoted and mischarged the title insurance premium, the cause for breach of a fiduciary duty was a viable claim to recover the balance of the premium. *Markocki v. Old Republic Title Ins. Co.,* 527 F.Supp.2d (E.D. Pa. 2007). This is generally how losses between the insurance company and the agent are handled when a mistake is one that does *not* arise out of coverage.

To be sure, the fiduciary duty between an agent and the carrier does not go away when the insured is alleging a mistake causing the insured a loss. However, it often takes a back seat when focusing on the liability issues between the three parties. To be clear, even when liability to the insured can be imputed to the insurance company, that does not relieve the agent of liability for the mistake as to the insured. Moreover, under the agency agreement, the agent may be liable for any loss to the insurance carrier who may have had to honor the mistake under either actual or apparent authority. Almost all agency agreements require indemnity in the event of an agent's mistake, the scope of the indemnity may be, in some circumstances, the loss paid, and in others, only the difference in premium between the risk as insured, and as paid by the carrier. The language of the agency agreement will control. Moreover, absent a contractual provision specifying the scope of the indemnity, there is also common law indemnity in most states, subject to joint and several liability laws.

However, what is recoverable as damages is not always clear. For example, in *Bogley v. Middle*

Tavern, Inc., 421 A.2d 571 (Md. 1980), the Maryland appellate court considered an instance in which the agent failed to provide business interruption coverage as requested. The agent and the carrier had both been found liable to the insured for the coverage at issue. On the crossclaim against the agent, the court determined that the damages would ordinarily be the difference between the premium for the coverage actually obtained, and what the premium would have been had the business interruption been included. The court suggested that the actual loss paid to the insured might have been recovered had there been evidence that the agent had agreed to coverage that the insurer would have rejected or that the agent failed to carry out unequivocal instructions form the company. *Bogley,* 421 A.2d at 573-574.[iii] *See also, Julien v. Spring Lake Agency*, 166 N.W. 255 (Minn. 1969). However, other courts have determined the measure of damages as that liability which the insurance company incurred but would not have, had the agent not made a mistake. *See, e.g., Central. Nat. Ins. Co. of Omaha v. Devonshire Coverage Corp.*, 566 F.2d 490, 498-99 (8th Cir. 1977).

Whose Agent is it Anyway?

At this point, we should probably take a step back and define exactly who we are talking about when we use the word "agent." In common parlance today, we use the words "agent," "broker," and modernly, "captive agent," and "independent agent" almost interchangeably. It results in a lot of confusion.

If you Google-Up the question of "who does an 'insurance agent' represent?", you are going to get this answer: "…insurance agents represent the insurance provider that employs them and help sell policies from that single provider. Insurance brokers represent the consumers who use them and can help them shop for policies from multiple providers."[iv] To be fair, Google is not too far off here, for the common law rule that is still *technically* applicable in many jurisdictions. There are a lot of cases, in a lot of states, that make this very distinction. For example, the Supreme Court of Florida has explained:

> The terms "insurance broker" and "insurance agent" are not synonymous; an "insurance broker" represents the insured by acting as a middleman between the insured and the insurer, soliciting insurance from the public under no employment from any special company, and, upon securing an order, places it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker, while an "insurance agent" represents an insurer under an exclusive employment agreement by the insurance company…. The distinction between an agent and a broker is important because acts of an agent are imputable to the insurer and *acts of a broker are imputable to the insured.*

Essex Ins. Co. v Zota, 985 So.2d 1036, 1046 (Fla. 2008) (citation omitted). So, is it that: "agents" or "captive agents" bind the carrier while "brokers" or "independent agents" bind the insured? No, that's not it; nice try Google. The *Essex* court goes on to explain that under Florida law and "based on the recognition of the 'sometimes amorphous nature of an insurance broker,'… under the provisions of section 626.342(2), Florida Statutes (1989) as well as Florida's common law, civil liability may be imposed upon insurers who cloak unaffiliated insurance agents with sufficient indicia of agency to induce a reasonable person to

conclude that there is an actual agency relationship." *Essex*, 985 So.2d at 1046 (citations omitted). So, in Florida, statutes and common law can easily shift who the "agent" or "broker" represents in any given statute. A similar analysis applies in Minnesota. *See, e.g., Morrison v. Swenson,* 142 N.W.2d 640 (Minn. 1966) (superseded by statute on other grounds).

The determination in California is equally nuanced. The state draws a distinction between insurance brokers and insurance agents. An insurance agent is "a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." Cal. Ins. Code § 31. An insurance broker is "a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer." Cal. Ins. Code § 33. The general rule appears to apply. "If an insurance agent is the agent for several companies, and either selects the company with which to place the insurance or picks an insurer at the insured's direction, the insurance agent is the agent of the insured, not the insurer. *Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 865 (Cal.App.3d Dist. 1988). However, in context and application, often the result shifts. For example, in *O'Riordan v. Federal Kemper Life Assurance Co.,* 36 Cal.4th 281 (Cal. 2005), the California Supreme Court considered whether the factual truth contradicting application misrepresentations related to medical history were imputed to the carrier because the independent agent knew the truth of the matters. The court said yes, because although the independent agent was "not [the insurance company's] agent when he assisted" the insured in responding to the medical questions, "he became one when he" submitted the application and a request to be so appointed. Thus, upon becoming an agent for the insurer during the application process, the knowledge was imputed to the carrier. *O'Riordan*, 26 Cal.App.4th at 288-89.

In Illinois, the general rule regarding agents representing insurers and brokers (aka independent agents) representing insureds equally applies, but courts look to a four factor test to determine whether an intermediary is an agent or a broker. They are: (1) who initiated the intermediary's actions; (2) who controls the intermediary's actions; (3) who pays the intermediary; and (4) whose interests the intermediary represents. *See e.g.*, *Royal Maccabees Life Ins. Co. v. Malachinski*, 161 F. Supp. 2d 847, 851–52 (N.D. Ill. 2001) (citing *Roby v. Decatur Steel Erectors, Inc.*, 375 N.E.2d 1355, 1359 (1978)).

Still in other states, like Texas, the determination is largely statutory. The Texas Insurance Code specifically defines who qualifies as an agent for the purpose of attributing liability for violations of code provisions. *See* TEX. INS. CODE ANN. § 4001.051. Section 4001.051(b) of the Code provides a list of persons who are considered to act as the agent of an insurer "for purposes of the liabilities, duties, requirements, and penalties provided" by the Code, "[r]egardless of whether the act is done at the request of or by the employment of an insurer, broker, or other person." *Id*. The list includes anyone who "receives, collects, or transmits an insurance premium," *Id.* § 4001.051(b)(7) as well as anyone who "receives or transmits other than on the person's own behalf an application for insurance or an insurance policy to or from the insurer." *Id.* § 4001.051(b)(6).

In Oklahoma, there are both common law rules and statutes implicated. Under common law, an agent taking an application is the agent of the insured. *Atlas Life Ins. Co. v. Chastain,* 178 P.2d 109 (Okla. 1946). Codified, at 36 O.S. § 1453.3.A, every insurance producer or limited lines producer who solicits or negotiates an application of insurance shall, "in any controversy between the insured or the insured's beneficiary and the insurer, be regarded as representing the insurer…." However, as to surplus lines

carriers, the opposite is true: the broker is the agent of the insured. 36 O.S. § 1435.3.B.

Finally, the question of dual agency is also difficult to pin down. Many states recognize the potential for dual agency, including California and Illinois, among others. Even Texas, whose statutory provisions primarily control, recognizes that in limited circumstances, an agent may be deemed to have acted on behalf of both the insured and insurer. *See, e.g., Vela Wood PC v. Associated Industries Insurance Co., Inc.,* 485 F.Supp.2d 704 (N.D.Tex. 2020) (holding that an agent acts on behalf of the insurance company for acts delineated by the Texas insurance code, for example taking premiums and selling a policy, but not for submission of a claim to a carrier, which is not specified by statute). An agent or independent agent may be acting on behalf of an insured when identifying and recommending particular coverages and/or carriers, but on behalf of the insurer when taking and submitting the application. Fundamental to the question of agency is: as to the actions/mistakes at issue, on whose behalf was the agent acting?

Context is Everything

The rules and considerations above provide a general roadmap for considering the impact and role of an agent's potential liability in a coverage dispute between an insured and a carrier. Some disputes are laden with agent conduct implications, like material misrepresentation/rescission matters and administration mistakes. Others involve post-issuance coverage determinations that at first blush are centered on insurer decisions – for example, a coverage dispute based on the terms of the policy, or a failure to settle. Regardless, an early and basic assessment of the agent's conduct to date and expected involvement forward requires understanding the above general rules and determining the nuances in the particular jurisdiction. With that foundation established, turning to the following inquiries in light of the appliable law is critical to developing a successful dispute resolution.

1. Did the agent make a mistake?
2. If so, was it material and did it implicate coverage?
3. Is the agent the agent of the insured or the insurer?
4. If there is a dual agency issue, which act of agency creates the exposure(s) at issue?
5. Is there a potential indemnity claim, contract or common law, against the agent?
6. Is an agent sued directly? If so, is there E&O coverage potentially available? If not, will the carrier defend the agent even absent a joint defense agreement?
7. Is there are fraudulent joinder issue?
8. Is a joint defense agreement advisable? Or a crossclaim?
9. Is there evidence the insured and agent are cooperating, even implicitly, in the litigation?
10. Has the agent been involved in the underwriting or claim process and to what objective or end?

[i] *See, e.g.,* Bronson Norby, LP, Aaron ----, 2019 U.S. 50 State Insurance Agent Standard of Care Update and Overview.

[ii] Heightened duty: Connecticut, Florida, Georgia, Idaho, Michigan, New Jersey, Pennsylvania (and the District of Columbia); Case by Case: Arizona, Hawaii and Montana. Author's Note: Please double check the jurisdiction's current case law and statutes to confirm the foregoing, and which states adhere to the "order taker" standard of care or deviate therefrom.

[iii] In *Bogley,* the insurance company failed to present evidence of the premium difference at issue, so it's crossclaim against the agent ultimately failed. *Id.*

[iv] Googler Beware: https://www.google.com/search?q=who+does+an+insurance+agent+represent&rlz=1C1GCEA_enUS1050US1050&oq=Who+doe+an+insurance+agent+&aqs=chrome.1.69i57j0i13i512j0i13i30l2j0i22i30l2j0i15i22i30j0i390i650.9039j0j7&sourceid=chrome&ie=UTF-8