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PROFESSIONALLY SPEAKING

NEWS & INSIGHTS

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Wilson Elser's newsletter features articles written by the firm's Professional Liability & Services Practice attorneys.

Professionally Speaking explores current topics of interest to general counsel, claims professionals and risk managers for various professional liability lines, including accountants, lawyers, design professionals, insurance brokers and others.

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By **Christopher J. Martin** and **Benjamin Mehic**

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Accountants' Role in the Beneficial Ownership Reporting Requirement Under the Corporate Transparency Act

By **Cynthia S. Butera** and **Kevin Shaftan**

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Disclosure upon the Death of a Client under Virginia Supreme Court Legal Ethics Opinion 1900

By **Matthew Lee**

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If we are fortunate, we develop "special relationships" in our lives. But believe it or not, there are situations – at least legally – where such relationships are undesirable because they come with higher expectations and, thereby, additional room for legal exposure.

In the case of an insurance broker, the establishment of a "special relationship" could create unique avenues for liability.

Generally, in New York, insurance brokers are not fiduciaries and have no continuing duty to advise, guide or direct a client to obtain additional coverage other than the coverage *requested* by the client. *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 735 (2012).

But sometimes, "particularized situations" may develop through insurance brokers' conduct or by express or implied contract with customers and clients where they "acquire duties *in addition* to those fixed at common law." *Murphy v. Kuhn*, 90 N.Y.2d 266, 272-273 (1997).

These "particularized situations" may just give rise to a "special relationship."

New York Courts have recognized three scenarios, each of which can signal this rare development:

- The agent receives compensation for consultation apart from payment of the premiums.
- There was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent.
- There is a course of dealing over an extended period of time that would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on.

Why do New York courts insist on digging a bit deeper for the facts pertaining to the broker-client relationship than the typical common law duties attributed to insurance brokers? Well, for fairness reasons – to reflect the realities wherein customers do, in fact, rely on insurance brokers for their "expertise" within the industry, rather than just accomplishing a singular goal (i.e., obtaining an insurance policy).

Continued

In the case of *Voss v. Netherlands, Ins. Co.*, 22 N.Y.3d 728, 731 (2014), the plaintiff had a long-time relationship with her insurance broker. The plaintiff owned two properties and met with an insurance broker to discuss potential coverages for the premises and, in particular, sought business interruption insurance – just in case something unforeseen occurred that forced her to temporarily close up shop. The policy proposed by the broker covered up to $75,000 per incident for business interruption losses, and *when the plaintiff asked* whether that amount was sufficient, she was allegedly assured that it was.

Note that was the first red flag – "when the plaintiff asked." For the Court of Appeals, this signals that the plaintiff was actively inquiring and seeking the broker's expertise – potentially creating that "special relationship."

As the years went on, the plaintiff sought to expand her business and discussed her new arrangements with the insurance broker. The broker renewed the same $75,000 policy. As life happened, she eventually experienced a roof leak at her business, causing her to sustain business losses that were thankfully covered by the policy. However, in the midst of dealing with the roofing issue, she met with the broker again, who indicated that her business interruption coverage would be reduced from $75,000 to $30,000. *She questioned the reduction*, and the broker said they would "take a look." The plaintiff never followed up, and the coverage stayed at the reduced $30,000 amount.

Note that was the second red flag – "she questioned the reduction." This once again indicated to the Court of Appeals that the plaintiff was relying on the broker's opinion and knowledge regarding the insurance policy.

When the plaintiff's roof unfortunately failed again, the plaintiff's business was disrupted once more – and the reduced amount, this time, was inadequate to cover the losses.

THEN CAME THE LAWSUIT.

From the insurance broker's perspective – they did what they needed to do. They technically obtained the insurance policy that the plaintiff requested. That's their common law duty, after all. But for the Court of Appeals, the facts suggested that the plaintiff was assured the coverage would be sufficient, sought the broker's opinion, and when she expanded her business, the broker recommended a downward adjustment of her coverage.

The Court of Appeals stressed that these special relationships are "not the norm" – but, clearly, they do happen from time to time, and here, whether one existed was a factual question precluding resolution on a dispositive motion and necessitating a trial. Facts of the relationship matter.

New York state courts now look into the status of the broker-client relationship, the advice given by the broker and, sometimes, what advice the broker *should have* given in the scenario depending on the individual's circumstances.

"Special relationships" are difficult to form – but if the insurance broker finds himself in one, he may just have exposed himself to liability where there otherwise would not have been any.

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While accountants' exposure to risk associated with assisting clients with their reporting requirements under the CTA has not been fully borne out, accountants should heed the considerations discussed herein before proceeding into currently uncharted waters. For now, practitioners should stick with what they know, and avoid taking on these new and uncertain compliance obligations on behalf of their clients, until such time as additional guidance arrives from the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN).

WHAT ARE THE NEW BENEFICIAL OWNERSHIP REPORTING REQUIREMENTS

Who must report?

The CTA requires so-called "reporting companies" to file reports with FinCEN identifying the company's beneficial owners and providing certain other information. All domestic and foreign entities formed or registered to do business in the United States must file a BOI report unless they meet one or more of the 23 filing exceptions.

The CTA defines a beneficial owner of an entity as any individual who, directly or indirectly, (1) owns or controls not less than 25 percent equity in the entity or (2) exercises substantial control over the entity. Generally, an individual exercises "substantial control" over an entity if the individual (1) serves as a senior officer, (2) has authority over the appointment or removal of a senior officer or a majority of the board of directors, or (3) directs, determines or has substantial influence over important business decisions.

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When Must the Report be Filed?

Reporting companies created before or registered to do business as of December 31, 2023, have until January 1, 2025, to file their initial BOI report with FinCEN. Reporting companies created or registered to do business on or after January 1, 2024, have ninety (90) days from the date of their registration to file an initial BOI report. After filing an initial BOI report, reporting companies only have thirty (30) days to file any updated reports detailing any changes about the reporting company and/or its beneficial owners.

Generally, the BOI report should include each beneficial owner's name, date of birth, residential or business address, and a unique identifying number from an acceptable identification document (such as a state driver's license or passport).

Penalties

Willfully providing false information to FinCEN or failing to timely report can result in fines of $591 per day, increased from $500 effective January 25, 2024, for each day that the violation is not addressed and criminal fines up to $10,000 and imprisonment for up to two years.

Practical Considerations and Application For Accountants

In light of the "newness" of this statute, there is a fair amount of uncertainty as to just how problematic the reporting requirements can be under the CTA. Further, there appears to be two schools of thought in the accounting profession as to how to respond to clients requesting their services in complying with the CTA/ BOI reporting requirements.

On one hand, the profession is loath to take on these compliance obligations for their clients because, if history repeats itself, there can be stiff and severe penalties for noncompliance that the clients will seek to pass on to their accountants. This lesson has been learned by practitioners from other FinCEN reporting requirements, where failures to report foreign interests and holdings led to large, unexpected penalties against their clients, the fallout of which was an increase in claims against accountants for these FinCEN Form 114 compliance obligations.

On the other hand, these new BOI reporting requirements may be viewed by some accounting practitioners as an opportunity to offer new services to clients, representing a significant growth opportunity for their business. Certainly, if practitioners choose to navigate these uncharted waters, they should do so only with proper safeguards and precautions.

Given that existing companies have until January 1, 2025, to determine what their reporting obligations are, accounting professionals should hold off on providing these compliance services until further guidance is forthcoming. Moreover, accounting professionals need to be clear in their current tax engagement letters that such compliance services are specifically excluded from the scope of the engagement.

Those accounting professionals that have clients contemplating forming companies this year should inform those clients of the shorter reporting requirement and urge them to seek legal counsel as to the option of delaying the formation of the new entity to put off triggering their reporting obligations under the CTA until such time that the impact of the CTA reporting requirements is clearer.

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PROCEED WITH CAUTION

Accounting professionals that choose to provide compliance reporting services for their clients under the CTA/BOI should do so with caution. First, the accounting professionals must be clear in their engagement letters that the service they are engaging to perform is solely the initial reporting obligation on behalf of the client under the CTA. There should be clear and unequivocal language inserted in the engagement letter disclaiming any responsibility or undertaking on the part of the accounting professional for the client's continued reporting obligation under the CTA related to any change in the beneficial ownership information. Of course, given the lack of guidance currently surrounding BOI reporting, it is good practice to consult with legal counsel when and if providing such services to clients.

Additionally, accounting professionals should exercise thoughtfulness and restraint when receiving questions and inquiries regarding interpretation of the CTA and the BOI reporting requirements. In such instances, accounting professionals should advise clients to consult with their legal counsel and follow up and confirm that guidance in writing.

It is worth noting that initial reactions from certain state boards of accountancy seem to be leaning toward treating the accounting professionals' insertion in the BOI reporting process as potentially being the "unauthorized practice of law." While that may or may not be the final verdict, it is further reason to slow down and let the guidance catch up to the rule before rendering professional compliance services regarding BOI reporting.

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On January 4, 2024, the Virginia Supreme Court issued Legal Ethics Opinion (LEO) 1900, which instructs that a lawyer "must disclose the client's death to opposing counsel or the opposing party" before engaging in any "further substantive communication." With respect to the court, the lawyer "must disclose" the death "no later than the next communication with, or appearance before," the tribunal.

AUTHORITY

The foregoing duties are rooted in the principle that the attorney-client relationship is automatically terminated upon the client's death. See Restatement (Third) of the Law Governing Lawyers, § 31 "Termination of a Lawyer's Authority," Comment e. Further, the LEO cited to Formal Opinion 397 of the American Bar Association Standing Committee on Ethics and Professional Responsibility, which provides, in part, that failure to disclose the client's death is tantamount to making a false statement of material fact under Rule of Professional Conduct 4.1(a).

Virginia Rule of Professional Conduct 4.1 provides that:

In the course of representing a client a lawyer shall not knowingly:

> (a) make a false statement of fact or law; or
>
> (b) fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Continued

Based on the foregoing authorities, LEO 1900 instructs that under Rule 4.1(a) it is ethically impermissible for an attorney to, by "any act or omission," perpetuate the belief that the attorney still represents the client or "has any authority to act on behalf of" the deceased client. LEO 1900 also cites with favor the conclusion expressed in Formal Opinion 397 that an attorney's failure to disclose a client's death during a court appearance violates Rule 3.3's prohibition regarding making a false statement of material fact to a court.

LEO 1900 does note, however, that it is ethically permissible for an attorney to delay having "any substantive communication with opposing counsel" while "for example, determining whether there is a representative of the client's estate and whether the representative wishes to hire the lawyer to continue to pursue the client's claim."

Finally, LEO 1900 expressly overrules LEO 952, which concluded, in part, that an attorney can "accept a settlement offer without disclosing the client's death absent a direct inquiry about the client's health…." Instead, following LEO 1900, an attorney "cannot accept or make an offer of settlement on behalf of the deceased client, even if the lawyer discloses the client's death…[because] the lawyer has no client and no authority to accept or make a settlement after the client's death" until such time as an administrator of the estate or success is appointed and retains the lawyer.

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