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PROFESSIONAL LIABILITY BLOG

Insurer May Be Liable to Policyholder for Agent's Failure to Explain Coinsurance Provision Reducing Coverage to Less Than Amount Requested

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Insurance agents are wise to mention and explain policy provisions that may cause a reduction in coverage below what the customer wants to have. And in Florida and other states that attribute an insurance agent's negligence to the insurance company (enabling a direct action against the company), insurers are wise to devise processes that ensure what is requested by the customer is reflected in the insurance policy.

That's the lesson learned from *Kendall South Medical Center v. Consolidated Insurance Nation, Inc*., in which an appellate court in Florida decided that a customer could go forward with a lawsuit for negligent procurement of insurance directly against the insurer. The customer had requested $100,000 of coverage, but received much less due to the penal nature of a 90% coinsurance clause. Coinsurance clauses are often used when the insured purchases coverage that is far less than the value of the insured property; such clauses operate by reducing the amount paid by the insurer in proportion to how much the property is underinsured.

What Led to the Lawsuit?

Kendall South, an operator of a medical center, sought an insurance policy from Insurance Nation. Kendall South met with (and requested from) one of Insurance Nation's agents "coverage of $100,000.00 to cover the property, supplies, furnishings, betterments or improvements of Kendall South Medical Center, Inc." The agent indicated the insurer would provide a policy giving Kendall South what it wanted.

What Kendall South got, however, was a policy providing property damage coverage of $100,000, with a $1000 deductible and a 90% coinsurance clause.

Later, when a leak occurred to the insured property causing more than $260,000 in damage, Kendall South received only $16,562.67 from Insurance Nation, in light of the policy's coinsurance clause. Feeling let down, Kendall South sued Insurance Nation directly for negligent procurement of insurance, alleging the insurer breached its duty to properly explain the policy when it knew or should have known the policy as written would not provide the requested coverage.

The Trial Court Dismisses, But the Court of Appeal Says Not So Fast

The trial court dismissed the lawsuit for failing to state a valid claim. On appeal, however, the District Court of Appeal of Florida[1] decided that Kendall South had pled a sufficient claim for negligent procurement of insurance. The appellate court determined that the claim arose from a failure to explain that a policy did not meet the insured's expressed needs. The appellate court's decision meant the case had to go back to the trial court for further proceedings—in other words, Kendall South had pled enough to make it to the next stage of litigation and avoid a dismissal.

In reaching its decision, the appellate court also noted that Kendall South was not alleging that insurers have a general duty to always explain a coinsurance clause before issuing a policy that contains one; rather, when a customer specifically tells of wanting a policy that meets certain requirements but the insurer fails to explain that the policy doesn't meet those requirements (and that different coverage would be required to do so), a valid claim exists for negligent procurement of insurance.

The Takeaway

In light of this ruling, insurance agents (and insurers in states like Florida that allow direct actions against insurers for the negligence of insurance agents) should be mindful to fully explain provisions that may cause coverage to be less than what a customer specifically asks for. Failure to do so could render the agent, insurer, or both liable for negligent procurement of insurance.

[1]In Florida, an insurance agent's negligence can be directly attributed to the insurance company. Florida courts refer to insurance agents as "captive agents" (as distinguished from insurance brokers, who are treated differently), and the acts of these agents are generally attributable to and binding upon the insurance company. See *Amstar Ins. Co. v. Cadet*, 862 So.2d 736, 740 (Fla. App. 2003). Practically speaking, this means the insured may bring a cause of action directly against the insurance company, as opposed to suing the insurance agent. This is not the case in every state, so it is important to know which state's laws will apply in a particular situation.