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2019 Minnesota Insurance Agent Standard of Care Update and Review

MINNESOTA EDITION

Brownson Norby PLLC's annual summary and review of the standard of care and duties for insurance agents – Minnesota

Updated for 2019 by
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2019 Minnesota Insurance Agent Standard of Care Update and Review By Aaron Simon[1]

1) The *Gabrielson* order taker standard of care continues to be the standard of care applied to insurance agents in Minnesota.

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

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

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

Under ***Gabrielson***, and subsequent decisions following ***Gabrielson***, Minnesota courts have explicitly defined what an insurance agent's specific and limited duties are under Minnesota law and determined that under normal circumstances (no special relationship), an insurance agent's duties under Minnesota law are to **simply act in good faith and to follow the instructions of the insurance customer**. *See* ***Gabrielson,*** 443 N.W.2d 540, 543 ("An insurance agent's duty is ordinarily limited to the duties imposed in any agency relationship, to act in good faith and follow instructions.")

In recent years courts continue to use and apply the ***Gabrielson*** standard.

See also Premium Plant Servs., Inc. v. Farm Bureau Prop. & Cas. Ins. Co., No. A17-2051, 2018 WL 4055821, at (Minn. Ct. App. Aug. 27, 2018), review denied (Nov. 13, 2018).

In this case the court first applied the order taker standard of care of care noting:

> "An insurance agent's duty is ordinarily limited to the duties imposed in any agency relationship, to act in good faith and follow instructions." ***Gabrielson v. Warnemunde***, 443 N.W.2d 540, 543 (Minn. 1989). "Absent an agreement to the contrary, an agent has no duty beyond what he or she has specifically undertaken to perform for the client." *Id*.

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> *Premium Plant Servs., Inc. v. Farm Bureau Prop. & Cas. Ins. Co*., No. A17-2051, 2018 WL 4055821, at *5 (Minn. Ct. App. Aug. 27, 2018), review denied (Nov. 13, 2018).

The court then concluded there were issues of material fact regarding whether or not the agent followed the instructions of the insurance customer that precluded summary judgment and stated:

> The district court concluded that PPS failed to establish that Sampson breached the duty owed to PPS because Sampson followed PPS's directions in obtaining an umbrella policy covering general liability, workers' compensation, and employer liability through Farm Bureau and automobile coverage through Progressive. PPS argues that this finding resolved a dispute of material fact. We agree. **There is conflicting evidence about what PPS's instructions to Sampson were and whether Sampson followed those instructions**.
>
> Prior to the accident that gave rise to this litigation, PPS had three separate insurance policies through Sampson: a general liability policy through Farm Bureau, an automobile policy though Progressive, and an umbrella policy through Farm Bureau. Prior to renewing or obtaining any of these policies, Parenteau testified that he directed Sampson to undertake "whatever the necessary process you go through ... to put in place a ten million umbrella" that covered "a bad situation" that would involve "three people dying and having the company exposed" related to an accident that occurred while the employees were traveling to or from a job site. Parenteau testified that Sampson told him that if he had an umbrella policy, he would be "bubble-wrapped" with respect to his concerns about fatalities. Each PPS employee testified that they had no knowledge of the automobile exclusion and that Sampson never informed them of its existence.
>
> It was improper for the district court to consider this testimony and determine that Parenteau instructed Sampson to obtain umbrella coverage in only three particular areas. Viewing the evidence in the light most favorable to PPS, **Parenteau's instructions to Sampson cannot be limited to only those areas**. If Sampson did receive directions to "put in place" an umbrella policy that extended to coverage of automobile-related liability, and if Sampson knew the policy he obtained a quote for did not provide that coverage, then there is a basis for finding that he failed to follow PPS's instructions. *See Scottsdale Ins. Co.*, 671 N.W.2d at 196. Because a reasonable jury could find that PPS instructed Sampson to "put in place" an umbrella policy that included automobile coverage, the district court erred in granting summary judgment on the negligent-procurement-of-insurance claim.

Id. at *5–6 (Minn. App. 2018) (emphasis added).

The court also implied that it was appropriate to consider expert testimony on what the standard of care is even in cases involving the basic normal order taker standard of care:

> In addition to Parenteau's testimony, PPS submitted an expert affidavit of an insurance agent with forty years of experience. An expert affidavit is "important in establishing a standard of care." *Gabrielson*, 443 N.W.2d at 545. The expert states that the applicable standard of care required Sampson to: (1) inform PPS that the umbrella coverage contained the automobile exclusion; (2) procure umbrella coverage that would cover automobiles; (3) conduct business in a timely fashion and accurately reflect the coverage amounts in place on each certificate of insurance. PPS has sustained its burden in opposing summary judgment by producing evidence concerning the standard of care of a reasonably prudent insurance agent in these circumstances. *See Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn. 1985) (affirming district court's dismissal where plaintiff failed to establish the duty of care through expert testimony).

Id. at *6.

This potentially contradicts previous Minnesota case law, in which Minnesota courts stated that an expert is only required when you are addressing a special relationship heightened to advise standard of care. *See below:*

"[T]estimony 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.'" *See ServiceMaster of St. Cloud v. GAB Bus. Servs*., Inc., 544 N.W.2d 302, 307 (Minn. 1996), (*citing Gabrielson v. Warnemunde*, 443 N.W.2d 540, 545 (Minn. 1989).

Furthermore, in *Atwater Creamery Co. v. Western Nat'l Mut. Ins. Co*., 366 N.W.2d 271, 279 (Minn. 1985), the court determined that in non-special relationship cases there is no need for an expert to say what Minnesota courts have already specifically dictated is the duty to be held to insurance agents. This is the duty stated in *Gabrielson*. Expert testimony does not establish a legal duty because the existence of a legal duty is a question of law, and in the absence of special circumstances, an insurance agent's duty does not go beyond following instructions and acting in good faith. *See Gabrielson v. Warnemunde*, 443 N.W.2d 540 and *Higgins on Behalf of Higgins v. Winter*, 474 N.W.2d 185, 188 (Minn. Ct. App. 1991). Thus, unless there are special circumstances an expert opinion is superfluous in claims against an insurance agent case.

In addition, if an expert tries to expand the duty put forth in *Gabrielson* this expert opinion should be disregarded. *See Klimstra v. State Farm Auto Ins. Co.*, 891 F.Supp. 1329, 1336 (D. Minn. 1995) where Plaintiff offered the testimony of its expert on the issue of an insurance agent's legal duty. The expert in the Klimstra case stated in his affidavit that the insurance agent had breached a legal duty to inform the insurance customer regarding insurance coverage issues. *Id*. at 1336-1337. Defendants in that case argued that the expert's opinion "usurps the court's function" by making a legal determination, and the court agreed that the expert's testimony cannot establish a legal duty. *Id*. at 1336. *See also Paul Revere Life Insurance Co. v. Wilner*, 230 F.3d 1359 (6th Cir. 2000) where the court precluded an expert from

testifying that a "special relationship" existed between an agent and the insured because this opinion was a legal conclusion.

See also AgCountry Farm Credit Servs., ACA v. Elbert, No. A17-1413, 2018 WL 2090617 (Minn. Ct. App. May 7, 2018), review denied (Aug. 7, 2018).

In this case the insurance customer asserted that the insurer and its captive agent failed to include a 118.8–acre tract of the insurance customer's crop land in the insurance policy. The insurance customer was unable to harvest the crop grown on the 118.8–acre tract and claimed that if the land had been properly added to his insurance policy, he would have received an insurance reimbursement.

The district court granted summary judgment in favor of the insurer and its captive agent on the insurance customer's negligence claim. The district court found that the insurance customer failed to request coverage on the 118.8–acre tract of land on the insurance application. The insurer sent the insurance customer a letter listing the identical acreage requested in the application that did not include the 118.8–acre tract of land. The letter urged the insurance customer to carefully review the information and notify the insurer immediately of any errors. The insurance customer did not alert his insurer as to any unlisted acreage and, as a result, the insurance customer's 2015 crop-insurance policy did not include the 118.8–acre tract of land. The district court determined that there were no genuine issues of material fact to support insurance customer's negligence counterclaim and dismissed it with prejudice.

See AgCountry Farm Credit Services, ACA v. Elbert, 2018 WL 2090617, at *1 (Minn. App. 2018).

In this case the court addressed the standard of care to be placed on the insurance agent and stated:

> An insurer has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." ***Gabrielson v. Warnemunde***, 443 N.W.2d 540, 543 (Minn. 1989) (alteration in original) (quotation omitted). Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured's instructions. *Id*. Thus, an insurer "is under no affirmative duty to take other actions on behalf of the client if the typical principal-agency relationship exists." *Id*.

Following *Gabrielson* the Minnesota Court of Appeals agreed with the district and found that the insurer was not negligent to the insurance customer stating: "Elbert [the insurance customer] did not produce competent evidence of negligence, and the undisputed facts reveal that AgCountry [the insurer] satisfied its duty of care by acting in good faith and by following Elbert's express instructions regarding his insurance coverage. *See Gabrielson*, 443 N.W.2d at 543." *Id*. at *2.

The court also found there were not special circumstances giving rise to a special relationship heightened to advise in this case. The court stated:

> The facts of each case dictate whether special circumstances create this extra duty. *Id*. at 543 n.1; *see also Johnson*, 405 N.W.2d at 889 (holding a duty to "offer, advise or furnish insurance coverage" may arise from the "circumstances of the transaction and the relationship of the agent vis-a-vis the insured"). Factors to consider in determining whether special

> circumstances exist include whether: (1) the insurer knew the insured was unsophisticated in insurance matters; (2) the insurer knew the insured relied upon the insurer to provide appropriate coverage; and (3) the insurer knew the insured needed protection from a specific threat. *Gabrielson*, 443 N.W.2d at 544. The existence of a heightened duty is a question of law. Id. at 543 n.1.
>
> Elbert claims that AgCountry owed him a heightened duty of care because of "special circumstances" present in the relationship. Elbert argues that special circumstances existed due to the length of the parties' relationship and Elbert's "actual reliance" on AgCountry to provide comprehensive insurance coverage. The district court rejected this argument, determining that Elbert failed to submit evidence demonstrating the existence of a heightened duty under *Gabrielson*.
>
> We agree with the district court. Elbert argued that he relied on AgCountry to provide appropriate crop insurance coverage. To create a special circumstance under this *Gabrielson* factor, the record would have to reflect that Elbert "delegate[d] decision-making authority" to AgCountry for his insurance needs. *Beauty Craft Supply & Equip. Co. v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101–02 (Minn. App. 1992), review denied (Minn. Mar. 19, 1992). But we have determined that "great reliance" is not present where an insured did not place all of his insurance needs into the hands of one insurance provider but rather, used other insurance providers as well. *Gabrielson*, 443 N.W.2d at 545; *see also Carlson v. Mut. Serv. Ins.*, 494 N.W.2d 885, 886–88 (Minn. 1993) (determining special circumstances exist where familial relationship existed and insured relied on agency for all insurance needs). Here, the record shows that AgCountry does not offer common insurance policies such as auto insurance, health insurance, or homeowner's insurance. Thus, Elbert could not have placed all of his insurance needs into AgCountry's hands. Moreover, Elbert has not presented sufficient evidence demonstrating that he was "unsophisticated in insurance matters" or needed protection from a "specific threat." *Gabrielson*, 443 N.W.2d at 544. Based on our review of the record, we conclude that the district court did not err by declining to recognize a special circumstance, and we affirm.

AgCountry Farm Credit Services, ACA v. Elbert, 2018 WL 2090617, at *3.

An insurer has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn. 1989) (alteration in original) (quotation omitted). Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured's instructions. Id. Thus, an insurer "is under no affirmative duty to take other actions on behalf of the client if the typical principal-agency relationship exists." Id.

See also Nelson v. Am. Family Mut. Ins. Co., 262 F. Supp. 3d 835, 858–59 (D. Minn. 2017) (emphasis added):

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

See also ***APM, LLLP v. TCI Ins. Agency, Inc.***, 2016 ND 66, ¶ 10, 877 N.W.2d 34, 36 (applying and adopting ***Gabrielson*** in a North Dakota State Court case):

> In *Rawlings*, 455 N.W.2d at 577, this Court adopted the Minnesota duty of care standard for insurance agents, "which requires an insurance agent to exercise the skill and care which a reasonably prudent person engaged in the insurance business would use under similar circumstances." *See Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn. 1989). "This duty is ordinarily limited to the duties imposed in any agency relationship to act in good faith and follow instructions." *Rawlings*, at 577.

In the ***APM, LLLP*** case APM purchased a Travelers Builders Risk Policy that covered the construction of a four-story apartment building located in Fargo, North Dakota. APM purchased the Travelers Builders Risk Policy through Gaard, an insurance agent of TCI. On September 7, 2012, there was a fire during the construction of the apartment building.

The fire allegedly delayed the opening of the construction building from February 1, 2013 until July 1, 2013. Travelers denied a portion of APM's claim for lost rents and additional interest charges on the basis that the Travelers Builders Risk Policy did not provide such coverage. Despite denying APM's claim for lost rent and interest, Travelers paid APM a total of $508,102.54 under the Travelers Builders Risk Policy procured by Gaard. On August 25, 2014, APM commenced the above-entitled action against TCI alleging that TCI and Gaard were negligent and at fault for failing to offer APM a policy endorsement providing coverage for loss of rent/income or soft costs such as interest. During discovery, APM was asked to identify the applicable standard of care that should be applied to TCI and Gaard in this action. In response, APM contends that, "Defendant should have offered an endorsement to the Builders Risk Policy which provided coverage for lost rent and soft costs."

TCI denied liability and moved for summary judgment, claiming that APM did not specifically request the additional coverage for lost rent and soft costs and that TCI and Gaard were not required to offer the

additional coverage to APM. The district court granted TCI's motion, determining only one conclusion could be drawn from the facts. The court concluded APM failed to raise a genuine issue of material fact as to whether Gaard breached his duty to APM. The court also concluded Gaard's duty was not enhanced because APM failed to establish a genuine issue of material fact indicating a special relationship existed between APM and TCI. The North Dakota Supreme Court affirmed the district court on appeal.

See also ***Herzog v. Cottingham & Butler Ins. Servs., Inc.***, No. A14-0528, 2015 WL 134043, at *3 (Minn. Ct. App. Jan. 12, 2015):

> An insurance agent's duty generally is limited to acting in good faith and following the insured's instructions. *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn.1989); *see also Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn.App.1986), review denied (Minn. Feb. 13, 1987) (insurance agent has a duty to carry out the express requests of an insured).

2) *The special relationship heightened standard of care continues to be rarely invoked.*

See AgCountry Farm Credit Servs., ACA v. Elbert, No. A17-1413, 2018 WL 2090617, at *3 (Minn. Ct. App. May 7, 2018), review denied (Aug. 7, 2018):

> Factors to consider in determining whether special circumstances exist include whether: (1) the insurer knew the insured was unsophisticated in insurance matters; (2) the insurer knew the insured relied upon the insurer to provide appropriate coverage; and (3) the insurer knew the insured needed protection from a specific threat. *Gabrielson*, 443 N.W.2d at 544. The existence of a heightened duty is a question of law. *Id*. at 543 n.1.
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> Elbert claims that AgCountry owed him a heightened duty of care because of "special circumstances" present in the relationship. Elbert argues that special circumstances existed due to the length of the parties' relationship and Elbert's "actual reliance" on AgCountry to provide comprehensive insurance coverage. The district court rejected this argument, determining that Elbert failed to submit evidence demonstrating the existence of a heightened duty under *Gabrielson*.
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> We agree with the district court. Elbert argued that he relied on AgCountry to provide appropriate crop insurance coverage. To create a special circumstance under this *Gabrielson* factor, the record would have to reflect that Elbert "delegate[d] decision-making authority" to AgCountry for his insurance needs. *Beauty Craft Supply & Equip. Co. v. State Farm Fire & Cas. Ins. Co.*, 479 N.W.2d 99, 101–02 (Minn. App. 1992), review denied (Minn. Mar. 19, 1992). But we have determined that "great reliance" is not present where an insured did not place all of his

> insurance needs into the hands of one insurance provider but rather, used other insurance providers as well. *Gabrielson*, 443 N.W.2d at 545; *see also Carlson v. Mut. Serv. Ins.*, 494 N.W.2d 885, 886–88 (Minn. 1993) (determining special circumstances exist where familial relationship existed and insured relied on agency for all insurance needs). Here, the record shows that AgCountry does not offer common insurance policies such as auto insurance, health insurance, or homeowner's insurance. Thus, Elbert could not have placed all of his insurance needs into AgCountry's hands. Moreover, Elbert has not presented sufficient evidence demonstrating that he was "unsophisticated in insurance matters" or needed protection from a "specific threat." *Gabrielson*, 443 N.W.2d at 544. Based on our review of the record, we conclude that the district court did not err by declining to recognize a special circumstance, and we affirm.

In the ***Herzog*** case mentioned above the insurance customer also argued for a special relationship heightened standard of care to be applied to the insurance agent but the court was not persuaded. Discussing the special relationship issue the court in ***Herzog*** stated:

> First, this is not a situation involving disparate business experience. As the district court cogently observed, Grounded Air successfully managed its workers' compensation and other insurance needs for more than a decade before contracting with Cottingham. Grounded Air stopped obtaining workers' compensation insurance through Cottingham after less than one year. And Grounded Air never sought advice from Cottingham regarding the adequacy of the workers' compensation insurance coverage PaySource was to obtain on Grounded Air's behalf. These facts do not establish a special relationship based on inexperience or dependence on Grounded Air's part. ***
>
> Second, Cottingham's referral to PaySource does not create a special relationship. Grounded Air asked Vogel how to reduce the cost of workers' compensation insurance, and Vogel recommended that Grounded Air obtain the insurance through PaySource, a separate entity. Grounded Air did just that, making PaySource the sole source of insurance for its employees' work-related risks after September 1, 2006. The fact that Cottingham may have received some form of compensation from PaySource for referring Grounded Air to PaySource is irrelevant. Grounded Air does not allege that Cottingham violated any duties to Grounded Air or engaged in fraud in the referral process.
>
> In sum, the facts relevant to the parties' relationship are undisputed. They demonstrate that Grounded Air only briefly relied on Cottingham to obtain workers' compensation insurance and terminated Cottingham's contractual obligation to do so on September 1, 2006. Because this record does not establish any basis for determining that Cottingham owed Grounded Air a heightened duty, Cottingham is entitled to summary judgment on Grounded Air's breach-of-fiduciary-duty claim

Herzog v. Cottingham & Butler Ins. Servs., Inc., No. A14-0528, 2015 WL 134043, at *3–4 (Minn. Ct. App. Jan. 12, 2015).

See also ***Timeshare Sys., Inc. v. Mid-Century Ins. Co.***, No. A12-0816, 2012 WL 5896834, at *4 (Minn. Ct. App. Nov. 26, 2012). In the ***Timeshare*** case, Timeshare, the insurance customer on a policy providing storm damage coverage for a commercial building, challenged the district court's summary judgment ruling dismissing their claim that the insurance agency and agent were negligent. The Minnesota Court of Appeals affirmed the judgment dismissing Timeshare's negligence claim against the insurance agency and agent. The Minnesota Court of Appeals stated:

> Appellants also argue that respondents agency and agent were negligent in selling a policy that lacked coverage for their office space. In establishing negligence, appellants must show (1) the existence of a duty; (2) a breach of the duty; (3) causation; and (4) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn.1987). An insurance agent has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn.1989) (alteration in original) (quotation omitted). This duty is limited to acting in good faith and following the insured's instructions. *Id*.
>
> Under special circumstances an agent may have a "duty to take some sort of affirmative action, rather than just follow the instructions of the client." *Id*. at 543–44. The facts of each case will dictate whether special circumstances create this extra duty. *Id*. at 543 n. 1. Facts to consider in determining whether special circumstances exist include whether the agent knew that the insured (1) was unsophisticated in insurance matters, (2) was relying on the agent to provide appropriate coverage, and (3) needed protection from a specific threat. *See id*. at 544.
>
> Appellants allege two acts of negligence: failure to inspect the property and failure to inform of no coverage due to vacancies. The district court correctly determined that respondents sold appellants the policy that they sought. This decision is supported by the record, as appellants sought a policy that was nearly identical to their previous policy and respondents sold appellants such policy. Therefore, respondents followed appellants' instructions. *See Gabrielson*, 443 N.W.2d at 543 (stating that an insurance agent must act in good faith and follow his client's instructions).
>
> Also, there are no special circumstances presented here. Kharbanda is a sophisticated property owner who is experienced with insurance matters. *Id*. at 544. Kharbanda was not relying on respondents to provide protection from a particular threat. *Id*. Kharbanda asked only for a policy that provided coverage identical to that of appellants' previous policy. Further, respondents are assumed to have knowledge of the policy's vacancy condition because Kharbanda provided the profit-loss statement that showed that much of the office space was vacant. Kharbanda did not

> indicate that there was concern that the office-structure basement might flood, especially when the record indicates that piping was sound and compliant. There are no coverage gaps in the policy provided for appellants.

Timeshare Sys., Inc. v. Mid-Century Ins. Co., No. A12-0816, 2012 WL 5896834, at *1 (Minn. Ct. App. Nov. 26, 2012).

See also ***Philter, Inc. v. Wolff Ins. Agency, Inc.***, No. A10-2230, 2011 WL 2750709, at *2-3 (Minn. Ct. App. July 18, 2011):

> The primary issue in this case is whether respondent had a duty to inform appellant that workers' compensation insurance is mandatory in Minnesota. Generally, an insurance agent has a duty to exercise the skill and care which "a reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn.1989) (alteration in original). Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured's instructions. *Id.* An insurance consumer is typically responsible to educate himself concerning matters of insurance coverage. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn.App.1986), review denied (Minn. Feb. 13, 1987).
>
> But a special circumstance or relationship may impose a heightened duty on the agent to take some sort of affirmative action, rather than just follow the insured's instructions. *Gabrielson*, 443 N.W.2d at 543–44; *see Johnson*, 405 N.W.2d at 889 (holding a duty to "offer, advise or furnish insurance coverage" may arise from the "circumstances of the transaction and the relationship of the agent vis-a-vis the insured"); *see also Osendorf v. Am. Family Ins. Co.*, 318 N.W.2d 237, 238 (Minn.1982) (stating that agent's admitted obligation to update insurance contract supported finding of negligence); *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn.1985) (holding that facts may give rise to a duty to offer additional coverage).
>
> Whether respondent had a duty to advise appellant that workers' compensation insurance is required in Minnesota is a question of law. *See Johnson*, 405 N.W.2d at 891 n. 5. When the existence of a duty turns upon disputed facts, the fact-finder must determine the underlying facts. Gabrielson, 443 N.W.2d at 543 n. 1.

Philter, Inc. v. Wolff Ins. Agency, Inc., No. A10-2230, 2011 WL 2750709, at *3 (Minn. Ct. App. July 18, 2011).

In ***Philter***, the Minnesota Court of Appeals went on to find no special relationship existed stating that the "record does not support that the agent knew appellant needed protection from the specific risk that resulted in the loss, and appellant never asked respondent to examine its exposure. Because appellant's

lack of sophistication as to insurance matters and its reliance on respondent also do not support the legal determination that special circumstances existed, respondent **did not owe appellant a heightened duty of care.**" *Id.* at *6. (Emphasis added).

3) ***Recommendations to Prevent E&O Issues***

Even though the standard of care applicable to insurance agents in Minnesota continues to be low, insurance agents continue to regularly be sued under novel and unique theories of liability. To better prevent and protect against potential claims it is recommended that agents agencies:

i. Use checklists and have insurance customers sign off and date the checklist;

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

iii. Perform regular thorough reviews with their insurance customers;

iv. Clearly document files;

v. Implement and consistently use a good computerized agency management system;

vi. Use confirmation letters and emails;

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

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

The upside of some these activities is that they often provide the agent with additional sales opportunities. In addition, if a potential E&O situation arises it is always a good idea to promptly contact your E&O carrier or legal counsel. Brownson Norby attorney Aaron Simon is always available to field your E&O questions and concerns at asimon@brownsonnorby.com or 612-315-6327.