E&O Overview for Minnesota Insurance Agents

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Outline ⟶

1. → Review Standard of Care/Duty of Insurance Agents in Minnesota.

2. → Trends in Insurance Litigation.

3. → Review specific case studies from prior lawsuits.

4. → Suggestions/Advice.

1. Review Standard of Care

What would a **reasonable person** do in similar circumstances?

Normal Standard of Care or Duty
Insurance Agents – Minnesota

"An insurance agent's duty is ordinarily limited to that of an agency relationship, to act in good faith and to follow instructions."

Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn.1989)

ORDER TAKER STANDARD

Normal Standard of Care or Duty
Insurance Agents – Minnesota

ORDER TAKER STANDARD

Special Relationship
Heightened Standard of Care

An insurance customer can demonstrate a special relationship by showing that there exists something more than the standard agent-customer relationship. This depends upon the particular relationship between the agent and the customer and is determined on a case by case basis.

Special Relationship
Heightened Standard of Care

To show a special relationship exists between an insurance agent and an insured is a high burden and the courts have frequently been wary to find the existence of a special relationship in prior cases.

2. Trends in Insurance Agent Litigation

Trends in Insurance/Insurance Agent Litigation

1. Increase in litigation costs and litigation complexity.
2. Automatic inclusion of agents in coverage case regardless of supporting facts.
3. Increase in insurance companies taking hard/strict positions on coverage; and denying or limiting claims.
4. More insurance products being developed – potential for more claims. E.g. – cyber liability coverage, drone coverage.

Trends in Insurance/Insurance Agent Litigation

Additional Problem Areas:

1. **Work Comp**
2. **Crop Insurance**
3. **Farm Package policies.**

3. Case Studies

Specific Case Examples
Case 1 – Crop Insurance case.

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Case 1 – Crop Insurance case.

1. “sales closing date” had already passed.
2. Agent contact underwriter.
3. Underwriter at Company says do it this way.
4. Agent follows underwriters advice.
5. Crop Loss
6. Company denies claim.

Specific Case Examples
Case 1 – Crop Insurance case.

After the denial of the claim by the crop insurance company the agent calculated the crop loss amount to be approximately $2,000. The agent on his own (without contacting his professional liability carrier) decided to pay the insurance customer this amount (approximately $2,000).

Specific Case Examples
Case 1 – Crop Insurance case.

The insurance customer disputed the amount of the crop loss. The insurance customer calculated the crop loss to be approximately $65,000.

Specific Case Examples
Case 1 – Crop Insurance case.

The insurance customer brought suit against the crop insurance company and the agent.

The agent tendered the defense of the case to the crop insurance company.

The crop insurance company denied the tender of the defense and refused to defend the agent.

Protracted litigation ensued, including multiple motions before the court and five depositions.

Specific Case Examples
Case 1 – Crop Insurance case.

On the eve of trial the case settled. The crop insurer paid $40,000 to the insurance customer and $500 in costs to the agent's professional liability carrier.

The agent and the agent's carrier paid nothing besides the $2,000 the agent offered to the insurance customer right after the denial of the claim and the forgiveness of approximately $3,000 owed to the agent by insurance customer for unpaid premiums fronted by the agent.

Specific Case Examples
Case 1 – Crop Insurance case.

However, over $60,000 was spent in attorneys' fees and costs defending the agency.

The agency had a $7,500 deductible that applied to settlement amounts or judgment amounts only (as opposed to a cost of defense deductible).

Specific Case Examples
Case 1 – Crop Insurance case.

Lessons learned from case:

1) Sometimes no matter what you do as an agent you might be sued. Make sure you are prepared for this possibility (funds for deductible – good documentation of your files).

2) You and your insurance customer might not agree on the amount or type of loss.

Specific Case Examples
Case 1 – Crop Insurance case.

Lessons learned from case:

3) Even in cases where both the agent and the agent's professional liability insurer pay nothing (or very little) to resolve the case there are still significant defense costs and significant time lost by the agent in almost every case.

Specific Case Examples
Case 1 – Crop Insurance case.

Lessons learned from case:

4) The agent should not make an offer to settle. In addition the agent should make no commitment one way or the other in regards to liability. The agent should not make statements about E&O insurance or the like. The agent must assume that whatever the agent says can and will be used against the agent in a subsequent lawsuit.

Specific Case Examples
Case 2 – Premises Change Request.

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Case 2 – Premises Change Request.

In June of 2007 the insurance customer made a request to change the insurance customer's mailing address and premises location. The agent told the customer that this would be taken care of.

The agent forwarded this request to the agent's CSR to handle. The agent's CSR sent a request for a change of mailing address and change of premises to the insurer.

Specific Case Examples
Case 2 – Premises Change Request.

After the request for a change of mailing address and change of premises was sent to the insurer, the insurer changed the mailing address but sent out a letter to the agent requesting additional information about the new building in order to process the premises change request.

The agent never saw the letter requesting additional information about the new premises.

No such letter was found in the agent's file.

Specific Case Examples
Case 2 – Premises Change Request.

The insurance customer's file at the agency showed that the request for a change of premises was forwarded to the insurer in the form of a policy memo from the agency.

The insurer's underwriting file shows that this policy memo was received by the insurer.

A short while later the insurer sent back a new declarations page to the agent and the insurance customer noting the change to the mailing address on the front page but not making any change to the premises on the second page.

Specific Case Examples
Case 2 – Premises Change Request.

In September of 2007 the insurance customer claimed an employee theft loss of its inventory.

This was close to the end of the first policy period.

The alleged theft loss arose out of a dispute amongst the owners of the insurance customer's business.

One of the owners took the inventory of the business without the consent of the other owner.

Specific Case Examples
Case 2 – Premises Change Request.

The other owner sued the owner that took the inventory. This other owner also submitted an insurance claim to the insurer for the alleged theft loss.

The insurer denied coverage for the theft loss based in part on the fact that it did not occur at scheduled premises.

The alleged theft loss occurred at the new location and the insurer claimed that there had not been an effective change of premises to the new location.

Specific Case Examples
Case 2 – Premises Change Request.

The insurer had additional and better support for its denial of coverage. Mainly the insurer's denial of coverage was supported by the fact that the individual that "stole" from the insurance customer business was an owner of the insurance customer business and thus there is no coverage for the alleged employee theft under the insurance customer's business policy.

Specific Case Examples
Case 2 – Premises Change Request.

The insurance customer sued the insurer.

The insurance customer did not sue the agent.

The agent's file was subpoenaed in this litigation. In addition, the agent and the agent's CSR were subpoenaed to testify at a deposition in this litigation.

The agent's insurer paid for an attorney to represent the agent in responding to the subpoenas. This is part of the coverage provided in many professional liability policies.

Specific Case Examples
Case 2 – Premises Change Request.

In the litigation between the insurance customer and the insurer there was a settlement mediation.

A few days before the settlement mediation the insurer's attorney "invited" the agent (and the agent's professional liability insurance carrier) to participate at the mediation.

Specific Case Examples
Case 2 – Premises Change Request.

The insurer's attorney argued that the agent was at fault for not following up on the premises change request and therefore the agent had potential exposure in the case.

The agent (and its professional liability insurance) disagreed and declined to participate in the mediation.

The mediation was unsuccessful.

Specific Case Examples
Case 2 – Premises Change Request.

After the mediation there was a Court ordered mandatory settlement conference with the Magistrate Judge assigned to the case.

Again the insurer "invited" the agent (and the agent's professional liability insurance carrier) to voluntarily participate in the settlement conference.

Again, the agent (and its professional liability insurance carrier) declined to participate in the settlement conference.

Specific Case Examples
Case 2 – Premises Change Request.

Shortly before the Court Ordered Settlement Conference the insurer instituted a third-party action against the agent; or in other words:

THE INSURER SUED THE AGENT!!!

This forced the agent (and the agent's professional liability insurance carrier) to participate in the settlement conference, because the agent was now a party to the litigation. The case settled at the Court ordered settlement conference with the Magistrate Judge for a confidential amount.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

1) Whenever possible follow up and confirm requests for changes to policies. This is particularly so when multiple requests for changes are made at the same time. Make sure each individual request for a change is made. If there are any discrepancies contact the insurer to resolve. Perhaps get your insurance customers to sign off in writing on complex or multiple changes.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

2) It can be surprising to find out how an insurer treats you as an agent in the litigation or claim context even if there has been a significant positive prior relationship between the you and the insurer.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

3) Simply because an agent is not sued initially, an agent may be brought into the case at a later time. If subpoenaed let your professional liability carrier know, particularly because of the subpoena coverage in many professional liability policies.

4) Also, even if you are just contacted by an attorney representing an insurance company or an insurance customer, contact your professional liability carrier and get their input and advice.

Specific Case Examples
Case 2 – Premises Change Request.

Lessons learned from case:

5) In general it is recommended that you not voluntarily turn over any information, files or documents without first contacting your professional liability carrier or an attorney. Exception is if one of your customers requests a copy of their file or something from their file.

RED FLAG – However, if your customer calls you up after a loss and asks you for a complete copy of their file this could signal the customer is contemplating a claim against you.

Specific Case Examples
Case 3 – Conversion Exclusion.

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Case 3 – Conversion Exclusion.

Theft coverage was in place in the insurance customer's policy with his previous agent and remained in place when the insurance customer transferred his policy to the new agent.

However in both of the insurance customer's previous policies and the policies purchased through the new agent there was an exclusion for conversion.

The insurance customer's property insurance was always insured under an Actual Cash Value basis as opposed to a Replacement Cost Value basis.

Specific Case Examples
Case 3 – Conversion Exclusion.

The insurance customer never communicated that he wanted coverage for conversion or coverage in the situation of if a customer failed to return a rented item.

Specific Case Examples
Case 3 – Conversion Exclusion.

In this case an individual rented a large wood chipper from the insurance customer's rental business but then failed to return it to the insurance customer's rental business. The individual that rented the wood chipper gave the insurance customer a fake name and used an invalid credit card.

Specific Case Examples
Case 3 – Conversion Exclusion.

At the request of the insurance customer a claim was submitted to the insurance customer's insurance carrier for the unreturned wood chipper.

The insurance carrier denied coverage for this claim under the conversion exclusion in the policy.

Specific Case Examples
Case 3 – Conversion Exclusion.

At first the agent thought the wood chipper was covered under the insurer's policy and the insurance company wrongfully denied coverage.

The agent did not fully appreciate the difference between conversion and theft and did not necessarily have all the facts from the insurance customer to properly make this determination.

Specific Case Examples
Case 3 – Conversion Exclusion.

After the conversion loss the agent sent correspondence to the broker involved in the sale of the policy and the insurer and questioned the denial of coverage in this regard.

Eventually the agent realized that conversion is different from theft and that the conversion exclusion applied and the denial of coverage while unfortunate was appropriate.

Specific Case Examples
Case 3 – Conversion Exclusion.

The damages in the case were limited to the actual cash value of the wood chipper at the time of loss (minus any additional insurance premium that would have been required in order to obtain special insurance for conversion).

The insurance customer sought $11,970.

This is what it cost the insurance customer to buy a new wood chipper.

Specific Case Examples
Case 3 – Conversion Exclusion.

However, the wood chipper was insured on an Actual Cash Value basis as opposed to a Replacement Cost Value basis.

The converted wood chipper was purchased for $6,750 a few years prior.

Thus, the converted wood chipper would likely have an actual cash value of $6,750 or less at the time of the loss. The property policy also had a $500 deductible.

Specific Case Examples
Case 3 – Conversion Exclusion.

It should also be noted that optional coverage for conversion is expensive.

Very few insurers in Minnesota will provide this type of insurance to rental companies.

The insurance customer received a quote for the conversion coverage after the loss and declined to purchase the additional coverage.

Specific Case Examples
Case 3 – Conversion Exclusion.

The insurance customer sued the insurance carrier for wrongful denial of coverage and the agent for failing to sell the insurance customer conversion coverage.

Both the insurance carrier and the agent were able to get out of the case on separate motions for summary judgment.

Specific Case Examples
Case 3 – Conversion Exclusion.

Lessons learned from case:

1) Even cases with small damage values can be a nuisance. The total claimed by the insurance customer in this case was only $11,970. Nevertheless, two depositions were taken and a motion was made before the Court. There was more spent defending the case then the actual amount of damages being sought by the insurance customer.

Specific Case Examples
Case 3 – Conversion Exclusion.

Lessons learned from case:

2) The one problem area in this case was the agent's representations as to coverage after the loss. If you choose to make representations as to coverage after a loss (which is highly discouraged) it is suggested that extra care is made under these circumstances (or in the alternative simply do not make any representations of coverage after a loss).

Generally, it is a best practice to leave coverage decisions up to the insurance carrier and stay out of this portion of the claims process.

4. Suggestions / Advice

Suggestions / Advice

1) Documentation! Documentation! Documentation! – Use Checklists and have insurance customer sign off and date the checklist.

2) Put in place a good electronic Agency Management System and use it regularly and consistently.

Suggestions / Advice

3) Use follow-up and confirming emails with your insurance customers whenever possible.

4) Calendar important dates in an outlook (or other similar electronic or online calendar program). Renewals, expirations, etc…

Suggestions / Advice

5) Avoid getting involved in the claims process and in particular claim determinations after a loss.

6) Be particularly careful around unique or unusual business circumstances and situations.

Suggestions / Advice

7) If you have a potential E&O or legal issue contact defense counsel (me) directly and/or your professional liability carrier.

8) It should be customary practice to offer the next level of insurance (generally in the form of a proposal with a quote or estimated quote for the next level of insurance).

Suggestions / Advice

9) Perform regular thorough reviews with their insurance customers.

10) Do not make assumptions about what your customers want or need; ask them.

11) Do not think that you will never be sued or that a claim will never be made against your agency.

Conclusion/Questions

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