Section 4 – The Insurance Agent as a Professional

The majority of claims made against agents come from ordinary negligence and simple errors. In this lesson you will review the types of claims that are regularly paid by agents and agent errors and omissions insurance for negligent acts by agents.

Sometimes, the courts may apply a higher standard of care for an insurance agent accused of negligence; that is, when a "special relationship" exists between agent and client. You will review a series of court cases that have addressed the issue of the insurance agent as a professional and explore situations where agents have been granted professional status when they engage in “special relationships” with clients.

Learning Objectives

1. Define tort.
2. Define negligence and the four elements required for negligence to exist.
3. Explain the common law defenses against negligence.
4. Define professional.
5. Describe how Hardt v. Brink and other court cases have applied the concept of “special relationship” in order to elevate an insurance agent to professional status.
6. List the circumstances that have been found to trigger “special relationships.”
7. List the reasons why there has been an increase in lawsuits against insurance agents.
8. Give examples of the types of negligence claims routinely filed against agents by consumers.
9. Give examples of the types of negligence claims routinely filed against agents by insurers.

Section 4 Topic A – Negligence Defined

The courts generally find that the insurance agent is not a professional except when a “special relationship” exists. However, insurance agents are routinely found guilty of ordinary negligence in the performance of duties toward clients and customers. Just what is negligence?

To understand negligence, we need to know a bit about the tort liability system.

Learning Objective: Define tort.

Tort Liability

A basic definition of "tort" is a civil legal wrong against another for which the courts often assess monetary damages against the wrongdoer. Tort liability is imposed by common law. Common law evolves through the application of court case decisions over time. In this Ethics course, we are concerned about the tort called negligence.

Learning Objective: Define negligence and the four elements required for negligence to exist.

Negligence

Negligence is the failure to exercise the care that an ordinary prudent person would exercise: either doing that which a prudent person would not do, or failing to do that which a prudent person would do. Four elements are required for an act to be considered negligent.

There must be a duty owed by the negligent party to another party.

- There must be a breach of that duty.
- An actual injury or loss must occur.
- There has to be a close cause and effect (proximate cause) relationship between the breach of that duty and the injury or loss.

If a driver runs a stop sign, the driver breached a duty owed. But unless they cause injury or property damage, there is no negligent tort.

Customer Jones came to the agency on Friday late to fill out an application for auto insurance. The agent put the application on a stack of stuff and went home for the weekend. On Monday the mail covered the stack of stuff and never seemed to whittle down to that application. A month and a half later, customer Jones files a claim that the company promptly denies. Agent digs through the stack of stuff and produces the application and claims to the underwriter that it was lost in the mail, but was completed on time. The claim is paid. Was the agent guilty of negligence in any way?

Advisory Response

The agent manipulated the truth in a fraudulent manner in the statement made to the company. If the lie is discovered and reported to the state, the agent could have his/her license suspended, or suffer other sanctions including license revocation and harsher penalties. The insurer may have a cause of action against the agent for the money paid to the claimant. This may lead the insurer to cancel the agency contract or restrict binding authority. Insurers that routinely accept late applications may be giving implied authority to agents to continue the practice.

Disclaimer: The advisory response is not a legal opinion. Different Federal and/or individual state laws may apply to this scenario or others with similar facts. Courts in different jurisdictions may interpret identical facts of the dilemma differently. Minor changes in the facts of the dilemma can produce different, legal or ethical interpretations. Finally, there may be one or more ethically or legally appropriate resolutions to the dilemma that have not been addressed.

Knowledge Check

Adam carelessly mows his lawn with his riding lawnmower. He sees a baseball in his yard, but mows right over it. The baseball flies up and hits his neighbor's window. Luckily no damage is done, and no one saw him do it. Which of the following describes the "test" for a negligent tort that has not been met?

a. No actual injury or damage occurred.
b. No one witnessed him.
c. He was no more negligent than the average person.
d. No duty was owed.

The answer is "No actual injury or loss occurred."

Learning Objective: Explain the common law defenses against negligence.

Common Law Defenses Against Negligence Causes of Action

Assumption of Risk

Assumption of risk is the voluntary acceptance of danger or exposure to loss. The agent might use this defense when an insured decides not to carry a recommended coverage. The agent should document this with a written declination.

Contributory or Comparative Negligence

In the majority of states, a defendant can be found partially at fault (comparative negligence) and still collect a portion of damages. In many contributory negligence states, the defendant cannot be even one percent at fault to collect damages (others may go as high as 10%).

The question of partiality of fault may arise in this type of situation:

The insured accepts state minimum limits for uninsured motorists coverage, but asks questions about why she should have the coverage to which the agent replies, “Oh, it just pays for uninsured accidents, but you will be insured.” The insured is injured by an uninsured motorist and quickly exhausts the limits of insurance and sues the agent for more money. The insured claims that the agent should have been more specific with the answer and the agent says that the insured signed the application and told him she wanted the cheapest possible insurance available, “Just whatever the state says I have to have”. If the court agrees that the agent should have provided a better answer and that the insured should have continued to ask questions if she didn’t understand the answer, the court may have to decide the proportion of fault for both parties.

Fellow Servant Rule

In common law, employers are not responsible for injuries suffered because of a fellow worker’s negligence. Such a defense may be used by an agency principal when a producer commits a negligent act outside the scope of employment that injures a client in some way. However, there are many other considerations in this type of claim including vicarious liability related to negligent supervision of the producer by the agency principals or managers.

Acts of Nature

One cannot be held liable for lighting strikes, hurricanes or earthquakes… However, the agent knew that the customer’s home was in a flood plain and failed to recommend flood insurance to the customer. After a hurricane storm surge floods the home, the agent may be considered

to be negligent in his/her duties as a professional. This leads us to the next topic. What is a professional and when are insurance agents considered professionals?

Knowledge Check

Which example illustrates a situation where the agent would have a common law defense of assumption of risk?

a. Nathan tells his insurance agent John that he only wants to insure his car for the minimum required amount. When asked if only the minimum liability coverage will suffice, John tells Nathan that he would be covered in an accident with only collision coverage.
b. Lisa has a homeowners policy. When an earthquake damages her house, she sues her insurance agent Scott for damages, alleging that he did not provide her with accurate coverage.
c. Lynn recommends to all her clients that they carry uninsured motorists insurance on their automobile policies. Her client Phillip decides to forgo purchasing uninsured motorists insurance and signs a declination document.
d. Mark is an agency principal. His producer John backs into a client's car while leaving for the day. The client sues Mark.

The answer is "Lynn recommends that all her clients carry uninsured motorists insurance on their automobile policies. Her client Phillip decides to forgo purchasing uninsured motorists insurance and signs a declination document."

Summary

Tort: A civil wrong against another for which courts often assess monetary damages against the wrongdoer.

Negligence: Failure to exercise care that an ordinary prudent person would exercise.

Four requirements for Negligent Tort:

- Duty owed to another
- Breach of that duty
- Actual injury
- Proximate cause

Negligence defenses:

- Assumption of risk
- Contributory or comparative negligence
- Fellow servant rule
- Act of nature

Section 4 Topic B – The Definition of Professional

Learning Objective: Define professional.

The 1999 Random House Webster's College Dictionary defines "profession" as: A vocation requiring extensive education in science or the liberal arts and often specialized training.

Most people agree that doctors, lawyers, and accountants are "professionals." In addition to years of education, doctors, lawyers, and accountants must be licensed by state authorities and must adhere to standards of the profession which go beyond the law.

If a doctor is not properly trained, a person could die; if a lawyer is incompetent, a client could lose money or freedom; or if the accountant is careless, the client could suffer heavy fines from the IRS and others.

PEOPLE EX REL. TOWER V. STATE TAX COMMISSION 282 N.Y. 407, 26 N.E.2d 955.

In 1940, the New York Court of Appeals took on the job of defining what a professional was. In New York, professionals were subject to the state's unincorporated business tax. The state classified the plaintiff, a customs clerk, as a professional and he sued the state for relief.

Because the plaintiff needed to understand customs law, the state reasoned that he was a professional. The court disagreed, saying that knowledge in and of itself did not define a professional but that "knowledge of an advanced type in a given field of science or learning gained by a prolonged course of specialized instruction or study" was the test.

*defining professional: "specialized knowledge and training"

LEE H. KIMMELL, ET AL., RESPONDENTS, v. HERMAN A. SCHAEFER, APPELLANT, ET AL., DEFENDANTS. 89 N.Y.2d 257, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996)

In 1989 in Kimmel v. Schaefer, the New York court further clarified the circumstances in which someone might be classified as a professional:

"Since a vast majority of commercial transactions are comprised of such 'casual' statements and contacts, we have recognized that not all representations made by a seller of goods or provider of services will give rise to a duty to speak with care.

Rather, liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.

Professionals, such as lawyers and engineers, by virtue of their training and expertise, may have special relationships of confidence and trust with their clients, and in certain situations we have imposed liability for negligent misrepresentation when they have failed to speak with care."

* defining professional: "special relationship"

The Agent May Be Subject to the "Special Relationship Test"

Even though insurance agents must study and pass tests to become licensed, these tests coined by the New York Court of Appeals require a higher standard, and therefore most courts have agreed that the agent is not normally a professional.

However, in the case of Hardt v. Brink, the Western District of Washington Federal Court determined that if a "special relationship" between the agent and the insured exists, the agent is considered a professional and subject to a higher standard of care than ordinary negligence. The essence of the professional relationship is one of degrees. No clear line exists and the courts have made it clear that the existence of a "special relationship" should be judged on a case-by-case basis.

We'll go over Hardt v. Brink in the next section.

*defining professional: "ordinary negligence vs. a higher standard of care"

Summary: Courts do agree that the agent is subject to ordinary negligence. Unless "special relationships" exist, the courts have generally found the following to be true:

- Consumers have a duty to read their insurance policies.
- The agent can be held negligent for misrepresentations of the nature, extent or scope of coverage.
- The insurance agent is not obligated to offer higher limits of insurance than the consumer asks for, nor does the agent have a duty to advise the consumer as to the adequacy of coverage.
    - However, if "special relationships" exist, then the insurance agent is held to a higher standard.

- The agent has a duty ask the consumer to clarify statements made by the consumer that the agent does not understand.
- The agent has a duty to act in good faith and to do what the consumer asks them to do.
- Agents should be held to a duty to perform that is consistent with other knowledgeable insurance agents in the state.

Section 4 Topic C – Court Cases that Define Insurance Agents as Professionals

Learning Objective: Describe how Hardt v. Brink and other court cases have applied the concept of "special relationship" in order to elevate an insurance agent to professional status.

HARDT V. BRINK, 192 F. Supp. 879, 881 (W.D. Wash. 1961)

Until this case in the Western District of Washington Federal Court, most people assumed that consumers ought to educate themselves about their insurance needs and that the agent didn't need to explain coverages to the client.

Hardt owned a metal products company that leased space in a building. Hardt's lease with the building owner excluded Hardt from any coverage under the landlord's building. After a fire, Hardt discovered that he had no coverage. Agent Brink argued that he knew nothing about the lease. The court noted that for eight years agent Brink had selected insurance coverage and settled claims for Hardt.

In this case, the court considered the underlying question of whether an agent who assumes additional duties for clients should be considered a professional. Additional duties in this case included the placement of coverage and the negotiation of claims payments.

Hardt also argued that agent Brink had held himself to be an expert in insurance and therefore should be considered a professional. In fact, the court found that agent Brink had represented himself as an expert both on stationary and on policy stickers.

The court noted, "This is an age of specialists and as more occupations divide into various specialties and strive towards 'professional' status, the law requires an ever higher standard of care in the performance of their duties." Based upon this, the court agreed that Hardt could assume that agent Brink "was a person highly skilled as an insurance advisor" and had assumed the duty to advise Hardt, thus putting himself in the position of being considered a professional, and subject to a higher standard of care.

Courts have recognized this expanded duty of care when so-called "special relationships" exist. Hardt left open the door for future cases to determine just what these professional duties are.

Generally, a professional is required to act within the degree of care and skill as a reasonable professional in the field. This is a higher duty of care than the reasonable and prudent person for ordinary negligence.

DIMEO V. BURNS, BROOKS & MCNEIL, INC., 6 Conn. App. 241, 504 A.2d 557, (1986), cert. denied, 199 Conn. 805, 508 A.2d 31

The plaintiff insured his home with the agent and then asked the agent to insure his autos.

The agent advised the plaintiff to increase liability insurance limits from $100,000 to $300,000. The plaintiff agreed. However, the agent did not recommend that the plaintiff increase uninsured motorists coverage, which remained at $20,000. The plaintiff was in a collision with an uninsured motorist and quickly used up the $20,000 uninsured motorists coverage, and then filed a claim against the agent for failure to advise.

The court ruled against the plaintiff in this case because it did not see that the agent had a special relationship with the insured. However, the court expanded upon the Hardt decision by saying, "an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client."

The rationale for this they said was because the consumer, “ordinarily looks to his agent and relies on the agent's expertise in placing his insurance problems in the agent's hands."

The court reasoned that the agent was a professional and had a duty to perform to the “knowledge, skill and diligence” of other insurance professionals licensed to do business in the State of Connecticut. One of these duties was to explain uninsured motorists coverage, explain the consequences of inadequate coverage and recommend a reasonable amount of coverage, and make a reasonable effort to find this amount of coverage for the customer.

This court decision and others have not provided agents with strong guidance with how to act when performing the duties of an agent.

Legally, the agent may not be normally required to advise the consumer to purchase higher limits of coverage, but ethically, the agent as a professional knows the consequences of inadequate liability and underinsured motorists coverage. The agent as a good businessperson knows that a book of business with inadequate limits of insurance is not highly marketable to insurers. Unhappy customers who are not indemnified after a loss spread the word of their unhappiness to their friends and blame the agent and insurer and many will sue the agent and the company to make up the difference in their loss.

WANG ET AL., PLAINTIFFS, RESPONDENTS V. ALLSTATE INSURANCE COMPANY ET AL., DEFENDANTS, APPELLANTS. New Jersey Supreme Court. No. A- 133/134. June 26, 1991

The injured party swerved to avoid two dogs and was injured in the resulting accident. The injured party then sued the two homeowners who owned the dogs for negligence in controlling

their animals.

Neither of the two homeowners had adequate insurance limits to pay for the injuries. Both homeowners sued their agent because neither claimed to have ever been given advice by their agent to increase liability coverage. One of the homeowners claimed to have been an insured of the agent for 20 years. Both homeowners claimed no expertise in insurance and said that they relied on the agent for advice.

While the court acknowledged that there are times when a “special relationship exists” between agents and customers, no special relationship or pattern of dependency, counseling or recommendation existed in this case.

It found that policies were routinely renewed without discussion and concluded that there was "no common law duty of a carrier or its agents to advise an insured concerning the possible need for higher policy limits upon renewal of the policy."

THOMAS MURPHY ET AL., APPELLANTS, v. DONALD C. KUHN, ET AL., RESPONDENTS. 90 N.Y.2d 266, 682 N.E.2d 972, 660 N.Y.S.2d 371 (1997)

The plaintiff was insured under a commercial automobile policy for $500,000. The plaintiff’s son was found to be at fault after a serious automobile accident. The actual final settlement for the claim was nearly $700,000. The plaintiff sued the defendant agent to recover the additional $200,000 over what the insurer paid.

In 1990 the defendant agent notified the plaintiff that his personal automobile policy was in danger of being cancelled because of the bad driving record of his children. The plaintiff then transferred coverage on the vehicle (titled in Murphy’s name) to his business automobile policy.

The plaintiff testified that he had titled all of his children’s vehicles in his name. For nearly ten years, the plaintiff had maintained coverage on his business policy at $250,000 per person and $500,000 per accident. The plaintiff never requested higher limits from the defendant/agent. The defendant agent had insured the plaintiff for personal lines since 1977 and for commercial lines since 1979.

The plaintiff argued that “insurance agents can assume or acquire legal duties not existing at common law by entering into a special relationship of trust and confidence with their customers. …"that a special relationship developed from a long, continuing course of business between plaintiffs and defendant insurance agent, generating special reliance and an affirmative duty to advise with regard to appropriate or additional coverage.”

The State Supreme Court, however, concluded that, “absent a request by the customer, an insurance agent ‘owes no continuing duty to advise, guide or direct the customer to obtain

additional coverage'." The court concluded that in this instance the so-called "special relationship" doctrine established by Hardt v. Brink did not apply.

However the court didn't stop there. The court advised that while this case didn't break new ground in the "special relationship" doctrine, "Exceptional and particularized situations may arise in which insurance agents through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those in addition to those fixed at common law." The court advised that these situations would need to be decided on a case-by-case basis.

Learning Objective: List the circumstances that have been found to trigger "special relationships."

What circumstances have courts found that trigger the "special relationship" test?

The Agent as Expert

- When the agent "holds himself out" to be an expert or has expertise in the type of insurance being sought by the consumer. FITZPATRIC V. HAYES, 57 Cal. App. 4th 917 67 Cal. Reptr. 2d 455 at 452 (1997). Also HARDT V. BRINK, 192 F. Supp. 879, 881 (W.D. Wash. 1961).

Relationship of Actual Closeness

- When there is a relationship of actual closeness. i.e. there is more than an arms-length business relationship including counseling on insurance coverage the agent doesn't write or providing services above and beyond what an average insurance agent would otherwise provide in the state. WEISBLATT V. MINNESOTA MUTUAL LIFE INS. CO., F. Supp. 2d 371 (E.D. Pa. 1998). Also HARDT V. BRINK, 192 F. Supp. 879, 881 (W.D. Wash. 1961)

Substantial Disparity

- When there is substantial disparity between the agent and the insured. i.e. the agent has significant expertise and the client is semi-literate. The doctor patient relationship is highly disparate because the patient must rely upon the doctor not only for diagnosis, but also for prescriptions and competent care. WEISBLATT V. MINNESOTA MUTUAL LIFE INS. CO., F. Supp. 2d 371 (E.D. Pa. 1998)

Reliance on the Agent

- When the insured actually relies upon the agent for advice and counsel. i.e., "recommend the limits you think are best for me and I will follow your advice," and this pattern extends over a period of time. WEISBLATT V. MINNESOTA MUTUAL LIFE INS. CO., F. Supp. 2d 371 (E.D. Pa. 1998)

Other Special Relationships

- The agent can enter into a “special relationship” with a client at any time. It is up to a court to decide when the line is crossed and which activities of the agent contribute to the “special relationship.” THOMAS MURPHY ET AL., APPELLANTS, v. DONALD C. KUHN, ET AL., RESPONDENTS. 90 N.Y.2d 266, 682 N.E.2d 972, 660 N.Y.S.2d 371 (1997).

Summary

Professional: Vocation requiring extensive training

Hardt v. Brink: First case to make agent professional when “special relationship” exists

Circumstances that trigger special relationship:

- Agent holds him/herself out to be an expert
- Relationship of actual closeness
- Insured relies upon agent for advice
- Substantial disparity between agent and insured
- “Special relationship” can occur at any time; court decides

Section 4 Topic D – Beyond Professionalism – Insurance Agents and the Legal System

We have reviewed only a few of the many cases related to agency law and the duties of insurance agents to their clients.

There are many more ordinary negligence cases that have been decided against agents who failed to submit applications on time, proclaimed coverage where none existed, or otherwise failed to secure proper insurance coverages for customers in a timely manner.

Whether the insurance agent is considered a professional or not in a particular case, we find the following to be true:

- Facts of similar cases have different outcomes in different jurisdictions; small factual changes can mean different outcomes in the same jurisdiction.
- The legal relationship with the client depends upon the services performed.
- The agent's liability grows with the authority granted by the customer to a point where that "special relationship" exists. However this is not a bright line and courts may need to determine when this relationship begins.
- Social, ethical, and legal responsibilities are linked — insurance is a people serving business.

Learning Objective: List the reasons why there has been an increase in lawsuits against insurance agents.

Increase in Lawsuits Against Insurance Agents

Insurance agents have not been spared from the increase in negligence lawsuits.

Increase Availability of Legal Services

Legal services are available to all consumers today. Many negligence cases are taken by lawyers who only get paid if they win the case, so even the poor can afford to hire an attorney. Attorneys advertise these services.

Deep Pocket Theory

Juries have come to believe that insurance companies and agencies have deep pockets and can afford to pay any claim. Within this concept is the notion that the person is injured—it wasn't his/her fault—someone should pay.

Errors and Omissions Insurance

The widespread purchase of errors and omissions insurance by agents increases the number of claims because attorneys, who were hesitant to file cases against small agencies with few assets, now believe there will be an insurance policy with significant assets to pay for any damages assessed by the court.

Increased Specialization

Increased specialization of services and markets — as agencies become more specialized their expertise increases and with that increase in expertise comes an increase in the responsibility of the agent to the insured.

Complexity of Insurance Products

Policies are more complex and endorsements more prevalent than ever before.

US Tort Costs Increases 1950 - 2001		
Year	**Tort cost as % of GDP****	**Tort cost per citizen**
1950	0.61%	$12
2001	2.04%	$721

**Gross Domestic Product

Extract from Insurance Information Institute Facts and Statistics, avail. http://www.iii.org/media/facts/statsbyissue/litigiousness/ from a report by Tillinghast-Towers Perrin.

Learning Objective: Give examples of the types of negligence claims routinely filed against agents by consumers.

Where Agents Have Been Found Liable to the Insured

Failure to provide coverage. This includes the following types of claims:

- **Improper analysis of risk**

  Failure to identify the risk of loss i.e. overlooked the fact that the insured had a second home that had been insured by the prior carrier.

- **Failure to offer proper coverage**

  Identified risk but did not offer proper coverage i.e. wrote a tenant homeowners policy for a home owner that did not cover the building.

- **Failure to request proper coverage**

  Client requested coverage, but agent did not ask company to provide.

- **Failure to receive proper coverage**

  The agent requested the coverage from the company but did not follow up to see that the coverage was provided.

- **Failure to place coverage on the best terms available**

  The agent has a choice between company A and Company B. Company B pays higher commissions but provides lower coverage. The agent recommends and the insured accepts Company B. A subsequent loss is either not covered or is inadequately covered by Company B and the insured finds out that he could have been insured properly with Company A.

- **Misrepresentations**

  Of coverages to the insured i.e. “Sure, you have replacement cost collision coverage.”

- **Failure to maintain or renew coverage**

  i.e., the agent forgot to send in the renewal questionnaire and the policy was cancelled by the insurer.

- **Failure to advise of cancellation or non-renewal**

- **Inadequate limits or modified coverage**

  The insured applies for a policy that includes X coverage, but the agent is unable to obtain X coverage from the underwriter and does not tell the customer.

- **Placing coverage with an insolvent insurer.**

- **Failure to service the policy.**

- **Failure to follow instructions**—the agent does not add the coverage for the new car on the correct date.

- **Failure to fully disclose**—withholds information about new endorsements with less coverage than provided under the previous policy.

HIGGINBOTHAM & ASSOCIATES V. GREER, 738 S.W.2d 45, 46 (Ct. App. Tex. 1987).

In this case, the agent placed coverage with an insurer who was insolvent at the time the claim was made, but not at the time the application was taken. While agents normally are not responsible for recommending an otherwise solvent insurer that later becomes insolvent, a certain amount of due diligence is required.

In Higginbotham, the judge ruled, "We...conclude that an agent is not liable for an insured's lost claim due to the insurer's insolvency if the insurer is solvent at the time the policy is procured, unless at that time or at a later time when the insured could be protected, the agent knows, or by the exercise of reasonable diligence should know, of facts or circumstances which would put a reasonable agent on notice that the insurance presents unreasonable risk."

Learning Objective: Give examples of the types of negligence claims routinely filed against agents by insurers.

Negligence Claims

The following are common situations where courts have found the agent legally responsible to the insurer:

1. Unauthorized instructions
2. Violation of company binding authority
3. Unauthorized coverage interpretations—the agent produces a brochure that references the insurer, includes some coverage interpretations verbatim supplied by the insurer, but uses a different interpretation not authorized by the insurer for one or more coverages
4. Failure to submit claims
5. Violation of agency agreement—the agency is only permitted to solicit insurance on behalf of the company in specific counties
6. Misrepresentations - misrepresentation of information supplied by the insured on the application, e.g., “No, they discontinued making fireworks years ago, ” and fireworks represents 20% of their profit

The producer in the agency likes to use an individually crafted detailed proposal for each account. Much of this language he has crafted himself. The agency contract with the XYZ insurance contract requires the agent to use specific language in reference to its proprietary Employment Practices Liability Policy. In order to obtain an account, the producer drops one of the required references to an exclusion that the incumbent carrier does not have. The customer is mulling over the decision. You are the agency owner and have just discovered this omission. What do you do?

Advisory Response

If fraudulently stated, it may be in your best interest to discipline the producer. In any event, contact the prospective customer immediately and correct the information.

Disclaimer: The advisory response is not a legal opinion. Different Federal and/or individual state laws may apply to this scenario or others with similar facts. Courts in different jurisdictions may interpret identical facts of the dilemma differently. Minor changes in the facts of the dilemma can produce different, legal or ethical interpretations. Finally, there may be one or more ethically or legally appropriate resolutions to the dilemma that have not been addressed.

Workers compensation is nearly impossible to write in your state. Your agency places most of its workers compensation customers in the state workers compensation insurance fund, as do most other agencies. You overhear one of your CSR's say to a customer, "Sure, it's the state, and they won't go bankrupt. They're safe and their rates are better than what we can get anywhere else." As the agency owner you know that both the state government and the state workers compensation insurance pool are experiencing grave fiscal problems and the legislature will probably grant significant workers compensation rate increases in the near future in an attempt to help fund increasing losses and to help encourage competition from private insurers, it is likely that the fund will become the most expensive insurer in the state. How should you respond to the conversation you just overheard?

Advisory Response

Educate the CSR. Customers hate surprises. Have the CSR contact any customer to whom this was said and explain that pending legislation could make the cost of workers compensation in the state fund more expensive.

Disclaimer: The advisory response is not a legal opinion. Different Federal and/or individual state laws may apply to this scenario or others with similar facts. Courts in different jurisdictions may interpret identical facts of the dilemma differently. Minor changes in the facts of the dilemma can produce different, legal or ethical interpretations. Finally, there may be one or more ethically or legally appropriate resolutions to the dilemma that have not been addressed.

Your agency must roll a book of homeowners business to a new carrier. The underwriter for the prospective insurer has just completed a review of the book of business and has expressed concern that the book of business for your best personal lines producer has problems with insurance to value. In fact, most policy dwelling limits have not been increased since they were first written. The level of increases required to meet the incumbent's insurance to value policies will double the premium or more for a significant number of clients. You do have other homeowners insurers that will take these counts without looking too hard at insurance to value. What will you do?

Advisory Response

Fix the problems before the errors and omissions claims come in.

You may not be required by law to advise clients to increase coverages because of inflation, but how do you know whether a court will say that the producer has had a "special relationship" with one or more clients and could have a duty to advise clients to increase coverage? The agency should consider contacting all of the affected customers and explain insurance to value and what that means. Document the files regarding any decisions by homeowners not to increase to recommended coverage levels. It would make sense to acknowledge the refusal in a letter written to the insured.

Educate the producer and put in controls to make sure that the producer does not put the agency in this type of bind again.

Disclaimer: The advisory response is not a legal opinion. Different Federal and/or individual state laws may apply to this scenario or others with similar facts. Courts in different jurisdictions may interpret identical facts of the dilemma differently. Minor changes in the facts of the dilemma can produce different, legal or ethical interpretations. Finally, there may be one or more ethically or legally appropriate resolutions to the dilemma that have not been addressed.

Summary

Agent liable to consumer

- Improper analysis of risk
- Failure to provide proper coverage
- Failure to request proper coverage
- Failure to receive proper coverage
- Failure to maintain or renew
- Failure to advise of cancellation
- Inadequate or modified limits
- Fail to place on best terms
- Misrepresentations
- Place with insolvent insurer
- Failure to service policy
- Failure to follow instructions
- Failure to fully disclose

Agent liable to insurer

- Unauthorized instructions
- Violate binding authority
- Violate agency agreement
- Unauthorized coverage interpretations
- Failure to submit claims

Reasons for increase in lawsuits against agents

- More legal services
- Deep Pockets
- Agents buy E&O
- Specialization
- Complex policies

Be sure to complete Self Quiz 4 at the end of Section 4.