2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 4: Friday, April 11, 2014 (10:25 am – 11:25 am)

Liability Exposure to Insurance Agents and Brokers and Defenses for Failure to Procure Coverage

I. Overview of Insurance Broker/Agent Liability Principles

Duty to Insured in Procuring Insurance

Agents and brokers may be held liable for failing to procure insurance for an insured. The agents and brokers must use reasonable diligence in obtaining the insurance requested and must notify the insured promptly if unable to obtain the requested insurance. In undertaking to procure insurance, the insurance agent or broker must obtain the specific coverage desired by the insured. The insured is required to clearly inform the agent or broker of the desired coverage. The agent or broker is not required to discuss with the insured every possible situation which might arise and whether that situation would be covered under the policy, but must inform the insured when the policy does not cover a particular risk about which the insured specifically inquired.

Duty to Insured after Delivery of Policy

The duties and obligations to the customer do not end after an insurance policy has been obtained and delivered to the customer. Agents and brokers have an affirmative duty to notify the customer of any premature termination or cancellation of the policy. There is also a duty to notify the insured of any financial problems with the company issuing the policy, such as insolvency, the placement of the insurance company in rehabilitation or other questionable financial information.

II. Trends Regarding Procurement of Coverage

Duty to obtain only coverage requested by insured

Agents and brokers only have a duty to obtain the insurance requested by the insured unless they take on a special duty to obtain the insurance needed by the insured. Whether a duty of care exists is a question of law for the court. Ordinarily, insurance agents and brokers assume only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured. The mere existence of such a relationship imposes no duty on the agent or broker to advise the insured on specific insurance matters. In the ordinary case, the burden is on the insured to inform the agent of the insurance he requires.

Duty to volunteer advice and the existence of a "special relationship"

An insurance agent or broker may assume a greater duty to the insured by holding himself out to be more than an "ordinary agent" or by misrepresenting the policy's terms or extent of coverage. While agents do not generally have a duty to advise an insured regarding the sufficiency of their liability limits, once agent or brokers elect to respond to these inquiries, a special duty arises requiring them to use reasonable care.

Under certain circumstances, the courts recognize a limited duty to provide unsolicited advice where the insured and the agent / broker share a "special relationship." There are several factors that courts consider to determine whether a "special relationship" exists. Some of these factors include:

(1) whether the broker or agent misrepresents the nature, extent or cope of the coverage being offered or provided;

(2) whether the agent or broker has received compensation beyond the premium payment;

(3) whether the insured requests or inquires about a particular type or extent of coverage;

(4) whether the agent or broker assumes an additional duty by express agreement;

(5) whether the insurance agent or broker had broad discretion in servicing the insured's needs; and

(6) whether the insurance agent or broker has held himself/herself out as having certain expertise in a specific field of insurance that relates to the insured's coverage.

The length of the relationship alone is insufficient to create a special relationship. Similarly, the fact that the agent or broker is aware that his customer is less knowledgeable than him is not enough to create such a duty. Some courts look exclusively to the question of whether the agent or broker has agreed, either expressly or impliedly, to render advice as to the customer's insurance needs.

Apart from the existence of a "special relationship," some courts have held that an insurance intermediary can have a duty to volunteer advice if the intermediary holds himself out as an expert in a given field of insurance. Though recognized as a valid legal theory in many jurisdictions, recovery under this rationale is very rare.

Duty of the insured after delivery of the policy

The agent's and broker's duties and obligations to the customer end after an insurance policy has been obtained and delivered to the customer. Agents and brokers have an affirmative duty to notify the customer of any premature termination or cancellation of the policy. They must also promptly notify the customer of possible financial problems with the company issuing the policy, such as insolvency, the

placement of the insurance company in rehabilitation or other questionable financial information subsequently received.

III. Insured's Failure to Read the Insurance Policy

In response to an insured's claim that is premised on an agent or broker's failure to procure adequate insurance, the agent or broker may raise the defense of the insured's negligence in failing to read the policy. However, this defense is not always successful. Only a minority of jurisdictions have found that the insured's failure to read the insurance policy will bar a claim against the broker. The majority of jurisdictions do not recognize the insured's duty to read an insurance policy as a defense to an insurance agents or broker's negligence or recognize the duty in special circumstances.

Majority Rule – Liability to insured who failed to read the policy

The majority of courts have held that insurance agents and brokers cannot avoid liability for failure to procure the correct insurance by claiming that the insureds have a duty to read their insurance policies. In other words, the comparative fault defense is unavailable to an insurance broker who asserts that the client failed to read his or her insurance policy.

Some Jurisdictions – Failure to read the insurance policy may amount to comparative negligence

Some jurisdictions have recognized that while an insured's failure to read a policy does not operate as a bar to relief, in certain situations, it may amount to contributory or comparative negligence. The issue becomes whether there is evidence from which a jury could find that, under the relevant circumstances, it was unreasonable for the insured not to have read the policy. These courts acknowledge that insureds "range from unsophisticated individuals who know nothing about insurance, to experienced business persons knowledgeable about insurance to large corporations with batteries of lawyers" and relevant provisions of the policy "may be simple . . .or complex."

Minority Rule – Insurance agent / broker not liable to insured who failed to read policy

In a minority of jurisdictions, an insured's duty to read an insurance policy is absolute and may protect an insurance broker from a claim for failure to procure adequate insurance. These courts have held that the insured had a duty to read their insurance policy and barred recovery against the agent noting that if the insured had reviewed the documents they would have been aware that they did not have the coverage they had requested.

However, it should be noted that some of the minority jurisdictions recognize an exception to this defense. While generally an insured is obligated to examine an insurance policy, the rule does not apply when (1) the broker has held himself out as an expert and the insured has reasonably relied on the broker's expertise to procure the requisite insurance or (2) there is a "special relationship" of trust which would prevent or excuse the insured of his duty to exercise ordinary diligence.

IV. Trends Regarding Agents and Brokers Owing a Fiduciary Duty

The courts usually do not hold that agents and brokers owe a fiduciary duty. The majority view is that while agents have fiduciary–like quality, courts will not impose true fiduciary standard. Several facts support the majority position: agents and brokers are not personal financial counselors, risk managers or guarantors of their client's liabilities; agents and brokers are not uniquely aware of their client's personal

assets or liabilities; and agents and brokers do not have the ability to bind the insured to a particular coverage or policy without the insured's consent (i.e. purchasing power).

Existence of Special Relationship

As set forth in detail above, the courts recognize a limited duty to provide unsolicited advice where the insured and the agent or broker share a "special relationship."

Effect of the Majority View That No Fiduciary Standard Exists

The fact that the courts will not impose a fiduciary standard eliminates the need for a plaintiff to prove breach of contract for failure to procure coverage is a special relationship is established. This may also eliminate contributory negligence defense in otherwise pure negligence cases.

V. Trends Regarding Claim Volume, Level of Complexity & Damages

Typical errors and omissions claims such as failure to obtain proper coverage and failure to obtain adequate limits, remain steady. However, the level of complexity of these cases has increased. For example, there are claims being alleged beyond negligence and breach of contract and there is a greater range of parties involved. Potential damages have also increased. In addition, there are new claims related to super storm Sandy and regulatory issues.