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Professional Liability Seminar

December 5–6, 2019
New York

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Leadership Note

From the Vice Chair

By Melody J. Jolly

Summer is almost over, the Annual Meeting is right around the corner, and the Professional Liability Committee is getting geared up for the dynamic speakers, networking events, and all of the other fun that New Orleans has to offer at the 2019 Annual Meeting, October 16–19, at the New Orleans Marriott Hotel. In a slight change from prior year's, many substantive law committee CLEs and business meetings will take place on Wednesday, so make sure you plan accordingly. You will not want to miss our joint CLE with the Lawyers' Professionalism and Ethics Committee, as this year's topic, Recent Developments in Legal Ethics *(ethics session)*, is being presented by Professor Dane Ciolino Loyola University New Orleans College of Law. For those of you who have not heard Professor Ciolino present, I guarantee that this is not a presentation you want to miss—he is simply an incredible speaker. Professor Ciolino will discuss recent rulemaking in the area of legal and judicial ethics, as well as recent reported decisions and published ethics opinions relating to the professional conduct standards governing lawyers and judges. Per usual, we will host our committee business meeting immediately following Professor Ciolino's presentation. Stay tuned for details of our committee networking event, which will be posted on the Professional Liability Communities page. We look forward to seeing you in the Big Easy!

This year's committee Fly-In meeting took place in March, and we enjoyed the warm weather that welcomed us in Nashville. The meeting was highly productive, and allowed our entire Steering Committee to collaborate face-to-face during the height of planning the 2019 Professional Liability Seminar. We enjoyed a fantastic dinner at Kanye Prime, then after our business meeting, we toured the Corsair Distillery, sampled their bourbon and then headed out for an evening of live music Nashville-style at the Listening Room Café. We capped everything off with some famous hot chicken from Hattie B's. All in all, the move to warmer weather and an earlier time of year was an overwhelming success. We look forward to continuing the new tradition of a March Fly-In meeting next year.

And of course, I can't leave out the big event—this year's Professional Liability Seminar will take place December 5–6 at the Sheraton New York Times Square, and it is shaping up to be bigger and better than ever. You will not want to miss this year's seminar: *Minding Your Business: Balance Client and Personal Expectations to Achieve a More Rewarding Practice.* This year's seminar comes with big news—we are proud to offer our committee membership, clients and guests an exclusive presentation from former New Jersey Governor Chris Christie about the devastating effects of substance abuse on attorneys. We will also have a roundtable discussion with elite claims professionals from all lines, and look forward to hosting another successful Litigation Skills Workshop as well as an inaugural Leadership Workshop, *Defining Your Career: A Professional Growth Workshop for Rising Leaders*. Please keep an eye out for this year's seminar brochure, and register by November 4 to receive a $100 discount on the price of registration. We are always looking for rising leaders and enthusiastic volunteers to serve on our committee, and there are always opportunities for you to get more involved. Our annual seminar presents a great opportunity for involvement, including a committee business meeting at the conclusion of Thursday's programming.

I am proud to be a part of this committee, and humbled that during the Annual Meeting this year, I will move into the role of Committee Chair. I follow in the footsteps of successful leaders, and I am proud of what our leaders and members have accomplished over the years. I hope you will get involved and join us on this ride, and I look forward to working with you along the way.

Melody J. Jolly is a partner at Cranfill Sumner & Hartzog LLP in Wilmington, NC. She leads the Firm's Professional Liability Section, and concentrates her practice on the defense of professionals including design professionals, attorneys, real estate professionals and others. Melody is the Vice Chair of the Professional Liability Committee

Feature Articles

Insurance Producer Liability for Breach of Fiduciary Duty

By Ryan J. Gavin

Insurance producers are commonly sued for an alleged failure to secure a policy of insurance matching that requested by a client. Most states impose duties of reasonable care, skill, and diligence on insurance producers who are placing coverage for an insured or applicant. The basis of these claims is typically common law negligence, breach of contract, or a hybrid thereof.

In many instances, however, these claims are accompanied by counts alleging a breach of fiduciary duty. A plaintiff may find this advantageous because it opens the door to the opportunity to wave the word "fiduciary" around in front of the jury—a word that implies a higher duty than the garden variety "reasonable care" standard. There may be additional implications including variations in the elements of the claims, a weightier burden of proof, or a different statute of limitations. However, state law regarding breach of fiduciary in this context is not uniform and, in some states, is completely lacking. Fiduciary duty is a different animal when compared to the ordinary care standard and, in theory, should be treated by courts and litigants as such.

This article will discuss some of the variations in how fiduciary duty claims against insurance producers are addressed in different jurisdictions. It is not offered as a comprehensive survey of all states but may be helpful in identifying or developing arguments or strategies to frame the case for appropriate disposition at trial.

What Is a Fiduciary?

In a not uncommon scenario, an insurance producer's client is sued in a third-party liability suit and discovers that the claim is excluded by its liability policy. The client, of course, asked its long-time broker to be insured against "all risks" to which its business is exposed. Because the claim was excluded, the client has expended money on defense costs and settlement. It therefore sues its broker for failing to secure an adequate policy or otherwise advise of the existence of the exclusion. Count I of the suit against the broker alleges negligence and Count II claims a breach of fiduciary duty.

What does it mean to be a fiduciary? Webster's dictionary defines "fiduciary" as "of, relating to, or involving a confidence or trust." "Fiduciary" has been defined by Black's Law Dictionary as (1) a "person who is required to act for the benefit of another person on all matters within the scope of their relationship; one who owes to another the duties of good faith, trust, confidence, and candor," and (2) "[o]ne who must exercise a high standard of care in managing another's money or property." *Black's Law Dictionary* 1864 (8th ed. 2004). Speaking generally and without regard to a specific factual context, courts may inquire into the characteristics of the relationship such as whether the proposed fiduciary serves in a trustee capacity or there is otherwise a surrender of independence by the party for whose benefit the relationship was created. *State v. Faulkner*, 75 Wyo. 104, 112 (Wyo. 1957); *In re Estate of Karmey*, 468 Mich. 68, 74 (Mich. 2003) (fn. 2); *Emerick v. Mutual Ben. Life Ins. Co.*, 756 S.W.2d 513, 526–27 (Mo. banc 1988).

Thus, it stands to reason that a breach of fiduciary duty only arises out of the relationship between insurance broker and client if there was a breach of trust, loyalty, or good faith. An example of this type of breach might be for the broker to direct the insured to purchase a policy in a company with a lower financial rating because it scores the broker a higher commission. In this scenario, the producer has placed his own interests in front of those of his client, has breached the trust placed in him, and been disloyal. While this distinction may appear obvious on its face, not all courts have recognized it.

Do Insurance Producers Owe a Fiduciary Duty?

A review of the law across different jurisdictions reveals a lack of consensus regarding the threshold question of whether insurance producers owe their clients a fiduciary duty. Thus, defense counsel must investigate case law, statutes, and regulations do determine whether a fiduciary duty may be imposed and what facts, if any, are prerequisites.

Certain states have declined to impose a fiduciary duty on insurance producers. The Supreme Court of Mississippi, for example, has held there is no fiduciary relationship "where the parties were involved in little more than an

arm's-length business transaction" and "[t]he severity of the burdens and penalties integral to a fiduciary relationship should not apply to ordinary insurance policy transactions." *Robley v. Blue Cross/Blue Shield of Mississippi*, 935 So.2d 990, 995-96 (Miss. 2006). Pennsylvania has similarly held that "the relationship between an insurance broker and client is an arm's length business relationship" and not generally a "confidential" relationship giving rise to a fiduciary duty. *Wisniski v. Brown & Brown Ins. Co. of PA*, 906 A.2d 571, 578-79 (Penn. Sup. 2006). Illinois, as an alternative to relying on common law principles (where a fiduciary duty did originally exist), has largely disposed of the duty by statute: "[n]o cause of action brought . . . against any insurance producer . . . concerning the sale, placement, procurement, renewal, binding, cancellation of, or failure to procure [insurance] shall subject the insurance producer . . . to civil liability under standards governing the conduct of a fiduciary" except where the wrongful retention or misappropriation of money is involved. 735 ILCS 5/2-2201(b); *Mizuho Corp. Bank (USA) v. Cory & Associates, Inc.*, 341 F.3d 644, 651 (7th Cir. 2003) (recognizing that a breach of fiduciary claim could have been brought underly Illinois law prior to passage of the Illinois Insurance Placement Liability Act).

In states that do impose a fiduciary duty upon insurance producers, it may be formed expressly or impliedly. An express fiduciary relationship may be created by contract, legal proceedings, statute, or regulation. *Johnson v. Catamaran Health Solutions, LLC*, 687 Fed.Appx. 825, 830 (11th Cir. 2017); 735 ILCS 5/2-2201(b) (Illinois statute creating limited action for breach of fiduciary duty). New Jersey, for example, specifically provides in its administrative code that "[a]n insurance producer acts in a fiduciary capacity in the conduct of his or her insurance business." N.J.A.C. 11:17A-4.10. The Supreme Court of New Jersey has interpreted this provision to subject insurance producers to a higher standard than ordinary care due to the "increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies." *Aden v. Fortsh*, 776 A.2d 792, 801 (N.J. 2001). The open-ended construction of this provision imposes a fiduciary duty on all parts of the broker-client relationship regardless of whether the breach specifically involves trust, good faith, or loyalty. One implication of this elevated professional malpractice standard is that comparative negligence is unavailable as a defense for New Jersey insurance producers. *Id.* at 802.

As an alternative to an express duty, an implied fiduciary relationship may be formed by operation of law or past course of dealing in the producer-client relationship. In Missouri, for example, an insurance broker is *always* a fiduciary by virtue of being the agent of the client. *Emerson Electric Co. v. Marsh & McLennan Companies*, 362 S.W.3d 7, 12-13 (Mo. banc 2012). The fiduciary duty extends to all matters within the scope of the agency and includes a duty to act loyally for the benefit of the insurance customer. *Id.* at 13. Alternatively, a fiduciary relationship may be also be implied based on the parties' past conduct or course of dealing where the broker has undertaken to advise, counsel and protect the customer who has grown dependent upon the broker. *Johnson*, 687 Fed.Appx. at 830; *Scotto Princeton LLC v. Felsen Associates, Inc.*, 807 N.Y.S.2d 546, 549–50 (N.Y. Sup. Ct. 2005).

When Is the Fiduciary Duty Breached?

It has been observed by some courts that claims of negligence and breach of fiduciary duty may be plead as alternative theories of recovery. *Wachovia Ins. Services, Inc. v. Toomey*, 994 So.2d 980, 990 (Fla. 2008). Treatment as alternative causes of action makes sense given the distinction between negligent conduct (a breach of the duty to exercise ordinary care) and disloyal behavior (such as self-dealing). Nonetheless, not all jurisdictions effectively treat these claims differently.

On one end of the spectrum, New York courts have drawn a distinct line between claims of negligence and allegations of breach of fiduciary duty. In *Core-Mark International v. Swett & Crawford Inc.* the insured sued its insurance broker for procuring a "scheduled loss" policy of property insurance rather than the "general limits" blanket policy it requested. 898 N.Y.S.2d 206, 207 (N.Y. App. Div. 2010). After sustaining a loss for which it was underinsured, the client filed a complaint asserting counts of negligence and breach of fiduciary duty. *Id.* The Appellate Division held dismissal of the breach of fiduciary duty count was warranted as the factual allegations only supported a breach of the common law duty to either obtain the coverage requested or advise of an inability to do so. *Id.* As stated in *Scotto Princeton LLC*, "[p]ermitting a customer of an insurance broker to sue for breach of fiduciary duty when the broker inaccurately or negligently advised the client of the unavailability of [] insurance coverage would 'open flood gates of even more complicated and undesirable litigation." 807 N.Y.S.2d at 550, citing *Murphy v. Kuhn*, 682 N.E2d 972 (N.Y. 1997).

Other jurisdictions, unfortunately, have not clearly distinguished negligence from breach of fiduciary duty. In *Emerson Electric Co. v. Marsh & McLennan Companies*, for example, the Supreme Court of Missouri held where a bro-

ker fails to procure the insurance requested by the client or fails to inform that the policy delivered is different from that requested, "the broker has *breached its fiduciary duty to exercise reasonable care, skill and diligence in procuring insurance*." 362 S.W.3d 7, 13 (Mo. banc 2012) (emphasis added). Similarly, in *Stonebridge Casualty Ins. V. D.W. Van Dyke & Co., Inc.* the United States District Court found that a broker of record letter created a special relationship giving rise to a fiduciary duty. 2015 WL 11995253, *7 (S.D. Florida 2015). The court held that the broker's failure to confirm the binding authority of various intermediaries was a "[breach of] its fiduciary duty of care." *Id.* When the obligations are conjoined in this manner it is impossible to parse where one duty ends and the next begins.

Conclusion

Attorneys defending breach of fiduciary duty claims against insurance producers are advised to investigate all potential sources of authority in the relevant jurisdiction. A fiduciary duty may be imposed by common law, statute, regulation, contract, or course of dealing. In jurisdictions lacking clear authoritative precedent, the distinction between ordinary negligence and the special circumstances of a breach of fiduciary duty may be highlighted to limit the claims presented to the jury and end the claim with a successful resolution.

Ryan J. Gavin is a partner at Kamykowski, Gavin & Smith, P.C. in St. Louis, Missouri. His practice focuses on professional liability, medical malpractice, insurance coverage, and personal injury cases. Ryan has been in practice for 20 years and tried more than 30 cases to verdict. He practices throughout Missouri and in Southern Illinois. He also currently serves as the Insurance Professionals SLG Chair for the DRI Professional Liability Committee.

Practice Pointers

Taking a Deposition That Can Actually Be Used at Trial

By Brian Yasuzawa

Depositions can be one of the most effective tools for a trial attorney during trial. The problem is many lawyers, especially young lawyers, do not take a deposition geared towards being used at trial. Many times, depositions are simply seen as fact finding missions, and lawyers miss an opportunity to use a well taken deposition as an offensive tool. For use at trial, a deposition should contain straightforward, simple, easy to understand "snap shots" or sound bites. Below are some tips in obtaining this type of testimony.

Know Your Audience

Too often lawyers at deposition forget who their ultimate audience is, the jury. Questions should be easy to understand and as straightforward as possible. Speak in plain English and try not to use complicated legal or medical jargon. Break down complicated concepts in to short questions so it is easier to understand and digest. This is not to say that every question should be dumbed down to its most elementary parts. But the lawyer should always have in the back of their mind the desire to obtain a sound bite type question and answer. Summarizing the witness' testimony and asking him to confirm if your interpretation is correct is one way to do this. For example, "Sir based on your testimony, is it correct that when you approached the intersection, the light was red?" This type of question allows you to obtain a critical fact in a simple yes or no question.

Beware of the Audio and Videotape

Remembering your audience is particularly important if your deposition is being videotaped. In these instances, the jury will get to hear your tone and form an impression of your demeanor towards the witness. It is easy to allow a witness to frustrate you or even at times irritate you. But it is critical to never let that frustration come out in your tone or demeanor towards the witness. Remember, the jury only hears a snippet of the deposition and has no context. The jury has no idea the witness has been avoiding your questions all day or that you are going on hour 10 of the deposition. Always maintain a calm and collected voice and tone. Juries expect lawyers to be professional and respectful.

Outlines: The Double-Edged Sword

In preparing for a deposition, it is common for lawyers to prepare an outline. Generally, this is a good idea. An outline should give you a good roadmap of the testimony you want to obtain and the areas you want to cover. An outline should not be your crutch and should not list question for question what you intend to ask. Too often attorneys become married to their outline and simply move from question to question without listening to a witness' answer. This is one of the biggest mistakes a lawyer can make. Do not be afraid to deviate from your outline and probe further in to an answer. Follow-up liberally with the witness and don't shy away from asking for more details. Use your outline as the place to come back to after you are done finishing up on a topic or answer.

Prepare Prepare Prepare

Before taking a deposition, you should know every detail of the topic you are examining the witness about. No one in the room should know the facts better than you. This allows you to catch any inconsistencies in the witness' testimony and show the witness and opposing counsel that you have a strong grasp over the subject matter. Make sure your exhibits are properly organized and easily accessible. Within the exhibits, know where the evidence is that you want to examine the witness about and tab or highlight the section. Make sure you have all the records available, no one likes to be surprised at the deposition. Always have a copy of your exhibits for the court reporter!

Avoid These Common Pitfalls

The Double Negative. This is the most common mistake lawyers make in a deposition and it sounds something like this. "You do not recall going to work on August 20, correct?" As you can see, the answer to this question is extremely complicated for such a simple topic. If the witness does not recall going to work on the 20th, the correct answer is "yes." Very confusing. Thankfully the fix is simple. "Do you recall going to work on August 20?" Avoiding this pitfall is crucial when trying to use a deposition at trial. Questions and answers used at trial need to be clean and easily understood. Whenever you catch yourself asking the double negative question, just stop and ask the question again, keeping in mind you want a clean yes or no answer with no ambiguity.

Not Identifying the Subject of the Question. Often a deposition can run hours, if not days long. It is easy for you to forget the jury is not listening to or reading the entire deposition. That is why it is crucial to identify the subject of your question by name. Using pronouns such as "he," "she," or "they" without reference to the actual person is not helpful even if the person was identified earlier in the deposition. Remember, the goal is to obtain soundbite testimony that can be read or played to the jury. A question like "When did he first contact you about becoming a partner in the business?" is much less effective than "When did Roger first contact you about becoming a partner in the business?" The second question identifies the subject of the question by name and makes it easy for the jury to immediately understand the context of the question. This also holds true for exhibits. Refer to exhibits by their title and not simply the exhibit number that has been assigned to it at the deposition. It is likely the exhibit will have a different number at the time of trial and context will again be lost.

"Do You Remember...?" This common pitfall sounds like this, "Do you remember if there was a warning on the packaging?" Answer, "no." This question is ambiguous because it is unclear if the witness is saying they don't remember a warning, or if there was no warning. Thankfully, again the fix is simple for this type of question. "Was there a warning on the packaging?" Simply remove "Do you remember" from your question and obtain the clean yes or no.

Following these simple, yet effective, pointers can help ensure depositions you are taking can be used as an offensive tool at trial. Always keep in mind you are looking for the snippet or soundbite you can play for the jury. These are best obtained when you are well prepared and ask simple, straightforward questions of the witness. Trial is stressful enough without having to contend with a deposition that is useless.

Brian Yasuzawa, a partner of Hawkins Parnell & Young LLP in Los Angeles, is an experienced litigator who primarily defends auto manufacturers and dealerships in commercial and contract litigation, including cases involving consumer protection laws such as California's Song Beverly Consumer Warranty Act (lemon law) and fraudulent concealment. He also represents individuals and corporations in complex product liability and toxic tort litigation. He has represented employers, premises owners, manufacturers, and distributors from a broad range of industries, including automotive, chemical, industrial, and consumer goods. Brian represents clients in state and federal courts across the country, however, concentrates his practice in California, Nevada, and Colorado. He has gone to verdict as first-chair and argued before state appeals courts.