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INSURANCE PRODUCER MALPRACTICE

By Frederick C. Berry, Jr., J.D., CPCU, CLU*

Frederick C. "Rick" Berry, Jr., a native of Phoenix, is a lawyer practicing insurance litigation. He received his B.S. in Insurance (1969) and his Juris Doctor (1973) from Arizona State University. While in law school, Mr. Berry served as an editor of the *Arizona State Law Journal*. He also served as Deputy Director of Insurance of the State of Arizona from 1976 through 1978. Rick has obtained the professional insurance designation of Chartered Property and Casualty Underwriter (CPCU) in 1981 and Charted Life Underwriter (CLU) in 1983. He is a certified specialist in personal injury and wrongful death litigation, a Judge Pro Temp of the Maricopa County Superior Court, has served on the State Bar of Arizona Professional Liability Committee as well as Chairman of its Insurance Committee and is a Hearing Officer for the Disciplinary Commission of the Arizona Supreme Court. Rick is married and has two children.

Rick served as the insured's standard of care expert witness in *Southwest Auto Painting & Body Repair, Inc. vs. Binsfield,* 183 Ariz. 44, 904 P.2d 1268 (App. 1995) and *Premium Cigars Intl. Vs Farmer-Butler-Levitt Insurance Agency,* 208 Ariz. 557, 96 P.3d 555 (App. 2004).

All too often insurance companies justify a claim denial based on an allegation that there is no coverage. Lawyers for insurance consumers are forced to search the policy for conflicting language and ambiguities in an effort to find coverage. Remember, insurance companies write insurance policies so that (1) the sales people can sell policies and (2) the claim people can deny claims. Coverage litigation is frequently lost on summary judgment because the insurers' attorneys are successful in persuading the judge to focus on conditions, limitations and exclusions that favor the insurance company. To counter this, lawyers attempt to plead and prove a case for "reasonable expectations" to get around difficult contract language. Such a case is sometimes difficult to prove and vulnerable to summary disposition.

If there is a claim denial based on a lack of coverage, attorneys for insureds must examine the role of the insurance producer. What did the insurance consumer request? What did the producer say to the consumer? Did the consumer request full coverage? Did the consumer ask that he or she be covered for "everything"? What did the sales literature imply? Did the insurance producer boast of good service or peace of mind? What does the producer's Web page say? Is UM/UIM coverage less than the liability coverage in your client's policy?

Remember, it does not make any difference if the insurance producer is independent, captive or direct. It does not make any difference if the producer characterizes itself as an "agent' or a "broker". It does not make any difference if the producer is a nameless person on the telephone or even a gecko character on your computer monitor.

In auto and general liability insurance, insurers use three different marketing methods.

1. Direct. When an insurance company employs the producers it is considered a direct writer. For example, most Allstate producers are employed by the insurance company. The telephone operators at GEICO are employed. The telephone operators with USAA (called "insurance specialist") are employed by USAA. If non-coverage is the fault of a direct producer, the individual could be found to be negligent and the employer will also be liable under ordinary principles of *respondent superior*. The same goes for direct mail and internet marketing.

2. Captive. These are producers who have a contract with one insurance company to only place insurance for that particular company. Although they are independent contractors, they generally are not allowed to sell insurance for other companies (except when the insurer does not write insurance coverage for a particular line of coverage). Examples of captive producers are Farmers and American Family.

3. Independent. These are independent contractors that write insurance for various independent insurers. They typically have "agency agreements" with various insurers. Their trade association, The Independent Insurance Agents and Brokers, is politically powerful in the legislatures and Congress.

Do Not Confuse Legal Duty with Standard of Care

It is very easy for anyone to confuse the legal duty of an insurance producer with the standard of care that the producer may owe to his customer. The legal duty of an insurance producer is **always** the same. For a good discussion of this issue, consider *Southwest Auto Painting & Body Repair, Inc. v. Binsfield,* 183 Ariz. 44, 446-7, 904 P.2 1268, 1270-71 (App. 1995)**:

> The distinction between duty owed and breach of the standard of care long has been a source of confusion. The Arizona Supreme Court addressed the distinction in Markowitz v. Arizona Parks Board, 146 Ariz. 352, 706

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P.2d 364 (1985), in which the court stated that "the existence of a duty is not to be confused with details of the standard of conduct." *Id.* at 355, 706 P.2d at 367. Duty is found in the relationship between individuals that "imposes upon one a legal obligation for the benefit of the other...." *Id. (quoting* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 356 (5th ed. 1984)). Details of conduct, such as whether a defendant should have posted warning signs or fixed potholes, have to do with whether the defendant breached the applicable standard of care, not whether a duty and attendant standard of care exist. *Id.; see also Coburn v. City of Tucson*, 143 Ariz. 50, 52, 691 P.2d 1078, 1080 (1984).

Arizona case law defines the duty a licensed insurance agent owes to a client or customer. In *Darner*, our supreme court stated that "an insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance." 140 Ariz. at 397, 682 P.2d at 402 *(quoting Quality Furniture, Inc. v. Hay*, 61 Haw. 89, 595 P.2d 1066, 1068 (Haw. 1979)).

Binsfield cites to *Darner Motors Sales, Inc. v. Universal Underwriters Insurance Company*, 140 Ariz. 383, 682 P.2d 388 (1984). Most lawyers consider *Darner* the original pronouncement of the Doctrine of Reasonable Expectations. That it is. But *Darner* is much more. It is also the seminal case considering insurance producer malpractice. Here, Justice Feldman stated in the text and footnote 14 (140 Ariz. at 398, 682 P.2d at 403):

> "The principle involved here is simply that a person who holds himself out to the public as possessing special knowledge, skill or expertise must perform his activities according to the standard of his profession. If he does not, he may be held liable under ordinary tort principles of negligence for the damage he causes by his failure to adhere to the standard. *See* W. Prosser, *Law of Torts* § 32, at 161-62 (4th ed. 1971). Proof of the standard in this type of case may require expert testimony at trial. n14
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> - - - - - - Footnotes - - - - - -
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> n14 We take note that Doxsee was not an independent agent, but was employed by Universal. We do not imply, by this opinion, that the standard of care is the same. It may be that "company agents" are held to a somewhat lower standard than "independent agents"; this, of course, is a matter of evidence."

Justice Feldman mused that there may be a different standard of care for an independent producer than a direct producer, but he emphasized the fact that the duty is the same. The text of the opinion also emphasizes the fact that proof of a failure to adhere to a standard of care may be something that requires expert testimony.

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Let the Jury Decide Insurance Producer Malpractice

Because the legal duty imposed on insurance producers is so clearly stated in the case law, a trial court judge's hands are tied. If the attorney for the injured insured brings a negligence claim for insurance producer malpractice and supports it with expert testimony defining the standard of care, violation of the standard of care and causation, damages almost always take care of themselves. That is, damages are usually defined by the loss for which the insurance company has denied coverage. In other words, a trial lawyer is probably going to be able to get her or his client's case before a jury.

Don't Forget to Disclose Your Expert Insurance Witness in the Claim Against a "Licensed Professional."

A.R.S. § 12-2602 requires that certain disclosures be made when bringing a civil action against a license professional. Insurance producers, of course, are licensed professionals like doctors, lawyers and architects.

When presenting your claim, A.R.S. § 12-2602 (A) requires that you "certify in a written statement that is filed and served with the claim" whether expert opinion testimony is necessary to prove a license professional's standard of care or liability. If so certified, A.R.S. § 12-2602 (B) requires you to serve a preliminary expert opinion affidavit with your Initial Disclosure Statement under Rule 26.1 A.R.C.P. This preliminary affidavit must include the following:

- The expert's qualifications to express an opinion on the licensed professional's standard of care or liability for the claim.
- The factual basis for each claim against a licensed professional.
- The licensed professional's acts, errors or omissions that the expert considers to be a violation of the applicable standard of care resulting in liability.
- The manner in which the licensed professional's acts, errors or omissions caused or contributed to the damages or other relief sought by the claimant.

If the Insurance Company is not Authorized by the Arizona Insurance Director to Write Direct Business in Arizona, You Have an Additional Cause of Action If a Claim Is Not Paid.

There is a little known statute that is part of the Unauthorized Insurer Act. An unauthorized insurer is simply a person that does not have a Certificate of Authority to transact an insurance business in the State of Arizona issued by the Director of Insurance of the State of Arizona. This would include most surplus line insurers, off shore insurers, insurers from other states that have not been "admitted" to do business in Arizona, risk pool and risk retention groups, or any risk bearer. If such an unauthorized insurer does not pay a claim within the terms of the insurance contract, A.R.S. § 20-402(B) makes "any person who acted directly or indirectly as an insurance producer for or otherwise presented or aided the insurer in the solicitation, negotiation, procurement or effectuation of the insurance contract or renewal of the contract is liable to the insured for the full amount of the claim or loss in the manner provided by the provisions of the insurance contract." This is a powerful statute and is intended to protect Arizona consumers from unauthorized insurers even at the expense of insurance producers who sold the insurance contract in "good faith." *State vs. Arizona Pension Planning*, 154 Ariz. 567 39 P.2d 1373 (1987).

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Do Not Forget to Consider Suing the Insurance Producer for Breach of Contract to Procure Insurance.

When an insurance producer promises to obtain "full coverage" or fails to place coverage requested by a customer, the producer can be found guilty of breach of contract to procure insurance. This is a cause of action sounding in contract which opens up two doors. First, the claim allows the prevailing party to seek reasonable attorney's fees pursuant to A.R.S. § 12-341.01 (albeit a two-edged sword). Second, it establishes the ability of an insured third party to accept an assignment of a cause of action from an insured under a *Morris or Damron* agreement.

Lawyers should carefully review *Premium Cigars Intl, Ltd. v. Farmer-Butler-Levitt Insurance Agency*, 208 Ariz. 557, 96 P.3d 555 (App. 2004).** There, the Court of Appeals held that a claim for insurance producer malpractice sounds in tort and is unassignable. If, however, there is a "specific promise" to procure insurance, the cause of action sounds in contract and may be assigned. Here the Court of Appeals stated (208 Ariz. at 568-69, 96 P.3d at 566-57):

> A request of an agent to procure insurance may be a contract implied in fact or a contract implied in law. If the agent is rendering professional services, then this is a contract implied in law, giving rise to a tort action because the assurances to provide insurance are based upon the relationship of the parties. Alternatively, an oral promise to procure insurance may bind the parties in contract if the requirements of contract formation are met.
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> ...A breach-of-contract claim that is based upon the relationship of the parties, a contract implied in law, cannot be assigned because it sounds in tort and all of the same public policy concerns for not assigning a professional negligence claim apply. A breach-of-contract claim based upon a contract implied in fact can be assigned, however. *See* 6 Am. Jur. 2D Assignments § 58 (1999). *Compare* 6A C.J.S. *Assignments* § 36, *with* 6A C.J.S. *Assignments* §§ 32, 33, 37 (1975 & Supp. 2001).
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> A contractual right can be assigned unless
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> (a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
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> (b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
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> (c) assignment is validly precluded by contract.
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> Restatement (Second) of Contracts § 317(2) (1981). Thus, unless certain exceptions apply, a breach-of-contract claim may be assigned.

Conclusion

When a consumer is advised that the claim is not covered or is underinsured, the attorney for the insurance consumer must

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AzTLA New Members

Megan E. Gailey
Ms. Gailey is with the firm Wilkes & McHugh located in Phoenix. She joins AzTLA as a regular member with just over three years in practice. Ms. Gailey's area of practice is focused on elder abuse law.

David L. Goldfarb
Mr. Goldfarb joins AzTLA as a regular member with over eight years in practice and is with the firm Wilkes & McHugh. He was admitted to practice in 1998 in Florida and admitted to Arizona Bar in 2005. His area of practice is focused on elder abuse.

Erica McCallum
Ms. McCallum is with the firm Kinerk, Beal, Schmidt, Dyer & Sethi in Tucson. Her area of practice is focused on plaintiff's personal injury. She joins AzTLA as a regular member with over two years in practice.

James M. Morgan
Mr. Morgan is with the firm Wilkes and McHugh located in Phoenix. He joins AzTLA as a regular member with over two years in practice. His area of practice is focused on elder abuse law.

Mary Ellen Spiece
Ms. Spiece has been in practice since 1986. She is with the firm Wilkes & McHugh in Phoenix. Ms. Spiece focuses her area of practice on elder abuse and joins AzTLA as a regular member.

Utiki Spurling
Ms. Spurling joins AzTLA as a regular member with nearly 5 years in practice. She is with the firm Wilkes & McHugh in Phoenix. Her area of practice is focused on elder abuse.

Cara E. Walsh
Ms. Walsh is with Goldberg & Osborne in Phoenix. She joins AzTLA as a regular member with less than two years in practice. Her area of focus will be on personal injury law. ■

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consider making a claim for insurance producer malpractice (a tort claim) or breach of contract to procure insurance (a breach of contract claim). Juries are quick to appreciate a complexity of the insurance contract as well as the insurance producer's role in the process of placing coverage. Individual jurors probably rely upon the expertise and advice of their insurance producer and are quick to understand that insurance producers are professionals just like doctors or lawyers. Since the insurance company usually takes a firm position of no coverage, the lawyer can enlist the expertise and power of the insurance company in presenting a claim against an insurance producer.

The trend in America is for insurance to not be produced by independent agents in the American Agency System. Rather, more and more insurance is produced on a direct basis by insurance companies. It makes no difference whether the insurance producer is independent, captive or a direct employee of the company. It makes no difference if the producer is a nameless person on the other end of a toll free telephone or even an internet screen. The legal duty owed by insurance producers is the same. If the jury is presented probative evidence supporting the insurance producer's violation of the standard of care, evidence of causation and damages, an insurance consumer can reasonably expect substantial justice. ■