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2021 Insurance Agent Case Law Year-End Review

2021 Insurance Agent Standard of Care and Duty Case Law Review

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2021 Insurance Agent Case Law Year-End Review
By Aaron M. Simon[1]

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

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.

Highlighted 2021 Cases

Pedersen v. State Farm Mut. Auto. Ins. Co., No. CV 19-29-GF-BMM-JTJ, 2021 WL 5810644, at *2 (D. Mont. Dec. 7, 2021).

> Just as Plaintiffs argue in this motion for leave to reconsider, Plaintiffs previously have argued that Judge Johnston incorrectly applied the Montana Supreme Court's reasoning in *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 938 P.2d 1347 (Mont. 1997) and *Monroe v. Cogswell Agency*, 234 P.3d 79 (Mont. 2010). (Doc. 56 at 3.) The Montana Supreme Court in *Monroe* recognized that an insurance agent owes a duty to obtain insurance coverage "which an insured directs that agent to procure." *Monroe*, 234 P.3d. at 86; *see also Gunderson v. Liberty Mutual Ins.*, 468 P.3d. 367, *6 (Mont. 2020). This Court determined that Judge Johnston correctly applied those cases. (Doc. 69 at 4-5, 11-12.)

Copacabana Realty, LLC v. A.J. Benet, Inc., 153 N.Y.S.3d 881, (Mem)–882 (App. Div. 2021) (November 3, 2021). (No causation for insurance agent providing advice about whether there was coverage after claim arose and analyzing normal order taker standard of care vs. special

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relationship; normal order taker standard claim properly dismissed but there were questions of fact precluding summary judgment on special relationship claim):

> The Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the first cause of action. The defendant established, prima facie, that its alleged breach of fiduciary duty in advising the insurer of its opinion that the policy did not provide coverage of the claim was not, as alleged, a cause of the insurer's denial of the claim. In opposition, the plaintiff failed to raise a triable issue of fact.
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> "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" (*Broecker v. Conklin Prop., LLC*, 189 A.D.3d 751, 752, 138 N.Y.S.3d 177 [internal quotation marks omitted]). Generally, " '[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy' " (*Joseph v. Interboro Ins. Co.*, 144 A.D.3d 1105, 1108, 42 N.Y.S.3d 316, quoting *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 735, 955 N.Y.S.2d 854, 979 N.E.2d 1181). "Thus, the duty is defined by the nature of the client's request" (*Broecker v. Conklin Prop., LLC*, 189 A.D.3d at 752, 138 N.Y.S.3d 177 [internal quotation marks omitted]; *see Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972). However, "[w]here a special relationship develops between the broker and client, ... the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage" (*Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 735, 985 N.Y.S.2d 448, 8 N.E.3d 823).
>
> Here, with regard to the second and third causes of action, the defendant insurance broker failed to meet its initial burden of tendering sufficient evidence to demonstrate the absence of triable issues of fact with respect to whether the plaintiff client made a specific request for coverage which was not obtained (*see Petri Baking Prods., Inc. v. Hatch Leonard Naples, Inc.*, 151 A.D.3d 1902, 1905, 57 N.Y.S.3d 838; *Hersch v. DeWitt Stern Group, Inc.*, 43 A.D.3d 644, 644–645, 841 N.Y.S.2d 516). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment dismissing the second cause of action, which alleges breach of contract. However, contrary to the court's determination, triable issues of fact exist as to whether a specific interaction took place between the plaintiff and the defendant regarding a question of coverage related to the plaintiff's renovation work on the insured property that could give rise to a special relationship between the parties (*see Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735, 985 N.Y.S.2d 448, 8 N.E.3d 823). Accordingly, the court should have denied that branch of the defendant's motion which was for summary judgment dismissing the third cause of action, which alleges negligent misrepresentation.

Villa Capriani Homeowners Ass'n, Inc. v. Lexington Ins. Co., No. 20 CVS 2703, 2021 WL 4806512, at *8–9 (N.C. Super. Oct. 14, 2021) (Summary Judgment in favor of agency – agency did procure requested coverage as a matter of law). As to agent's duty the court cited to *Mayo v.*

American Fire & Casualty Co., 282 N.C. 346, 353, 192 S.E.2d 828 (1972); *Holmes v. Sheppard*, 255 N.C. App. 739, 744, 805 S.E.2d 371 (2017); *Bentley v. N.C. Ins. Guaranty Ass'n*, 107 N.C. App. 1, 12, 418 S.E.2d 705 (1992) and stated:

> If an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so.

Swordfish Fitness of Franklin, Inc. v. Markel Ins. Co., No. 3:20-CV-00876, 2021 WL 4480509, at *6–7 (M.D. Tenn. Sept. 30, 2021). (In case where insurer denied coverage for COVID-19 related business closure claims of Plaintiff, court also dismissed breach of fiduciary duty and negligence claims against agent – as part of ruling court ruled agent had no duty to explain to insurance customer the nature of the virus exclusions in policy sold to insurance customer):

> 1. Fiduciary Duty
>
> Plaintiffs have not pled facts to allege plausibly the existence of a fiduciary duty owed to Plaintiffs by Siner or Markel. "Ordinarily the relationship between an insured and the agent that sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one." *Wright v. State Farm Fire & Cas. Co.*, 555 F. App'x 575, 580 (6th Cir. 2014).
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> Plaintiffs allege the existence of a fiduciary relationship "based on Defendant Siner's undertaking and assuming responsibility to obtain business owner insurance on the Properties." (Compl. ¶ 61). Although Plaintiffs included in the Complaint a separate section entitled "Special Relationship," they have not, in fact, alleged any facts showing a "special relationship." Plaintiffs allege that "the parties had a relationship as the Insurance Company, the Insurance Company's Agent, and Insured" and that Markel and Siner are "experts in insurance" and Plaintiffs are not. (Compl., ¶ 48).
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> Moreover, Plaintiffs have specifically alleged that Siner was Markel's agent. (Compl., ¶¶ 23-26, 56-57, 70-71); *see also*, Tenn. Code Ann. § 56-6-115(b) (providing that an "insurance producer who solicits or negotiates an application for insurance is regarded as the agent of the insurer and not the insured"). Indeed, the agency relationship between Siner and Markel is the purported basis for Markel's vicariously liability. Plaintiffs then asserts that an agent, including an insurance agent, owes a fiduciary duty to its principle. (Doc. No. 31 at 20 (citing *Watkins v. HRRW, LLC*, No. 3:05-cv-00279, 2006 WL 3327659, at *8 (M.D. Tenn. Nov. 14, 2006)).[7] The law does not preclude Siner acting as an agent for Plaintiffs, but in this case, Plaintiffs allege that Siner was Markel's agent. Accordingly, any fiduciary duty owed by Siner on the basis of an agency relationship would be to Markel, not Plaintiffs.
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> The Court finds that Plaintiffs have not alleged sufficient facts to establish a plausible claim for breach of fiduciary duty. Accordingly, this claim will be dismissed without prejudice.

2. Negligence

Plaintiff's negligence claim is based on Siner's alleged failure to "inform and explain to Plaintiffs the nature of the virus exclusions on Plaintiffs' policies, [and] use reasonable care and diligence in ensuring Plaintiff [sic] was aware of the virus exclusions applicable to Plaintiffs' policies." (Compl., ¶¶ 50-51).

Siner argues that Plaintiffs do not allege they requested coverage against a viral pandemic, and he was under no duty to explain the policy coverage or make sure Plaintiffs understood the policy. (Doc. No. 26-1 at 6 (citing *Weiss v. State Farm Fire & Cas. Co.*, 107 S.W.3d 503, 506 (Tenn. Ct. App. 2001)). He also argues that under Tennessee law, the payment of the insurance premium creates a rebuttable presumption that Plaintiffs accepted the coverage provided. (Doc. No. 26-1 (citing Tenn. Code Ann. § 56-7-135(b)).

Plaintiffs argue the rebuttable presumption that they accepted the coverage provided does not apply here because they are not bringing a claim for negligent failure to procure coverage. The Court agrees that Tenn. Code Ann. § 56-7-135(b) is not necessarily dispositive of the negligence claim, as it establishes only a rebuttable presumption that Plaintiffs accepted the coverage provided. Determination of whether Plaintiffs can rebut the presumption is not appropriate on a motion to dismiss.

Nevertheless, the Court agrees that Plaintiffs' negligence claim should be dismissed. Although the insurance agent has a duty to obtain the insurance asked for by the client, Plaintiffs do not allege they requested coverage that was not provided. *Weiss*, 107 S.W. at 506 (an insurance agent's obligation to a client ends when the agent obtains the insurance asked for by the client) (citing 16 Tenn. Juris. *Insurance* § 8 (2001)). Instead, Plaintiffs allege Siner failed to explain the nature of the virus exclusions. *Weiss* makes clear that he did not have a duty to do so.[8] *See Weiss*, 107 S.W. at 506 (holding that insurance agents do not have a duty to explain the details of policy coverage or make sure insureds understand the policy coverage).

Moriarty v. Bayside Ins. Assocs., Inc., No. 20-56139, 2021 WL 4061105, at *1–2 (9th Cir. Sept. 7, 2021). (Court analyzed both standard order taker duty to procure and special relationship duty to advise and found agent did not breach either duty and affirmed district court's grant of summary judgment):

The district court granted summary judgment to Bayside on the professional negligence claim, finding that Bayside did not owe the duty that Moriarty alleged. Later, the parties stipulated to the dismissal of Moriarty's negligent misrepresentation claim, as duty is an element of both claims. The district court then entered final judgment for Bayside under Federal Rule of Civil Procedure 54(b). We review the district court's grant of summary judgment de novo and affirm. *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339 (9th Cir. 1989).

In California, "whether a duty of care exists is a question of law for the court." *Fitzpatrick v. Hayes*, 57 Cal.App.4th 916, 67 Cal. Rptr. 2d 445, 448 (1997) (citation and alteration omitted). In the usual case, "[i]nsurance [agents] owe a limited duty to their clients, which is only to use reasonable care, diligence, and judgment in *procuring* the insurance requested by an insured." *Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc.*, 203 Cal.App.4th 1278, 138 Cal. Rptr. 3d 294, 297 (2012) (quotation marks and citation omitted). Thus, in *Kotlar v. Hartford Fire Insurance*, 83 Cal.App.4th 1116, 100 Cal. Rptr. 2d 246 (2000), the California Court of Appeal held that an insurance agent does not owe an insured a general duty to notify him of an insurer's intent to cancel his insurance policy due to nonpayment of premiums. *Id.* at 250. California will impose a special duty beyond this limited duty "when—*but only when*—one of ... three things happens." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452 (emphasis added).

First, California will impose a special duty when "the agent misrepresents the nature, extent or scope of the coverage being offered or provided." *Id.* Moriarty does not allege that Bayside misrepresented the nature, extent, or scope of her husband's life insurance policy. Unlike in *Free v. Republic Insurance*, 8 Cal.App.4th 1726, 11 Cal. Rptr. 2d 296 (1992), Bayside answered Moriarty's email inquiry with correct information. *Cf. id.* at 297–98. And unlike in *Paper Savers, Inc. v. Nacsa*, 51 Cal.App.4th 1090, 59 Cal. Rptr. 2d 547 (1996), Bayside did not induce Moriarty's husband to purchase the life insurance policy through affirmative misrepresentations. *Cf. id.* at 554.

Second, California imposes a special duty to volunteer certain information regarding additional or different coverage when "there is a request or inquiry by the insured for a particular type or extent of coverage." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452. This exception, by its own terms, doesn't apply here. *Cf. Westrick v. State Farm Ins.*, 137 Cal.App.3d 685, 187 Cal. Rptr. 214, 217–19 (1982) (holding that an insurance agent has "an affirmative duty of disclosure" during the sale of an insurance policy if a client's inquiry puts the agent on notice that the policy will not meet the client's unique needs).

Third, California will impose a special duty when "the agent assumes an additional duty by either express agreement or by 'holding [it]self out' as having expertise in a given field of insurance being sought by the insured." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452. Bayside did not enter into an express agreement with the Moriartys to tell them about the status of the life insurance policy. Its statement that it was "trying to have a team follow up on status" was not an express agreement to do so. Nor did Bayside hold itself out as a life insurance expert. Unlike in *Murray v. UPS Capital Insurance Agency, Inc.*, 54 Cal.App.5th 628, 269 Cal. Rptr. 3d 93 (2020), Bayside does not specialize in the type of insurance at issue, *cf. id.* at 110, and Moriarty does not otherwise show that Bayside held itself out as a life insurance expert.

Moriarty also argues that Bayside owed her a duty because of their "special relationship." But Moriarty has not shown that Bayside was in a more "unique position" than the typical insurance agent to protect her or her husband from

> injury. *See Brown v. USA Taekwondo*, 11 Cal.5th 204, 276 Cal.Rptr.3d 434, 483 P.3d 159, 166 (2021). Finally, Moriarty argues that the panel should impose an affirmative duty on Bayside under *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968). But the California Supreme Court recently held in *Brown v. USA Taekwondo*, 276 Cal.Rptr.3d 434, 483 P.3d 159, that "[t]he multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing duty, but instead as a means for deciding whether to limit a duty derived from other sources." *Id.*, 276 Cal.Rptr.3d 434, 483 P.3d at 166.
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> Thus, as the district court found, Moriarty's professional negligence and negligent misrepresentation claims fail because she has not established an essential element—duty. *See Eriksson v. Nunnink*, 191 Cal.App.4th 826, 120 Cal. Rptr. 3d 90, 100 (2011); *Eddy v. Sharp*, 199 Cal.App.3d 858, 245 Cal. Rptr. 211, 213 (1988).

Sykes v. White, No. 09-20-00227-CV, 2021 WL 3555723, at *6 (Tex. App. Aug. 12, 2021). ("Under Texas law, an insurance agent who undertakes to procure insurance for another owes a duty to the client to use reasonable diligence to procure the insurance or notify the client that he was unable to do so." *See May v. United Servs. Ass'n*, 844 S.W.2d 666, 669 (Tex. 1992)).

Wobig v. Safeco Ins. Co. of Illinois, No. CV 20-431 (JRT/KMM), 2021 WL 2827369, at *8 (D. Minn. July 7, 2021). (Like many 2021 cases plaintiff confuses insurer and agent duties, court nevertheless discuss duties of agents under Minnesota law and finds no breach of agent duties).

> Yet, irrespective of whether Simmons was acting as Safeco's agent, the Wobigs cannot establish, as a matter of law, that Simmons was negligent. A claim for negligent procurement of insurance coverage requires a showing that the agent owed a duty of reasonable care in procuring insurance, the duty was breached, and the insured sustained a loss. *Id.* at 116. Insurance agents have a duty "to exercise the standard of skill and care that a reasonably prudent person engaged in the insurance business will use in similar circumstances," *id.* (quoting *Johnson v. Farmers & Merchs. State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982)), to act in good faith and follow instructions, *Ma Amba Minn., Inc. v. Cafourek & Assocs., Inc.*, 387 F. Supp. 3d 947, 953 (D. Minn. 2019), and an affirmative duty to perform actions specifically undertaken for the client, *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989). The record includes no evidence that would permit a reasonable juror to conclude that Simmons had an affirmative duty to advise the Wobigs that their use of the shop would not be covered by the Safeco homeowner's policy or, even if such a duty did exist, how Simmons breached it. The Court will therefore grant Safeco's Motion with respect to Count II.

Coleman E. Adler & Sons, LLC v. Axis Surplus Ins. Co., No. CV 21-648, 2021 WL 2710469, at *2 (E.D. La. July 1, 2021). (In case involving denied claims for COVID-19 related losses, court identifies normal agent duty and rarely invoked heightened duty to advise, and finds neither duty was breach by agent in case).

Wilson v. Berger Briggs Real Est. & Ins., Inc., 2021-NMCA-054, ¶ 9, 497 P.3d 654, 658–59, (May 10, 2021), *cert. denied* (Oct. 20, 2021). (Case discusses in general claims that can be brought against agents under New Mexico law):

> We begin with Wilson's arguments, which are consistent with the district court's ruling. Wilson is first correct that New Mexico allows claims in tort against insurance agents or brokers, such as those at issue here. For instance, New Mexico law permits an insured to sue an agent for failing to obtain a requested policy. *See Topmiller v. Cain*, 1983-NMCA-005, ¶ 12, 99 N.M. 311, 657 P.2d 638 (stating that "[i]t seems to be well settled that an insurance agent or broker who undertakes to provide insurance for another, and through his own fault or neglect, fails to do so, is liable" (internal quotation marks and citation omitted)). "[L]iability may be predicated either upon the theory that [the] defendant is the agent of the insured and has breached a contract to procure a policy of insurance, or that he owes a duty to his principal to exercise reasonable skill, care, and diligence in securing the insurance requested and negligently failed to do so." *Sanchez v. Martinez*, 1982-NMCA-168, ¶ 14, 99 N.M. 66, 653 P.2d 897. "An agent who agrees to procure or renew an expired policy of insurance has a duty to either obtain the insurance, renew or replace the policy, or seasonably notify the principal that he is unable to do so in order that the principal may obtain insurance elsewhere." *Id.* ¶ 15. A suit for negligence may be predicated upon either an express or implied agreement between the parties. *See id.*

VCS, LLC v. Mt. Hawley Ins. Co., 534 F. Supp. 3d 635, 651 (E.D. La. 2021) (April 14, 2021). Case analyzes whether wholesale broker was acting as insurance customer's broker or agent and court concluded this was a question of fact. Court then states the normal duty or standard of care under Louisiana law:

> In order to recover for a loss arising out of the failure of an insurance agent to obtain insurance coverage, a plaintiff must prove:
>
> (1) an undertaking or agreement by the insurance agent to procure insurance; (2) failure of the agent to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly if he has failed to obtain the insurance; and (3) actions by the agent warranting the client's assumption that the client was properly insured.

After this the court does a detailed analysis of the very limited special relationship duty sometimes placed on agents in Louisiana.

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.

Highlighted 2021 Special Relationship Duty to Advise Cases

Maynard v. Murray, No. 353850, 2021 WL 6064481, at *1 (Mich. Ct. App. Dec. 21, 2021).

> The issue presented is whether defendant Scott Murray, an insurance agent employed by defendant Transamerica Life Insurance Company, assumed a duty to advise Dervin Maynard regarding the impending lapse of Dervin's life insurance policy—a policy that Murray had sold. Viewed in the light most favorable to Dervin's estate, the evidence supports that Dervin repeatedly sought Murray's guidance regarding continued coverage and repeatedly received inaccurate advice. Murray counseled Dervin regarding Dervin's existing policy and promised that coverage under a new policy would be forthcoming. These interactions created a "special relationship," bringing this case squarely within the duty framework described in *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999). We vacate the summary dismissal of the estate's lawsuit and remand for continued proceedings consistent with this opinion.

Cheshier v. Travelers Home & Marine Ins. Co., No. 3:21-CV84-M-RP, 2021 WL 3573621, at *2–3 (N.D. Miss. Aug. 12, 2021). (No affirmative duty to advise but if advice is given there is duty to exercise care in providing advice):

> ... we do not find that insurance agents in Mississippi have an affirmative duty to advise buyers regarding their coverage needs.... Imposing liability on agents for failing to advise insureds regarding the sufficiency of their coverage would remove any burden from the insured to take care of his or her own financial needs. However, we find that if agents do offer advice to insureds, they have a duty to exercise reasonable care in doing so. A jury should be allowed to decide whether reasonable care was exercised here. *Mladineo v. Schmidt*, 52 So.3d 1154, 1160 (Miss. 2010).

I Square Mgmt. LLC v. McGriff Ins. Servs., Inc., No. 4:19-CV-00922-JM, 2021 WL 3025485, at *1–2 (E.D. Ark. July 16, 2021). (Court analyzed duties of insurance agents under Arkansas law, including special relationship duty to advise/inquire, and ultimately found no special relationship duty to advise/inquire and granted agent's motion for summary judgment):

> McGriff's Motion for Summary Judgment

To prevail on their claim of negligence against McGriff, Plaintiffs must first prove that McGriff owed them a duty of care. The question of whether a duty is owed by a defendant to a plaintiff is always a question of law. *Mans v. Peoples Bank of Imboden*, 10 S.W.3d 885 (Ark. 2000). It is well established under Arkansas law that an insurance agent or broker has no duty to advise the insured as to different coverages or to investigate to ensure that the insured is adequately covered; rather, the Courts have placed that responsibly squarely on the insured to "educate himself concerning matters of insurance coverage." *Scott-Huff Ins. Agency v. Sandusky*, 887 S.W.2d 516, 517 (Ark. 1994) (quoting *Howell v. Bullock*, 764 S.W.2d 422, 424 (Ark. 1989)).

Arkansas has recognized a very limited exception to this rule "where there is a special relationship between the agent and the insured, as can be evidenced by "an established and ongoing relationship over a period of time, with the agent being actively involved in the client's business affairs and regularly giving advice and assistance in maintaining proper coverage for the client." *Buelow v. Madlock*, 206 S.W.3d 890, 893 (Ark. App. 2005) (quoting *Stokes v. Harrell*, 711 S.W.2d 755 (Ark. 1986)). "The existence of a special relationship presents a question of fact." *Id.* The court in *Buelow* further expounded on the proof required to show a special relationship exists between an insured and an insurance agent:

> An insured can demonstrate a special relationship by showing that there exists something more than the standard insurer-insured relationship. This depends upon the particular relationship between the parties and is determined on a case-by-case basis. Examples include express agreement, long established relationships of entrustment in which the agent clearly appreciates the duty of giving advice, additional compensation apart from premium payments, and the agent holding out as a highly-skilled expert coupled with reliance by the insured.

Id. (quoting *Sintros v. Hamon*, 810 A.2d 553 (N.H. 2002)). *See also Temple v. Bancinsure, Inc.*, No. 1:10-CV-01059, 2012 WL 4458186, at *4 (W.D. Ark. Sept. 25, 2012).
***

In analyzing the issue of whether Plaintiffs have presented sufficient proof to survive McGriff's summary judgment motion, the Court is relying on the evidence the parties directed the Court to consider in the summary judgment record. *Rodgers v. City of Des Moines*, 435 F.3d 904 (8th Cir. 2006). When viewed most favorably to Plaintiffs, the facts do not leave room for a reasonable jury to find that a special relationship existed between Plaintiffs and McGriff. The close friendship and relationship of I Square's *investor* Stephen LaFrance to McGriff's agent John Pierron does not translate into a special relationship between Plaintiffs and McGriff. Plaintiffs submitted LaFrance's declaration in opposition to the summary judgment motion in which he states that that he regularly gave advice to Goyal and Chakka about Plaintiffs' business; this fact, likewise, does not lead to an inference that McGriff was involved in advising Plaintiffs on their business ventures. The

> parties' relationship began in early 2017, about two years before the flood.[16] The fact that investor LaFrance had a prior insured-insurer relationship with Pierron does not piggyback onto Plaintiffs' two-year relationship with McGriff. The evidence put forth by Plaintiffs, taken as true, does not prove that McGriff was an "integral part of the team" who was actively involved in Plaintiffs' business affairs. Rather, these facts show nothing beyond that of an ordinary insurance broker responding to its client. Defendant's motion for summary judgment is granted on the basis that McGriff had no duty to Plaintiffs under Arkansas law. Therefore, the Court need not address the remaining bases for summary judgment.

Primerica Life Ins. Co. v. Pawlik, No. MO:20-CV-063-DC, 2021 WL 5234975, at *8-10 (W.D. Tex. July 13, 2021). (Claims against agent for breach of fiduciary duty and negligence dismissed as a matter of law).

> In general, there is no fiduciary duty between an insurer and an insured. *Id.*; *see also Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 678 (Tex. App.—Fort Worth 2010, no pet.) (same). Similarly, there is generally no fiduciary relationship between an insured and an insurance broker or agent. *Env't Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 628 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).
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> Ms. Pawlik argues that the circumstances of Movants' conduct were sufficient to establish a fiduciary duty. (*See* Doc. 13 at 35). This argument is contrary to Texas law. "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)). And "mere subjective trust does not, as a matter of law, transform arm's-length dealing into a fiduciary relationship." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997). Ms. Pawlik's allegations do not establish a "special relationship of trust and confidence" that existed "prior to, and apart from" the parties' business interactions related to the Policy and the Spouse Rider. *See Meyer*, 167 S.W.3d at 331.
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> Because no fiduciary duty existed between Primerica and its agents and Ms. Pawlik, Primerica and Mr. Dennis are entitled to summary judgment on Ms. Pawlik's breach of fiduciary duty claims.
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> ***
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> Additionally, Ms. Pawlik's negligence claim against Mr. Dennis fails as a matter of law. Under Texas law, "[a]n insurance broker owes common-law duties to a client for whom the broker undertakes to procure insurance: (1) to use reasonable diligence in attempting to place the requested insurance; and (2) to inform the client promptly if unable to do so." *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 14, 26 (Tex. App.—Corpus Christi 2013, pet. denied) (citing *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992)). "The nature of the relationship between the insurance broker and the client is a significant consideration in determining the existence of a duty of care in cases involving

> professional negligence." *Id.* Generally, a professional negligence claim cannot proceed against the professional unless there is privity of contract. *Id.* "Privity of contract is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff." *Allan v. Nersesova*, 307 S.W.3d 564, 571 (Tex. App.—Dallas 2010, no pet.) (citing *Redmon v. Griffith*, 202 S.W.3d 225, 239 (Tex. App.—Tyler 2006, pet. denied)). Ms. Pawlik presents no evidence that Mr. Dennis sold her the Policy or was engaged to procure insurance for her or that privity of contract existed between them.
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> Although Ms. Pawlik argues that Mr. Dennis provided advice to her and thus had an obligation to exercise reasonable care when providing that advice, the only authority she cites for that proposition is a dissenting opinion in *May*. (*See* Doc. 42 at 22). In *May*, Justice Gammage dissented from the decision of the majority of the Texas Supreme Court and relied on Wisconsin law for the proposition that insurance agents have an affirmative duty to advise clients if the agents expressly or implicitly agree to give advice to clients regarding the selection of appropriate insurance. 844 S.W.2d at 678 (Gammage, J., dissenting). Needless to say, a dissenting opinion is not sufficient authority to persuade the Court that such a duty exists under Texas law.
>
> As there is no evidence that Mr. Dennis and Ms. Pawlik were in privity of contract or that Mr. Dennis agreed to procure insurance for Ms. Pawlik and Ms. Pawlik fails to cite authority for the proposition that Mr. Dennis had a duty under Texas law to provide advice to her under a standard of reasonable care, the Court concludes that Mr. Dennis is entitled to summary judgment on this claim.

Kahlenberg v. Bamboo Ins. Servs., Inc., No. 220CV06805FLAPDX, 2021 WL 2433796, at *5 (C.D. Cal. June 15, 2021). (Agent may be liable to insurance customer under heightened fiduciary duty or special relationship standard when agent "chose to complete the insurance application on Plaintiff's behalf without seeking her or her husband's input on the contents of the application, and submitting it with the agent's signature rather than the insured's."

Palek v. State Farm Fire & Cas. Co., 535 F. Supp. 3d 382, 388 (W.D. Pa. 2021) (April 21, 2021): "where the contested policy provisions are clear and unambiguous," Pennsylvania law does not impose a general duty on insurance agents to " 'anticipate and then counsel their insured on the hypothetical, collateral consequences of the coverage chosen.' " (citing *Kilmore v. Erie. Ins. Co.*, 407 Pa.Super. 245, 595 A.2d 623, 626 (1991) and quoting *Banker v. Vall. Forge Ins. Co.*, 363 Pa.Super. 456, 526 A.2d 434, 438 (1987)).

101 Ocean Blvd., LLC v. Foy Ins. Grp., Inc., 174 N.H. 130, 261 A.3d 250 (2021). (Supreme Court of New Hampshire (March 19, 2021). (Special Relationship Case):

> Supreme Court of New Hampshire Held:
>
> commercial lines checklist exhibit was admissible;

alleged false and prejudicial statements by hotel owner's counsel during closing argument were not plain error;

repairs were required to comply with state building code;

special verdict for sufficiently showed causal link;

evidence was sufficient to support finding of a "special relationship" between insurance agency and hotel owner which gave rise to duty; and

evidence was sufficient to support finding that additional law and ordinance coverage was available.

***

The trial court instructed the jury as follows on when a "special relationship" between an insurance agent and client arises:

> The general duty of care does not include an affirmative obligation to give advice regardless of the availability or sufficiency of coverage.
>
> However, the existence of a "special relationship" between the insurance agent and the client may impose upon an insurance agent an affirmative duty to provide advice regardless of the availability or sufficiency of insurance coverage. An insured ... can demonstrate ... a "special relationship" by showing that there exists something more than the standard insurer-insured relationship between the parties. This depends upon the particular relationship between the parties and is determined on a case-by-case basis. Examples include an express agreement between the insured agent and client, a long-established relationship or entrustment in which the agent clearly appreciates the duty of giving advice, the paying [of] an additional compensation apart from the premium payment, and the agent holding himself or herself out as a highly-skilled expert coupled with reliance by the insured. Also, a "special relationship" between the parties may exist when the insured relies upon the agent's offered expert [advice] regarding the question of coverage, or when there is a course of dealings over time putting the agent on notice that his or her advice is being sought and relied upon. If a "special relationship" exists between the parties, the Plaintiff must demonstrate not only the existence of the relationship, but also that he or she was justified in relying upon the relationship.

Foy argues that this jury instruction "incorrectly suggested that a special relationship could be established without proof of at least one of the Sintros factors, and, therefore, misstated the law to the jury." See Sintros, 148 N.H. at 481-82, 810 A.2d 553. To the contrary, the instruction repeats, nearly verbatim, what we said

> in Sintros. See id. The examples we gave in Sintros of facts or circumstances demonstrating a special relationship between an insurance agent and a client were just that, examples; they were not an exclusive list of factors. Id. at 482, 810 A.2d 553. Nor did we hold that, to establish the existence of a special relationship, a plaintiff had to prove that its relationship with its insurance agent fit one of our examples. See id. at 481-82, 810 A.2d 553. Therefore, we conclude that the trial court's "special relationship" instruction was sufficient as a matter of law. See Halifax-American, 170 N.H. at 578, 180 A.3d 268.

Deer v. Nat'l Gen. Ins. Co., No. X03HHDCV206135938S, 2021 WL 1535358, at *3 (Conn. Super. Ct. Mar. 18, 2021). Court found No special relationship or fiduciary duty to advise insured of cancellation of policy.

Jin Chai-Chen v. Metro. Life Ins. Co., 190 A.D.3d 635, 141 N.Y.S.3d 41, 43 (January 28, 2021).

> Plaintiffs' assertion that they had a confidential, special or fiduciary relationship with Li is also not persuasive. While the relationship between an insurance agent and an insured is generally not the type of special relationship giving rise to advisory duties, "[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" (*Murphy v. Kuhn,* 90 N.Y.2d 266, 272, 660 N.Y.S.2d 371, 682 N.E.2d 972 [1997]). No such relationship existed here.
>
> By plaintiffs' own admission, this was the first time that plaintiffs or the insured had worked with Li to purchase insurance. Plaintiff Jenny's preexisting personal relationship with Li, which the complaint's allegations suggest was a friendship with a former coworker, did not create a heightened or fiduciary duty. Plaintiffs' claim against Li for negligent misrepresentation, which was also premised upon the existence of a special relationship or heightened duty, similarly does not withstand scrutiny (*J.A.O. Acquisition Corp. v. Stavitsky,* 8 N.Y.3d 144, 148, 831 N.Y.S.2d 364, 863 N.E.2d 585 [2007]).
>
> Plaintiffs' negligence claim against Li was also properly dismissed. Li met her common-law duty to obtain coverage for her client, despite the fact it was later disclaimed (*see e.g. Murphy,* 90 N.Y.2d at 270, 660 N.Y.S.2d 371, 682 N.E.2d 972; *Koloski v. Metropolitan Life Ins. Co.,* 5 Misc.3d 1028(A), 2004 N.Y. Slip Op. 51596(U), 2004 WL 2903626). It was not Li's responsibility to make sure that the information on the application was complete and accurate, despite any alleged language barriers.
>
> We have considered plaintiffs' remaining contentions and find them unavailing.

Historical Key Special Relationship Duty to Advise Cases

Osendorf v. American Family, 318 N.W.2d 237 (Minn.1982). 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).

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.

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.

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.

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.

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) 2021 Insurance Agent Standard of Care and Duty Cases

Yankee Pride Transportation & Logistics, Inc. v. UIG, Inc., 2021 ME 65, ¶ 15. Supreme Judicial Court of Maine, 2021 WL 6071621, (December 23, 2021). Court found no causation as to all claims against agent and no basis for breach of fiduciary duty claim against agent.

> The parties agreed that UIG had a duty "to use reasonable care, diligence and judgment in obtaining the insurance coverage requested by the insured party" consistent with the language used in *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991).[6] Yankee Pride contends that UIG breached its duty to make timely efforts to find coverage by waiting until December 2018 to start its search. Yankee Pride also argues that it should have been given more information about the assigned risk insurance policy. Though there may be a genuine issue of material fact as to the timeliness of UIG's efforts, any claim for negligence fails for the same reason as the breach of contract claim: there is no competent evidence establishing causation, i.e., that comparable insurance would have been available at an acceptable cost had UIG begun the search earlier. *See Murdock v. Thorne*, 2017 ME 136, ¶ 11, 166 A.3d 119 (identifying duty, breach of duty, causation, and damages as the elements required to make a prima facie case for negligence).

Maynard v. Murray, No. 353850, 2021 WL 6064481, at *1 (Mich. Ct. App. Dec. 21, 2021).

> The issue presented is whether defendant Scott Murray, an insurance agent employed by defendant Transamerica Life Insurance Company, assumed a duty to advise Dervin Maynard regarding the impending lapse of Dervin's life insurance policy—a policy that Murray had sold. Viewed in the light most favorable to Dervin's estate, the evidence supports that Dervin repeatedly sought Murray's guidance regarding continued coverage and repeatedly received inaccurate advice. Murray counseled Dervin regarding Dervin's existing policy and promised that coverage under a new policy would be forthcoming. These interactions created a "special relationship," bringing this case squarely within the duty framework described in *Harts v Farmers Ins Exch*, 461 Mich 1; 597 NW2d 47 (1999). We vacate the summary dismissal of the estate's lawsuit and remand for continued proceedings consistent with this opinion.

Dynamic Indus., Inc. v. Metlife - Am. Int'l Grp. - Arab Nat'l Bank Coop. Ins. Co., No. CV 21-748, 2021 WL 5961326, at *8 (E.D. La. Dec. 16, 2021):

> Under Louisiana law, the insured has a duty to read and know its insurance policy provisions. *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199, 205 (5th Cir. 1990). Accordingly, for allegations of failure to procure insurance coverage, "the one-year peremptive period begins to run when the insured receives a copy of the policy." *TCI Packaging*, 2020 WL 730329, at *5; *see also Campbell*, 509 F.3d at 670. There are some instances, however, where an insurance agent can still be held liable, despite the insured filing suit more than a year after receiving its insurance policy. *See, e.g., St. Charles Surgical Hosp. LLC v. HUB Int'l, Ltd.*, No. 20-2094, 2021 WL 1561218, *7 (Apr. 21, 2021); *Jackson v. QBE Specialty Ins. Co.*, No. 17-

> 11730, 2018 WL 3408182, at *8 (E.D. La. July 18, 2018). "Although Louisiana law does not recognize a duty owed by an insurance agent to spontaneously advise a client regarding insurance coverage, an agent may voluntarily assume such a duty. *Id.*; *see also Offshore Prod. Contrs. v. Republic Underwriters Ins. Co.*, 910 F.2d 224, 230 (5th Cir. 1990). In cases where the insured alleges the insurance agent breached a greater duty to advise and consult with the insured, the peremptive period can begin when the insured realizes its missing coverage. *See Jackson*, 2018 WL 3408182, at *9; *St. Charles Surgical Hosp.*, 2021 WL 1561218, at *7.

Gellner v. Progressive N. Ins. Co., No. 21-CV-0401-CVE-JFJ, 2021 WL 5789146, at *2–3 (N.D. Okla. Dec. 7, 2021):

> Plaintiffs argue that they have asserted a viable negligence claim against Brown, because plaintiffs asked Brown to procure insurance with collision coverage and Brown failed to procure such coverage. Dkt. # 9, at 2. 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) (quoting 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, 2015 WL 588607, at *2 (quoting Rotan, 83 P.3d at 895).
>
> Plaintiffs' petition wholly fails to state a claim against Brown under this standard and there is no possibility that plaintiff could recover against Brown under Oklahoma law. Plaintiffs generally allege that Brown had a duty to act as a competent insurance agent and that it failed "act in good faith and use reasonable care, skill and diligence in gathering information from the Plaintiff, completing the application, and procuring [insurance]." Dkt. # 1-2, at 3. Plaintiffs' allege that their boat collided with an object beneath the surface of the water and they submitted an insurance claim for damage to their boat. Id. Plaintiffs' insurance claim was denied because Progressive determined that the damage to the boat was caused by "wear and tear," rather than a collision. Id. Progressive does not deny that the insurance

> policy covers damage caused by collisions, and it does not dispute that plaintiffs' claim would be covered if plaintiffs could establish that damage to the boat was caused by a collision. This is simply a garden variety breach of insurance contract claim against the insurer, and there are no allegations in the petition suggesting that the insurer's decision on plaintiffs' claim would have been different if the insurance agent had obtained some other insurance policy. The outcome of plaintiffs' claims against Progressive depend upon the cause of the damage to the boat, not the lack of collision coverage in the insurance policy, and plaintiffs have not stated a viable claim against Brown.
>
> Plaintiffs make additional allegations describing their claim against Brown in more detail in their motion to remand, and the Court will consider these allegations to determine whether plaintiffs could file an amended complaint stating a viable claim against Brown. Plaintiff Rachel Vogle states that she spoke with an employee of Brown, Tama Roberts, after purchasing a boat, and Vogle expressly requested boat insurance with "comprehensive collision coverage." Dkt. # 9-1, at 1. Roberts requested information about the boat and plaintiffs' intended use of the boat, and Roberts represented that she could an obtain insurance policy for the boat with collision coverage. Id. Plaintiffs allege that Roberts failed to inspect the boat or ask if the boat was in need of repair. Id. at 2. On March 29, 2021, Progressive sent a letter to plaintiffs' attorney explaining the basis for the denial of plaintiffs' insurance claim. The letter outlined the coverage available under plaintiffs' insurance policy, and the policy included coverage for "sudden, direct and accidental loss to a covered watercraft resulting from a collision." Id. at 4. However, the evidence available to Progressive showed that the damage to the boat's propellor was the result of lack of maintenance, rather that any "recent sudden, direct, and accidental impact." Id. at 3.

Pedersen v. State Farm Mut. Auto. Ins. Co., No. CV 19-29-GF-BMM-JTJ, 2021 WL 5810644, at *2 (D. Mont. Dec. 7, 2021).

> Just as Plaintiffs argue in this motion for leave to reconsider, Plaintiffs previously have argued that Judge Johnston incorrectly applied the Montana Supreme Court's reasoning in *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 938 P.2d 1347 (Mont. 1997) and *Monroe v. Cogswell Agency*, 234 P.3d 79 (Mont. 2010). (Doc. 56 at 3.) The Montana Supreme Court in *Monroe* recognized that an insurance agent owes a duty to obtain insurance coverage "which an insured directs that agent to procure." *Monroe*, 234 P.3d. at 86; *see also Gunderson v. Liberty Mutual Ins.*, 468 P.3d. 367, *6 (Mont. 2020). This Court determined that Judge Johnston correctly applied those cases. (Doc. 69 at 4-5, 11-12.)

McKernan v. ABC Ins. Co., 2021-00859 (La. November 21, 2021), 328 So. 3d 69. Louisiana Supreme Court ruled that the insured's failure of duty to read policy showing no flood coverage preempted any negligence or negligent misrepresentation claims against insurance agent.

Copacabana Realty, LLC v. A.J. Benet, Inc., 153 N.Y.S.3d 881, (Mem)–882 (App. Div. 2021) (November 3, 2021). (No causation for insurance agent providing advice about whether there was coverage after claim arose and analyzing normal order taker standard of care vs. special

relationship; normal order taker standard claim properly dismissed but there were questions of fact precluding summary judgment on special relationship claim):

> The Supreme Court properly granted that branch of the defendant's motion which was for summary judgment dismissing the first cause of action. The defendant established, prima facie, that its alleged breach of fiduciary duty in advising the insurer of its opinion that the policy did not provide coverage of the claim was not, as alleged, a cause of the insurer's denial of the claim. In opposition, the plaintiff failed to raise a triable issue of fact.
>
> "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" (*Broecker v. Conklin Prop., LLC*, 189 A.D.3d 751, 752, 138 N.Y.S.3d 177 [internal quotation marks omitted]). Generally, " '[t]o set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy' " (*Joseph v. Interboro Ins. Co.*, 144 A.D.3d 1105, 1108, 42 N.Y.S.3d 316, quoting *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 735, 955 N.Y.S.2d 854, 979 N.E.2d 1181). "Thus, the duty is defined by the nature of the client's request" (*Broecker v. Conklin Prop., LLC*, 189 A.D.3d at 752, 138 N.Y.S.3d 177 [internal quotation marks omitted]; *see Murphy v. Kuhn*, 90 N.Y.2d 266, 270, 660 N.Y.S.2d 371, 682 N.E.2d 972). However, "[w]here a special relationship develops between the broker and client, ... the broker may be liable, even in the absence of a specific request, for failing to advise or direct the client to obtain additional coverage" (*Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 735, 985 N.Y.S.2d 448, 8 N.E.3d 823).
>
> Here, with regard to the second and third causes of action, the defendant insurance broker failed to meet its initial burden of tendering sufficient evidence to demonstrate the absence of triable issues of fact with respect to whether the plaintiff client made a specific request for coverage which was not obtained (*see Petri Baking Prods., Inc. v. Hatch Leonard Naples, Inc.*, 151 A.D.3d 1902, 1905, 57 N.Y.S.3d 838; *Hersch v. DeWitt Stern Group, Inc.*, 43 A.D.3d 644, 644–645, 841 N.Y.S.2d 516). Accordingly, the Supreme Court properly denied that branch of the defendant's motion which was for summary judgment dismissing the second cause of action, which alleges breach of contract. However, contrary to the court's determination, triable issues of fact exist as to whether a specific interaction took place between the plaintiff and the defendant regarding a question of coverage related to the plaintiff's renovation work on the insured property that could give rise to a special relationship between the parties (*see Voss v. Netherlands Ins. Co.*, 22 N.Y.3d at 735, 985 N.Y.S.2d 448, 8 N.E.3d 823). Accordingly, the court should have denied that branch of the defendant's motion which was for summary judgment dismissing the third cause of action, which alleges negligent misrepresentation.

Accera Grp. Corp. v. L/P Ins. Servs., Inc., 495 P.3d 1122 (Nev. 2021) (October 15, 2021). (No proximate causation in regard to any alleged duties of agent):

> Appellants argue that the district court erred by granting summary judgment because it improperly limited the scope of an insurance agent's duty. We need not address that argument because the record shows that appellants cannot demonstrate that respondent proximately caused their injuries.

Villa Capriani Homeowners Ass'n, Inc. v. Lexington Ins. Co., No. 20 CVS 2703, 2021 WL 4806512, at *8–9 (N.C. Super. Oct. 14, 2021) (Summary Judgment in favor of agency – agency did procure requested coverage as a matter of law). As to agent's duty the court cited to *Mayo v. American Fire & Casualty Co.*, 282 N.C. 346, 353, 192 S.E.2d 828 (1972); *Holmes v. Sheppard*, 255 N.C. App. 739, 744, 805 S.E.2d 371 (2017); *Bentley v. N.C. Ins. Guaranty Ass'n*, 107 N.C. App. 1, 12, 418 S.E.2d 705 (1992) and stated:

> If an insurance agent or broker undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so.

Est. of Greenwood v. Montpelier US Ins. Co., 326 So. 3d 459, 463–64 (Miss. 2021) (October 7, 2021). (Confirming analysis and ruling in *Mladineo v. Schmidt*, 52 So. 3d 1154, 1162 (Miss. 2010) regarding agent negligent misrepresentation claims):

> Greenwood's next two issues are based on his contentions that his first agent knew the nature of his business, that the second agent who purchased the first agent's business should be charged with the imputed knowledge of the first agent (the second agent sold him the insurance policy with the demolition-exclusion rider), and that the insurer should be liable for the negligence of its agents.
>
> ¶12. Both of these issues receive only cursory briefing, but unlike the first two issues, some authority is cited. Greenwood relies entirely on a single case, however, and he only cites half the holding. In *Mladineo v. Schmidt*, 52 So. 3d 1154, 1162 (Miss. 2010), this Court held that an insurance agent could be liable for negligent misrepresentations to a client. In that case, the agent had allegedly misrepresented to the insured that the covered property was not in a flood plain, when in fact part of it was. *Id.* But this Court was quite careful to limit the scope of that holding:
>
> > We go further to clarify that, contrary to a minority of jurisdictions, we do not find that insurance agents in Mississippi have an affirmative duty to advise buyers regarding their coverage needs. The majority of jurisdictions have stated strong policy reasons for finding that an agent does not have an affirmative duty to advise the insured of coverage needs: insureds are in a better position to assess their assets and risk of loss, coverage needs are often personal and subjective, and imposing liability on agents for failing to advise insureds regarding the sufficiency of their coverage would remove any burden from the insured to take care of his or her own financial needs. However, we find that if agents do offer advice to insureds, they have a duty to exercise reasonable care in doing so. A jury

> should be allowed to decide whether reasonable care was exercised here.

Id. at 1163 (footnotes omitted). The Court clarified, beyond any doubt, that an agent cannot be held liable for misrepresentations that could be cured by reading the policy: "These alleged omissions and misrepresentations are not barred by the 'imputed knowledge' of the policy because they are not misrepresentations that would have been disclosed by reading the policy." *Id.* at 1162-63; *see also Robichaux v. Nationwide Mut. Fire Ins. Co.*, 81 So. 3d 1030, 1041 (Miss. 2011) (discussing *Mladineo*).

¶13. Greenwood cannot rely on *Mladineo* because it expressly limits the liability of insurance agents to misrepresentations that cannot be cured by reading the policy, and the policy in this case expressly excluded coverage for demolition work on buildings over four stories, excluded coverage for damage to common walls, etc. "This Court has held as a matter of law that an insured is charged with the knowledge of the terms of the policy upon which he or she relies for protection." *Robichaux*, 81 So. 3d at 1041 (internal quotation marks omitted) (quoting *Mladineo*, 52 So. 3d at 1161).

Swordfish Fitness of Franklin, Inc. v. Markel Ins. Co., No. 3:20-CV-00876, 2021 WL 4480509, at *6–7 (M.D. Tenn. Sept. 30, 2021). (In case where insurer denied coverage for COVID-19 related business closure claims of Plaintiff, court also dismissed breach of fiduciary duty and negligence claims against agent – as part of ruling court ruled agent had no duty to explain to insurance customer the nature of the virus exclusions in policy sold to insurance customer):

1. Fiduciary Duty

Plaintiffs have not pled facts to allege plausibly the existence of a fiduciary duty owed to Plaintiffs by Siner or Markel. "Ordinarily the relationship between an insured and the agent that sells the insurance is, without proof of more, an ordinary business relationship, not a fiduciary one." *Wright v. State Farm Fire & Cas. Co.*, 555 F. App'x 575, 580 (6th Cir. 2014).

Plaintiffs allege the existence of a fiduciary relationship "based on Defendant Siner's undertaking and assuming responsibility to obtain business owner insurance on the Properties." (Compl. ¶ 61). Although Plaintiffs included in the Complaint a separate section entitled "Special Relationship," they have not, in fact, alleged any facts showing a "special relationship." Plaintiffs allege that "the parties had a relationship as the Insurance Company, the Insurance Company's Agent, and Insured" and that Markel and Siner are "experts in insurance" and Plaintiffs are not. (Compl., ¶ 48).

Moreover, Plaintiffs have specifically alleged that Siner was Markel's agent. (Compl., ¶¶ 23-26, 56-57, 70-71); *see also*, Tenn. Code Ann. § 56-6-115(b) (providing that an "insurance producer who solicits or negotiates an application for insurance is regarded as the agent of the insurer and not the insured"). Indeed, the agency relationship between Siner and Markel is the purported basis for Markel's

vicariously liability. Plaintiffs then asserts that an agent, including an insurance agent, owes a fiduciary duty to its principle. (Doc. No. 31 at 20 (citing *Watkins v. HRRW, LLC*, No. 3:05-cv-00279, 2006 WL 3327659, at *8 (M.D. Tenn. Nov. 14, 2006)).[7] The law does not preclude Siner acting as an agent for Plaintiffs, but in this case, Plaintiffs allege that Siner was Markel's agent. Accordingly, any fiduciary duty owed by Siner on the basis of an agency relationship would be to Markel, not Plaintiffs.

The Court finds that Plaintiffs have not alleged sufficient facts to establish a plausible claim for breach of fiduciary duty. Accordingly, this claim will be dismissed without prejudice.

2. Negligence

Plaintiff's negligence claim is based on Siner's alleged failure to "inform and explain to Plaintiffs the nature of the virus exclusions on Plaintiffs' policies, [and] use reasonable care and diligence in ensuring Plaintiff [sic] was aware of the virus exclusions applicable to Plaintiffs' policies." (Compl., ¶¶ 50-51).

Siner argues that Plaintiffs do not allege they requested coverage against a viral pandemic, and he was under no duty to explain the policy coverage or make sure Plaintiffs understood the policy. (Doc. No. 26-1 at 6 (citing *Weiss v. State Farm Fire & Cas. Co.*, 107 S.W.3d 503, 506 (Tenn. Ct. App. 2001)). He also argues that under Tennessee law, the payment of the insurance premium creates a rebuttable presumption that Plaintiffs accepted the coverage provided. (Doc. No. 26-1 (citing Tenn. Code Ann. § 56-7-135(b)).

Plaintiffs argue the rebuttable presumption that they accepted the coverage provided does not apply here because they are not bringing a claim for negligent failure to procure coverage. The Court agrees that Tenn. Code Ann. § 56-7-135(b) is not necessarily dispositive of the negligence claim, as it establishes only a rebuttable presumption that Plaintiffs accepted the coverage provided. Determination of whether Plaintiffs can rebut the presumption is not appropriate on a motion to dismiss.

Nevertheless, the Court agrees that Plaintiffs' negligence claim should be dismissed. Although the insurance agent has a duty to obtain the insurance asked for by the client, Plaintiffs do not allege they requested coverage that was not provided. *Weiss*, 107 S.W. at 506 (an insurance agent's obligation to a client ends when the agent obtains the insurance asked for by the client) (citing 16 Tenn. Juris. *Insurance* § 8 (2001)). Instead, Plaintiffs allege Siner failed to explain the nature of the virus exclusions. *Weiss* makes clear that he did not have a duty to do so.[8] *See Weiss*, 107 S.W. at 506 (holding that insurance agents do not have a duty to explain the details of policy coverage or make sure insureds understand the policy coverage).

Jesmer v. Erie Ins. Co., No. 21-5186, 2021 WL 4473396, at *5 (6th Cir. Sept. 30, 2021). (Under

Tennessee law, insurance customer (not agent) responsible for ensuring that information on insurance application is accurate):

> But under Tennessee law, Jesmer, and not the agent, was ultimately responsible for ensuring that his insurance application contained truthful information. *See Giles v. Allstate Ins. Co., Inc.*, 871 S.W.2d 154, 157 (Tenn. Ct. App. 1993) (holding that an insurance policy was void under § 56-7-103 when an applicant provided truthful information to the insurance agent but the agent wrote incorrect information on the application, because "[a]n insured has the duty to read the application for insurance and to verify the information therein stated") (quoting *Montgomery v. Reserve Life Ins.*, 585 S.W.2d 620, 622 (Tenn. Ct. App. 1979)). Jesmer confirmed that he "glanced" at the application before signing it, R. 25-1, PID 169–70, but he would still have been responsible for its content even if he had not read the application at all. *Giles*, 871 S.W.2d at 156.
>
> ***
>
> Jesmer does not argue that the agent misled or deceived him or acted in any way independently of his wishes. Additionally, he had the opportunity to review and sign the insurance application before submitting it to Erie. Accordingly, Jesmer's cases are distinguishable and Tennessee law holds him responsible for the misrepresentations in the application. *Giles,* 871 S.W.2d at 156.

Spyres v. Pruco Life Ins. Co., No. 2:21-CV-01147-WBS-AC, 2021 WL 4168689, at *3–4 (E.D. Cal. Sept. 14, 2021). (Court analyzing agent's duty under California law and ultimately finding thin potential liability premise to keep alive insurance customer's claim against insurance customer):

> Plaintiff's sole cause of action against defendant Zeiter in the complaint is for "Professional Negligence". (See Compl. at ¶¶ 49–56.) The elements of a cause of action for professional negligence are: (1) the duty of the professional to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) breach of that duty; (3) a causal connection between the negligent conduct and the result injury; and (4) actual loss or damages resulting from the professional negligence. See Loube v. Loube, 64 Cal. App. 4th 421, 429 (1st Dist. 1998). "[I]t is not enough to show that the defendant breached a duty owed to the client; the client also must demonstrate that the breach of that duty caused actual loss or damages." Id. at 425.
>
> In California, an insurance broker owes a duty of care in procuring the coverage requested by the client. See Fitzpatrick v. Hayes, 57 Cal. App. 4th 916, 922 (1st Dist. 1997). Ordinarily, an insurance agent assumes only those duties found in any agency relationship such as "reasonable care, diligence, and judgment in procuring the insurance requested by the insured." Paper Savers, Inc. v. Nacsa, 51 Cal. App. 4th 1090, 1095–96 (2d Dist. 1996). However, a special duty may be created by express agreement or by the agent holding himself out to be more than an "ordinary agent." See id. (internal citations omitted). An insurance broker may breach a professional duty if he adds a misrepresentation to an application without the

knowledge of the applicant. See Quiroz v. Valley Forge Ins. Co., No. C 05-2025 SBA, 2005 WL 1806366, at *7 (N.D. Cal. July 28, 2005) (broker omitted information in final application without applicant's knowledge); Isch v. Nw. Mut. Life. Ins. Co., No. C-99-5257 WHO, 2000 WL 274193, at *3 (N.D. Cal. Mar. 6, 2000) (plaintiff stated a claim by alleging that broker had applicant sign application without being offered the chance to review contents).

District courts within California have also held that plaintiffs may be able to state a claim for professional negligence where a broker affirmatively advises an applicant to omit certain information. See Hudgens v. N.Y. Life Ins. Co., No. CV 08-08550-MMMR (RCx), 2009 WL 782312, at *4 (C.D. Cal. Mar. 17, 2009). However, "an insurer does not have the duty to investigate the insured's statements made in an insurance application and to verify the accuracy of the representations" because "it is the insured's duty to divulge fully all he or she knows." Hartford Cas. Ins. Co. v. Fireman's Fund Ins. Co., 220 F. Supp. 3d 1008, 1019 (N.D. Cal. 2016) (citing Am. Way Cellular, Inc. v. Travelers Prop. Cas. Co. of Am., 216 Cal. App. 4th 1040, 1051 (2d Dist. 2013)).

Under the allegations of plaintiff's complaint as it stands, it does not appear that the element of breach of duty is adequately alleged in plaintiff's her professional negligence claim against Zeiter. The complaint alleges that the decedent did not know the truth of the answers given in the policy application that constituted allegedly material misrepresentations. (See Compl. at ¶¶ 19–21.) Thus, it does not appear how anything Zeiter or his staff could have advised or explained to him would have prevented decedent from making the allegedly false statements.

*4 Nor does the complaint contain any allegation that Zeiter added a misrepresentation to the decedent's application without his knowledge or affirmatively advised him to omit certain information. Indeed, Zeiter testified in his deposition that he never instructed any applicant or his coworkers to answer applications untruthfully, and he would not submit an application to an insurer if he knew the answer to any question to be false. (See Decl. of Laura L. Geist in Opp'n to Mot. to Remand, Ex. A at 88:2–89:10 ("Geist Decl.") (Docket No. 7-2).) The decedent was given multiple opportunities to provide correct answers in his application. (See Opp'n to Mot. to Remand at 11 (Docket No. 7).) The decedent reviewed the application on the phone with a third party examiner and gave the same answers (see Geist Decl. at Ex. C), and signed the application stating that the statements in the application were complete, true, and correctly recorded. (See Compl. at Ex. B.)

Nevertheless, the court cannot say at this stage of the proceedings that there is no set of facts consistent with the complaint under which Zeiter could be held liable for professional negligence. While not alleged in the complaint, plaintiff now claims that Zeiter or his staff told the decedent "not to stress too much" if he could not recall his medical history and/or the answers to the questions on his application, because Pruco would request his medical records and verify the information during the application process.

Moriarty v. Bayside Ins. Assocs., Inc., No. 20-56139, 2021 WL 4061105, at *1–2 (9th Cir. Sept. 7, 2021). (Court analyzed both standard order taker duty to procure and special relationship duty to advise and found agent did not breach either duty and affirmed district court's grant of summary judgment):

> The district court granted summary judgment to Bayside on the professional negligence claim, finding that Bayside did not owe the duty that Moriarty alleged. Later, the parties stipulated to the dismissal of Moriarty's negligent misrepresentation claim, as duty is an element of both claims. The district court then entered final judgment for Bayside under Federal Rule of Civil Procedure 54(b). We review the district court's grant of summary judgment de novo and affirm. *Tzung v. State Farm Fire & Cas. Co.*, 873 F.2d 1338, 1339 (9th Cir. 1989).
>
> In California, "whether a duty of care exists is a question of law for the court." *Fitzpatrick v. Hayes*, 57 Cal.App.4th 916, 67 Cal. Rptr. 2d 445, 448 (1997) (citation and alteration omitted). In the usual case, "[i]nsurance [agents] owe a limited duty to their clients, which is only to use reasonable care, diligence, and judgment in *procuring* the insurance requested by an insured." *Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc.*, 203 Cal.App.4th 1278, 138 Cal. Rptr. 3d 294, 297 (2012) (quotation marks and citation omitted). Thus, in *Kotlar v. Hartford Fire Insurance*, 83 Cal.App.4th 1116, 100 Cal. Rptr. 2d 246 (2000), the California Court of Appeal held that an insurance agent does not owe an insured a general duty to notify him of an insurer's intent to cancel his insurance policy due to nonpayment of premiums. *Id.* at 250. California will impose a special duty beyond this limited duty "when—*but only when*—one of ... three things happens." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452 (emphasis added).
>
> First, California will impose a special duty when "the agent misrepresents the nature, extent or scope of the coverage being offered or provided." *Id.* Moriarty does not allege that Bayside misrepresented the nature, extent, or scope of her husband's life insurance policy. Unlike in *Free v. Republic Insurance*, 8 Cal.App.4th 1726, 11 Cal. Rptr. 2d 296 (1992), Bayside answered Moriarty's email inquiry with correct information. *Cf. id.* at 297–98. And unlike in *Paper Savers, Inc. v. Nacsa*, 51 Cal.App.4th 1090, 59 Cal. Rptr. 2d 547 (1996), Bayside did not induce Moriarty's husband to purchase the life insurance policy through affirmative misrepresentations. *Cf. id.* at 554.
>
> Second, California imposes a special duty to volunteer certain information regarding additional or different coverage when "there is a request or inquiry by the insured for a particular type or extent of coverage." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452. This exception, by its own terms, doesn't apply here. *Cf. Westrick v. State Farm Ins.*, 137 Cal.App.3d 685, 187 Cal. Rptr. 214, 217–19 (1982) (holding that an insurance agent has "an affirmative duty of disclosure" during the sale of an insurance policy if a client's inquiry puts the agent on notice that the policy will not meet the client's unique needs).

> Third, California will impose a special duty when "the agent assumes an additional duty by either express agreement or by 'holding [it]self out' as having expertise in a given field of insurance being sought by the insured." *Fitzpatrick*, 67 Cal. Rptr. 2d at 452. Bayside did not enter into an express agreement with the Moriartys to tell them about the status of the life insurance policy. Its statement that it was "trying to have a team follow up on status" was not an express agreement to do so. Nor did Bayside hold itself out as a life insurance expert. Unlike in *Murray v. UPS Capital Insurance Agency, Inc.*, 54 Cal.App.5th 628, 269 Cal. Rptr. 3d 93 (2020), Bayside does not specialize in the type of insurance at issue, *cf. id.* at 110, and Moriarty does not otherwise show that Bayside held itself out as a life insurance expert.
>
> Moriarty also argues that Bayside owed her a duty because of their "special relationship." But Moriarty has not shown that Bayside was in a more "unique position" than the typical insurance agent to protect her or her husband from injury. *See Brown v. USA Taekwondo*, 11 Cal.5th 204, 276 Cal.Rptr.3d 434, 483 P.3d 159, 166 (2021). Finally, Moriarty argues that the panel should impose an affirmative duty on Bayside under *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 (1968). But the California Supreme Court recently held in *Brown v. USA Taekwondo*, 276 Cal.Rptr.3d 434, 483 P.3d 159, that "[t]he multifactor test set forth in *Rowland* was not designed as a freestanding means of establishing duty, but instead as a means for deciding whether to limit a duty derived from other sources." *Id.*, 276 Cal.Rptr.3d 434, 483 P.3d at 166.
>
> Thus, as the district court found, Moriarty's professional negligence and negligent misrepresentation claims fail because she has not established an essential element—duty. *See Eriksson v. Nunnink*, 191 Cal.App.4th 826, 120 Cal. Rptr. 3d 90, 100 (2011); *Eddy v. Sharp*, 199 Cal.App.3d 858, 245 Cal. Rptr. 211, 213 (1988).

Vulk v. State Farm Gen. Ins. Co., 69 Cal. App. 5th 243, 284 Cal. Rptr. 3d 360 (2021). (August 31, 2021). (Lengthy discussion of duties of agent, including when special relationship duty applies, but court ultimately found agent did not breach any duties to insurance customer.)

Durham Wood Fired Pizza Co. LLC v. Cincinnati Ins. Co., No. 1:20CV856, 2021 WL 3856169, at *2–3 (M.D.N.C. Aug. 27, 2021). (In a case involving denial of coverage for CVOID-19 related business closure claims, court analyzed possible duty of agent and found there could potentially be a duty and breach of that duty by agent); (Emphasis added):

> Under North Carolina law, a plaintiff establishes a prima facie case for an insurance agent's negligent failure to procure requested coverage by showing: "[1] the existence of a legal duty owed to the plaintiff by the defendant, [2] breach of that duty, and [3] a causal relationship between the breach and plaintiff's injury or loss." *Holmes v. Sheppard*, 805 S.E.2d 371, 374 (N.C. Ct. App. 2017). An insurance agent's duty arises when the agent "undertakes to procure for another insurance against a designated risk" or "lulls the insured into the belief that such insurance has been effected" with "a promise or some affirmative assurance." *Id.* at 375. This is a fact intensive inquiry. *See id.* In *Holmes*, plaintiff had a possibility of recovery where there was evidence that his insurance agent knew that the reason he

> needed new building insurance was because his building was newly vacant, but nevertheless recommended insurance that did not cover vacant buildings. *Id.* In contrast, a plaintiff has no possibility of recovery—and remand is therefore inappropriate—where his dispute is not with "the adequacy of the coverage provided" but with "the manner in which [the insurer] carried out its contractual duties to the policyholder." *Harris v. State Farm Fire and Cas. Co.*, 2013 WL 3356582, *3 (E.D.N.C. July 3, 2012) (denying a motion to remand where plaintiff alleged only that the insurer negligently conducted an inspection to assess fire damage, and not that the policy itself was inadequate).
>
> At this stage, the Court cannot conclude that the Insurance Agents were fraudulently joined. **There remain questions of fact as to what Plaintiffs asked of the Insurance Agents, what promises or assurances the Insurance Agents made to Plaintiffs, and whether they otherwise acted to "lull" Plaintiffs into believing that their policies—purchased at a time when government mandated closures appeared imminent—would cover losses caused by such closures. Resolving each of these issues of fact in Plaintiffs' favor provides a clear path to recovery against the Insurance Agents**. Unlike in *Harris*, Plaintiffs here directly challenge the "adequacy" of the coverage provided to them by the Insurance Agents rather than the "manner" in which an insurance provider carried out its contractual duties. Thus, there is some possibility that Plaintiffs will recover against the Insurance Agents.
>
> Defendants' argument that Plaintiffs cannot recover because they failed to plead sufficient facts to establish a cause of action is inapposite. The question before this Court is not whether Plaintiffs have submitted a well pleaded complaint or plead sufficient facts to allege a cause of action against the Agents—these questions are for the state court. The question here, rather, is whether resolving both the factual and legal issues related to Plaintiffs' claim in Plaintiffs' favor provides even a "glimmer of hope" that their cause of action has even the "slightest possibility" of success in state court against the non-diverse parties; in this case, the Insurance Agents. The Court finds that they do. A resolution of all questions of law and fact in Plaintiffs' favor makes clear that a state court *could* find that the Insurance Agents owed Plaintiffs a duty, breached that duty, and caused them damages. Thus, the Insurance Agents were not fraudulently joined, and this case must be remanded.

NEDHS Logistics, LLC v. Genesis Transportation Servs., Inc., No. DBDCV215016833S, 2021 WL 4240777, at *4 (Conn. Super. Ct. Aug. 26, 2021). (Agent has no duty to additional insured under an insurance policy issued to insured).

Gaslight Inn LLC v. Mut. of Enumclaw Ins. Co., No. 1 CA-CV 20-0600, 2021 WL 3743821 (Ariz. Ct. App. Aug. 24, 2021). (Insurance agent does not owe a duty to ensure that each non-party to a contract, with an insurable interest, is a named insured under an insurance policy.)

> Moreover, the Plaintiffs have not cited any other authority for their claim that an insurance agent owes a duty to ensure that each non-party to a contract, with an

> insurable interest, is a named insured under an insurance policy. *See Ferguson v. Cash, Sullivan & Cross Ins. Agency*, 171 Ariz. 381, 386 (App. 1991) (explaining "an agent owes no duty to a third party to recommend insurance").

Polinard v. Covington Specialty Ins. Co., No. SA-21-CV-00353-XR, 2021 WL 3742404, at *4 (W.D. Tex. Aug. 24, 2021). (No duty to procure insurance for additional insured listed on certificate of insurance):

> Plaintiff's original petition does not provide enough factual allegations to draw a reasonable inference that Defendant breached a duty owed to Plaintiff. The Court cannot reasonably infer that Defendant owed Plaintiff a fiduciary duty, because the petition does not set forth any facts to establish the existence of an informal relationship with Tabak and Granados. *Wayne Duddlesten, Inc.*, 110 S.W.3d 85 at 96. Historically, Texas courts have not "interposed any duty in favor of a non-client upon a client's insurance agent regarding the agent's negligent failure to procure a liability policy with a certificate designating the non-client as an additional insured." *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 14, 26 (Tex. App.—Corpus Christi 2013, pet. denied). As such, Tabak and Granados owed no duty to procure insurance with Plaintiff as the additional insured or to ensure that the Policy remained in effect. *Id.*
>
> Additionally, Tabak's and Granados's correspondence with Plaintiff consisted of a single email. ECF No. 11 ¶ 4. Such limited correspondence is not enough evidence to show a contractual connection or relationship with Tabak and Granados. *Pavement Markings, Inc.*, 446 S.W.3d at 26. Nor is such evidence sufficient to establish privity, even if it was foreseeable that Plaintiff would rely on such correspondence. *Id.* at 27; *see also Hartman v. Urban*, 946 S.W.2d 546, 550 (Tex. App —Corpus Christi 1997, no writ) (holding engineer who prepared an inaccurate plot did not owe a duty to subsequent purchaser due to a lack of privity, even though it was foreseeable that purchaser would rely on the plot). Plaintiff's negligence claims against Tabak and Granados must be dismissed because there is no reasonable basis for the district court to predict that Plaintiff might be able to recover them. *Smallwood*, 385 F.3d at 573.

Old Ironsides Energy, LLC v. Marsh & McClennan Agency, LLC et al. Additional Party Names: Edward D. Fitzgerald, John Kurkulonis, Jr, Marsh USA, Inc., Marsh, LLC, No. 1984CV912BLS2, 2021 WL 5630747, at *11 (Mass. Super. Aug. 13, 2021). (No viable breach of contract claim and no viable professional negligence claim against agency):

> The SAC alleges that Marsh USA served as a "professional consultant and advisor." (SAC 143.) But as noted above, the critical communications on which Old Ironsides relies, the January 6 and 16 emails, did not show that Marsh USA accepted any duty directly to Old Ironsides. Instead, it shows that Marsh USA, and specifically Millet, "agreed" to serve as a "resource" to Fitzgerald, Old Ironsides' insurance broker, "on ... policy language" (January 6) and that Millet had "connected" with Fitzgerald on it (January 16). At best, then, the SAC contends that Marsh USA acted with Fitzgerald as an insurance broker for Old Ironsides. But the SAC fails to allege facts to support that claim.

The Appeals Court has recently explained the duty of care owed by insurance brokers as follows:

> [T]here is no general duty of an insurance agent to ensure that the insurance policies ... provide coverage that is adequate for the needs of the insured. However, an insurance agent may acquire a greater duty of investigation, advice, and assistance to an insured by reason of special circumstances. Such special circumstances of assertion, representation and reliance may create a duty of due care.

Factors creating special circumstances include (1) a prolonged business relationship; (2) the complexity and comprehensiveness of the customer's coverages; (3) the frequency of contact between a customer and agent to attend to the customer's insurance needs; and (4) the extent to which a customer relies on the advice of the agent by reason of the complexity of the policies. The list is not exhaustive; for example, enhanced duties will arise when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured.

Perreault v. AIS Affinity Ins. Agency of New England, Inc., 93 Mass.App.Ct. 673, 677-78, (2018) (internal quotes and citations omitted). The allegations in the SAC show that Marsh USA had no formal business relationship with Old Ironsides, let alone a prolonged one, had minimal contact with the company (merely a lunch and a few emails), and was provided no compensation in exchange for its purported offer to review the CNA policy. Moreover, the facts alleged do not show that Old Ironsides reasonably relied on Marsh USA to act as a broker and identify the missing coverage. Not only is it true that the parties never reached any agreement for Marsh USA to provide such services and that no duty can be implied from these facts, but the record shows that Old Ironsides delayed for years in seeking to assert this claim against Marsh USA, showing rather plainly that Old Ironsides did not rely on Marsh USA for this service.

For the foregoing reasons, Old Ironsides has failed to state a claim for negligence against Marsh USA. Its motion to amend the complaint to add this claim is denied as futile.

S.L. & M.B., L.L.C. v. United Agencies, Inc., 2021-Ohio-2780, ¶ 18. (August 12, 2021). (Agent had no duty to third party).

Cheshier v. Travelers Home & Marine Ins. Co., No. 3:21-CV84-M-RP, 2021 WL 3573621, at *2–3 (N.D. Miss. Aug. 12, 2021). (No affirmative duty to advise but if advice is given there is duty to exercise care in providing advice):

> ... we do not find that insurance agents in Mississippi have an affirmative duty to advise buyers regarding their coverage needs.... Imposing liability on agents for failing to advise insureds regarding the sufficiency of their coverage would remove any burden from the insured to take care of his or her own financial needs.

> However, we find that if agents do offer advice to insureds, they have a duty to exercise reasonable care in doing so. A jury should be allowed to decide whether reasonable care was exercised here. *Mladineo v. Schmidt*, 52 So.3d 1154, 1160 (Miss. 2010).

Sykes v. White, No. 09-20-00227-CV, 2021 WL 3555723, at *6 (Tex. App. Aug. 12, 2021). ("Under Texas law, an insurance agent who undertakes to procure insurance for another owes a duty to the client to use reasonable diligence to procure the insurance or notify the client that he was unable to do so." *See May v. United Servs. Ass'n*, 844 S.W.2d 666, 669 (Tex. 1992)).

Sooner Legends, LLC v. Navigators Specialty Ins. Co., Inc., No. CIV-21-552-C, 2021 WL 3476615, at *2 (W.D. Okla. Aug. 6, 2021). (Plaintiff insurance customer pled sufficient facts to establish viable claim against insurance agent):

> Plaintiff brings claims against Defendant Tatum for negligence in procurement of the insurance policy and negligent misrepresentation/constructive fraud arising from procurement of the policy. Oklahoma law provides that "an insurance agent may be liable under either contract or tort theories for failure to obtain insurance." Swickey v. Silvey Cos., 1999 OK CIV APP 48, ¶ 8, 979 P.2d 266, 268.* An insurance agent has a duty "to exercise reasonable care and skill in performing its tasks, i.e. procuring insurance," and may be "liable to the insured if, by the agent's fault, insurance is not procured as promised and the insured suffers a loss." Id., ¶ 13, 979 P.2d at 269. According to Plaintiff, it relied on Defendant Tatum's expertise and service in procuring an insurance policy that would cover all insurable risks Plaintiff might face. Plaintiff argues that in reliance on Defendant Tatum's promise that that policy had been provided, premiums were paid. Defendants argue that Plaintiff has failed to state a claim of negligence in the procurement of insurance, as Oklahoma law does not require an agent to procure a specific amount or type of insurance. Rather, under Oklahoma law, an agent must only provide the coverage requested and the coverage that is promised. Defendants' argument improperly narrows the scope of Plaintiff's claims. As noted, Plaintiff has raised allegations which, if proven, would establish that Plaintiff requested specific coverage and Defendant Tatum promised to provide that coverage. Viewing these allegations in a light most favorable to Plaintiff, it cannot be said that Plaintiff can prove no set of facts that would entitle it to relief. Whether or not Plaintiff is able to ultimately prevail on its claims is not at issue at this stage. As the Tenth Circuit has recognized, the objective is not to pre-try the merits of Plaintiff's claims, as " '[a] claim which can be dismissed only after an intricate analysis of state law is not so wholly insubstantial and frivolous that it may be disregarded for purposes of diversity jurisdiction.' " Brazell v. Waite, 525 F. App'x 878, 881 (10th Cir. 2013) (unpublished) (quoting Batoff v. State Farm Ins. Co., 977 F.2d 848, 853 (3d Cir. 1992)). Thus, Defendants have failed to establish by clear and convincing evidence that the joinder of Defendant Tatum was fraudulent. Hart v. Wendling, 505 F. Supp. 52, 53 (W.D. Okla. 1980). Consequently, complete diversity does not exist, and this Court lacks subject matter jurisdiction to consider the matter further.

Chaudhary v. Arthur J. Gallagher & Co., No. CV H-18-2179, 2021 WL 3423096, at *6–8 (S.D. Tex. Aug. 5, 2021). (Allegations of insurance customer sufficiently pled claims of common-law misrepresentation, and negligence against insurance agent but did not sufficiently plead breach of fiduciary duty claim or DTPA/Insurance Code claim). (Court's analysis of negligence and breach of fiduciary duty claim are as follows):

> **D. The Common-Law Negligence Claim**
>
> To plead a common-law negligence claim, the Chaudharys must allege facts sufficient to show that AJG owed a duty and breached that duty, which proximately caused them damages. *D. Hous., Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002) ("A cause of action for negligence in Texas requires three elements. There must be a legal duty owed by one person to another, a breach of that duty, and damages proximately caused by the breach."). The Chaudharys allege that AJG and Bettina were negligent in failing to procure the insurance the Chaudharys requested. (Docket Entry No. 56-2 at ¶ 53). AJG argues that the Chaudharys did not adequately allege a duty or causation.
>
> **1. Duty**
> Texas courts impose "liability on insurance agents for failing to secure sufficient coverage in narrow circumstances." *Edwea, Inc.*, 2010 WL 5099607, at *11. No "legal duty exists on the part of an insurance agent to extend the insurance protection of his customer merely because the agent has knowledge of the need for additional insurance of that customer, especially in the absence of evidence of prior dealings where the agent customarily has taken care of his customer's needs without consulting him." *Choucroun v. Sol L. Weisenberg Ins. Agency-Life & Health Div., Inc.*, No. 01-03-00637-CV, 2004 WL 2823147, at *4 (Tex. App.—Houston [1st. Dist.] Dec. 9, 2004, no pet.) (quoting *Critchfield v. Smith*, 151 S.W.3d 225, 230 (Tex. App.—Tyler 2004, pet. denied)). Insurance agents, however, owe a duty to their clients to "use reasonable diligence" to procure "the requested insurance and to inform" their clients "promptly if unable to do so." *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992).
>
> The Chaudharys allege that they requested insurance that would reimburse them for "any loss" to their "home and possessions." (Docket Entry No. 56-2 at ¶ 13). They allege that, over the course of multiple discussions with Bettina, they picked assets they wanted covered, and asked Bettina to procure appropriate policies. (*Id.* at ¶ 12). Bettina and the Chaudharys met many times and talked regularly on the phone, and Bettina visited the Chaudharys' house to assess its contents and value to place the insurance. (*Id.* at ¶ 13). The Chaudharys allege that Bettina and AJG would "customarily take care of" the Chaudharys' insurance needs without consulting them. (*Id.* at ¶ 14). The coverage amounts were allegedly "left up to the expertise and discretion of Bettina, who repeatedly assured [the Chaudharys] they were covered under the 'worst case scenarios' that could damage the home and its contents." (*Id.*). The Chaudharys allege that AJG and Bettina did not provide or renew the coverage they requested. (*Id.* at ¶ 53). They also allege that AJG and Bettina never notified them that they did not have the requested insurance in place as promised. (*Id.*).

These allegations raise a plausible inference that AJG did not use reasonable diligence to procure private excess flood insurance, as requested and represented, and did not notify the Chaudharys that their home and contents were not covered as requested. *See Edwea, Inc.*, 2010 WL 5099607, at *11 (denying an insurance agent's motion to dismiss when the plaintiff alleged that the agent "misrepresented to Plaintiffs, prior to Hurricane Ike, that sufficient commercial coverage existed to protect them from related damages"); *May*, 844 S.W.3d at 669 (discussing *Burroughs v. Bunch*, 210 S.W.2d 211 (Tex. App.—El Paso 1948, writ ref'd) (finding an insurance agent liable for fire damage to a house under construction because the agent represented to the customer that the agent would have a builder's risk policy issued on the house but failed to notify the customer that he failed to procure such a policy)).

2. Causation

AJG argues that the Chaudharys cannot establish causation because, under Texas law, it is the insured's duty to read and be familiar with the terms of the insurance policy, *see Coachmen Indus., Inc. v. Willis of Ill., Inc.*, 565 F. Supp. 2d 755, 768 (S.D. Tex. 2008), and an insurer is not liable for a policyholder's mistaken belief about the scope or availability of coverage, *see, e.g.*, *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692–93 (Tex. App.—San Antonio 1998, no pet.). (Docket Entry No. 69 at 8).

As discussed above, the Chaudharys allege that they never received a copy of the insurance policy and, if they did, their failure to read it bears on their contributory negligence, not their ability to state a claim. (Docket Entry No. 70 at 4, 9); *see Aspen Specialty Ins. Co.*, 514 F. Supp. 2d at 982 ("[The plaintiff] had no duty to read a policy it did not have."); *Kloesel*, 266 S.W.3d at 469 & n.27 ("[A]n inquiry as to whether [insureds] are legally presumed to have read and have knowledge of the [policy] touches upon a matter that traditionally goes to the issue of contributory negligence."); *see also Edwea, Inc.*, 2010 WL 5099607, at *12 ("[T]he defendants have not presented any basis to conclude that the plaintiffs' negligence claim against [the insurance agent] results solely from their failure to read the insurance policy or their mistaken belief about the policy's coverage.").

The Chaudharys adequately pleaded their negligence claim. AJG's motion to dismiss the negligence claim is denied.

E. The Breach of Fiduciary Duty Claim

The Chaudharys assert a breach of fiduciary duty claim against Bettina based on their "longstanding relationship of trust and confidence" that existed "prior to and apart from the insurance agreement that is the basis of this lawsuit." (Docket Entry No. 56-2 at ¶ 57).

A "fiduciary duty is an extraordinary duty that is not lightly created." *E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 318 (Tex. 2004) (citations omitted). While no formal fiduciary relationship exists "between an insurer and its

> insured," *EC & SM Guerra, LLC v. Phila. Indem. Ins. Co*, No. 20-CV-00660, 2020 WL 6205855, at *4 (W.D. Tex. Oct. 21, 2020), an informal fiduciary relationship "may arise where one person trusts in and relies upon another, whether the relationship is moral, social, domestic, or purely a personal one," *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007) (citation omitted). To impose an informal fiduciary duty, a "special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998). Not "every relationship involving a high degree of trust and confidence rises to the stature of a fiduciary relationship." *Meyer v. Cathey*, 167 S.W.3d 327, 330 (Tex. 2005). Neither subjective trust nor a long, "cordial" relationship necessarily creates a fiduciary relationship. *Hogget v. Brown*, 971 S.W.2d 472, 488 (Tex. App.—Houston [14th Dist.] 1997, pet. denied). An informal fiduciary relationship may exist between an insurance agent and his client when the client is "accustomed to being guided by the judgment or advice of the [agent] or is justified in placing confidence in the belief that [the agent] will act in its interest." *Aspen*, 514 F. Supp. 2d at 983 (citation omitted).
>
> The Chaudharys failed to allege a fiduciary relationship before or apart from the insurance policies at issue. The Chaudharys allege that Bettina served as their insurance agent from 2013 until Hurricane Harvey, held himself out as an expert in determining the appropriate coverage for them, was responsible for renewing their insurance policies, and assured them that they would be "fully covered in the event that their home sustained any type of damages from the storm, including flooding." (Docket Entry No. 56-2 at ¶¶ 12, 13, 27, 29, 35). These alleged actions do not rise above the actions taken in a typical relationship between an insurance agent and insured. *See Env't Procs., Inc. v. Guidry*, 282 S.W.3d 602, 627 (Tex. App.—Houston [14th Dist.] 2009) (an insurance agent's "expertise in the insurance industry" does not establish an informal fiduciary relationship); *Choucroun*, 2004 WL 2823147, at *8 ("[The plaintiff] may have had a long-standing relationship with [the insurance agent], but there is nothing to show that [the agent] undertook any duties over and above those of any insurance agent."); *Hitchcock Indep. School Dist. v. Arthur J. Gallagher & Co.*, No. 3:20-CV-00125, 2021 WL 1095320, at *5 (S.D. Tex. Feb. 26, 2021) ("The fact that [the agent] assisted [the insured] in procuring insurance in the past is insufficient, by itself, to give rise to a fiduciary relationship.").
>
> AJG's motion to dismiss the breach of fiduciary duty claim is granted.

French v. Davenport Agency, Inc., No. 2:20-CV-1079-WKW, 2021 WL 3173579, at *2–3 (M.D. Ala. July 27, 2021). (Plaintiff pled sufficient claims against insurance agent):

> "Like any other negligence claim, a claim in tort alleging negligent failure of an insurance agent to fulfill a voluntary undertaking to procure insurance, ... requires demonstration of the classic elements of negligence, *i.e.*, '(1) duty, (2) breach of duty, (3) proximate cause, and (4) injury.' " *Kanellis v. Pac. Indem. Co.*, 917 So. 2d 149, 155 (Ala. Civ. App. 2005) (quoting *Albert v. Hsu*, 602 So. 2d 895, 897 (Ala. 1992)). Applying the elements of negligence to the procurement of

insurance, Alabama courts have stated that once an insurance agent, "with a view toward compensation, undertakes to procure insurance for a client," the agent owes a duty to the client to "exercise reasonable skill, care and diligence in effecting" the coverage agreed upon. *Highlands Underwriters Ins. Co. v. Elegante Inns, Inc.*, 361 So. 2d 1060, 1065 (Ala. 1978).

Berkshire argues that there is no reasonable possibility that Plaintiffs can prove a negligent procurement claim against the Davenport Agency and Davenport for two reasons: (1) Plaintiffs' failure to read the insurance policy and to discern its coverage limits amounts to contributory negligence, thus barring their negligent procurement claim as a matter of law; and (2) there can be no negligent procurement because the Davenport Defendants did in fact procure an insurance policy for Plaintiffs. Neither argument is persuasive.

Starting with contributory negligence, the Alabama Supreme Court has "held that the doctrine ... applies in the context of an insured's failure to read an insurance contract." *Crook v. Allstate Indem. Co.*, 314 So. 3d 1188, 1199 (Ala. 2020) (citing *Alfa Life Ins. Corp. v. Colza*, 159 So. 3d 1240 (2014)). Here, however, the record does not support Berkshire's contributory negligence argument.
First, while Berkshire does attach to its notice of removal the forty-five-page insurance policy at issue (*See* Doc. # 1-5, at 19–64), it does not identify the specific provision or provisions of the policy that would have put Plaintiffs on notice that the damage they caused to their customer's mobile home was not covered under the policy. Berkshire merely states that Plaintiffs should have read the policy. Berkshire's failure to pinpoint the relevant provisions is problematic because it leaves the court guessing as to which terms of the policy so clearly prelude coverage. Further complicating matters is the fact that the record does not indicate how and in what manner Plaintiffs damaged the mobile home. These facts will undoubtedly impact whether Plaintiffs are entitled to coverage under the policy. Simply put, Berkshire's failure to identify the relevant policy terms excluding coverage and the absence of facts surrounding how the damage to the mobile home occurred create significant doubts about whether Plaintiffs were contributorily negligent. *See City of Vestavia Hills v. Gen. Fidelity Ins. Co.*, 676 F.3d 1310, 1313 (11th Cir. 2012) ("Indeed, all doubts about jurisdiction should be resolved in favor of remand to state court.") (cleaned up).

Second, Berkshire relies on *Kanellis* to support its contributory negligence argument. 917 So. 2d, at 149. As another district court found, this reliance is flawed: "*Kanellis* concerned a ruling upon motion for summary judgment, where the court had before it a factual record from which it could determine whether the plaintiff was on notice that the insurance policy did not provide the type of coverage the plaintiffs alleged they had sought." *Kieran v. CNA, CNA-LTC*, NO. CV 10-J-1816-S, 2010 WL 11618089, at *3 (N.D. Ala. July 13, 2010). Here, at the motion to remand stage, no such record exists that would permit a finding that Plaintiffs had notice that their policy did not cover the damage to their customer's mobile home.

Berkshire's second argument—that a claim for negligent procurement of insurance can be maintained only when an agent fails altogether to procure any insurance for

> a plaintiff—fares no better. Berkshire does not cite a single Alabama case supporting the limitation it seeks to impose on Plaintiffs' negligent procurement claim. Conversely, several Alabama state court decisions support Plaintiffs' theory that an insurance agent's failure to procure complete and adequate insurance can give rise to a negligent procurement claim. *See, e.g., Crump v. Geer Bros., Inc.*, 336 So. 2d 1091, 1093–94 (Ala. 1976) (affirming jury verdict for the plaintiff based on his theory that the defendant agent did not procure complete and adequate coverage); *Hickox v. Stover*, 551 So. 2d 259, 260–61 (Ala. 1989) (discussing a claim for negligent failure to procure "full, complete, and adequate insurance for the plaintiffs"), *overruled on other grounds by Foremost Ins. Co. v. Parham*, 693 So. 2d 409 (Ala. 1997); *Kanellis*, 917 So. 2d at 153 (discussing a claim for negligent procurement of insurance based upon allegations that the insurance coverage obtained was inadequate).

Dupass v. Kansas Ins., Inc., 491 P.3d 660 (Kan. Ct. App. 2021). (July 23, 2021). (Breach of contract claim against insurance agent began to accrue on date of alleged breach, not on date any damages were ascertained, and thus breach of contract claim against agent barred by three year statute of limitations).

I Square Mgmt. LLC v. McGriff Ins. Servs., Inc., No. 4:19-CV-00922-JM, 2021 WL 3025485, at *1–2 (E.D. Ark. July 16, 2021). (Court analyzed duties of insurance agents under Arkansas law, including special relationship duty to advise/inquire, and ultimately found no special relationship duty to advise/inquire and granted agent's motion for summary judgment):

> McGriff's Motion for Summary Judgment
>
> To prevail on their claim of negligence against McGriff, Plaintiffs must first prove that McGriff owed them a duty of care. The question of whether a duty is owed by a defendant to a plaintiff is always a question of law. *Mans v. Peoples Bank of Imboden*, 10 S.W.3d 885 (Ark. 2000). It is well established under Arkansas law that an insurance agent or broker has no duty to advise the insured as to different coverages or to investigate to ensure that the insured is adequately covered; rather, the Courts have placed that responsibly squarely on the insured to "educate himself concerning matters of insurance coverage." *Scott-Huff Ins. Agency v. Sandusky*, 887 S.W.2d 516, 517 (Ark. 1994) (quoting *Howell v. Bullock*, 764 S.W.2d 422, 424 (Ark. 1989)).
>
> Arkansas has recognized a very limited exception to this rule "where there is a special relationship between the agent and the insured, as can be evidenced by "an established and ongoing relationship over a period of time, with the agent being actively involved in the client's business affairs and regularly giving advice and assistance in maintaining proper coverage for the client." *Buelow v. Madlock*, 206 S.W.3d 890, 893 (Ark. App. 2005) (quoting *Stokes v. Harrell*, 711 S.W.2d 755 (Ark. 1986)). "The existence of a special relationship presents a question of fact." *Id.* The court in *Buelow* further expounded on the proof required to show a special relationship exists between an insured and an insurance agent:

> An insured can demonstrate a special relationship by showing that there exists something more than the standard insurer-insured relationship. This depends upon the particular relationship between the parties and is determined on a case-by-case basis. Examples include express agreement, long established relationships of entrustment in which the agent clearly appreciates the duty of giving advice, additional compensation apart from premium payments, and the agent holding out as a highly-skilled expert coupled with reliance by the insured.

Id. (quoting *Sintros v. Hamon*, 810 A.2d 553 (N.H. 2002)). *See also Temple v. Bancinsure, Inc.*, No. 1:10-CV-01059, 2012 WL 4458186, at *4 (W.D. Ark. Sept. 25, 2012).
***

> In analyzing the issue of whether Plaintiffs have presented sufficient proof to survive McGriff's summary judgment motion, the Court is relying on the evidence the parties directed the Court to consider in the summary judgment record. *Rodgers v. City of Des Moines*, 435 F.3d 904 (8th Cir. 2006). When viewed most favorably to Plaintiffs, the facts do not leave room for a reasonable jury to find that a special relationship existed between Plaintiffs and McGriff. The close friendship and relationship of I Square's *investor* Stephen LaFrance to McGriff's agent John Pierron does not translate into a special relationship between Plaintiffs and McGriff. Plaintiffs submitted LaFrance's declaration in opposition to the summary judgment motion in which he states that that he regularly gave advice to Goyal and Chakka about Plaintiffs' business; this fact, likewise, does not lead to an inference that McGriff was involved in advising Plaintiffs on their business ventures. The parties' relationship began in early 2017, about two years before the flood.[16] The fact that investor LaFrance had a prior insured-insurer relationship with Pierron does not piggyback onto Plaintiffs' two-year relationship with McGriff. The evidence put forth by Plaintiffs, taken as true, does not prove that McGriff was an "integral part of the team" who was actively involved in Plaintiffs' business affairs. Rather, these facts show nothing beyond that of an ordinary insurance broker responding to its client. Defendant's motion for summary judgment is granted on the basis that McGriff had no duty to Plaintiffs under Arkansas law. Therefore, the Court need not address the remaining bases for summary judgment.

LockandLocate, LLC v. Hiscox Ins. Co., No. 220CV09416MCSAGR, 2021 WL 3913193, at *6 (C.D. Cal. July 16, 2021). (Insurance customer sufficiently plead claims of intentional and negligent misrepresentation and negligence against insurance agent).

Stewart v. USAA Gen. Indem. Co., No. D076992, 2021 WL 2934492, at *5-6. (Cal. Ct. App. July 13, 2021). (Plaintiffs confuses duties of insurer and duties of agent but court still addresses duty of agent under California law):

> Stewart's cause of action for negligence alleges that USAA had a duty to recommend to him that he purchase an insurance policy from a company that engaged in fair business practices and did not have an ordinary business practice

designed to keep from paying policy benefits legitimately owed to policyholders. He further alleged USAA "as insurance agents" had a duty of care to him to ensure USAA had certain business practices that would not deprive him of his rights and increase USAA's profits. Citing *Sanchez v. Lindsey Morden Claim Services, Inc.* (1999) 72 Cal.App.4th 249, USAA argues that cause of action is not viable as a matter of law because negligence is not generally available against insurers and insurer-retained adjusters do not owe a duty of care to an insured.

This is not a question of whether a duty of care can be imposed on an *outside insurance adjuster* as was the case in *Sanchez*, but whether there can be no duty of care on USAA as an insurance agent as a matter of law, such that Stewart's complaint is incapable of amendment. It is in fact well-settled that insurance agents or brokers owe a limited duty to their clients, which is only " 'to use reasonable care, diligence, and judgment in *procuring* the insurance requested by an insured.' " (*Pacific Rim Mechanical Contractors, Inc. v. Aon Risk Ins. Services West, Inc.* (2012) 203 Cal.App.4th 1278, 1283, citing *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954; see also *Murray v. UPS Capital Insurance Agency, Inc.* (2020) 54 Cal.App.5th 628, 639; *Travelers Property Casualty Co. of America v. Superior Court* (2013) 215 Cal.App.4th 561, 578; *Kotlar v. Hartford Fire Ins. Co.* (2000) 83 Cal.App.4th 1116, 1123; *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1993) 12 Cal.App.4th 1249, 1257.) "These duties do not disappear because the agent is also an agent for an insurer. Dual agencies are not uncommon, and do not negate the agent's duty to the client." (*Kurtz*, at p. 1257.) " ' "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 ...." [Citation.] The agent who assumes additional duties, by holding herself out as having expertise in the insurance being sought by the insured, "may be liable to the insured for losses which resulted as a breach of that special duty." ' " (*Travelers Property Casualty Co.*, at pp. 578-579; *Pacific Rim*, at p. 1283, quoting *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927.)

Because insurance agents may have a duty of care under these circumstances, such liability is not precluded as a matter of law. As a consequence, we cannot say Stewart's negligence cause of action is completely incapable of amendment. Though Stewart alleged that USAA *itself* had a duty in connection with recommending a policy of insurance, Stewart should be afforded an opportunity to amend that allegation and others. In sum, the court erred by sustaining USAA's demurrer to this cause of action without leave to amend.

Primerica Life Ins. Co. v. Pawlik, No. MO:20-CV-063-DC, 2021 WL 5234975, at *8-10 (W.D. Tex. July 13, 2021). (Claims against agent for breach of fiduciary duty and negligence dismissed as a matter of law).

In general, there is no fiduciary duty between an insurer and an insured. *Id.*; *see also Rice v. Metro. Life Ins. Co.*, 324 S.W.3d 660, 678 (Tex. App.—Fort Worth 2010, no pet.) (same). Similarly, there is generally no fiduciary relationship between an insured and an insurance broker or agent. *Env't Procedures, Inc. v. Guidry*, 282 S.W.3d 602, 628 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

Ms. Pawlik argues that the circumstances of Movants' conduct were sufficient to establish a fiduciary duty. (*See* Doc. 13 at 35). This argument is contrary to Texas law. "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Meyer v. Cathey*, 167 S.W.3d 327, 331 (Tex. 2005) (quoting *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 287 (Tex. 1998)). And "mere subjective trust does not, as a matter of law, transform arm's-length dealing into a fiduciary relationship." *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997). Ms. Pawlik's allegations do not establish a "special relationship of trust and confidence" that existed "prior to, and apart from" the parties' business interactions related to the Policy and the Spouse Rider. *See Meyer*, 167 S.W.3d at 331.

Because no fiduciary duty existed between Primerica and its agents and Ms. Pawlik, Primerica and Mr. Dennis are entitled to summary judgment on Ms. Pawlik's breach of fiduciary duty claims.

***

Additionally, Ms. Pawlik's negligence claim against Mr. Dennis fails as a matter of law. Under Texas law, "[a]n insurance broker owes common-law duties to a client for whom the broker undertakes to procure insurance: (1) to use reasonable diligence in attempting to place the requested insurance; and (2) to inform the client promptly if unable to do so." *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 14, 26 (Tex. App.—Corpus Christi 2013, pet. denied) (citing *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992)). "The nature of the relationship between the insurance broker and the client is a significant consideration in determining the existence of a duty of care in cases involving professional negligence." *Id.* Generally, a professional negligence claim cannot proceed against the professional unless there is privity of contract. *Id.* "Privity of contract is established by proving that the defendant was a party to an enforceable contract with either the plaintiff or a party who assigned its cause of action to the plaintiff." *Allan v. Nersesova*, 307 S.W.3d 564, 571 (Tex. App.—Dallas 2010, no pet.) (citing *Redmon v. Griffith*, 202 S.W.3d 225, 239 (Tex. App.—Tyler 2006, pet. denied)). Ms. Pawlik presents no evidence that Mr. Dennis sold her the Policy or was engaged to procure insurance for her or that privity of contract existed between them.

Although Ms. Pawlik argues that Mr. Dennis provided advice to her and thus had an obligation to exercise reasonable care when providing that advice, the only authority she cites for that proposition is a dissenting opinion in *May.* (*See* Doc. 42 at 22). In *May*, Justice Gammage dissented from the decision of the majority of the

> Texas Supreme Court and relied on Wisconsin law for the proposition that insurance agents have an affirmative duty to advise clients if the agents expressly or implicitly agree to give advice to clients regarding the selection of appropriate insurance. 844 S.W.2d at 678 (Gammage, J., dissenting). Needless to say, a dissenting opinion is not sufficient authority to persuade the Court that such a duty exists under Texas law.
>
> As there is no evidence that Mr. Dennis and Ms. Pawlik were in privity of contract or that Mr. Dennis agreed to procure insurance for Ms. Pawlik and Ms. Pawlik fails to cite authority for the proposition that Mr. Dennis had a duty under Texas law to provide advice to her under a standard of reasonable care, the Court concludes that Mr. Dennis is entitled to summary judgment on this claim.

Wobig v. Safeco Ins. Co. of Illinois, No. CV 20-431 (JRT/KMM), 2021 WL 2827369, at *8 (D. Minn. July 7, 2021). (Like many 2021 cases plaintiff confuses insurer and agent duties, court nevertheless discuss duties of agents under Minnesota law and finds no breach of agent duties).

> Yet, irrespective of whether Simmons was acting as Safeco's agent, the Wobigs cannot establish, as a matter of law, that Simmons was negligent. A claim for negligent procurement of insurance coverage requires a showing that the agent owed a duty of reasonable care in procuring insurance, the duty was breached, and the insured sustained a loss. *Id.* at 116. Insurance agents have a duty "to exercise the standard of skill and care that a reasonably prudent person engaged in the insurance business will use in similar circumstances," *id.* (quoting *Johnson v. Farmers & Merchs. State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982)), to act in good faith and follow instructions, *Ma Amba Minn., Inc. v. Cafourek & Assocs., Inc.*, 387 F. Supp. 3d 947, 953 (D. Minn. 2019), and an affirmative duty to perform actions specifically undertaken for the client, *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989). The record includes no evidence that would permit a reasonable juror to conclude that Simmons had an affirmative duty to advise the Wobigs that their use of the shop would not be covered by the Safeco homeowner's policy or, even if such a duty did exist, how Simmons breached it. The Court will therefore grant Safeco's Motion with respect to Count II.

Coleman E. Adler & Sons, LLC v. Axis Surplus Ins. Co., No. CV 21-648, 2021 WL 2710469, at *2 (E.D. La. July 1, 2021). (In case involving denied claims for COVID-19 related losses, court identifies normal agent duty and rarely invoked heightened duty to advise, and finds neither duty was breach by agent in case).

Kahlenberg v. Bamboo Ins. Servs., Inc., No. 220CV06805FLAPDX, 2021 WL 2433796, at *5 (C.D. Cal. June 15, 2021). (Agent may be liable to insurance customer under heightened fiduciary duty or special relationship standard when agent "chose to complete the insurance application on Plaintiff's behalf without seeking her or her husband's input on the contents of the application, and submitting it with the agent's signature rather than the insured's."

Bryant v. Am. Mod. Select Ins. Co., No. 1:21-CV-625-CAP, 2021 WL 3929004, at *4 (N.D. Ga. May 21, 2021). (Case discussing agent "expert" exception of Georgia law requiring insured to read policy):

> [w]hile Georgia law generally provides that an insured has a duty to read their policy, an expert exception to the general rule exists when an insurance agent has held himself out as an expert and the insured has reasonably relied on the agent's expertise to identify and procure [the] correct amount or type of insurance, unless examination of the policy would have made it readily apparent that the coverage requested was not issued." *Id.* (citing *Cottingham & Butler, Inc. v. Belu*, 774 S.E.2d 747, 750 (Ga. Ct. App. 2015))

B&P Rest. Grp., LLC v. Eagan Ins. Agency, LLC, No. CV 21-555, 2021 WL 1851844, at *4 (E.D. La. May 10, 2021). (Court discusses duties of agent under Louisiana law and finds at pleading stage plaintiff has sufficiently pled out claims against agent).

Wilson v. Berger Briggs Real Est. & Ins., Inc., 2021-NMCA-054, ¶ 9, 497 P.3d 654, 658–59, (May 10, 2021), *cert. denied* (Oct. 20, 2021). (Case discusses in general claims that can be brought against agents under New Mexico law):

> {9} We begin with Wilson's arguments, which are consistent with the district court's ruling. Wilson is first correct that New Mexico allows claims in tort against insurance agents or brokers, such as those at issue here. For instance, New Mexico law permits an insured to sue an agent for failing to obtain a requested policy. *See Topmiller v. Cain*, 1983-NMCA-005, ¶ 12, 99 N.M. 311, 657 P.2d 638 (stating that "[i]t seems to be well settled that an insurance agent or broker who undertakes to provide insurance for another, and through his own fault or neglect, fails to do so, is liable" (internal quotation *659 marks and citation omitted)). "[L]iability may be predicated either upon the theory that [the] defendant is the agent of the insured and has breached a contract to procure a policy of insurance, or that he owes a duty to his principal to exercise reasonable skill, care, and diligence in securing the insurance requested and negligently failed to do so." *Sanchez v. Martinez*, 1982-NMCA-168, ¶ 14, 99 N.M. 66, 653 P.2d 897. "An agent who agrees to procure or renew an expired policy of insurance has a duty to either obtain the insurance, renew or replace the policy, or seasonably notify the principal that he is unable to do so in order that the principal may obtain insurance elsewhere." *Id.* ¶ 15. A suit for negligence may be predicated upon either an express or implied agreement between the parties. *See id.*

Kridner v. Est. of Padilla, 2021 IL App (4th) 200453-U, ¶ 66, *appeal denied sub nom. Kridner v. Hough*, 175 N.E.3d 91 (Ill. 2021) (May 10, 2021). (Court enforced two year statute of limitation barring claims against agent, and reaffirmed agent statute of limitations analysis established in *Am. Fam. Mut. Ins. Co. v. Krop*, 2018 IL 122556, 120 N.E.3d 982, where the Illinois Supreme Courtheld that insureds' cause of action for negligent failure to procure insurance accrued, and two-year limitations period began to run, when insureds first purchased their policy).

Fendley v. Norment, No. 06-20-00066-CV, 2021 WL 1680207, at *3-4 (Tex. App. Apr. 29, 2021). (Case discussing agent's duties under Texas law):

> "An insurance agent ... generally does not owe a duty unless there is privity," and no evidence showed that Jeff and Norment were in privity with respect to any policy

that would provide coverage for Jeff's personal belongings. *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, 446 S.W.3d 14, 26 (Tex. App.—Corpus Christi 2013, pets. denied) (finding that there is no "Texas case that interposed any duty in favor of a non-client upon a client's insurance agent regarding the agent's negligent failure to procure a liability policy with a certificate designating the non-client as an additional insured").

Even accepting Jeff's argument that he is Norment's customer based on past, unspecified, dealings, "[i]n Texas, an insurance agent owes the following common-law duties to a client when procuring insurance: 1) to use reasonable diligence in attempting to place the requested insurance, and 2) to inform the client promptly if unable to do so." *Critchfield v. Smith*, 151 S.W.3d 225, 230 (Tex. App.—Tyler 2004, pet. denied) (citing *Moore v. Whitney-Vaky Ins. Agenc*y, 966 S.W.2d 690, 692 (Tex. App.—San Antonio 1998, no pet.) (citing *May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992))). Here, neither of those duties was breached because (1) Jeff did not pay for or apply for additional insurance, and (2) the coverage he paid for on behalf of his parents was provided pursuant to the Policy. *See Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692 (Tex. App.—San Antonio 1998, no pet.).

Although Jeff asked for Norment's opinion on the need for renter's insurance,

> [n]o legal duty exists on the part of an insurance agent to extend the insurance protection of his customer merely because the agent has knowledge of the need for additional insurance of that customer, especially in the absence of evidence of prior dealings where the agent customarily has taken care of his customer's needs without consulting him.

Id. (citing *Pickens v. Tex. Farm Bureau Ins. Cos.*, 836 S.W.2d 803, 805 (Tex. App.—Amarillo 1992, no writ)) (citing *McCall v. Marshall*, 398 S.W.2d 106, 109 (Tex. 1965)); *see Sonic Sys. Int'l, Inc. v. Croix*, 278 S.W.3d 377, 389 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (rejecting imposition of a general duty on agents to assess and obtain insurance coverage for clients). Here, no evidence showed that Jeff and Norment "share[d] an expectation that the agent habitually [would] satisfy all of [Jeff's] insurance needs without consultation."[5] *Sledge v. Mullin*, 927 S.W.2d 89, 93 (Tex. App.—Fort Worth 1996, no pet.) (citing *McCall v. Marshall*, 398 S.W.2d 106, 109 (Tex. 1965)).

Our analysis must be limited by what was actually pled in Jeff's petition. Critically, Jeff did not plead any cause of action based on misrepresentation. Instead, he claimed only that Norment "had a duty to provide the insurance coverage that the Plaintiff needed and paid a premium for." This failure to provide coverage claim failed as a matter of law because Texas law imposed no duty on Norment to secure additional insurance not specifically requested or applied for under the facts of this case, and the coverage under the Policy that was paid for was provided. Therefore, we find that the trial court properly granted Norment's summary judgment motion. As a result, we overrule Jeff's first point of error on appeal.

Raleigh Ltd., Inc. v. Ohio Sec. Ins. Co., No. 120CV02966JMSDLP, 2021 WL 1599281, at *4 (S.D. Ind. Apr. 23, 2021). (Case analyzing whether plaintiff has pled facts that properly allege a special relationship duty to advise between plaintiff insured and plaintiff's insurance agent; and concluding plaintiff has met this burden at the pleading stage).

St. Charles Surgical Hosp. LLC v. HUB Int'l, Ltd., No. CV 20-2904, 2021 WL 1561218, at *3 (E.D. La. Apr. 21, 2021). (In a case involving plaintiffs bringing a claim of negligence against plaintiffs' insurance agent for his failure to advise them of the availability of pandemic coverage, the court examines the duties of insurance agents under Louisiana law).

Palek v. State Farm Fire & Cas. Co., 535 F. Supp. 3d 382, 388 (W.D. Pa. 2021) (April 21, 2021): "where the contested policy provisions are clear and unambiguous," Pennsylvania law does not impose a general duty on insurance agents to " 'anticipate and then counsel their insured on the hypothetical, collateral consequences of the coverage chosen.' " (citing *Kilmore v. Erie. Ins. Co.*, 407 Pa.Super. 245, 595 A.2d 623, 626 (1991) and quoting *Banker v. Vall. Forge Ins. Co.*, 363 Pa.Super. 456, 526 A.2d 434, 438 (1987)).

RZQ, L.L.C. v. McClelland & Hine, Inc., No. 13-19-00471-CV, 2021 WL 1418226, at *12 (Tex. App. Apr. 15, 2021). No breach of contract or breach of fiduciary duty claims against insurance agent/broker but certain affidavit testimony was "more than a scintilla of evidence supporting a finding that MHI had the duty to disclose to appellants the lack of the forum-selection clause in the Prime policies."

VCS, LLC v. Mt. Hawley Ins. Co., 534 F. Supp. 3d 635, 651 (E.D. La. 2021) (April 14, 2021). Case analyzes whether wholesale broker was acting as insurance customer's broker or agent and court concluded this was a question of fact. Court then states the normal of duty or standard of care under Louisiana law:

> In order to recover for a loss arising out of the failure of an insurance agent to obtain insurance coverage, a plaintiff must prove:
>
> (1) an undertaking or agreement by the insurance agent to procure insurance; (2) failure of the agent to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly if he has failed to obtain the insurance; and (3) actions by the agent warranting the client's assumption that the client was properly insured.

After this the court does a detailed analysis of the very limited special relationship duty sometimes placed on agents in Louisiana.

Bourgeois v. Blue Cross Blue Shield of Massachusetts, 531 F. Supp. 3d 407, 417 (D. Mass. 2021) (March 31, 2021). In dismissing duty to advise and negligent misrepresentation claims against agent, court discusses duty of insurance agents under Massachusetts law:

> However, absent special circumstance, an insurance agent does not have a duty to ensure that the policies provide adequate coverage for the need of the insured. *Perreault v. AIS Affinity Insurance Agency of New England, Inc.*, 93 Mass.

> App. Ct. 673, 677, 107 N.E.3d 1222 (2018). An insured individual cannot avoid responsibility for learning the coverage of the policy, even though the insured may rely on their broker as an agent. *Campione v. Wilson*, 422 Mass. 185, 196, 661 N.E.2d 658 (1996). The Plaintiffs have not alleged any facts in their complaint which would establish the special circumstances necessary to state a plausible claim against Hayes for negligence. Accordingly, Hayes' motion to dismiss Count V is *granted.*

101 Ocean Blvd., LLC v. Foy Ins. Grp., Inc., 174 N.H. 130, 261 A.3d 250 (2021). (Supreme Court of New Hampshire (March 19, 2021). (Special Relationship Case):

> Supreme Court of New Hampshire Held:
>
> **1.** commercial lines checklist exhibit was admissible;
>
> **2.** alleged false and prejudicial statements by hotel owner's counsel during closing argument were not plain error;
>
> **3.** repairs were required to comply with state building code;
>
> **4.** special verdict for sufficiently showed causal link;
>
> **5.** evidence was sufficient to support finding of a "special relationship" between insurance agency and hotel owner which gave rise to duty; and
>
> **6.** evidence was sufficient to support finding that additional law and ordinance coverage was available.
>
> ***
>
> The trial court instructed the jury as follows on when a "special relationship" between an insurance agent and client arises:
>
> > The general duty of care does not include an affirmative obligation to give advice regardless of the availability or sufficiency of coverage.
> >
> > However, the existence of a "special relationship" between the insurance agent and the client may impose upon an insurance agent an affirmative duty to provide advice regardless of the availability or sufficiency of insurance coverage. An insured ... can demonstrate ... a "special relationship" by showing that there exists something more than the standard insurer-insured relationship between the parties. This depends upon the particular relationship between the parties and is determined on a case-by-case basis. Examples include an express agreement between the insured agent and client, a long-established relationship or entrustment in which the agent clearly appreciates the duty of giving advice, the paying [of] an additional

> compensation apart from the premium payment, and the agent holding himself or herself out as a highly-skilled expert coupled with reliance by the insured. Also, a "special relationship" between the parties may exist when the insured relies upon the agent's offered expert [advice] regarding the question of coverage, or when there is a course of dealings over time putting the agent on notice that his or her advice is being sought and relied upon. If a "special relationship" exists between the parties, the Plaintiff must demonstrate not only the existence of the relationship, but also that he or she was justified in relying upon the relationship.

Foy argues that this jury instruction "incorrectly suggested that a special relationship could be established without proof of at least one of the Sintros factors, and, therefore, misstated the law to the jury." See Sintros, 148 N.H. at 481-82, 810 A.2d 553. To the contrary, the instruction repeats, nearly verbatim, what we said in Sintros. See id. The examples we gave in Sintros of facts or circumstances demonstrating a special relationship between an insurance agent and a client were just that, examples; they were not an exclusive list of factors. Id. at 482, 810 A.2d 553. Nor did we hold that, to establish the existence of a special relationship, a plaintiff had to prove that its relationship with its insurance agent fit one of our examples. See id. at 481-82, 810 A.2d 553. Therefore, we conclude that the trial court's "special relationship" instruction was sufficient as a matter of law. See Halifax-American, 170 N.H. at 578, 180 A.3d 268.

O'Brien v. HII Ins. Sols., No. 2:20-CV-02115-KJM-AC, 2021 WL 1060398, at *8-9 (E.D. Cal. Mar. 19, 2021). In dismissing the negligence and negligent misrepresentation claims against the agent, the court analyzes these claims under California law:

> Axis moves to dismiss the negligence and negligent misrepresentation claims.
>
> "In negligence cases, respondeat superior liability is properly imposed when the tortfeasor was the 'servant' of the party against whom liability is sought." *Krueger By & Through Krueger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222, 223 (9th Cir. 1989) "In some circumstances, an insurance agent may assume a special duty of care to an insured to provide accurate information regarding the terms or adequacy of a policy's coverage and may be held liable for negligence if that duty is breached." *Hadley v. Prudential Ins. Co. of Am.*, No. 09-414, 2009 WL 10692152, at *2 (E.D. Cal. Apr. 1, 2009) (citing *Paper Savers, Inc. v. Nacsa*, 51 Cal. App. 4th 1090, 1097 (1996)). "When an insurance agent breaches such a duty, the insurer can be held vicariously liable for negligence if it directed, authorized, or ratified the agent's conduct." *Id.* (citing *Desai v. Farmers Ins. Exch.*, 47 Cal. App. 4th 1110, 1118, 1121 (1996)).
>
> The elements of negligent misrepresentation include "(1) the misrepresentation of a past or existing material fact, (2) without reasonable ground for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." *Apollo Capital Fund, LLC v. Roth Capital Partners, LLC*, 158 Cal. App. 4th 226, 243

> (2007) (citing *Shamsian v. Atl. Richfield Co.*, 107 Cal. App. 4th 967, 983 (2003)). "A principal may be held liable for the negligent misrepresentation of an agent." *Hadley*, 2009 WL 10692152, at *2 (citing *Furla v. Jon Douglas Co.*, 65 Cal. App. 4th 1069, 1078 (1998)). Here, the complaint lacks any factual allegations that Axis breached a duty of care it owed plaintiffs. Rather, the complaint includes details of conduct by HII defendants, which plaintiffs insist constitute negligence, FAC ¶¶ 51–56, and conclusory statements that Axis "is liable for the injuries and damages caused by the negligence of HII Defendants on a *respondeat superior* basis or other vicarious liability bases," *id.* ¶ 58. Legal conclusions that HII defendants were "[a]t various times..., but not all of [the] time[ ] ... acting as the agents of Axis" are not sufficient to state a negligence claim under a respondeat superior or vicarious liability theory. *See Desai*, 47 Cal. App. 4th at 1119.
>
> Plaintiffs' negligent misrepresentation claim unravels for the same reason. The operative complaint does not properly allege such a claim against Axis, as there are no factual allegations that Axis made any misrepresentations to the plaintiffs. Plaintiffs only allege that Julio made representations. They have not adequately pled that Axis is a principle that can be held liable for Julio's actions. *See Hadley*, 2009 WL 10692152, at *2.
>
> The court dismisses plaintiffs' negligence and negligent misrepresentation claims with respect to Axis. Plaintiffs may amend if possible within the confines of Rule 11.

Deer v. Nat'l Gen. Ins. Co., No. X03HHDCV206135938S, 2021 WL 1535358, at *3 (Conn. Super. Ct. Mar. 18, 2021). Court found No special relationship or fiduciary duty to advise insured of cancellation of policy.

W. Virginia Potato Chip Co., LLC v. Erie Ins. Prop. & Cas. Co., No. 2:20-CV-00853, 2021 WL 1032306, at *5 (S.D.W. Va. Mar. 17, 2021). Court generally analyzes duties of insurance agents under Virginia law and notes uncertainty of whether or not Virginia recognizes a special relationship duty to advise. Court ultimately concludes that "When all issues of fact and law are resolved in the Plaintiff's favor, the Court cannot find that the Plaintiff's negligence claim against Intra-State [the agent] has no possibility of success."

Bristoe v. State Farm Mut. Auto. Ins. Co., No. 5:20-CV-106-TBR, 2021 WL 951025, at *4 (W.D. Ky. Mar. 12, 2021).

> An insurance agent's duty to her clients is a question of law. *Hardy Oil Co., v. Nationwide Agribusiness Ins. Co.*, 587 Fed. Appx. 238, 240 (6th Cir. 2014). Pursuant to Kentucky law, an insurance agent has "no affirmative duty to advise ... by the mere creation of an agency relationship." *Id.* Rather, an insurance agent merely owes her clients a standard duty of reasonable care. *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 63 (Ky. 2010); *Helton v. Am. Gen. Life Ins. Co.*, 946 F.Supp.2d 695, 708 (W.D. Ky. 2013). "An insurer may assume a duty to advise an insured when: (1) he expressly undertakes to advise the insured; or (2) he impliedly undertakes to advise the insured." *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992). "An implied

> assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of premium ... (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on ... or (3) the insured clearly makes a request for advice." *Id.* (citations omitted). The parties appear to agree that Agent Waldon-Denton never expressly undertook to advise Bristoe. Therefore, the question is whether Agent Waldon-Denton had an implied duty to advise Bristoe.

Court analyzed additional Kentucky case law and found no heightened duty to advise based on either "course of dealing" or "assumption of responsibility".

McConnell v. IMA Fin. Grp., Inc., No. 21-1041-JAR-KGG, 2021 WL 877000, at *12 (D. Kan. Mar. 9, 2021) (Court briefly touches on standard of care but does not analyze because Court rules standard of care not at issue in the case):

> To support a claim for retaliatory discharge, McConnell must "clearly allege a violation of specific and definite rules, regulations, or laws beyond a mere feeling of wrongdoing."[62] McConnell argues that his complaints were based on well-established rules, regulations, and laws pertaining to the obligations owed by insurance brokers and producers to clients under Kansas law. As support, he cites *Marshel Investments, Inc. v. Cohen*,[63] in which the Kansas Court of Appeals set forth the applicable standard of care for an insurance agent or broker who undertakes to procure insurance for another: "An insurance agent or broker who undertakes to procure insurance from another owes to the client the duty to exercise the skill, care and diligence that would be exercised by a reasonably prudent and competent insurance agent or broker acting under the same circumstances."[64] The court referred to this standard of care as the "exercise care duty."[65]
>
> ***
>
> In showing that he reported violations of specific and definite public policy rules, regulations, or laws, McConnell may not rely on the "exercise care duty" articulated in *Marshel* because it merely embodies a general standard of care for insurance agents and brokers. To support a retaliatory discharge claim, the public policy must be "so thoroughly established as a state of public mind so united and so definite and fixed that its existence is not subject to any substantial doubt."[67]

Hitchcock Indep. Sch. Dist. v. Arthur J. Gallagher & Co., No. 3:20-CV-00125, 2021 WL 1095320, at *4–5 (S.D. Tex. Feb. 26, 2021), *report and recommendation adopted*, No. 3:20-CV-00125, 2021 WL 1092538 (S.D. Tex. Mar. 22, 2021). Court found insurance customer's fiduciary duty claim and other related claims were not viable against insurance agent.

> It is widely recognized that the relationship between an insurance agent and an insured does not give rise to a formal fiduciary duty. *See Lexington Ins. Co. v. N. Am. Interpipe, Inc.*, No. H-08-3589, 2009 WL 1750523, at *2 (S.D. Tex. June 19, 2009); *Aspen Specialty Ins. Co. v. Muniz Eng'g, Inc.*, 514 F. Supp. 2d 972, 988–89 (S.D. Tex. 2007); *Env't. Procs., Inc. v. Guidry*, 282 S.W.3d 602, 627–28 (Tex.

App.—Houston [14th Dist.] 2009, pet. denied). An informal fiduciary relationship "may arise where one person trusts in and relies upon another, whether the relationship is a moral, social, domestic, or purely personal one." *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007) (quotation omitted). To impose an informal fiduciary duty in a business transaction, however, "the special relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit." *Associated Indem. Corp. v. CAT Contracting, Inc.*, 964 S.W.2d 276, 288 (Tex. 1998). As Judge Ewing Werlein, Jr. explained:

> The fact that a business relationship has been cordial and of extended duration is not by itself evidence of a confidential relationship. Nor is subjective trust sufficient to transform an arms-length transaction into a fiduciary relationship.

Lexington, 2009 WL 1750523, at *2 (quotation omitted).

The First Amended Complaint sets forth bare assertions, and nothing more, that a fiduciary relationship existed between HISD and Gallagher. The fact that Gallagher assisted HISD in procuring insurance in the past is insufficient, by itself, to give rise to a fiduciary relationship. *See id.* There is nothing in the First Amended Complaint to suggest that the Gallagher-HISD relationship was anything more than a routine, arms-length business transaction. Gallagher's motion to dismiss this claim should be granted.

Matter of Est. of Sullivan, No. CV 2018-0741-PWG, 2021 WL 668005, at *10 (Del. Ch. Feb. 22, 2021).

> It is possible that insurance agents may be found liable for negligence based upon the premise that a definite relationship exists between the parties and that relationship is "of such a character that social policy justifies the imposition of a duty to act."[91] One instance is when, under certain circumstances, an insurance agent fails to act on a life insurance application within a reasonable time.[92] And, courts have considered whether the agent failed, through his own fault or neglect, to obtain insurance for the applicant.[93] Even if Petitioner was Decedent's insurance agent, there are not sufficient facts pleaded to reasonably infer that Petitioner failed to act when he had a duty to do so, or that it was through his fault or neglect that she didn't know her beneficiary designations could have been altered during the divorce. I find there are no reasonably inferable facts under which Sullivan can prevail on her equitable claim seeking to impose a constructive trust.

Council v. Allstate Vehicle & Prop. Ins. Co., No. 351676, 2021 WL 646827, at *5 (Mich. Ct. App. Feb. 18, 2021).

> While the insured has a duty to read its insurance policy, "under the common law, 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 is to present the product of the principal and take orders. *Harts v. Farmers Ins. Exch.*, 461 Mich.

1, 8, 597 N.W.2d 47 (1999). However, "when an event occurs that alters the nature of the relationship between the agent and the insured," the agent can create a special relationship that imposes a duty on the part of the agent to advise the insured about coverage. *Id.* at 10, 597 N.W.2d 47. The Michigan Supreme Court in *Harts* recognized four situations in which an agent could create a special relationship with the insured:

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured. [*Id.* at 10-11, 597 N.W.2d 47.]

In *Zaremba*, 280 Mich. App. at 36, 761 N.W.2d 151, we held that a comparative fault analysis was appropriate to assess the plaintiff's failure-to-read defense because the plaintiff owed a duty to read the insurance contract and the agent owed a duty because of the special relationship he had created. In this case, there is no indication that the agent created a special relationship with plaintiff. Therefore, a comparative fault analysis is appropriate where plaintiff was solely responsible for failing to read the application.

King v. Ameriprise Auto & Home Ins., No. 20-CV-04118-VC, 2021 WL 521218, at *1–2 (N.D. Cal. Feb. 11, 2021).

To survive a motion to dismiss, the complaint needs to allege facts showing that an insurance agent misrepresented the terms of King's insurance policy to King or otherwise acted in a way that created a special duty. *Paper Savers, Inc. v. Nacsa*, 51 Cal.App.4th 1090, 1096–97 (Cal. Ct. App. 1996) (an insurance agent assumes a greater duty only by (1) express agreement, (2) holding himself out as having special expertise in the field, (3) misrepresenting the extent or scope of the coverage, or (4) responding to a request from the insured for a specific type of coverage). This Court's prior order granting dismissal may have stated the test too narrowly by suggesting that an agent needed to have specifically told King that he was covered "regardless of the policy's express limits." But the complaint does need to allege facts showing the agent made some statement or took some act that created a special duty (such as misrepresenting the terms of the policy), and King has not done so here.

The core problem with this complaint is that King's allegations are too vague to show any misrepresentation. Some parts of the complaint could conceivably be read in isolation as alleging that King asked the insurance agent he spoke with in 2017 for a policy that would cover a complete rebuild no matter what it cost—for example, paragraph 65(C). But most parts of the complaint seem to allege that King knew he was discussing a policy that would cover the cost of rebuilding only up to certain limits, and was merely asking the agent to make sure that those limits would be sufficient to completely cover his costs—for example, paragraph 75. Such limits are always based on estimates, and do not constitute a promise that the actual cost of rebuilding will never exceed the estimation. And the complaint plainly

> acknowledges that the policy King actually paid for had limits. If King had clearly alleged that the agent promised him that the insurance he was buying was different in any material way from what the text of the policy provides (such as by saying that the coverage would not have limits), he would have a viable claim. But the best interpretation of the current complaint (while it is admittedly vague) is that King was unsure of what he was actually asking for, not that an agent affirmatively misrepresented what he was getting. That is not enough to state a claim, especially because King's fraud-based claims must meet the more demanding standard of Rule 9(b).
>
> Because the Court cannot rule out the possibility that King could plead additional facts to adequately state a claim, dismissal is, once again, with leave to amend.

Mainstream Fiber Network, LLC v. New Hampshire Ins. Co., No. 120CV01338JMSDML, 2021 WL 767768, at *3 (S.D. Ind. Feb. 10, 2021), *report and recommendation adopted*, No. 120CV01338JMSDML, 2021 WL 767467 (S.D. Ind. Feb. 26, 2021). At the pleading stage of proceedings court ruled that if insurer denied coverage because its insurance agent did not timely provide notices of claims, then the agent was negligent in performing duties to its insurance customer.

Merrick Bank Corp. v. Royal Grp. Servs., Ltd., No. 15 CIV. 5120 (AKH), 2021 WL 431425, at *2 (S.D.N.Y. Feb. 8, 2021). Court denied insurance agent's motion for summary judgment and stated:

> "[I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so." *Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc.*, 19 N.Y.3d 730, 735, 979 N.E.2d 1181 (2012) (quoting *Murphy v. Kuhn*, 90 NY2d 266, 270 (1997)). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy *Am. Bldg. Supply Corp. v. Petrocelli Grp., Inc.*, 19 N.Y.3d 730, 735, 979 N.E.2d 1181 (2012) (citing *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 NY3d 152, 155 (2006)). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" *Hoffen & Sons Inc.*, 7 N.Y.3d at 158. Regardless of whether Chartis would have provided a policy without the disputed provision, Defendants had a duty to communicate that their requested coverage had not been procured. *See Omni Build Inc.v. Dimver & Assocs., Inc.*, 2020 Ny Slip Op 31631 (U) at *16 (N.Y. Sup. Ct. Kings Ct. May 28, 2020) ("[T]here is an issue of fact regarding whether [Defendant] breached its duty to [Plaintiff] regardless of whether or not the coverage could have been procured.").
>
> Merrick has provided evidence that through RGS' and Richmond's history working with Merrick, that they knew and understood that Merrick was seeking a policy which did not require them to seek indemnification from the ISOs. *See* Pl. 56.1 Counterstatement ¶¶ 61-63, ECF No. 134 ("Please make sure that it is clearly understood that ... reimbursement by the ISO to the Bank does not impact the Bank's right to recover under the policy."); *see also* Richmond 2015 Dep. Tr. 101: 20-25, ECF No. 135-11. ("Q: You were aware that Merrick was looking for a provision

> which would provide that if the ISO didn't engage in fraud or wrongdoing it would be the insurance that would cover the loss, and they wouldn't have to look to the ISO first? A: Correct."). The exhibits indicate that Merrick had conversations with Richmond telling him that they "did not want to have a repeat of the USN episode," and that Richmond assured them they would not. Fox 2020 Dep. Tr. 340:24-341:13, ECF No. 135-10.
>
> Defendants also claim that Merrick's approval relieves them of any liability for the inclusion of the ISO provision. It is undisputed that Defendants provided Merrick with a proposed draft of the Chartis Uncollectible Chargeback Insurance Policy and that Merrick's attorney, Brian Jones ("Jones") reviewed it, commented on it, and ultimately approved it in its final form. This does not, as a matter of law, bar Merrick's claims. *See Baseball Office of Com'r v. Marsh & McLennan, Inc.*, 295 A.D.2d 73, 82, 742 N.Y.S.2d 40 (2002) ("While an insured's failure to read or understand the policy or to comply with its requirements may give rise to a defense of comparative negligence in a malpractice suit against the broker, the insured's conduct does not.... bar such an action.").

Soundview Cinemas Inc. v. Great Am. Ins. Grp., 71 Misc. 3d 493, 505, 142 N.Y.S.3d 724, 734 (N.Y. Sup. Ct. 2021) (February 8, 2021). Insurance agents motion for summary judgment granted by court.

> An insurance broker may be liable on a breach of contract or negligence theory for failing to procure insurance upon a demonstration that the agent or broker "failed to discharge the duties imposed by the agreement to obtain insurance, either by proof that it breached the agreement or because it failed to exercise due care in the transaction." *Da Silva v. Champ Constr. Corp.*, 186 A.D.3d 452, 453, 128 N.Y.S.3d 582 (2d Dept. 2020). The plaintiff must demonstrate that a specific request was made to the broker for coverage that was not provided in the policy. *Brannigan v. Christie Overhead Door*, 149 A.D.3d 892, 893-94, 53 N.Y.S.3d 106 (2d Dept. 2017).
>
> An insurance broker has a common-law duty to obtain the requested coverage within a reasonable amount of time, or to inform the client that he or she is unable obtain the requested coverage. Accordingly, the insurance broker's duty is defined by the nature of the client's request. *Broecker v. Conklin Prop., LLC*, 189 A.D.3d 751, 752, 138 N.Y.S.3d 177 (2d Dept. 2020). Nevertheless, where the broker and client share a special relationship, the broker may be liable for failing to advise or direct the client to obtain additional coverage even in the absence of a specific request. *Waters Edge @ Jude Thaddeus Landing, Inc. v. B & G Group, Inc.*, 129 A.D.3d 706, 707, 10 N.Y.S.3d 563 (2d Dept. 2015). The Court of Appeals has identified three such exceptional situations that may create a special relationship: "1) the agent receives compensation for consultation apart from payment of the premiums, 2) there was some interaction regarding **735 a question of coverage, with the insured relying on the expertise of the agent; or 3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and

> specifically relied on." *Id.*, quoting *Voss v. Netherlands Ins. Co.*, 22 N.Y.3d 728, 735, 985 N.Y.S.2d 448, 8 N.E.3d 823 (2014).
>
> ***
>
> The Insurance Brokers' motion is granted. Plaintiff does not allege that it made any inquiries about specific insurance *507 coverage that might apply to these unprecedented times, and certainly does not allege that it inquired about coverage for pandemic-related government closures. Mr. Desner's vague assertion that he asked if Soundview was sufficiently insured for known and unknown business risks does not suffice to allege that a specific request was made to the Insurance Brokers for coverage that was not provided in the Policy. And even assuming, *arguendo*, that Mr. Desner's long-term friendship with Mr. Schuster of Five Star gave rise to a special relationship, Plaintiff has not plausibly alleged that the Insurance Brokers breached their duty by failing to direct Plaintiff to obtain additional coverage. Indeed, Plaintiff does not allege that any such insurance coverage for pandemic-related government closures existed prior to March 2020.
>
> Plaintiff's claims against Jimcor and Great American based on the Insurance Brokers' conduct fails in the absence of underlying negligence and/or a failure to properly procure insurance by the Insurance Brokers.

Maier v. Green Eyes USA, Inc., 845 F. App'x 869 (11th Cir. 2021) (February 5, 2021). Insurer and insurance agent did not, under Georgia law, owe a duty to motorist to decrease the risk of harm to others in their review of motor-vehicle records for employer; and employer did not change its position in reliance on review of motor-vehicle records conducted by insurer and insurance agent.

Jin Chai-Chen v. Metro. Life Ins. Co., 190 A.D.3d 635, 141 N.Y.S.3d 41, 43 (January 28, 2021).

> Plaintiffs' assertion that they had a confidential, special or fiduciary relationship with Li is also not persuasive. While the relationship between an insurance agent and an insured is generally not the type of special relationship giving rise to advisory duties, "[e]xceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law" (*Murphy v. Kuhn*, 90 N.Y.2d 266, 272, 660 N.Y.S.2d 371, 682 N.E.2d 972 [1997]). No such relationship existed here.
>
> By plaintiffs' own admission, this was the first time that plaintiffs or the insured had worked with Li to purchase insurance. Plaintiff Jenny's preexisting personal relationship with Li, which the complaint's allegations suggest was a friendship with a former coworker, did not create a heightened or fiduciary duty. Plaintiffs' claim against Li for negligent misrepresentation, which was also premised upon the existence of a special relationship or heightened duty, similarly does not withstand scrutiny (*J.A.O. Acquisition Corp. v. Stavitsky*, 8 N.Y.3d 144, 148, 831 N.Y.S.2d 364, 863 N.E.2d 585 [2007]).

> Plaintiffs' negligence claim against Li was also properly dismissed. Li met her common-law duty to obtain coverage for her client, despite the fact it was later disclaimed (*see e.g. Murphy*, 90 N.Y.2d at 270, 660 N.Y.S.2d 371, 682 N.E.2d 972; *Koloski v. Metropolitan Life Ins. Co.*, 5 Misc.3d 1028(A), 2004 N.Y. Slip Op. 51596(U), 2004 WL 2903626). It was not Li's responsibility to make sure that the information on the application was complete and accurate, despite any alleged language barriers.
>
> We have considered plaintiffs' remaining contentions and find them unavailing.

Murray-Kaplan v. NEC Ins., Inc., 617 S.W.3d 485 (Mo. Ct. App. 2021) (January 26, 2021). At pleading stage breach of fiduciary duty and negligence against insurance agent and broker were not barred by the five-year statute of limitations; and allegations at pleading stage stated a claim against insurance agent individually for negligence and breach of fiduciary duty.

KC Transp., Inc. v. LM Ins. Corp., No. 2:18-CV-00005, 2021 WL 261277, at *5 (S.D.W. Va. Jan. 26, 2021).

> [T]he Supreme Court of Virginia has held that an insurance agent 'did not have a common law duty to the [insured] arising out of the parties' dealings' and that '[t]he law of torts provides redress only for the violation of certain common law and statutory duties involving the safety of persons and property....' " *Metropolitan Life Insurance*, 2016 WL 10489865, at *3 (quoting *Filak v. George*, 267 Va. 612, 594 S.E.2d 610, 614 (Va. 2004)).

St. Luke MB Church v. Evanston Ins. Co., No. 2:20-CV-188-KS-MTP, 2021 WL 4242365, at *3 (S.D. Miss. Jan. 25, 2021).

> Under Mississippi law, insurance agents "may be held liable for negligence in performing [their] duties." *Nguyen v. Regions Bank*, 2010 WL 5071173, at *4 (S.D. Miss. Dec. 7, 2010). "An insurance agent must use that degree of diligence and care with reference thereto which a reasonably prudent person would exercise in the transaction of his own business." *Mladineo v. Schmidt*, 52 So. 3d 1154, 1162 (Miss. 2010). Accordingly, insurance agents may be liable for misrepresentations or omissions of material facts upon which an insured reasonably relies to their detriment. *Id.* at 1164-65. Likewise, insurance agents may be liable for their negligent failure to provide notice of a decrease in a policy's coverage limit, *Haggerty v. Allstate Ins. Co.*, 2008 WL 2705515, at *6 (S.D. Miss. July 7, 2008), negligent cancellation of a policy against the insured's wishes, *Buchert v. Meyers*, 2013 WL 485866, at *4 (S.D. Miss. Feb. 6, 2013), or allowing a policy to lapse by negligently failing to remit a premium payment. *Nguyen*, 2010 WL 5071173 at *3-*5; *see also Terrell v. ACCC Ins. Co.*, 2015 WL 11120543, at *2 (S.D. Miss. Jan. 26, 2015).
>
> Here, Plaintiff alleged that the Foxworth Defendants omitted material information regarding the nonrenewal of its policy, that it relied upon the Foxworth Defendants to provide such information, and that, as a result of said material omission, Evanston did not renew the policy. Plaintiff also alleged that the Foxworth

> Defendants knew about the alleged construction deficiencies in the property, knew about Evanston's alleged intention to deny any claim because of said deficiencies, and conspired with Evanston to collect premiums from Plaintiff nonetheless. In the Court's opinion, these allegations are sufficient to state a plausible claim of misrepresentation by omission, at the very least.

Napolitano v. Ace Am. Ins. Co., No. X07HHDCV186104406S, 2021 WL 1250934, at *3 (Conn. Super. Ct. Jan. 22, 2021).

> Lanza and Echevarria say an insurance agent's duty ends once the policy is issued. But as our Appellate Court held in 2008 in *Precision Mechanical Services, Inc. v. T.J. Pfund Associates, Inc.*, that is not so when, after the policy is issued, an agent "agrees to do certain ... other servicing acts."[3]
>
> It is undisputed here that Ace told Napolitano to ask Lanza for information about his policy. Napolitano asked Lanza to get information related to the policy, and Lanza—through Echevarria—voluntarily undertook to get it. Once it did so, it assumed a duty of reasonable care in seeking the information. Thus, if through her own negligence, Echevarria gave Ace or Napolitano materially misleading information, she could be liable for it and so could the employer responsible for her work.
>
> Thus, there is no legal obstacle to holding Lanza and Echevarria liable for any negligence, but the material facts are in dispute. Therefore, they will have to be resolved by a fact finder and may not be resolved on summary judgment.
>
> Lanza and Echevarria's motion for summary judgment is denied.

Auto-Owners Ins. Co. v. Pletcher, No. 3:18-CV-949-JD-MGG, 2021 WL 51026, at *3 (N.D. Ind. Jan. 5, 2021), dismissed, No. 21-1225, 2021 WL 3417925 (7th Cir. Feb. 23, 2021). Court granted summary judgment to insurance agent after lengthy discussion of insurance agent duties under Indiana law.

> To survive summary judgment, the Shop Plaintiffs must point to sufficient evidence to support their claim that the Agency Defendants breached their standard duty of care. *See Siegel*, 612 F.3d at 937. The Agency Defendants argue that the Shop Plaintiffs have failed to do so, in large part because the Shop Plaintiffs do not have expert testimony to define what it means to abide by the standard insurance agent duty of care in Indiana. Without first having a proper definition of the scope of the duty, they assert, the Shop Plaintiffs cannot adequately show that there was a breach. The Agency Defendants' argument draws from Indiana's requirement that parties elicit expert testimony to define duties in negligence cases for other professionals like engineers, pharmacists, and real estate brokers. *See Troutwine Estates Dev. Co. LLC v. Comsub Design & Eng'g Inc.*, 854 N.E.2d 890, 902 (Ind. Ct. App. 2006) (standard for engineers); *Masick v. McColly Realtors, Inc.*, 858 N.E.2d 682, 689 (Ind. Ct. App. 2006) (standard for real estate brokers); *Shidler v. CVS Pharmacy Inc.*, No. 205-CV-209 CAN, 2007 WL 601748, at *5 (N.D. Ind. Feb. 20, 2007) (standard for pharmacists). But Indiana has not

clearly extended that expert testimony standard to include insurance agents. The Shop Plaintiffs counter that this lack of a clear requirement in Indiana means that expert testimony is not necessary to establish a breach in this case. They also assert that the caselaw they cite provides the proper parameters to define the duty and that the uncomplicated nature of the factual issues would allow a juror relying solely on a lay opinion of reasonableness to accurately decide this negligence dispute. (DE 90 at 17.)

The Court recognizes that there is legitimate ambiguity over whether Indiana requires expert testimony in a case like this. But the Court does not need to decide the expert testimony question to decide this motion because the outcome would be the same whether expert testimony is required or not. If the Agency Defendants are correct that expert testimony is required under Indiana law, the Court would grant summary judgment because there is no dispute that the Shop Plaintiffs did not provide expert testimony, which would leave them with insufficient evidence to support their breach claims. Additionally, even if the Shop Plaintiffs are correct that expert testimony is not required and a reasonable jury could make a determination based solely on its conception of the underlying duty, summary judgment is still appropriate because there are no genuine disputes of material fact and a reasonable jury could not find a breach of duty given the evidence the Shop Plaintiffs have provided.

The Shop Plaintiffs rely on *Brennan* and *Roe v. Sewell*, 128 F.3d 1098 (7th Cir. 1997) to explain the type of conduct that is deemed to be a breach of an insurance agent's duty of care in Indiana. They argue the underlying facts in the cases clearly establish that insurance agents in Indiana who acted similarly to Ms. Davis were found to have acted negligently. (DE 90 at 17.) The Agency Defendants dispute that, arguing the cases are distinguishable on their facts both because of the type of insurance being sold and the insurance agents' conduct in the cited cases. (DE 94 at 10.)

In *Brennan*, an insurance agent helped a woman by filling out an application for homeowner's insurance on her behalf while she answered the questions. One portion of the application asked whether the applicant had any animals or exotic pets and asked the applicant to note breed or bite history. *Brennan*, 904 N.E.2d at 385. The woman told the insurance agent she had dogs, which prompted the agent to ask whether the dogs were vicious. The woman answered that they were not, and the insurance agent marked "no" on the application, reasoning he did not have to disclose her dogs because she said they were not vicious. *Id.* at 385. The woman then signed the application, trusting that the insurance agent completed it accurately. *Id.* When one of the woman's dogs, a Doberman Pinscher, later bit the woman's niece, the insurance company denied coverage because of the faulty application, saying it would never have issued coverage if it had known the woman owned Dobermans. *Id.* at 386.

In *Sewell*, an insurance agent met with a woman hoping to get disability insurance. The agent filled out some portions of the company's insurance application while the woman filled out other portions. *Sewell*, 128 F.3d at 1100. After their initial efforts

to complete the application, the woman and agent left one question blank that asked whether the woman had other disability coverage because the woman did not know if she had coverage through her employer. *Id.* at 1100–01. The agent told the woman he would check with her employer and answer the question later. But he never checked with her employer and instead simply marked on the application that she did not have coverage. *Id.* at 1101. The insurance company later denied the woman coverage when it discovered she did in fact have coverage through her employer. *Id.*

While these cases do explain insurance agent conduct that has been found to be a breach of the agent's duty of care, the cases are different enough from the present case to not be applicable here. And, even if they were, they establish a standard for breach that, when applied to Ms. Davis, would not find her to have breached her duty. There are two main reasons for that finding.

First, as the Agency Defendants assert in their reply, the cases involve homeowner's insurance and disability insurance while the present case involves a commercial policy. (DE 94 at 10.) The personal lines of insurance in *Brennan* and *Sewell* did not involve separate inspections by the issuing insurance company of the home or individual to be insured. Instead, they were heavily reliant on the information contained in the application, making misstatements or omissions in the application more harmful. In contrast, the policy at issue in the present case included a separate inspection of the premises by the issuing company, and thus the information contained in the application, while still important, did not carry as much weight.

Second, and more importantly, Ms. Davis took noticeably more precautions than the agents in *Brennan* and *Sewell*. Unlike those agents, she contacted AOIC, the issuing company, directly for help with the application and only proceeded after getting confirmation from AOIC that it would accept the risk of insuring K&Q given the underlying facts. Further, none of the parties argue that Ms. Davis' actions, even with her inclusion of the "yes" answer on the application, prevented AOIC from being fully informed about the lack of a paint booth both at the time AOIC received the application and at the time AOIC issued the policy. (DE 79 at 4; DE 89 at 9.) The insurance agencies in *Brennan* and *Sewell* were not operating with that kind of information when they issued their policies. The Shop Plaintiffs do not address these discrepancies in their response, leaving it unclear how *Brennan* and *Sewell* can stand for the proposition that Ms. Davis breached her duty.

The evidence the Shop Plaintiffs have pointed to in the record to support their claims is also insufficient to meet their burden. A reasonable jury relying on the evidence could not conclude that Ms. Davis or KFG breached their duties. The Shop Plaintiffs assert in their counterclaim that Ms. Davis breached her duty "to accurately record and report the information given to her by [Mr.] Pletcher regarding the non-existence of a paint booth" and "negligently gave inaccurate information to [AOIC]" by marking on the application that the premises had a paint booth. (DE 48 at 9.) They stake their arguments for both claims on the fact that Ms. Davis answered "yes" on the portion of the application asking about the paint booth

when she knew the answer was "no." *Id.*; (DE 90 at 9–13.) They do not assert that Ms. Davis failed to tell Mr. Pletcher about the importance of a paint booth to receiving the insurance. Evidence in the record shows Mr. Pletcher knew of the importance of a paint booth to his planned business both because he knew there was a question on the insurance application about a paint booth and because he had spent many years in the industry before starting the business. (DE 88-1 at 4; DE 86-3 at 20–21.) By relying only on Ms. Davis's answer of "yes" on the paint booth portion of the application to support their negligence claims, the Shop Defendants fall short of their burden because they fail to account for the rest of the undisputed material facts in the record that put the answer on the application in context.

The Shop Plaintiffs agree that Ms. Davis communicated with AOIC as she was filling the application out to make sure she was doing so correctly and properly representing Mr. Pletcher's situation as his agent. Specifically, they agree that Ms. Davis reached out to Kim Durkes with AOIC's underwriting department as she was completing the application and told Ms. Durkes about Mr. Pletcher, including that he did not currently have a paint booth but planned to get one in the future. (DE 89 at 6.) They also agree that Ms. Davis answered "yes" on the application only after Ms. Durkes told her that AOIC would accept the risk of insuring the business so long as Mr. Pletcher followed through on that plan by the time AOIC did an inspection following its issuance of the policy. *Id.* And, finally, they agree that Ms. Davis's action of asking AOIC for help during the application process informed AOIC both when it received the application and when it issued the policy that there was not a paint booth on the premises. (DE 89 at 7, 9.)

The Shop Plaintiffs present no arguments to discount the additional precautions Ms. Davis took or to explain how there could have been a breach when they agree Ms. Davis accurately conveyed the information Mr. Pletcher gave her to AOIC. They also present no evidence to suggest AOIC relied solely on the application in issuing the policy or even that there was some internal confusion within AOIC as to whether there was a paint booth on the premises because of Ms. Davis' answer on the application. In short, the evidence points to the conclusion that given Ms. Davis's in-depth communication with AOIC before submitting the application, her answering "yes" to the paint booth question was essentially a confirmation of what Ms. Davis had already told AOIC, that Mr. Pletcher intended to get the booth on the premises soon and knew that a paint booth was required to conduct his insured business. There has been no evidence shown that Ms. Davis lied or made a misrepresentation. Instead there is only evidence to show that Ms. Davis's "yes" answer after clearing the information with AOIC conveyed exactly what she intended it to convey and what Mr. Pletcher had told her.

The Court recognizes that summary judgment is generally inappropriate in negligence cases because of the usually fact-specific nature of the underlying issues, but this is one of the rare cases where summary judgment is appropriate. The Shop Plaintiffs would have the burden to prove negligence at trial and, at the summary judgment stage, they must produce enough evidence to support their case for their claims to survive. *See Cox*, 828 N.E.2d at 912; *Coffman*, 815 N.E.2d at 527. Given the law and undisputed facts, the evidence is insufficient for a

reasonable juror to conclude that Ms. Davis breached her duty as an insurance agent to exercise reasonable care, skill, and good faith diligence in obtaining the insurance policy. And, since the Shop Plaintiffs cannot prevail against Ms. Davis, it follows that they cannot prevail against KFG, her employer, under the theory of respondeat superior. *See Barnett*, 889 N.E.2d at 283.

5) 2021 Case Trends

i. Order taker general standard continues to be applied

In 2021 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. Slight uptick in agent claims directly related to COVID-19 in 2021

Compared to 2020, there appeared to be a little more claims against insurance agents related to COVID-19 insurance coverage issues. However, there did not appear to be a flood of COVID-19 insurance coverage related claims against insurance agents; and in general there was nothing out of the ordinary as to how courts dealt with these claims versus non-COVID-19 related claims against insurance agents.

iii. Continued assertion of both straight negligence claims based on failure to procure and special relationship duty to advise claims by plaintiffs counsel

Plaintiffs' counsel representing insurance customers continue to assert both straight negligence claims based on failure to procure insurance and special relationship duty to advise claims. However, courts continue to seldom apply a special relationship duty to advise.

iv. Courts and plaintiffs' counsel are increasingly confusing insurer and agent and the duties imposed on each

There appears to be an increase in courts and plaintiffs' counsel confusing insurer and agent and the duties imposed on each.

6) 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.

7) 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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