



Pursuing insurance agents and brokers for professional negligence

These can be difficult cases, but there are scenarios in which they are viable

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Insurance agents and insurance brokers can be held accountable for performing their professional duties negligently, but only in limited circumstances. To prove professional negligence against an insurance agent or broker, the client must prove the basic elements of negligence – duty, breach, causation, and damages. The challenge in these cases is proving

the existence of a duty because in most jurisdictions insurance agents and brokers have only limited duties to their clients.

The professional conduct of insurance agents and brokers is governed by the laws of each state, and we have not exhaustively researched each state's laws for each of the concepts that we discuss in this article. This article is an introduction to the key issues that an attorney should consider when evaluating or prosecuting a negligence case against an

insurance agent or an insurance broker. We provide authority from several jurisdictions, which will provide the reader with an informed starting point for further analysis and research.

Insurance agent vs. insurance broker

People often think the terms “insurance agent” and “insurance broker” are synonymous and interchangeable, but they are not.



An insurance *agent* is an agent of the insurance company she represents. She is considered to be acting for the carrier, and her actions can bind the carrier. For example, an Allstate agent is, as a matter of law, an agent of Allstate (the same applies to a State Farm or Farmers agent). She acts on Allstate's behalf, and her actions can bind Allstate. If the agent fails to obtain specific coverage that the insured requested and that the agent said would be provided by a particular policy, a court – applying the common-law doctrine of equitable reformation – may in effect re-write the insurance contract to include the requested coverage.

In contrast to an insurance agent, an insurance *broker* typically works with several carriers and typically is considered to be acting for the insured. Except in rare circumstances, a broker's actions will not bind the carrier and will not be imputed to the carrier.

Although insurance agents occasionally can be held accountable for negligence in the performance of their duties as agents, since their professional actions can be imputed to the carrier, it is more common for brokers to be named as defendants in cases of alleged professional negligence. For this reason, and for simplicity's sake, we focus in this article not on insurance agents but on insurance brokers.

Four typical scenarios for broker negligence

There are four basic situations in which a client will approach an attorney with a possible claim for professional negligence against an insurance broker.

Scenario 1: The client claims that she forwarded money to her broker to pay the policy's premium, but the broker failed to pay the premium.

Scenario 2: The client asked the broker to buy specific insurance, such as earthquake insurance. The broker said he would but then failed to do so.

Scenario 3: The broker held herself out as having particular expertise in a certain type of insurance, or in insurance for a

particular industry or for a particular business, such as a jewelry store or a car wash. The client asked her to get the appropriate insurance for that particular business, and the broker failed to procure the necessary and available insurance for that business.

Scenario 4: The client asked for homeowner's insurance for his house. The broker procured the coverage. The house burns down, and the client learns that she does not have sufficient coverage to rebuild her home to its pre-loss condition.

In each of these scenarios, the client has suffered a loss that she thought was covered but that turns out not to be.

Three of these four scenarios present potentially worthwhile broker-negligence cases. The first two scenarios are straightforward examples of broker negligence. If one of these cases comes in your door, consider yourself lucky: the broker's E&O carrier usually will settle these cases quickly (depending, as always, on the facts of a particular case). The fourth scenario presents a case that is probably not worth pursuing: in most jurisdictions – not all, but most – courts will hold the policyholder responsible for choosing the amount of coverage.

Most broker-negligence litigation arises from the third scenario. These cases turn on whether the attorney can develop the evidence necessary to establish that the broker had a duty to procure insurance that the insured had not specifically requested.

Insurance brokers have only limited duties to their clients

An insurance broker has a duty to exercise reasonable care in procuring the insured's requested coverage. (See, e.g., *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.) In *Jones*, the California court held that, “[o]rdinarily, an insurance agent assumes only those duties normally found in any agency relationship. This includes the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.” (*Ibid.*)

Most jurisdictions interpret this duty narrowly, which makes it a challenge to hold brokers accountable for professional negligence. In most jurisdictions an insurance broker's duties do not include an obligation “to volunteer to an insured that the latter should procure additional or different insurance coverage.” (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.)

A few jurisdictions impose greater duties on insurance brokers. In these jurisdictions brokers have an obligation to give advice regarding additional coverages and limits without proving the existence of any special relationship between the broker and his client. For instance, the New Jersey Supreme Court in *Brill v. Guardian Life Ins. Co. of Am.* (1995) 142 N.J. 520 held that in addition to the duty to act with reasonable skill and diligence, the broker has a duty to inform the potential insured regarding coverage available through a temporary binder. (*Id.* at p. 542 (“if a broker does not inform the prospective insured of the availability of a temporary binder option, the broker has committed professional negligence”).) Similarly, an insurance broker or agent in Louisiana “owes a fiduciary duty to his customers, which includes a duty to prudently advise one's clients regarding recommended coverage.” (*Barreca v. Weiser* (2010) 53 So.3d 481, 492.) The Idaho Supreme Court has held that “when an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.” (*McAlvain v. General Ins. Co.* (1976) 97 Idaho 777, 780 (1976).) In these jurisdictions, scenario four might be a broker-negligence case worth pursuing.

Sometimes, the law will impose additional duties on a broker

Brokers sometimes will assume additional duties that can result in them being



held accountable for professional negligence. The courts will sometimes treat the broker as more than just a glorified order-taker and impose a greater duty under the following circumstances:

- If the broker misrepresents the nature, extent, or scope of the coverage being offered;

- If the broker assumes additional duties, either by express agreement or by holding himself out as having expertise regarding insurance for a particular business or industry; or

- If the broker and the insured have a special relationship, which can be created by having a long-term relationship.

(See, e.g., *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.) The courts have held that “a special duty may be created by express agreement or by the agent holding himself out to be more than an ‘ordinary agent.’” (*Paper Savers, Inc. v. Nasca* (1996) 51 Cal.App.4th 1091, 1096 (internal citations omitted); see also *Kurtz, Richards, Wilson & Co., Inc. v. Insurance Communicators Marketing Corporation* (1993) 12 Cal.App.4th 1249, 1257 (holding that special duty was created when brokerage held itself out as an expert on the specific type of insurance requested by Kurtz).

A good example of the case described in scenario three is *Williams v. Hilb, Rogal & Hobbs Insurance Services of California, Inc.* (2009) 177 Cal.App.4th 624. In *Williams*, the clients sued their insurance broker for failing to procure worker’s compensation insurance for their business. The clients had chosen an insurance agency that advertised an expertise in providing complete insurance packages for business. The appellate court upheld a finding of both a duty and breach of that duty by the insurance broker based on the following facts:

- Williams and Simon “reasonably assumed agent Thaw’s expertise and relied on her in the belief they were offered an insurance ‘package’ tailored for Rhino dealerships.” (*Id.* at p. 641.)

- The court found the Williams’s evidence that they never received any

advisement from Thaw, that they were required to obtain separate workers’ compensation insurance, and that workers’ compensation insurance was not a part of the “package” – more credible than Thaw’s contrary testimony that she offered and discussed workers’ compensation insurance with Williams in 1999 and his wife in 2000. The court further found it “taxes credibility, and plain common sense expectation of business practice under the circumstances, that no written record of even minimum formality exists by agent Thaw documenting considerations, discussions, advisement, or Plaintiffs’ alleged declinations relating to workers’ compensation insurance for Plaintiffs’ Rhino SFS dealership.” (*Ibid.*)

Therefore, in any potential broker negligence case, the attorney should be looking for facts to show that the broker advertised an expertise in a specific area of insurance.

In some jurisdictions an insurance broker can be liable for breach of fiduciary duty

In most jurisdictions, including California, neither insurance agents nor insurance brokers owe their clients fiduciary duties unless they are holding the client’s money, which could make them fiduciaries for reasons other than the procurement of insurance. (*Hydro-Mill Co., Inc. v. Hayward, Tilton and Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145.)

There are some jurisdictions that impose fiduciary obligations on brokers for procuring insurance and not simply for transmitting funds. In Missouri, for example, if an insurance broker fails to inform a client that the policy procured is not the one requested, then the broker may be held liable for breach of fiduciary duty. (*Emerson Electric Co. v. Marsh & McLennan Companies* (Mo. 2012) 362 S.W.3d 7.) Brokers in Illinois might have fiduciary obligations to inform a proposed insured of all material facts and to procure requested insurance. (See *Lake County Grading Co. v. Great Lakes Agency, Inc.* (Ill. 2d. Dist. 1992) 589 N.E.2d

1128.) The Supreme Court of New Jersey noted that “the import of the fiduciary relationship between the professional and the client is no more evident than in the area of insurance coverage.”

(*Aden v. Fortsh* (2001) 169 N.J. 64, 78.) Accordingly, New Jersey courts have held that insurance intermediaries owe a fiduciary duty to the client. (*Ibid.*) In any jurisdiction that recognizes a fiduciary relationship, this cause of action should be included with negligence as it might increase the available damages.

Practical tips for suing brokers/agents

Find and retain an expert as soon as you can, even before you agree to take the case

In our experience, there are not many working insurance brokers who are willing to testify against another insurance broker. Furthermore, most of the broker experts who are willing and competent to testify prefer to work for defendants or for the defendants’ errors-and-omission carriers. Consequently, it is important to find and retain an expert as soon as you can.

Indeed, we urge attorneys who are even considering such a case to consult with a broker *before you take the case*. An honest, experienced, knowledgeable broker should be able to tell you pretty quickly whether the conduct of the potential client’s broker fell below the industry standard of care.

Determine whether the coverage was available in the marketplace at a price the insured would have paid

Another reason to retain and consult with an expert as soon as possible is to determine whether the coverage the potential client needed or wanted was even available in the marketplace. This is important: the insurance must have been available in the marketplace, and at a price the insured would have paid, before a broker can be held accountable for failing to obtain coverage. For example, a bar can ask for insurance to cover bar fights, but coverage for such claims is increasingly rare and difficult to find,



let alone at an affordable rate. Consequently, a broker's failure to obtain coverage for such claims probably would not constitute negligence.

Go back to the beginning of the relationship

Consider the following example, a true story: We once represented a small, family-owned manufacturing firm in a negligence case against its insurance broker. The firm's operations were housed in separate buildings in the same industrial neighborhood. As the firm's needs would change, the firm would move its operations from one building to another. The firm disclosed all of this to its broker, who obtained a comprehensive general liability ("CGL") policy. The firm renewed the policy year after year for ten years.

One night the firm suffered a large fire. The fire damaged several buildings, and it gutted the building that housed the firm's most important and expensive machines. The firm submitted a claim, but the carrier paid only a fraction of the total loss. It turns out, instead of setting an aggregate limit for the firm and all its operations regardless of the building in which that particular operation was housed, the broker had requested separate limits for each building based on the firm's operations in each building at the time the broker first placed the policy *a decade earlier*. We discovered the broker's mistake by reviewing the original documents from ten years earlier and each of the annual renewals.

If you are prosecuting a claim for negligence against an insurance broker, you should obtain documents reflecting the entire relationship between the broker and your client, from the beginning to the time of the loss. These documents might reveal mistakes the broker made long before the loss but that become apparent only after the loss. These

documents might also help you establish whether there was a special relationship between the broker and your client sufficient to persuade a court that the broker should be treated as more than just an order-taker.

Go to broker school

For most broker negligence cases, neither case law, nor statutes, nor administrative regulations will give you sufficient information to establish the industry standard of care for insurance brokers. We recommend you go to broker school – and by "broker school," we mean the books and on-line courses that would-be brokers study to pass their licensing exams and that licensed brokers study for their continuing education.

Another real-world example: When the opposing party in one broker negligence case disclosed its testifying expert, we researched that expert's background online. We discovered that he taught continuing education courses for insurance brokers and that his courses were available on-line and on-demand. We bought one of his recorded lectures.

In that case one of the disputed issues was whether the broker had taken certain necessary actions. The defendant broker insisted that he had, but there was no evidence of this anywhere in the documents – not in any of the e-mail messages, not in any of the broker's letters, not in any of the communications with potential carriers with whom he had communicated. That defendant's expert, in his on-line lecture, emphasized the importance of keeping documents in the file. He repeatedly told his students, "If it's not in the file, it didn't happen." At our deposition of this expert, I played this excerpt from the lecture. The expert's

face was red when he confirmed that the voice was his.

The case settled the following week.

The Insurance Journal (www.insurancejournal.com) offers on-line courses for brokers, but the courses are available to anyone who pays. The books that would-be brokers study to pass their licensing exams are another good source you can use to establish the industry standard of care.

Conclusion

Insurance agents and brokers are for the most part insulated by the law from negligence claims. However, the more an agent or broker promises, the more likely he can be held liable for negligence. Therefore, as you are reviewing a potential case, it is important to get as much information as possible to find out if the agent or broker made misrepresentations regarding a policy, held themselves out as an expert in a specific field, or mishandled funds.



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