PRACTICAL PRACTICE TIPS FOR INSURANCE AGENTS

By: Geneau M. Thames, Esquire

Even though insurance products are sold in advance of a loss when an insured is free to evaluate the scope of coverage, purchase the coverage needed and review the coverage provided, insurance agents have increasingly borne the brunt of malpractice claims when coverage is denied by the insurance company. These lawsuits are hindsight driven and provide the insured with recourse when suit directly against the insurance company appears difficult to prevail upon. It leaves the unprepared insurance agent at the mercy of the jury. Here are some practical tips that agents can use while procuring and maintaining insurance for his/her customers to better protect themselves in the event of a malpractice claim.

1. Avoid Creating a Special Relationship

Under Maryland law, an agent has no duty to advise clients about types or limits of coverage absent a special relationship. *Cooper v. Berkshire Life Ins. Co*., 810 A. 2d 1045. An agent has a general duty to "[do] what is necessary to effectuate the policy." *Id.* An agent can avoid creating a higher duty, by avoiding a special relationship with his clients. Do not hold yourself out as an expert of any type. For example, if a customer asks for "full coverage," the agent should advise the client of all of the types of coverage available, explain that "full coverage" does not exist and let the customer chose the type of coverage he/she wants. Avoid making blanket statements about any particular coverage because from a practical standpoint, blanket coverage does not exist.

2. Take Notes, Document & Confirm

An agent must take notes during the customer interview, document the conversation and confirm the substance of it in writing either through email or in a letter. Keep a copy of the letter in your file for each customer. Advise the customer that you cannot decide how much coverage he/she should purchase but present higher policy limits with broader coverage and lower limits with narrower coverage to each client. Let the customer choose and then document the customer's choice of lower limits if that is the ultimate choice. It is this documentation that will assist in your defense five or ten years into the future when the customer claims you failed to properly advise of coverage.

3. Whose Application is it?

Remember, it's not your application of insurance, it's the customers. It is not prudent to complete the insurance application for your client. Have the customer provide the answers to each application question. Then, have the customer read and sign it. Avoid helping the customer by withholding material information on applications of insurance. If you have binding authority, do not bind coverage without a signed application for insurance. If you do not, then tell the customer

that the insurer will not bind coverage without it. Make a habit of getting full and complete applications of insurance for all customers. The application of insurance is the first document that is reviewed when an insured later claims that he or she did not get the coverage they asked for. If it is incomplete, then blame is pointed at the agent at the outset of the investigation.

4. Change, Change, Change…

Changes in coverage happen. When a customer informs you of new information to modify existing coverage, forward it immediately to the underwriter and copy the customer on your correspondence. If you do not have binding authority, call the underwriter the same day to request immediate modification. If you have binding authority, prepare and mail the endorsement on the same day. This will limit or sometimes avoid altogether exposure for a loss that may occur between the time of the customer's request to the agent and the effective date of the modification.

5. Stay away from Claim Handling

Outside of notifying the insurer of the loss, stay away from determining coverage. Let the insurer accept or decline coverage. If coverage is denied, avoid telling the insured that it should have been accepted. In doing so, an agent will often violate the provisions of its agency agreement with an insurer and then jeopardize its business relationship, and even more compelling its defense and indemnification by that particular insurer. Write to the customer and explain that he or she will correspond directly with the insurer after you have notified the insurer of the loss. Then, stay away.

This list is obviously not exhaustive or all-encompassing. It seeks to address the issues that we have seen develop in recent malpractice claims against insurance agents and identifies practical ways in which these pitfalls can be avoided or at least defended against in the future.

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Geneau M. Thames practices in the litigation department at Niles, Barton & Wilmer LLP, concentrating in professional liability, property insurance law, related first party insurance matters and commercial litigation in the State of Maryland and the District of Columbia. Her experience includes first and third-party claims and fraud investigation. She represents professionals, including insurance agents and brokers, attorneys, architects, engineers, contractors, accountants, corporate directors and officers, and real estate professionals, in malpractice and breach of fiduciary duty actions. She is a member of the Professional Liability Defense Federation and The Professional Liability Underwriting Society. Ms. Thames has been named to the *Super Lawyers Maryland* Rising Stars list as one of the top up-and-coming attorneys in Professional Liability for 2010, 2011 and 2012.

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