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INTRODUCTION

Texas Insurance Agent Liability in Light of the Elusive "Special Relationship"

It goes without saying that the insurance agent in Texas performs a critical and complex role in business. The agent's role is wholly underappreciated, at least until a claim gets denied. Then in the eyes of the client, the agent transforms from a mere commodity—the middleman whose main purpose is to find the lowest price—to the fount of wisdom upon which the client relied to satisfy his each and every need.

In truth, the agent *is* often a trusted intermediary. On the one hand is the insurance carrier, which in the minds of many consumers is somewhere along the spectrum of complicated business necessity to unfathomable behemoth. On the other is the consumer, who ranges from the new homeowner who knows next to nothing about insurance to the sophisticated businessperson who knows exactly what coverage is needed; most are somewhere in between.

Texas case law recognizes that balance to an extent, in that an insurance agent generally has the duty to obtain requested coverage while informing the client when the insurance agent is unable to do so. The looming specter of the "Special Relationship," however, potentially enlarges that duty: depending upon the previous course of dealing between agent and client, along with other potential factors, the agent may take on additional duties. This paper will address some of the common areas of agent liability while looking toward the future of that liability, specifically the special relationship.

In the end, the best course is always to clearly document the nature of any request from the client and the relationship between an insurance agent and client. "Lawsuits consume time, and money, and rest, and friends."[1] The wise insurance agent heeds Herbert's admonition and acts accordingly.

Section I: General Duties of an Insurance Agent

A. COMMON-LAW DUTY

1. General Duty in *May*

An insurance agent in Texas has the common-law duty to do the following:

> (1) use reasonable diligence to attempt to place the *requested* insurance and
>
> (2) inform the client promptly if the agent is unable to do so.
>
> *May v. United Services Ass'n of America*, 844 S.W.2d 666, 669 (Tex. 1992) (emphasis added).

A corollary to that duty is that an insurance agent may be held liable for wrongly leading an insured to believe that a policy covers a certain risk when it does not. See *id*. at 669-70 (citing cases in which the agent misrepresented coverage).

[1] George Herbert, The English Poems of George Herbert Together with his Collection of Proverbs Entitled Jacula Prudentum . 247, Rivingtons; London, Oxford, and Cambridge, 1871.

In *May*, the agent procured for the May family group health insurance that was underwritten by Continental Bankers of the South ("Continental"), which had received a "C" rating from the A.M. Best Company. Continental later terminated the Mays' group. Faith May was pregnant at the time, and she called the agent to determine how the termination would affect her coverage. The agent told May that Hermitage Insurance Company would cover the Mays on the same terms as Continental.

The Mays' son was born with congenital heart and lung disorders. Although Hermitage covered the initial expenses, it also terminated the Mays' group. Keystone Life Insurance Company assumed the Mays' group but classified the Mays' son as totally disabled and refused to cover his medical expenses. Hermitage covered the Mays' expenses for 90 days after the termination, after which the Mays had no insurance coverage until their son's death two years later.

The Mays sued and claimed that the agent was negligent in placing coverage with Hermitage and Keystone because the agent (1) should have known the danger posed to the Mays by a policy that allowed shifting insurance coverage by substituting underwriters, (2) should have investigated the underwriters' financial solvency, and (3) should have avoided placing coverage with a potentially insolvent insurance company.

As to the second and third theories of negligence, the court ruled that the underwriters' solvency did not cause the Mays' damages because there was no evidence that Keystone's decision to terminate coverage was based on poor financial conditions. *Id*. at 674.

More importantly, however, the court addressed the first claim as a challenge to the agent's professional judgment. Acknowledging that the agent "could have done a better job by ascertaining whether the Mays would have preferred to pay a higher premium for a nongroup policy without a comparable termination provision," the court held that, in the absence of a request for better insurance or an expression of dissatisfaction with the current policy, the agent's failure to ascertain the parents' preferences showed no evidence of negligence. *Id*. at 672-73. It must be noted, however, that the court distinguished the facts in *Mays* from instances in which a greater familiarity with the Mays' situation would have made the agent aware that the policy was inappropriate for them. *Id*. at 672. [2]

From a policy perspective, the court noted the "infeasibility" a cause of action based solely on the subsequent failure of coverage. *Id*. at 672. In rejecting an attempt to impose liability on insurance agents based upon an alleged failure to obtain "sufficient" insurance coverage, the Supreme Court reasoned that placing such a duty on agents would render them "blanket insurers." *Id*.

In spite of the court's reluctance to create a blanket insurer, it nonetheless noted that some jurisdictions expand the agent's duty beyond misrepresentations to a failure to disclose, basing that expanded duty on "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." *Id*. at 672 n.10. Because the Mays did not contend that the agent failed to disclose a limitation of the policy, the court declined to decide (1) whether it would follow a similar approach and (2) whether such a

[2] Citing Justice Doggett's reliance on *Frank B. Hall & Co. v. Beach, Inc.*, 733 S.W.2d 251, 261 (Tex. App.—Corpus Christi 1987, writ ref'd n.r.e.), in which the agent's lack of understanding of lift risk was an appropriate basis for a negligence cause of action by the plaintiff trucking company.

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