What Are the Fiduciary Duties of Insurance Agents and Brokers?

A COMMON MISCONCEPTION is that insurance agents and brokers owe their insureds fiduciary duties as a matter of law. Many attorneys also think so, basing their opinion on general agency principles, case law and treatises, or what they learned in law school regarding agency law. Many fundamental cases addressing the fiduciary duties of agents, however, were decided before the Insurance Code was enacted in 1935, and as insurance law and the Insurance Code have evolved, California courts have become less dependent on general agency principles when determining the duties of insurance agents and brokers. Currently, under California law, there is no clear answer as to whether fiduciary duties apply to insurance agents and brokers and in what respect. While there is no appellate precedent in California permitting an insured to sue an insurance broker or agent on a common law cause of action for breach of fiduciary duty, California courts have been hesitant to confirm outright that this cause of action is inapplicable to insurance brokers and agents.

For example, in Workmen’s Auto Insurance Company v. Guy Carpenter & Company, Inc., the Second District Court of Appeal initially definitively answered the question of whether insurance brokers owe any fiduciary duties to insureds in the negative. However, any relief this decision brought to insurance agents and brokers was short-lived, as the opinion was vacated and depublished by a subsequent rehearing, which affirmed the initial opinion but remained unpublished.

The opinion of the subsequent rehearing in Workmen’s is illustrative of the hesitancy of California courts to establish a bright-line rule on this issue. For example, in the original opinion, the court held in its summary: “In particular, we hold that an insurance broker cannot be sued for breach of fiduciary duty.” In the opinion on rehearing, the court copied the summary of opinion from the original opinion but omitted that definitive statement. The court stepped back further on the confidence of its original opinion by stating, “[T]hese authorities do not close the door on fiduciary duty claims against insurance brokers” and “a fiduciary duty cause of action against an insurance broker very well might pass muster in an appropriate case.” In less than a year, the same judges had drastically limited the definitiveness of their opinion. Moreover, the opinion was not officially published.

Although the Workmen’s opinion is not citable, the case was strongly litigated on both sides, thus offering great insight into the mental processes and arguments of brokers and agents, insureds, and the Second District. After Workmen’s, the landscape on this issue remains as polarized as before, and counsel on both sides must look to the few ambiguous cases addressing the issue, the Insurance Code, treatises, jury instructions, and other sources for guidance.

No Outright Fiduciary Duty

Before Workmen’s, California courts had begun to take significant strides in answering whether insurance brokers and agents owed any fiduciary duties to insureds. The most significant cases supporting the assertion that, as a matter of law, insurance brokers and agents do not owe any fiduciary duties to insureds, are Kotlar v. Hartford Fire Insurance Company and Hydro-Mill Company, Inc. v. Hayward, Tilton & Rolapp Insurance Associates, Inc.

In Kotlar, the court refused to broaden an insurance broker’s duties beyond negligence and held that “the duty of a broker, by and large, is to use reasonable care, diligence, and judgment in procuring the insurance requested by the client.” The court refused to analogize the broker-client relationship to the attorney-client relationship

Under California law, there is no clear answer as to whether fiduciary duties apply to insurance agents and brokers.

and held that such an attempt was “wide of the mark.” The court went on to say that “while an attorney must represent his or her clients zealously within the bounds of the law, a broker only needs to use reasonable care to represent his or her client.” To support this distinction, the court noted that unlike lawyers, who normally do not represent both parties to a transaction, insurance brokers can be dual agents, representing both the insurer and the insured. Thus, Kotlar is the authority for the proposition that the scope of an insurance broker’s duties is defined by negligence law, not fiduciary law.

In Hydro-Mill, the Second District cited and expanded on Kotlar but left wiggle room. Based on the complaint, the court reasoned that “the allegations of professional negligence subsume all of the allegations of breach of fiduciary duty.” Finding that the gravamen of the complaint was the insurance broker’s “failure to execute its obligations as an insurance broker,” the court held that only a cause of action for professional negligence applied. Basically, the Hydro-Mill opinion refused to recognize a separate cause of action for breach of fiduciary duty against insurance brokers.

The Hydro-Mill court also relied on the California Supreme Court’s holding that an insurer is not a fiduciary. In Vu v. Prudential Property & Casualty Insurance Company, California’s highest court held that the “insurer-insured relationship...is not a true ‘fiduciary relationship’ in the same sense as the relationship between trustee and beneficiary, or attorney and client.” The court further explained that any “special” or “heightened” duties imposed on insurers, which often resemble duties owed by fiduciaries, are only “fiduciary-like duties...because of the unique nature of the insurance contract, not...
because the insurer is a fiduciary.” One leading treatise foresees the implication of this statement and offers a practice pointer to insureds, stating that there is no apparent advantage to pleading claims for breach of “fiduciary-like” duties because breach of the duties does not by itself show the requisite oppression, malice, or fraud that is required for an award of punitive damages for breach of fiduciary duty. The Hydro-Mill court found the logic in Var applicable to insurance brokers and opined, “If an insurer is not a fiduciary, then arguably, neither is a broker.”

Although Kotlar and Hydro-Mill seem to be the only direct cases discussing the fiduciary duties of brokers and agents, they represent the most recent cases in a long line of California precedent to tip-toe around the issue. For example, in Wilson v. All Service Insurance Corporation, an insurance broker was sued on five theories, including negligence and breach of fiduciary duty, for placing insurance without investigating the insurer’s financial condition. The court held that breach of fiduciary duty incorporated all the allegations of the negligence count. Furthermore, the court held that the breach of fiduciary duty cause of action depended upon the existence of an alleged duty on the defendant’s part, and “since no duty exists, defendant is not liable to plaintiffs under any of the theories pleaded.” In Pabick v. Frager, the court held that the insurance broker owed no duty other than to secure for the client a policy meeting the statutory requirements.

The opinion of Justice Joyce Kennard in Jones v. Grewe is one of the seminal opinions clarifying the duties owed by an insurance broker. In Grewe, the insured sued the insurance broker for misrepresenting the coverage obtained and alleged causes of action for negligence and breach of fiduciary duty. The court refused to recognize a separate cause of action for breach of fiduciary duty. Instead, the court stated that an insurance broker assumed only the normal duties found in any agency relationship, which include “the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured.” The court refused to recognize any heightened duties, fiduciary or otherwise, absent “express agreement or a holding out.”

Numerous cases decided after Grewe leading up to Kotlar and Hydro-Mill supported the holding that no separate breach of fiduciary duty cause of action is available against insurance brokers and agents, reasoning that the duties of an insurance broker and agent are the same regardless of the legal theory applied. These opinions resonate in leading treatises, one of which was cited by the Hydro-Mill court in explaining that it is unclear whether the fiduciary duty of insurers, if any, differs from their duty of reasonable care. In the eight years since Hydro-Mill was decided, no published California case has found that a cause of action lies for breach of fiduciary duty against an insurance broker or agent, and at least two federal courts have rejected the attempt to state such a claim when applying California law. Nonetheless the above decisions, insureds routinely bring breach of fiduciary claims against insurance brokers and agents.

**Basis for Fiduciary Duty**

Agency law established long ago that agents can be liable for breach of fiduciary duty. Until there is a published decision that definitively answers the issue, insureds may rely on general agency principles when suing insurance agents and brokers. Moreover, the Hydro-Mill opinion prefaces its discussion of fiduciary duty by observing, “It is unclear whether a fiduciary relationship exists between an insurance broker and an insured.” This cautious statement is partially influenced by a case that insureds and others in favor of imposing outright fiduciary duties on insurance brokers and agents swear by: Eddy v. Sharp. In Eddy, the court famously stated, “Where the agency relationship exists there is not only a fiduciary duty but an obligation to use due care.” This sentence has formed the basis of the arguments of many insureds for imposing fiduciary duties on insurance brokers and agents.

It is interesting that insureds and trial courts have relied so heavily on Eddy, considering that it was declared dicta on the issue of fiduciary duty and not followed in Hydro-Mill. The leading treatises on this issue also classify the statement in Eddy as dicta. Nevertheless, the confidence of this statement has caused many courts much hesitancy. For example, immediately after classifying the statement in Eddy as dicta, the Hydro-Mill court went to say that, “Whether or not the broker-insured relationship is a fiduciary one, a broker still has certain fiduciary duties.” The court was referring to California Insurance Code Section 1733, which mandates that premium payments received by insurance agents and brokers are held in a fiduciary capacity. Interestingly, there is precedent implying that the receipt of premium payments triggers the fiduciary role of insurance agents and brokers, even if the receipt itself is not necessarily wrongful. Regardless, Section 1733 only applies in the limited scenario in which the insurance agent or broker receives premium payments. As such, the section does not answer the question of whether insurance agents and brokers are fiduciaries as a matter of law. By shifting the focus to Section 1733 and the limited scenario to which it applies, the court in Hydro-Mill effectively evaded the issue.

Aside from referencing Section 1733 for the proposition that brokers may have certain fiduciary duties, the Hydro-Mill court also mentioned Westrec Marina Management, Inc. as an example of a case in which “brokers [were] found liable for breach of fiduciary duty where they failed to obtain insurance at [the] best available price.” However, the applicability of this case to the issue of fiduciary duties is highly doubtful. Treatises by and large ignore this case, and the Workmen’s court refused to discuss it on the ground that “it does not provide guidance” because the Westrec court was not asked to decide on appeal whether a broker can be sued for breach of fiduciary duty. Regardless of the shaky arguments supporting an insured’s cause of action for breach of fiduciary duty against an insurance agent or broker, trial courts are often hesitant to dismiss such claims at the pretrial stage, especially on a demurrer or motion to strike.

Although cases like Kotlar and Hydro-Mill have cast serious doubts on whether insurance brokers and agents are fiduciaries, it remains difficult for trial courts to dismiss breach of fiduciary duty causes of action against brokers and agents in the early stages of litigation. For example, a trial judge may find that alleging an insurance broker or agent relationship is sufficient, for pleading purposes, to state a cause of action for breach of fiduciary duty. Another complication for trial courts during the initial pleading stages is determining whether the existence of a fiduciary duty is a question of law or fact. For example, some trial courts find that a breach of fiduciary duty claim against an insurance broker or agent is not prohibited as a matter of law. As such, the breach of fiduciary duty claim may not be summarily dismissed before there is a presentation of facts to establish that such a relationship did not exist. This implies that, although a court may be reluctant to dismiss a breach of fiduciary duty cause of action against an insurance broker or agent on demurrer, where the facts are not disputed, the cause of action may yet be dismissed pretrial on a case-by-case basis depending on the factual circumstances of the specific insurance broker or agent.

Some appellate courts have also expressed that the determination of whether a fiduciary relationship exists is a factual one. In Tri-Growth Centre City, Ltd. v. Silldorf, the court held that, based on the unique circumstances of the case, “there [was] a factual question as to the existence of a fiduciary relationship and whether defendants breached it.” In Liadas v. Sahadi, the California Supreme Court similarly held that, in the specific instance of the case, existence of a fiduciary relationship could not be deter-
Supreme Court has expressed that “the existence of a duty is a question of law,” even stating that “legal duties are not discoverable facts of nature, but merely conclusory expressions.” In Grewe, the court similarly held that “whether a duty of care exists is a question of law.” One case tried to put it together and held, “While breach of fiduciary duty is a question of fact, the existence of legal duty in the first instance is a question of law.” Regardless of which standard the courts choose, creating a new duty is a question of public policy, not something for the courts to decide.

Insurance Law or Agency Law

Under principles of agency law, an agent is automatically a fiduciary. However, the Insurance Code and insurance case law are not so quiet to label insurance brokers and agents as fiduciaries. The Workmen’s court labeled this inherent conflict as a “legal conundrum,” which could be “resolved only by stare decisis and public policy.”

One of the essential considerations in this analysis is the effect of imposing new duties, fiduciary or otherwise, on insurance brokers and agents, and whether those duties would conflict with existing case law. The court in Workmen’s was wary of throwing the insurance profession “into limbo” and disrupting well-defined case law, which has been established through years of litigation. From a policy standpoint, the court was concerned that such a disruption could increase the cost of insurance. Another argument was that the CACI instructions on breach of fiduciary duty may not apply to insurance brokers. The “Directions for Use” following CACI No. 4102, which lays out the essential factual elements for breach of fiduciary duty, state, “This instruction is not intended for cases involving insurance brokers or agents.” Thus, in weighing the conflicting ideologies on whether insurance agents and brokers can be liable for breach of fiduciary duty, future courts must consider the state of the policy line that decades of insurance law cases have drawn and balance the positive and negative consequences of disrupting that policy line.

Since California courts have never explicitly recognized a separate common law cause of action for breach of fiduciary duty against insurance agents and brokers, an appellate decision addressing this issue is necessary. The Workmen’s opinion gave an insight into the thinking process of the Second District Court of Appeal of California. It states that what is to be gleaned from “Kotlar, Hydro-Mill, Wilson and Jones is this: the agency of a broker must be viewed only through the lens of insurance law because it is a constellation of rules and policies all its own.” Unfortunately, this opinion was vacated. Deciding whether insurance brokers and agents owe an outright fiduciary duty to insureds is a matter of public policy and cannot be determined by the trial courts. The court of appeal must address this issue again in a published opinion that stays published.

1 Courts often use the terms “insurance agent” and “insurance broker” inconsistently and interchangeably. See Kurtz v. Insurance Communicators Mktg. Corp., 12 Cal. App. 4th 1249 n.1 (1993) (giving the terms “agent” and “broker” a generic rather than technical meaning due to the inconsistency of usage).
2 39 CAL. JUR.: INSURANCE COMPANIES ¶183 (3d ed. 2012) (“As a general rule, the powers of an agent of an insurance company are governed by the general laws of agency.”) (citing Cronin v. Coyle, 6 Cal. App. 2d 205 (1935)).
4 Id.
7 Kotlar, 83 Cal. App. 4th at 1123.
8 Id.
9 Id.
10 Id.
11 Id.
12 See Id. (“For example, an insurance broker acts as an agent for the insured in procuring insurance for the insured, but the broker may also be the agent of the insurer in respect to the policy.”) (citing Frasier-Yamor Agency, Inc. v. County of Del Norte, 68 Cal. App. 3d 201, 213 (1977)).
14 Id.
16 Id. at 1150-51.
17 Id. (emphasis in original).
18 CAL. PRACTICE GUIDE: INSURANCE LITIGATION ¶11:155 (2011) (pleading breach of “fiduciary-like” duties may also be ground for demurrer or motion for judgment on the pleadings, or worse still, for reversal of any judgment obtained by plaintiffs.).
21 See id.
22 Id. at 799.
23 Id.
25 Id. at 402.
27 Id. at 953.
28 Id. at 954.
29 Id.
32 See Minisco v. Pacific Maritime Assoc., 2005 WL 2203149, at *10 (N.D. Cal. Sept. 13, 2005); Kaui Scuba Ctr., Inc. v. Padi Amrs., Inc., 2011 U.S. Dist. LEXIS 75704 (C.D. Cal. July 13, 2011) (dismissing a claim for breach of fiduciary duty against an insurance broker because the plaintiff “failed to allege how the insurance broker entered into a relationship with the plaintiff such that a fiduciary duty was imposed.”).
36 Id. at 865 (citing 1 WITKIN, SUMMARY OF CAL. LAW §§84-85 (8th ed. 1973)).
38 See CAL. PRACTICE GUIDE: INSURANCE LITIGATION ¶11:165 (2011) (referring to Eddy as dictum); 2 CAL. INS. LAW DICTIONARY & DESK REF. ¶91 (2013) (recognizing that Eddy was declared dicta).
40 See Workmen’s Auto Ins. Co., 2012 WL 681202 n.6 (Cal. App. 2d Dist. Mar. 1, 2012) (stating “an opinion is not authority for a proposition not therein considered”)(citing Palmer v. GTE Cal., Inc., 30 Cal. 4th 1265, 1278 (Cal. 2003)).
42 Id. at 4-5.
43 Id.
45 Id. at 1151.
47 Id. at 284.
49 See Christensen, 54 Cal. 3d at 885 (citing Tarasoff v. Regents of Univ. of Calif., 17 Cal. 3d 425, 434 (1976)).
52 See Jones, 189 Cal. App. 3d 950 at 954 (While the determination of whether a duty of care exists in the law is a matter for the courts, “whether, and the extent to which, a new duty is recognized is ultimately a question of public policy.”).
55 Id. at 1480.
56 Id.
57 2-4100 CACI 4101.
58 See Workmen’s, 194 Cal. App. 4th at 1479.