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Thank you for logging on to this Primerus Webinar, presented by the Professional Liability Practice Group.

The presentation will begin shortly.

Agent/Broker Liability For Failure to Procure Adequate or Proper Coverage

Presented by:

Robert D. (Bob) Brown



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What we are not going to cover:

- **Whether agent represents the insured or the insurance company. Time constraints make this a topic for another day.**
- **State-by-state analysis. Presentation is based on Texas law which follows the majority rule in these areas. Individual states may differ in some respects.**



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Assumptions:

- Discussion assumes agent represents the insured.
- General rule is, if the agent represents the insurance company, the agent's acts are imputable to the insurance company. If the agent represents the insured, they are not.



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Duties of Agents/Brokers:

Duty to Procure

- An insurance broker agreeing to obtain insurance has a legal duty to obtain same and, if it cannot be obtained, to notify the principal.
- In addition, the agent is under a general duty to ensure appropriate exclusions and limits for the risk.



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Duties of Agents/Brokers: Duty to Understand Insured's Business

- One court has held agent has duty to “thoroughly acquaint” himself with insured’s needs and must procure the coverage most appropriate to fulfill them. Texas Supreme Court has expressly reserved judgment on whether such a duty exists in Texas.



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Duties of Agents/Brokers:

Duty to Explain Terms & Coverage

- When agent of insured agrees to apply for insurance on behalf of insured, agent has the duty to explain the application form, or otherwise inform insured of what coverages are included in application;



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Duties of Agents/Brokers:

Duty to Explain Terms & Coverage

- **Some courts have extended this rule beyond affirmative misrepresentations to failure to disclose some limitation in the policy's coverage if there is an explicit agreement, a course of dealing, or other evidence establishing an undertaking by the agent to determine the customer's insurance needs and to counsel the customer as to how they can best be met.**



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Duties of Agents/Brokers: Duty to Review Policy

- Agent is under an obligation to review the policy to make sure the coverage afforded comports with the coverage requested.



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Duties of Agents/Brokers:

Duty Regarding Insurer's Solvency

- Agent is not liable for an insured's lost claim due to insurer's insolvency if insurer was solvent at time the policy was procured, unless, if at that time or a later time, the agent knows or has a reason to know of facts or circumstances which would put a reasonable agent on notice, and the insurance presents an unreasonable risk.



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Claims Defense

Presented by:

Adina Johnson

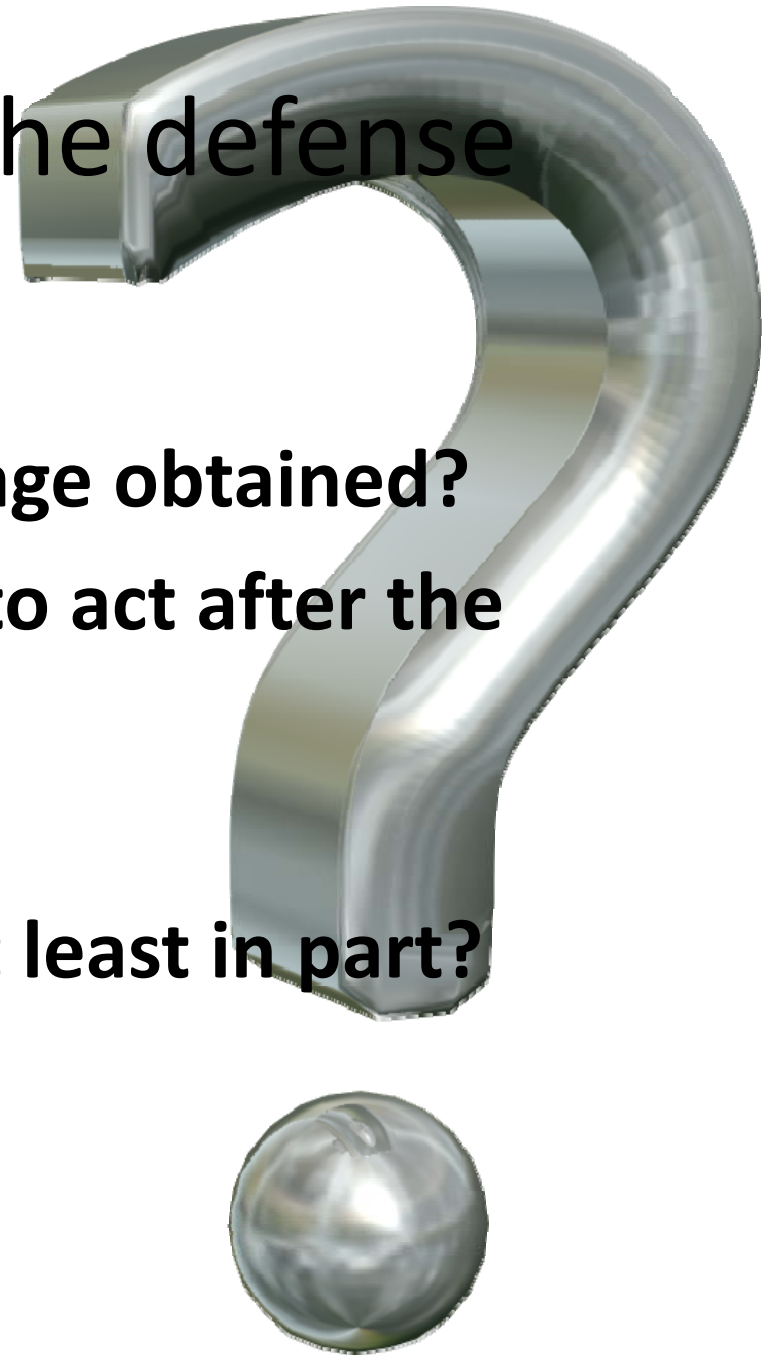
Wuestling & James, L.C.

The Standard:

- Broker is required to exercise reasonable:
 - Skill
 - Care
 - Diligence

Five questions for the defense

- 1. Was there a Contract?**
- 2. Was the requested coverage obtained?**
- 3. Was the broker required to act after the purchase?**
- 4. Was there coverage?**
- 5. Was the client at fault –at least in part?**



Was there a Contract?

Discussions \neq Agreement

MIA – Essential terms for Insurance Contracts.

- Subject Matter
- Risk Insured
- Duration
- Coverage Limits
- Identity of Parties
- Premiums.



BEWARE: Prior Transactions!!!!!!

Was the requested coverage procured?

Procuring ≠ Advising

Advising: Show me the money (Compensation)



Specific requests lessen the burden.

But they requested COMPLETE
coverage.

Practically speaking: Insured knows its business
and its needs.

Insured's Burden



Was the Broker required to act after the purchase?



No duty to prevent or of lapse.

Exceptions:

1. Agreement
2. Course of Dealing

Insolvency – Documenting the Investigation

Was there coverage?

Timely Question.



Denial based on policy conditions.

- *Notice
- *Application
- *Misrepresentation

Policy Cancellation

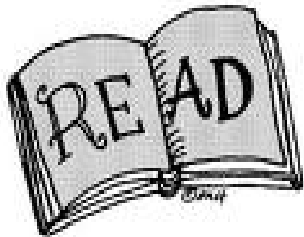


Was the client at fault?

Contributory Negligence.



Responsibility



Reading the policy

Providing the required information
Exceptions





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Direct Communication and Broker Liability

Presented by Sidney W. Degan, III
Degan, Blanchard & Nash
A Professional Law Corporation

Issue: Whether an insured can assert a claim against a broker without direct communication between the insured and the broker.

Several recent cases say “NO.”

- I. What do the cases say?
- II. What is the underlying principle?
- III. Could the holdings expand to other courts?

Initial Points:

- VERY new. Unclear how the defense will develop.
- ALL are in the Louisiana Federal Eastern District Court.
- ALL are unpublished decisions.
- ALL involve Hurricane Katrina claims.
- ONLY applies to traditional intermediary “brokers.”
- Does NOT eliminate potential claim by “agent” against the “broker.”

I. What do the cases say?

The Three Foundation Cases:

- *Frischhertz v. Lexington Ins. Co.*, 2006 Lexis 80620 (E.D.La.)
(*unpublished*);
- *Bowman, et. al., v. Lexington Ins. Co., et. al.*, 2006 Lexis
90819 (E.D.La.) (*unpublished*);
- *T.J.'s Sports Bar, Inc. v. Scottsdale Ins. Co., et. al.*, 2007 Lexis
4723 (E.D.La.) (*unpublished*).

I. What do the cases say?

The Three Key Cases:

- *Cajun Kitchen of Plaquemines, Inc. v. Scottsdale Ins. Co., et. al.*, 2007 Lexis 1415, (E.D.La.) (*unpublished*);
 - Stronger focus on communication as primary issue.
- *Teamer v. Lexington Ins. Co., et. al.*, 2007 Lexis 97570 (E.D.La.) (*unpublished*);
 - “[T]he record establishes that Hull has no communication between it and Lexington customers...Hull has met its burden in proving that Teamer has no possibility of recovery against it under Louisiana state law.”
- *Tai Nguyen d/b/a Happy Land v. Scottsdale Ins. Co., et. al.*, 2007 Lexis 97487 (E.D.La.) (*unpublished*).
 - “[B]ecause wholesale brokers do not communicate with insurance customers, plaintiffs have no possibility of recovery against them under Louisiana state law.”

I. What do the cases say?

The Affirmation:

- *Belmont Commons, L.L.C. v. Axis Surplus Ins. Co., et. al.*, 2008 Lexis 116896 (E.D.La.) (*unpublished*).
 - “Many sections in this District have reviewed the liability question presented here: whether the intermediary broker who does not have a direct relationship and contact with the insured can be held liable under Louisiana law for breach of fiduciary duty. Those courts hold no duty exists.”

I. What do the cases say?

Opposing Cases?

- *Ronald C. Durham v. McFarland, et. al.*, 527 So. 2d 403 (La.App.4th Cir. 1988);
 - “Broker” is liable to insured and is not a mere “order taker”.
 - Was communicating with insured.
 - Also called “broker” an “agent”.

- *Alex M. LeGros v. Great American Ins. Co., et. al.*, 02-1485 (La.App. 3 Cir. 11/12/03); 865 So.2d 792.
 - Was a denial of a supervisory writ.
 - Right factual situation.
 - Broker did not assert lack of communication.
 - Broker argued no duty to insured as a matter of law.
 - Court said not a proper topic for summary judgment.
 - Didn’t specifically address communication.

II. Underlying Concept?

As discussed earlier:

- Broker liability generally arises from a fiduciary duty and/or agency relationship.

UNDERLYING PRINCIPLE

If no direct communication = no fiduciary duty, no agency relationship;

Then, no fiduciary duty, no agency relationship = no claim.

III. Could Other Courts Follow?

ANSWER = It depends...

- Statutes, regulations, and liabilities vary from state to state.
- Contract law varies from state to state.
- Likely to be fact- and jurisdiction-specific.

WHAT NOW???

At this stage of the game:

- Be aware of the potential defense. How does your business communicate?
Letters = evidence; Affidavits = evidence.
- Discuss the potential defense with local counsel.
- Outside of ED La = persuasive only
- Most likely use = Motion for Summary Judgment, maybe No Right or Cause of Action if pleadings and Court are right.

Direct Communication and Broker Liability

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