Special Relationships, the Duty to Advise, and the High Stakes Insurance Agent and Broker E&O Claim Strategies for Defending and Trying These Cases

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Panel

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Setting The Stage: The High Stakes Case
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HURRICANE FRANCES
Vero Beach Barrier Islands, Florida
September 4th and 5th, 2004

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Setting The Stage: The High Stakes Case
Working as a Team

“I need a list of specific unknown problems that we’ll encounter.”
Ethical and Practical Concerns Presented by the Tripartite Relationship

- Duty to cooperate in defense/report to insurer in compliance with defense guidelines
- Tension created where client has engaged in non-covered conduct
  - What can/must be reported?
  - What strategic considerations can be impacted?
- Practical Considerations on the Part of the Insurer
  - When can/can’t a DJ action be brought?
Making it Work

• Understand everyone’s role, everyone’s interests, and everyone’s goals
• Work to harmonize the objectives where possible
• Where interests/objectives may conflict, make sure transparency and clarity of purpose rule
• Communication is key
Special Relationship

• Common Features:
  – Receipt of compensation in addition to commissions, such as for a “service fee”
  – Counseling of the insured with respect to specialized coverage or a specific coverage issue, or other “interaction with regard to a question of coverage”
  – Agent’s/broker’s expressed expertise
  – Agent’s/broker’s exercise of broad discretion in servicing the insured’s account
  – A course of dealing over an extended period sufficient to have put an objectively reasonable agent/broker on notice that his advice is being specially relied upon
  – An ambiguous request for coverage that requires clarification
Understanding the Current Landscape

- Insurance and insurance policies increasingly viewed as complex and confusing
- Agents/brokers increasingly viewed as experts
- Duty to advise claims more difficult than ever to dispose of
- Negative public perception of insurance and purveyors of insurance generally
Juror Perceptions
Do Jurors Respect and Appreciate the Work Done by Insurance Brokers and Others Who Provide Insurance Services?

1. Definitely
2. Probably
3. Probably Not
4. Definitely Not
INSURANCE BROKER
Insurance companies write their policies in language that is too hard to understand.

23%  1. Strongly agree
57%  2. Somewhat agree
17%  3. Somewhat disagree
  3%  4. Strongly disagree

Mean = 2.00
Juror Attitudes “By the Numbers”

76% believe that corporate executives lie and cover up

30% believe that it takes “billions” to send a message to corporations

71% do not believe there should be caps on jury awards

45% will ignore judge’s instructions

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Assessing the Risk

• Gathering/Preserving Information
  – Understanding the scope of the ESI challenge confronted, and the risks of failing to do so
  – What you need to do
  – The critical importance paper still plays
Assessing the Risk (Cont’d)

- Identifying witnesses
- Interviewing witnesses
- The special issues and concerns presented by former employees
- Identifying problem witnesses early on, and working to address the problems
Identifying the Applicable Law

• In situations where the agent/broker is alleged to have acted negligently or engaged in other misconduct in one state, the insured does business in another, and the insured risk is located in one or more additional locations, which state law applies?

• Choice of law rules of forum state will control

• Law may be different depending on the actor, and depending on the issue
Establishing Themes

- Establishing themes early is critically important
  - Is the insured a “careful reader,” “highly sophisticated,” a “price buyer,” as opposed to a “risk buyer”, an established “risk taker”?  
  - Can it be established that the insured is “super cost conscious” and a very “skeptical consumer”?  
  - Is the insured a “particularly experienced and knowledgeable purchaser of the specific coverage in issue”?
Establishing Themes (Contd)

• “This is wrong! How many times are you going to make the same mistakes? IDIOTS!!!!!!!”

• “Are you retarded?”

• “Why are we pointing fingers at the broker? Every year he tells us we should be purchasing more insurance!”
Treating Depositions as the Start Of Trial

• In a high stakes litigation, it is imperative to treat depositions as the start of trial
• Mistakes/errors/faulty recollection resulting from failure to be fully prepared will be characterized at trial as ineptness or attempts to deceive
• Non-credible/unlikable witnesses can do immense damage
• Prepping witnesses thus needs to go beyond just reviewing the documents and issues
Preparing Witnesses to Testify

Shortest Possible True Answer

Please bring your vehicle to a speed not exceeding zero miles per hour at this coordinate in space and time as there is other vehicular traffic moving in a direction perpendicular to your own and may intersect with your vehicle’s current trajectory.

Additional Words Are Expensive
Preparing Witnesses to Testify

Teach

LISTEN to the question
THINK about the question
FORMULATE the answer
PAUSE
SPEAK the answer
STOP
Preparing Witnesses to Testify

Teach

Four Great Answers

Yes
No
I don’t know
I don’t remember
Experts

• It is also critical to identify necessary experts, fully vet and retain early
  – Because broker E&O cases can often be defensed based on the availability of the absent coverage, this may include experts in the types of available coverage, cost, standard forms, and optional coverages
  – Because broker E&O cases can often be defensed based on arguments that the claim wouldn’t have been covered, experts with regard to loss causation, the appropriate number of occurrences, and coverage issues generally may also be necessary
  – Because broker E&O cases can often be defensed based on the valuation of the loss, damages experts will typically be needed
Experts (Cont’d)

• Things to be wary of:
  – Sloppiness/mistakes
  – Unsupported assumptions
  – Factual argument/excessive factual detail
  – Offering expert opinions beyond scope of expertise
  – Being too much of an advocate
  – Offering opinions on the ultimate issue
  – Lack of backbone
Making Effective Use of Jury Science

• Usefulness in assessing value
• Usefulness in organizing opinions of interested parties
• Dangers of confirmation bias
Trial

Five quick comments:

• This is the jury consultant’s sandbox; make use of his/her expertise to the fullest

• The adage is true: openings and closings are where cases are often won or lost – prepare accordingly

• Understand and respect the critical importance of jury selection
  - 76% of jurors believe that corporate executives lie and cover up
  - 30% believe that it takes “billions” to send a message to corporations
  - 71% do not believe there should be caps on juror awards
  - 45% will ignore a judge’s instructions
Trial (Cont’d)

• Because the law regarding broker duties and the existence of a “special relationship” can vary significantly depending on the applicable law, jury instructions play an especially critical role.

• Tech smart, savvy and visually compelling presentations are no longer an extra; they are essential.
Questions?