

Insurance Agents & Brokers E&O: 2019

Moderator:

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Panelists:

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Kiera Goral, AVP, Specialty Claims, QBE

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November 7-9, 2018

Prologue

*"I didn't do it. Nobody saw me do it.
You can't prove anything."
Bart Simpson*

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF LAC QUI PARLE

EIGHTH JUDICIAL DISTRICT

Court File No. 37-CV-14-120

[Redacted]

Plaintiffs,

v.

SPECIAL VERDICT FORM

[Redacted]

Agency,
Defendants.

We, the jury in the above-entitled action, having been duly impaneled and sworn to try the issues in the above entitled case, for our verdict answer the questions submitted to us as follows:

1. Did Defendant provide false information to Plaintiffs?

Yes No

9. Was Defendant negligent in obtaining insurance for Plaintiffs?

Yes No

10. If your answer to Question 9 was "Yes," then answer this question:

Did Defendant's negligence cause any damage to Plaintiffs?

Yes No


For person

Dated: 10-30-15, City of Maplewood, Minnesota

Current State of the IA&B E&O Coverage Market

- Producer Perspective
- Underwriter Perspective

INSURANCE



IA&B Claim Counts/Settlements/Expense Data



Trend Spotlight: Cyber

- Cyber Security
- Cyber Crime Extensions
- Social Engineering Phishing Claims
- Fund Transfer Fraud
- Industry Response



Trend Spotlight: Cannabis Industry

- Placement Activity
- Coverage Exposure Scrutiny
- Effect of Regulatory Confusion
 - State
 - Federal
- Effect on IA&B E&O
- Where is this Going?



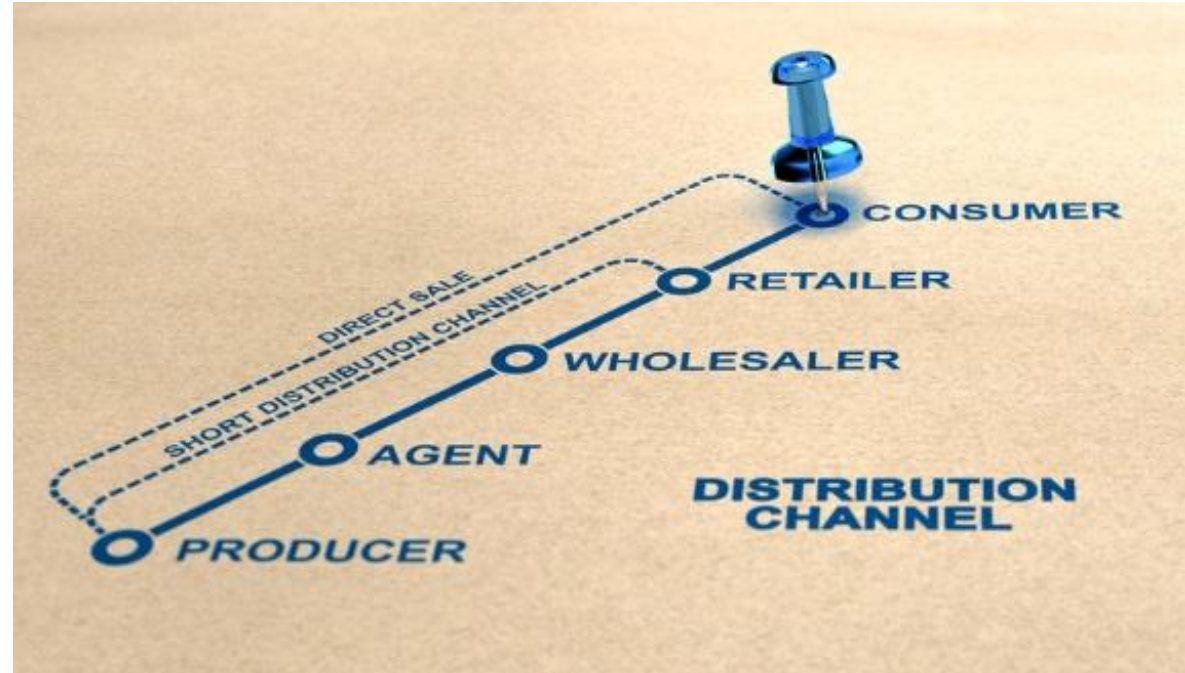
Trend Spotlight: Other

- Active Shooter/Threat
- Workplace Violence
- K&R
- Food-Borne Illness
- Business Interruption
- Excess & Surplus Lines
- Producer M&A
- Other Insurance Arrangements



Trend Spotlight: Other Distribution Channel E&O

- MGA/MGU
- Captive Managers
- Fronting Carriers
- Reinsurance Intermediaries
- Wholesalers
- Actuaries



Producer's Limited Duty – General Rule

- Duty to Follow Instructions
- Duty to Act in Good Faith
- Duty to Comply with the Standard of Care
 - Reasonable care, skill, diligence
- Rationale
 - Customer is in better position to know needs
 - E&O claim should not be post-loss insurance

Trend Spotlight: Enhanced Duty

- Special Relationship
 - Needy, unsophisticated client
 - More than usual reliance
 - Agent markets as expert
 - Receives extra compensation
 - More than mere order taker
 - Coverage complexity
 - Prolonged relationship
 - Lots of advice
 - Legal effect
- Role of Industry Ethics Codes
- RPLU, CPCU, ChFC, CIC, CLU Effects
- Fiduciary Duty
 - More than special relationship
 - Facts show agent like trustee
 - Client cedes control of decision-making
 - Minority rule
 - Few states go this far
 - E.g., New Jersey, Ohio

Ron: With Pat being the experienced insurance salesman and we have to have a certain amount of trust in him and I'm asking him to go through it and find areas where we're high or low. He's the experience guy, I'm not.

Relationship Ramifications

- Agent/Broker Distinction
- Dilution of the Distinction
- Does the Producer's Conduct Bind the Carrier?
- Scope of the Engagement
- Technology/Modernity Effects
 - Is technology reducing claims?
- Insurance Consultants/Counsel Enter the Traditional Producer Relationship
- Role of Insurer Customer Service Center

Claim Nuance Potpourri

- Claim Assignments
- Assuming Defense of the Underlying Claim
- Claim Repair
- Producer Website “Puffery” Mitigation
- Law Choice: Multi-State Parties/Events
- Spoliation Avoidance
- Claims by Non-Clients
- Risk Transfer: Client’s Commercial Agreement Terms

Claim Mitigation Strategies

- Office Procedure Consistency
- Documentation Preservation
- Use of Engagement Agreement
- Marketing Statement Prudence
- Sub-Producer Management
- Special Care: Cyber
- Claim Repair Strategies



Common Legal Claim Allegations

- Professional Negligence
 - Breach of the standard of care
- Breach of Contract
- Fraud/Negligent Misrepresentation
 - Requires justifiable reliance
- Breach of Fiduciary Duty
- Breach of Statutory Duty
 - Deceptive trade practices laws
 - Consumer fraud laws

Mayor Flash: You being the professional – what do you see?



Common Factual Claim Allegations

- Failure to Procure Coverage (Client/AI)
- Failure to Explain Coverage or Exclusions
- Failure to Identify Exposures
- Failure to Recommend Coverage
- Failure to Disclose
- Failure to Provide Timely Notice
- Failure to Bind
- Failure to Renew
- Failure to Advise of Declination
- Misrepresentation
- Insolvent Carrier Placements
- What's on the Horizon?

Customer's Duty

- Determine Coverage to Request
- Limits to Choose
- Accuracy of Application
- Confirm Policy Terms Appropriate
- Inform Agent of Changes Needed
- Act on Renewals
- Pay Premiums
- Disclose Commercial Agreements
 - Risk-shifting terms
 - Als

“Full” or “Same” Coverage

- Customer Testifies
 - I asked for *complete* coverage
 - I asked for *sufficient* coverage
 - I asked for *full* coverage
 - I asked for *best* coverage
 - I asked for *same* coverage
- Courts Criticize
 - Makes agent guarantor of unarticulated coverage needs
 - Agent must anticipate every policy term
 - Creates impossible burden

A I believe we had a conversation about that and that he wanted to quote it, and that was fine. We had just received an offering letter from Auto-Owners stating the new coverages and pricing. He was given that to do a competitive, comparable quote against.

Mr. Harts did recall an earlier conversation in which he discussed "full coverage" for the Century with Mr. Pietrzak.

The Filips told Block that they wanted the same coverage

Claim Defense Strategies

- E&O Claim Notice Tender
- Expert Retention
- Litigation Hold
- Securing e- and Paper-Files
- Agency Agreement Review
- E&O Did Not Cause Loss
- Limitations Statute
- Choice of the Better Law
- Client Negligence
 - Failure to read policy/other communications
 - Duty to inquire
 - Proof of client insurance expertise
 - Furnishing insufficient/erroneous info
- Reptile Strategy Preparation?
- Absent Coverage Not Available
- Claim Not Covered
- Damages are Exaggerated

Carrier Role Ramifications

- Terms of the Agency Agreement
- Policy Reformation to Mitigate Producer Error
- Policy Rescission Due to Application Misrepresentation
- Vicarious Liability
- Producer Conduct Within Scope of Agency May Prevent Personal Exposure

Damages

- Actual Loss Sustained
 - Policy limit cap, or
 - All consequential damages caused
- Pre- & Post-Judgment Interest
- Attorneys' Fees
 - Typically requires statute
- Economic Loss Rule Defense
- Bad Faith
 - Exposure to Damages Beyond Limits
 - Most States Do Not Extend to Agents
 - Absence of contract (policy)
 - Contracts include covenants of good faith and fair dealing
- Punitive Damages
 - Fraud, Malicious, Reckless Conduct
 - Intentional Torts or Crimes

Special E&O Considerations: Captive Agents

- Ordinarily Represent One Company
- Generally Cannot Sell Other Carrier Products
- Lesser Exposure
- Insurer Vicarious Liability
 - Rarely personal exposure
- Dual Duty Conundrum
- California Rule