State of Mind

Missouri Codifies Discrimination

On June 30, 2017, Missouri Gov. Eric Greitens signed into law S.B. 43. The new law amends the Missouri Human Rights Act, effective Aug. 28. The changes more closely align Missouri law to federal policies and law, but opponents say it creates unreasonably difficult standards of proof. The act tinkers with the definitions of the terms "employer," "employment" and "employment agency" and specifies that only employers as entities—not as individuals—can be considered liable for discrimination. Furthermore, the act introduces a new causation standard, replacing the previous "contributing factor" measurement with a stricter "motivating factor." The plaintiff must now prove not only that the accused employer held an unlawful bias against the plaintiff but also that this bias was a compelling factor in the employer's decision to terminate the plaintiff. S.B. 43 also alters the language of the MHRA with respect to the filing of complaints, now mandating that such a complaint be formally filed by the victim within 180 days of any alleged discriminatory offense. The law also details a more specific guideline for the awarding of punitive damages: now, the maximum penalty possible depends upon the total number of employees of the employer, with the penalties ranging from $50,000 to $500,000. The new law additionally creates the Whistleblower Protection Act, which essentially prohibits termination of whistleblowers for their actions. The signing of S.B. 43 necessitates the abrogation of F*arrow v. Saint Francis Medical Center*, *McBryde v. Ritenour School District*, and all existing Missouri-approved jury instructions concerning the MHRA, analysts say.
—Joshua Sipple

Nickel Defense

Insurance agents and brokers should put five basic proactive measures in play to avoid professional liability claims.

By David Oberly

In recent years, a number of factors—including increased competition in the insurance industry and the introduction of more varied, complex insurance policies and coverages—has triggered a significant uptick in the number of E&O claims and lawsuits filed against insurance agents and brokers. Fortunately for insurance agents, there are several proactive steps that can be taken to avoid the risk of falling victim to a professional liability claim or lawsuit.

David Oberly

Duties of Insurance Agents

At the outset, agents must maintain in-depth knowledge of the duties and responsibilities they owe to prospects and clients. In all states, insurance professionals owe a duty to exercise reasonable care and diligence to procure the coverage that is requested by the insured. However, in some states, agents also maintain a duty to exercise reasonable care to advise the customer as to relevant coverage issues as well. While this heightened "duty to advise" standard of care varies significantly from jurisdiction to jurisdiction, it is often triggered by "special circumstances" that exist in connection with the relationship between the agent and the customer. Courts have recently found "special circumstances" to exist sufficient to trigger the duty to advise in a wide range of scenarios. Those include when the customer specifically requests advice, where a long-term course of dealing exists between the agent and customer such that the agent understands that the customer is relying on his expertise, and where the agent holds himself out as an expert. Accordingly, given the

New Lease Accounting Standards on the Way

Revised lease accounting standards are set to take effect Jan. 1, 2019, and apply to fiscal years beginning in calendar year 2019. The revised standards are comprised in IAS 16 of the International Accounting Standards Board and the Financial Accounting Standards Board's Accounting Standards Update (ASU) 842. Under the new standards, publicly traded companies worldwide must report leases as both assets and liabilities on their balance sheets. This reflects the addition of operating leases of 12 months or more, even if the asset is to be returned to the owner or landlord. The updated standards include tangible property as well as real estate, and they present a big change in accounting procedures for the technology, media and telecommunications sector because valuations will have to be established for communications towers, fiber networks and small hardware, among other shared assets. Parsing an asset's economic benefit to each user—e.g., apportioning value from a cloud server—could be fraught with difficulties and errors. ■

wide variations in the duty to advise that exist across jurisdictions, agents must be acutely aware of the applicable law as it relates to their duties so they can satisfy all obligations owed to the customer in connection with the insurance procurement process.

Ensuring Correct Coverage Is Obtained

As a general rule, most insurance agent and broker errors and omissions claims stem from allegations that an agent failed to obtain or maintain coverage requested by the insured. Accordingly, insurance agents and brokers must develop and maintain an intricate understanding of the coverages and policies they offer to prospects and customers in their day-to-day practices so that the correct coverage can be obtained in every instance. In addition, while continuing education plays a vital role in ensuring adequate knowledge, agents must also ensure that the proper time and effort is expended to effectively address the desires and needs of every individual client so the right coverage is procured.

Proper Documentation

Importantly, because one of the strongest E&O defenses involves producing written accounts of activities and conversations that occurred during the insurance procurement process, agents must also ensure that they utilize effective file documentation and retention protocols and practices. In this respect, agents should habitually confirm any oral conversation with a customer in writing immediately after the communication takes place and document their file accordingly. Agents should also consider recording all inbound and outbound phone calls. Moreover, in today's highly technological age, agents should retain copies of all email correspondence, ideally in paper format contained in the customer's physical file.

Proper documentation is also especially crucial when it comes to client rejection of coverage, as proper documentation of that refusal may be a key element in the event of an uncovered claim. When any recommended coverage is rejected, the agent should require the customer to sign in writing that such coverage was offered and declined. This written acknowledgement should then be followed up with written notification from the agent that no coverage has been placed on behalf of the customer.

Today, agents also run significant risk of material misrepresentation claims instituted by insurance carriers when the agent fails to obtain a signed policy application.

Application/Renewal Process

Another area of significant concern for agents is the application and renewal process. In particular, when an agent fails to adequately record in a client's file the application information supplied by the customer, an agent may find himself involved in a "he said, she said" dispute in the event an E&O claim is filed and no signed application exists in the file. As such, if an application is completed with information supplied by the customer over the phone, all information should be confirmed in writing by the agent, with instructions to the customer to review and verify its accuracy. In addition, agents should avoid completing renewal applications on behalf of a customer simply by relying on information supplied in a prior application.

Today, agents also run significant risk of material misrepresentation claims instituted by insurance carriers when the agent fails to obtain a signed policy application. Conversely, however, as a general rule the customer will be held responsible for the accuracy of information contained in an application if the application is signed by the customer. Accordingly, agents must make sure that signed applications are obtained in every instance and without fail—ideally after the customer has reviewed the application in its entirety to ensure the accuracy of all information contained in the application.

MGA/Wholesaler Considerations

Finally, agents must exercise special caution when engaging in business relationships with wholesalers or managing general agents (MGAs). In particular, agents must exercise due diligence before entering into a relationship with a wholesaler or MGA, because others who place business on the agent's behalf may not always satisfy the agency's standards and expectations. When an agent does decide to do business with an MGA, the agent should obtain a written letter from the MGA authorizing the agent to issue certificates on the MGA's behalf. Similarly, when doing business with a wholesaler, the agent should provide written disclosure letters to insureds whenever the agent places coverage with a surplus lines insurer.

Taken together, by implementing these best practices, insurance agents can put themselves in the best position to steer clear of E&O claims in today's highly litigious business environment and can set themselves up with strong defenses in the event they ever find themselves on the receiving end of an E&O action. ■

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