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2020 Insurance Agent Case Law Year-End Review

Summary and review of 2020 Insurance Agent Case Law

Special Section on COVID-19 related cases

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2020 Insurance Agent Case Law Year-End Review
By Aaron M. Simon[1]

1) In most jurisdictions the order taker standard of care remains

Most states continue to use the "order taker" standard of care as the general duty applicable to insurance agents under most circumstances. This "order taker" standard of care duty simply requires insurance agents to follow the specific instructions of their insurance customers, and procure for their insurance customers the insurance specifically requested by their insurance customers. Most jurisdictions also have a limited exception to the general order taker duty but only where special circumstances give rise to a special relationship heightened duty to advise, and courts rarely find there are special circumstances giving rise to a special relationship heightened duty to advise.

See Pedersen v. State Farm Mut. Auto. Ins. Co., No. CV-19-29-GF-BMM, 2020 WL 2850137, at *5 (D. Mont. June 2, 2020):

> On the most basic level, an agent has the duty to obtain for an insured the insurance coverage that the insured requests. *Fillinger*, 938 P.2d at 1355-56. An agent's duty changes from insured to insured based on the coverage requested. The inquiry becomes more complicated when additional factors get added, such as a business owner's general request for coverage that adequately will cover her business assets. *See Dulaney*, 324 P.3d at 1215.

See also IAN DANIELS, et al. v. SCOTTSDALE INSURANCE CO., et al., 2020 WL 7183365, at *4 (E.D.La., Dec. 7, 2020) (emphasis added), where the court affirmed the order taker standard stating:

> In Louisiana, "**an insurance agent owes a duty of 'reasonable diligence' to [its] customer**" which "**is fulfilled when the agent procures the insurance requested**." *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 42 So. 3d 352, 356 (La. 2010) (citations omitted). "[A]n insured has a valid claim against the agent when the insured demonstrates that: 1) the insurance agent agreed to procure the insurance; 2) the agent failed to use 'reasonable diligence' in attempting to procure

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> the insurance and failed to notify the client promptly that the agent did not obtain insurance[;] and 3) the agent acted in such a way that the client could assume he was insured." *Id*. at 356-57 (quotations marks and citation omitted). Accordingly, **the insured has the responsibility to request the type and amount of insurance coverage needed, whereas the agent has no "obligation to spontaneously or affirmatively identify the scope or the amount of insurance coverage the client needs**." *Id*. at 359.

See also MARK BIEGLER, Plaintiff, v. G.M.I. N.A. INC. D/B/A GMI INSURANCE; UNDERWRITING SERVICE MANAGEMENT COMPANY, LLC; UNITED SPECIALTY INSURANCE COMPANY, and DOES 1*-10, Defendants*, 2020 WL 7209151, at *5 (D.Mont., December 7, 2020):

> Under Montana law, "an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure." *Monroe v. Cogswell Agency*, 234 P.3d 79, 86 ¶ 31 (Mont. 2010). Biegler's negligence claims against GMI (Counts I, IV and V) all fail for the simple reason that GMI provided Fleetlogix with the primary coverage Biegler requested. (Doc. 1 at ¶ 17). GMI's motion to dismiss will be granted as to Counts I, IV, and V of the complaint.

See also Broecker v. Conklin Prop., LLC, No. 2018-11587, 2020 WL 7053523, at *1 (N.Y. App. Div. Dec. 2, 2020):

> An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so. Thus, the duty is defined by the nature of the client's request" (*Verbert v. Garcia*, 63 A.D.3d 1149, 1149, 882 N.Y.S.2d 259 [citations omitted]; *see Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972).

See also STEPHEN F. WORDEN, Plaintiff & Appellant, v. FARMERS FIRE INSURANCE EXCHANGE et al., Defendants & Respondents. Additional Party Names: Matthew Hague Ins. Agency, No. A156876, 2020 WL 6879333, at *5, 9 (Cal. Ct. App. Nov. 24, 2020): "Accordingly, the courts have uniformly rejected the assertion that insurers and their agents owe a 'duty' to ensure that a policy will provide full coverage for an insured loss"…; and "[t]he trial court therefore correctly concluded the general rule applies here and defendants owed no special duty to assure that Worden carried full replacement cost coverage."

See also Rains v. CSAA Fire & Cas. Ins. Co., No. 20-CV-0400-CVE-FHM, 2020 WL 6729085, at *5 (N.D. Okla. Nov. 16, 2020) (emphasis added):

> Under Oklahoma law, "[a]n agent has the duty to act in good faith and use reasonable care, skill and diligence in the procurement of insurance and an agent is liable to the insured if, by the agent's fault, insurance is not procured as promised and the insured suffers a loss." *Swickey v. Silvey Companies*, 979 P.2d 266, 269 (Okla. Civ. App. 1999). "This duty rests, in part, on "specialized knowledge [about] the terms and conditions of insurance policies generally." *Rotan v. Farmers Ins. Group of Cos.*, 83 P.3d 894, 895 (Okla. Civ. App. 2003) (*citing Swickey*, 979 P.2d

> at 269). "To discharge their duty to act in good faith and use reasonable care, skill, and diligence in the procurement of insurance, including use of their specialized knowledge about the terms and conditions of insurance policies, **insurance agents need only offer coverage mandated by law and coverage for needs that are disclosed by the insureds, and this duty is not expanded by general requests for 'full coverage' or 'adequate protection.'** " *Id*. (emphasis in original). If an agent is not provided with pertinent information, "the scope of the agent's duty to use reasonable care, skill, or diligence in the procurement of insurance does not extend" to create liability for unknown information. *Rotan*, 83 P.3d at 895. Oklahoma courts are in agreement that an insurance agent does "not have a duty to advise an insured with respect to his insurance needs." *Id.*; *Mueggenborg v. Ellis*, 55 P.3d 452, 453 (Okla. Civ. App. 2002). "What is required is that the agent 'offer coverage ... for needs that are disclosed by the insured.' " *Asbury v. N. Star Mut. Ins. Co.*, No. CIV-14-1331-HE, 2015 WL 588607, at *2 (W.D. Okla. Feb. 11, 2015) (*quoting Rotan*, 83 P.3d at 895).

See also Platte River Power Auth. v. Gallagher Benefit Servs., Inc., No. 20-CV-02353-CMA-MEH, 2020 WL 6281596, (D. Colo. Oct. 27, 2020), where the court stated that generally the order taker standard of care applied but special circumstances could give rise to a special relationship heightened duty to advise, and that the insurance customer adequately pled a special relationship heightened duty to advise claim. Nevertheless, the court still reaffirmed that "[t]he general rule under Colorado law is that an insurance agent does not have an affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy absent a special relationship." *Id*. at 5.

See also Heidingsfelder v. Ameriprise Auto & Home Ins., No. 19-CV-08255-JD, 2020 WL 5702111, at *3 (N.D. Cal. Sept. 24, 2020) (quotations and citations omitted) "It is also worth noting that an insurance agent has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured, but not a duty to advise the insured on specific insurance matters."

See also Hare v. Allstate Prop. & Cas. Ins. Co., No. 1:20-CV-209-JB-C, 2020 WL 5647488, at *3 (S.D. Ala. Sept. 22, 2020) ("Generally, an insurance agent's duty does not exceed the procurement of requested insurance unless a plaintiff can show a confidential relationship or special circumstances giving rise to more.)

See also D C Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc., 848 S.E.2d 552, 557 (N.C. Ct. App. Sept. 1, 2020):

> An insurance agent's duty in procuring insurance is limited to securing the coverage that the policyholder has requested. *Baggett v. Summerlin Ins. and Realty, Inc.*, 143 N.C. App. 43, 50-51, 545 S.E.2d 462, 467 (Tyson, J., dissenting), *rev'd for reasons stated in the dissent*, 354 N.C. 347, 554 S.E.2d 336 (2001). Failure to recommend additional insurance to cover a risk faced by the policyholder does not constitute negligence. *See Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 562, 393 S.E.2d 306, 308 (1990) (no reasonable expectation that defendant insurance agent recommend or procure coverage for home after builder's policy lapsed at completion of construction); *Phillips by Phillips v. State Farm Mut.*

> *Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (insurance agent had no duty to inform client that increasing liability coverage limits would make him eligible for uninsured motorist coverage).

See also Merrick v. Fischer, Rounds & Assocs., Inc., 305 Neb. 230, 238, 939 N.W.2d 795, 802–03 (March 13, 2020) (citations and footnotes omitted):

> To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages. An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence. When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. An insurance agent has no duty to anticipate what coverage an insured should have. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
>
> *In Polski v. Powers*, this court noted that although it may be good business for an insurance agent to make insurance coverage suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. We went on to hold that it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way.

See also ***Ma Amba Minnesota, Inc. v. Cafourek & Assocs., Inc.*, 387 F. Supp. 3d 947 (D. Minn. 2019).** [Further discussion of case below]

See also Wilson Works, Inc. v. Great Am. Ins. Grp., No. 1:11-CV-85, 2012 WL 12960778, at *3 (N.D.W. Va. June 28, 2012) (emphasis added):

> **A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage**. *See, e.g., Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482-83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. Ct. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. Ct. App. 902, 653 N.E.2d 207, 207-08 (1995); *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990).

See also Robert H. Jerry, II, ***Understanding Insurance Law*** § 35(f)(2)(ii), at 212 (2d ed.1996) (emphasis added):

> **[N]o duty to give advice is created simply because the insurance intermediary becomes a person's agent. This applies both to advice about what policies should be purchased as well as advice about what coverage is contained in an insured's existing policy.**

See also Somnus Mattress Corp. v. Hilson, No. 1170250, 2018 WL 6715777 at *6–7 (Ala. Dec. 21, 2018) (emphasis added):

> Several cases from other jurisdictions have explained the reasons for the courts' unwillingness to impose such a duty upon insurance agents.
>
> "**A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage**. *See, e.g., Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482–83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. App. Ct. 902, 653 N.E.2d 207, 207–08 (1995); *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990). *But see SW Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268, 1271–72 (1995); *Dimeo v. Burns, Brooks & McNeil, Inc.*, 6 Conn. App. 241, 504 A.2d 557, 559 (1986).
>
> "**That general duty of care excludes an affirmative obligation to give advice regarding the availability or sufficiency of coverage for several persuasive reasons**. Some courts have reasoned that insureds are in a better position to assess their assets and the risk of loss to which they may be exposed. *See, e.g., Peter*, 22 P.3d at 486; *Sadler*, 776 A.2d at 40; see also Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 257 (1991) ('unrealistic to impose on an insurance agent the ongoing duty of surveillance with respect to an insured's constantly changing circumstances'. These courts have also noted that decisions regarding the amount of insurance coverage are personal and subjective, based upon a trade-off between cost and risk. *See Peter*, 22 P.3d at 486; Sadler, 776 A.2d at 40. An insurance agent is in no better position than the insured to predict the extent of damage that the insured might incur at some time in the future. *See Sadler*, 776 A.2d at 40; *Murphy*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976.
>
> "Imposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage would 'remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available,' *Nelson*, 456 N.W.2d at 346, and would convert agents into 'risk managers with guarantor status.' Sadler, 776 A.2d at 40–41 (quotation omitted); see also *Murphy*, 90 N.Y.2d

> 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976. Significantly, 'the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered.' *Nelson*, 456 N.W.2d at 346. 'This would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear.' Peter, 22 P.3d at 486 (quotation omitted)."
>
> *Sintros v. Hamon*, 148 N.H. 478, 480–81, 810 A.2d 553, 555–56 (2002). *See, e.g., Peter v. Schumacher Enters., Inc.*, 22 P.3d 481, 486–87 (Alaska 2001); *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 9–11, 597 N.W.2d 47, 51–52 (1999); and *Nelson v. Davidson*, 155 Wis.2d 674, 681–82, 683-84, 456 N.W.2d 343, 346, 347 (1990).

Also, ordinarily an insurance customer knows the extent of his personal assets and ability to pay increased premiums better than the insurance agent. *See Gates v. Logan*, 862 P.2d 134, 136 (Wash. App. 1993).

> Mere knowledge of the insureds' annual income or notion as to their net worth does not constitute a "special circumstance" which imposes a duty on an insurance agent to advise as to increased policy limits. **The amount of protection an insured wishes to obtain against any specific risk concerns the allocation of personal resources. It is a matter uniquely within the province of the insured.**

Id. (Emphasis Added).

In addition "it is unrealistic to expect an agent to advise an insured as to every possible insurance option, a logical requirement if there is a general duty to advise as to specific policy limits." *Id.*

Focus on Minnesota Law

The Minnesota Supreme Court established the order taker standard of care applicable to insurance agents in *Gabrielson v. Warnemunde*, 443 N.W.2d 540 (Minn. 1989). The Minnesota Supreme Court in *Gabrielson* stated:

> **Absent an agreement to the contrary, an agent has no duty beyond what he or she has <u>specifically</u> undertaken to perform for the client. * * * Thus, the agent is under no affirmative duty to take other actions on behalf of the client if the typical principal agent relationship exists.**

Id. at 543-44 (citations omitted) (emphasis added).

The court also concluded that it is for <u>the court</u> to determine whether the facts and circumstances in a given case give rise to a duty of care owed by an insurance agent. *Id*. at 543 n. 1. (Emphasis added):

> The court of appeals held that his case should go to the jury for a determination of whether the facts and circumstances of the case give rise to a duty of care owed by Warnemunde to LaCanne. This is erroneous. The existence of a legal duty is a question **<u>for the court</u>**, not the jury. *Johnson v. Urie*, 405 N.W.2d 887, 891 n. 5

> (Minn.1987); W. Prosser, R. Keeton, *The Law of Torts* § 37 p. 236 (5th ed.) (1984); Restatement (Second) of Torts § 328B (1965). The existence of a legal duty depends on the factual circumstances of each case. It is not, however, the jury's function to determine whether the facts give rise to a duty. Rather, the jury's role is to resolve disputed facts, upon which the court then determines whether a duty of care exists. *Urie,* 405 N.W.2d at 891 n. 5. The facts in the case are essentially undisputed. The existence of a legal duty owed by the defendant Warnemunde to LaCanne is a question of law for the court.

See also Johnson v. Urie, 405 N.W.2d 887, 891 (Minn. 1987); and ***Philter, Inc. v. Wolff Ins. Agency, Inc.***, No. A10-2230, 2011 WL 2750709, at *3 (Minn. Ct. App. July 18, 2011).

Under *Gabrielson*, and subsequent decisions following *Gabrielson*, Minnesota courts have explicitly defined what an insurance agent's specific and limited duties are under Minnesota law under normal circumstances (not special circumstances), and determined that an insurance agent's duties under Minnesota law, under normal circumstances, are to simply act in good faith and to follow the specific instructions of the insurance customer. *See Gabrielson***,** 443 N.W.2d 540, 543 ("An insurance agent's duty is ordinarily limited to the duties imposed in any agency relationship, to act in good faith and follow instructions.") *See also Scottsdale Ins. Co. v. Transport Leasing/Contract, Inc.*, 671 N.W.2d 186, 195-196 (Minn. App. 2003) ("Unless there is a special circumstance or relationship, the agent's duty is to act in good faith and to simply follow the instructions of the insured**.**")

Furthermore, once a policy has been issued, the insurance agent has only a limited duty to update the insurance policy; and the agent has no ongoing duty of surveillance. *Gabrielson*, 443 N.W.2d at 544 (quotation omitted). In *Kashmark v. West. Ins. Co.*, the Minnesota Supreme Court explained that "it is unrealistic to impose on an insurance agent who services hundreds of policies an ongoing duty of surveillance." *Kashmark v. West. Ins. Co.*, 344 N.W.2d 844, 847 (Minn. 1984). "Absent special circumstances in the relationship with the insured" an insurance agent is not "under an affirmative duty to update an insurance policy at the time it is renewed or to inquire whether any changes have occurred to the insured's property which would affect coverage." *Gabrielson,* 443 N.W.2d at 542.

> Once a policy has been issued, the insurance agent has only a limited duty to update the insurance policy. The agent has no ongoing duty of surveillance or obligation to ferret out at regular intervals information which brings policyholders within the provisions of an exclusion. The insured bears the responsibility to inform the agent of changed circumstances which might affect the coverage of the insurance policy, because the insured is in a better position to communicate those changes than the agent could be expected to discover on his or her own initiative.

Id. at 544. (Citations and quotations omitted).

In addition, generally an insurance customer is responsible to educate himself or herself in insurance matters. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986). An insurance customer "is charged with notice of his policy when he accepts it, and he is bound by its conditions, if he retains it without objection, unless he be misled

by the insurer." *Hayfield Farmers Elevator & Mercantile Co. v. New Amsterdam Casualty Co.*, 282 N.W. 265, 268 (Minn. 1938).

In recent years courts continue to use and apply the *Gabrielson* standard. *See Nelson v. Am. Family Mut. Ins. Co.*, 262 F. Supp. 3d 835, 858–59 (D. Minn. 2017) (emphasis added):

> The Nelsons [as the insurance customers] argue that American Family [and its agents] had a specific duty to **periodically update replacement cost estimates and possibly to disclose the documents it relied on in that process**. *** However, the case law directly contradicts the Nelsons' position. *See Gabrielson*, 443 N.W.2d 540 at 544 ("Once a policy has been issued, the insurance agent has only a limited duty to update the insurance policy. The agent has no ongoing duty of surveillance.... The insured bears the responsibility to inform the agent of changed circumstances which might affect the coverage of the insurance policy, because the insured is in a better position to communicate those changes than the agent could be expected to discover on his or her own initiative." (citations omitted)). Thus, American Family [and its agents] **did not have a duty to periodically update the replacement cost estimate for the Nelson Home, or provide the Nelsons with the documentation used in that process**.

See also Ma Amba Minnesota, Inc. v. Cafourek & Assocs., Inc., 387 F. Supp. 3d 947, 952–53 (D. Minn. 2019):

> In the insurance agent context, the Minnesota Supreme Court has held that, by and large, the only legally-enforceable duty that an insurance agent owes to its customers is the duty "to act in good faith and follow instructions." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989); *accord Nelson v. Am. Family Mut. Ins. Co.*, 262 F. Supp. 3d 835, 858 (D. Minn. 2017). In other words, "[a]bsent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client," and thus "is under *no affirmative duty* to take other actions on behalf of a client," *Gabrielson*, 443 N.W. 2d at 543, such as "offering, furnishing, or advising regarding insurance coverage," *Beauty Craft Supply & Equip. Co v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101 (Minn. Ct. App. 1992). Consequently, in the usual course of business, a plaintiff cannot hold an insurance agent liable for negligence based solely on a sin of "omission." *See Ruberg v. Skelly Oil Co.*, 297 N.W.2d 746, 750 (Minn. 1980) ("An omission constitutes negligence only where there is a duty to act affirmatively."). This limitation on insurance agent liability exists because, "generally, an insurance customer is responsible to educate himself concerning matters of insurance coverage." *Louwagie v. State Farm Fire & Cas. Ins. Co.*, 397 N.W.2d 567, 569 (Minn. Ct. App. 1986).

2) Special Relationship Heightened Duty to Advise

Despite the fact that in most situations the order-taker standard of care will be the duty applied to insurance agents, a claim of special circumstances giving rise to a special relationship heightened duty to advise is often claimed by insurance customers against their agents. However, to show a special relationship exists between an insurance agent and an insurance customer is usually a high burden and courts have frequently been wary to find the existence of a special relationship heightened duty to advise.

See Osendorf v. American Family, 318 N.W.2d 237 (Minn.1982). [Further discussion of case is below].

See also Hare v. Allstate Prop. & Cas. Ins. Co., No. 1:20-CV-209-JB-C, 2020 WL 5647488, at *3 (S.D. Ala. Sept. 22, 2020) where the court first stated that "[g]enerally, an insurance agent's duty does not exceed the procurement of requested insurance unless a plaintiff can show a confidential relationship or special circumstances giving rise to more." However, the court then recognized that sometimes there are special circumstances giving rise to a special relationship to advise/disclose. After a detailed thorough analysis the court determined that as a matter of law that there were not special circumstances giving rise to a special relationship duty to advise/disclose in this particular case.

See also Murray v. UPS Capital Ins. Agency, Inc., 54 Cal. App. 5th 628, 651, 269 Cal. Rptr. 3d 93, 112 (September 11, 2020), as modified on denial of reh'g (Oct. 5, 2020) – detailed analysis of special relationship heightened duty to advise where court ultimately found there were material questions of fact precluding summary judgment on the special relationship issue.

See also Hassanein v. Encompass Indem. Co., No. 347544, 2020 WL 5495210, at *10 (Mich. Ct. App. Sept. 10, 2020) – court recognized general duty only to procure insurance specifically requested by insurance customer as well as exception to general rule if special circumstances existed that gave rise to a special relationship heightened duty to advise. Court found that agent had no duty to advise when insurance customer did not provide adequate information to agent so that agent could provide advice. Court also ruled that expert cannot establish standard of care or duty and that it is the court that determines which duty to apply on undisputed facts.

See also Burt v. Delmarva Sur. Assocs., Inc., No. 3417, SEPT.TERM,2018, 2020 WL 2091748, at (Md. Ct. Spec. App. Apr. 30, 2020), cert. denied sub nom. Delmarva Sur. Assoc. v. Burt, 470 Md. 212, 235 A.3d 34 (2020) – somewhat thorough analysis of application of special relationship heightened duty to advise under Maryland law.

Further if there are not any material disputed facts regarding the relationship between the insurance customer and the insurance agent, then under most jurisdictions case law it is the court that must decide what duty should be applied to the agent not the jury and not an expert. *See Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 n.1; *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987); and *Philter, Inc. v. Wolff Ins. Agency, Inc.*, No. A10-2230, 2011 WL 2750709, at *3 (Minn. Ct. App. July 18, 2011). *See also K.L. v. Riverside Med. Ctr.*, 524 N.W.2d 300, 302 (Minn. Ct. App.

1994) (citing *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985) ("Whether a legal duty exists is, on agreed facts, a question for the court to determine as a matter of law.")

See also ServiceMaster of St. Cloud v. GAB Bus. Servs., Inc., 544 N.W.2d 302, 307 (Minn. 1996), discussing *Gabrielson* and the interplay between determining the existence of a duty, which is the responsibility of the court, and determining how a duty can be met, which can be addressed by an expert:

> In *Gabrielson v. Warnemunde*, we reversed a court of appeals ruling that expert testimony as to industry custom established a legal duty. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 545 (Minn.1989). We held that the testimony by an experienced insurance agent as to necessary skill and care in renewing an insurance policy, "while important in establishing a standard of care, does not by itself establish a legal duty to exercise that care for the benefit of the insured." *Id*. Our analysis here is similar: the evidence of industry custom would be relevant as to a standard of care, but did not establish a duty on the part of Sentry to ServiceMaster.

Focus on Minnesota Law

The main case in Minnesota where the court found that a special relationship heightened duty to advise existed between an insurance agent and an insurance customer is *Osendorf v. American Family*, 318 N.W.2d 237 (Minn.1982). In *Osendorf*, the insurance agent was held liable for negligence in failing to advise the insurance customer to obtain other needed coverage during the ten-year period the policy was in effect. *Osendorf*, 318 N.W.2d at 238. The insurance customer was a farmer who because of his limited education could not read much of his insurance policy and therefore relied on his agent to help select the proper coverage. *Id.* His first agent misrepresented to him that part-time farm workers would be covered under the policy. *Id.* In fact, they were excluded. *Id.* His second agent, whom he sued, serviced the policy for ten years, making ten visits to the farm. *Id.* The Court held that the agent was aware or should have been aware that the farmer employed part-time workers, who were not covered by the policy, and that he should have advised the insurance customer of this gap in coverage. *Id.*

In a later case, the court explained that liability was imposed in *Osendorf* partly because of the misrepresentation of the first insurance agent. *See Johnson v. Urie*, 405 N.W.2d at 889. In *Johnson v. Urie* the court identified other special circumstances in *Osendorf* which supported the existence of a special duty of the agent to update the policy and these included: (1) that the agent **knew** that the insurance customer was unsophisticated in insurance matters, (2) that the agent **knew** that the insurance customer was relying upon the agent to provide appropriate coverage, and (3) that the agent **knew** that the insurance customer needed protection from claims of part time farm laborers. *Johnson v. Urie*, 405 N.W.2d at 889-90. Furthermore, in *Osendorf* the insurance agent **admitted** in that case that he had a duty to update the insurance customer's insurance coverage. *See Osendorf*, 318 N.W.2d at 238.

In *Scottsdale*, the court indicated that a special relationship could exist if the insurance customer asks the agent to examine the insurance customer's insurance coverage. *Scottsdale Ins. Co.*, 671 N.W.2d 186, at 196. In another case, the court indicated that there is no special relationship when there is no delegation of decision-making authority and no lack of sophistication on the part of the

insurance customer. *See Beauty Craft Supply & Equip. Co. v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101 (Minn. App. 1992) ("Special circumstances may arise when the insured delegates decision-making authority to the agent and the agent acts as an insurance consultant." *Id.* at 101-102).

3) Jurisdictions that do not adhere to the normal order-taker standard of care with the special relationship limited exception.

Arizona

The standard of care placed on insurance agents in Arizona is a case by case analysis. There is no standard duty, and possibly a heightened affirmative duty to advise. ***See Madison Alley Transportation & Logistics Inc. v. W. Truck Ins. Co.,*** No. CV-17-03038-PHX-SMB, 2019 WL 3017621, (D. Ariz. July 10, 2019); ***Fink v. Brown & Brown Program Insurance Services Incorporated***, 2018 WL 1744999 (D.Ariz., 2018) (April 11, 2018); & ***BNCCORP, Inc. v. HUB Int'l Ltd.***, 243 Ariz. 1, 400 P.3d 157, 165 (Ct. App. 2017), review denied (Mar. 20, 2018).

Connecticut

The standard of care placed on insurance agents in Connecticut is a heightened duty to advise of the "kind and extent of desired coverage". *See* ***Syed Sons II, Inc. v. Scottsdale Ins. Co.***, No. HHDCV186092251S, 2018 WL 6982682, at *5 (Conn. Super. Ct. Dec. 10, 2018); ***Pine Orchard Yacht & Country Club, Inc. v. Sinclair Ins. Grp., Inc.***, No. CV126032519, 2017 WL 3080801, at *7 (Conn. Super. Ct. June 12, 2017); and ***Dimeo v. Burns, Brooks & McNeil, Inc.***, 6 Conn.App. 241, 504 A.2d 557, 559 (1986).

Florida

The standard of care placed on insurance agents in Florida is a heightened order taker standard of care with sometimes a heightened duty to advise included. ***See Goldberg as Tr. of Rothstein Rosenfeldt Adler, P.A. v. Aon Risk Servs., Ne., Inc.***, No. 13-21653-CIV, 2018 WL 6266512, at *7 (S.D. Fla. Sept. 12, 2018), report and recommendation adopted sub nom. *Goldberg v. Aon Risk Servs. Ne., Inc.*, No. 13-21653, 2018 WL 6259616 (S.D. Fla. Sept. 27, 2018); ***Kendall S. Med. Ctr., Inc. v. Consol. Ins. Nation, Inc.***, 219 So. 3d 185, 188-189 (Fla. Dist. Ct. App. 2017); & ***Adams v. Aetna Cas. & Sur. Co.***, 574 So. 2d 1142, 1155 (Fla. Dist. Ct. App. 1991).

Georgia

The standard of care placed on insurance agents in Georgia is a heightened order taker standard of care with sometimes a heightened duty to advise included. ***See Bush v. AgSouth Farm Credit, ACA***, 346 Ga. App. 620, 627–28, 816 S.E.2d 728, 736 (2018), cert. denied (Mar. 4, 2019); ***Cottingham & Butler, Inc. v. Belu***, 332 Ga. App. 684, 687–88, 774 S.E.2d 747, 750–51 (2015); & ***MacIntyre & Edwards, Inc. v. Rich***, 267 Ga. App. 78, 80 (2004).

However, a March 2020 case indicated the insurance customer had duty to read the customer's policy; this duty is only abrogated if the insurance agent has a special relationship with the insurance customer; had insurance customer read the policy the insurance customer would have known there was no coverage under the policy; and this defeats insurance customer's negligent and negligent misrepresentation claims against insurance agent. ***See Martin v. Chasteen***, 354 Ga. App. 518, 521–22, 841 S.E.2d 157, 161 (March 13, 2020).

Hawaii

The standard of care placed on insurance agents in Hawaii sometimes includes a heightened duty to advise and the analysis is on a case by case basis. ***Aquilina v. Certain Underwriters at Lloyd's Syndicate #2003***, 406 F. Supp. 3d 884, 919 (D. Haw. 2019); ***Am. Auto. Ins. Co. v. Hawaii Nut & Bolt, Inc.,*** No. CV 15-00245 ACK-KSC, 2017 WL 4079522, at *7 (D. Haw. Sept. 14, 2017); ***Certain Underwriters at Lloyd's London Subscribing to Policy No. LL001HI0300520 v. Vreeken***, 133 Haw. 449, 329 P.3d 354 (Ct. App. 2014); ***Macabio v. TIG Ins. Co.***, 87 Haw. 307, 318–19, 955 P.2d 100, 111–12 (1998); & ***Quality Furniture, Inc. v. Hay***, 61 Haw. 89, 93, 595 P.2d 1066, 1069 (1979).

Idaho

The standard of care placed on insurance agents in Idaho is a heightened duty to advise. ***See Lynch v. N. Am. Co. for Life & Health Ins.***, No. 1:16-CV-00055-CWD, 2016 WL 3129107, at *3–4 (D. Idaho June 2, 2016); & ***McAlvain v. Gen. Ins. Co. of Am.***, 97 Idaho 777, 780, 554 P.2d 955, 958 (1976).

Michigan

The standard of care placed on insurance agents in Michigan is possibly a heightened duty to advise. ***See Deremo v. TWC & Assocs., Inc.***, No. 305810, 2012 WL 3793306, at *3 (Mich. Ct. App. Aug. 30, 2012 ("Thus, because TWC's agents are independent agents, *Genessee* governs, and they owed Croad a duty to provide him with the most comprehensive coverage and ensure that the insurance contract properly addressed his needs."); & ***Genesee Foods Servs., Inc. v. Meadowbrook, Inc.,*** 279 Mich. App. 649, 656, 760 N.W.2d 259, 263 (2008).

However, several more recent unpublished decisions of the Michigan Court of Appeals have issued opinions dealing with independent insurance agents where they followed the older ***Harts*** decision and did not strictly follow ***Genesee Foods*** and ***Deremo***. In addition two cases from 2020 undercut the duties placed on insurance agents under Michigan law.

See Loney v. Sleeva, No. 345655, 2020 WL 262898, at *4 (Mich. Ct. App. Jan. 16, 2020), appeal denied, 949 N.W.2d 680 (Mich. 2020), where the court ruled the insurance customer had a duty to read policy and this defeated any claims against agent.

See also Hassanein v. Encompass Indem. Co., No. 347544, 2020 WL 5495210, at *10 (Mich. Ct. App. Sept. 10, 2020), where the court recognized general duty only to procure insurance specifically requested by insurance customer as well as exception to general rule if special circumstances existed that gave rise to a special relationship heightened duty to advise. Court found that agent had no duty to advise when insurance customer did not provide adequate information to agent so that agent could provide advice. Court also ruled that expert cannot establish standard of care or duty and that it is the court that determines which duty to apply on undisputed facts.

Montana

The standard of card placed on insurance agents is usually the order taker standard of care but can be elevated to heightened duty to advise and the analysis of when duty is heightened is on a case by case basis. ***See Pedersen v. State Farm Mutual Automobile Insurance Company***, 2020 WL 2850137, at *6 (D.Mont., June 2, 2020).

New Jersey

The standard of care placed on insurance agents in New Jersey is possibly a heightened duty to advise. ***See Luzzi v. HUB International Northeast Ltd.,*** 2018 WL 3993450 (D.N.J., 2018) (August 21, 2018). The court in this case found there was a duty to advise stating that the agent "had a duty to ascertain the customer's needs and recommend appropriate coverage."

Pennsylvania

The standard of care placed on insurance agents in Pennsylvania is a heightened duty to advise. ***See Allegrino v. Conway E & S, Inc.***, No. CIV. A. 09-1507, 2010 WL 1854125, at *8 (W.D. Pa. May 5, 2010); ***Decker v. Nationwide Ins. Co.***, 83 Pa. D. & C.4th 375, 380–81 (Com. Pl. 2007); ***Amendolia v. Rothman***, No. CIV.A. 02-8065, 2003 WL 23162389, at *5 (E.D. Pa. Dec. 8, 2003); &***Swantek v. Prudential Prop. & Cas. Ins. Co.,*** 48 Pa. D. & C.3d 42, 47 (Pa. Com. Pl. 1988)

Virginia

The standard of care placed on insurance agents in Virginia is arguably only a strict breach of contract standard. ***See Lexcorp v. W. World Ins. Co.***, No. 4:10CV00027, 2010 WL 3855305, at *5 (W.D. Va. Oct. 1, 2010); ***& Filak v. George,*** 267 Va. 612, 618–19, 594 S.E.2d 610, 613–14 (2004).

Washington D.C.

The standard of care placed on insurance agents in Washington D.C. is potentially a heightened duty to advise standard. ***See Saylab v. Don Juan Rest., Inc.***, 332 F. Supp. 2d 134, 146-147 (D.D.C. 2004)

West Virginia

In West Virginia there is no special relationship heightened duty to advise under any circumstances. ***See Mine Temp, LLC v. Wells Fargo Ins. Servs. of W. Virginia, Inc.***, No. 18-0755, 2019 WL 5692296 (W. Va. Nov. 4, 2019); ***Gemini Ins. Co. v. Sirnaik, LLC***, No. 2:18-CV-00424, 2019 WL 5212905 (S.D.W. Va. Oct. 16, 2019); ***Bound v. State Farm Mut. Auto. Ins. Co.***, No. 1:19CV39, 2019 WL 2437469 (N.D.W. Va. June 11, 2019).

4) 2020 Agent Standard of Care Cases

IAN DANIELS, et al. v. SCOTTSDALE INSURANCE CO., et al., 2020 WL 7183365, at *4 (E.D.La., Dec. 7, 2020) – court affirmed order taker standard stating:

> In Louisiana, "an insurance agent owes a duty of 'reasonable diligence' to [its] customer" which "is fulfilled when the agent procures the insurance requested." *Isidore Newman Sch. v. J. Everett Eaves, Inc.*, 42 So. 3d 352, 356 (La. 2010) (citations omitted). "[A]n insured has a valid claim against the agent when the insured demonstrates that: 1) the insurance agent agreed to procure the insurance; 2) the agent failed to use 'reasonable diligence' in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain insurance[;] and 3) the agent acted in such a way that the client could assume he was insured." *Id*. at 356-57 (quotations marks and citation omitted). Accordingly, the insured has the responsibility to request the type and amount of insurance coverage needed, whereas the agent has no "obligation to spontaneously or affirmatively identify the scope or the amount of insurance coverage the client needs." *Id*. at 359.

MARK BIEGLER, Plaintiff, v. G.M.I. N.A. INC. D/B/A GMI INSURANCE; UNDERWRITING SERVICE MANAGEMENT COMPANY, LLC; UNITED SPECIALTY INSURANCE COMPANY, and DOES 1-10*, Defendants*, 2020 WL 7209151, at *5 (D.Mont., December 7, 2020):

> Under Montana law, "an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure." *Monroe v. Cogswell Agency*, 234 P.3d 79, 86 ¶ 31 (Mont. 2010). Biegler's negligence claims against GMI (Counts I, IV and V) all fail for the simple reason that GMI provided Fleetlogix with the primary coverage Biegler requested. (Doc. 1 at ¶ 17). GMI's motion to dismiss will be granted as to Counts I, IV, and V of the complaint.

STANLEY K. RYAN and NORMA K. RYAN, Plaintiffs-Appellants, v. COUNTRY MUTUAL INSURANCE COMPANY and JEFF PEABODY, Defendants-Appellees., 2020 IL App (5th) 190206-U, ¶ 36, 2020 WL 7233488, at *6 (Ill.App. 5 Dist., Dec. 4, 2020) – appellate court ruled there remained a genuine issue of material fact as to whether the plaintiffs reasonably could have been expected to determine the extent of their coverage by simply reading their policy, and thus summary judgment based on statute of limitations period addressed in *Krop case* (*Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556, ¶ 4, 120 N.E.3d 982, 985, reh'g denied (Nov. 26, 2018)) was not appropriate. [Notably there was a dissent in this case that ruled completely opposite].

Glob. Diversity Logistics LLC v. Hebson Ins. Agency Inc., No. CV-20-01035-PHX-DLR, 2020 WL 7075351, at *1 (D. Ariz. Dec. 3, 2020) – addressed procedure under Arizona law for requiring expert opinion regarding insurance agent stand of care, and court ultimately ruled plaintiff must produce expert affidavit establishing standard of care:

> Under Arizona law, a plaintiff who brings an action against a licensed professional must certify "whether or not expert opinion testimony is necessary to prove the

> licensed professional's standard of care or liability for the claim." A.R.S. § 12-2602(A). If the plaintiff certifies that expert opinion testimony is not necessary, but the defendant licensed professional disagrees, the defendant may move the court for an order requiring the plaintiff to obtain and serve a preliminary expert opinion affidavit. Id. at (D). If the court concludes that expert testimony will be needed, it must set a date and time for the plaintiff to comply. Id. at (E). If the plaintiff fails to do so, the court must dismiss the case without prejudice. Id. at (F).
>
> In Arizona, "[a]n insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance." Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388, 402 (Ariz. 1984) (citation and quotation omitted). In a case alleging a breach of this duty, "proof of the standard of care ... may require expert testimony at trial." Id. at 403. Consistent with § 12-2602(A), GDL certified that expert opinion testimony will not be necessary to prove Hebson's standard of care or liability for the claim. Hebson, however, disagrees and moves the Court for an order requiring GDL to produce a preliminary expert opinion affidavit. (Doc. 17.)

Broecker v. Conklin Prop., LLC, No. 2018-11587, 2020 WL 7053523, at *1 (N.Y. App. Div. Dec. 2, 2020) – court affirmed order-taker standard of care under New York law:

> An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time, or to inform the client of the inability to do so. Thus, the duty is defined by the nature of the client's request" (*Verbert v. Garcia*, 63 A.D.3d 1149, 1149, 882 N.Y.S.2d 259 [citations omitted]; *see Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972).

ACCIDENT FUND INSURANCE COMPANY OF AMERICA, Plaintiff, v. CUSTOM MECHANICAL CONSTRUCTION, INC., & DANNY COPE, Defendants. CUSTOM MECHANICAL CONSTRUCTION, INC., Counter Claimants, No. 316CV00251RLYMPB, 2020 WL 7027874 (S.D. Ind. Nov. 30, 2020) – court addressed both order taker standard of care and special relationship heightened duty to advise finding that there were questions of fact precluding summary judgment for or against agent. The court noted:

> [A] jury could reasonably conclude such a "special relationship" exists, especially considering Sublett served as Custom Mechanical's insurance agent for more than 10 years, met three to four times a year with its management to discuss coverage, held himself out as an expert, and affirmatively sought out cheaper policies. See Cook, 463 N.E.2d at 528 – 29. The court cannot say a "special relationship" did not exist as a matter of law, so a jury must decide this issue. Indiana Restorative Dentistry, 27 N.E.3d at 265 – 67 (noting existence of special relationship is a mixed question of law and fact).
>
> *Id*. at *11

STEPHEN F. WORDEN, Plaintiff & Appellant, v. FARMERS FIRE INSURANCE EXCHANGE et al., Defendants & Respondents. Additional Party Names: Matthew Hague Ins.

Agency, No. A156876, 2020 WL 6879333 (Cal. Ct. App. Nov. 24, 2020). Court ruled normal order taker standard of care and no special circumstances giving rise to a special relationship duty to advise. The court stated. "Accordingly, the courts have uniformly rejected the assertion that insurers and their agents owe a 'duty' to ensure that a policy will provide full coverage for an insured loss"…; and "[t]he trial court therefore correctly concluded the general rule applies here and defendants owed no special duty to assure that Worden carried full replacement cost coverage." *Id*. at *5, 9.

Rains v. CSAA Fire & Cas. Ins. Co., No. 20-CV-0400-CVE-FHM, 2020 WL 6729085, (N.D. Okla. Nov. 16, 2020) – court found order taker standard applied but that there were questions of fact if agent met order taker duty as a matter of law.

Platte River Power Auth. v. Gallagher Benefit Servs., Inc., No. 20-CV-02353-CMA-MEH, 2020 WL 6281596, (D. Colo. Oct. 27, 2020) – court stated that generally order taker standard of care applied but special circumstances could give rise to special relationship heightened duty to advise, and that insurance customer adequately pled claim for special relationship heightened duty to advise – "The general rule under Colorado law is that an insurance agent does not have an affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy absent a special relationship." *Id*. at 5.

Ginn v. Mut. of Omaha Ins. Co., No. CV208590DMGAGRX, 2020 WL 6161508, at *4 (C.D. Cal. Oct. 20, 2020) – court recognized both normal order taker standard of care and possibility for heightened special relationship duty to advise standard of care, and found insurance customer adequately (although just barely so) plead claims against insurance agent.

Troth v. Warfield, No. 3:19-CV-1106-JD-MGG, 2020 WL 6149801, at *3 (N.D. Ind. Oct. 20, 2020) – court found insurance customer adequately plead special relationship heightened duty to advise claim against insurance agent.

Fansler v. N. Am. Title Ins. Co., No. CV N17C-09-015 EMD, 2020 WL 5805653 (Del. Super. Ct. Sept. 29, 2020) – court addressed when an expert is needed to establish standard of care.

Hanick v. Ferrara, 2020 -Ohio- 5019, 2020 WL 6193960 (Ohio App. 7 Dist., Sept. 28, 2020) - court noted that sometimes expert testimony is required to show breach of the standard of care by an insurance agent and sometime no expert testimony is required.

Heidingsfelder v. Ameriprise Auto & Home Ins., No. 19-CV-08255-JD, 2020 WL 5702111, at *3 (N.D. Cal. Sept. 24, 2020) – court recognized both normal general order taker standard of care and potential for heightened special relationship duty to advise but found plaintiff insurance customer's current complaint did not adequately plead claims against defendant insurance agent; however court granted plaintiff insurance customer leave to amend the complaint to fix pleading deficiencies.

Miller by & through Miller v. Allianz Life Ins. Co. of N. Am., No. 5:20-CV-00930, 2020 WL 5653548, (N.D. Ohio Sept. 23, 2020) – court granted motion to dismiss in favor of insurer and agent finding as to agent that complaint did not adequately pled claims against agent and that generally agents are nor fiduciaries to their insurance customers.

Hare v. Allstate Prop. & Cas. Ins. Co., No. 1:20-CV-209-JB-C, 2020 WL 5647488, at *3 (S.D. Ala. Sept. 22, 2020) Court first stated that "[g]enerally, an insurance agent's duty does not exceed the procurement of requested insurance unless a plaintiff can show a confidential relationship or special circumstances giving rise to more." Court then recognized that sometimes there are special circumstances giving rise to a special relationship to advise/disclose, but after a detailed thorough analysis the court determined as a matter of law that there were not special circumstances giving rise to a special relationship duty to advise/disclose.

Lost Lake Distillery, LLC v. Atain Ins. Co., No. 346552, 2020 WL 5582239, at *3 (Mich. Ct. App. Sept. 17, 2020) – agent only required to procure insurance specifically requested by insurance customer, and in this case agent met that standard.

Alabassi v. T.I.B. Ins. Brokers, Inc., 825 F. App'x 593, 596 (10th Cir. Sept. 17, 2020) – under Colorado law 10th Circuit Court of Appeals ruled that the district court did not err by concluding that expert testimony was necessary to prove insurance customer's claim that the insurance agent failed to use reasonable care in providing insurance customer with adequate insurance coverage; and that the district court did not err by granting summary judgment for agent on the ground that expert testimony was necessary to prove insurance customer's negligence claim and insurance customer failed provide this expert testimony. The court ruled that an insurance agent's standard of care must be established by expert testimony when the applicable standard "is outside the common knowledge and experience of ordinary persons."

Murray v. UPS Capital Ins. Agency, Inc., 54 Cal. App. 5th 628, 651, 269 Cal. Rptr. 3d 93, 112 (Sept. 11, 2020), as modified on denial of reh'g (Oct. 5, 2020) – detailed analysis of special relationship heightened duty to advise where court ultimately found there were material questions of fact precluding summary judgment in favor of insured.

Fairchild v. Fairchild, No. 3:18CV623-GCM, 2020 WL 5502314, at *3 (W.D.N.C. Sept. 11, 2020) - under North Carolina law "[a]n insurance agent's fiduciary duty is limited to procuring insurance for an insured, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage." Nevertheless, court found that insurance customer sufficiently pled facts that "plausibly alleges a relationship of trust and confidence between" the agent and the insurance customer and that the agent "took advantage of those relationships for his own benefit."

Hassanein v. Encompass Indem. Co., No. 347544, 2020 WL 5495210, at *10 (Mich. Ct. App. Sept. 10, 2020) – court recognized general duty only to procure insurance specifically requested by insurance customer as well exception to general rule if special circumstances existed that gave rise to a special relationship duty to advise. Court found that agent had no duty to advise when insurance customer did not provide adequate information to provide advice. Court also ruled that expert cannot establish standard of care or duty and that it is the court that determines which duty to apply on undisputed facts.

Johnson v. Smith Bros. Ins. LLC, No. 2020-101, 2020 WL 5269927, (Vt. Sept. 4, 2020) – court applied normal general order taker standard of care and found agent met this standard of care.

Westfield Insurance Company v. Sistersville Tank Works, Inc., 2020 WL 5351596 (N.D.W.Va., Sept. 4, 2020) - court found agent cannot be held liable for failing to procure coverage on behalf

of insurance customer when court found, as a matter of law, that coverage exists under the policy at issue.

Westcott Enterprises, Inc. v. Federated Mut. Ins. Co., No. 20CV7-LAB (BGS), 2020 WL 5232519, (S.D. Cal. Sept. 2, 2020) - court found that insurance customer sufficiently pled claims against insurance agent in order to defeat motion to dismiss.

D C Custom Freight, LLC v. Tammy A. Ross & Assocs., Inc., 848 S.E.2d 552, 557 (N.C. Ct. App. Sept. 1, 2020) - Court found: 1) insurance agent's failure to procure insurance coverage for short-term rental trucks did not constitute a violation of agent's duty to use reasonable skill, care, and diligence in procuring insurance for insured; 2) insurance agent's failure to procure insurance coverage for short-term rental trucks was not a breach of contract; 3) insured did not rely on insurance agent's alleged misrepresentation to support UDTP claim; and 4) any reliance by insured in insurance agent's alleged misrepresentation as to scope of insurance coverage was unreasonable.

> An insurance agent's duty in procuring insurance is limited to securing the coverage that the policyholder has requested. *Baggett v. Summerlin Ins. and Realty, Inc.*, 143 N.C. App. 43, 50-51, 545 S.E.2d 462, 467 (Tyson, J., dissenting), rev'd for reasons stated in the dissent, 354 N.C. 347, 554 S.E.2d 336 (2001). Failure to recommend additional insurance to cover a risk faced by the policyholder does not constitute negligence. *See Baldwin v. Lititz Mut. Ins. Co.*, 99 N.C. App. 559, 562, 393 S.E.2d 306, 308 (1990) (no reasonable expectation that defendant insurance agent recommend or procure coverage for home after builder's policy lapsed at completion of construction); *Phillips by Phillips v. State Farm Mut. Auto. Ins. Co.*, 129 N.C. App. 111, 113, 497 S.E.2d 325, 327 (1998) (insurance agent had no duty to inform client that increasing liability coverage limits would make him eligible for uninsured motorist coverage).

Id. at 557.

Pratt v. Safeco Ins. Co. of Am., No. CIV-20-93-D, 2020 WL 4735350, at *2 (W.D. Okla. Aug. 14, 2020) – court ruled under Oklahoma law an insurance agent does not owe a fiduciary duty to prospective customer or established customer:

> Under Oklahoma law, an insurer does not owe a fiduciary duty to an insured. In fact, "[t]here are no Oklahoma cases holding that an insurance agent owes a fiduciary duty to a prospective insured, or to an established customer with respect to procurement of an additional policy." *Swickey v. Silvey Cos.*, 979 P.2d 266, 269 (Okla. Civ. App. 1999). Recognizing that transactions between an insurer and insured are at an arms' length, the Oklahoma Supreme Court noted that the parties "[do] not stand vis-à-vis each other in any recognized form of special relationship." *Silver v. Slusher*, 770 P.2d 878, 882 n.11 (Okla. 1988); *see also Cosper v. Famers Ins. Co.*, 309 P.3d 147, 150 (Okla. Civ. App. 2013). Defendant directs the Court to *Slover v. Equitable Variable Life Ins. Co.*, 443 F. Supp. 2d 1272, 1281 (N.D. Okla. 2006) *and Latta ex rel. Latta v. Great American Life Ins. Co.*, 60 F. App'x 219, 220–21 (10th Cir. 2003). Both cases hold that Oklahoma does not recognize a fiduciary relationship between an insurer and insured.

Johnson v. U.S. Title Agency, Inc., 2020-Ohio-4056, ¶ 49, 2020 WL 4719287 (August 13, 2020, Slip Copy) - an insurance agent has a duty to exercise ordinary care, and is negligent when it fails to procure requested insurance.

Gunderson v. Liberty Mut. Ins., 2020 MT 197N, ¶¶ 26-27, 468 P.3d 367 (August 4, 2020) - an insurance agent owes a duty to obtain the insurance coverage which an insured directs the agent to procure; and Montana have never recognized a heightened duty of care to advise under circumstance of this case.

Shelter Ins. Co. v. Gomez, 306 Neb. 607, 616, 947 N.W.2d 92, 99 (July 31, 2020) – court dismissed claims against agent stating "an insurance agent has no duty to anticipate what coverage an insured should have.... Rather, when an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance." (Citing *Hansmeier v. Hansmeier*, 25 Neb. App. 742, 752, 912 N.W.2d 268, 275-76 (2018)).

Parducci v. Overland Sols., Inc., No. 18-CV-07162-WHO, 2020 WL 4193368, at *4 (N.D. Cal. July 21, 2020) – under California law court analyzed difference between normal order taker standard of care and special relationship heightened duty to advise standard of care:

> "At a minimum, an insurance agent has a duty to use reasonable care, diligence, and judgment in procuring the insurance requested by its client." *Kurtz, Richards, Wilson & Co. v. Ins. Communicators Mktg. Corp.*, 12 Cal. App. 4th 1249, 1257, (1993), *modified* (Feb. 5, 1993). The general rule is that "an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage." *Fitzpatrick v. Hayes*, 57 Cal. App. 4th 916, 927 (1997), *as modified* (Oct. 16, 1997). "The rule changes, however, when—but only when—one of the following three things happens": "(a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided"; "(b) there is a request or inquiry by the insured for a particular type or extent of coverage"; or "(c) the agent assumes an additional duty by either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured." *Id.*

The court found that the insurance customer did not adequately plead claims against the insurance customer but granted insurance customer leave to amend complaint to fix deficiencies in complaint.

Roadrunner Transportation Servs., Inc. v. Bob White Express, Inc., No. 5:17-CV-457-JKP, 2020 WL 4188609, at *7 (W.D. Tex. July 21, 2020) – court analyzed standard of care placed on insurance agents under Texas law but sua sponte raised question of whether insurance customer's negligence claim against insurance agent was barred based on the economic loss doctrine.

Ladner Investments Inc. v. Michael Conway Inc., 301 So. 3d 86, 96 (Miss. Ct. App. July 21, 2020) – court found insurance customer had duty to read policy; had insurance customer read policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's negligent and negligent misrepresentation claims against insurance agent. (*Citing Mladineo v. Schmidt*, 52 So. 3d 1154, 1166 (Miss. 2010)).

Garcia v. United of Omaha Life Ins. Co., No. 120CV00043MSMPAS, 2020 WL 3895918, at *3 (D.R.I. July 10, 2020) – court ruled under normal circumstances an insurance agent does not owe a fiduciary duty to an insurance customer; "a heightened duty arises only when special circumstances of assertion, representation, and reliance are present such as when the agent has a longstanding relationship with the client, holds herself out as the client's insurance advisor, or is paid separately for her advice"; and that the insurance customer "alleged no such 'special circumstances' that plausibly could give rise to a heightened duty", even though it was alleged that the insurance agent assisted the insurance customer's decedent with an application form due to a language barrier.

Crook v. Allstate Indem. Co., No. 1180996, 2020 WL 3478552, (Ala. June 26, 2020) - court found insurance customer had duty to read policy; had insurance customer read policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's claims against insurance agent.

State Farm Life Ins. Co. v. Landfried, No. 519CV01845SVWSHK, 2020 WL 5356706, (C.D. Cal. June 25, 2020) – analyzing California law court set forth general order taker standard of care and special relationship heightened duty to advise exception to general order taker standard of care; and court found insurance customer sufficiently pled claims against insurance agent.

Bogus v. GEICO Indem. Co., 468 F. Supp. 3d 1178, 1182 (D. Ariz. June 23, 2020) - court analyzed insurance agent's duty to inform insurance customer about UM/UIM coverage under Arizona statute addressing this, and found that agent met this duty.

Hale v. Country Mut. Ins. Co., No. 3:19-CV-06059-RBL, 2020 WL 3433086, (W.D. Wash. June 23, 2020) - analyzing Washington law court set forth general order taker standard of care and special relationship heightened duty to advise exception to general order taker standard of care; and court found insurance customer sufficiently pled claims against insurance agent.

Ping Yew v. FMI Ins. Co., No. A-4947-18T3, 2020 WL 3408766, at *3 (N.J. Super. Ct. App. Div. June 22, 2020), cert. denied, No. 084876, 2020 WL 6927551 (N.J. Nov. 20, 2020) – insurance customer did not establish a basis for finding a special relationship that would give rise to a duty to inform the insurance customer of the need to buy sump pump coverage.

Gibson & Cushman Contracting, LLC v. Cook Maran & Assocs., Inc., 184 A.D.3d 755, 126 N.Y.S.3d 156, 158, leave to appeal dismissed, 35 N.Y.3d 1108, 132 N.Y.S.3d 722 (June 17, 2020) – court ruled that an insurance agent has a duty to obtain requested coverage for an insurance customer within a reasonable amount of time, or to inform the insurance customer of the inability to do so; and at a minimum allegations in the insurance customer's complaint sufficiently pled that insurance coverage provided to insurance customer did not comport with the insurance customer's request for coverage.

Pedersen v. State Farm Mutual Automobile Insurance Company, 2020 WL 2850137, (D.Mont., June 2, 2020) - the standard of care placed on insurance agents is usually the order taker following instructions standard of care, but standard of care can be elevated to heightened duty to advise, and the analysis of when duty is heightened is on a case by case basis. The insurance customer alleged that insurance agents had a duty to explain and offer UIM coverage because their agents had "encouraged [them] to trust, value and rely on their specialized insurance knowledge" and

they "relied on [their] agent[s] for advice on which coverages were necessary to protect [them] from catastrophic losses and damages. Analyzing the special relationship heightened duty to advise under what the court considered to be a first impression for a court applying Montana law, that court ruled that the insurance customer sufficiently pled a special relationship that could give rise to an obligation to explain and offer UIM coverage.

Vestal v. Pontillo, 183 A.D.3d 1146, 124 N.Y.S.3d 441, 446 (May 21, 2020) – court address situation involving when an agent may owe a duty to non-customer third party intended beneficiary:

> An insurance agent ordinarily does not owe a duty of care to a nonclient; however, where an agent's negligence results in an insured being without coverage, the agent may be liable for damages sustained by an injured third party if the third party was the intended beneficiary of the insurance contract and "the bond between [the agent and the third party is] so close as to be the functional equivalent of contractual privity" (*Ossining Union Free School Dist. v. Anderson LaRocca Anderson,* 73 N.Y.2d 417, 419, 541 N.Y.S.2d 335, 539 N.E.2d 91 [1989]; *see Vestal v. Pontillo*, 158 A.D.3d 1036, 1039, 72 N.Y.S.3d 610 [2018]; *Henry v. Guastella & Assoc.*, 113 A.D.2d 435, 438, 496 N.Y.S.2d 591 [1985], *lv denied* 67 N.Y.2d 605, 501 N.Y.S.2d 1024, 492 N.E.2d 794 [1986]). The functional equivalent of privity may be found, as relevant here, where the defendants are aware that their representations are "to be used for a particular purpose," there was "reliance by a known party or parties in furtherance of that purpose" and there is "some conduct by the defendants linking them to the party or parties and evincing [the] defendant[s'] understanding of their reliance" (*Ossining Union Free School Dist. v. Anderson LaRocca Anderson*, 73 N.Y.2d at 425, 541 N.Y.S.2d 335, 539 N.E.2d 91; *see Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 551, 493 N.Y.S.2d 435, 483 N.E.2d 110 [1985], *amended* 66 N.Y.2d 812, 498 N.Y.S.2d 362, 489 N.E.2d 249 [1985]).

The court ultimately ruled that prior to the issuance of the policy, the agent did not engage in any conduct that linked them to the plaintiff or evidenced their understanding of plaintiff's reliance on the agent; thus all claims against the agent were dismissed.

Sang v. Smith, No. 19-CV-00686-GKF-FHM, 2020 WL 6472683, (N.D. Okla. May 19, 2020) – court ruled order taker standard of care generally applied to insurance agent and that insurance customer sufficiently pled order taker negligence claim against insurance agent.

Burt v. Delmarva Sur. Assocs., Inc., No. 3417, SEPT.TERM,2018, 2020 WL 2091748, (Md. Ct. Spec. App. Apr. 30, 2020), cert. denied sub nom. Delmarva Sur. Assoc. v. Burt, 470 Md. 212, 235 A.3d 34 (2020) – court ruled there were questions of fact precluding summary judgment on insurance customer's negligent misrepresentation claim and special relationship heightened duty to advise claim against insurance agent.

Wood v. State Farm Fire & Cas. Co., No. 2019-CA-000462-MR, 2020 WL 1898401 (Ky. Ct. App. Apr. 17, 2020) – court ruled there were not special circumstances giving rise to a special relationship heightened duty to advise and court declined to impose upon insurance agents a duty to inform insurance customers of insurance company's intention not to renew an insurance policy.

McAlpin v. Am. Gen. Life Ins. Co., 601 S.W.3d 188, 194 (Ky. Ct. App. April 3, 2020) – court affirmed trial court's dismissal on summary judgment of insurance customer's negligent misrepresentation claim and special relationship heightened duty to advise claim against insurance agent.

Henry v. Am. Church Grp. of Arizona, LLC, No. 2 CA-CV 2019-0042, 2020 WL 1650642 (Ariz. Ct. App. Apr. 2, 2020) – court ruled because plaintiffs were not the agent's insurance customers, there can be no duty absent a special relationship between them; and the court further ruled there was not a special relationship between the plaintiffs and the agent.

Live Face on Web, LLC v. Merchants Ins. Grp., No. 2:19-CV-00528-JDW, 2020 WL 1550758 (E.D. Pa. Apr. 1, 2020) – court addressed what is the standard of care for insurance agents under Pennsylvania law but found there were questions of fact whether the agent breached the standard of care in this case:

> Pennsylvania law imposes on insurance agents a duty to obtain the coverage that a reasonably prudent insurance professional would have obtained under the circumstances." Under Pennsylvania law, an "insurance broker is under a duty to exercise the care that a reasonably prudent businessman in the brokerage field would exercise under similar circumstances." *Indus. Valley Bank & Tr. Co. v. Dilks Agency*, 751 F.2d 637, 640 (3d Cir. 1985) (quote omitted); *see also Berenato v. Seneca Specialy Ins. Co.*, 240 F. Supp.3d 351, 362 (E.D. Pa. 2017). Thus, Martin [the agent] owed Live Face [the insurance customer] a duty as a matter of law.

Kaufer v. Am. Auto. Ass'n of N. California, Nevada & Utah, No. A155801, 2020 WL 1546421 (Cal. Ct. App. Apr. 1, 2020) – court ruled insurance customers claims against insurance agent of professional negligence and breach of fiduciary duty, negligence, and misrepresentation/fraud/ and/or concealment could not withstand summary judgment.

Am. Loans, Inc. v. Arthur J. Gallagher & Co., No. 2:18-CV-00558, 2020 WL 1473995, at *3 (D. Utah Mar. 26, 2020) - court ruled that in "Utah, courts consider the totality of the circumstances to determine whether an insurance agent has assumed a duty to procure insurance." The court concluded that the agent procured the insurance that insurance customer had requested, that the agent had no duty to go beyond that request; and that accordingly, insurance customer's claim for failure to procure insurance failed. The court then also analyzed whether there were special circumstances that would invoke a special relationship heightened duty to advise but concluded there were not and thus not duty to advise.

Saks v. Government Employees Insurance Company, 2020 WL 1479143, (D.Ariz., March 26, 2020) – court found under Arizona law no duty placed on insurer "to inform policyholders of the coverages and relevant exclusions" in a policy sold by insurer to insurance customer; but noted that "Arizona has imposed on individual insurance agents a duty to uphold a certain standard of care." (*citing Darner Motor Sales, Inc. v. Univ. Underwriters Ins. Co.*, 682 P.2d 388, 403 (Ariz. 1984).

Pederson v. State Farm Mut. Auto. Ins. Co., No. CV 19-29-GF-BMM-JTJ, 2020 WL 4484720, at (D. Mont. Mar. 18, 2020), report and recommendation adopted sub nom. *Pedersen v. State Farm*

Mut. Auto. Ins. Co., No. CV-19-29-GF-BMM, 2020 WL 2850137 (D. Mont. June 2, 2020) – insurance customer alleged that insurance agents had a duty to explain and offer UIM coverage because their agents had "encouraged [them] to trust, value and rely on their specialized insurance knowledge" and they "relied on [their] agent[s] for advice on which coverages were necessary to protect [them] from catastrophic losses and damages. Analyzing the special relationship heightened duty to advise under what the court considered to be a first impression for a court applying Montana law, that court ruled that the insurance customer sufficiently pled a special relationship that could give rise to an obligation to explain and offer UIM coverage.

Merrick v. Fischer, Rounds & Assocs., Inc., 305 Neb. 230, 238, 939 N.W.2d 795, 802–03 (March 13, 2020) (citations and footnotes omitted) – court addressed standard of care applicable to insurance agents under Nebraska law:

> To prevail in any negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and resulting damages. An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence. When an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. An insurance agent has no duty to anticipate what coverage an insured should have. It is the duty of an insured to advise the agent as to the insurance he wants, including the limits of the policy to be issued.
>
> *In Polski v. Powers*, this court noted that although it may be good business for an insurance agent to make insurance coverage suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. We went on to hold that it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way.

Ultimately the court found under the facts of this case the agent did not breach the standard of care by not advising insurance customer about worker's compensation coverage, absent a specific request to do so, and the insurance customer's claims against the agent failed as a matter of law.

Martin v. Chasteen, 354 Ga. App. 518, 521–22, 841 S.E.2d 157, 161 (March 13, 2020) - court found insurance customer had duty to read policy; this duty is only abrogated if insurance agent has a special relationship with insurance customer; had insurance customer read the policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's negligent and negligent misrepresentation claims against insurance agent:

> Here, Martin [the insurance customer] has not shown the existence of a special relationship or other unusual circumstance that would have prevented or excused him from exercising ordinary diligence to ensure that insurance for the barn had been issued. Martin [the insurance customer] refers to his years of dealing and communicating with Chasteen [the insurance agent] on insurance matters, although

> we note that in his argument he has made no citations to specific parts of the record supporting this claim. See Court of Appeals Rule 25 (c) (2). Regardless, the fact "[t]hat two people have transacted business in the past and have come to repose trust and confidence in each other as the result of such dealings is not sufficient, in and of itself, to warrant a finding that a confidential relationship exists between them." *Canales*, 261 Ga. App. at 531 (1), 583 S.E.2d 203 (citation and punctuation omitted). We find that Martin has pointed to no facts demonstrating the existence of a "confidential relationship [or other unusual circumstances] between [him] and [Chasteen] that would have abrogated [Martin's] duty to read the policy." *Id*.

Wright v. State Farm Mut. Auto. Ins. Co., 443 F. Supp. 3d 789, 799 (W.D. Ky. March 11, 2020) – court addressed normal order taker standard of care and exceptions to the normal standard of care:

> Agent Morrill did not owe an affirmative duty under the policy or Kentucky law that would require her to contact Plaintiff and advise the policyholder of all coverages that are available. Agent Morrill did not expressly undertake to advise Plaintiff on the availability of UIM under Plaintiff's policy. Nor did Agent Morrill impliedly undertake to advise Plaintiff because Plaintiff did not pay Agent Morrill consideration beyond the mere payment of a premium, there is not a course of dealing which would put a reasonable insurance agent on notice that her advice is being sought and relied upon, and Plaintiff did not clearly request UIM coverage advice from Agent Morrill.

Toussie v. Allstate Ins. Co., No. 14-2705 (FB) (CLP), 2020 WL 1066251, at *3 (E.D.N.Y. Mar. 5, 2020) – court ruled that an agent could assume a duty to use due care in accepting and applying insurance customer's premium payments, but ultimately found that even if there was error in the agent applying the insurance customer's premium payment, this did not cause any damage to the insurance customer.

Sheahan v. State Farm Gen. Ins. Co., 442 F. Supp. 3d 1178, 1187 (N.D. Cal. March 4, 2020) – court addressed normal order taker standard of care and special relationship heightened duty to advise exception to the normal standard of care under California law, ultimately finding agent met applicable standard of care. "Absent an affirmative misrepresentation, the general rule is that an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage."

Jacobson v. Am. Family Ins. Co., No. CV-17-04373-PHX-MTL, 2020 WL 919173, at *1 (D. Ariz. Feb. 26, 2020) – court ruled that under the facts of this case that without an expert opinion no reasonable juror could find in favor of the plaintiffs on their negligence claim.

Vargas v. Safeco Ins. Co. of Illinois, No. 219CV01230GMNDJA, 2020 WL 929490, at *3 (D. Nev. Feb. 25, 2020) – court briefly addressed the applicable standard of care under Nevada law and ruled that insurance customer had sufficiently pled claims against insurance agent.

Baudy v. Adame, 441 F. Supp. 3d 293 (E.D. La. Feb 19, 2020) (citations and quotations omitted) - Under Louisiana law, while an insurance agent "does not have a duty to spontaneously identify a client's needs, an agent is still required to provide coverage for the client's specific concerns" and

"[s]imilarly, if a client directly informs the broker about a particular risk, reasonable diligence requires the broker to address that specific risk, and to determine which insurance company can provide the desired coverage."

Johnston v. Nationwide Mut. Ins. Co., 291 So. 3d 410, 417 (Miss. Ct. App. Feb. 18, 2020) – court ruled no duty to advise and further insurance customer had a duty to read policy that abrogated any claims against agent.

Am. Builders Ins. Co. v. Keystone Insurers Grp., Inc., No. 4:19-CV-01497, 2020 WL 583823, at *3 (M.D. Pa. Feb. 6, 2020) – court ruled that in context of filling out an insurance application that an insurance agent could still have a duty toward an insurance customer, even if that insurance customer signs a disclaimer as part of the application.

Purcell v. Farmers Ins. Exch., No. B292698, 2020 WL 582136, at *10–11 (Cal. Ct. App. Feb. 6, 2020) – court reviewed normal order taker standard of care and special relationship heightened duty to advise exception to the normal standard of care:

> *Williams* explains that an insurance agent generally has no duty to recommend additional or different insurance. (*Williams, supra*, 177 Cal.App.4th at p. 635.) *Williams*, however, recognizes an exception to this general rule where an agent " ' "hold[s] himself out" as having expertise in a given field of insurance being sought by the insured ....' " (*Id.* at p. 636.)
>
> *Williams* involved an insurance agent who represented that she had special expertise in the insurance needs of plaintiffs' business, a dealership for spraying linings onto the beds of pickup trucks, which involved handling toxic materials. Plaintiffs requested an insurance package that would cover the needs of that kind of business. The defendant agent recommended an insurance package that did not include worker's compensation coverage. Thereafter, an employee of the dealership was severely injured in a fire on the dealership's premises; the employee won a large verdict against the dealership and its owners. The dealership and its owners then sued the insurance agent for negligence in failing to recommend worker's compensation insurance and sought compensation in the amount of the verdict in favor of the injured employee. Division Eight of this court held that under these circumstances, the insurance agent "breached the duty she assumed by holding herself out as 'the expert on the product necessary to satisfy [plaintiffs' business's] insurance needs.' " (*Williams, supra*, 177 Cal.App.4th at p. 637.)
>
> The foregoing principle does not apply here because there was no evidence that Stroud held himself out as an expert in a particular field of insurance. There was no evidence Stroud held himself out as having expertise in the needs of the Café. As we have previously observed, (1) neither appellant requested that Purcell be included as an insured on the business liability coverage; (2) the record does not support their assertions to the contrary; and (3) there was no evidence that either appellant informed Stroud or Farmers that Purcell had any role in the Café. In addition to lacking factual support, appellants cite no legal authority supporting the proposition that in recommending business owner insurance, a broker

> or insurance agent has a duty to include the romantic partner of a sole proprietor as an insured or additional insured.
>
> Finally, because appellants fail to raise a triable issue of fact as to Stroud's liability, we need not consider their claim that Farmers was vicariously liable for Stroud's alleged negligence. This argument rests entirely on a showing that Stroud owed them a duty to procure insurance for Purcell, which appellants have not made.

Austin Highlands Dev. Co. v. Midwest Ins. Agency, Inc., 2020 IL App (1st Jan 30, 2020) 191125, ¶ 16, 153 N.E.3d 1049, 1056, *appeal denied*, 147 N.E.3d 690 (Ill. 2020) – court address application of *Krop* case and when two year statute of limitations began to accrue.

Ford v. Liberty Mut. Ins. Co., No. CIV-19-925-G, 2020 WL 259554, at *3 (W.D. Okla. Jan. 16, 2020) – court ruled claims against insurance agent sounding in negligent misrepresentation were sufficiently plead by insurance customer.

Loney v. Sleeva, No. 345655, 2020 WL 262898, at *4 (Mich. Ct. App. Jan. 16, 2020), appeal denied, 949 N.W.2d 680 (Mich. 2020) - court ruled insurance customer had a duty to read policy and this defeated any claims against agent:

> [P]laintiffs' evidence does not establish that Geico's agent undertook any duty by going beyond presenting the product and taking plaintiffs' order. Zaremba Equip, 280 Mich. App. 16 (an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage because the agent's job consists merely of presenting the product of his principal and taking orders as can be secured from those who want to purchase the coverage offered). Viewing the evidence in a light most favorable to plaintiffs, Geico's agents orally informed plaintiffs that Geico's policy provided the same coverage that plaintiffs had with their prior insurer, including UIM coverage. Moreover, even if Geico's agents negligently misrepresented that its policy provided the same coverage that plaintiffs had under their old policy, once plaintiffs received the written policy and had a reasonable time to review it, they should have discovered that it unambiguously did not provide UIM coverage. Thus, they were not justified in continuing to believe that the policy provided UIM coverage, particularly when they continued to renew the policy thereafter.

5) COVID-19 Related Insurance Agent Cases

COVID-19 has affected everyone's lives in many ways. With many individuals being laid off or furloughed and suffering economic hardships, undoubtedly there will be an increase in insurance claims and litigation. There has already been numerous lawsuits throughout the country seeking business income coverage and other related coverages as a result of COVID-19 related issues. All of this will likely cause an increase in insurance agent E&O claims. The following are some examples of insurance agent cases directly related to COVID-19.

See Terry Black's Barbecue, LLC v. State Auto. Mut. Ins. Co., No. 1:20-CV-665-RP, 2020 WL 6537230, at *1 (W.D. Tex. Nov. 5, 2020):

> Plaintiffs allege that, because of "Civil Authority orders and mandates" issued during the COVID-19 global pandemic, they "have been forced to cease their full service operations because of physical injury to their properties," including physical curtailment of access to their properties by customers. Dkt. 1-1 at ¶ 8. Plaintiffs allege that they have suffered "business interruption and a loss of business income" as a result of the Civil Authority orders, and that such losses are covered under the terms of the Policies. Id. ¶ 16. In April 2020, State Auto denied Plaintiffs' claims, contending that Plaintiffs' losses were not covered under the terms of the Policies.
>
> Plaintiffs filed this suit in state court against State Auto and ROI on May 14, 2020. Plaintiffs assert claims against State Auto for breach of contract and the common-law duty of good faith and fair dealing, as well as violations of the Texas Insurance Code and the Texas Prompt Payment Act. *See Terry Black's Barbecue v. State Auto. Mut. Ins. Co.*, D-1-GN-20-002659 (250th Dist. Ct., Travis County, Tex. May 14, 2020) (Dkt. 1-1 at 7). Plaintiffs allege that ROI was negligent in failing to "evaluate the sufficiency of the coverage limits it was recommending and selling to Plaintiffs." *Id.* ¶ 45.

The court in this case ruled the claims against the agent were not ripe yet because the coverage issue had to be determined first. If there was coverage then there can be no claim against the agent and if there was not coverage then the claims against the agent could proceed.

See also Vizza Wash, LP v. Nationwide Mut. Ins. Comany, No. 5:20-CV-00680-OLG, 2020 WL 6578417, at *3 (W.D. Tex. Oct. 26, 2020). Insurance customer asserted various claims against insurance agent as a result of insurer's' coverage denial of COVID-19 related claims but court found that there was "no possibility of recovery by Plaintiff [insurance customer] against Worth [insurance agent], at least insofar as any such relief would be premised on the allegations and theories of relief that Plaintiff has presently alleged." The court further noted: "[m]oreover, with respect to Worth's purported misrepresentations by omission, there are no other allegations that support an inference that Worth had any specific basis for knowing that Plaintiff expected its requested Policy to provide coverage for business interruptions caused by the ongoing Covid-19 pandemic (or any other specific virus) when Worth procured the Policy." *Id.*

Wilson v. Hartford Cas. Co., No. CV 20-3384, 2020 WL 5820800 (E.D. Pa. Sept. 30, 2020) – Insurance customers made claims against their insurance company and broker-agent, alleging breach of insurance contract and obligations to them by denying their claim for coverage arising from interruption of their business caused by coronavirus and resulting governmental COVID-19 closure orders. Court dismissed claims against agent because the insurance customer did not even attempt to plead any independent wrongdoing by agent.

Vandelay Hosp. Grp. LP v. Cincinnati Ins. Co., No. 3:20-CV-1348-D, 2020 WL 4784717, at *8 (N.D. Tex. Aug. 18, 2020) – insurance customer brought claims against insurer and insurance agent involving claims related to business interruption insurance coverage for the COVID-19 pandemic. In this lawsuit the insurance customer alleged that the agent stated that "business interruption insurance would kick in in the event its restaurants were ever closed due to a wide-spread virus or another pandemic such as the COVID-19 [pandeminc]." The insurance customer asserted that it "suffered pecuniary loss because of its justifiable reliance (via the amount of coverage it should have been entitled to, and [Vandelay's] factual allegation that it actually purchased the policy with the promised coverages)." The court concluded that the insurance customer failed to state a negligent misrepresentation claim because the damages the insurance customer sought were not available under this claim as a matter of law. Court then dismissed the claims against the agent because the court concluded the insurance agent failed to state a plausible claim upon which relief may be granted as to the agent.

6) 2020 Case Trends

i. Order taker general standard continues to be applied

In 2020 most states continue to use the "order taker" standard of care as the general duty applicable to insurance agents, with only a limited exception to the general order taker duty where special circumstances give rise to a special relationship heightened duty to advise.

ii. Few agent claims directly related to COVID-19

Currently there does not appear to be many claims against agents related to COVID-19 insurance coverage issues.

iii. Several jurisdictions ruled insurance customer's failure to read policy barred claims against insurance agent

Several jurisdictions specifically ruled that an insurance customer had a duty to read the insurance customer's policy, and that the failure of the insurance customer to read the insurance policy abrogated any claims against the insurance agent.

Ladner Investments Inc. v. Michael Conway Inc., 301 So. 3d 86, 96 (Miss. Ct. App. July 21, 2020) – court found insurance customer had duty to read policy; had insurance customer read policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's negligent and negligent misrepresentation claims against insurance agent. (*Citing Mladineo v. Schmidt*, 52 So. 3d 1154, 1166 (Miss. 2010)).

Crook v. Allstate Indem. Co., No. 1180996, 2020 WL 3478552, (Ala. June 26, 2020) - court found insurance customer had duty to read policy; had insurance customer read policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's claims against insurance agent.

Martin v. Chasteen, 354 Ga. App. 518, 521–22, 841 S.E.2d 157, 161 (March 13, 2020) - court found insurance customer had duty to read policy; this duty is only abrogated if insurance agent has a special relationship with insurance customer; had insurance customer read the policy the insurance customer would have known there was no coverage under policy; and this defeats insurance customer's negligent and negligent misrepresentation claims against insurance agent:

> Here, Martin [the insurance customer] has not shown the existence of a special relationship or other unusual circumstance that would have prevented or excused him

> from exercising ordinary diligence to ensure that insurance for the barn had been issued. Martin [the insurance customer] refers to his years of dealing and communicating with Chasteen [the insurance agent] on insurance matters, although we note that in his argument he has made no citations to specific parts of the record supporting this claim. See Court of Appeals Rule 25 (c) (2). Regardless, the fact "[t]hat two people have transacted business in the past and have come to repose trust and confidence in each other as the result of such dealings is not sufficient, in and of itself, to warrant a finding that a confidential relationship exists between them." *Canales*, 261 Ga. App. at 531 (1), 583 S.E.2d 203 (citation and punctuation omitted). We find that Martin has pointed to no facts demonstrating the existence of a "confidential relationship [or other unusual circumstances] between [him] and [Chasteen] that would have abrogated [Martin's] duty to read the policy." *Id*.

Johnston v. Nationwide Mut. Ins. Co., 291 So. 3d 410, 417 (Miss. Ct. App. Feb. 18, 2020) – court ruled no duty to advise and further insurance customer had a duty to read policy that abrogated any claims against agent.

Loney v. Sleeva, No. 345655, 2020 WL 262898, at *4 (Mich. Ct. App. Jan. 16, 2020), appeal denied, 949 N.W.2d 680 (Mich. 2020) - court ruled insurance customer had a duty to read policy and this defeated any claims against agent:

> [P]laintiffs' evidence does not establish that Geico's agent undertook any duty by going beyond presenting the product and taking plaintiffs' order. Zaremba Equip, 280 Mich. App. 16 (an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage because the agent's job consists merely of presenting the product of his principal and taking orders as can be secured from those who want to purchase the coverage offered). Viewing the evidence in a light most favorable to plaintiffs, Geico's agents orally informed plaintiffs that Geico's policy provided the same coverage that plaintiffs had with their prior insurer, including UIM coverage. Moreover, even if Geico's agents negligently misrepresented that its policy provided the same coverage that plaintiffs had under their old policy, once plaintiffs received the written policy and had a reasonable time to review it, they should have discovered that it unambiguously did not provide UIM coverage. Thus, they were not justified in continuing to believe that the policy provided UIM coverage, particularly when they continued to renew the policy thereafter.

7) Statute of Limitations

Generally, there are no hard and fast rules regarding the application of the statute of limitations to insurance agent claims and lawsuits. This is because agents can be sued under multiple theories of liability including, but not limited to, negligence, breach of contract, and breach of fiduciary duty. Each theory of liability, or type of claim, may have a different statute of limitation.

Nevertheless, typical periods of statutes of limitations for claims against insurance agents run from 2-6 years.

Usually (but not always) the statute of limitations begins to run only once damage has occurred as a result of the agent's failure to procure insurance. Typically, this damage occurs when there is a loss and there is an issue with the insurance customer's insurance coverage. However, some courts in some states such as Illinois, New York, and Ohio have stated that the statute of limitations may begin to run once the policy is issued. *See Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556 (October 18, 2018) (Illinois State Supreme Court ruled that a two-year statute of limitations for negligence claims begins to run on the date the policy is received by the insured, not when there is a loss and coverage issues arise.): *Spinnato v. Unity of Omaha Life Ins. Co.*, 322 F. Supp. 3d 377, 392 (E.D.N.Y. 2018) ("A negligence claim against an insurance agent or broker does not occur when the wrongdoing is discovered; it accrues when the act takes place. Here, that occurred on the date that the given policy was purchased."); and *LGR Realty, Inc. v. Frank & London Ins. Agency*, 2018-Ohio-334, 152 Ohio St. 3d 517, 523, 98 N.E.3d 241, 248 ("We hold that the four-year statute-of-limitations period began to run when F & L issued the insurance policy setting forth the specific-entity exclusion. LGR's action, therefore, is time-barred.").

In addition, sometimes the statute of limitation can be tolled for some reason such as fraud or concealment.

8) Recommendations

It is recommended to use the following best practices as an insurance agent:

i. Develop and implement new contactless ways to interact with your insurance customers. This includes: using e-signature methods; Zoom meetings as opposed to in-person meetings; and electronic delivery of insurance documents.

ii. Be extremely careful in making comments to your customers about claims or potential claims.

iii. Use checklists and have insurance customers electronically sign off and date the checklist.

iv. Review policy declaration pages and have insurance customers sign off and date declaration pages.

v. Perform regular thorough reviews with your insurance customers.

vi. Clearly document files.

vii. Implement and consistently use a good computerized agency management system.

viii. Use confirmation emails.

ix. Specifically advise insurance customers in writing to review their insurance documents and let the agent know if any changes are needed.

x. Identify potentially problematic insurance customers and take extra measures to protect against potential claims from these customers.

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