

Errors & Omissions Claims
From Beginning to End
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Introduction and Qualifications

- Presenter: John Scott Hoff
- Involved in complex aviation insurance coverage issues for over four decades.
- Past president of the AIA from 1993 to 1994.
- Possess a CPCU credential since 1980 (for 38 years).

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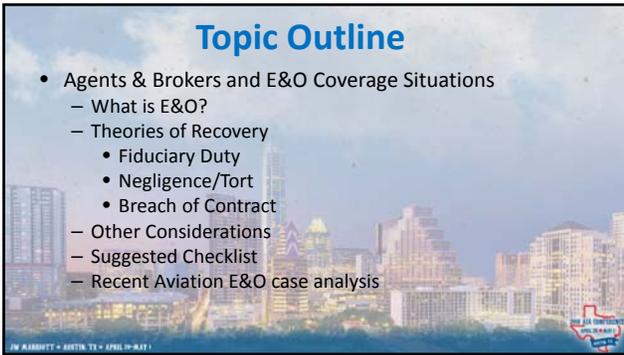
Introduction (cont'd)

- Multistate practice, licensed in 9 states, 11 U.S. District Courts, 7 U.S. Appellate Courts.
- Also licensed in 4 specialty Federal Courts and the U.S. Supreme Court.
- Taught Aviation Law and Insurance Law as an adjunct professor on the teaching facility of the John Marshall Law School (Chicago) for 22 years.

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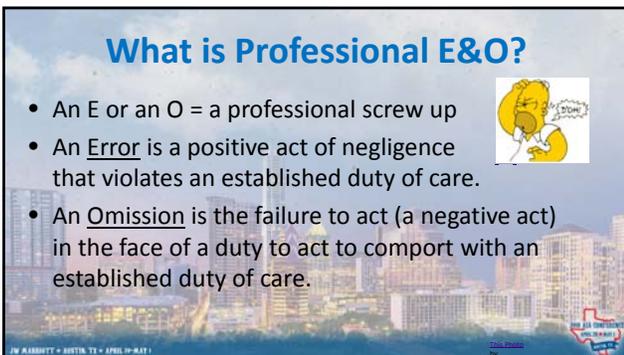
Topic Outline

- Agents & Brokers and E&O Coverage Situations
 - What is E&O?
 - Theories of Recovery
 - Fiduciary Duty
 - Negligence/Tort
 - Breach of Contract
 - Other Considerations
 - Suggested Checklist
 - Recent Aviation E&O case analysis



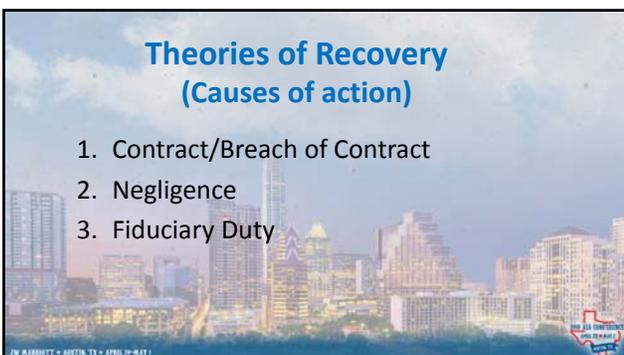
What is Professional E&O?

- An E or an O = a professional screw up
- An Error is a positive act of negligence that violates an established duty of care.
- An Omission is the failure to act (a negative act) in the face of a duty to act to comport with an established duty of care.



Theories of Recovery (Causes of action)

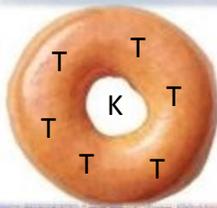
1. Contract/Breach of Contract
2. Negligence
3. Fiduciary Duty



Fiduciary Duty

- Typically not applicable for an aviation insurance placement E&O.
- A Fiduciary duty is a related duty, generally not applicable (in some states, but not all).
- A duty exists only if it founded on a special relationship of particular confidence where one party has a sole duty to act for the benefit of the other.
- Three things must exist.

Negligence



Donut Hole Analogy

Negligence (cont'd)

Elements of a Tort/Negligence

- 1) A duty owed
- 2) Breach of that duty owed
- 3) Damages
- 4) Directly caused damages
- 5) Proximately recognized damages

negligent
adjective
characterized by carelessness
in action, omission, or
statement.
negligent adj.
and was char-
acterized by care-
lessness.

Negligence (cont'd)

- Proximate Cause in the context of insurance placement:

May be proven by showing that if the insured/client had been properly advised or informed, coverage could have been obtained from elsewhere, or the insured/client could have avoided or reduced the risk.

Negligence (cont'd)

Typical E&O coverage gives two principle duties to the insurer:

1. Defend; and/or
2. Indemnify



Negligence (cont'd)

- The principle duties apply when there is a failure to procure proper coverage or the failure to:

- Issue a policy
- Procure adequate coverage limits/leave gaps
- Failure to timely renew (time lapse gaps)
- Not properly cancelling coverage
- Not getting proper geographical limits
- Negligent handling of premiums, commissions or funds
- Failing to explain key policy terms, conditions and/or exclusions

Negligence (cont'd)

- Exclusions - typically:
 - No coverage for intentional acts.
 - Separate CGL exclusions typically exclude "aircraft operations" (arising from aircraft owned or operated by the insured). "Owned or Operated Exclusions"



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Negligence (cont'd)

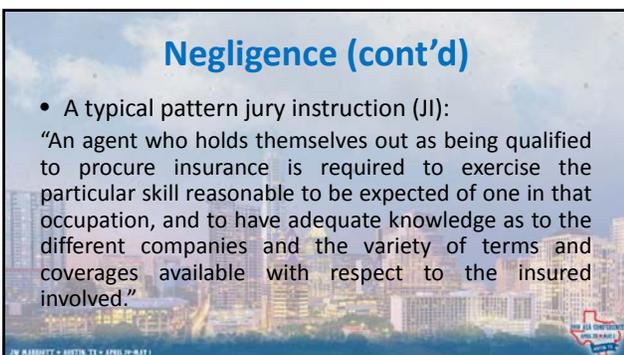
- The standard of care applicable:
 - Duty to use reasonable diligence to procure or place coverage.
 - Provide insurance specified by the insured; or seasonably notify and advise a potential insured of the agent's inability to place coverage desired.



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Negligence (cont'd)

- A typical pattern jury instruction (JI):
"An agent who holds themselves out as being qualified to procure insurance is required to exercise the particular skill reasonable to be expected of one in that occupation, and to have adequate knowledge as to the different companies and the variety of terms and coverages available with respect to the insured involved."



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Breach of Contract

- Despite the intimidating “fine print,” it is still just a contract. No real “mystery” about an E&O insurance policy: analogous to a contract (K) – not at “tort.”



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Breach of Contract (cont'd)

Elements of Formation:

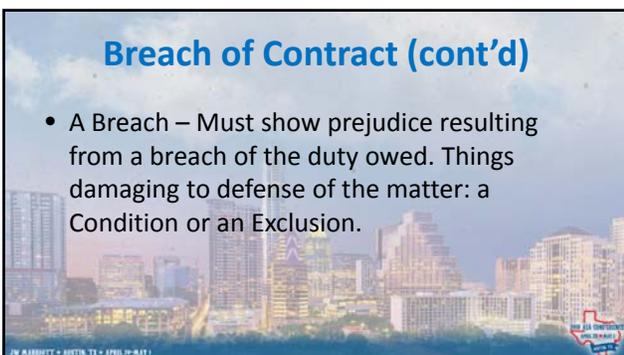
1. Offer
2. Acceptance
3. Mutuality
4. Consideration
5. Legality of purpose



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Breach of Contract (cont'd)

- A Breach – Must show prejudice resulting from a breach of the duty owed. Things damaging to defense of the matter: a Condition or an Exclusion.



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Breach of Contract (cont'd)

- In law school, the short-hand for a contract is "K."
- When in doubt, RTFK.
 - Read The Darn Contract!
- The answer to most all questions lies therein (within the 4 corners of the contract.)



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Occurrence vs. Claims Made

- Typically an E&O is a "claims made." The claim (and not necessarily the negligent act) must be within coverage term. Claims made – also known as "discovery" period.
- "Claim" can be a nasty phone call, threatening letter, service of process (summons and complaint).

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Other Considerations

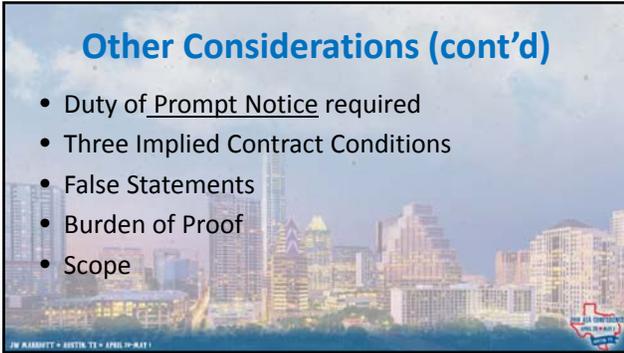
- The Big Question: Is there a duty to defend?
- Options to the Carrier
- Loss of Control
- Pleading Alternative Theories of Liability

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Other Considerations (cont'd)

- Duty of Prompt Notice required
- Three Implied Contract Conditions
- False Statements
- Burden of Proof
- Scope



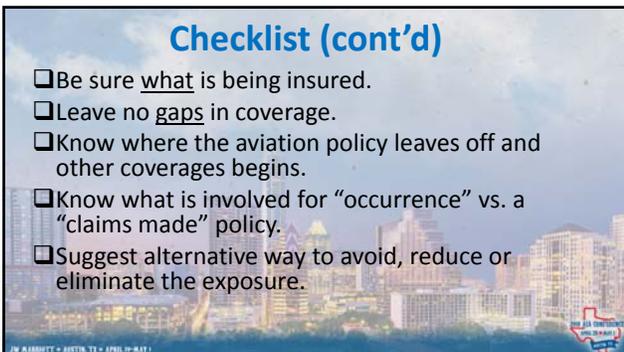
Checklist

- Be sure of what the insured needs and desires. Document everything. **CYA!**
- Explain policy and CSL limits and any potential excess exposure.
- Be sure your own coverage limits are adequate.
- Review application and underwriting policy carefully.
- Review declarations page carefully.



Checklist (cont'd)

- Be sure what is being insured.
- Leave no gaps in coverage.
- Know where the aviation policy leaves off and other coverages begins.
- Know what is involved for "occurrence" vs. a "claims made" policy.
- Suggest alternative way to avoid, reduce or eliminate the exposure.



Recent Case Example

- Insured is an "FBO"/Charter Operation/lease operator of an aircraft on leaseback
- Loss aircraft: a Cessna 421C
- ANI: aircraft owner/lessor
- Insurer: BIG insurance company
- Brokerage: ABC insurance brokerage
- Agent: Fred
- Crash circumstances: 4 fatalities (PIC and three PAX); Aircraft totally destroyed.
- PAX estates sue FBO for negligent actions of employee/PIC
- D/L: December 2011
- P/L: Minibraska
- Coverage limits:
 - \$3 million aircraft policy
 - \$20 million CGL policy (contained exclusions for owner/operated aircraft)

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Thank you for attending!

- Any additional questions, or if you would like a copy of this presentation or this PowerPoint, please contact me directly.
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