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Defending Insurance Agents in Texas – Common Issues

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"Defending Insurance Agents in Texas – Common Issues"

I. Introduction

Two recent catastrophic events in the Gulf Coast area of Texas – Hurricane Rita and Hurricane Ike – resulted in thousands of lawsuits related to the insurance coverage (or lack of insurance coverage) for thousands of individuals and businesses. One very familiar type of lawsuit following Hurricanes Rita and Ike was the first-party coverage case between an insured and the insurance company. Issues of bad faith, breach of contract and late payment of claims permeated those cases. The conduct of insurance adjusters was often at issue. In those cases there was typically no question that an insurance policy was in effect at the time of the loss and there was typically no question that there was at least an argument why the loss was covered.

But what about cases where there was no policy? What about cases where there was a policy, but no coverage for the loss? What about cases where the insured was told there was coverage when there was not? These questions are typically answered in the context of an entirely unique lawsuit – a lawsuit between an insured and the insurance agent. The issues and law in cases between an insured and an insurance agent are often unrelated to the issues in a typical first-party coverage case. One significant difference, which will discussed below, is that the law in Texas is generally very favorable to an insurance agent in Texas. The duties and obligations of an insurance agent in Texas are typically limited. The law regarding insurance companies, on the other hand, is typically not favorable to an insurance company. This paper addresses common issues in cases between an insured and an insurance agent and highlights case law that demonstrates the difficulties in suing an insurance agent in Texas.

II. Failure to Procure / Negligence by the insurance agent.

A. Basic Duty of an Insurance Agent:

Perhaps the most common issue between an insured and an insurance agent is the "failure to procure" claim, which is a negligence-based claim. The foundation of this claim can be traced to a basic duty owed by an insurance agent to the insured:

> "It is established in Texas that an insurance agent who undertakes to procure insurance for another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." *May v. United Serv. Ass'n of America*, 844 S.W.2d 666 (Tex. 1992).

This duty is limited. *Id.* It is expressly limited to the agent's "client." *Id.* It is limited to placing the "requested insurance." *Id.* It does not impose any obligations to procure the coverage at all costs – an agent must use "reasonable diligence." *Id.* The agent's inability to procure the coverage requested does not mean the agent has failed to satisfy his duties if he informs the client of his inability to procure the coverage. *Id.*

In a recent decision by the 14th Court of Appeals, the limitations of this duty were put to the test. In *W. Houston Airport, Inc. v. Millennium Ins. Agency, Inc.*, 349 S.W.3d 748 (Tex. App.–Houston [14th Dist.] 2011, pet. denied), the trial court granted summary judgment in favor of the insurance agent. The Plaintiff, a landlord who was not the client of the insurance agent, appealed the summary judgment. On appeal, the landlord argued for an expansion of the *May* duty, to interpose duties on an insurance agent to a non-client when the agent's client requests procurement of a general-liability policy with a certificate designating the non-client as an additional insured. *Id.* After discussing the limitations of the duties owed by an insurance agent

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