



California Uber Drivers Get Class

Uber drivers given class action status in lawsuit on their status as employees or independent contractors. Suit could cover more than 160,000 California drivers. Victory for plaintiffs could force Uber to pay Social Security, workers comp and unemployment.

More Health Centers Slated for Underserved

Federal government to spend \$169 million from ACA funds to add 266 new nonprofit health centers in underserved communities. These will add to the 700 centers opened with ACA funding since the law was implemented. The centers can be managed by either private or public organizations. The funding comprises about 20% of the typical center's operating budget.

E&O LIABILITY > SCOTT SINDER AND KEN FALL

Are You Special?

Before you answer, think about how special you want to be.

We all like to think we're special.

Insurance agents and brokers are no different. After all, they often strive to differentiate themselves by marketing their special skills and expertise. Do clients agree insurance agents and brokers are special? Viewed through the lens of broker E&O liability, it seems clear the answer often is yes. Increasingly, policyholder lawyers have argued that insurance agents and brokers should be held to a higher duty than the traditional reasonable standard of care.

Traditionally, agents and brokers are obliged to perform reasonably in carrying out the instructions received from their clients. They have no duty to advise or recommend that clients

obtain additional coverage or higher policy limits, absent extraordinary circumstances that would support the existence of a "special relationship" with their client. Several recent decisions, however, suggest the courts may be more willing to find that a special relationship has been established under circumstances that don't seem so extraordinary.

For example, Northrop Grumman claimed it relied on its broker's alleged representations of "full coverage" in a case arising from a perceived insurance recovery shortfall for Hurricane Katrina damage to its shipbuilding facilities. Northrop contended it relied on its long-standing relationship with its brokerage and on its marketing materials.

Under California law, these kinds of allegations can trigger the application of enhanced "special relationship" duties. At the close of discovery, the brokerage moved for summary judgment, arguing Northrop had a sophisticated risk management department and never requested coverage for storm surge damage. The court denied the motion on all counts and set the case for a jury trial. In June the brokerage reportedly paid \$150 million to resolve the case.

If you think the Northrop case is unique, think again. Marsh argued before a Florida jury last year that it owed no "special relationship" to a former client, Tiara Condominium Association, which, Marsh argued, was a sophisticated insurance buyer. Tiara argued Marsh had failed to recommend the association purchase sufficient policy limits to cover the full cost of repairing its building after it suffered hurricane damage. The judge sent the "special >>

REGULATORY NEWS TICKER

NEW YORK U.S. Sen. Charles Schumer wants USDA to bring national malt barley crop insurance program to New York, where 13 malt houses are either already operating or plan to begin in the state soon. There are 39 farms growing malt barley across 2,000 acres. Schumer says the lack of insurance availability is hampering business for craft breweries in the state. www.dfs.ny.gov

OHIO Licenses first captive—Imprise Financial, a protected cell that will insure select contractual liability risks of NWAN

Inc., a third-party administrator of service contracts and warranties for autos, RVs and motorcycles. >> Andy Hardy named assistant director of legislative affairs and communications at the Department of Insurance. He previously was senior legislative assistant to U.S. Rep. Patrick Tiberi. www.insurance.ohio.gov

SOUTH CAROLINA Approves overall average voluntary workers comp rate increase of 1.9% and a decrease of 0.3% in assigned risk, both effective Sept. 1. By industry group for voluntary rates, manufacturing

is up 0.6%, contracting will decrease by 1.2% on average, office and clerical will decrease 4%, goods and services will rise 2.4%, and miscellaneous will decrease 0.8%. www.doi.sc.gov

SOUTH DAKOTA ISO upgrades Sioux Falls fire rating to second-highest possible. Upgrade took 25 years to achieve. www.state.sd.us/drr2/reg/insurance/

TEXAS Names Kevin Brady deputy commissioner for agency affairs and Doug Slape

deputy commissioner for financial regulation. Slape, former associate commissioner in financial regulation division, takes over for Danny Saenz, who retired after 27 years with the department. Brady's position is new and will oversee government relations with industry associations. He had been deputy chief of staff at Department of Insurance. They began new roles Sept. 1. >> New FEMA flood maps expand central Texas floodplains along banks of Blanco River and tributaries. Open for public review through August 2016. www.tdi.state.tx.us

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» relationship” issue to the jury, which concluded that no “special relationship” had been established between Marsh and Tiara, and the judge dismissed the case. Had the jury gone the other way, the case would have entered a phase during which the jury would have considered Marsh’s liability under an elevated standard of care.

These two cases don’t stand alone. In March the Indiana Supreme Court sent the issue of whether a special relationship (and thus a duty to advise) existed between the Laven Insurance Agency and its client to trial. The same month, a Pennsylvania federal judge refused to dismiss allegations that insurance brokerage Morgan & Associates breached its duty of care to its client, finding the brokerage had an “overmastering influence” on the client’s insurance decisions. Finally, last year a New York state appellate court found a special relationship

might exist between an insurance agent or broker and a client under less than extraordinary circumstances.

So what can insurance agents and brokers do to help protect themselves against this evolving legal trend? Courts that have considered the “special relationship” issue have looked closely at the documentation. This includes setting out the work that the insurance agent or broker agreed to perform for the client and marketing the agent or broker’s capabilities to its client before and during the course of the business relationship.

Clearly documenting the scope of the services your firm provides to a client (and perhaps expressly excluding those services it does not provide) in an engagement letter or client services agreement is one step to consider seriously. Similarly, consider training colleagues at your firm to document consistently the coverage options they present to clients and the decisions made by those clients regarding the

types and amounts of coverage they elect to purchase.

Another consideration is for your firm to review carefully the use of certain terms in its engagement letters, RFP responses and marketing materials.

For example, if your firm describes itself in these materials as a “risk advisor,” possessing special “expertise,” or providing insurance solutions that “fully address all of [a client’s] insurance risks,” your firm should be prepared to see those same materials displayed to the jury in an E&O

claim. Of course, your firm will continue to market its capabilities to clients, but you should recognize those efforts increasingly might pose risks. Consciously consider your language so you are only as special as you really want to be.

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HOT BUTTON

IRS published new regulations in the *Federal Register* laying out the method multiemployer pension plans must follow when they need to cut member benefits to retain solvency. The guidelines flesh out a 2014 law allowing multiemployer plans, such as those from unions, to revamp benefit plans to survive.

NLRB Changes Joint-Employer Determination

The National Labor Relations Board on Aug. 27 issued a ruling that alters how it determines joint-employer status. It has now added indirect control over employment matters as a consideration in a company’s status. Previously, a company could be a joint employer only if it had “direct and immediate control” over employees. That means temporary staffing agencies can be held as joint employers and employers that hire contract employees from an agency could be liable for new exposures and responsibilities. Those include costs of benefits and various taxes. The IRS had not issued guidance on the matter as of press time.

REGULATORY NEWS TICKER

VERMONT Agrees to pay BC/BS of Vermont \$1.6 million for past-due premiums and incorrectly paid claims from 2014 resulting from technical problems with state exchange website, which lacked an automated change of circumstance function, forcing workers to manually process such changes and generating a backlog. Insurers, therefore, were not notified they should stop billing customers and should not pay claims for coverage that had ended. That function has been added to the website’s software program.

Errors for 2015 plans are still outstanding. www.bishca.state.vt.us

VIRGINIA NCCI proposes average workers comp voluntary market loss cost increase of 3.4%, effective April 1. By industry group: 2.1% increase for manufacturing, 4.2% for contracting, 2.8% for office and clerical, 3.8% for goods and services, and 3.1% for miscellaneous. NCCI also proposes overall average assigned risk rate increase of 2.3%. www.scc.virginia.gov/division/boi

WASHINGTON, D.C. Issues bulletin regarding ban on price optimization use by p-c insurers doing business in the District. Says it violates insurance anti-discrimination laws. Bulletin 15-IB-06-8/15 was issued Aug. 25 and directs insurers currently using price optimization to rate policies to halt the practice and comply with the bulletin. They must also submit a SERFF filing that is compliant with the bulletin no later than Nov. 30, 2015, with proposed effective dates no later than March 31, 2016, for new and renewal business. Acting commissioner

Stephen Taylor says some insurers are charging higher premiums to policyholders deemed likely to accept such prices instead of basing premiums on losses and expenses. www.disr.washingtondc.gov

WEST VIRGINIA New state program, WV CARES, requires criminal background checks for applicants for some jobs at long-term care facilities. Program to be phased in over six months. www.wvinsurance.gov