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Managing and Defending the High Stakes Insurance Agent and Broker E&O Claim

I. Introduction

Insurance agents and brokers face a broad array of potential E&O risks, which can include anything from failing to properly place coverage requested, failing to timely submit notice of claim, issuing certificates of insurance misrepresenting the coverage purchased, to offering negligent advice with regard to insurance policy terms, provisions or exclusions. Additionally, insurance agents and brokers are facing ever greater risk of loss from claims based on their alleged failure to properly advise the policyholder.

Often, the exposure will be fairly limited, but the fact of the matter is that the risks faced by insurance agents and brokers varies with the insurance exposures faced by their customers. E&O claims involving tens of millions of dollars of alleged damages can arise, and have to be defended. In some instances, the size of the risk notwithstanding, the case can literally boil down to the word of the insured that the broker made a verbal misstatement about what would be covered, failed to offer a certain coverage option, or made a recommendation about coverage limits that is not directly provable or disprovable by contemporaneous documentation. In these cases, the E&O exposure presented can literally be dependent in its entirety on the jury's willingness/unwillingness to believe who as between the insured and the agent/broker is telling the truth about a conversation held on the telephone.

The purpose of this presentation is to offer some guidance with regard to managing and defending the high stakes insurance agent/broker E&O claim.

II. The Current Landscape

Traditionally, insurance agents and brokers have been viewed by the courts as largely being akin to "order takers," with the limited responsibility of procuring the coverage requested by their customers, or advising within a reasonable period of their inability to do so. Their customers were viewed as having a responsibility to read their policies, raise questions if they didn't understand anything, and complain if the coverage didn't match with what they understood was being purchased on their behalf, or the agent's/broker's representations. To the extent they failed to do so, the courts were in large measure comfortable concluding that any uninsured/underinsured loss incurred after the customer had received its policy and had a reasonable opportunity to review it should be the responsibility of the customer, for failing to

read his/her/its policy. Further, absent "special circumstances" or the existence of a "special relationship," agents/brokers were largely viewed as owing no special duty to advise, guide or instruct their customers with regard to their coverage, because the insureds were in the best possible position to know the value of the business, place, interest or thing being insured against, the risk presented, their ability/willingness to pay premiums, and their appetite for taking on uninsured risk.

Today, while there continues to be a recognized "duty to read" on the part of insureds, the failure to do so will not represent a death knell to a claim against the broker for negligent failure to procure or negligent advice in the vast majority of jurisdictions. Instead, it will be just one of a number of factors considered in determining whether the insured was comparatively at fault for the damage incurred. Further, while the vast majority of jurisdictions do not view insurance agents/brokers as occupying a fiduciary relationship in their dealings with their customers absent special circumstances or evidence of a special relationship, the factors that tend to lend support to the argument for same will often include what are now fairly normal, everyday interactions involving agents/brokers and their customers with any kind of specialized insurance needs. This includes whether the agent/broker – typically competing for business with other similarly situated agents/brokers – holds itself out as having specialized expertise and knowledge with regard to a particular type of insurance coverage offering available to the public. This also includes whether the agent/broker takes the time to make an individualized assessment of the customer's insurance exposures and needs, and provides advice and recommendations based thereon.

Added to this mix is the fact that insurance policies have grown more complex over time, and a number of jurisdictions have become more willing to view agents/brokers as professionals with specialized knowledge and expertise in navigating the complexities of insurance coverage issues. The result is that the landscape for insurance agents/brokers has grown more perilous in terms of the circumstances where they might expect to face viable allegations that they owed a higher duty of care, and thus potential responsibility for policyholder losses, even in situations where the insured received exactly the coverage that was proposed, offered, accepted and received. This is particularly concerning when the claims involve tens of millions of dollars in uninsured or underinsured loss alleged to have been the fault of the agent/broker in failing to properly advise the insured regarding the risk, the coverage in place, the optional coverages available, applicable policy provisions that might impact the available limits, etc.

II. Assessing the Risk

A. Gathering Documents and Information

Once the E&O claim has arisen, it is necessary to gather as much information as possible about the alleged failings on the part of the agent/broker, the individuals involved in the handling of the account, and the sources of documents/electronically stored information relevant to the dispute. A number of agents/brokers have electronic document management systems to which all relevant emails, notes regarding offerings, notes regarding what was discussed at renewal meetings, etc. are supposed to be posted. It is key at the outset that everyone involved in handling the account/specific matter during the relevant time period has been identified, search terms relevant to the issues are identified, and all potential sources of

both paper and electronic documents are determined so that any potentially relevant documents and communications can be identified and reviewed.

In this regard, it is important to note that many hands can touch an account. Including the producer, there may well be one or more account executives involved in handling the account who will have engaged in both internal and external email communications with regard to the coverage in issue. There may also be clerical personnel involved whose only job is to send out endorsements or policies or certificates of insurance. It is good practice to make sure in all cases that each potential name of a person who may have touched the account has been identified, but this is particularly important in high stakes agent/broker litigations.

Today, the vast majority of records are going to either be electronic, or have been scanned and saved onto the document management system being used by the agent/broker. So the focus and attention in searching for all potentially relevant records is going to be on looking for ESI. This said, it cannot be forgotten that not everyone is completely untethered to paper. It is not uncommon for brokers to take notes to remember specific issues to discuss, and to make handwritten notes of issues discussed during phone calls or at meetings to discuss coverages or claims with their customers. And, unfortunately, regardless of how many times it may be drummed into people's heads to make electronic notes or save all handwritten notes to the electronic file, this doesn't always happen. Because these notes can sometimes contain the most crucial evidence in a case involving disputed allegations of what was offered, what was discussed, and/or what the insured indicated it wasn't interested in purchasing, it is imperative that time and attention be spent on carefully interviewing each and every witness involved in the transaction at issue and the handling of the account to make certain that no relevant handwritten records go unidentified and unaccounted for.

It also must be remembered that while the practice and procedure may be that all relevant emails should be saved and moved into the client file, there may be emails that were not saved because the broker either forgot or just thought they weren't important enough to save. So individual email accounts also should be searched. Additionally, producers may have close enough relationships with certain customers that they speak via cell phone, and may occasionally communicate by text. Each such potential relationship must be explored, and a search should be considered for possibly relevant texts.

Lastly, we should remember that case theories are living organisms, and can change in emphasis and focus based on what is discovered during the initial investigation of the claim, and during discovery. As a result, sometimes the original identified sources of documents/ESI may change. Sometimes the initial search terms need to be tweaked or modified or expanded. It is critical that this aspect of the defense be kept under regular surveillance, monitored, and revisited on a regular basis.

B. Interviewing Witnesses

While it is fairly obvious that all employees with involvement in and/or knowledge about the specific coverage placement and account in issue need to be interviewed early on, a mistake that can be made is speaking only with the current employees and leaving former employees on the backburner. To the extent their testimony may be critical, it is important to let them understand the importance of their testimony, and try to get them to buy in to the idea of being

part of the "team" insofar as being willing to make himself/herself available to assist in answering questions or reviewing documents or helping clear up questions or clarify issues. It may also prove useful to try to preserve what is anticipated to be helpful testimony in an affidavit. While an affidavit will not be admissible at trial, it can be used on summary judgment motions, and having it locked in when the witness' memory is fresh can prove extremely useful if the case drags on a year or more before coming to trial.

C. Otherwise Investigating the Claim

In addition to tracking down and interviewing former employees who may have knowledge, it is important to seek their input about the existence of potentially relevant documents. Current employees may be unaware of potentially relevant records that a former employee has identified. It is also important to, where appropriate, take advantage of the availability of potentially relevant public records. Did the loss in issue involve a building collapse? There may be relevant records among the records concerning applications for and provision of construction or demolition permits. Were there news reports concerning the loss? There may be video about the loss. Is there related litigation? There may be records useful to the agent's/broker's defense disclosed in discovery in the related litigation.

1. Special Relationship

If the insured is alleging there was a special relationship based on an extended course of dealing such that the broker should have reasonably understood that the insured was relying on the broker for advice and guidance, it is going to be important to look for that would potentially undermine this argument. This would include instances where the insured left for a time to go to another broker because the other broker was able to procure cheaper coverage or for some other reason. It would include instances where the insured was offered other coverages, perhaps for other insured risks, which the insured declined to purchase. It would include instances where the insured sought competing bids for the coverage at issue. It would also include instances where the insured pointed out mistakes, suggested the broker's recommendations were motivated by a desire to generate additional premium, and instances where the insured was critical of the broker's performance. On this last point, for example, it might be difficult for a fact finder to believe the insured was placing special reliance on the broker when it was repeatedly challenging the motivations of and/or criticizing or complaining regarding the broker's performance.

III. Early Resolution

Once the claims have been thoroughly investigated, consideration should be given to the possibility of early resolution. In a high stakes litigation, you know you are already looking at a high risk/high exposure scenario. Plus, the cost of defending such a claim is almost certainly going to be substantial. The fact of the matter is that where big dollars are involved, litigation is almost certain to be heavily contested, in every way possible. Discovery requests are likely to be challenged, leading to the necessity for making one or more motions to compel. As discussed above, ESI will have to be thoroughly searched, and this can be costly. These costs can continue to be incurred for months or even years depending on how long the litigation may drag on.

Additionally, multiple experts may be required, and with each expert in a heavily litigated case comes the opportunity for motions in limine to exclude some or all of the testimony of that expert. In the event there are grounds for dismissal of one or more claims on the pleadings, the odds are good that it will make sense to file a motion, and the same goes for motions for summary judgment at the close of discovery. Further, if it's a he said/she said case, it is going to be critical to obtain as much evidence and testimony as possible to build or challenge the credibility of each side's version of events. This could mean multiple depositions. Then, there are of course all of the costs attendant with preparing for and proceeding with a trial. Not to mention the potential for appeal, which will be heightened dramatically if enough money is at stake.

For all of these reasons, it is important to give serious consideration to early resolution, either through direct settlement negotiations, mediation, or both.

IV. Treating Depositions as the Start of Trial

Because the stakes are high, it is imperative to realize that trial starts during the depositions. If a witness is not fully prepared, and makes mistakes or errors that are later effectively portrayed as examples of the witness being disingenuous, or lacking in credibility, this can cause enormous damage. There are just no two ways about it: the depositions have to be treated as the start of trial. Because of this, time has to be devoted in particular to preparing the defense witnesses. No two people are alike. Some can be highly effective communicators. Some can be simply awful at communicating. Some can be glib and confident in any setting. Some can be extraordinarily confident, successful masters of their universe, and become completely unnerved by the idea of having to give testimony under oath. Others would be great if they could only learn to shut up after giving the answer to the question posed to them.

Because the depositions are so critical, it is important to make sure that in addition to preparing the witnesses in terms of reviewing the relevant documents and refreshing their recollection about the relevant facts, time is spent making sure they understand and become comfortable with the process. In this regard, it may be useful to engage a jury consultant. A highly skilled jury consultant can provide enormous help in terms of preparing witnesses for trial, both in terms of how they dress, their overall appearance, their posture, how they listen to and process questions, and how they articulate their responses. Movie producers will never put a movie out without running test screenings. A soda manufacturer would never try to roll out a new flavor without running some taste tests. In a high stakes litigation, it can be highly valuable to obtain the input of a highly trained specialist as you look to prepare your witnesses for both their depositions and trial.

V. Establishing Themes

Early on it is important to identify the themes of the defense case, and then put in the work necessary to fully develop them. Looking at the "special circumstances" or "special relationship" case as an example, if the insured contends it relied on the agent/broker's expertise, it is important to identify the themes that can potentially be used to rebut this argument, and build them brick by brick. Can evidence be shown that the insured is a "price buyer" as opposed to being a "risk buyer"? If so, look for every piece of evidence that can be utilized to build this argument. If the insured argues it didn't have $10 million in excess

insurance coverage because it was acting on the recommendations of the broker, and the broker contends that they verbally discussed the need for higher limits and possible options for obtaining them, it is going to be extremely helpful to the defense to identify provable instances where the insured was offered higher limits or optional coverages and rejected them. If the insured is claiming that it relied on the broker's specialized expertise, it is important to develop evidence of the insured's experience with the specific type of coverage in issue, and its knowledge of the relevant terms. It will also be useful, if there is evidence available, to identify instances where the insured is critical of the broker's recommendations, advice or services generally. Is there an email in regards to an unrelated account where the insured calls the broker an IDIOT!!! In all caps and with 3 exclamation points? That is definitely going to be helpful to your efforts to counter the plaintiff's claim that he/she relied on the broker's specialized knowledge and expertise.

It is something you've almost certainly heard or experienced on multiple occasions, but the fact is that it's true and bears repeating: insurance agent/broker cases are often the result of failure to document advice given, the declination of coverage by the insured, or the refusal of the insured to purchase specific options or limits offered. This means that there is going to be an excellent chance that the high stakes litigation that goes to trial is going to hinge upon the credibility of the plaintiff's version of events and the agent's/brokers competing version of events. In this context, mining the documentation and communications from the course of the parties' business relationships for evidence to build and establish the themes that will enable a jury to believe your client's version of events is a critical task to be undertaken.

VI. Experts

It is important that time be spent identifying those you will need for your defense case, and then retaining them early in the process. Experts are presented as just that – people who have specialized expertise whose testimony is expected to provide especially helpful and useful insights to the jury about the critical issues in dispute. Because of their potential for having an outsized importance in the eyes of the jury, it is important that the process of investigating for potential experts, vetting them, and retaining them is not left until the last minute. Moreover, if there are only one or two really strong experts in the area who have the specific knowledge, experience, and credentials necessary to provide cogent and compelling testimony on the issue, you want to make sure you are the one who obtains the expert, not your adversary.

In vetting your potential experts, it is important to carefully search for all cases in which they have testified, and determine if they have ever been disqualified as an expert or their testimony has been precluded in whole or in part. It is important to review all available written materials, videos or transcripts of lectures they have given, as well as expert reports, deposition testimony, and/or testimony at trial. It is also important to speak with other counsel about their experiences with this expert. Once you've decided to marry the expert, it's too late to seek a divorce after you find that he's not responsive, has submitted expert reports with conflicting opinions on the same issue, or has been annihilated under cross-examination.

Once the expert is on board, it is just as important to make sure mistakes aren't made that could lead to preclusion of the expert from testifying at trial. One of the problems that can arise is a desire on the part of the expert to please counsel. This can lead to the expert taking what clearly appears to be an advocate's position, and thus undermining his/her credibility. It

can also lead to the expert making the mistake of opining on the ultimate issue in the case, or as to the intent of the plaintiff, or the credibility of the parties' versions of events – all of which can result in having the expert's testimony stricken. It is important that the expert be constantly challenged to support each opinion offered, and that each opinion is given with respect to an issue the expert has demonstrable expertise in, either through training, review of authoritative writings, or extensive experience. The time spent reviewing the expert's report for each of these issues is time well spent insofar as you can avoid later dealing with the possibility that your expert may be disqualified or precluded in whole or in part from offering the testimony you specifically hired him/her to give.

VII. ESI

As few as just 15 years ago, ESI was still a fairly new concept. In fact, it is just over 15 years since the first Sedona conference was held for the purpose of developing a set of principles with regard to the identification, collection, preservation, review and production of electronically stored information, and a little over 13 years since the first Sedona principles were published. Since that time, ESI has undergone mind-boggling growth.

To provide a sense of the growth of ESI, it is worth noting that the total amount of digital data/information grew from 494 billing gigabytes in 2008 to 800 billion gigabytes in 2009, to 1.2 trillion gigabytes in 2010, or 1.2 zettabytes. By 2013, that number had increased to 4.4 zettabytes. By 2020, it is expected that there will be 44 zettabytes of digital data/information (i.e., 44 trillion gigabytes). More data has been created in the past two years than in the entire history of the human race. In fact, if you try to equate the data to physical presence, the Library of Congress houses 17 million books. This equals 136,000 gigabytes of information. So by 2020, we will have enough digital data/information to house in 323,529,412 Libraries of Congress.

The prevalence of this data is in no small part a function of how we communicate today. At work, it's via email. Socially, and with friends and family, it is via text or postings on social media. Because this is how we communicate, it is essential that when we search for relevant "documents" in discovery, we are making sure the attorneys for the plaintiff are actually having searches undertaken of *all* of the sources of potentially relevant ESI, and they are conducting searches designed to effectively identify, gather and collect *all* of the documents and communications that will be relevant to the resolution of the parties' dispute.

The fact is that sharp elbowed attorneys will look for whatever advantage they can come up with in litigating cases, and these tendencies will only be exacerbated in litigating the high stakes insurance agent/broker E&O claim. One of the tools that can be utilized is to reverse engineer searches to find ways to run searches for ESI which appear to be reasonable and appropriate, but which, with carefully chosen modifiers, serve to avoid identification and collection of damaging documents. Because of this, it is imperative that when discussing and negotiating the searches to be undertaken by the parties with regard to ESI, great care is taken to make sure that search terms are carefully considered. In this regard, it is a good idea to get an ESI expert involved early on, both to assist in searching for and gathering relevant ESI during the course of your investigation into the claims from your client's records, to assist in helping to develop arguments for why otherwise onerous searches proposed by your adversary should be modified, and to make sure that you don't get sold a bill of goods at the outset of the case that

serves to deny you access to the most relevant and critical documents in the plaintiff's possession, custody and control.

It is also useful to get a highly skilled ESI expert involved early to manage what could otherwise be enormous costs of engaging in this work. In this regard, it is noteworthy that there are firms that provide high quality, low cost attorney first level review of e-discovery. There are also rapidly improving software programs that can help conduct identification and sorting of documents through predictive coding. Depending on the potential volume of ESI involved, these options for grappling with ESI need to be carefully considered.

VIII. Jury Science/Mock Trial

As soon as possible after all discovery has been completed, it is important to consider investing in obtaining the benefit of jury science, in the form of gathering data from a polling group expected to match the makeup of your anticipated jury pool to gauge their assessments of the parties, the issues, and the expected themes and arguments. It is then time to consider following up with one or more mock trials, to see how juries absorb and react to the competing versions of events, and assess the credibility of the key witnesses. This can be an invaluable exercise in myriad ways. From the perspective of the claims professional overseeing the defense of the litigation, setting reserves, and attempting to assess the value of the case for settlement purposes, this can be a helpful tool in making these assessments.

IX. Trial

As for trial, entire books have been written about how to successfully conduct a trial, and time and space does not allow for more than a few comments here. First, this is where it can be helpful to lean on your jury consultant, both in helping to identify the right jury makeup to try to develop, and in helping to develop the key themes to drive home with the jury to get them to believe the agent's/broker's version of events, and to doubt the veracity of the plaintiff's version of events. Second, because the existence or breach of a duty to advise can be dependent on a weighing of multiple factors, it is important to thoroughly research the law on this and craft jury instructions that will not allow for vague offerings of special circumstances to be treated as the basis for a conclusion that a duty to advise exists where it wouldn't otherwise. Last, technology and presentation are key. People are used to seeing high level graphics and seamless presentations in every aspect of their lives, day and night, whether it be on TV, their laptops or their smart phones. There is still a time and a place for low tech presentations in the right circumstances. But the jury is going to expect to see everything come together at the end in a highly polished presentation that seamlessly moves from issue to issue.

X. Conclusion

There are a number of aspects to managing and defending the high stakes agent/broker E&O claim. Hopefully, this has offered a few useful insights.