



PROFESSIONAL LIABILITY UNDERWRITING SOCIETY

Errors & Omissions for Insurance Agents

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Your source for professional liability education and networking.

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- Duties & Liabilities of Insurance Agents
- Underwriting Insurance Agents E&O
- E&O Insurance
- Trends in Insurance/Insurance Agent Litigation
- Case Examples
- Risk Management

- General Duties:
 - Honesty & Fairness
 - Reasonable Skill & Care
 - Disclosure
 - Accounting

- Fiduciary Duties:
 - Includes all of the General Duties
 - Loyalty
 - Obedience
 - Confidentiality



Normal Standard of Care or Duty Insurance Agents - MN

- “An insurance agent’s duty is ordinarily limited to that of an agency relationship, to act in good faith and to follow instructions.”

Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn.1989)

ORDER TAKER STANDARD

- Heightened Standard of Care
- An insurance customer can demonstrate a special relationship by showing that there exists something more than the standard agent-customer relationship. This depends upon the particular relationship between the agent and the customer and is determined on a case by case basis.

- Heightened Standard of Care
- To show a special relationship exists between an insurance agent and an insured is a high burden and the courts have frequently been wary to find the existence of a special relationship in prior cases.

- Tort Liability
 - Negligence
 - Misrepresentation
 - Breach of Fiduciary Duty
- Contractual Liability
 - Breach of Agent-Carrier Contract
 - Binding Coverage in Excess of Authority
 - Breach of Agent-Insured Contract

- Factors considered in rating:
 - Premium Volume
 - Number of Agency Staff
 - Revenue & Commissions
 - Type of Agency Services Provided
 - Book of Business
 - Location
 - Claim Experience
 - Direct Appointments vs. amount of Brokered Business
 - Retroactive Coverage

- Other considerations:
 - Agency History
 - Qualifications & Experience of Agency Staff
 - Internal Policies & Procedures
 - Risk Control
 - Carrier Representation
 - Scope of Related Services Provided

- Coverage to defend against claims alleging a negligent act, error, or omission; personal injury or advertising injury in the rendering of Professional Services
- Claims Made/Claims Made and Reported

- Professional Services can include those rendered as or in connection with:
 - Managing General Insurance Agent, General Insurance Agent, Insurance Agent, or Insurance Broker
 - Insurance Consultant
 - Premium Financing Services
 - Loss Control, Risk Management or Anti-Fraud Services
 - Registered Representative for Variable Life/Annuity Products
 - Countersigning Agent for Out-of-State Insurance Agencies

- Other Related Services can Include:
 - Teaching a Formal Insurance Course
 - Notary Public
 - Testimony as an Expert Witness
 - Advertising Activities
 - Claims Adjustor

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- Common Features:
 - Catastrophe Extra Expense Coverage
 - Subpoena Response
 - Personal Data Protection
 - Regulatory Defense
 - Common Exclusions:
 - Bodily Injury/Property Damage
 - Certain Breaches of Personal Data
 - Insolvency
 - Insured vs. Insured
 - Licensure
 - Third-Party Administrator



Trends in Insurance/Insurance Agent Litigation

- Increase in litigation costs and litigation complexity.
- Automatic inclusion of agents in coverage case regardless of supporting facts.
- Increase in insurance companies taking hard/strict positions on coverage; and denying or limiting claims.
- More insurance products being developed – potential for more claims. E.g. – cyber liability coverage, drone coverage.



Trends in Insurance/Insurance Agent Litigation

- Additional Problem Areas:
 - Workers Compensation
 - Crop Insurance
 - Farm Package Policies

Specific Case Examples

Case 1 - Crop Insurance case.



1. “sales closing date” had already passed.
2. Agent contact underwriter.
3. Underwriter at Company says do it this way.
4. Agent follows underwriters advice.
5. Crop Loss
6. Company denies claim.

After the denial of the claim by the crop insurance company the agent calculated the crop loss amount to be approximately \$2,000. The agent on his own (without contacting his professional liability carrier) decided to pay the insurance customer this amount (approximately \$2,000).

The insurance customer disputed the amount of the crop loss. The insurance customer calculated the crop loss to be approximately \$65,000.

The insurance customer brought suit against the crop insurance company and the agent.

The agent tendered the defense of the case to the crop insurance company.

The crop insurance company denied the tender of the defense and refused to defend the agent.

Protracted litigation ensued, including multiple motions before the court and five depositions.



Specific Case Examples

Case 1 - Crop Insurance case.

On the eve of trial the case settled. The crop insurer paid \$40,000 to the insurance customer and \$500 in costs to the agent's professional liability carrier.

The agent and the agent's carrier paid nothing besides the \$2,000 the agent offered to the insurance customer right after the denial of the claim and the forgiveness of approximately \$3,000 owed to the agent by insurance customer for unpaid premiums fronted by the agent.

However, over \$60,000 was spent in attorneys' fees and costs defending the agency.

The agency had a \$7,500 deductible that applied to settlement amounts or judgment amounts only (as opposed to a cost of defense deductible).

Lessons learned from case:

- 1) Sometimes no matter what you do as an agent you might be sued. Make sure you are prepared for this possibility (funds for deductible – good documentation of your files).
- 2) You and your insurance customer might not agree on the amount or type of loss.

Lessons learned from case:

- 3) Even in cases where both the agent and the agent's professional liability insurer pay nothing (or very little) to resolve the case there are still significant defense costs and significant time lost by the agent in almost every case.

Lessons learned from case:

- 4) The agent should not make an offer to settle. In addition the agent should make no commitment one way or the other in regards to liability. The agent should not make statements about E&O insurance or the like. The agent must assume that whatever the agent says can and will be used against the agent in a subsequent lawsuit.



In June of 2007 the insurance customer made a request to change the insurance customer's mailing address and premises location. The agent told the customer that this would be taken care of.

The agent forwarded this request to the agent's CSR to handle. The agent's CSR sent a request for a change of mailing address and change of premises to the insurer.

After the request for a change of mailing address and change of premises was sent to the insurer, the insurer changed the mailing address but sent out a letter to the agent requesting additional information about the new building in order to process the premises change request.

The agent never saw the letter requesting additional information about the new premises.

No such letter was found in the agent's file.

The insurance customer's file at the agency showed that the request for a change of premises was forwarded to the insurer in the form of a policy memo from the agency.

The insurer's underwriting file shows that this policy memo was received by the insurer.

A short while later the insurer sent back a new declarations page to the agent and the insurance customer noting the change to the mailing address on the front page but not making any change to the premises on the second page.

In September of 2007 the insurance customer claimed an employee theft loss of its inventory.

This was close to the end of the first policy period.

The alleged theft loss arose out of a dispute amongst the owners of the insurance customer's business.

One of the owners took the inventory of the business without the consent of the other owner.

The other owner sued the owner that took the inventory. This other owner also submitted an insurance claim to the insurer for the alleged theft loss.

The insurer denied coverage for the theft loss based in part on the fact that it did not occur at scheduled premises.

The alleged theft loss occurred at the new location and the insurer claimed that there had not been an effective change of premises to the new location.

The insurer had additional and better support for its denial of coverage. Mainly the insurer's denial of coverage was supported by the fact that the individual that "stole" from the insurance customer business was an owner of the insurance customer business and thus there is no coverage for the alleged employee theft under the insurance customer's business policy.

The insurance customer sued the insurer.

The insurance customer did not sue the agent.

The agent's file was subpoenaed in this litigation. In addition, the agent and the agent's CSR were subpoenaed to testify at a deposition in this litigation.

The agent's insurer paid for an attorney to represent the agent in responding to the subpoenas. This is part of the coverage provided in many professional liability policies.

In the litigation between the insurance customer and the insurer there was a settlement mediation.

A few days before the settlement mediation the insurer's attorney "invited" the agent (and the agent's professional liability insurance carrier) to participate at the mediation.

The insurer's attorney argued that the agent was at fault for not following up on the premises change request and therefore the agent had potential exposure in the case.

The agent (and its professional liability insurance) disagreed and declined to participate in the mediation.

The mediation was unsuccessful.

After the mediation there was a Court ordered mandatory settlement conference with the Magistrate Judge assigned to the case.

Again the insurer “invited” the agent (and the agent’s professional liability insurance carrier) to voluntarily participate in the settlement conference.

Again, the agent (and its professional liability insurance carrier) declined to participate in the settlement conference.

Shortly before the Court Ordered Settlement Conference the insurer instituted a third-party action against the agent; or in other words:

THE INSURER SUED THE AGENT!!!

This forced the agent (and the agent's professional liability insurance carrier) to participate in the settlement conference, because the agent was now a party to the litigation. The case settled at the Court ordered settlement conference with the Magistrate Judge for a confidential amount.

Lessons learned from case:

- 1) Whenever possible follow up and confirm requests for changes to policies. This is particularly so when multiple requests for changes are made at the same time. Make sure each individual request for a change is made. If there are any discrepancies contact the insurer to resolve. Perhaps get your insurance customers to sign off in writing on complex or multiple changes.

Lessons learned from case:

2) It can be surprising to find out how an insurer treats you as an agent in the litigation or claim context even if there has been a significant positive prior relationship between the you and the insurer.

Lessons learned from case:

3) Simply because an agent is not sued initially, an agent may be brought into the case at a later time. If subpoenaed let your professional liability carrier know, particularly because of the subpoena coverage in many professional liability policies.

4) Also, even if you are just contacted by an attorney representing an insurance company or an insurance customer, contact your professional liability carrier and get their input and advice.

Lessons learned from case:

5) In general it is recommended that you not voluntarily turn over any information, files or documents without first contacting your professional liability carrier or an attorney. Exception is if one of your customers requests a copy of their file or something from their file.

RED FLAG – However, if your customer calls you up after a loss and asks you for a complete copy of their file this could signal the customer is contemplating a claim against you.

The insurance customer never looked at the insurance policies sold to his businesses by the insurance agent.

The insurance customer wanted to be added to the farm package policy for “Personal Injury Liability” coverage.

Prior to the underlying lawsuit, the insurance customer had never been sued for sexual harassment, assault and battery, reprisal, or slander.

The insurance customer's son that dealt with the agent had nothing to do with the gas station business and had nothing to do with the underlying sexual harassment lawsuit.

Around 2006, the insurance customer's son took over the insurance for the cattle sales business from his mom. Around this same time the insurance customer's son recalls calling the agent and asking him over the phone to add coverage for the insurance customer (his father) on the business insurance.

This phone conversation lasted less than a minute. Besides the one phone call with the agent, the son does not recall any other discussions with the agent about the "Personal Injury Liability" coverage.

The son did not specifically ask the agent to sell insurance coverage for sexual harassment, reprisal, assault and battery, or slander. The son also did not ask for any employment related practices insurance.

After this single brief phone conversation, the agent wrote up an insurance proposal indicating that he would request that the farm package insurer add “Personal Injury Liability” coverage for the insurance customer and his son to the farm package policy.

The son discussed this insurance proposal made by the agent with his friend, another insurance agent. The other agent told the insurance customer's son that the "Personal Injury Liability" coverage that was contained in the proposal was the insurance the customer needed.

Even though the agent requested "Personal Injury Liability" coverage from the farm package insurer, the insurer declined to offer "Personal Injury Liability" coverage to the insurance customer.

The insurance customer was specifically notified by the insurer that it was not adding the “Personal Injury Liability” coverage for the insurance customer. The insurance customer did nothing after the receipt of this letter to obtain further or additional liability coverage.

After the letter the insurance customer (as well as his son) did not ask the agent to follow up on this issue or attempt to obtain any personal liability coverage from any other insurance company.

The agent was never asked to sell the insurance customer insurance to cover sexual harassment, assault and battery, reprisal, or slander. The agent never sold insurance to the insurance customer in regards to the gas station.

In the fall of 2009 a former employee of the gas station brought claims against the insurance customer alleging assault and battery, slander, sexual harassment, and reprisal.

The claims brought in this lawsuit were made against the insurance customer personally and the gas station. The claims brought against the insurance customer in this lawsuit were for assault and battery and intentional slander.

The claims for assault and battery arose out of two trips to Florida where the insurance customer was involved in car racing. The former employee claimed the insurance customer intentionally sexually assaulted her on these trips to Florida.

The claims for intentional slander arose out of alleged intentional negative false statements made by the insurance customer regarding the former employee after the Florida trips. The claims brought against the gas station were for sexual harassment and reprisal.

The former employee worked at the gas station but none of the insurance customer's other's businesses.

The former employee is the sister of a woman who used to be married to another son of the insurance customer (this is the son that owns the gas station).

The insurance customer claimed the trips to Florida to race cars were a business expense of the cattle sales business. The agent was never informed about the trips to Florida to race cars or that the insurance customer was claiming these trips as a business expense of the cattle sales business. The agent was never asked to sell insurance in regards to these trips or for any type of car racing activities. In fact, the agent had no idea that the insurance customer was racing cars in Florida and that an employee of the gas station was going on these trips.

The insurance customer tendered the lawsuit to his insurers under two different policies.

His insurers denied a defense and denied indemnity for the lawsuit.

The insurance customer then defended the lawsuit himself, hiring his own attorney, and eventually settled the case with the former employee.

In the litigation against the insurance customer it was defense counsel's position (supported by testimony from representatives of the insurer and an expert opinion) that even if the insurer would have issued "Personal Injury Liability" coverage for the insurance customer personally under the policy, the policy would not have covered the claims alleged against the insurance customer in the underlying sexual harassment lawsuit.

This is because: 1) the definition of "occurrence" in the policy and, 2) various exclusions in the policy.

The insurance customer also tendered the underlying sexual harassment lawsuit to the gas station's insurance carrier. This policy was not sold by the insurance agent in this case. This insurer also denied coverage for the underlying sexual harassment lawsuit for similar reasons cited insurance customer's other insurers.

The farm package insurer does not sell an insurance product that would have covered the claims alleged against the insurance customer in the underlying sexual harassment lawsuit.

Also, it would have been very difficult if not impossible for the insurance customer to obtain insurance from any insurance company that would have covered the claims asserted against the insurance customer in the underlying sexual harassment lawsuit.

The insurance customer brought a lawsuit against the insurance agent for failing to obtain the “Personal Injury Liability” coverage and other related claims.

After taking depositions and exchanging numerous documents, I made a motion for summary judgment to be dismissed from the case. The arguments in favor of dismissal of the agent were as follows.

First, the agent reasonably followed the instructions of his insurance customer and acted in good faith, and thus the agent was entitled to summary judgment.

Second, the specific insurance that the insurance customer requested the agent to sell him (“Personal Injury Liability” coverage) would not have provided coverage to the insurance customer for the claims in the underlying lawsuit.

Third, the insurance customer failed to produce any evidence that any insurance company would have sold insurance to the insurance customer that would have covered the claims brought against him in the underlying sexual harassment lawsuit.

The Court agreed with me and granted the motion for summary judgment and dismissed the case.

Lessons learned from case:

- 1) Even in situations where it appears there is clearly no coverage, and there is no reason that there should be any coverage, an agent can still be sued by his insurance customer.

Lessons learned from case:

- 2) The insurance customer had little direct contact with the agent in this case. While this was not overly problematic in this case it should raise red flags. This is particularly the case when an insurance customer has multiple and different types of business. Contact should be made with the specific insurance customer or documentation from the insurance customer should be obtained directing the insurance agent to work with an intermediary.

Lessons learned from case:

- 3) The agent in this case had an initial strong desire to appease his insurance customer and thought he was negligent. The agent initially wanted the professional liability carrier and me to settle the case. It took a little time for me to convince the agent that he was not negligent and that he did not do anything wrong from a legal standpoint.
- 4) Therefore do not necessarily assume as an agent you are negligent or that you made a mistake. Speak with your professional liability carrier or defense counsel first.

1. Problem insurance customers (non-renews, non-pay, failure to complete audits).
2. Independent contractor vs. employee game.
3. Construction industry issues with GCs and multiple layers of subcontractors.

1. Misunderstanding of coverage on farm package policy – limitation and exclusions not well understood always.
2. Old outbuildings that have been renovated – has coverage been updated?
3. Complexity of crop insurance still creating problems.



Risk Management Suggestions

1. Documentation! Documentation! Documentation!
2. Put in place a good electronic Agency Management System and use it regularly and consistently.
3. Use follow-up and confirming emails with your insurance customer whenever possible.

4. Calendar important dates in an Outlook (or other similar electronic or online calendar program).

Renewals, expirations, etc...

5. Avoid getting involved in the claims process and in particular claims determinations after a loss.



Risk Management Suggestions

6. Be particularly careful around unique or unusual business circumstances and situations.

7. If you have a potential E&O issue contact your professional liability carrier and/or defense counsel directly.

8. It should be customary practice to offer the next level of insurance (generally in the form of a proposal with a quote or estimated quote for the next level of insurance).

9. Do not make assumptions about what your customers want or need; ask them.



Risk Management Suggestions

10. Do not think that you will never be sued or that a claim will never be made against your agency.

- Questions?