PUBLICATION UPDATE

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Responsibilities of Insurance Agents and Brokers

Publication 362 Release 94 June 2025

HIGHLIGHTS

- The release features updates and enhancements of Chapters 1, 2, 3, 4, 5, 7, 8, and 16 including:

Chapter 2—New commentary on statutory definitions of an insurance broker and an insurance solicitor, on the consequences of the agent versus broker classification, on limitations of a broker's authority to act on behalf of an insurer, and on holding an insurance adjuster vicariously liable for losses to an insured; new commentary on statutes and cases regarding brokers acting as dual agents; new commentary regarding cases on failure to attribute independent insurance agency misrepresentation to an insurer, on responsibilities of a surplus (or excess) line broker, on brokers' fees, on the wide range of insurance agents, on agency agreements with insurers, on whether an insured can maintain a common law action against an independent claim adjuster, and on whether an insurance company was vicariously liable for its agent's negligence resulting in an insured's underinsurance under her California FAIR Plan policy.

Chapter 3—State-by-state revision of cases on establishing agent's or broker's misconduct as proximate cause for loss; state-by-state revision of cases on agent or broker not being liable for insurer's denial of coverage; state-by-state revision of cases on fiduciary duty of brokers to their insureds; elaboration of choice of law issues regarding allegations of agent's or broker's liability to insured; Florida statutes on "unafilliated insurance agents;" and cases on the following issues: limitations of agents or brokers liability for compensatory damages; diverse theories

of coverage for COVID-19 losses; when statute of limitations commences for negligent failure to obtain insurance coverage; third-party beneficiaries' right to sue agents or brokers for failure to procure adequate insurance; court's lack of personal jurisdiction in the matter of broker's alleged negligence; fraud in the inducement to purchase insurance; the general no-duty-to-advise rule applying to both captive insurance and independent insurance agents; no heightened duty on agents and brokers to provide sufficient coverage for inherited clients after they purchased a book of business; admissibility of expert testimony at trial on brokers' duty of care; broker notification of impossibility of obtaining desired insurance; and on election of allegations of negligence vs. breach of contract in failure to obtain desired insurance.

Chapter 4—Cases on diverse issues: insurer use of equitable principles to seek indemnity from agent or broker; limitations provided in the parol evidence rule; preclusion in the insurance policy from attributing agent's alleged misrepresentation and negligence to the insurer; maritime policy void *ab initio* for material omissions in insurance application; New York statute on broker owing a limited fiduciary obligation as to handling of funds received from the insured, but case holds it does not extend to a duty of a broker to an insurer to take adequate steps to prevent or discover fraudulent claims and claims practices in the absence of a special relationship between the broker and the insurer.

Chapter 5—New section on viatical settlements not constituting insurance policies; new analysis of federal criminal legislation affecting certain persons engaged in the business of insurance whose activities affect interstate commerce; analysis of whether private insurers and an underwriting association violated antitrust laws by creating a monopoly and boycotting a broker; analysis of whether the federal Gramm-Leach-Bliley Act (GLBA) preempted a provision of the Puerto Rico Insurance Code that prohibited brokers and agents to share commissions and significantly interfered with a bank's ability to sell, solicit, or cross-market insurance; identification of statutes in 24 states specifically addressing unauthorized insurers' advertising circulated through the mail, the radio or a television station to residents of the respective states; identification of criminal statutes in 35 states regarding the sale of unauthorized insurance, four states of which apply the law only to an unauthorized insurer, six states apply it to producers writing policies of unauthorized insurers, and the remaining 25 states apply it to insurers, producers and others associated with an unauthorized insurance enterprise; and analysis of the application of special rules as to nonadmitted insurers and surplus lines brokers in California.

Chapter 7—New reports on cases regarding:

— Establishing what *respondeat superior* entails in

terms of insurance liability and when resort to it is not needed to establish liability (§ 7.02);

- Distinguishing between legal fraud and actual fraud (§ 7.06[1][a][i][B]);
- Whether an insurer must provide coverage for the insured when its agent commits fraud on both the insurer and the insured (§ 7.06[1][a][i][D]);
- Whether an insurer is estopped from repudiating a contract when its agent prepared the application with its inaccuracy as well as the policy (§ 7.06[1][a][i][H]);
- The particularity needed to sustain a claim for bad faith (§ 7.07);
- Whether an insurer of an insurance agent have the duty to defend the agent in a class action lawsuit alleging common law invasion of privacy and violation of the federal Telephone Consumer Protection Act? (§ 7.09);
- The necessary and sufficient elements to establish a civil conspiracy (§ 7.12);
- Whether a professional liability insurer has a duty to defend an attorney in a malicious prosecution action brought by an insurance broker (§ 7.15); and
- Whether an insurance broker could maintain an action for malicious prosecution after a voluntary compromise and settlement of that case (§ 7.15).

The chapter also reports on Maryland statutes and cases on:

- Conditions under which an insurer may cancel its agreement with a broker or agent and whether it may cancel or refuse to renew the policy of the insured because of the broker's termination (§ 7.14[1]); and
- Whether an insurer tortiously interfered with a business contract by notifying policyholders that the agency relationship had been terminated (§ 7.14[1]).

Chapter 8—New subtopics on issue of judicial construction of restrictive covenants (§ 8.10), include:

- Under what circumstances former insurer's employees should be enjoined from possessing trade secret documents, soliciting the insurer's policyholders, or discouraging the policyholders from doing further business with the insurer (§ 8.10[1]);
- Whether a reinsurer's customer list was truly a trade secret (§ 8.10[1]);
- Whether restrictive noncompetition and nonsolicitation agreements that exceeded statutory limits for the duration of the restrictions were invalid

(§ 8.10[1][b][i]);

- Whether those agreements that failed to specify any geographic limits as to the restrictions were invalid (§ 8.10[1][b][ii]);
- What must be established to override a forum selection clause (§ 8.10[2][a]);
- What must be established to invalidate restrictive covenants (§ 8.10[2][b]);
- When will breach of a non-competition clause after the termination of an agency contract not necessarily result in a forfeiture of an agent's right to payment of the contract's value (§ 8.10[2][c]);
- How have the courts applied the statutory restraints on restrictive covenants (§ 8.10[2][d]);
- When is judicial "blue penciling" of restrictive covenants warranted (§ 8.10[2][e]);
- When is injunctive relief from the enforcement of non-competition, non-solicitation, and non-disclosure covenants in an employment agreement between an insurance agent and his former employer warranted (§ 8.10[2][f]); and
- When are such covenants upheld (§ 8.10[2][g]).
- New state-by-state revision of the effects of terminations "at will" of insurance agency contracts (§ 8.12[2][b]);
- New section on choice of law issues that have arisen in wrongful termination litigation (§ 8.12[10]); and
- Expanded coverage of cases on waiver, estoppel, and modification of agency agreements (§ 8.02[6]).

Chapter 8 further provides new reports on cases regarding:

- Whether a professional liability insurer was obligated to defend and indemnify its insureds, who were owners of an insurance agency, for failure to remit insurance premiums (§ 8.01[3]);
- Whether a third-party suit against a broker's reinsurer who had issued the broker a policy with a claims-made and reported provision had to abide by the time limitations in that provision (§ 8.01[3]);
- Prohibitions in the parol evidence rule (§ 8.02[6]); and
- Whether local insurance agent agreement providing retirement benefits violated state law where it allowed the agent's acceptance of commissions or benefits based on work he performed before the dates of his federal court convictions and the state Insurance Commissioner's cease and desist order (§ 8.12[1]).

Chapter 16—New reports on cases regarding:

- Basic requirements for E&O coverage (§ 16.01);
- Typical and additional E&O insuring agreement language (§ 16.03);
- Untimely notice of claim (§ 16.03[1][a]);
- Whether insurer was obligated to cover independent sales agents allegedly deceptive sales practices, based on their roles at the times in question and what the applicable policy provided (§ 16.03[1][a][ii]);
- How agent or broker could be able to insured on both tort and contract theories (§ 16.03[2][c][i]);
- Failure to plausibly plead all elements of negligence, such as duty to procure specific coverage or lack of damages could be dispositive, but even if all elements are proven existence of applicable exclusion or lack of damages could also be dispositive (§ 16.03[2][c][i]);
- Based on a 2023 decision of a Virginia federal court, Virginia does not appear to recognize a professional negligence exception from its economic loss doctrine for insurance agents and brokers (§ 16.03[2][c][ii]);
- The Fifth Circuit ruled on whether an exclusion that precludes coverage for injuries 'arising out of' described conduct should be given a broad, general and comprehensive interpretation so that a claim need only bear an incidental relationship to the described conduct for the exclusion to apply (§ 16.03[4]);
- The Tenth Circuit ruled on whether an insurance broker and its president were entitled to their insurer's defense of claims brought against them in several state court lawsuits claiming fraud and negligence in the course of their insurance business. The E&O policy contained an "insolvency" exclusion that might eventually preclude recovery for some, but not all, of the claims (§ 16.04[3]);
- Whether a professional liability insurer had a duty to defend or indemnify an insurance broker who foresaw a potential claim before the inception of the policy (§ 16.04[4]);
- In a relatively unsettled area of the law, the Ninth Circuit predicted how the Oregon Supreme Court would rule in a dispute between two insurance companies over coverage for a personal injury suit, which arose "because of bodily injury," and the claims of professional negligence against the agent, which procured inad-

equate liability coverage (§ 16.04[5]).

New analysis of statute:

— 735 Ill. Comp. Stat. 5/2-2201(b) provides that an insurance broker is not liable as a fiduciary unless it wrongfully retained or misappropriated funds, but a fiduciary's liability is not limited by the statute to a refund of the fee the fiduciary received, such as a broker's commission (§ 16.03[2][c][i]).

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