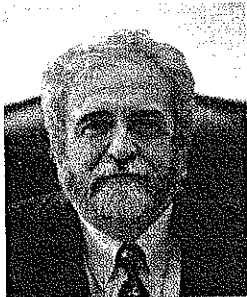


Agents and Coverage Opinions



BY MICHAEL SEAN QUINN

If an agent undertakes to suggest to an insured that something is not covered, and the agent is wrong, the agent may well have liability to the insured.

Insurance intermediaries—agents, brokers, and the like—do all sorts of things for their customers and clients. They help them select coverages. They help select insurers. They shop for price. They prepare applications. They help explain the meaning of insurance policies. They help with and then transmit claims. They explain claims to adjusters. Sometimes, they discuss with the insured whether to file a claim at all.

If an agent undertakes to suggest to an insured that something is not covered, and the agent is wrong, the agent may well have liability to the insured. This might happen, for example, if an agent said that there was no coverage under a policy, so that an insured failed to file its claim in a timely manner, and the claim was properly denied. An agent may also—or in the alternative—have liability to an insurer, if the insurer fouls things up somehow, at least in part because of the agent's error, and becomes liable to the insured for mishandling a claim. (In Texas, this might happen if an intermediary turned out to be the legal agent of the insurer and somehow authoritatively told the insured he didn't have to file a claim immediately, and the insurer subsequently refused the claim on the grounds of late notice.)

A bankruptcy case styled *In re Cooper Manufacturing Corporation*, decided a federal district court in Oklahoma on Feb. 7, 2001, illustrates these observations almost perfectly. One of the delightful features of this case is that it applied to both Oklahoma and Texas law. There are so many parties and issues in this complicated and long-running case, it will be necessary to simplify the facts somewhat.

The series of cases which go by the name *Cooper* began in 1984. By 2000, most of the problems had been resolved. Cooper's insurance intermediary ("Agent") was now being pursued by the commercial general liability and the excess liability insurers for Cooper, working in tandem, as if they were one ("Insurer"). Everyone agreed that Agent was, from the legal point of view, the dual agent of both Cooper and Insurer. Although Oklahoma law was used to establish that proposition, the same would be true under Texas law.

A dual agent is a legal agent for both sides of the same transaction. Thus, when an insurance agent is a dual agent, he is the legal agent of the carrier and the legal agent of the insured. This means that the agent has fiduciary duties to both the insurer and the insured. It also means that the intermediary can bind either side or both.

Cooper was a prominent manufacturer and supplier of worked over drilling rigs—used derricks (or masts), mounted upon mobile platforms (or car-

riers), together with other machinery—all of which had been reconditioned. In 1984, Cooper discovered that some of its rigs included defective steel. It immediately issued a warning letter to its customers. On the same day, a senior Cooper risk official met with the president of Agent to discuss the problem. Shortly thereafter, drilling companies began suing Cooper and its steel suppliers, particularly Babcock and Wilcox ("B&W"). Two of these suits were filed in Texas. The plaintiffs allege that the rigs were defective and sought damages for the cost of fixing them, lost profits, transportation costs, storage costs, equipment substitute costs, loss of business, loss of market share, and loss of good will.

A month or so after the suits were filed, Cooper filed for Chapter 11 bankruptcy. A year and a half later, the bankruptcy court confirmed Cooper's plan of reorganization. The plan reorganized Cooper as a liquidating trust, the purpose of which was to payoff Cooper's contingent debts to companies which bought its drilling rigs.

Two years later, the plaintiff drilling companies settled their lawsuits by taking money from B&W—which supplied the defective steel—and assigning their claims against Cooper to it. Under the assignment, B&W was permitted to enforce the claims of the original plaintiffs against Cooper only to the extent of Cooper's insurance coverage, if any. These suits were venued in Texas.

Probably, the assignments to B&W did not matter much. In product defect cases, an original manufacturer or supplier is liable for the defective stuff it provides. An assembler, like Cooper will be liable only for misassembly. Even most cases of negligent inspection by the assembler end up with the original manufacturer. If B&W supplied defective steel, probably, Cooper would be able to recover from B&W, if it had liability to end-user customers. B&W at length settled with Cooper itself. In conformity with the usual paradigm for product defect cases, B&W eventually paid Cooper's liquidating trust \$18 million, and that sum was distributed to Cooper's creditors. (Perhaps the assignments B&W received somehow reduced its liability.)

Apparently, B&W did not pay all of Cooper's liability, since several years later, Cooper sued Insurer for coverage. Eventually, the bankruptcy court held that Insurer provided coverage for many of the types of damages alleged against Cooper by those who purchased its wells made the sole exception was the damages which resulted from replacing the defective masts themselves. These damages were excluded by an owner's products exclusion. The court also held that Insurer was not exonerated from insuring Cooper by the fact that the insured

did not file its claims immediately.

Subsequently, Cooper also sued Insurer for various forms of bad faith. Since Cooper's purchasers suited in Texas, and since the activities of Insurer were conducted in Texas, Texas bad faith law applied. Cooper alleged that Insurer wrongfully failed to defend Cooper and to investigate the claims against it. Apparently, Insurer also resisted coverage on the grounds of late notice. Insurer's errors and omissions, according to Cooper, caused Cooper's bankruptcy and caused its death as a company. Cooper's expert valued its "death of the company" damage claim in the \$55-86 million range, without reference to statutory trebling or punitive damages.

Eventually, Cooper and Insurer settled all of its claims for \$7.5 million. Insurer then sought indemnity and contribution from Agent. The technicalities of Oklahoma indemnity and contribution law need not detain us, although they take up a substantial portion of the court's opinion. (Unfortunately for Agent, he remembers different things at different phases of the case. The longer the Cooper case went, and the closer the liability got to him, the more he remembered with crystalline clarity that he said nothing which would create liability for him. Needless to say, the court was skeptical of this testimonial evolution.)

The keys to understanding Agent's liability,

if he eventually has any, are the discussions regarding coverage had with Cooper. Basically, the district court took the position that if Agent had told Cooper that it had no coverage, then Agent might very well be liable to Cooper and therefore to Insurer.

Agent admitted that he had said that there was no coverage for the defects in the rigs. He claimed that all other discussions, however, were no more than exploratory, and he specifically denied that he said there was no coverage for Cooper's other forms of liability.

Although the case against the agent still has to go to a jury, the court plainly indicated that if the agent was not careful, cautious, and restricted in the way he discussed coverage, he may very well be liable to Insurer for sums Insurer had to pay in bad faith settlement. In effect, the court said that if the agent said anything—or failed to say something—which made matters worse for his client—the insured—then the agent may have liability.

What lessons may be drawn from this pending legal disaster? Some intermediaries might be tempted to say, Don't express opinions about coverage, ever! Let the insurer do it, always! This idea is as unrealistic as it is irresponsible. The economic function of Agents is to service the needs of insureds and prospective insureds. This function includes services the claims context. Every large agency has a claims depart-

ment. Many large agencies now even have claims attorneys.

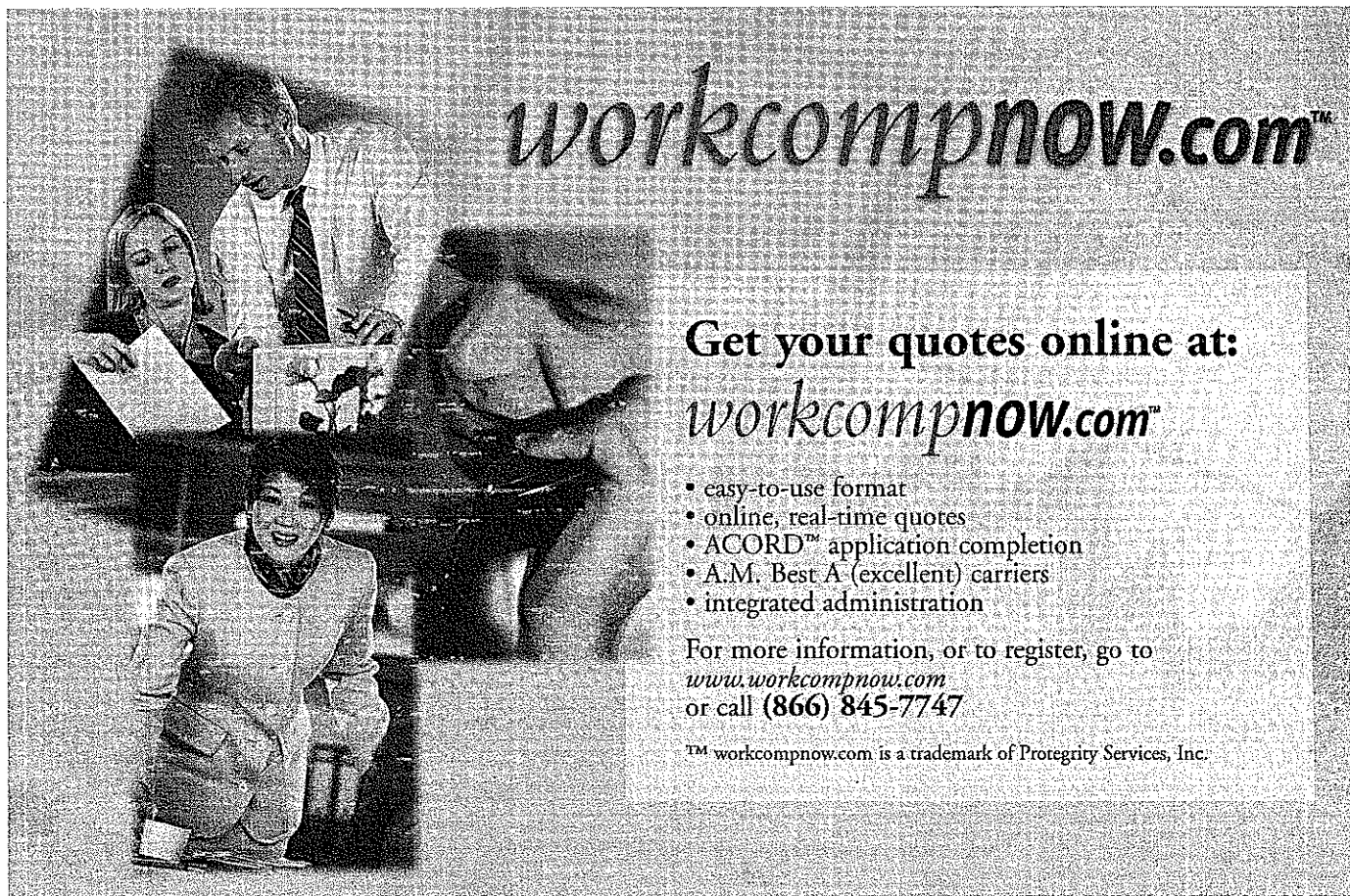
Commercial agents and brokers must function as intermediaries across the board. They must relate insureds to insurers, and the claims context is an important one where relations need to be facilitated.

It would be much better for agents to learn three lessons from the Cooper contretemps. First, discuss coverage in the claims context cautiously and tentatively. Listening is at least as important as talking. Have the policy itself nearby. Consider telling the policyholder to retain counsel.

Second, keep an internal record of such discussions. Make this exercise habitual.

Third, in every serious case, dispatch a letter to the customer-client-insured after a serious coverage discussion outlining the contents of the discussion. Naturally, the internal memo and the letter should match. Make sure that tentative observations, speculations, and musings are so classified. Under many circumstances, the agent may wish to send a copy of this letter to the insurer. What would it hurt? ■

Quinn is an Austin attorney with the law firm of Bell, Turney, Coogan and Richards. He litigates and testifies on insurance-related problems and is currently the chair of the Insurance Section of the State Bar of Texas. He also is a Visiting Professor of Law at the University of Texas-Austin.



workcompnow.com™

Get your quotes online at:
workcompnow.com™

- easy-to-use format
- online, real-time quotes
- ACORD™ application completion
- A.M. Best A (excellent) carriers
- integrated administration

For more information, or to register, go to
www.workcompnow.com
or call (866) 845-7747

™ workcompnow.com is a trademark of Protegrity Services, Inc.