



## Alerts

### Court Examines Producer's Role in Processing Inaccurate Online Application

September 9, 2014

Professional Lines Alert

*Douglas et al. v. Fidelity National Insurance Co.*, 2014 WL 4261346 (Cal.App. 8/29/14).

A California Court reversed an \$800,000 fire loss recovery on the grounds that an independent agent may have effectively acted as the policyholder's broker in submitting an inaccurate online application. In that event the court suggested the property insurer Fidelity National Insurance Co. would likely be entitled to rescind the policy.

The claim arose out of an application for insurance through an affiliate of the agency in question. Cost-U-Less Insurance Services operates insurance agencies offering competitive pricing of auto insurance. When a potential customer is interested in other personal line products, according to the decision, Cost-U-Less prepares initial application paperwork and refers the customer by telephone to a producer with a sister company, InsZone Insurance Services (InsZone). In the case of homeowners insurance the InsZone producer reviews a detailed 43-question online application with the customer. The InsZone application form mirrors the questions of a standard ACORD form.

There were credibility disputes at trial as to how a variety of inaccurate answers regarding the fire safety and use of the dwelling found their way into the electronic application. The application protocol called for the submission of a complete online application for signature of the applicant *after* the agent's interview was completed. The insureds insisted a Cost-U-Less representative only asked him three questions prior to presenting the application and that the application was signed in blank, *before* any questions were answered on the form. Thus, there was apparently no real-time electronic signature that could be used to prove the producer completed the electronic application before the final application was signed. Complicating matters, a blank ACORD form was emailed and printed simultaneously with the completed InsZone application. It was not completed because the questions were identical in the respective InsZone and ACORD forms.

Fidelity failed to establish that the policy was subject to rescission. The jury awarded over \$800,000 in damages for the fire loss and \$1.9 million in punitive damages. Critically the judge refused an instruction to the jury that InsZone might have been acting as the insured's broker such that the false answers might be imputed to the policyholder. As such, a directed verdict was entered in favor of InsZone.

#### Attorneys

Edward F. Donohue III

#### Service Areas

Professional Liability



## Question Before the Court

*Should the trial court have independently concluded that the producer was acting as the insurer's agent or allowed the jury to decide whether the producer was acting as a broker?*

The Court of Appeals reversed on the grounds that the lower court improperly concluded InsZone was Fidelity's agent in preparing and submitting the application. Instead, in light of evidence that InsZone may have acted only as the policyholder's broker, the jury should have decided the issue. The court looked specifically to a provision in the compensation agreement that stated, with limited exceptions, that InsZone had no authority to bind Fidelity. In addition, the court considered the lack of evidence that a notice of appointment of InsZone by Fidelity had been filed with the California Department of Insurance for the product. Thus, the court concluded InsZone and the individual producer may have been acting as broker for the policyholder. In that case any false information of the applicant would be imputed to the insured.

## What the Court's Decision Means for Practitioners

A September 1998 NAIC White Paper, *The Marketing of Insurance Over the Internet* noted two significant potential downsides of the use of online sales — lack of face-to-face interaction between the producer and the customer and difficulties in signature verification. As noted, the agency's signature verification procedure apparently had a glitch. The completed InsZone application as well as a blank ACORD application were simultaneously emailed to the Cost-U-Less store for signing. This partially blank application package provided the jury with grounds to accept the insured's claim that application papers were blank at the time they were signed or that there was post-signature tampering with the paperwork. Such a dispute might be avoided by requiring the applicant to electronically initial each answer.

The case highlights a second problem with defending such cases — the anonymity of internet-based or other remote insurance sales. Thus, the individual producer had no memory at all of the application intake process. The best he could offer was testimony on his normal practices.

As to whether InsZone was actually acting as a broker, a producer's formal licenses status does not control in California. The agent may be acting as the insured's broker based on the "totality of the circumstances". Cal. Ins. Code § 1623(e). The key question on re-trial will be whether the agent was comparison shopping for the customer for the best rates and product or simply binding an eligible applicant pursuant to an appointment. That is a challenging test to apply in the impersonal realm of e-commerce.

For more information, please contact [Edward F. Donohue III](#).

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*