

Strategies for Defending Agents in Error and Omissions Insurance Cases: Protecting Against Misrepresentations on Certificates of Insurance

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Agents make mistakes. In the intricate world of insurance, certificate of insurance (COI) claims are a recurring challenge for insurance errors and omissions (E&O) defense attorneys. When insurance agents issue COIs, third parties often rely on those representations to make informed decisions about insurance coverage. If agents fail to accurately convey the policy terms and conditions, third parties may suffer significant financial losses and expose agents to legal claims. In this column, we will explore effective strategies for attorneys defending agents who made misrepresentations on COIs. By understanding the jurisdiction, legal principles involved, and the nuances of COI errors, you can better advocate for your clients and mitigate potential liabilities.

What is a COI?

A certificate of insurance is a technical document that provides evidence of insurance coverage. Typically, an insurance agent uses a common copyrighted template from the Association for Cooperative Operations Research and Development (ACORD) organization and issues a COI to a third party as proof that a particular policy is in effect. The COI summarizes the key details of the insurance coverage, such as policy limits, effective dates, insurance companies, and named insured parties. Third parties, often clients or business partners, heavily rely on these documents to confirm that the desired insurance coverage is in place before entering into agreements or engaging in activities with the insured.

A COI is a snapshot of the coverage in effect at a specific point in time but does not guarantee that the policy was in force when the accident occurred.

Limitations of a COI

A COI is *not* an insurance policy and does *not* grant any rights or coverage on its own. It does not constitute a contract between the certificate holder and the insurance company. A COI is a snapshot of the coverage in effect at a specific point in time but does not guarantee that the policy was in force when the accident occurred. The four corners of the actual insurance policy govern any rights, obligations, terms and conditions, or disputes related to the insurance coverage. COIs will not include all the details or exclusions within the policy.

Agent's Duties & Responsibilities

What would the prudent agent do? Insurance agents are state licensed and expected to provide accurate and complete information. The COI should reflect the policyholder's coverage details and any specific requirements requested by the third party. Insurance agents must adhere to client instructions, applicable laws, regulations, contractual obligations with insurers and verify the policyholder's coverage details when preparing a COI. When presented with specific insurance requirements, agents should seek clarification to avoid misunderstandings if there are any ambiguities or uncertainties. If the

policyholder and the third-party request certain coverages, the agent must exercise reasonable diligence to understand their respective needs and expectations, bind the requested coverage, or promptly notify all parties if the agent was unable to place requested coverage.

Misrepresentations

A misrepresentation is a material deviation between the COI and actual insurance policy. Misrepresentations are either intentional or unintentional. Only unintentional misrepresentations are discussed and assumed for this article, as intentional misrepresentation is fraud and typically excluded. The most common misrepresentations include:

- Incorrect Named Insured
- Issuing Agent Typos
- Wrong Box Checked
- Effective/Expired Dates
- Incorrect Certificate Holder
- Insufficient Limits
- Missing Coverages
- Description of Operations
- Additional Insured Endorsements
- Waiver of Subrogation
- Loss Payable Clauses
- Exclusions

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How bad is the problem?

In 2005, The American Risk Management Resources Network LLC conducted a survey for their client of hundreds of actual insurance policies and the corresponding insurance certificates over four years. They found nine out of 10 COIs contained material misrepresentations about the actual insurance coverage in place. How can this be? When I started in the insurance business thirty years ago, one of my first duties was issuing COIs, an entry level position. The ACORD 25, the most used document template, has over 100 fillable fields. No matter what question I asked about how to complete a COI, there were two answers: “Read the Policy”, with an occasional RTFP! Reading a policy can take 20 - 45 minutes, and in today’s hypersonic, needed it yesterday world, I don’t think much has changed based on the fact I personally reject four out of five COIs on the first pass. In many cases, the third party or policy holder did not verify the COI met the contractual obligations. Most businesses do not have the expertise on staff to evaluate a COI and consider verification a clerical function. One might observe the least qualified is issuing a COI being checked by the least qualified.

Understand the Legal Landscape

To effectively defend agents in E&O insurance cases, it is crucial to have a comprehensive understanding of the legal framework surrounding COIs. Attorneys must be well-versed in the relevant jurisdictions, industry standards, contractual obligations between agents & insurers, and case precedents. By gaining a deep understanding of the legal landscape, attorneys can identify potential defenses and craft a robust legal strategy.

Build a Strong Defense

When representing agents facing E&O claims related to COI misrepresentations, consider the following defense strategies:

- **Establish Reasonable Care:** Demonstrate that the agent acted with reasonable care and skill in issuing the COI. This can include providing evidence of adherence to industry standards, consistent training, comprehensive policy review procedures, documentation, and record-keeping.
- **Policyholder Acknowledgment:** If the insured acknowledged the potential errors or discrepancies on the COI or policy, it could significantly strengthen the agent’s defense. Gather supporting evidence of any correspondence or discussions where the insured was made aware of the limitations or inaccuracies.
- **Reliance Factors:** Explore the reliance placed by the third party on the COI and evaluate whether they had a duty to independently verify the accuracy of the information. Was the reliance reasonable and justifiable? Demonstrating that the third party had the means and opportunity to verify the details may help mitigate the agent’s liability.
- **Contributory Negligence:** Assess the degree of fault attributed to the agent versus other parties involved. Consider factors such as the clarity of communication, the potential contribution of the insured in providing incorrect information, or any intervening actions by third parties that may have contributed to the error.

- **Conduct a Thorough Investigation:** Gather all relevant documents, emails, claim files, pictures, interview key witnesses and consult experts in insurance practices and standards. Investigations include any possible statute of limitations and all contractual liability clauses within the agreements.

Evaluate Agent’s Standard of Care

What would the prudent agent do? Attorneys should carefully analyze the agent’s duties and the applicable standard of care by state. Standards vary from state to state, from “order-taker” status to “duty to advise.” Agents have a duty to exercise reasonable skill, diligence, and professionalism when issuing COIs. By assessing the circumstances leading to the alleged mistake, attorneys can determine whether the agent breached their duty of care or whether the standard of care was met. Defense attorneys should assess:

- Agent’s compliance with industry standards
- Agent’s adherence to internal protocols
- Agent’s qualifications, training, certifications
- Error correction and amendment processes
- Policyholder’s clear instructions

Conclusion

Defending agents who make mistakes on certificates of insurance requires a multifaceted approach that combines a comprehensive understanding of the legal landscape with effective defense strategies. By conducting a thorough investigation, evaluating the agent’s standard of care, and analyzing the client’s reliance and contractual obligations,

attorneys can build a strong case to protect their clients' interests.

Once a clear understanding of the circumstances has been determined, evaluate the potential cost-benefit analysis of settlement versus trial. Consider the potential impact on the agent's reputation, identify weaknesses and strengths in the defense, and anticipate potential counter arguments.

Additionally, skillful negotiation and settlement strategies can offer a favorable resolution while minimizing the potential impact on the agent's professional reputation. Ultimately, by employing these strategies, attorneys can provide effective representation for agents facing COI-related liabilities, safeguard their clients' interests, and help agents successfully navigate the complexities of E&O insurance defense. ■



About the AUTHOR

Nationally recognized as one of the top insurance professionals for his leadership and dedication to the insurance profession, **Scott**

Margraves of *Gulf Coast Risk Management, LLC* has over thirty years of "hands on" commercial property and casualty experience. Scott weathered five major hurricanes, three "five-hundred-year floods" and multiple catastrophic fire claims. Mr. Margrave's expertise includes Agent E&O; Property; Construction; Maritime; Oil & Gas; CYBER; and owner of COIs R Us, a Certificate of Insurance (COI) tracking and compliance company for general contractors and property managers. He may be reached at scott@gcrrmlc.com.

Practicing Well: Smile

Patty Beck | *A Balanced Practice, LLC*

"I'm too busy." This is something I hear all too often from lawyers, insurance professionals, and other members of the legal profession. It's understandable given the seemingly endless demands on our time throughout the workday and in our personal lives. I've grappled with this at various stages of my career, and it can be overwhelming when there's no clear path to a more manageable schedule. It can feel even more challenging when it seems like there are not enough hours in the day for bigger self-care items. While we can't always control how busy we are, there are little things we can do with our mindset, body, and environment to help us feel happier and more energized during hectic days that all involve smiling!

Studies show that gratitude is effective because it keeps our minds focused on appreciating what we already have (which can inspire feelings of optimism, confidence, and happiness), rather than focusing on what we don't have (which can lead to feelings of depression, anxiety, and low self-esteem).

I often find myself smiling not only when adding a slip of paper to my gratitude jar but when I hear stories of what other people are grateful for. Including others in your gratitude practice can have a powerful impact in setting a positive tone throughout the workplace, which can help colleagues feel more connected to each other. For example, starting a team meeting or a conference call with

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For your mindset, I encourage you to explore the benefits of gratitude. Spending even one minute (or less) each day acknowledging what you are grateful for can be beneficial to your overall health and well-being, and can train your mind to see the good even in challenging moments. Gratitude can be about anything — a nice conversation with a colleague or client, having good health, or even the mere fact that it's a beautiful day outside.

gratitude can foster authentic relationships when we hear the good things happening in each other's lives.

Regarding your body, never underestimate the power of literally moving your facial muscles to smile! Laughter and smiles can positively impact your body's immune system and cause it to release endorphins, which can help with managing daily stressors. Whether it's by your-

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