

FULL DISCLOSURE OF PRODUCER COMPENSATION: THE CHEAPEST E&O INSURANCE

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1 Historically, insurance intermediaries did not disclose their compensation to their customers. The insurance intermediaries saw no problem with this lack of disclosure because they received their compensation from the insurers. Perilously, the insurance intermediary assumed there was no requirement to disclose the amount or nature of the compensation. Recent developments have spurred regulations requiring disclosure to the customer of all compensation an insurance intermediary may receive. 2

Should an insurance intermediary disclose to the insurance consumer all potential compensation? Yes. The need to disclose potential compensation precedes the current regulatory mood and is rooted in the insurance intermediaries' common law duties to his or her clients. The statutes and regulations enacted across the nation following former New York Attorney General Eliot Spitzer's investigation of the insurance industry potentially subjects the insurance intermediary to regulatory penalties, such as fines. The real threat to the insurance intermediaries, though, is the potential civil liability from the codification of these duties as well as violations of the existing common law duties.

I. INSURANCE INTERMEDIARIES

This discussion first requires an overview of insurance intermediaries. An insurance intermediary is an individual or business firm that stands between the consumer and the seller of insurance.³ Generally speaking, there are three types of insurance intermediaries - brokers, exclusive agents and independent insurance agents.⁴ Brokers are insurance intermediaries who solely represent the consumer.⁵ Exclusive agents are employed by and represent only one insurer. Independent agents represent multiple insurers.⁶ Independent agents place the bulk of the property-casualty policies in the United States.⁷

The distinction between brokers and independent agents is subtle, as no absolute dichotomy exists between them.⁸ Textbooks state that insurance agents are, in the legal sense, agents of the insurer, while brokers are agents of the customer. ⁹ The textbook definition is far too simplistic for the real world insurance market because independent agents and brokers perform many of the same functions and services, including acting as advocates for the insured and providing services for claims management.¹⁰ In addition, many "brokers" operate under documents functionally indistinguishable from the "agency appointment" contracts that the independent agents enter into.¹¹ Even if acting in a "dual agency" role, the independent producer may be the agent of the insured, not the insurer.¹² The primary distinction between independent agents and brokers relates more to the size, range, and depth of services provided.¹³ Independent agents tend to be smaller and provide services to relatively small businesses and consumers in a localized market. In contrast, the broker's service area tends to be larger and involve more complicated business insurance needs. Therefore, while the labels "agent" and "broker" have a disarming simplicity, the economic reality is much more complex.

The structure of the market also complicates the distinction between insurance intermediaries. Insurance intermediaries act as gatekeepers between the insurance consumers and the insurance providers thereby creating confusion for the intermediaries as to who is actually the "customer." Is the "customer" the one to whom it is providing the good risks (the insurer) or the end user of the insurance policy (the consumer).¹⁴ The difficulty in distinguishing between agents and brokers in the marketplace is aptly illustrated in California's Consumer Guide to Automobile Insurance (Broker Fee Regulations), which only compounds the

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confusion between a broker and an agent with its definition of broker: “A broker will usually have the words ‘insurance agency,’ ‘insurance brokers,’ ‘insurance brokerage,’ or ‘insurance services’ in its business name.”¹⁵ Because of the difficulty in distinguishing between agents and brokers, the National Association of Insurance Commissioners (NAIC) Model Rules¹⁶ and the laws of many states ¹⁷ classify all insurance intermediaries as “producers.”

Under whatever name it operates, an independent insurance producer, whether a broker or independent agent, helps consumers identify their coverage and risk management needs, matches consumers with appropriate insurers by scanning the market, and helps the consumer select from competing offers. Those independent producers who have a relationship with their customers arguably owe their customers a fiduciary duty. The custom and practice of insurance producers, along with the prior regulatory climate, however, made insurance producers unable to fully comprehend that the failure to disclose conflicts of interest was problematic.

II. INSURANCE PRODUCERS' CUSTOMS AND PRACTICES

In the past, transparency was not the objective standard in the insurance industry. “The problem that we’ve had up till now is that there had been no disclosure. Had disclosure been in place all these years, would you see all of these knee-jerk reactions?”¹⁸

Unlike law or accounting, insurance lacks an established written set of objective laws governing business practices.¹⁹ Training of new insurance producers is typically done by more senior producers.²⁰ The training occurs without examination of the ethical considerations of the already existing business practices.²¹

Insurance regulators were also complicit in the lack of transparency. The predominate means of regulating the industry historically was through mandatory requirements and prohibitions by the state regulators, rather than voluntary disclosures.²² Prior to Spitzer’s investigation, insurance regulators reportedly did not receive many complaints from the public about broker disclosure.²³ Clearly, because consumers were kept in the dark they were unable to even recognize whether there was a problem. Since Spitzer, everything has changed and what was once acceptable is no longer acceptable.

III. THE NEED FOR DISCLOSURE

The profile of undisclosed compensation rose sharply when New York Attorney General Eliot Spitzer turned his attention to the insurance industry. Spitzer’s investigation revealed that some of the largest brokers in the insurance industry were engaged in inflating bids to steer business to preferred insurers and other activity of questionable propriety. Spitzer’s investigations involved commercial lines insurance, not personal lines. The brokers involved in the New York investigation were dealing with sophisticated purchasers, such as Washington Mutual and Costco, and significant amounts of money per client.²⁴

Following Spitzer’s example, other state attorneys general turned their attention to insurance producers. There is ongoing litigation in Connecticut against Marsh.²⁵ In Massachusetts, a \$4 million complaint and consent judgment was filed against William Gallagher Associates Insurance Brokers for double-billing customers by charging brokerage fees and receiving undisclosed standard commissions.²⁶ Florida settled with Brown & Brown over disclosure of the relationship between Brown’s retail and wholesale brokerage.²⁷

Spitzer focused the debate on contingent commissions and the widespread reexamination of the way insurance brokers do business. ²⁸ Long before Spitzer galvanized public opinion regarding the opacity in brokers fees, a movement was afoot by the insurance industry itself to introduce transparency into the broker-customer relationship. Previously, those states that required disclosure only required disclosure of compensation when the producer was paid by both the insurer and the customer.²⁹ This changed in 1999 when the Risk and Insurance Management Society (RIMS) urged disclosure of all broker compensation arrangements before

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insurance was purchased,³⁰ and the New York State Department of Insurance formally reminded the industry that insurance customers should be informed of all compensation arrangements between insurer and broker so that the customer could “understand the costs of coverage and the motivation of their broker.”³¹

In 2001, the NAIC began examining the effectiveness of disclosures in informing and protecting insurance consumers.³² This was done because one of the foundations and assumptions of a working market is that the consumers are informed about what is occurring in the market. In 2005, the NAIC completed its review of different forms of disclosures. The NAIC determined: (1) Consumers had limited understanding of the insurance disclosures they received; (2) Consumers look to insurance disclosures to empower themselves with information about the options available to them and to make them feel better about their insurance purchases; (3) The more specific the information in disclosures, the more positively the consumers respond to it; (4) Consumers assume that they will receive any disclosures before purchasing a policy; and (5) Consumers want the disclosures explained to them, usually by their agent/broker.³³

Recent regulations enacted in several states expose compensation schemes and clarify the role of independent producers. For these disclosures to work and allow an efficient market response, the consumers must have a basic understanding of the underlying services they are receiving and the prices those services should cost.³⁴ Without the ability to assess the quality of various insurance options, even those customers who are aware of what is happening in the insurance markets are susceptible to being steered to insurers that are inappropriate for that customer.³⁵

State action, or inaction, post-Spitzer can be organized in four categories. The first category would be states, such as New York, that have chosen not to regulate disclosure of fixed commissions. On January 30, 2008 the New York State Insurance Department issued an opinion concerning broker disclosure of fixed commissions and other compensation, stating that as “a general matter, there is no legal requirement that a broker disclose to its clients the fixed commission that it earns on the policies that it places.”³⁶ This resulted from a New York appeals court decision that not only found that contingent commission agreements were legal but held that, without a special relationship, an insurance agent or broker had no duty to disclose the existence of the contingent commission agreement.³⁷

The second category is states, such as California, that have decided to mandate disclosures and impose civil penalties for the failure to disclose. California’s disclosure regulations³⁸ were placed in effect in November 2000 and make it an unfair trade practice to fail to provide the consumer with the Standard Broker Fee Disclosure form.³⁹ California’s position is that producers deemed to be acting as agents rather than brokers cannot charge brokers fees. In *Krumme v. Mercury Ins. Co.*, wherein the Plaintiff sought retroactive disgorgement of all brokers fees, the San Francisco Superior Court ruled that brokers for Mercury Insurance acted as de facto agents of Mercury and could not charge broker fees.⁴⁰

In this same vein, the two agencies that create model insurance laws, the NAIC and the National Council of Insurance Legislators (NCOIL), have also promulgated producer disclosure legislation. Several states, including Rhode Island⁴¹ Arkansas⁴² Connecticut⁴³ and Texas⁴⁴ have enacted the NAIC broker disclosure law in part or in whole.⁴⁵ The NAIC model rule prohibits a producer who “receives any compensation from the customer” or “represents the customer” in an insurance placement from receiving undisclosed compensation.⁴⁶ Section (1)(b) of the NAIC rule contains a generic disclosure provision, which states the producer is to disclose “...the amount of compensation from the insurer or other third party for that placement. If the amount of compensation is not known at the time of disclosure, the producer shall disclose the specific method for calculating the compensation and, if possible, a reasonable estimate of the amount.”⁴⁷

The NCOIL rule is less stringent. Adopted in March 2005, the NCOIL Model law does not contain a generic disclosure provision and requires disclosure only where the producer was to be paid by both parties to the transaction. NCOIL made significant departures from the NAIC law, including limiting disclosure to only the

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initial placement of insurance; the means of disclosure of compensation; eliminating the definition of a customer; and, problematically, eliminating the necessity to have written acknowledgment of the disclosure.

The third category are states, such as Nevada, that have chosen to codify the existing common law requirements. In 2006, Nevada adopted Nevada Administrative Code (NAC) §683A.716, which, according to a Nevada Division of Insurance Formal Opinion, codifies the common law duties of loyalty and obedience of an agent to its principal.⁴⁸ The independent producer owes a duty to the client; therefore, the independent producer should disclose anything that might affect the fulfillment of that duty.⁴⁹ In summary, NAC §683A.716 states that the producer shall not unreasonably place his own interest above the interest of the client, and that at or before the time of the purchase of insurance, disclosure of the producer's compensation structure with the various insurers, including sources of compensation, and written documentation of this disclosure.⁵⁰ In codifying the common law, Nevada has not substantively changed how producers should deal with their clients, but clarifies how the relationship is to operate. If the Nevada Division of Insurance enforces a violation of this regulation, then a regulatory violation occurs. As this is a codification of the common law, individual insureds who bring cases against their producer for violation of fiduciary duty may be awarded damages for such a violation.

The last category is states, such as Illinois, that require disclosures but eliminate penalties and civil liability, except for certain actions. Illinois codified that a producer must disclose fees, while eliminating civil liability for a breach of the producer's fiduciary duty to the consumer, except for misappropriation.⁵¹ A recent Illinois Appeals decision affirmed and clarified the statute.⁵² Before the implementation of this statute, there was clearly a fiduciary duty from the independent producer to the customer.⁵³ In 2003, Missouri rescinded a regulation ⁵⁴stating that the broker had a fiduciary duty that ran to the insured.⁵⁵

IV. THE OVERLOOKED COMMON LAW FIDUCIARY DUTY.

Overshadowed by recent regulatory developments is that independent producers have always been subject to a lawsuit in some states based upon their failure to uphold their common-law fiduciary duty to their customer. A fiduciary duty is usually defined as some variation of placing the beneficiary's (i.e. the customer's) interest ahead of, or equal to, the fiduciary's (i.e. the broker's) interest because of the right to expect trust and confidence in the fidelity and integrity of another.⁵⁶ The independent producer is the agent of the insured who has a fiduciary duty to the customer.⁵⁷ An independent producer's fiduciary duty to the customer is recognized in a number of states.⁵⁸

The independent producer has a fiduciary duty to the customer because, regardless of how well the customer understands the potential conflicts of interest that exist for the producer, customers are vulnerable to being steered to coverages that do not optimally meet their coverage needs.⁵⁹ Customers may be sold more (or less) coverage than needed to increase their producer's compensation. Insurance products are inherently complex, and such complexity makes it difficult for customers to fully understand both the coverage they need and to evaluate the service and claims paying capability of various insurers.⁶⁰ Like almost everyone else, insurance producers respond to the incentives provided to them, and the problems in the insurance industry may be traced directly to ill-conceived and hidden compensation structures.⁶¹ In an example of civil litigation resulting from the failure to disclose these hidden compensation schemes, a lawsuit alleged that the broker for an engineering firm steered it away from an admitted carrier and into a surplus lines carrier, despite the fact that the coverages provided by the admitted carrier and the surplus lines carrier were exactly the same. Further allegations stated the producer's advice was tainted by its receipt of 22.5% in commissions and fees; whereas, the producer would have only received a 7.5% commission from the admitted carrier. Another lawsuit asserted that a small trucking company was steered from a superior policy into an inferior policy for the same price because the commissions on the lower coverage policy were higher. The lawsuit was triggered by a loss not covered by the inferior policy.

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In both cases, it was argued that the producer did not recommend the best coverage, but rather recommended the product that provided the most compensation to the producer in violation of the producer's fiduciary duty. Avoidance of a lawsuit against a producer for breach of fiduciary duty is a more compelling reason for full disclosure of all compensation than a regulatory fine.

V. OTHER CLAIMS AVAILABLE TO CONSUMERS AGAINST INDEPENDENT PRODUCERS

The failure to disclose compensation to a customer subjects producers to other forms of legal recovery in addition to breach of fiduciary duty. For example, Nevada has a deceptive trade practice, which is defined as a person failing to disclose a material fact in connection with the sale of goods or services and/or violating a state or federal regulation relating to the sale of goods and services.⁶² The statutes and regulations enacted post-Spitzer may support a deceptive trade practice action against the insurance producer; if the producer fails to disclose material facts in connection with the sale of his insurance services, such as the amount of compensation the producer stands to receive, the producer may be subject to a lawsuit and damages.

Another potential claim for relief against an independent producer is negligence per se. While negligence per se varies from jurisdiction to jurisdiction, most follow a version of the statement that a violation of statute establishes the duty and breach elements of negligence if the injured party belongs to the class of persons that the statute was intended to protect and the injury is of the type against which the statute was intended to protect.⁶³ By codifying the already existing common law duties, a claim of negligence per se may be brought against a broker in addition to the common law breach of fiduciary duty claim if the broker has failed to perform disclosures as required by Nevada's statute. The law is unsettled if a violation of regulation can support a claim of negligence per se.⁶⁴ In many jurisdictions, unless there is an underlying loss, it is unlikely that a negligence claim stemming from a failure to disclose fees would be supported due to the economic loss doctrine. While the definition of economic loss varies from jurisdiction to jurisdiction, it follows the general principle that a plaintiff can not sue for purely economic loss unless there is some underlying injury.⁶⁵

For those producers who sign a contract to receive a fee paid by the insured and receive a commission on top of the fee without disclosing such a commission to the insured, a breach of the duty of good faith and fair dealing may be found. This is because in some states, the duty of good faith and fair dealing exists in every contract. ⁶⁶

VI. CONCLUSION

All insurance producers wherever they do business should follow the practice of total disclosure. As the CEO of one of the largest brokers recently stated: "Disclosure has been good for the industry. It's expensive. It's painful. But I think it's a good procedure."⁶⁷

Much like the unfair trade practices act, the disclosure statutes are a good starting point because both arguably set the minimum standards. Much like the recent fall of the credit swap defaults, the damage caused by failing to disclose compensation can rapidly spiral out of control. Insurance exists so that people may be protected from future contingencies. Between the regulatory penalties and civil damages, the producer could be substantially harmed by a lack of disclosure. The least expensive E&O insurance, and the best risk prevention technique, an independent producer can obtain is disclosure of compensation, acknowledged in writing by the customer.

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1. This article was co-authored by Vernon E. Leverty, William R. Ginn, and Patrick R. Leverty of the law firm of Leverty & Associates Law, CHTD.
2. Some states are now requiring that all producers obtain E&O insurance as a part of their licensing. R.I.G.L. §27-2.4-23. Most insurance producers agreements contain requirements requiring E&O Insurance. Ultimately, disclosure acts as a risk prevention service by ensuring that all applicable laws and regulations are followed.
3. J. David Cummins and Neil A. Doherty, *The Economics of Insurance Intermediaries*, Journal Risk & Insurance, Vol. 73, No. 3, pp. 359 (September 2006)
4. Sean M. Fitzpatrick, *The Small Laws: Eliot Spitzer and the Way To Insurance Market Reform*, 74 Fordham L. Rev. 3041, 3054 (May 2006).
5. *Id.*
6. *Id.*
7. Cummins, *supra*.
8. Cummins, *supra*.; *Krumme v. Mercury Ins. Co.*, 123 Cal.App.4th 924, 930 (Cal.App. 2004).
9. *Id.*
10. *Id.*
11. *Id.*
12. *Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 839 P.2d 599 (Nev. 1992); *European Bakers, Ltd. v. Holman*, 177 Ga.App. 172, 338 S.E.2d 702 (Ga.App. 1985).
13. Cummins, *supra*.
14. Fitzpatrick, *supra*, at 3048.
15. Available at http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0010-automobile/upload/Final_Web_AutoIns at pg. 3.
16. See NAIC Producer Licensing Model Act, section 1.
17. See *i.e.*, NRS 679A.117
18. Dawn Love, *Broker Disclosure Dominates Western States Surplus Lines Conference*, Insurance Journal, 8/22/2005. Available at <http://www.insurancejournal.com/magazines/west/2005/08/22/features/59613.htm>
19. Fitzpatrick, *supra*, at 3048.
20. *Id.*
21. *Id.*

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22. Daniel Schwarcz, *Beyond Disclosure: The Case for Banning Contingent Commissions*, Yale Law & Policy Review, Vol. 25, p. 316 (2007).
23. Love, *supra* note 18. Sherwood Girion, deputy commissioner for consumer services and market conduct at the California Department of Insurance stated: “Since I’m deputy commissioner over consumer service and marketing conduct where all the complaints come in, I should have a big long list. I have my paper with me and it has about zero complaints on it.”
24. Puget Sound Business Journal, *Marsh Settlement Offers \$14M to Washington Clients*, May 25, 2005, available at <http://www.bizjournals.com/seattle/stories/2005/05/23/daily6.html>, stating that Costco and Washington Mutual were each offered settlements in excess of \$500,000.
25. *Connecticut v. Marsh and McLennan Companies, Inc.*, 286 Conn. 454, 944 A.2d 315 (Ct. 2008)
26. *Mass. AG files complaint against William Gallagher Assoc.*, Boston Business Journal, December 20, 2007, available at <http://www.bizjournals.com/boston/stories/2007/12/17/daily51.html>.
27. *A House Divided: While The Four Biggest Insurance Brokers – and Several Top Insurance Carriers – Shun Contingent Commissions, Many Smaller Players In The Industry Defend And Rely On Them*, Best’s Review, April 1, 2007, available at http://goliath.ecnext.com/coms2/summary_0199-6518846_ITM
28. *Id.*
29. *See Wisconsin Stat. Ann.* §628.32, stating “(1) An intermediary may not accept compensation from an insured or from both an insured and another source due to the insured’s purchase of insurance or for advice regarding the insured’s insurance needs or coverage unless the intermediary, before the insured incurs an obligation to pay compensation, clearly and conspicuously and in writing discloses to the insured all of the following:
 - (a) The amount of compensation to be paid by the insured, excluding commissions paid by the insurer to the intermediary.
 - (b) If compensation will be paid by another source, the fact that the intermediary will also receive compensation from the other source.”
30. Russ Banham, *Seeing No Evil*, CFO Magazine, September 2005, available at http://www.cfo.com/article.cfm/4315564/c_4334841?f=insidecfo
31. Joseph B. Resaster, *Insurer’s Pay the Brokers, Making Customer’s Wary*, The New York Times, February 14, 1999.
32. NAIC Disclosure Guidelines and Process, August 17, 2006 draft, available at http://www.naic.org/documents/committees_ex_broker_comp_disclosure.pdf, at pg. 3.
33. *Id.*
34. Schwarcz, *supra*, at 314.
35. *Id.*, at 315.
36. New York Office of General Counsel Opinion 08-01-10, available at <http://www.ins.state.ny.us/ogco2008/rg080110.htm>

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37. *The People of the State of New York by Andrew M. Cuomo, Attorney General of the State of New York v. Liberty Mutual Insurance Company, et al.* No 3972 401726/06, N.Y. App. Div., 1st Dept.
38. 10 CCR §2189.1.
39. 10 CCR §2189.5(a).
40. 2002 WL 34127822 (2002), aff'd, *Krumme v. Mercury Ins. Co.*, 123 Cal.App.4th 924 (2004); Mercury General Corp. form 10-Q dated 11/5/2004, available at <http://sec.edgar-online.com/2004/11/05/0001193125-04-187892/Section10.asp>.
41. R.I. Gen. Laws §27-2.4-15.1.
42. Ar. Code. Ann. §23-64-520.
43. Ct. Gen. Stat. Ann. §38a-707a.
44. Tex. Ins. Code Ann. Ins. §4005.004
45. The NAIC broker disclosure law was promulgated first, with NCOIL then adopting a different approach.
46. NAIC Producer Licensing Model Act, §18
47. *Id.*
48. NV Formal Op. 06-005, at pg. 6.
49. *Id.*
50. NAC §683A.716.
51. 735 ILCS 5/2-2201(b).
52. *DOD Technologies v. Mesirow Ins. Services, Inc.*, 887 N.E.2d 1 (Ill.App. 2008).
53. *Black v. Illinois Fair Plan Ass'n*, 87 Ill.App.3d 1106, 1111, 409 N.E.2d 549, 553 (1980); 298 Ill.App.3d 1007, 700 N.E.2d 189 (1998).
54. <http://www.sos.mo.gov/adrules/csr/previous/20csr/20csr0608/20c700-1.pdf>.
55. 20 CSR 700-1.090, stating “*PURPOSE: This regulation explains the fiduciary duty of a broker to the insured. This regulation was adopted pursuant to the provisions of section 374.045, RSMo and implements section 375.121, RSMo.* Broker’s Duty to Insured. The fiduciary duty imposed by law upon an insurance broker shall run from the broker to the insured and not to the insurer. This duty of an insurance broker to a prospective insured shall include the primary duty of first using any funds received from the prospective insured to pay the premium for the insurance requested.” (Italics in original) Available at <http://www.sos.mo.gov/adrules/csr/previous/20csr/20csr1099/20c700-1.pdf>.
56. See Black’s Law Dictionary, (8th ed.), *Powers v. USAA*, 962 P.2d 596 (Nev. 1998); *Love v. Fire Ins. Exchange*, 271 Cal.Rptr. 246, 253 (Cal.App. 1990).

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57. See *Steadman v. McConnell*, 149 Cal.App.2d 334, 338, 308 P.2d 361 (1957)(where an insurance agent was an expert in the field and the insured was a layman, a fiduciary relationship existed); *Williams v. Fab-Con, Inc.*, 990 F.2d 228 (5th Cir.1993)(an insurance broker has a fiduciary duty toward the insured); *Lake County Grading Co. of Libertyville, Inc. v. Great Lakes Agency, Inc.*, 589 N.E.2d 1128 (Ill.App. 1992); *Baldwin v. Lititz Mut. Ins. Co.*, 393 S.E.2d 306 (N.C.App 1993); *Powell v. James, Hereford & McClelland, Inc.*, 377 S.E.2d 683 (Ga.App. 1989); *AYH Holdings, Inc. v. Avreco, Inc.*, 826 N.E.2d 1111 (Ill.App.2005).
58. Nevada Formal Opinion 06-005, at pg. 6.
59. Schwarcz, *supra*, at 323.
60. Cummins, *supra*.
61. Fitzpatrick, *supra*, at 3047.
62. NRS §598.0923.
63. *Sagebrush Ltd. v. Carson City*, 99 Nev. 204, 208, 660 P.2d 1013, 1015 (1983), *see also*, Blacks Law Dictionary 1063 (8th ed.) “**negligence per se**. Negligence established as a matter of law, so that the breach of the duty is not a jury question. •Negligence per se usu. Arises from a statutory violation. – Also termed *legal negligence*.”
64. See *Padilla v. Pomona College*, 166 Cal.App.4th 661, 82 Cal.Rptr.3d 869 (Cal.App. 2008)(no claim of negligence per se based on violation of regulation); *Joy v. Bell Helicopter Textron, Inc.*, 999 F.2d 549 (D.C.Cir.1993)(violation of regulation may lead to negligence per se); *Obendorf v. Terra Hug Spray Co., Inc.*, 145 Idaho 892, 188 P.3d 834 (Idaho 2008).
65. Douglas Laycock, *Modern American Remedies, Cases and Materials*, 116 (3d Ed., Aspen L. & Bus. 2002).
66. See *Ainsworth v. Combined Ins. Co.*, 104 Nev. 587, 592 n. 1, 763 P.2d 673, 676 (1988); *Rawlings v. Apodaca*, 151 Ariz. 149, 153, 726 P.2d 565, 569 (1986); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal.4th 85, 91, 44 Cal.Rptr.2d 420, 900 P.2d 669 (1995); *Midwest Builder Distributing, Inc. v. Lord and Essex, Inc.*, 383 Ill.App.3d 645, 891 N.E.2d 1 (Ill.App. 2007); *Dalton v. Educational Testing Services Inc.*, 46 N.Y.2d 62 (1978).
67. Jim Henderson, CEO of Brown & Brown, quoted in Best’s Daily, *supra*.