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2019 U.S. 50 State Insurance Agent Standard of Care Update and Overview

50 State Edition

Brownson Norby PLLC's annual summary and review of the standard of care and duties for insurance agents - United States 50 State Review

Updated for 2019 by Aaron M. Simon

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Summary and review of the standard of care and duties for insurance agents - United States 50 State Review
By Aaron Simon[1]

NOTE:** ***This summary and review is not intended as legal advice, but rather to be used as a general guide and overview. Case law, authorities, and precedent in any given jurisdiction often can change – please contact an attorney directly to discuss the specifics of any applicable jurisdiction's case law, authorities, and precedent.

1) Order taker standard generally applied in most jurisdictions.

To begin with, most jurisdictions continue to impose an "order taker standard" on insurance agents. ***See Wilson Works, Inc. v. Great Am. Ins. Grp***., No. 1:11-CV-85, 2012 WL 12960778, at *3 (N.D.W. Va. June 28, 2012):

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

"[N]o duty to give advice is created simply because the insurance intermediary becomes a person's agent. This applies both to advice about what policies should be purchased as well as advice about what coverage is contained in an insured's existing policy." Robert H. Jerry, II, ***Understanding Insurance Law*** § 35(f)(2)(ii), at 212 (2d ed.1996). Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status, and it is well settled that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage. ***Murphy v. Kuhn***, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 976 (1997).

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See also 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):

> "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*.

See also AgCountry Farm Credit Servs., ACA v. Elbert, No. A17-1413, 2018 WL 2090617, at *2 (Minn. Ct. App. May 7, 2018), review denied (Aug. 7, 2018):

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

> Several cases from other jurisdictions have explained the reasons for the courts' unwillingness to impose such a duty upon insurance agents.
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> "A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage. *See, e.g., Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482–83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. App. Ct. 902, 653 N.E.2d 207, 207–08 (1995); *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990). *But see SW Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268, 1271–72 (1995); *Dimeo v. Burns, Brooks & McNeil, Inc.*, 6 Conn. App. 241, 504 A.2d 557, 559 (1986).
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> "That general duty of care excludes an affirmative obligation to give advice regarding the availability or sufficiency of coverage for several persuasive reasons. Some courts have reasoned that insureds are in a better position to assess their assets and the risk of loss to which they may be

exposed. *See, e.g., Pete*r, 22 P.3d at 486; *Sadler*, 776 A.2d at 40; see also Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 257 (1991) ('unrealistic to impose on an insurance agent the ongoing duty of surveillance with respect to an insured's constantly changing circumstances'. These courts have also noted that decisions regarding the amount of insurance coverage are personal and subjective, based upon a trade-off between cost and risk. *See Peter*, 22 P.3d at 486; Sadler, 776 A.2d at 40. An insurance agent is in no better position than the insured to predict the extent of damage that the insured might incur at some time in the future. *See Sadler*, 776 A.2d at 40; *Murphy*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976.

"Imposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage would 'remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available,' *Nelson*, 456 N.W.2d at 346, and would convert agents into 'risk managers with guarantor status.' Sadler, 776 A.2d at 40–41 (quotation omitted); see also *Murphy*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976. Significantly, 'the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered.' *Nelson*, 456 N.W.2d at 346. 'This would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear.' Peter, 22 P.3d at 486 (quotation omitted)."

Sintros v. Hamon, 148 N.H. 478, 480–81, 810 A.2d 553, 555–56 (2002). See, e.g., Peter v. Schumacher Enters., Inc., 22 P.3d 481, 486–87 (Alaska 2001); Harts v. Farmers Ins. Exch., 461 Mich. 1, 9–11, 597 N.W.2d 47, 51–52 (1999); and Nelson v. Davidson, 155 Wis.2d 674, 681–82, 683-84, 456 N.W.2d 343, 346, 347 (1990).

The four insurance agent cases from 2018 that are the most significant are:

Am. Family Mut. Ins. Co. v. Krop, 2018 IL 122556 (October 18, 2018) – Illinois

In this case the 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**.

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

Court 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.

Luzzi v. HUB International Northeast Ltd., 2018 WL 3993450 (D.N.J., 2018) (August 21, 2018) – New Jersey

Poorly decided case implicating a possible duty to advise under normal circumstances

Fink v. Brown & Brown Program Insurance Services Incorporated, 2018 WL 1744999, at *3 (D.Ariz., 2018) (April 11, 2018) – Arizona

This case follows Arizona's poor case law on insurance agent standard of care and duties in which Arizona courts have concluded that in looking at the standard of care applied to insurance agents, it is a case by case duty analysis, and there is no standard duty.

One should also keep in mind that even in jurisdictions where the "order taker standard" is generally applied, there is also often a carve out for special circumstances giving rise to a special relationship heightened duty to advise. If special circumstances exist that give rise to a special relationship, then courts may apply a heightened duty to advise standard. However, even when special circumstances and special relationship is pled in a complaint or asserted in a claim, it is very rarely applied by the court.

In addition, this review focuses on case law. Most jurisdictions also have regulations, statutes, and other laws that may also apply to the actions of insurance agents and brokers.

2) 2018 Key Case Highlights

i. ***Somnus Mattress Corp. v. Hilson*, No. 1170250, 2018 WL 6715777 (Ala. Dec. 21, 2018) (December 21, 2018) – Alabama**

The insurance customer brought a claim against its insurance agent and agency, alleging that that insurance agent and agency were negligent in providing advice to the insurance customer to not purchase insurance coverage for business interruption and loss of profits. There were disputed facts about what the insurance agent told the insurance customer as to the recommendations on insurance coverage for business interruption and loss of profits. The agent claimed he told the insurance customer to purchase this insurance and the customer declined. The insurance customer claimed the agent told him not to purchase this coverage.

As to the general standard of care placed on insurance agents the court confirmed that that the order taker standard of care adopted in most jurisdictions applied and stated:

> Even if Somnus had presented substantial evidence creating a genuine issue of material fact as to what Hilson's advice actually was, Somnus also had to demonstrate that Hilson and CGIA are not entitled to a judgment as a matter of law, i.e., that Hilson and CGIA had a duty to advise Somnus concerning the adequacy of its insurance coverage and that they breached that duty. Hilson and CGIA correctly observe that jurisdictions throughout the country have overwhelmingly concluded that insurers have no such duty to advise clients. A leading insurance treatise ably summarizes the general rule:
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> "Absent a specific agreement to do so, an insured's agent does not have a continuing duty to advise, guide, or direct the insured's coverage after the agent has complied with his or her obligation to obtain coverage on behalf of the insured. Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs. In addition, upon receiving the policy of insurance, the client has a duty to review the policy to ascertain that his or her needs are met. In addition, insurance agents generally are not liable for actions other than obtaining insurance coverage for their insureds unless a special relationship has been established between the parties."
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> 3 Steven Plitt et al., Couch on Insurance § 46:38 (3d ed. 2011) (footnotes omitted).
>
> Several cases from other jurisdictions have explained the reasons for the courts' unwillingness to impose such a duty upon insurance agents.
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> "**A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an**

affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage. *See, e.g., Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482–83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. App. Ct. 902, 653 N.E.2d 207, 207–08 (1995); *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990). *But see SW Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268, 1271–72 (1995); Dimeo v. Burns, Brooks & McNeil, Inc., 6 Conn. App. 241, 504 A.2d 557, 559 (1986).

"**That general duty of care excludes an affirmative obligation to give advice regarding the availability or sufficiency of coverage for several persuasive reasons**. **Some courts have reasoned that insureds are in a better position to assess their assets and the risk of loss to which they may be exposed**. *See, e.g., Peter*, 22 P.3d at 486; *Sadler*, 776 A.2d at 40; *see also* Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 257 (1991) ('**unrealistic to impose on an insurance agent the ongoing duty of surveillance with respect to an insured's constantly changing circumstances'**. **These courts have also noted that decisions regarding the amount of insurance coverage are personal and subjective, based upon a trade-off between cost and risk**. *See Peter*, 22 P.3d at 486; *Sadler*, 776 A.2d at 40. **An insurance agent is in no better position than the insured to predict the extent of damage that the insured might incur at some time in the future.** *See Sadler*, 776 A.2d at 40; Murphy, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976.

"Imposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage would 'remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available,' *Nelson*, 456 N.W.2d at 346, **and would convert agents into 'risk managers with guarantor status.'** *Sadler*, 776 A.2d at 40–41 (quotation omitted); *see also Murphy*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976. **Significantly, 'the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered**.' *Nelson*, 456 N.W.2d at 346. '**This would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear**.' *Peter*, 22 P.3d at 486 (quotation omitted)."

Sintros v. Hamon, 148 N.H. 478, 480–81, 810 A.2d 553, 555–56 (2002). *See, e.g., Peter v. Schumacher Enters., Inc.*, 22 P.3d 481, 486–87 (Alaska 2001); *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 9–11, 597 N.W.2d 47,

> 51–52 (1999); *and Nelson v. Davidson*, 155 Wis.2d 674, 681–82, 683-84, 456 N.W.2d 343, 346, 347 (1990). (Emphasis added).

However the insurance customer argued that the issue in the case was that once an insurance agent allegedly gives advice to the insurance customer, this advice should be accurate. The court concluded that "[t]here is no dispute that the general notion of voluntary assumption of a duty can be applied to insurance companies and agents"; but stated that "in this case the questions are whether this particular duty -- the duty to advise a client concerning the adequacy of insurance coverage -- can be voluntarily assumed, and, if so, what triggers such a duty?" *Somnus Mattress Corporation v. Hilson*, 2018 WL 6715777, at *7.

The court also analyzed whether there were special circumstances giving rise to a special relationship heightened duty to advise. The court found there were not special circumstances giving rise a special relationship.

Affirming summary judgment in favor of the agent the court ultimately concluded:

> Somnus [the insurance customer] has not alleged that Hilson[the insurance agent] misrepresented whether Somnus qualified for business-income coverage; Jones was fully aware in 2009 that business-income coverage was available. Somnus simply chose not to purchase such coverage because, it alleges, Hilson told Jones: "I don't think you need it." This was not a misrepresentation as to coverage; at most, it was Hilson's assessment of whether Somnus should purchase insurance for an uncovered risk that was known to Somnus. Somnus has provided no authority for the proposition that Hilson and CGIA could voluntarily assume a duty to advise on that basis.

Id.

ii. *Dahms v. Nodak Mut. Ins. Co.*, 2018 ND 263 (December 6, 2018) – North Dakota

In the *Dahms* case, the agent's insurance customers insured their home through the insurer beginning in 2008. The home had a detached garage. The insurance customers at a later date constructed a deck between the garage and the house but did not inform the insurance agent of this modification. Fire damaged the home in 2013 and the insurer denied a portion of the claim, contending successfully that the garage was not a structure attached to the house. As for the negligence claim against the agent, the court found that the insurance customers never told the agent about the deck or requested more coverage. Like in most jurisdictions, insurance agents in North Dakota have a duty to act in good faith and to follow the instructions of their insurance customers. The insurance customers raised no genuine issue of material fact as to the insurance agent following the instructions.

The insurance customers also could not establish special circumstances giving rise to a special relationship heighted duty to advise. While the relationship was "long standing", the insurance customers "sought no advice about the garage, did not contact [agent] regularly, and [agent] did not visit their property." *Dahms v. Nodak Mut. Ins. Co.*, 2018 ND 263 (Dec. 6, 2018).

iii. *Mears v. Jones*, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018) (December 6, 2018) – Mississippi

In May of 2015, insurance customer George Mears contacted insurance agent Lance Fagan Jones seeking builders risk and home owners insurance for a home he intended to build in Long Beach, Mississippi. During their first conversation, Mears indicated to Jones that he wished to obtain $400,000 in coverage. In June 2015, Jones provided Mears with a nonbinding quote from Lexington Insurance Company for that amount.

In 2016, about a year after they initially made contact, Mears contacted Jones and told him that he was ready to begin construction and wanted to finalize his insurance policy. Jones thereafter sought out quotes from Lloyd's of London and the Mississippi Residential Property Insurance Underwriting Association ("MRPIUA"), the state's insurance agency. Altogether and including the prior Lexington quote, Jones sought quotes from three insurers.

The parties dispute what happened next. According to Mears (the insurance customer), Jones (the agent) informed him that his only insurance option was the MRPIUA policy, which had a maximum limit of $200,000. In the case Mears stated in an affidavit that Jones told him that "no other insurer would write coverage for properties on the beach and that the maximum amount of coverage that could be obtained under any circumstances was $200,000." At his deposition, Mears testified that Jones told him that Lexington would no longer provide the earlier-quoted insurance because it "was not going to write the policy based on upon the [house's] location ... on the beach."

Contrary to Mears's account, Jones stated that he provided all three quotes to Mears at this time, including the Lexington quote for $400,000. Jones claims that he gave Mears the opportunity to choose the higher Lexington quote but Mears refused and instead opted for the lower coverage contained in the MRPIUA policy.

In October 2016, Mears's house, while under-construction, burned to the ground as the result of suspected arson. After the fire, MRPIUA paid out the policy limit of $200,000. Mears claims that the fire caused damages far in excess of the $200,000 policy. According to Mears's complaint, Mears subsequently discovered that there were other available insurance policies that would have covered the entire value of his house.

In summary Mears alleged that Jones failed to advise him as to other available insurance options and made a negligent representation to him about the coverage available. Mears argued that Mississippi law imposed on the Jones, the agent, a duty to advise him of available insurance. The court found that although the agent had no duty to offer advice in the first place, if advice was offered the agent had a duty to exercise reasonable care in offering this advice to the insurance customer. *See Mears v. Jones*, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018) (citing to *Mladineo v. Schmidt*, 52 So.3d 1154, 1162 (Miss. 2010) (second alteration in original)):

> The district court reads *Mladineo* too narrowly. As the district court recognized, *Mladineo* held that while insurance agents lack "an affirmative duty to advise buyers regarding their coverage needs," when they "do offer advice to insureds, they have a reasonable duty to exercise care in doing so." *Id.* at 1163. We note at the outset that a fair reading of

> this capacious language regarding the duty to advise would include giving advice as to what coverage options exist. Appearing to anticipate this issue, Jones and Farm Bureau argue that Jones did not offer "advice" by making the alleged statement but rather merely "opined that only MRPIUA would insure his property." However, this statement had the consequence of leading Mears to purchase the MRPIUA policy. This brings Jones's statement within the holding of *Mladineo*.

Mears v. Jones, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018)

The court concluded there were material issues of fact that precluded summary judgment on both the insurance customer's duty to properly advise claim and the insurance customer's negligent misrepresentation as to available coverages claim.

iv. *Jensen v. Wiseman*, 2018 WL 5733485, at *1 (S.C.App., 2018) (October 31, 2018) – South Carolina

In this case the insurance customer, Donna Jensen, argued that the circuit court erred in granting summary judgment in favor of the insurance agent and agency, Matthew Wiseman and People's Underwriters, Inc.

"Specifically, Jensen contends the circuit court erroneously addressed whether Jensen had an insurable interest in daycare buses covered under a commercial automobile insurance policy (the Policy) because Respondents did not raise the 'insurable interest' issue in their summary judgment motion. Jensen further asserts summary judgment was improper because she submitted more than a mere scintilla of evidence demonstrating Wiseman breached a duty to adequately advise her when she procured the Policy." *Jensen v. Wiseman*, 2018 WL 5733485, at *1 (S.C.App., 2018)

In the case the court stated that "generally, an insurer and its agents owe no duty to advise an insured. If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice." (*citing to Trotter v. State Farm Mut. Auto. Ins. Co*., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988).

The court went on to note:

> Jensen [the insurance agent] presented no evidence that she sought Wiseman's [the insurance agent's] advice in procuring the Policy—Jensen merely stated **she trusted Wiseman because he was a "professional."** See *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 16, 620 S.E.2d 326, 331 (2005) (holding insurance agent did not owe a duty to the insured because "the record is simply devoid of any such evidence" showing the insured made "a clear request for advice"). "**A request for 'full coverage,' 'the best policy,' or similar expressions does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase**." *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347. Likewise,

> there is **no evidence of an ongoing relationship between Jensen and Wiseman such that Wiseman should have been on notice that Jensen sought and relied on his advice**. Wiseman first reached out to Jensen in April 2010, a little over one year before the accident, and Wiseman and Jensen communicated only briefly about the Policy.

The court further noted that Jensen the insurance customer "admitted she did not fully read the Policy when Wiseman [the insurance agent] instructed her to do so in order for her to ask questions or determine whether the coverage was sufficient"; and that this admission was fatal to Jensen's claim. *Id*. at *2 (*citing to Carolina Prod. Maint., Inc. v. U.S. Fid. & Guar. Co.*, 310 S.C. 32, 38, 425 S.E.2d 39, 43 (Ct. App. 1992); and *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 416–22, 171 S.E.2d 486, 489–91 (1969)

In addition, the court noted that the only expert opinion regarding the standard of care that was before the court stated that the insurance agent complied with the standard of care in placing insurance for the insurance customer and did not breach any duties to the insurance customer. The insurance customer did not provide a contradictory opinion or other expert testimony addressing the standard of care or duty question.

The court affirmed summary judgment in favor of the insurance agent stating that the insurance customer failed to present a mere scintilla of evidence to support her assertion that insurance agent undertook to advise her, either expressly or impliedly, or that the insurance agent otherwise had or breached any duty to advise the insurance customer to list herself individually on the commercial policy.

v. *Slaubaugh Farm, Inc. Farm Family Cas. Ins. Co.*, 2018 WL 5473033, (Del.Super., 2018) (October 29, 2018) – Delaware

The issue in this case was weather the insurance customer requested snow-ice coverage. There court found there were disputed facts on the issue of whether this coverage was requested by the insurance customer that precluded summary judgment.

As to duty the court stated:

> An insurance agent "assumes only those duties normally found in an agency relationship." This duty includes "the obligation to use reasonable care, diligence and judgment in procuring the insurance requested by the insured." An insurance agent must "offer coverage in the way that a reasonably competent agent would under the circumstances." **Generally, an insurance agent does not have a duty to advise a client with respect to appropriate insurance coverage. This general rule, however, does not apply if the agent voluntarily assumes the responsibility for selecting the appropriate coverage or if the insured makes an ambiguous request for coverage that requires clarification**.
>
> Viewing McGowan's statements and actions in the light most favorable to the Plaintiffs, there is certainly a genuine issue of material fact as to whether McGowan had a duty to obtain snow-ice coverage for Plaintiffs,

> making the granting of summary judgment in his favor unwarranted. Quite frankly, McGowan's own statements and actions undermine his argument on this issue.

Slaubaugh Farm, Inc. Farm Family Cas. Ins. Co., 2018 WL 5473033, at *2–3 (Del.Super., 2018) (foot notes omitted) (emphasis added).

vi. *Davis v. Claude Reynolds Insurance Agency, Inc.*, 2018 WL 5310144 (Ky.App., 2018) (October 26, 2018) – Kentucky

In this case the court ruled there was no duty placed on insurance agents to obtain the best premium prices under Kentucky law.

vii. *Arrington v. Jackson National Life Insurance Company*, 2018 WL 5298388, (N.D.Tex., 2018) (October 25, 2018) – Texas

In this case the insurance customer claimed insurance agent has a duty to help his client avoid losing coverage if he is aware that the client is about to lose coverage.

As to duty the court stated:

> In Texas, insurance agents owe their clients limited duties. *See May v. United Servs. Ass'n of Am.*, 844 S.W.2d 666, 669 (Tex. 1992) ("It is established in Texas that an insurance agent ... owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so."); *Aspen Specialty Ins. Co. v. Muniz Eng'g, Inc.*, 514 F. Supp. 2d 972, 982 (S.D. Tex, 2007) ("An insurance agent may not misrepresent an insurance policy's terms. Also, if an agent is acting on behalf of the insured, he is under a duty to explain the application for insurance and the terms of the coverage being applied for." (citations omitted)). Whether any other duties exist "most likely depend[s] on the course of dealings between agent and insured." *Aspen Specialty Ins. Co.*, 514 F. Supp. 2d at 983 (citing *McCall v. Marshall*, 398 S.W.2d 106, 109 (Tex. 1965)).
>
> Courts applying Texas law have imposed additional duties on insurance agents in certain circumstances. *See, e.g., Kitching v. Zamora*, 695 S.W.2d 553, 554 (Tex. 1985) (imposing duty to keep customer informed about insurance policy expiration date where agent received information intended for customer). While the Court is skeptical that the circumstances alleged by Buck would give rise to a duty to notify Bill of the potential lapse in insurance coverage, the Court finds that the issue is most properly determined by the state court. *See Holcomb v. Brience, Inc.*, No. 3:01-CV-1715-M, 2001 WL 1480756, at *3 (N.D. Tex. Nov. 20, 2001).

Arrington v. Jackson National Life Insurance Company, 2018 WL 5298388, at *3–4 (N.D.Tex., 2018).

The insurance customer also argued that the insurance agent owed a heightened duty to the insurance customer because there were special circumstances giving rise to a special relationship because the two had a relationship spanning more than ten years; because the relationship involved high levels of trust"; and because the agent assisted the insurance customer with multiple insurance policies. *Id*. The court concluded that it was unclear whether the facts alleged were sufficient to give rise to a special relationship and impose heightened duties. *Id*.

Ultimately the court found that it was ambiguous whether Texas law would impose a duty on the insurance agent. The court went on to state that if a duty was imposed, the insurance customer had at least alleged sufficient facts to support a finding that the insurance agent breached duties owed to the insurance customer. *Id*.

viii. *Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556 (October 18, 2018) – Illinois

In this case the 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**.

The details of the case involve the Krops alleging that they instructed their American Family insurance agent to give them the same or better coverage they had in place with a previous insurer. As it turns out the American Family policy sold to the Krops was not as robust as the Krops' prior policy. The Krops were subsequently sued for defamation, invasion of privacy, and intentional infliction of emotional distress, and requested coverage and defense of the suit from American Family. American Family denied coverage for the suit because the American Family policy did not cover claims for defamation, invasion of privacy, and intentional infliction of emotional distress, claims that would arguably be covered by the Krops' prior policy.

The Krops in turn sued their American Family agent for failing to sell them the same or better coverage they had in place with their previous insurer. **However, since the American Family policy was issued and received by the Krops in March of 2012 and the Krops didn't file their lawsuit against their agent until September 2015, the court ruled the action was barred by the two year statute of limitations and was untimely**.

The decision focused on the principle that policyholders have a duty to read their insurance policies. The court stated:

> We hold that when customers have the opportunity to read their insurance policy and can reasonably be expected to understand its terms, the cause of action for negligent failure to procure insurance accrues as soon as the customers receive the policy. Here the Krops filed their complaint over two years after they received their American Family policy, and they did not plead facts that would support any recognized exception to the expectation that customers will read the policy and understand its terms, so their claim was untimely.

Am. Family Mut. Ins. Co. v. Krop, 2018 IL 122556, ¶ 2

This decision will significantly limit the ability of policy holders to bring suit against insurance agents in Illinois because typically the alleged negligent procurement of coverage is not realized until there is a loss and coverage issues arise, which is often years later.

ix. *Olson v. Wisconsin Mutual Insurance Company*, 2018 WI App 71, ¶¶ 38-46, 2018 WL 4770898 (Wis.App., 2018) (October 2, 2018) – Wisconsin

In this case the insurance customer argued that the insurance agent was negligent by not obtaining the proper coverage from the insurance comply at the inception of the policy on January 23, 2013, and second, by failing to tell the insurance customer of the importance of having underlying automobile coverage with a certain insurance company. The insurance customer argued that had he known that the farm umbrella endorsement would not cover the off-farm use of his personal automobiles unless he also carried underlying automobile insurance with the same insurance company, he would have switched all of his coverage to one company immediately.

As to duty and standard of care the court stated:

> An insurance agent has a duty to exercise reasonable skill and diligence in the transaction to which he or she is entrusted. *Avery v. Diedrich*, 2007 WI 80, ¶ 23, 301 Wis. 2d 693, 734 N.W.2d 159. "When an insurance agent fails to act with reasonable care, skill, and diligence in procuring coverage he or she agreed to procure, the agent has breached his or her duty to the insured." *Id.* **Under ordinary circumstances, an insurance agent "only assumes those duties normally found in any agency relationship," including the obligation to deal with the principal in good faith and to carry out the principal's instructions**. *Nelson*, 155 Wis. 2d at 681 (citing *Hardt v. Brink*, 192 F. Supp. 879, 880 (W.D. Wash. 1961)); *see also Appleton Chinese Food Serv., Inc. v. Murken Ins., Inc.*, 185 Wis. 2d 791, 802, 519 N.W.2d 674 (Ct. App. 1994) (concluding an insurance agent breached the duty to act with reasonable care by failing to procure coverage she had agreed to procure for the insureds).
>
> **The majority rule is that an insurance agent generally does not have an affirmative duty to advise a client regarding the availability or adequacy of coverage**. *Nelson*, 155 Wis. 2d at 682. This general rule can be defeated by a showing of "special circumstances" that give rise to something more than the standard insured-insurer relationship. *Avery*, 301 Wis. 2d 693, ¶¶ 26-27. "Special circumstances" can include an express agreement that an agent will advise the insured about his or her coverage, a long-standing relationship between the agent and the insured evidencing an enhanced duty, or compensation paid to the agent for his or her advice independent of remuneration by the insurer. *Id.*, ¶ 27; *see also Nelson*, 155

> Wis. 2d at 683-84. "[A]n insurance agent does not have a duty to procure requested insurance coverage until there is an agreement that the agent will do so." *Avery*, 301 Wis. 2d 693, ¶ 29. An agent also bears no liability for failing to explain each and every exclusion to an insured absent a specific request to do so. *Sprangers*, 175 Wis. 2d at 73.

See Olson v. Wisconsin Mutual Insurance Company, 2018 WI App 71, ¶¶ 38-46, 2018 WL 4770898, at *9–11 (Wis.App., 2018).

The court went on to note:

> Both theories of negligence Keyes [the insurance customer] advances revolve around the underlying automobile coverage. Keyes contends Truax [the insurance agent] was negligent in not telling him to convert his Wisconsin Mutual automobile policy in January 2013, and also in failing to have the coverage written in April 2013 when the Wisconsin Mutual premium expired. He also argues Truax was negligent in failing to tell Keyes about the importance of having underlying Rural automobile coverage. Keyes asserts the circumstances here are similar to those in *Poluk v. J.N. Manson Agency, Inc.*, 2002 WI App 286, 258 Wis. 2d 725, 653 N.W.2d 905, wherein this court concluded that, because the insured advised the agent that a tenant was leaving the insured building, the agent had a duty to advise the insured that a vacancy clause might exempt the insured building from coverage. *See id.*, ¶ 14.

The court rejected the insurance customer's arguments. The court found that the insurance customer's arguments necessarily assume, contrary to the record, that the insurance customer specifically requested coverage for the use of his vehicles off the farm premises. However, the record reflected that the insurance customer admitted he did not make such a request. *Id*.

The court went on to state that at "most, Keyes [the insurance customer] requested from Truax [the insurance agent] a quote for the premium Rural would charge for underlying automobile coverage, if Keyes chose to purchase it." *Id*. However, the insurance customer never affirmatively requested underlying automobile coverage from Rural. *Id*.

The court also found there were not special circumstances giving rise to a special relationship standard of care. The court stated:

> There is no evidence or argument that Truax agreed to advise Keyes regarding coverage, that Keyes paid Truax for his advice, that there was a long-standing relationship between Keyes and Truax, or that Truax marketed himself in such a way as to give Keyes the impression that he could be relied upon for advice. Truax's duties under the circumstances were those that attach to a typical agent-insured relationship, including to procure the coverage that the insured actually requests. Keyes agreed that Truax had provided all coverages identified in his signed application.

Id.

"Here, there could be no duty on Truax's part to procure the umbrella coverage Keyes now seeks because, by his own admission, he did not request such coverage."

The insurance customer also tried to established a standard of care through the use of an expert but the court rejected that argument as well, stating that a "circuit court need not defer to an expert witness's opinion on a question of law. *See Town of East Troy v. Town & Country Waste Serv., Inc.*, 159 Wis. 2d 694, 707 n.7, 465 N.W.2d 510 (Ct. App. 1990)." *Id.*

Ultimately the court dismissed the insurance customer's negligence claim against the insurance agent and found that:

> [N]o reasonable fact-finder could conclude Truax [the insurance agent" had breached the relevant standard of care. Keyes admitted he received the coverage for which he applied, despite his vague request for "full coverage." There is no evidence from which a fact-finder could reasonably infer that Keyes had specifically requested umbrella coverage for the off-farm use of his personal automobiles or that he ever requested any automobile coverage from Rural after January 2013, when the farmowners policies first issued. Accordingly, the circuit court properly dismissed Keyes's agent negligence claim.

Id.

x. *Brown v. Trustguard Insurance Company*, 2018 WL 447273 (W.D.Ky., 2018) (September 18, 2018) – Kentucky

In this case the insurance customer made a claim against an insurance agency for processing retroactive cancellation of an insurance policy. The insurance agency argued that there is no evidence that it did anything other than exactly what the insurance customer requested, assist the insurance customer in effecting cancellation of an insurance policy because the insurance customer did not wish to have double coverage.

The court addressed the standard of care applied to insurance agents under Kentucky law and stated:

> "The duty an insurance agent has to his clients is a question of law ... **Under Kentucky law, there is no 'affirmative duty to advise ... by the mere creation of an agency relationship.' ... Instead, an insurance agent owes his client a standard duty of reasonable care."** *Atic Enters. v. Cottingham & Butler Ins. Servs.*, 690 F. App'x. 313, 316 (6th Cir. 2017) (citations omitted). **Where the facts do not demonstrate that an insurance agent has assumed a duty to advise the insureds, the agent is under no duty "to protect them from themselves."** *Nationwide Mut. Fire Ins. Co. v. Nelson*, No. 11-32-ART, 2011 WL 6726917, at *2, 2011 U.S. Dist. LEXIS 147009 at *7 (E.D. Ky. Dec. 21, 2011).

Brown v. Trustguard Insurance Company, 2018 WL 4472733, at *8 (W.D.Ky., 2018) (emphasis added).

The court ruled in favor of the insurance agency and dismissed the negligence claim against the agency stating that "the facts conclusively demonstrate that Assured [the insurance agency] did exactly as Mr. Brown [the insurance customer] requested in handling the policy cancellation."

xi. *Upscale Fashions, Inc. v. Underwriters at Lloyd's London*, 254 So.3d 784, 790–92, 2018-0015 La.App. 4 Cir. 8/29/18, 7–12 (La.App. 4 Cir., 2018) (August 29, 2018) – Louisiana

Reinforcing the order taker standard of care applied to insurance agents under Louisiana law the court stated that an "agent fulfills the duty of 'reasonable diligence' when he or she procures the insurance requested. *Upscale Fashions, Inc. v. Underwriters at Lloyd's London*, 254 So.3d 784, 790–92, 2018-0015 La.App. 4 Cir. 8/29/18, 7–12 (La.App. 4 Cir., 2018) (citing *Isidore Newman Sch. v. J. Everett Eaves, Inc*., 09-2161, p. 7 (La. 7/6/10), 42 So.3d 352, 356 (citation omitted). In addition under Louisiana law the court stated that an insurance agent is also responsible for notifying a customer when the agent was unable to procure the desired coverage. *Id.* (citing *Karam v. St. Paul Fire & Marine Ins. Co*., 281 So.2d 728, 730-31 (La. 1973)).

xii. *Estvold Oilfield Services, Inc. v. Hanover Insurance Company*, 2018 WL 4101504 (D.N.D., 2018) (August 28, 2018) – North Dakota

In an insurance agent professional negligence case expert testimony was not required to establish standard of care placed on insurance agents, noting that expert testimony is not required when the "wrongfulness of the conduct involved is within the common knowledge of laypersons." *Estvold Oilfield Services, Inc. v. Hanover Insurance Company*, 2018 WL 4101504, at *9 (D.N.D., 2018) (*citing Klimple v. Bahl*, 2007 ND 13, ¶ 6, 727 N.W.2d 256). *; Consolidated Sun Ray, Inc. v. Lea*, 401 F.2d 650, 658 (3d Cir.1968) (agent's "efforts to fulfill contractual obligations palpably insufficient" and not requiring expert testimony to support the claim); *Allstate Property and Cas. Ins. Co. v. Mirkia*, No. 2:12-cv-01288, 2014 WL 2801310, at **1–5, 12–13 (D. Nev. June 19, 2014) (expert testimony not required to sustain a claim against an insurance agent for failing to accurately complete and update an insurance application including whether the broker knew or should have known of alleged inaccuracies in the application); *CIGNA Prop. & Cas. Co. v.Zeitler*, 730 A.2d 248 (Ct. Sp. App. Md. 1998) (expert testimony not required for the failure to secure requested coverage); *Clary Insurance Agency v. Doyle*, 620 P.2d 194 (Ala. 1980) (same); Lori J. Henkel, *Annot: Necessity of Expert Testimony to Show Standard of Care in Negligence Action Against Insurance Agent or Broker*, 52 A.L.R.4th 1232 (1987) (discussing cases that address when an expert is required to support a claim of negligence on the part of an insurance agent or broker and when an expert is not required).

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

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*.

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 language 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.

Moreover, 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.

xiv. Mary'z Mediterranean Cuisine, Inc. v. Blackboard Insurance Company, **2018 WL 4080458 (S.D.Tex., 2018) (August 27, 2018) – Texas**

In this case the insurance customer sufficiently pled claims against the insurance agent for negligence, negligent misrepresentation, and for violations of the Texas Insurance Code and the DTPA.

The court noted that under Texas law "an insurance agent who undertakes to procure insurance for another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." *Mary'z Mediterranean Cuisine, Inc. v. Blackboard Insurance Company*, 2018 WL 4080458, at *3–4 (S.D.Tex., 2018) (c*iting May v. United Services Association of America*, 844 S.W.2d 666, 669 (Tex. 1992).

The court also stated that "Texas courts have also held agents liable for negligence when the agent wrongly led clients to believe their policy provided protection against a particular risk that was in fact excluded from the policy's coverage." *Id.* (*citing Rainey-Mapes v. Queen Charters, Inc.* 729 S.W.2d 907, 913-14 (Tex. App.--San Antonio 1987, writ dism'd by agr.) (implicitly affirmed by May, 844 S.W.2d at 670).

In addition, the court stated that the:

> Texas Insurance Code prohibits any 'person' from engaging in deceptive practices in the business of insurance, such as misrepresenting the terms of a policy or the benefits or advantages promised by the policy. Tex. Ins. Code §§ 541.003, 541.051. Agents are "persons" engaged in the business of insurance for purposes of the Insurance Code. Id. § 541.002(2).

Id.

In this case the insurance customer alleged that the insurance agent: knew how the insurance customer's property would be used when they marketed the policy to the insurance company; knew that the property lacked an internal fire alarm system; misrepresented that the policy would cover damages caused by fire when it did not; failed to disclose that the policy did not cover fire damage; and that the insurance customer relied on the insurance agent to procure the appropriate coverage. The insurance customer further alleged that the insurance agent knowingly misrepresented the terms of the policy and coverage provided by making untrue statements of material fact and that the insurance agent owed a

duty to the insurance customer to obtain appropriate insurance coverage for the property, or in the alternative if they could not obtain the requested coverage, to notify the insurance customer of this. *Id*.

The court ruled that if the insurance customer allegations were true then the insurance customer could prevail on its negligence and Insurance Code claims against the insurance agent. *Id*.

xv. *PWB Dev., L.L.C. v. Acadia Ins. Co.*, No. CIV-17-387-R, 2018 WL 4088793 (W.D. Okla. Aug. 27, 2018) (August 27, 2018) – Oklahoma

In this case the court ruled that the standard of care insurance agents are held to under Oklahoma law is that "'[**A]n insurance agent may be liable ... in tort for failure to ... use reasonable care, skill and diligence in the procurement of insurance ... if, by the agent's fault, insurance is not procured *as promised* and *the insured* suffered a loss.**'" *PWB Dev., L.L.C. v. Acadia Ins. Co.*, No. CIV-17-387-R, 2018 WL 4088793, at *8 (W.D. Okla. Aug. 27, 2018) (quoting *Swickey v. Silvey Companies*, 979 P.2d 266, 268–69 (Okla. Civ. App. 1999) (emphasis in orginal).

However, the court found that the insurance agent did not owe a duty to the Plaintiff because the insurance agent never promised it would procure business income insurance for Plaintiff PWB. Instead, the insurance agent represented to its insurance customer that it would add Plaintiff PWB as an "additional insured" as to liability coverage it sold to its insurance customer. The court further found that the insurance agent "cannot be negligent for failing to procure insurance that would not have affected Plaintiff's damages in this case." *Id*.

The court went on to state:

> Even assuming a duty could exist between an insurance agent and uninsured party, Frates cannot be held negligent for ignoring a request that Plaintiff never made. *Hardison v. Balboa Ins. Co.*, 4 Fed. App'x 663, 673 (2001) (unpublished) ("[L]iability under [a negligence] theory [for failure to procure insurance] occurs only where the insured has actually requested coverage from the agent."); *Swickey*, 979 P.2d at 268 ("[The plaintiff] told someone at Agency that she wanted full coverage for Mike, and she wanted him shown as the named insured," and then Mike "called Agency to make sure he was 'the insured of the vehicle' ...."). Plaintiff has not shown that it requested business income coverage from Frates, and its only request directly to Frates was for coverage for the 11/29/13–11/29/14 term, which has no bearing on lost rents during the 2015 repairs. Frates's apparent carelessness is troubling, issuing several incorrect insurance forms in 2014 and even again in 2016 after the Johnny Carino's fire, but without a duty to PWB, Frates is entitled to summary judgment on Plaintiff's negligence claim.

Id.

xvi. Luzzi v. HUB International Northeast Ltd., 2018 WL 3993450 (D.N.J., 2018) (August 21, 2018) – New Jersey

In this case the issue centered on the low amount of insurance coverage in place of loss of personal property. The agent claimed that additional coverage was offered to the insurance customer and the insurance customer declined the additional coverage. The insurance customer claimed that she did not see or understand the policy limit of $15,000 on the declaration page for loss of personal property and that **she believed she had purchased unlimited coverage for loss of personal property for a premium of $126**.

The court addressed the standard of care insurance agents are held to under New Jersey law stating:

> "At common law both [insurance] agents and brokers, when acting on behalf of an insured, **owe the insured a duty of due care**." *Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc.*, 135 N.J. 182, 189 (1994). *See President v. Jenkins*, 180 N.J. 550, 568 (2004) (internal citations omitted) ("Brokers and agents generally owe the same duties to an insured ... '**Agents, like brokers, are obligated to exercise good faith and reasonable skill in advising insureds' and in informing them of available coverage**."). In *Rider v. Lynch*, 42 N.J. 465, 476 (1964), the New Jersey Supreme Court addressed the scope of the duty that an insurance broker owes to an insured or prospective insured. *Rider* recognized that a broker engaged to obtain insurance must exercise "good faith and reasonable skill, care and diligence in the execution of the commission." *Id.* In particular, the broker "is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected." *Id.* **Furthermore, "[a]n insurance agent may assume duties in addition to those normally associated with the agent-insured relationship" if there is evidence of greater responsibilities, i.e. a "special relationship."** *Glezerman v. Columbian Mut Life Ins. Co.*, 944 F.2d 146, 150–51 (3d Cir. 1991).[10]
>
> *Rider* "**defined the obligations of a broker as (1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply**." *President*, 180 N.J. at 569 (citing *Rider*, 42 N.J. at 476). "If an agent or broker fails to exercise the requisite skill and diligence when fulfilling those obligations, then there is a breach in the duty of care, and liability arises." *Id.* (citing *Rider*, 42 N.J. at 476). The New Jersey Supreme Court has cautioned, however, that ***Rider* does not "limit[ ] the establishing of a broker's liability to th[o]se three circumstances**." *Bates v. Gambino*, 72 N.J. 219, 225 n.2 (1977)).

Luzzi v. HUB International Northeast Ltd., 2018 WL 3993450, at *6 (D.N.J., 2018) (emphasis added).

The court found there was a duty to advise stating that the agent **"had a duty to ascertain the customer's needs and recommend appropriate coverage."** The court went on to note that there was a genuine issue on material fact as to the scope of that duty under the facts and circumstances of the case, and there was a genuine issue of material fact as to whether the agent breached that duty. *Id*. at *7.

This case was not decided well. The analysis was not robust. The case law cited by the court references a duty to advise if there are special circumstances giving rise to a special relationship, not that there is always a duty to advise. The court performs no analysis of if there is in fact special circumstances giving rise to a special relationship heightened duty to advise. This case is probably an outlier. However, if this case stands then this would change New Jersey from an order taker standard of care state to a potential heightened duty to advise standard of care state.

xvii. Baker v. Kentucky Farm Bureau Mut. Ins. Co., No. 2017-CA-000118-MR, 2018 WL 3814763 (Ky. Ct. App. Aug. 10, 2018) (August 10, 2018) – Kentucky

The court stated in this case that under Kentucky law, "[**a]n implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the 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**." *Baker v. Kentucky Farm Bureau Mut. Ins. Co.*, No. 2017-CA-000118-MR, 2018 WL 3814763, at *3 (Ky. Ct. App. Aug. 10, 2018) (citing *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992) (citations omitted) (emphasis added).

In this case the insurance customer argued that the insurance agent had a duty to her to investigate the property being insured and advise the insurance customer on the need to obtain a different type of insurance policy. In particular the insurance customer argued that the agent had a duty to investigate the property's interior, ascertain that it was not occupied by a church, inform the insurance customer that the insurance policy did not cover the vacant property, and ensure that the resulting application contained no misrepresentations that voided the policy at its inception.

The court ruled that the agent did not owe this broad a duty to the insurance customer. *Id*. The court stated:

> The record does not support that Newton [the insurance agent] impliedly assumed a duty to Baker [the insurance customer] other than that which a normal insurance agent and insured have. Baker cites no Kentucky law to support her contention that Newton owed her a duty of care. As *Mullins* points out, "When circumstances present an issue of an insurance company and/or agent 'holding itself out' as a counselor and/or advisor, proof of the standard in this type of case may require expert testimony at trial." *Id.* at 249. This case does not pose such an issue. Wherefore, we concur with the court that Newton owed no duty to Baker.

Id.

xviii. *Perreault v. AIS Affinity Ins. Agency of New England, Inc.*, 93 Mass. App. Ct. 673, 107 N.E.3d 1222, 1227–28 (2018) (August 2, 2018) – Massachusetts

This case looked at whether there were special circumstances giving rise to a special relationship standard of care. The court first addressed Massachusetts law regarding the normal standard of care and special relationship:

> Negligence -- duty. As the plaintiff properly acknowledges, there 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." *Martinonis v. Utica Natl. Ins. Group*, 65 Mass. App. Ct. 418, 420, 840 N.E.2d 994 (2006). *See Robinson v. Charles A. Flynn Ins. Agency, Inc.*, 39 Mass. App. Ct. 902, 902–903, 653 N.E.2d 207 (1995). However, an insurance agent may acquire a greater duty of investigation, advice, and assistance to an insured by reason of "special circumstances." *McCue v. Prudential Ins. Co. of America*, 371 Mass. 659, 661–662, 358 N.E.2d 799 (1976). *Martinonis, supra* at 421, 840 N.E.2d 994. Such "special circumstances of assertion, representation and reliance" may create a duty of due care. *McCue*, supra at 661, 358 N.E.2d 799, quoting from *Rapp v. Lester L. Burdick, Inc.*, 336 Mass. 438, 442, 146 N.E.2d 368 (1957).
>
> 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. *See McCue*, 371 Mass. at 661–663, 358 N.E.2d 799; *Bicknell, Inc. v. Havlin*, 9 Mass. App. Ct. 497, 500–501, 402 N.E.2d 116 (1980); *Construction Planners, Inc. v. Dobax Ins. Agency, Inc.*, 31 Mass. App. Ct. 672, 674-676, 583 N.E.2d 255 (1991). 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." *Baldwin Crane & Equip. Corp. v. Riley & Rielly Ins. Agency, Inc.*, 44 Mass. App. Ct. 29, 32, 687 N.E.2d 1267 (1997) (quotation omitted).

Perreault v. AIS Affinity Ins. Agency of New England, Inc., 93 Mass. App. Ct. 673, 677–78, 107 N.E.3d 1222, 1226–27 (2018)

Analyzing the Massachusetts case law applied to the facts of the case and focusing on the issue of special relationship the court stated:

> Viewing the undisputed facts in the light most favorable to the plaintiff, no rational finder of fact could conclude that special circumstances existed such that AON owed Mann a duty of care. Although Burns had worked

with A & G since 2005, Mann did not have a prolonged business relationship with AON and had no involvement in acquiring or purchasing the A & G professional liability policy. Mann did not communicate personally with AON until 2007, when he sought professional liability coverage for AGM, and then again in 2009, to place the Mann Firm coverage. His relationship with AON spanned only three years. *Contrast McCue*, 371 Mass. at 660, 662, 358 N.E.2d 799 (twenty-eight-year relationship between insured and agent involving seven different policies).

Mann's insurance needs were not complex but, rather, were limited to basic malpractice liability insurance coverage. Burns communicated perfunctorily with Mann via e-mail, telephone, and letter. Burns did not evaluate AGM's particular coverage needs and was not asked to provide risk management services or consultation regarding the scope of insurance that AGM or the Mann Firm might need. *Contrast McCue*, 371 Mass. at 662, 358 N.E.2d 799 (agent made monthly visits to attend to client's insurance needs); *Martinonis*, 65 Mass. App. Ct. at 421–422, 840 N.E.2d 994 (plaintiffs asked specific questions about adequacy of policy limits and were assured by agent that policy limits were proper). Neither AGM nor Mann paid any additional fees for professional advice. *See Baldwin Crane & Equip. Corp.*, 44 Mass. App. Ct. at 32, 687 N.E.2d 1267.

Perreault looks to statements from AON's Web site to support the existence of a special relationship. As the motion judge stated, "[S]uch reliance is misplaced because [Perreault] has not even alleged that Mann relied on, or ever even read, these statements prior to this lawsuit." Furthermore, the affidavit of Joseph Guerrero, president of AON's "Attorneys' Advantage" and "A & E Advantage" divisions, states that the Web site Perreault references pertained to a division of AON with which Mann did not deal and listed services that the division Mann dealt with did not provide to attorneys who purchased the malpractice liability policies. Neither AGM nor the Mann Firm retained the other AON division to provide additional services.

Perreault also contends that Burns was bound to issue Mann a policy with adequate prior acts coverage because Mann informed Burns that he "needed coverage for all [his] past work since [he] first became an attorney in 2006," and Burns responded, "Please make [the AGM policy] payment so that [it] does not cancel so we can offer you prior acts." This exchange did not create a special relationship. Burns told Mann that he needed to keep the AGM policy in force if he (or other members of the firm) wanted to be offered prior acts coverage in the future. See note 3, supra. She did not promise to provide prior acts coverage, advise him regarding eligibility, or advise him regarding his insurance needs.

Mann then departed from the path laid out in Burns's e-mail and directed that the AGM policy lapse no later than December 31, 2009. He then

> manually checked a box on the Mann Firm policy application setting the prior acts coverage date of January 4, 2010. He did not request a tail, despite the fact that Burns told him to read the pertinent clause regarding coverage extensions. When Mann received the Mann Firm policy it specifically stated that it had a prior acts date of January 4, 2010. In the absence of a special relationship, Mann was obligated to review the Mann Firm policy before signing. "[I]n such circumstances, a business entity such as [Mann] should read its policies rather than rely on representations by an agent." *See Sarnafil, Inc. v. Peerless Ins. Co*., 418 Mass. 295, 307, 636 N.E.2d 247 (1994).
>
> Summary judgment was properly granted on the negligence claim as a matter of law because Perreault did not demonstrate that there were facts in dispute that would establish a duty running from AON to Mann.

Id.

xix. ***AB Oil Servs. Ltd. v. TCE Ins. Servs., Inc.*, 59 Misc. 3d 1228(A) (N.Y. Sup. Ct. 2018) (May 24, 2018) – New York**

The court in this case ruled that absent a special relationship, or specific instructions, the duty of an insurance broker is to place the insurance coverage its customer has requested within a reasonable period of time or to advise the customer that it is unable to do so, and if it fails to perform that duty, it can be held accountable in negligence or contract. *AB Oil Servs. Ltd. v. TCE Ins. Servs., Inc.*, 59 Misc. 3d 1228(A) (N.Y. Sup. Ct. 2018) (May 24, 2018). The court ruled there were not sufficiently pled allegations of a special or privity-like relationship that would support a negligent misrepresentation claim against the insurance agent.

xx. ***AgCountry Farm Credit Servs., ACA v. Elbert***, No. A17-1413, 2018 WL 2090617, at *2 (Minn. Ct. App. May 7, 2018), review denied (Aug. 7, 2018) (May 7, 2018) – Minnesota

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 appellate court agreed with the district court 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 appellate 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.

xxi. Fink v. Brown & Brown Program Insurance Services Incorporated, 2018 WL 1744999, at *3 (D.Ariz., 2018) (April 11, 2018) – Arizona

This is an interesting case where the claim is that an insurance broker failed to advise an insurance agent about the appropriate errors and omissions coverage the insurance agent should have procured. The allegation was that the broker negligently failed to "explain the need for or recommend" retroactive or tail coverage when the agent purchased and cancelled his E&O policy. *Fink v. Brown & Brown Program Insurance Services Incorporated*, 2018 WL 1744999, at *1 (D.Ariz., 2018).

The insurance broker asserted that insurance brokers do not have a duty "to advise insureds about the adequacy or appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available." (*quoting BNCCORP, Inc. v. HUB Int'l Ltd*., 400 P.3d 157, 166 (Ariz. Ct. App. 2017))). Instead, the broker argued insurance brokers need only provide the insurance coverage that the client requests. Since the agent's complaint only alleged that the broker failed to recommend additional coverage, the broker argued that the agent did not plead facts that establish the broker breached a duty of care owed to the insurance agent under Arizona law. *Id*. at *2 (D.Ariz., 2018)

The court addressed the standard of care to be applied to insurance agents under Arizona law and stated:

> In *BNCCORP*, the appeals court credited the trial court's factual finding—following a bench trial—that the applicable standard of care did not require the insurance agent to "inform [insureds] about optional coverage that might be available." *BNCCORP*, 400 P.3d at 166. Contrary to Defendant's argument, the court did not hold as a matter of law that such conduct could never breach the duty applicable to the insurer-insured relationship. Instead, the court recognized "the *general* rule is that 'brokers have no [obligation] to advise insureds about the adequacy or

> appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available.' " *Id.* (quoting 1-2 New Appleman on Insurance Law Library Edition § 2.05(5)(a)) (emphasis added). The court reiterated, however, that "[q]uestions as to the applicable standard of care are for the trier of fact" and should be "determined on a case-by-case basis." *Id.* at 165; *see Coburn*, 691 P.2d at 1080 ("[T]he duty remains constant, while the conduct necessary to fulfill it varies with the circumstances.").

Id. at *3 (D.Ariz., 2018).

The court found there were questions of fact whether the broker met the standard of care by not explaining the need for or recommend retroactive or tail coverage when the agent purchased and cancelled his E&O policy. *Id.*

This case follows Arizona's poor case law on insurance agent standard of care and duties in which Arizona courts have concluded that in looking at the standard of care applied to insurance agents, it is a case by case duty analysis, and there is no standard duty. This case could also be read to mean that under Arizona law there very well may be an affirmative duty on insurance agents to advise on appropriate coverages.

xxii. ***Hansmeier v. Hansmeier***, 25 Neb. App. 742, 751–56, 912 N.W.2d 268, 275–78 (2018) (April 10, 2018) – Nebraska

No duty to anticipate what coverage an insured should have and no duty to advise.

xxiii. ***Am. Zurich Ins. Co. v. Guilbeaux***, No. 1:16CV354-LG-RHW, 2018 WL 1661629, at *4–6 (S.D. Miss. Apr. 5, 2018) (April 5, 2018) – Mississippi

Agent's duty is limited – agent is under no "affirmative duty to advise buyers regarding their coverage needs," as "insureds are in a better position" to make that assessment.

xxiv. ***Commercial Credit Grp. Inc. v. Allianz Glob. Corp. & Specialty N. Am.***, No. 1:15-CV-00093 KGB, 2018 WL 1569476, at *8 (E.D. Ark. Mar. 30, 2018) (March 30, 2108) – Arkansas

No reasonable juror could conclude that special circumstances or a confidential relationship existed in the case.

xxv. ***Tracey Rd. Equip., Inc. v. Ally Fin., Inc.***, No. 518CV0011LEKATB, 2018 WL 1578160, at *2–5 (N.D.N.Y. Mar. 29, 2018) (March 29, 2018) – New York

Heavy analysis of whether or not there were special circumstances giving rise to a special relationship heightened duty to advise, with the court ultimately finding there were not special circumstances giving rise to a special relationship heightened duty to advise).

xxvi. ***He v. Norris***, No. 76236-2-I, 2018 WL 1382397, at *1–5 (Wash. Ct. App. Mar. 19, 2018) (March 19, 2018) – Washington

General order take duty met and no special circumstances giving rise to a special relationship heightened duty to advise.

xxvii. ***Mallek v. Allstate Indem. Co.***, No. 17-CV-5949-KAM-SJB, 2018 WL 3635060, at *6–8 (E.D.N.Y. Mar. 12, 2018), *report and recommendation adopted,* No. 17-CV-5949(KAM), 2018 WL 3629596 (E.D.N.Y. July 31, 2018) (March 12, 2018) – New York

"[A]bsent a 'special relationship" the agent's independent duty to a customer ceases after insurance coverage is purchased"

xxviii. ***Brooklin Boat Yard, Inc. v. Starkweather & Shepley Ins. Brokerage Inc.***, No. 1:16-CV-588-NT, 2018 WL 2143107, at *5–8 (D. Me. Mar. 5, 2018) (March 5, 2018) – Maine

"An insurance agent does not have a duty to advise an insured about the adequacy of coverage merely because an agency relationship exists between the parties. Before such a duty can arise, a special agency relationship must exit between the parties".

xxix. ***Holborn Corp. v. Sawgrass Mut. Ins. Co.,*** 304 F. Supp. 3d 392, 403–05 (S.D.N.Y. 2018) (January 17, 2018) – New York

No special circumstances giving rise to a special relationship heightened duty to advise)

3) State by State Analysis

Alabama – Order Taker Standard

***See Somnus Mattress Corp. v. Hilson*, No. 1170250, 2018 WL 6715777 (Ala. Dec. 21, 2018) – Alabama.**

In *Somnus* the insurance customer brought a claim against its insurance agent and agency, alleging that that insurance agent and agency were negligent in providing advice to the insurance customer not to purchase insurance coverage for business interruption and loss of profits. There were disputed facts about what the insurance agent told the insurance customer as to recommendations on insurance coverage for business interruption and loss of profits. The agent claimed he told the insurance customer to purchase this insurance and the customer declined. The insurance customer claimed the agent told him not to purchase this coverage.

As to the general standard of care placed on insurance agents the court in *Somnus* confirmed that that the order taker standard of care adopted in most jurisdictions applied and stated:

> Even if Somnus had presented substantial evidence creating a genuine issue of material fact as to what Hilson's advice actually was, Somnus also had to demonstrate that Hilson and CGIA are not entitled to a judgment as a matter of law, i.e., that Hilson and CGIA had a duty to advise Somnus concerning the adequacy of its insurance coverage and that they breached that duty. Hilson and CGIA correctly observe that jurisdictions throughout the country have overwhelmingly concluded that insurers have no such duty to advise clients. A leading insurance treatise ably summarizes the general rule:
>
> "Absent a specific agreement to do so, an insured's agent does not have a continuing duty to advise, guide, or direct the insured's coverage after the agent has complied with his or her obligation to obtain coverage on behalf of the insured. Insurance agents do not have an independent duty to identify their clients' needs and to advise them regarding whether they may be underinsured because it is the client's responsibility or duty, not the insurance agent's, to determine the amount of coverage needed and advise the agent of those needs. In addition, upon receiving the policy of insurance, the client has a duty to review the policy to ascertain that his or her needs are met. In addition, insurance agents generally are not liable for actions other than obtaining insurance coverage for their insureds unless a special relationship has been established between the parties."
>
> 3 Steven Plitt et al., Couch on Insurance § 46:38 (3d ed. 2011) (footnotes omitted).
>
> Several cases from other jurisdictions have explained the reasons for the courts' unwillingness to impose such a duty upon insurance agents.

"**A majority of courts that have considered the issue have held that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage**. *See, e.g., Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 482–83, 486 (Alaska 2001); *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1094 (Me. 1991); *Sadler v. Loomis*, 139 Md. App. 374, 776 A.2d 25, 46 (2001); *Robinson v. Charles A. Flynn Ins. Agency*, 39 Mass. App. Ct. 902, 653 N.E.2d 207, 207–08 (1995); *Harts v. Farmers Ins. Exchange*, 461 Mich. 1, 597 N.W.2d 47, 48 (1999); *Murphy v. Kuhn*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997); *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990). *But see SW Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268, 1271–72 (1995); Dimeo v. Burns, Brooks & McNeil, Inc., 6 Conn. App. 241, 504 A.2d 557, 559 (1986).

"**That general duty of care excludes an affirmative obligation to give advice regarding the availability or sufficiency of coverage for several persuasive reasons**. **Some courts have reasoned that insureds are in a better position to assess their assets and the risk of loss to which they may be exposed**. *See, e.g., Peter*, 22 P.3d at 486; *Sadler*, 776 A.2d at 40; *see also* Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249, 257 (1991) ('**unrealistic to impose on an insurance agent the ongoing duty of surveillance with respect to an insured's constantly changing circumstances'**. **These courts have also noted that decisions regarding the amount of insurance coverage are personal and subjective, based upon a trade-off between cost and risk**. *See Peter*, 22 P.3d at 486; *Sadler*, 776 A.2d at 40. **An insurance agent is in no better position than the insured to predict the extent of damage that the insured might incur at some time in the future.** *See Sadler*, 776 A.2d at 40; Murphy, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976.

"Imposing liability on insurance agents for failing to advise insureds regarding the sufficiency of their insurance coverage would 'remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available,' *Nelson*, 456 N.W.2d at 346, **and would convert agents into 'risk managers with guarantor status.'** *Sadler*, 776 A.2d at 40–41 (quotation omitted); *see also Murphy*, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d at 976. **Significantly, 'the creation of a duty to advise could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered**.' *Nelson*, 456 N.W.2d at 346. '**This would amount to retroactive insurance, a concept that turns the entire theory of insurance on its ear**.' *Peter*, 22 P.3d at 486 (quotation omitted)."

Sintros v. Hamon, 148 N.H. 478, 480–81, 810 A.2d 553, 555–56 (2002). *See, e.g., Peter v. Schumacher Enters., Inc.*, 22 P.3d 481, 486–87 (Alaska 2001); *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 9–11, 597 N.W.2d 47, 51–52 (1999); *and Nelson v. Davidson*, 155 Wis.2d 674, 681–82, 683-84, 456 N.W.2d 343, 346, 347 (1990). (Emphasis added).

However the insurance customer argued that the issue in the case was once an insurance agent allegedly gives advice to the insurance customer, must this advice be accurate. The court concluded that "[t]here is no dispute that the general notion of voluntary assumption of a duty can be applied to insurance companies and agents"; but stated that "in this case the questions are whether this particular duty -- the duty to advise a client concerning the adequacy of insurance coverage -- can be voluntarily assumed, and, if so, what triggers such a duty?" *Somnus Mattress Corporation v. Hilson*, 2018 WL 6715777, at *7 (Ala., 2018).

The court also analyzed whether there were special circumstances giving rise to a special relationship heightened duty to advise. The court found there were not special circumstances giving rise a special relationship.

Affirming summary judgment in favor of the agent the court ultimately concluded:

> Somnus [the insurance customer] has not alleged that Hilson[the insurance agent] misrepresented whether Somnus qualified for business-income coverage; Jones was fully aware in 2009 that business-income coverage was available. Somnus simply chose not to purchase such coverage because, it alleges, Hilson told Jones: "I don't think you need it." This was not a misrepresentation as to coverage; at most, it was Hilson's assessment of whether Somnus should purchase insurance for an uncovered risk that was known to Somnus. Somnus has provided no authority for the proposition that Hilson and CGIA could voluntarily assume a duty to advise on that basis.

Id.

"When an insurance agent or broker, with a view to compensation, undertakes to procure insurance for a client and unjustifiably or negligently fails to do so, he becomes liable for any damage resulting therefrom." *See Lewis v. Roberts*, 630 So. 2d 355, 357 (Ala. 1993); *see also Crump v. Geer Brothers, Inc.*, 336 So. 2d 1091, 1093 (Ala. 1976); and *Maloof v. John Hancock Life Ins. Co.*, 60 So. 3d 263, 272 (Ala. 2010).

Once the parties have come to an agreement on the procurement of insurance, the agent or broker must exercise reasonable skill, care, and diligence in effecting coverage. *Montz v. Mead & Charles, Inc.*, 557 So.2d 1 (Ala.1987).

See also Maloof v. John Hancock Life Ins. Co., 60 So. 3d 263, 274 (Ala. 2010):

> This testimony indicates that the Maloofs certainly did not view their relationship with Glasgow, though cordial and long-standing, as anything special or outside the typical salesperson-customer relationship. Combined with the facts in the record indicating that John is a well-educated

professional and an experienced investor, we agree with the conclusion of the trial court that there was "no evidence that would justify the imposition of a fiduciary duty owed to [the Maloofs] by [John Hancock and Glasgow]" and that the summary judgment was accordingly proper.

Alaska – Order Taker Standard

See Peter v. Schumacher Enterprises, Inc., 22 P.3d 481, 485–86 (Alaska 2001):

> This court has previously held that an insurance agent owes a duty to the insured to exercise reasonable care, skill, and diligence in procuring insurance. Insurance agents have a well-established common-law duty "to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so." Because the prospective insured typically knows the extent of her personal assets and her ability to pay better than the insurance agent, however, it is generally the responsibility of the insured to advise the agent of the insurance that she actually wants, including policy limits. Ordinarily, then, an insurance agent fulfills her duty to the insured by providing requested coverage, and has no duty to advise a client to obtain different or additional coverage.

See also Christianson v Conrad Houston Ins., 318 P3d 390 (Alaska 2014); *Preblich v Zorea*, 996 P.2d 730, 734 (Alaska 2000); *Nome Commercial Co. v. Nat'l Bank of Alaska*, 948 P.2d 443, 453 (Alaska 1997); *Johnson & Higgins of Alaska, Inc. v. Blomfield*, 907 P.2d 1371 (Alaska 1995); *Chizmar v. Mackie*, 896 P.2d 196, 203 (Alaska 1995); *Jefferson v. Alaska 100 Ins., Inc.*, 717 P.2d 360, 364 (Alaska 1986); and *Clary Ins. Agency v. Doyle*, 620 P.2d 194, 201 (Alaska 1980).

Arizona – Case by Case Duty/No Standard Duty – possible heightened affirmative duty to advise

***i. Fink v. Brown & Brown Program Insurance Services Incorporated*, 2018 WL 1744999, at *3 (D.Ariz., 2018) (April 11, 2018) – Arizona.**

This is an interesting case where the claim is that a broker failed to advise an insurance about the appropriate errors and omissions coverage the insurance agent should have procured. The allegation was that the broker negligently failed to "explain the need for or recommend" retroactive or tail coverage when the agent purchased and cancelled his E&O policy. *Fink v. Brown & Brown Program Insurance Services Incorporated*, 2018 WL 1744999, at *1 (D.Ariz., 2018).

The insurance broker asserted that insurance brokers do not have a duty "to advise insureds about the adequacy or appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available." (*quoting BNCCORP, Inc. v. HUB Int'l Ltd*., 400 P.3d 157, 166 (Ariz. Ct. App. 2017))). Instead, the broker argued insurance brokers need only provide the insurance coverage that the client requests. Since the agent's complaint only alleges that the broker failed to recommend additional coverage, the broker argued that the agent did not plead facts that establish the broker breached a duty of care owed to the insurance agent under Arizona law. *Id*. at *2 (D.Ariz., 2018)

The court addressed the standard of care to be applied to insurance agents under Arizona law and stated:

> In *BNCCORP*, the appeals court credited the trial court's factual finding—following a bench trial—that the applicable standard of care did not require the insurance agent to "inform [insureds] about optional coverage that might be available." *BNCCORP*, 400 P.3d at 166. Contrary to Defendant's argument, the court did not hold as a matter of law that such conduct could never breach the duty applicable to the insurer-insured relationship. Instead, the court recognized "the *general* rule is that 'brokers have no [obligation] to advise insureds about the adequacy or appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available.' " *Id.* (quoting 1-2 New Appleman on Insurance Law Library Edition § 2.05(5)(a)) (emphasis added). The court reiterated, however, that "[q]uestions as to the applicable standard of care are for the trier of fact" and should be "determined on a case-by-case basis." *Id.* at 165; *see Coburn*, 691 P.2d at 1080 ("[T]he duty remains constant, while the conduct necessary to fulfill it varies with the circumstances.").

Id. at *3 (D.Ariz., 2018).

The court found there were questions of fact whether the broker met the standard of care by not explaining the need for or recommend retroactive or tail coverage when the agent purchased and cancelled his E&O policy. *Id.*

This case follows Arizona's poor case law on insurance agent standard of care in which Arizona courts have concluded that in looking at the standard of care applied to insurance agents is a case by case duty analysis and there is no standard duty. This case could also be read to mean that under Arizona law there very well may be an affirmative duty on insurance agents to advise on appropriate coverages.

See also BNCCORP, Inc. v. HUB Int'l Ltd., 243 Ariz. 1, 400 P.3d 157, 165 (Ct. App. 2017), review denied (Mar. 20, 2018) (emphasis added):

> As the trial court indicates, the default rule in Arizona is that a broker who agrees to obtain insurance for a client owes a duty to the client "to exercise reasonable care, skill and diligence" in so doing. *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 140 Ariz. 383, 397, 682 P.2d 388, 402 (1984); *see also Webb*, 217 Ariz. at 367, ¶ 20, 174 P.3d at 279 (citations omitted) (acknowledging the *Darner* standard); *Sw. Auto*, 183 Ariz. at 448, 904 P.2d at 1272 (reaffirming the *Darner* standard). *Darner* also suggests that this **standard of care is not universally applicable**, and that an applicable standard should be determined on a case-by-case basis, and is an evidentiary determination that may require proof in the form of expert testimony at trial. 140 Ariz. at 397–98 & n.14, 682 P.2d at 402–03 & n.14. Thus, we must examine the record in this case to determine whether the relationship between BNC and HUB commanded the tailored standard the trial court imposed, or instead whether some different and heightened standard of care is applicable.

In Arizona an expert can establish that the normal standard of care requires an insurance agent to affirmatively inform and advise the insurance agent's insurance customer. *See SW Auto Painting v. Binsfeld*, 183 Ariz. 444, 904 P.2d 1268, 1271-72 (1995)

See also Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 140 Ariz. 383, 397, 682 P.2d 388, 402 (1984).

Arkansas – Order Taker Standard

See Buelow v. Madlock, 90 Ark. App. 466, 471, 206 S.W.3d 890, 893 (2005):

> Our supreme court has ruled that an insurance agent has no duty to advise or inform an insured as to insurance coverages; instead, our law places the responsibility on the policy holder to educate himself concerning matters of insurance. *Scott–Huff Ins. Agency v. Sandusky*, 318 Ark. 613, 887 S.W.2d 516 (1994); *Howell v. Bullock*, 297 Ark. 552, 764 S.W.2d 422 (1989); *Stokes v. Harrell*, 289 Ark. 179, 711 S.W.2d 755 (1986). The court adopted this position in *Stokes v. Harrell*, supra, and in doing so, it recognized an exception where there is a special relationship between the agent and the insured, as 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.

See also Scott-Huff Ins. Agency v. Sandusky, 318 Ark. 613, 887 S.W.2d 516 (1994); *Howell v. Bullock*, 297 Ark. 552, 764 S.W.2d 422 (1989); *Stokes v. Harrell*, 289 Ark. 179, 711 S.W.2d 755 (1986); and *Williams-Berryman Ins. Co. v. Morphis*, 249 Ark. 786, 461 S.W.2d 577 (1971).

California – Order Taker Standard

See Pac. Rim Mech. Contractors, Inc. v. Aon Risk Ins. Servs. W., Inc., 203 Cal. App. 4th 1278, 1283, 138 Cal. Rptr. 3d 294, 297–98 (2012):

> Insurance 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." (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954, 234 Cal.Rptr. 717, italics added; *see Kotlar*, *supra*, 83 Cal.App.4th at p. 1123, 100 Cal.Rptr.2d 246.) Accordingly, an insurance broker does not breach its duty to clients to procure the requested insurance policy unless "(a) the [broker] 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 [broker] 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." (*Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927, 67 Cal.Rptr.2d 445.)
>
> California law is well settled as to this limited duty on the part of insurance brokers. (*Hydro–Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1153, 10 Cal.Rptr.3d 582 [insurance brokers owe a duty to procure the requested insurance]; *Nowlon v. Koram Ins. Center, Inc.* (1991) 1 Cal.App.4th 1437, 1447, 2 Cal.Rptr.2d 683 ["the duty of the broker ... is incurred in the procurement or issuance of an insurance policy ..."]; *see also Wilson v. All Service Ins. Corp.* (1979) 91 Cal.App.3d 793, 798, 153 Cal.Rptr. 121 [holding that a broker has no duty to investigate the financial condition of insurer authorized to conduct business when policy issued].)

See also Williams v. Hilb, Rogal & Hobbs Ins. Servs. of California, Inc., 177 Cal. App. 4th 624, 635, 98 Cal. Rptr. 3d 910, 919 (2009):

> We begin with a few foundational principles. *Fitzpatrick*, supra, 57 Cal.App.4th 916, 67 Cal.Rptr.2d 445 summarizes the general rule on insurance agent negligence, which was articulated by Justice Kennard in *Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954–955, 234 Cal.Rptr. 717 (*Jones*). "It is that, as a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage." (*Fitzpatrick*, at p. 927, 67 Cal.Rptr.2d 445, fn. omitted.) Thus, ordinarily the insurance agent's duty is "to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." (*Jones*, at p. 954, 234 Cal.Rptr. 717.)

See also San Diego Assemblers, Inc. v. Work Comp for Less Ins. Servs., Inc., 220 Cal. App. 4th 1363, 1369, 163 Cal. Rptr. 3d 621, 625 (2013).

See also Jones v. Grewe, 189 Cal.App.3d 950, 234 Cal.Rptr. 717, 721 (1987) (general duty of reasonable care which an insurance agent owes his client does not include the obligation to procure a policy affording the client complete protection, but insured has responsibility to advise agent of the insurance he or she wants, including the limits of the policy to be issued);

Colorado – Order Taker Standard

See Kaercher v. Sater, 155 P.3d 437, 441 (Colo. App. 2006):

> Colorado follows the general rule that insurance agents have a duty to act with reasonable care toward their insureds, but, absent a special relationship between the insured and the insurer's agent, that agent has no affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy. *See Estate of Hill v. Allstate Ins. Co.*, 354 F.Supp.2d 1192, 1197 (D.Colo.2004) (quoting 4 Couch on Insurance § 55:5 (3d ed.): "The general duty of the insurer's agent to the insured is to refrain from affirmative fraud, not to watch out for all rights of the insured and inform the latter of them.")

See also Golting v. Hartford Accident and Indemnity Co, 43 Colo. App. 337, 603 P.2d 972 (1979); *Apodaca v. Allstate Insurance Company*, 232 P.3d 253 (Colo.App. 2009); *Golden Rule Insurance Corporation v. Greenfield*, 786 P.2d 914 (D. Colo. 1992); and *Taco Bell, Inc. v. Lannon*, 744 P.2d 43, 46 (Colo. 1987).

Connecticut – Heightened Duty to Advise of "kind and extent of desired coverage"

See Dimeo v. Burns, Brooks & McNeil, Inc., 6 Conn.App. 241, 504 A.2d 557, 559 (1986) (emphasis added).

> An insurance agent has the duty to **exercise reasonable skill, care and diligence to see that his client has proper coverage**. *Todd v. Malafronte*, 3 Conn.App. 16, 22, 484 A.2d 463 (1984). " 'Where he undertakes to procure a policy affording protection against a designated risk, the law imposes upon him an obligation to perform with reasonable care the duty he has assumed....' " (Emphasis in original.) *Id*. The court instructed the jury that selling insurance is a specialized field with specialized knowledge and experience, and that an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client. The court told the jury that the client ordinarily looks to his agent and relies on the agent's expertise in placing his insurance problems in the agent's hands. The court instructed the jury that, if the agent performs these duties negligently, he is liable therefor, just as other professionals are. The court also instructed that the standard of care is not that of ordinary negligence but the knowledge, skill and diligence of insurance agents in Connecticut in July, 1980, in similar cases. The court further instructed the jury, on the basis of the expert testimony produced in the case through Reynolds and Ellen, that an agent has the duty to explain uninsured motorist coverage, to explain the consequences of not having a sufficient amount of such coverage, to recommend the proper amount, and to attempt to procure that amount and offer it to the client.

See also Todd v. Malafronte, 3 Conn. App. 16, 19–20, 484 A.2d 463, 466 (1984):

> Insofar as the sale of insurance requires specialized knowledge, we agree that this case differs from the ordinary negligence action since matters within that specialized body of knowledge are crucial to the determination of the issues raised. Our review of the testimony adduced at trial, however, leads us to conclude that the requirements of proper care applicable to insurance agents were adequately established for the guidance of the jury. The transcript reveals that the defendant Linardos testified that it is the responsibility of the insurance agent to make sure of the fact that the potential insured has the proper coverage. This testimony, while sparse, was sufficient to amount to an opinion by one with special knowledge of the sale of insurance on the standard of care to which an insurance agent is held.

However, a recent unpublished case would suggest that only the order taker standard is applied. *See Preston v. Chartkoff*, No. CV0020071112S, 2004 WL 304323, at *6 (Conn. Super. Ct. Jan. 30, 2004): "Generally speaking, the duty imposed on an insurance broker to procure insurance, under either tort or contract law, simply requires the broker to act reasonably and without delay to try to obtain the

requested coverage, but the broker cannot be held liable for the failure to obtain coverage as long as the client is informed of that fact."

See also Byrd v. Ortiz, 136 Conn. App. 246, 44 A.3d 208 (2012); *Ursini v. Goldman*, 118 Conn. 554, 173 A. 789, 790 (Conn. 1934).

Delaware – Order Taker Standard

See Sinex v. Wallis, 611 A.2d 31, 33 (Del.Super.Ct.1991) (an insurance agent assumes no duty to advise the insured on specific insurance matters merely because of the agency relationship):

> Ordinarily, an insurance agent assumes only those duties normally found in an agency relationship. This includes the obligation to use reasonable care, diligence and judgment in procuring the insurance requested by the insured. *Jones v. Grewe*, 189 Cal.App.3d 950, 234 Cal.Rptr. 717 (1987); 3 Couch on Insurance. 2d.Ed. § 25:37. The agent assumes no duty to advise the insured on specific insurance matters merely because of the agency relationship. 16A Appleman, Insurance Law and Practice, § 8836 at 64-66.

See also Blanchfield v. State Farm Mut. Auto. Ins. Co., 511 A.2d 1044 (Del. 1986):

> Although this responsibility includes promptly procuring a policy that effectually covers the property of the insured, in the normal insurer-insured relationship there is no general obligation for an insurance company or its agent to review the insured's risks and recommend coverages to adequately protect the changing needs of the insured. *See Sandbulte v. Farm Bureau Mutual Insurance Co.*, Iowa Supr., 343 N.W.2d 457 (1984); *Smith v. Millers Mutual Insurance Co.*, La. App., 419 So. 2d 59, writ denied 422 So. 2d 155 (1982).

See also Polly Drummond Thriftway, Inc. v. W.S. Borden Co., 95 F.Supp.2d 212 (D. Del. 2000).

Florida – Order Taker Plus – Sometimes Heightened Duty to Advise Included

See Adams v. Aetna Cas. & Sur. Co., 574 So. 2d 1142, 1155 (Fla. Dist. Ct. App. 1991):

> It is settled law that an insurance agent "is required to use reasonable skill and diligence, and liability may result from a negligent failure to obtain coverage which is specifically requested or clearly warranted by the insured's expressed needs." *Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc*., 530 So.2d 422 (Fla. 1st DCA 1988). This general duty requires the agent to exercise due care in correctly advising the insured of the existence and availability of particular insurance, including the availability and desirability of obtaining higher limits, depending on the scope of the agents undertaking. *Seascape of Hickory Point Condominium Association v. Associated Insurances Services, Inc.*, 443 So.2d 488 (Fla. 2d DCA 1984); *Woodham v. Moore*, 428 So.2d 280 (Fla. 4th DCA 1983); *Sheridan v. Greenberg*, 391 So.2d 234 (Fla. 3d DCA 1981). The trial court correctly determined that Bacon was under a duty of care to Mr. Adams in this case based on the evidence of their relationship and the scope of Bacon's undertaking.

See also Kendall S. Med. Ctr., Inc. v. Consol. Ins. Nation, Inc., 219 So. 3d 185, 189 (Fla. Dist. Ct. App. 2017) (duty to advise included in general duty to procure) ("In short, Kendall South alleges, albeit somewhat inartfully, that liability arises here from the agent's negligent failure to advise Kendall South at the August 10, 2011 meeting that the procured policy was inadequate to address Kendall South's expressed insurance needs.*"); Seascape of Hickory Point Condo. Ass'n, Inc., Phase III v. Associated Ins. Serv., Inc.*, 443 So. 2d 488 (1984); *Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc.*, 530 So. 2d 442 (Fla. 1st DCA 1988); and *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980 (Fla. 2008).

Georgia – Order Taker Plus – Sometimes Heightened Duty to Advise Included

See Cottingham & Butler, Inc. v. Belu, 332 Ga. App. 684, 687–88, 774 S.E.2d 747, 750–51 (2015) (emphasis added):

> *In McCoury v. Allstate Ins. Co.*, 254 Ga.App. 27, 29(2), 561 S.E.2d 169 (2002), for example, we found that an insurance agent was not entitled to summary judgment on a negligent procurement claim because the insured parties offered evidence that they **relied on the agent's expertise in determining whether coverage was adequate**. And in *Hunt v. Greenway Ins. Agency*, 213 Ga.App. 14, 15, 443 S.E.2d 661 (1994), summary judgment for the insurance agency was appropriate when the insured presented "no evidence that the agent had any discretion in the type of insurance procured or that the proposed insured relied on the agent to decide what type of insurance was needed." Nothing in these or similar cases restricts the expertise exception to situations involving the equivalent of a business partnership between the insured and the insurance agency, or requires that an insured "turn[ ] his business records over to an agent," as C & B contends. On the contrary, the exception applies **when an insurance agent "has undertaken to perform an additional service," beyond merely procuring specified insurance, " such as determining the amount of insurance required, and the insured relies upon the agent to perform that service."** *Fregeau v. Hall*, 196 Ga.App. 493, 494, 396 S.E.2d 241 (1990).
>
> The Belus presented at least some evidence that they relied on C & B to assess their insurance needs in this case. According to Mrs. Belu, she did not request any particular amount of coverage. She depended upon a C & B representative to determine the type and amount of insurance Express Auto needed. And once the representative made that determination, he instructed her not to worry because she was "covered." Although C & B claims that it simply procured insurance for the Belus, this evidence raises questions of fact as to whether the agency went beyond mere procurement and offered expert advice upon which the Belus relied. *See McCoury, supra*; compare *Traina, supra*, 289 Ga.App. at 838(2), 658 S.E.2d 460 (no evidence of reliance on insurance agency's expertise where insured calculated amount and type of insurance needed and did not authorize agent to assess these needs, offer recommendations, or adjust coverage); *Brasington v. King*, 167 Ga.App. 536, 538(1), 307 S.E.2d 16 (1983) (no expertise exception where agent did not "complete any analysis of plaintiff's insurance needs"), aff'd, *King v. Brasington*, 252 Ga. 109, 312 S.E.2d 111 (1984); *Ethridge v. Associated Mutuals, Inc.*, 160 Ga.App. 687, 689, 288 S.E.2d 58 (1981) (expertise exception did not apply where insured told agent amount and type of coverage he desired, leaving no discretion to agent).

See aslo McCoury v. Allstate Ins. Co., 254 Ga.App. 27, 29(2), 561 S.E.2d 169 (2002); *Hunt v. Greenway Ins. Agency*, 213 Ga.App. 14, 15, 443 S.E.2d 661 (1994); *Fregeau v. Hall*, 196 Ga.App. 493, 494, 396

S.E.2d 241 (1990); *Brasington v. King*, 167 Ga.App. 536, 538(1), 307 S.E.2d 16 (1983); *Ethridge v. Associated Mutuals, Inc.*, 160 Ga.App. 687, 689, 288 S.E.2d 58 (1981); *MacIntyre & Edwards, Inc. v. Rich*, 267 Ga. App. 78, 80 (2004); and *Canales v. Wilson Southland Ins. Agency, Inc.*, 261 Ga. App. 529, 531 (2003)

Hawaii – Heightened Duty to Advise Sometimes Imposed

See Certain Underwriters at Lloyd's London Subscribing to Policy No. LL001HI0300520 v. Vreeken, 133 Haw. 449, 329 P.3d 354 (Ct. App. 2014):

> In Hawai‘i, however, "[a]n insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance." *Quality Furniture, Inc. v. Hay*, 61 Haw. 89, 93, 595 P.2d 1066, 1068 (1979). Such a duty is owed to "the extent of the responsibilities that the agent had in rendering help and providing advice to the insured." *Macabio*, 87 Hawai‘i at 318, 955 P.2d at 111 (quoting *Quality Furniture*, 61 Haw. at 93, 595 P.2d at 1068) (internal quotation marks and brackets omitted).

See also Quality Furniture, Inc. v. Hay, 61 Haw. 89, 93, 595 P.2d 1066, 1069 (1979):

> In the instant case, Jerry Hay and Jerry Hay, Inc. were Quality Furniture's insurance agents for only a few months before the Sand Island warehouse was leased. Although Quality Furniture relied on the appellees' expertise, they could not procure additional insurance without the permission of Quality Furniture's vice-president William Stone. Furthermore, Quality Furniture did not submit the report forms which were requested and which would have informed appellees of the new storage location. Lastly, Quality Furniture's bookkeeper knew that the warehouse did not have fire insurance and failed to act to get insurance. Under these circumstances, the trier of fact did not err in finding Jerry Hay and Jerry Hay, Inc. not negligent.

See also Macabio v. TIG Ins. Co., 87 Haw. 307, 318–19, 955 P.2d 100, 111–12 (1998) (emphasis added):

> *Quality Furniture* is the only case on point in this jurisdiction. Accordingly, we turn to it for guidance. According to Quality Furniture, although an insurance agent owes a duty to the insured, **"the extent of the responsibilities that the [agent] had in rendering help and providing advice to the [insured]" turns on the facts of each case**.
>
> * * *
>
> According to the record, there appears to be no evidence that the prior dealings between agent Matsuno and the Macabios created such reliance. Like the agent in the McCall case, agent Matsuno took care of the Macabios' needs only when the Macabios consulted him. There is no evidence set forth by the Macabios that agent Matsuno informed them of changes in the insurance laws on his own accord. Without such evidence, we cannot conclude that the Macabios "justifiably relied" on agent Matsuno to inform them of the changes in the insurance law pertaining to stacking.

Idaho – Heightened Duty to Advise

See McAlvain v. Gen. Ins. Co. of Am., 97 Idaho 777, 780, 554 P.2d 955, 958 (1976) (emphasis added):

> A person in the business of selling insurance holds himself out to the public **as being experienced and knowledgeable in this complicated and specialized field**. The interest of the state that competent persons become insurance agents is demonstrated by the requirement that they be licensed by the state, I.C. s 41-1030; pass an examination administered by the state, I.C. s 41-1038; and meet certain qualifications, I.C. s 41-1034. An **insurance agent performs a personal service for his client, in advising him about the kinds and extent of desired coverage and in choosing the appropriate insurance contract for the insured**. Ordinarily, an insured will look to his insurance agent, relying, not unreasonably, on his expertise in placing his insurance problems in the agent's hands. *See discussion in Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969). When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services.

See also Keller Lorenz Co. v. Insurance Assoc. Corp., 570 P.2d 1366, 98 Idaho 678 (1977); and *Foremost Ins. Co. v. Putzier*, 627 P.2d 317, 102 Idaho 138 (1981).

Illinois – Order Taker Standard and tight statute of limitations

***Am. Family Mut. Ins. Co. v. Krop*, 2018 IL 122556 (October 18, 2018) – Illinois**

In this case the 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**.

The details of the case involve the Krops alleging that they instructed their American Family insurance agent to give them the same or better coverage they had in place with a previous insurer. As it turns out the American Family policy sold to the Krops was not as robust as the Krops' prior policy. The Krops were subsequently sued for defamation, invasion of privacy, and intentional infliction of emotional distress, and requested coverage and defense of the suit from American Family. American Family denied coverage for the suit because the American Family policy did not cover claims for defamation, invasion of privacy, and intentional infliction of emotional distress, claims that would arguably be covered by the Krops' prior policy.

The Krops in turn sued their American Family agent for failing to sell them the same or better coverage they had in place with their previous insurer. **However, since the American Family policy was issued and received by the Krops in March of 2012 and the Krops didn't file their lawsuit against their agent until September 2015, the court ruled the action was barred by the two year statute of limitations and was untimely**.

The decision focused on the principle that policyholders have a duty to read their insurance policies. The court stated:

> We hold that when customers have the opportunity to read their insurance policy and can reasonably be expected to understand its terms, the cause of action for negligent failure to procure insurance accrues as soon as the customers receive the policy. Here the Krops filed their complaint over two years after they received their American Family policy, and they did not plead facts that would support any recognized exception to the expectation that customers will read the policy and understand its terms, so their claim was untimely.

Am. Family Mut. Ins. Co. v. Krop, 2018 IL 122556, ¶ 2

This decision will significantly limit the ability of policy holders to bring suit against insurance agents in Illinois because typically the alleged negligent procurement of coverage is not realized until there is a loss and coverage issues arise, which is often years later.

See also Office Furnishings, Ltd. v. A.F. Crissie & Co., 2015 IL App (1st) 141724, ¶¶ 21-22, 44 N.E.3d 562, 567–68 (emphasis added):

> Generally, to state a cause of action for negligence, plaintiff must show that defendant owed plaintiff a duty, defendant breached that duty, and defendant's breach was the proximate cause of plaintiff's injury. *Hills v.*

> *Bridgeview Little League Ass'n*, 195 Ill.2d 210, 228, 253 Ill.Dec. 632, 745 N.E.2d 1166 (2001). "In the context of an insurance broker procuring insurance on behalf of the plaintiff, 'the primary function of an insurance broker as it relates to an insured is **to faithfully negotiate and procure an insurance policy according to the wishes and requirements of his client**.' " *Industrial Enclosure Corp. v. Glenview Insurance Agency, Inc.*, 379 Ill.App.3d 434, 439–40, 318 Ill.Dec. 647, 884 N.E.2d 202 (2008) (quoting *Pittway Corp. v. American Motorists Insurance Co.*, 56 Ill.App.3d 338, 346–47, 13 Ill.Dec. 244, 370 N.E.2d 1271 (1977)).
>
> **This common law duty of a broker is codified in section 2–2201(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2–2201(a) (West 2010)),** which requires an insurance producer to "exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." Under this section, the duty to exercise ordinary care arises only after coverage is " 'requested by the insured or proposed insured.' " *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 37, 390 Ill.Dec. 94, 28 N.E.3d 747 (quoting 735 ILCS 5/2–2201(a) (West 2010)). Once such coverage is requested, insurance producers "exercise ordinary care and skill in responding to the request, 'either by providing the desirable coverage or by notifying the applicant of the rejection of the risk.' " *Id*. (quoting *Talbot v. Country Life Insurance Co.*, 8 Ill.App.3d 1062, 1065, 291 N.E.2d 830 (1973)).

NOTE: common law duty codified by statute. See 735 ILCS 5/2–2201(a).

Indiana – Order Taker Standard

See Myers v. Yoder, 921 N.E.2d 880, 885 (Ind. Ct. App. 2010):

> In resolving this issue, we initially observe that an insurance agent who undertakes to procure insurance for another owes the principal a general duty to exercise reasonable care, skill and good faith diligence in obtaining the insurance. Am. Family Mut. Ins. Co. v. Dye, 634 N.E.2d 844, 847 (Ind.Ct.App.1994); Craven v. State Farm Mut. Auto. Ins. Co., 588 N.E.2d 1294, 1296 (Ind.Ct.App.1992). On the other hand, an insurance agent's duty does not extend to providing advice to the insured unless the insured can establish the existence of an intimate, long-term relationship with the agent or some other special circumstance. Craven, 588 N.E.2d at 1296. In other words, something more than the standard insurer-insured relationship is required to create a special relationship obligating the agent to advise the insured about coverage. Dye, 634 N.E.2d at 848.

See also Parker v. State Farm Mut. Auto. Ins. Co., 630 N.E.2d 567, 570 (Ind.Ct.App.1994); *Bulla v. Donahue*, 366 N.E.2d 233 (Ind. Ct. App. 1977); *Nahmias Realty, Inc. v. Cohen*, 484 N.E.2d 617 (Ind. Ct. App. 1985); *Butler v. Williams*, 527 N.E.2d 231 (Ind. Ct. App. 1988); and *Parker v. State Farm Mut. Auto. Ins. Co.*, 630 N.E.2d 567 (Ind. Ct. App. 1994).

Iowa – Order Taker Standard

The Iowa legislature codified this law regarding insurance agent standard of care with Iowa Code § 522B.11(7):

> a. Unless an insurance producer holds oneself out as an insurance specialist, consultant, or counselor and receives compensation for consultation and advice apart from commissions paid by an insurer, the duties and responsibilities of an insurance producer are limited to those duties and responsibilities set forth in *Sandbulte v. Farm Bureau Mut. Ins. Com.*, 343 N.W.2d 457 (Iowa 1984).

See also Amling v. State Farm Ins. Co., 801 N.W.2d 32 (Iowa Ct. App. 2011) (emphasis added):

> We determine the Amlings have not met their burden to show an agreement for Baumhover to render services beyond the general duty to obtain the coverage requested. There is no evidence they made a specific inquiry about additional coverage or whether they had adequate coverage, or in fact sought Baumhover's assistance in assessing their insurance needs. *See Merriam v. Farm Bureau Ins.*, 793 N.W.2d 520, 524 (Iowa 2011). There is no evidence of a direct or implied agreement that Baumhover would advise the Amlings with respect to insurance coverage. *See Langwith*, 793 N.W.2d at 226. **Where the evidence does not indicate the insurance agent has assumed a duty beyond the procurement of the coverage requested, "the insurance agent has no obligation to advise a client regarding additional coverage or risk management."** *See id.* at 223.

NOTE: common law duty codified by statute. Iowa Code § 522B.11(7).

See also Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464-465 (Iowa 1984) ("We said such general duty is the duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." * * * "We conclude that merely asking for 'sufficient coverage' is an insufficient factual basis for asserting the existence of an expanded agency agreement and, therefore, defendants Simonson and Horstman are entitled to summary judgment as a matter of law.")

Kanas – Order Taker Standard

In *Marshel Investments, Inc. v. Cohen*, 6 Kan.App.2d 672, Syl. ¶ 1, 634 P.2d 133 (1981), the court stated "An insurance agent or broker who undertakes to procure insurance for 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."

Also, in the absence of "a specific agreement to do so, an insurance agent does not have a continuing duty to advise, guide, or direct an insured's coverage after the agent has complied with his obligation to obtain coverage on behalf of the insured." *Marshall v. Donnelli*, 14 Kan.App.2d 150, Syl. ¶ 1, 783 P.2d 1321 (1989), rev. denied 246 Kan. 768 (1990).

See also Duncan v. Janosik, Inc., 203 P.3d 88 (Kan. Ct. App. 2009):

> Turning to *Marshall*, we note the court held that in the absence of "a specific agreement to do so, an insurance agent does not have a continuing duty to advise, guide, or direct an insured's coverage after the agent has complied with his obligation to obtain coverage on behalf of the insured." 14 Kan.App.2d 150, Syl. ¶ 1, 783 P.2d 1321. The issue in *Marshall* was whether the agent had an affirmative duty when it is told to cancel one automobile policy to find out if a new automobile policy purchased from another agency meets the terms of an umbrella policy for minimum underlying insurance coverage. The insured did not seek his agent's advice regarding the adequacy of underlying coverage. Following up on this reasoning, the court held that the agent was not responsible for any gaps between the coverages of the two policies. 14 Kan.App.2d 150, Syl. ¶ 2, 783 P.2d 1321. There is no evidence of a specific agreement here requiring Janosik, Inc., to give guidance and advice to the Duncans.

See also Casas v. Farmers Ins. Exch., 35 Kan. App. 2d 223, 231, 130 P.3d 1201, 1207 (2005); *Carpenter v. Bolz*, 234 P.3d 866 (Kan. Ct. App. 2010); *Marker v. Preferred Fire Ins. Co.*, 211 Kan. 427, 506 P.2d 1163 (1973); and *Marshall v. Donnelli*, 14 Kan.App.2d 150, 783 P.2d 1321 (1989).

Kentucky – Order Taker Standard

See Khazai Rug Gallery, LLC v. State Auto Prop. & Cas. Ins. Co., No. 2016-CA-000129-MR, 2017 WL 945116, at *8 (Ky. Ct. App. Mar. 10, 2017):

> [I]nsurance agents owe a standard duty of reasonable care to their clients. *Id*. This duty of reasonable care does not include a duty to advise the client unless: (1) the agent undertakes to advise the client; or (2) the agent impliedly undertakes to advise the client. *Mullins v. Commonwealth Life Ins. Co.*, 839 S.W.2d 245, 248 (Ky. 1992) (citing *Trotter v. State Farm Mut. Auto Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343, 347 (1988)). The implied assumption of duty arises in three circumstances: (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. Mullins, supra (citation omitted). It is the insured's burden to prove the insurer assumed such a duty. *Id*.

See also Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248–49 (Ky. 1992):

> An insurance agent ordinarily only assumes those duties found in an agency relationship. *Hardt*, supra at 880. An agent owes his principal the obligation to deal in good faith and to carry out the principal's instructions. See 29 A.L.R.2d 171. Other jurisdictions have found that, generally, 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. *Trotter v. State Farm Mut. Auto. Ins. Co.*, 297 S.C. 465, 377 S.E.2d 343, 347 (1988). The insured has the burden of proving that the insurer assumed such a duty. *Id*.
>
> An implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the premium, *Id*., citing *Nowell v. Dawn–Leavitt Agency, Inc.*, 127 Ariz. 48, 617 P.2d 1164 (1980); (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, *Trotter, supra, citing Nowell, supra;* or (3) the insured clearly makes a request for advice. *Trotter, supra, citing Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc.*, 44 Or.App. 739, 607 P.2d 763 (1980).
>
> The appellants in the case at bar neither paid the insurance agent an amount beyond the premium for such advice, nor had a long-term course of dealing with the insurance *agent, nor expressly asked for advice. Thus, it appears no implied assumption of duty to advise is implicated.

See also *Associated Ins. Service, Inc. v. Garcia*, 307 S.W.3d 58, 63 (Ky. 2010).

Louisiana – Order Taker Standard

See Sitaram, Inc. v. Bryan Ins. Agency, Inc., 47,337 (La. App. 2 Cir. 9/19/12), 104 So. 3d 524, 532–33, writ denied, 2012-2283 (La. 11/30/12), 103 So. 3d 375:

> An insurance agent who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he has failed to obtain the requested insurance. The client may recover from the agent the loss he sustains as a result of the agent's failure to procure the desired coverage if the actions of the agent warranted an assumption by the client that he was properly insured in the amount of the desired coverage. *Isidore Newman School, supra*; *Karam v. St. Paul Fire & Marine Insurance Co.*, 281 So.2d 728 (La.1973).
>
> This duty of "reasonable diligence" is fulfilled when the agent procures the insurance requested. *Id.* An insured has a valid claim against the agent when the insured demonstrates: 1) the insurance agent agreed to procure the insurance; 2) the agent failed to use "reasonable diligence" in attempting to procure the insurance and failed to notify the client promptly that the agent did not obtain the insurance; and 3) the agent acted in such a way that the client could assume he was insured. *Id.*

See also Isidore Newman Sch. v. J. Everett Eaves, Inc., 2009-2161 (La. 7/6/10), 42 So. 3d 352, 356; and *Karam v. St. Paul Fire & Marine Ins. Co.*, 281 So. 2d 728, 730 (La. 1973); *Isidore Newman School v. J. Everett Eaves Inc.*, 42 So.3d 352 (La. 2010).

Maine – Order Taker Standard

See Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1094 (Me. 1991):

> An insurance agent generally assumes only those duties found in an ordinary agency relationship, that is, to use reasonable care, diligence and judgment in obtaining the insurance coverage requested by the insured party. *Sandbulte v. Farm Bur. Mut. Ins. Co.*, 343 N.W.2d 457, 464 (Iowa 1984); *see Hardt v. Brink*, 192 F.Supp. 879, 880 (W.D.Wash.1961). An insurance agent does not have a duty to advise an insured about adequacy of coverage merely because an agency relationship exists between the parties. Before such a duty can arise, a special agency relationship must exist between the parties. *See, e.g., Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 347 (1990); *Bruner v. League Gen. Ins. Co.*, 164 Mich.App. 28, 416 N.W.2d 318, 320 (1987); *Nowell v. Dawn Leavitt Agency, Inc.*, 127 Ariz. 48, 617 P.2d 1164, 1168 (App.1980).

See also Morse Bros. Inc. v. Desmond & Payne, Inc., No. CV-02-365, 2003 WL 24132272, at *3 (Me. Super. Dec. 17, 2003); and *Noveletsky v. Metro. Life Ins. Co.*, No. 2:12-CV-00021-NT, 2013 WL 2945058, at *6 (D. Me. June 14, 2013).

Maryland – Order Taker Standard

See Sadler v. Loomis Co., 139 Md. App. 374, 410–12, 776 A.2d 25, 46–47 (2001):

> Numerous other states are to the same effect; absent a request from the insured or a "special relationship" between the insured and the agent or broker, an insurance agent or broker does not owe a continuing or affirmative duty to render unsolicited advice to its insured as to the adequacy of liability coverage.
>
> * * *
>
> Our resolution of this case does not turn on whether Loomis should have done more to assure Sadler's financial protection. Nor is the outcome based on our conclusion that Sadler was in some way contributorily negligent. Rather, we have determined that, in the absence of a special relationship, an insurance agent or broker has no affirmative, legally cognizable tort duty to provide unsolicited advice to an insured regarding the adequacy of liability coverage.
>
> Sadler testified that she thought $100,000 in liability coverage was "enough," because she never "dreamed" that she would be involved in a serious automobile accident that "would cost that much." Her plight is probably not uncommon; we recognize that some people, especially the elderly, might not keep pace with the modern circumstance of large or runaway verdicts. It does not follow, however, that an insurance agent or broker bears responsibility for identifying those customers *411 who do not keep current in order to advise them accordingly. Although the record does not reflect the particular number of years for which Sadler had automobile liability coverage in the amount of $100,000, she apparently was insured at that level for several years. Whether that amount of coverage was too low, too high, or just right was a matter for appellant's consideration and determination.
>
> In a sense, it is a matter of business judgment on the part of the broker or agent, and personal preference on the part of the customer, that determines whether a customer or agent pursues a laissez-faire style rather than a proactive, aggressive one. To be sure, some customers prefer the "don't call me, I'll call you" approach with regard to their insurance agents and brokers, believing that they can determine for themselves what they need, and that insurance brokers and agents are just out to sell policies or excessive coverages that are unnecessary. Many of these customers undoubtedly believe that they are able to decide the extent of risk that can or should tolerate, and they know best what they can afford to pay in premiums. On the other hand, there are customers who undoubtedly want an insurance broker or agent who looks out for the customer's interests before a problem develops, and alerts a client to the kinds of insurance available for maximum protection, or who makes suggestions relating to

> appropriate coverage and adequacy of coverage. For many of the same reasons, some agents or brokers may consider it prudent business practice to adopt a proactive style, and volunteer information to an insured regarding additional types of coverage, the need for increased coverage, or to help the insured assess his or her particular insurance needs. In contrast, others may believe that they should only respond to a customer's particular request, without aggressively attempting to suggest alternatives.
>
> We empathize with appellant's unfortunate situation. We also recognize that other insurance agents may have been more assertive, proactive, or aggressive in suggesting that appellant procure greater protection, and that appellant would have been better served by such an agency. This does not mean, however, that appellee is liable in tort for failing to recommend to appellant that she secure greater liability protection. Accordingly, we shall affirm.

See also Cooper v. Berkshire Life Ins. Co., 810 A.2d 1045, 1073 (Md. 2002); Jones v. Hyatt Insurance Agency, Inc., 741 A.2d 1099 (Md. 1999); and *Robinson v. Liberty Ins. Corp., No.* CV WMN-16-42, 2016 WL 3653969, at *4 (D. Md. July 8, 2016).

Massachusetts – Order Taker Standard

See Guida v. Herbert H. Landy Ins. Agency, Inc., 84 Mass. App. Ct. 1105, 991 N.E.2d 188 (2013):

> The general relationship between an insurance agency and its policyholder customer does not impose a duty on the agency to investigate the customer's needs for particular coverage or to advise about the availability of insurance products to meet those needs. *Robinson v. Charles A. Flynn Ins. Agency, Inc.*, 39 Mass.App.Ct. 902, 902–903 (1995). However, an insurance agent or broker may acquire a greater duty of investigation, advice, and assistance to an insured by reason of "special circumstances." *McCue v. Prudential Ins. Co. of Am.*, 371 Mass. 659, 661–662 (1976). *Martinonis v. Utica Natl. Ins. Group*, 65 Mass.App.Ct. 418, 421 (2006). Such "special circumstances of assertion, representation and reliance" may create a duty of due care. *McCue v. Prudential Ins. Co. of Am.*, supra at 661, quoting from *Rapp v. Lester L. Burdick, Inc.*, 336 Mass. 438, 442 (1957).

See also Robinson v. Charles A. Flynn Ins. Agency, 39 Mass.App.Ct. 902, 653 N.E.2d 207, 207-08 (1995); *Martinonis v. Utica Natl. Ins. Group*, 65 Mass. App. Ct. 418, 420–421, 840 N.E.2d 994 (2006); and *Rayden Engr. Corp. v. Church*, 337 Mass. 652, 655, 151 N.E.2d 57 (1958).

Michigan – Arguably Heightened Duty to Advise if Independent Insurance Agent (Not Captive)

See Genesee Foods Servs., Inc. v. Meadowbrook, Inc., 279 Mich. App. 649, 656, 760 N.W.2d 259, 263 (2008): "Although defendants had a limited fiduciary relationship with Citizens for purposes of accepting and binding Citizens according to the terms of the 1988 agreement, because defendants were independent insurance agents when they assisted plaintiffs, **their primary fiduciary duty of loyalty rested with plaintiffs**, who could depend on this duty of loyalty to ensure that defendants were acting in their best interests, both in terms of **finding an insurer that could provide them with the most comprehensive coverage and in ensuring that the insurance contract properly addressed their needs**." (Emphasis added).

See also 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.")

Contrast above with *Harts v. Farmers Ins. Exch.*, 461 Mich. 1, 6–11, 597 N.W.2d 47, 50–52 (1999) (emphasis added):

> Sound policy reasons also support the general rule that **insurance agents have no duty to advise the insured regarding the adequacy of insurance coverage**. For instance, in *Nelson v. Davidson*, supra at 681–682, 456 N.W.2d 343, the Wisconsin Supreme Court noted that a contrary rule (1) "would remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available," (2) could result in liability for a failure to advise a client "of every possible insurance option, or even an arguably better package of insurance offered by a competitor," and (3) could provide an insured with an opportunity to self-insure "after the loss by merely asserting they would have bought the additional coverage had it been offered."
>
> Thus, under the common law, **an insurance agent whose principal is the insurance company owes no duty to advise a potential insured about any coverage**. Such an agent's job is to merely present the product of his principal **and take such orders as can be secured from those who want to purchase the coverage offered**. Our Legislature also recognizes the limited nature of the agent's role. Those who offer insurance products have been regulated by statute in Michigan for at least 120 years, with insurance agents and insurance counselors being in fact subject to licensure before they can offer their services to the public. The most recent revisions to these regulatory statutes became effective in 1973. What is clear from these provisions is that the Legislature has long distinguished between insurance agents and insurance counselors, with agents being essentially **order takers** while it is insurance counselors who function primarily as advisors.

> However, as with most general rules, the general no-duty-to-advise rule, where the agent functions as simply an **order taker** for the insurance company, is subject to change when an event occurs that alters the nature of the relationship between the agent and the insured. This alteration of the ordinary relationship between an agent and an insured has been described by our Court of Appeals as a "special relationship" that gives rise to a duty to advise on the part of the agent. *Bruner*, supra; *see also Marlo Beauty Supply, Inc. v. Farmers Ins. Group of Cos.*, 227 Mich.App. 309, 314–315, 575 N.W.2d 324 (1998); *Stein v. Continental Casualty Co.*, 110 Mich.App. 410, 416–417, 313 N.W.2d 299 (1981); *Palmer v. Pacific Indemnity Co.*, 74 Mich.App. 259, 267, 254 N.W.2d 52 (1977).
>
> * * *
>
> We thus modify the "special relationship" test discussed in *Brune*r and the other cases cited above so that the general rule of no duty changes when (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.
>
> In this case, there is no documentary evidence suggesting that Mr. Pietrzak misrepresented the coverage offered or provided. As stated, plaintiffs had in fact received notice that uninsured motorist coverage was available for the Cavalier only three months before the accident. Further, there is no evidence that Mr. Harts made a request about insurance coverage on the Cavalier that might be construed as ambiguous or that would have required clarification. Mr. Harts never requested or inquired about "full coverage" on the Cavalier. Finally, Mr. Pietrzak did not expressly agree or promise to advise Mr. Harts about insurance coverage generally or uninsured motorist coverage specifically. Thus, with respect to the coverage obtained on the Cavalier, no event occurred that could or would take this case outside the general rule that Mr. Pietrzak owed plaintiffs no duty to advise them about coverage.

It is to be noted that several unpublished decisions of the Michigan Court of Appeals have issued opinions dealing with independent insurance agents where they followed *Harts* and disagreed with the decisions in *Genesee Foods* and *Deremo*. *See e.g. Chem. Tech., Inc. v. Berkshire Agency, Inc.*, No. 326394, 2016 WL 4008455, at *2 (Mich. Ct. App. July 26, 2016):

> Generally, "insurance agents have no duty to advise the insured regarding the adequacy of insurance coverage." *Id.* at 7, 597 N.W.2d 47. Instead, "[s]uch an agent's job is to merely present the product of his principal and take such orders as can be secured for those who want to purchase the coverage offered." *Id.* at 8, 597 N.W.2d 47. "However, as with most general rules, the general no-duty-to-advise rule ... is subject to change when an event occurs that alters the nature of the relationship between the

> agent and the insured." *Id.* at 9–10, 597 N.W.2d 47. Under "the 'special relationship' test,"
>
> > the general rule of no duty changes when (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 advise and the agent, though he need not, gives advise 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 this case, the circuit court concluded that Berkshire had no duty to advise Chemical regarding the adequacy of its insurance coverage under Harts. Specifically, it concluded that the general no-duty-to-advise rule and none of the four exceptions set forth in the "special relationship" test applied.

See also Estate of Richardson v. Grimes, No. 312782, 2014 WL 231917, at *5 (Mich. Ct. App. Jan. 21, 2014).

Minnesota – Order Taker Standard

See *Gabrielson v. Warnemunde*, 443 N.W.2d 540 (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**. * * * 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 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.")

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*.

> *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); *Herzog v. Cottingham & Butler Ins. Servs., Inc.*, No. A14-0528, 2015 WL 134043, at *3 (Minn. Ct. App. Jan. 12, 2015); *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn. App. 1986), review denied (Minn. Feb. 13, 1987); *Philter, Inc. v. Wolff Ins. Agency, Inc.*, No. A10-2230, 2011 WL 2750709, at *2-3 (Minn. Ct. App. July 18, 2011*); Johnson v. Farmers & Merchants State Bank of Balaton*, 320 N.W.2d 892, 898 (Minn. 1982); *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn. 1987); *Tollefson v. American Family Ins. Co.*, 302 Minn. 1, 3, 226 N.W.2d 280, 284 (1974); *Bus. Impact Grp., LLC v. Stanton Grp.*, LLC, No. A09-2187, 2010 WL 2733390, at *2 (Minn. Ct. App. July 13, 2010); *Scottsdale Ins. Co. v. Transp. Leasing/Contract, Inc.*, 671 N.W.2d 186, 196 (Minn. App. 2003); *Higgins ex rel. Higgins v. Winter*, 474 N.W.2d 185, 188 (Minn. App. 1991); *Osendorf v. American Family*, 318 N.W.2d 237 (Minn. 1982); *Atwater Creamery Company v. Western National Mutual Insurance Company*, 366 N.W.2d 271 (Minn. 1985); and *Beauty Craft Supply & Equipment Company v. State Farm Fire and Cas. Ins. Co.*, 479 N.W.2d 99 (Minn. App. 1992).

Mississippi – Order Taker Standard

See Mladineo v. Schmidt, 52 So.3d 1154, 1163 (Miss. 2010):

> 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.

See also Ritchie v. Smith, 311 So.2d 642, 646 (Miss. 1975).

Missouri – Order Taker Standard

See Jones v. Kennedy, 108 S.W.3d 203, 207 (Mo. Ct. App. 2003):

> All parties agree, and we do as well, that insurance agents are held to a professional standard of care. As to what is, or is not, included within that standard of care, we note that Missouri does not recognize a duty on the part of an insurance agent to advise customers as to their particular insurance needs or as to the availability of optional coverage. *Blevins v. State Farm Fire & Cas. Co.*, 961 S.W.2d 946, 951 (Mo.App.1998).
>
> In a case in which an appellant urged the Eastern District of this Court to impose a duty on insurance agents to inform potential customers of the availability of optional coverage, specifically underinsured motorist coverage, as part of the generalized standard of care for the insurance industry, the Court declined. *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 85–86 (Mo.App.1994). The Court stated specific policy reasons, including that the legislature neither requires motorists to carry underinsured coverage nor insurance companies/agents to offer or explain such available coverage. *Id*. at 86. The Court also analyzed some of the cases Appellant cites from other jurisdictions that have imposed such a duty, but found that they were unpersuasive because they failed to address those policy concerns. *Id*.

See also Blevins v. Am. Family Mut. Ins. Co., 423 S.W.3d 837, 841 (Mo. Ct. App. 2014):

> A broker or agent who undertakes to procure insurance for another for compensation owes a duty of reasonable skill and diligence in obtaining the insurance requested, and the broker or agent may be sued in tort for negligent failure to procure that insurance. *Extended Stay, Inc. v. American Auto. Ins. Co.*, 375 S.W.3d 834, 841 (Mo.App.E.D.2012) (internal citation omitted). To state a claim of negligent failure to procure insurance, a plaintiff must plead facts to show that: (1) the agent agreed to procure, for compensation, insurance; (2) the agent failed to procure the agreed upon insurance, and in doing so failed to exercise reasonable care and diligence; and (3) the plaintiff suffered damages as a result of the failure. *Id*.
>
> In a negligence action, the plaintiff must prove, among other things, that the defendant had a duty to the plaintiff. *Hardcore Concrete, LLC v. Fortner Ins. Services, Inc.*, 220 S.W.3d 350, 355 (Mo.App.S.D.2007) (citing *Hecker v. Missouri Prop. Ins. Placement Facility*, 891 S.W.2d 813, 816 (Mo. banc 1995)). The question of whether such a duty exists is one of law, and therefore, it is a question for the trial court. *Id.* A legal duty may arise under law, contract, or from the legislature. *Stein*, 284 S.W.3d at 605. Missouri courts have long held that if an agent undertakes to procure insurance for another for compensation, that agent owes a duty of care in obtaining the insurance. *Extended Stay, Inc.*, 375 S.W.3d at 841. However,

a prerequisite to the imposition of such a duty is "some consensual undertaking by the agent, for at least the prospect of compensation, to act on behalf of the customer as his principal." *Farmers Ins. Co., Inc. v. McCarthy*, 871 S.W.2d 82, 85 (Mo.App.E.D.1994) (internal citation omitted). Here, Plaintiffs allege in their petitions that Foust agreed to procure, for compensation, insurance to cover Busey Truck's property, including their personal property leased by Busey Truck. They do not allege that Foust agreed to purchase insurance for them, or that they provided compensation to her for the procurement of such insurance.

Montana – Order Taker Standard

See Fillinger v. Nw. Agency, Inc., of Great Falls, 283 Mont. 71, 83–84, 938 P.2d 1347, 1355 (1997):

> Northwestern asserts that the District Court erred in instructing the jury because the Fillingers are pursuing a professional negligence claim and therefore they must have provided expert testimony as to the standard of care, duty of care, and breach of that duty by the insurance agent. This Court has previously addressed the legal standard of care for insurance agents with respect to insurance procurement. In *Gay v. Lavina State Bank* (1921), 61 Mont. 449, 202 P. 753, we explained:
>
> > [A]s between the insured and his own agent or broker authorized by him to procure insurance there is the usual obligation on the part of the latter to carry out the instructions given him and faithfully discharge the trust reposed in him, and he may become liable in damages for breach of duty. If he is instructed to procure specific insurance and fails to do so, he is liable to his principal for the damage suffered by reason of the want of such insurance.
>
> *Gay*, 202 P. at 755, followed in *Lee v. Andrews* (1983), 204 Mont. 527, 667 P.2d 919.
>
> Jenkins herself testified as an insurance agent to what the duties and responsibilities are of an insurance agent when asked to procure specific insurance coverage. No additional independent expert testimony is required to establish the standard of care.
>
> Although we have not specifically addressed this issue, it is clear to this Court that the determination of whether an insurance agent reasonably fulfilled his or her duty and procured the coverage requested is easily within the common experience and knowledge of lay jurors. No expert testimony is required as there are no technical insurance issues beyond the understanding of the trier of fact. *See, e.g., Shahrokhfar v. State Farm Mut. Auto. Ins. Co.* (1981), 194 Mont. 76, 634 P.2d 653 (holding that the question whether the actions of an insurance agent and his attorney were negligent was well within the realm of knowledge of a layperson); *Salt Lake City School Dist. v. Galbraith & Green,Inc.* (Utah App.1987), 740 P.2d 284 (applying the majority rule that "expert testimony is not required in matters involving insurance agents and brokers unless technical insurance issues beyond the understanding of the average trier of fact are involved").

See also Bailey v. State Farm Mut. Auto. Ins. Co., 2013 MT 119, ¶ 20, 370 Mont. 73, 79, 300 P.3d 1149, 1153:

> Under Montana law, it is "well established that an insurance agent owes an absolute duty to obtain the insurance coverage which an insured directs the agent to procure." *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 32, 356 Mont. 417, 234 P.3d 79; *Fillinger v. Northwestern Agency*, 283 Mont. 71, 83, 938 P.2d 1347, 1355 (1997); *Lee v. Andrews*, 204 Mont. 527, 532, 667 P.2d 919, 921 (1983); *Gay v. Lavina State Bank*, 61 Mont. 449, 458, 202 P. 753, 755 (1921). If an insurance agent is instructed to procure specific insurance and fails to do so, he is liable for damages suffered due to the absence of such insurance. *Fillinger*, 283 Mont. at 83, 938 P.2d at 1355; *Lee*, 204 Mont. at 532, 667 P.2d at 921; *Gay*, 61 Mont. at 458, 202 P. at 755.

See also Monroe v. Cogswell Agency, 2010 MT 134, ¶¶ 31-32, 356 Mont. 417, 234 P.3d 79 (2010); *Lee v. Andrews*, 204 Mont. 527, 532, 667 P.2d 919 (1983).

Nebraska – Order Taker Standard

See Hansmeier v. Hansmeier, 25 Neb. App. 742, 752–53 (2018) (emphasis added):

> The Nebraska Supreme Court has stated that an insurance agent has no duty to anticipate what coverage an insured should have. Dahlke v. John F. Zimmer Ins. Agency, 245 Neb. 800, 515 N.W.2d 767 (1994). Rather, when an insured asks an insurance agent to procure insurance, the insured has a duty to advise the insurance agent as to the desired insurance. *Id.*
>
> While it may be good business for an insurance agent to make such suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. *Polski v. Powers*, 221 Neb. 361, 377 N.W.2d 106 (1985) (although agent may have been aware that clients had built new building and were keeping hogs in building, he had no knowledge that they wished to change their insurance coverage or to obtain other or different coverage). "[I]t would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way." *Id*. at 364, 377 N.W.2d at 108. *See, also, Flamme v. Wolf Ins. Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991) (no evidence that clients requested underinsured motorist coverage over and above someone else's liability insurance or that agent agreed to obtain such coverage; therefore, agent and his agency could not be held liable for failing to obtain such coverage).
>
> As well-stated by the district court in this case:
>
> > If it is an unreasonable burden to require insurance agents to anticipate what coverage an individual should have absent the insured's request, it would be an equally unreasonable burden to require an insurance agent to anticipate what steps the insured should take to not have the coverage he has already told the agent he does not want.
>
> Because Merva had no duty to advise Scott and Karie that workers' compensation insurance was available or necessary, their negligence action fails as a matter of law.

See also Flamme v. Wolf Insurance Agency, 239 Neb. 465, 476 N.W.2d 802 (1991): *Dahlke v. John F. Zimmer Insurance Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994); and *Broad v. Randy Bauer Insurance Agency, Inc.*, 275 Neb. 788, 749 N.W.2d 478 (2008).

Nevada – Order Taker Standard

See Flaherty v. Kelly, No. 59582, 2013 WL 7155078, at *2 (Nev. Dec. 18, 2013):

> In Nevada, an agent or broker has a duty "to use reasonable diligence to place the insurance and seasonably to notify the client if he is unable to do so." *Keddie v. Beneficial Ins., Inc.*, 94 Nev. 418, 420, 580 P.2d 955, 956 (1978). An insurance agent or broker does not owe the insured any additional duties other than procuring the requested insurance.

See also Keddie v. Beneficial Ins., Inc., 94 Nev. 418, 420, 580 P.2d 955, 956 (1978); *Havas v. Carter*, 89 Nev. 497, 499-500 (1973); and *Lucini-Parish Ins., Inc. v. Buck*, 108 Nev. 617 (1992).

New Hampshire – Order Taker Standard

See Sintros v. Hamon, 148 N.H. 478, 482, 810 A.2d 553, 557 (2002): "These cases do not persuade us to depart from the majority rule that an insurance agent owes clients a duty of reasonable care and diligence, but absent a special relationship, that duty does not include an affirmative, continuing obligation to inform or advise an insured regarding the availability or sufficiency of insurance coverage."

See also DeWyngaerdt v. Bean Ins. Agency, Inc., 151 N.H. 406, 407–09, 855 A.2d 1267, 1269–71 (2004).

New Jersey – Affirmative Duty to Advise standard? (See 2018 Luzzi case discussed below)

***Luzzi v. HUB International Northeast Ltd.*, 2018 WL 3993450 (D.N.J., 2018) (August 21, 2018).**

In this case the issue centered around the low amount of insurance coverage in place of loss of personal property. The agent claimed that additional coverage was offered to the insurance customer and the insurance customer declined the additional coverage. The insurance customer claimed that she did not see or understand the policy limit of $15,000 on the declaration page for loss of personal property and that **she believed she had purchased unlimited coverage for loss of personal property for a premium of $126**.

The court addressed the standard of care insurance agents are held to under New Jersey law and stated:

> "At common law both [insurance] agents and brokers, when acting on behalf of an insured, **owe the insured a duty of due care**." *Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc.*, 135 N.J. 182, 189 (1994). *See President v. Jenkins*, 180 N.J. 550, 568 (2004) (internal citations omitted) ("Brokers and agents generally owe the same duties to an insured ... '**Agents, like brokers, are obligated to exercise good faith and reasonable skill in advising insureds' and in informing them of available coverage**."). In *Rider v. Lynch*, 42 N.J. 465, 476 (1964), the New Jersey Supreme Court addressed the scope of the duty that an insurance broker owes to an insured or prospective insured. *Rider* recognized that a broker engaged to obtain insurance must exercise "good faith and reasonable skill, care and diligence in the execution of the commission." *Id.* In particular, the broker "is expected to possess reasonable knowledge of the types of policies, their different terms, and the coverage available in the area in which his principal seeks to be protected." *Id.* **Furthermore, "[a]n insurance agent may assume duties in addition to those normally associated with the agent-insured relationship" if there is evidence of greater responsibilities, i.e. a "special relationship."** *Glezerman v. Columbian Mut Life Ins. Co.*, 944 F.2d 146, 150–51 (3d Cir. 1991).[10]
>
> *Rider* "**defined the obligations of a broker as (1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply**." *President*, 180 N.J. at 569 (citing *Rider*, 42 N.J. at 476). "If an agent or broker fails to exercise the requisite skill and diligence when fulfilling those obligations, then there is a breach in the duty of care, and liability arises." *Id.* (citing *Rider*, 42 N.J. at 476). The New Jersey Supreme Court has cautioned, however, that ***Rider* does not "limit[ ] the establishing of a broker's liability to th[o]se three circumstances**." *Bates v. Gambino*, 72 N.J. 219, 225 n.2 (1977)).

Luzzi v. HUB International Northeast Ltd., 2018 WL 3993450, at *6 (D.N.J., 2018) (emphasis added).

The court found there was a duty to advise stating that the agent "had a duty to ascertain the customer's needs and recommend appropriate coverage." The court went on to note that there was a genuine issue on material fact as to the scope of that duty under the facts and circumstances of the case, and there was a genuine issue of material fact as to whether the agent breached that duty. *Id*. at *7.

This case was not decided well. The case law cited by the court references a duty to advise if there are special circumstances giving rise to a special relationship, not that there is always a duty to advise. The court performs no analysis of if there is in fact special circumstances giving rise to a special relationship heightened duty to advise. This case is probably an outlier. However, if this case stands then this would change New Jersey from an order taker standard of care state to heightened duty to advise standard of care state.

See also Duffy v. Certain Underwriters at Lloyd's of London Subscribing to Policy No. 09ASC185004, No. A-5797-11T4, 2014 WL 3557861, at *6 (N.J. Super. Ct. App. Div. July 21, 2014):

> *In President v. Jenkins*, 180 N.J. 550, 853 A.2d 247 (2004) the Court clarified the scope of an insurance broker's obligations to a prospective insured, stating the broker is responsible: "(1) to procure the insurance; (2) to secure a policy that is neither void nor materially deficient; and (3) to provide the coverage he or she undertook to supply." *Id*. at 569, 853 A.2d 247. However, "[t]he duty of a broker or agent ... is not unlimited." *Carter Lincoln–Mercury, Inc., Leasing Div. v. EMAR Group, Inc.*, 135 N.J . 182, 190, 638 A.2d 1288 (1994).

See also Carter Lincoln-Mercury, Inc., Leasing Div. v. EMAR Grp., Inc., 135 N.J. 182, 190, 638 A.2d 1288, 1292 (1994): "The duty of a broker or agent, however, is not unlimited. In *Wang*, supra, 125 N.J. at 11-12, 592 A.2d 527, we held that an insurance agent had no duty to advise an insured to consider higher amounts of homeowner's insurance."

See also Rider v. Lynch, 42 N.J. 465, 470, 201 A.2d 561, 563 (1964); and *Wang v. Allstate Ins. Co.*, 125 N.J. 2, 4, 592 A.2d 527, 528 (1991).

New Mexico – Order Taker Standard

See Sanchez v. Martinez, 1982-NMCA-168, ¶¶ 14-15, 99 N.M. 66, 69–70, 653 P.2d 897, 900–01:

> An insurance agent or broker who undertakes to procure insurance for others and, through his fault or neglect, fails to do so, may be held liable for any damage resulting therefrom. Under such facts, liability may be predicated either upon the theory that 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. The defendant may be sued for breach of contract or negligent default in the performance of a duty imposed by contract or both. *Brown v. Cooley*, 56 N.M. 630, 247 P.2d 868 (1952); *see also Lanier v. Securities Acceptance Corp.*, 74 N.M. 755, 398 P.2d 980 (1965); *White v. Calley*, 67 N.M. 343, 355 P.2d 280 (1960); *Wiles v. Mullinax*, 267 N.C. 392, 148 S.E.2d 229 (1966).
>
> 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. *Butler v. Scott*, 417 F.2d 471 (10th Cir.1969) (applying N.M. law); *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440, (Tex.Civ.App.1977); *Ezell v. Associates Capital Corporation*, 518 S.W.2d 232 (Tenn.1974); *Wiles*, supra.

See also Federated Mut. Ins. Co. v. Ever-Ready Oil Co., No. 09-CV-857 JEC/RHS, 2012 WL 12917267, at *10 (D.N.M. Mar. 29, 2012):

> The liability of a broker "who undertakes to procure insurance for others and, through his fault or neglect, fails to do so," may be predicated on negligence or breach of contract. *Sanchez v. Martinez*, 99 N.M. 66, 70, 653 P.2d 897, 900 (Ct. App. 1982). A failure to procure insurance claim, predicated on a breach of contract, requires a legally enforceable promise to procure coverage. *Nance v. L.J. Dolloff Associates, Inc.*, 138 N.M. 851, 856, 126 P.3d 1215, 1220 (2005). Summary judgment on a failure to procure insurance claim is appropriate where no request for specific coverage has been made. *State Farm Fire and Cas. Co., v. Price*, 101 N.M. at 446, 684 P.2d at 532; *Hardison v. Balboa Ins. Co.*, 4 Fed. Appx. 663, 673 (10th Cir. 2001) (unpublished) (liability for failure to procure insurance, under either a contract or tort theory, occurs only where the insured has actually requested coverage from the agent).

New York – Order Taker Standard

See Murphy v. Kuhn, 90 N.Y.2d 266, 660 N.Y.S.2d 371, 682 N.E.2d 972, 974 (1997). (Insurance agents or brokers are not personal financial counselors and risk managers, approaching guarantor status, and it is well settled that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage.): "Generally, the law is reasonably settled on initial principles that insurance 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; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage."

See also *AB Oil Servs. Ltd. d/b/a AB ENVIRONMENTAL, ABLE ENVIRONMENTAL SERVICES INC. & FAIRWAY ENVIRONMENTAL LLC, Plaintiffs, v. TCE Ins. Servs., Inc. & ANTHONY DeFEDE, Defendants.*, No. 17-603133, 2018 WL 2423893, at *4 (N.Y. Sup. Ct. May 24, 2018); *Holborn Corp. v. Sawgrass Mut. Ins. Co.*, No. 16-CV-09147 (AJN), 2018 WL 485975, at *8 (S.D.N.Y. Jan. 17, 2018); *Cromer v. Rosenzweig Ins. Agency Inc.*, 156 A.D.3d 1192, 1194, 68 N.Y.S.3d 169, 172 (N.Y. App. Div. 2017); *Joseph v. Interboro Ins. Co.*, 144 A.D.3d 1105, 1108, 42 N.Y.S.3d 316, 320 (N.Y. App. Div. 2016) ("Thus, 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.")

North Carolina – Order Taker Standard

See Pinney v. State Farm Mut. Ins. Co., 146 N.C. App. 248, 254–55, 552 S.E.2d 186, 191 (2001):

> We noted that "an insurance agent has a duty to procure additional insurance for a policyholder at the request of the policyholder." *Id.* (*citing Johnson v. Tenuta & Co.*, 13 N.C.App. 375, 381, 185 S.E.2d 732, 736 (1972)). "The duty does not, however, obligate the insurer or its agent to procure a policy for the insured which had not been requested." *Id.* (*citing Baldwin v. Lititz Mutual Ins. Co.*, 99 N.C.App. 559, 561, 393 S.E.2d 306, 308 (1990)).

See also Baggett v. Summerlin Ins. & Realty, Inc., 354 N.C. 347, 554 S.E.2d 336, 337 (2001); *Meadlock v. Am. Family Life Assur. Co.*, 221 N.C. App. 669, 729 S.E.2d 127 (2012)

North Dakota – Order Taker Standard

See Dahms v. Nodak Mut. Ins. Co., 2018 ND 263 (Dec. 6, 2018).

In the Dahms case, the agent's insurance customers insured their home through the insurer beginning in 2008. The home had a detached garage. The insurance customers at a later date constructed a deck between the garage and the house but did not inform the insurance agent of this modification. Fire damaged the home in 2013 and the insurer denied a portion of the claim, contending successfully that the garage was not a structure attached to the house. As for the negligence claim against the agent, the court found that the insurance customers never told the agent about the deck or requested more coverage. Like in most jurisdictions, insurance agents in North Dakota have a duty to act in good faith and to follow the instructions of their insurance customers. The insurance customers raised no genuine issue of material fact as to the insurance agent following the instructions.

The insurance customers in the *Dahms c*ase also could not establish special circumstances giving rise to a special relationship heighted duty to advise. While the relationship was "long standing", the insurance customers "sought no advice about the garage, did not contact [agent] regularly, and [agent] did not visit their property." *Dahms v. Nodak Mut. Ins. Co*., 2018 ND 263 (Dec. 6, 2018).

See also APM, LLLP v. TCI Ins. Agency, Inc., 2016 ND 66, ¶ 10, 877 N.W.2d 34, 36 (applying and adopting Minnesota *Gabrielson* case 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.

Ohio – Order Taker Standard

See Tornado Techs., Inc. v. Quality Control Inspection, Inc., 2012-Ohio-3451, ¶ 19, ¶¶ 24-30, 977 N.E.2d 122, 125-127 (2012):

> Pertinent to the elements of duty and breach, an insurance agency has a duty to exercise good faith and reasonable diligence in obtaining insurance that its customer requests. *Moor v. Am. Family Ins. Co.*, 3d Dist. No. 4–09–13, 2009-Ohio-4442, 2009 WL 2710071, *citing Fry v. Walters & Peck Agency, Inc.*, 141 Ohio App.3d 303, 310, 750 N.E.2d 1194 (6th Dist.2001). *See also First Catholic Slovak Union v. Buckeye Union Ins.*, 27 Ohio App.3d 169, 170, 499 N.E.2d 1303 (8th Dist.1986); S*tuart v. Natl. Indemn. Co.*, 7 Ohio App.3d 63, 454 N.E.2d 158 (8th Dist.1982). However, an insurance agent owes no duty to seek replacement coverage for an insured in the absence of a request by the insured to do so. *See Slovak*.
>
> * * *
>
> Nonetheless, QCI maintains that it relied on FAC's expertise to procure sufficient coverage. In essence, QCI argue that FAC were fiduciaries with a higher duty of care, a duty not only to provide the coverage requested but also to advise QCI of the amount of coverage needed.
>
> The Ohio Supreme Court has defined a "fiduciary relationship" as one "in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust." *Nichols v. Schwendeman*, 10th Dist. No. 07AP–433, 2007-Ohio-6602, 2007 WL 4305718, *citing Ed Schory & Sons, Inc. v. Soc. Natl. Bank*, 75 Ohio St.3d 433, 442, 1996-Ohio-194, 662 N.E.2d 1074, *quoting In re Termination of Emp.*, 40 Ohio St.2d 107, 115, 321 N.E.2d 603 (1974).
>
> A fiduciary relationship may be created out of an informal relationship "only when both parties understand that a special trust or confidence has been reposed." *Umbaugh Pole Bldg. Co., Inc. v. Scott*, 58 Ohio St.2d 282, 390 N.E.2d 320 (1979), paragraph one of the syllabus; *Hoyt v. Nationwide Mut. Ins. Co.*, 10th Dist. No. 04AP–941, 2005-Ohio-6367, 2005 WL 3220192. Thus, a fiduciary relationship cannot be unilateral; it must be mutual. *Horak v. Nationwide Ins. Co.*, 9th Dist. No. CA 23327, 2007-Ohio-3744, 2007 WL 2119861.
>
> However, it is important to note that while the law has recognized a public interest in fostering certain professional relationships, such as the doctor-patient and attorney-client relationships, it has not recognized the insurance agent-client relationship to be of similar importance. *Rose v. Landen*, 12th Dist. No. CA2004–06–066, 2005-Ohio-1623, 2005 WL 752431, *citing Nielsen Ents., Inc. v. Ins. Unlimited Agency, Inc.*, 10th Dist.

> No. 85AP–781, 1986 WL 5411 (May 8, 1986). *See also Roberts v. Maichl*, 1st Dist. No. C–040002, 2004-Ohio-4665, 2004 WL 1948718.
>
> In this case, we find that the record shows the relationship between QCI and FAC was nothing more than an ordinary business relationship between insurance agent and client. Furthermore, QCI was in the best position to know how much coverage it needed. QCI knew the quantity and the quality of the data it was storing off-site with Tornado. QCI knew that its off-site coverage was limited to $50,000. QCI was in a position to know the type of impact the loss of said data would have on its company. QCI was in a position to properly forecast the financial cost of retrieving or re-creating data that could be lost off-site or even on its own premises. Given that QCI was in the uniquely superior position of knowing the nature and scope of its business needs, it had a duty to bring these relevant concerns to FAC's attention and request the appropriate coverage.
>
> As previously noted, the policy declaration clearly stated that the duplicate storage limit was set at $50,000. QCI received a renewal policy for more than five years reflecting this fact, but they failed to seek the additional coverage or notify FAC of the off-site storage of their electronic data. It is our opinion that the storage off-site in and of itself was not the concern. The concern was the limit of $50,000. QCI was best able to evaluate whether that limit was too much or too small.
>
> We conclude that FAC's exercise of good faith and reasonable diligence was satisfied in obtaining the insurance as requested by QCI over the years, but there was no duty to advise QCI, without them furnishing additional and pertinent information, that additional coverage was needed. As such, we find no evidence from which reasonable minds could conclude that the relationship between QCI and FAC was anything other than an ordinary business relationship between an insurance agent and a client. Thus, we find no error in the trial court's entry of summary judgment in favor of FAC on QCI's breach of fiduciary duty claim.

See also Stuart v. National Indemnity Co., 7 Ohio App.3d 63, 454 N.E.2d 158 (8th Dist. 1982); *First Catholic Slovak Union v. Buckeye Union Insurance Co.*, 27 Ohio App.3d 169, 499 N.E.2d 1303 (8 Dist. 1986); *Nielsen Enterprises, Inc. v. Insurance Unlimited Agency, Inc.*, 10th Dist. No. 85AP-781, 1986 WL 5411 (May 8, 1986); *Craggett v. Adell Ins. Agency*, 92 Ohio App.3d 443, 635 N.E.2d 1326 (8th Dist. 1993); *Lu-An-Do, Inc. v. Kloots*, 131 Ohio App.3d 71, 75, 721 N.E.2d 507 (5th Dist. 1999); *Fry v. Walters & Peck Agency, Inc.*, 141 Ohio App.3d 303, 750 N.E.2d 1194 (6th Dist. 2001); and *Island House Inn, Inc. v. State Auto Ins.*, 150 Ohio App.3d 522, 2002-Ohio-7107, 782 N.E.2d 156 (6th Dist. 2002).

Oklahoma – Order Taker Standard

See Cosper v. Farmers Ins. Co., 2013 OK CIV APP 78, ¶¶ 8-9, 309 P.3d 147, 149 (Okla. Ct. App. 2013):

> However, "[i]nsurance companies and their agents do not have a duty to advise an insured with respect to his insurance needs." *Rotan v. Farmers Ins. Group of Companies*, 2004 OK CIV APP 11, ¶ 2, 83 P.3d 894, 895, *citing Mueggenborg v. Ellis*, 2002 OK CIV APP 88, ¶ 6, 55 P.3d 452, 453. The Supreme Court has held an insurer was under no statutory duty to explain uninsured motorist coverage to its insureds. *Silver v. Slusher*, 1988 OK 53, ¶ 7, fn. 11, 770 P.2d 878, 882.
>
> Defendants did not fail to procure insurance for Plaintiffs, and we decline to extend *Swickey* and impose a duty upon an insurer to provide an "adequate amount" of coverage. Plaintiffs did not allege that they requested a specific coverage limit and Defendants disregarded the request and issued a policy in some other amount. We further find nothing in the record shows Ott played any part in setting a coverage limit.

See also Smith v. Allstate Vehicle & Prop. Ins. Co., No. CIV-14-0018-HE, 2014 WL 1382488, at *2 (W.D. Okla. Apr. 8, 2014):

> The Oklahoma Court of Civil Appeals held in *Swickey v. Silvey Cos.*, 979 P.2d 266, 269 (Okla.Civ.App.1999) that "[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." However, the Oklahoma appellate court subsequently "decline[d] to extend *Swickey* and impose a duty upon an insurer to provide an 'adequate amount' of coverage," when an insurance company and its agent "did not fail to procure insurance for Plaintiffs." *Cosper v. Farmers Ins. Co.*, 309 P.3d 147, 149 (Okla.Civ.App.2013). In reaching that conclusion in *Cosper*, the court noted that the plaintiffs "did not allege that they requested a specific coverage limit and Defendants disregarded the request and issued a policy in some other amount." *Id.* The *Cosper* court also determined that " '[i]nsurance companies and their agents do not have a duty to advise an insured with respect to his insurance needs .' " *Id.* (quoting *Rotan v. Farmers Ins. Group of Cos.*, 83 P .3d 894, 895 (Okla.Civ.App.2004)).

See also Swickey v. Silvey Cos., 979 P.2d 266, 269 (Okla.Civ.App.1999); *Mueggenborg v. Ellis*, 55 P.3d 425 (Ok. Ct. App. 2002); and *Rotan v. Farmers Ins. Group*, 83 P.2d 894 (Okla.Ct.App. 2003).

Oregon – Order Taker Standard (likely)

See Lewis-Williamson v. Grange Mut. Ins. Co., 179 Or. App. 491, 494, 39 P.3d 947, 949 (2002) (emphasis added):

> Specifically, an insurance agent acting as an agent for the insured owes a general duty to exercise reasonable skill and care in providing the **requested insurance**. *See Joseph Forest Products v. Pratt*, 278 Or. 477, 480, 564 P.2d 1027 (1977), quoting 16 Appleman, Insurance Law and Practice § 8841, at 510–14 (1968); *Hamacher v. Tumy et al.*, 222 Or. 341, 347, 352 P.2d 493 (1960); *see also Nofziger v. Kentucky Central Life Insurance Co.*, 91 Or.App. 633, 639, 758 P.2d 348, rev. den. 306 Or. 527, 761 P.2d 928 (1988); *Albany Ins. Co. v. Rose–Tillmann, Inc.*, 883 F.Supp. 1459 (D.Or.1995).

Pennsylvania – Heightened Duty to Advise

See Swantek v. Prudential Prop. & Cas. Ins. Co., 48 Pa. D. & C.3d 42, 47 (Pa. Com. Pl. 1988):

> Our appellate courts have held that the focal point of an insurance transaction is the reasonable expectation of the insured. *See State Auto Insurance Assoc. v. Anderson*, 365 Pa. Super. 85, 528 A.2d 1374, (1987) *citing to Collister v. Nationwide Life Insurance Co.*, 479 Pa. 579, 388 A.2d 1346 (1978). Those expectations are, in large part, created and perpetuated by the complexity of the insurance industry itself. *Id*. This concept **underscores the reason for recognizing a duty to advise on behalf of an insurance agent**.
>
> As did the court in Peterson, this court now concludes that an insurance agent is held to the standard of care found in section 299 of the Restatement (Second) of Torts, and given that standard **the agent has a correlative duty to advise insureds of the availability of other types of insurance benefits**. Moreover, a cause of action exists where the agent allegedly breaches this duty. A finding that the plaintiffs herein have put forth a valid cause of action does not end the court's present inquiry.

See also Decker v. Nationwide Ins. Co., 83 Pa. D. & C.4th 375, 380–81 (Com. Pl. 2007).

Rhode Island – Order Taker Standard (likely) - insufficient case law

See Affleck v. Kean, 50 R.I. 405, 148 A. 324, 325 (1929):

> An insurance broker must obey the instructions given by his principal, 32 C. J. 1087, and, if he agrees to procure insurance and fails to do so, he is liable to his principal for the damage sustained by reason of the want of such insurance. *Milwaukee Bedding Co. v. Graebner*, 182 Wis. 171, 196 N. W. 533; *Journal Co. v. Gen. Acc. Fire & Life As. Co.*, 188 Wis. 140, 205 N. W. 800; *Everett v. O'Leary*, 90 Minn. 154, 95 N. W. 901; *Cass v. Lord*, 236 Mass. 430, 128 N. E. 716*; Elam, Appt., v. Smithdeal Realty & Ins. Co.*, 182 N. C. 599, 109 S. E. 632, 18 A. L. R. 1210 and note, 1214.

See also Kenney Mfg. Co. v. Starkweather & Shepley, Inc., 643 A.2d 203, 208 (R.I. 1994).

South Carolina – Order Taker Standard

***See Jensen v. Wiseman*, 2018 WL 5733485, at *1 (S.C.App., 2018)**

In a professional negligence claim, the insurance customer, Donna Jensen, argued that the circuit court erred in granting summary judgment in favor of the insurance agent and agency, Matthew Wiseman and People's Underwriters, Inc.

"Specifically, Jensen contends the circuit court erroneously addressed whether Jensen had an insurable interest in daycare buses covered under a commercial automobile insurance policy (the Policy) because Respondents did not raise the 'insurable interest' issue in their summary judgment motion. Jensen further asserts summary judgment was improper because she submitted more than a mere scintilla of evidence demonstrating Wiseman breached a duty to adequately advise her when she procured the Policy." *Jensen v. Wiseman*, 2018 WL 5733485, at *1 (S.C.App., 2018)

In the case the court stated that "generally, an insurer and its agents owe no duty to advise an insured. If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice." (*citing to Trotter v. State Farm Mut. Auto. Ins. Co*., 297 S.C. 465, 471, 377 S.E.2d 343, 347 (Ct. App. 1988).

The court went on to note:

> Jensen [the insurance agent] presented no evidence that she sought Wiseman's [the insurance agent's] advice in procuring the Policy—Jensen merely stated she trusted Wiseman because he was a "professional." See *Houck v. State Farm Fire & Cas. Ins. Co.*, 366 S.C. 7, 16, 620 S.E.2d 326, 331 (2005) (holding insurance agent did not owe a duty to the insured because "the record is simply devoid of any such evidence" showing the insured made "a clear request for advice"). "A request for 'full coverage,' 'the best policy,' or similar expressions does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." *Trotter*, 297 S.C. at 472, 377 S.E.2d at 347. Likewise, there is no evidence of an ongoing relationship between Jensen and Wiseman such that Wiseman should have been on notice that Jensen sought and relied on his advice. Wiseman first reached out to Jensen in April 2010, a little over one year before the accident, and Wiseman and Jensen communicated only briefly about the Policy.

The court further noted that Jensen the insurance customer "admitted she did not fully read the Policy when Wiseman [the insurance agent] instructed her to do so in order for her to ask questions or determine whether the coverage was sufficient"; and that this admission was fatal to Jensen's claim. Id. at *2 (*citing to Carolina Prod. Maint., Inc. v. U.S. Fid. & Guar. Co.*, 310 S.C. 32, 38, 425 S.E.2d 39, 43 (Ct. App. 1992); and *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 416–22, 171 S.E.2d 486, 489–91 (1969)

In addition, the court noted that the only expert opinion regarding the standard of care that was before the court stated that the insurance agent complied with the standard of care in placing insurance for the

insurance customer and did not breach any duties to the insurance customer. The insurance customer did not provide a contradictory opinion or other expert testimony addressing the standard of care or duty question.

The court affirmed summary judgment in favor of the insurance agent stating that the insurance customer failed to present a mere scintilla of evidence to support her assertion that insurance agent undertook to advise her, either expressly or impliedly, or that the insurance agent otherwise had or breached any duty to advise the insurance customer to list herself individually on the commercial policy.

See also Trotter v. State Farm Mut. Auto. Ins. Co., 297 S.C. 465, 471–72, 377 S.E.2d 343, 347–48 (Ct. App. 1988):

> Generally, an insurer and its agents owe no duty to advise an insured. *Nowell v. Dawn–Leavitt Agency, Inc.*, 127 Ariz. 48, 617 P.2d 1164 (App.1980). If the agent, nevertheless, undertakes to advise the insured, he must exercise due care in giving advice. *See Riddle–Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969).
>
> An insurer may assume a duty to advise an insured in one of two ways: (1) he may expressly undertake to advise the insured; or (2) he may impliedly undertake to advise the insured. *See Bicknell, Inc. v. Havlin*, 9 Mass.App. 497, 402 N.E.2d 116 (1980); *Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc.*, 44 Or.App. 739, 607 P.2d 763 (1980); *Northern Assurance Co. of Am. v. Stan–Ann Oil Co., Inc.*, 603 S.W.2d 218 (Tex.Civ.App.1979). It is the insured, however, who bears the burden of proving the undertaking. *See Riddle–Duckworth, Inc. v. Sullivan, supra*.
>
> An implied undertaking may be shown if: (1) the agent received consideration beyond a mere payment of the premium, *Nowell v. Dawn–Leavitt Agency, Inc., supra*; (2) the insured made a clear request for advice, *see Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., supra*; or (3) 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. *See Nowell v. Dawn–Leavitt Agency, Inc., supra; Northern Assurance Co. of Am. v. Stan–Ann Oil Co., Inc., supra*.
>
> It was incumbent on Trotter to prove Ledford agreed to advise him about his insurance needs. Courts cannot create contracts for the parties. There must be a clear oral or written agreement for a court to enforce. Trotter may not seek, after the fact, to have a court or jury create an undertaking favorable to him, if the parties themselves did not enter such an agreement. *See Chapman v. Willia*ms, 112 S.C. 402, 100 S.E. 360 (1919); *Somerset v. Reyner*, 233 S.C. 324, 104 S.E.2d 344 (1958); *Texcon, Inc. v. Anderson Aviation, Inc.*, 284 S.C. 307, 326 S.E.2d 168 (Ct.App.1985).
>
> Trotter presented no evidence to show that either State Farm or Ledford expressly undertook to advise him. He testified that he saw several State

> Farm advertisements which in effect said that State Farm's agents are well trained and highly qualified individuals, who will advise people with respect to their insurance needs. These advertisements, however, do not amount to an express undertaking. Ordinarily, an advertisement is a mere invitation to the public to contact the advertiser and request its services, as opposed to an offer to perform those services. *See Georgian Co. v. Bloom*, 27 Ga.App. 468, 108 S.E. 813 (1921). State Farm's advertisements were nothing more than invitations to the public.
>
> There was likewise no evidence of an implied undertaking. Trotter did not contend that State Farm or Ledford received any consideration beyond the payment of premiums from which an implied undertaking could arise. Moreover, he produced no evidence to show he made a clear request which would put Ledford on notice that his advice was being sought and relied on. A request for "full coverage," "the best policy," or similar expressions does not place an insurance agent under a duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase. *See Ethridge v. Assoc. Mut., Inc.*, 160 Ga.App. 687, 288 S.E.2d 58 (1981) ("full coverage"); *Nowell v. Dawn–Leavitt Agency, Inc., supra* ("the best policy").

See also Houck v. State Farm, 620 S.E.2d 326, 329 (S.C. 2005); *Riddle-Duckworth, Inc. v. Sulliv*an, 171 S.E.2d 486 (S.C. 1969); *Sullivan Co., Inc. v. New Swirl, Inc.*, 437 S.E.2d 30 (S.C. 1993); and *Fowler v. Hunter*, 668 S.E.2d 803 (S.C. Ct. App.) (affd. by 697 S.E.2d 531 (S.C. 2010).

South Dakota – Order Taker Standard

See City of Colton v. Schwebach, 1997 S.D. 4, ¶ 10, 557 N.W.2d 769, 771 (1997):

> The duty of an insurance agent was discussed by this court in both *Fleming v. Torrey*, 273 N.W.2d 169, 170 (S.D.1978), and *Trammell v. Prairie States Ins. Co.*, 473 N.W.2d 460, 462 (S.D.1991). The duty consists of "procur[ing] insurance of the kind and with the provisions specified by the insured." *Fleming*, 273 N.W.2d at 170. The court in *Trammell* added that an insurance "agent had a duty to obey [client's] instructions in good faith and with reasonable professional skill. [The agent] had no duty to go beyond this standard and ask [client] further questions if [client] appeared clear about what he wanted." 473 N.W.2d at 462.

See also Cole v. Wellmark of S.D., Inc., 2009 S.D. 108, ¶ 34, 776 N.W.2d 240, 251 (2009); *Rumpza v. Larsen*, 1996 S.D. 87, 551 N.W.2d 810; *Trammel v. Prairie States Insurance Company*, 473 N.W.2d 460 (S.D.1991); *Ward v. Lange*, 553 N.W.2d 246, 250 (S.D. 1996); *Fleming v. Torrey*, 273 N.W.2d 169 (S.D. 1978); and *Feldmeyer v. Engelhart*, 54 S.D. 81, 222 N.W. 598, 599 (1928).

Tennessee – Order Taker Standard

See Mears v. Jones, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018).

In May 2015, insurance customer George Mears contacted insurance agent Lance Fagan Jones seeking builders risk and home owners insurance for a home he intended to build in Long Beach, Mississippi. During their first conversation, Mears indicated to Jones that he wished to obtain $400,000 in coverage. In June 2015, Jones provided Mears with a nonbinding quote from Lexington Insurance Company for that amount. About a year after they initially made contact, Mears contacted Jones and told him that he was ready to begin construction and wanted to finalize his insurance policy. Jones thereafter sought out quotes from Lloyd's of London and the Mississippi Residential Property Insurance Underwriting Association ("MRPIUA"), the state's insurance agency. Altogether and including the prior Lexington quote, Jones sought quotes from three agencies.

The parties dispute what happened next. According to Mears (the insurance customer), Jones (the agent) informed him that his only insurance option was the MRPIUA policy, which had a maximum limit of $200,000. Mears wrote in an affidavit that Jones stated that "no other insurer would write coverage for properties on the beach and that the maximum amount of coverage that could be obtained under any circumstances was $200,000." At his deposition, Mears testified that Jones told him that Lexington would no longer provide the earlier-quoted insurance because it "was not going to write the policy based on upon the [house's] location ... on the beach."

Contrary to Mears's account, Jones avers that he provided all three quotes to Mears at this time, including the Lexington quote for $400,000. Jones claims that he gave Mears the opportunity to choose the higher Lexington quote but Mears refused and instead opted for the MRPIUA policy.

In October 2016, Mears's under-construction house burned to the ground as the result of a suspected arson. After the fire, MRPIUA paid out the policy limit of $200,000. Mears claims that the fire caused damages far in excess of the $200,000 policy. According to Mears's complaint, Mears subsequently discovered that there were other available insurance policies that would have covered the entire value of his house.

In summary Mears alleged that Jones failed to advise him as to other available insurance options and made a negligent representation to him about the coverage available. Mears argued that Mississippi law imposed on the Jones, the agent, a duty to advise him of available insurance. The court found that although the agent had no duty to offer advice in the first place, if advice was offered the agent had a duty to exercise reasonable care in offering this advice to the insurance customer. *See Mears v. Jones*, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018) (*citing to Mladineo v. Schmidt*, 52 So.3d 1154, 1162 (Miss. 2010) (second alteration in original)):

> The district court reads *Mladineo* too narrowly. As the district court recognized, *Mladineo* held that while insurance agents lack "an affirmative duty to advise buyers regarding their coverage needs," when they "do offer advice to insureds, they have a reasonable duty to exercise care in doing so." *Id.* at 1163. We note at the outset that a fair reading of this capacious language regarding the duty to advise would include giving advice as to what coverage options exist. Appearing to anticipate this issue, Jones and Farm Bureau argue that Jones did not offer "advice" by

> making the alleged statement but rather merely "opined that only MRPIUA would insure his property." However, this statement had the consequence of leading Mears to purchase the MRPIUA policy. This brings Jones's statement within the holding of *Mladineo*.

Mears v. Jones, 2018 WL 6444011, at *3–4 (C.A.5 (Miss.), 2018)

See also Weiss v. State Farm Fire & Cas. Co., 107 S.W.3d 503, 506 (Tenn. Ct. App. 2001):

> The Weisses ask this court on appeal whether State Farm and Mr. Brooks had a duty to make sure Mrs. Weiss understood her insurance coverage and whether the failure to advise her of her level of UM coverage was a cause in fact of her damages. According to Tennessee law, unless there exists an agreement creating continuing responsibilities, an insurance agent's obligation to a client ends when the agent obtains the insurance asked for by the client. See 16 Tenn. Juris. Insurance § 8 (2001) (citing *Quintana v. Tennessee Farmers Mut. Ins. Co.*, 774 S.W.2d 630 (Tenn.Ct.App.1989)).

See also Barrick v. State Farm Mut. Auto. Ins. Co., No. M2013-01773-COA-R3CV, 2014 WL 2970466, at *3 (Tenn. Ct. App. June 27, 2014):

> The trial court specified two undisputed facts in its order for which it based its decision to grant summary judgment in favor of State Farm and Mr. Jones. First, over the period of 20 or 25 years, the Barricks procured State Farm Insurance from Mr. Jones continuously. Second, the Barricks received copies of their insurance policies, declarations pages, and renewal notices during this time period. Correctly citing *Weiss v. State Farm Fire & Casualty Company*, 107 S.W.3d 503, 506 (Tenn.Ct.App.2001) and *Quintata v. Tennessee Farmer's Mutual Ins. Co.*, 774 S.W.2d 630 (Tenn.Ct.App.1989), the court concluded State Farm and Mr. Jones did not owe a duty to the Barricks, as an agent's duty ends when the agent obtains insurance for plaintiffs and properly provides copies, notices, and declarations.

See also Bell v. Wood Ins. Agency, 829 S.W.2d 153, 154 (Tenn. Ct. App. 1992):

> It is the universal rule that an agent or broker of insurance who is compensated for his services and undertakes to procure insurance for another and unjustifiably fails, will be held liable for any damage resulting. *Massengale v. Hicks*, 639 S.W.2d 659 (Tenn.App.1982). In a recent case where an insurance agent promised full coverage for an insured's business and obtained a policy providing less than full coverage, the Supreme Court in *Bill Brown Construction Co. v. Glen Falls Insurance Co.*, 818 S.W.2d 1 (Tenn.1991), held:
>
> "We think it matters not whether the insurer places limitations on coverage in the insuring or exclusionary clauses of its own contract:

> reasonable reliance to the detriment of the insured has precisely the same result." 818 S.W.2d at 11.
>
> Plaintiff repeatedly advised Williamson that coverage was needed for the entire inventory and the requirement was re-emphasized when the contract was renewed. The Chancellor in examining the policy found the numbers confusing, and was convinced that Mrs. Bell understood that she had $30,000.00 coverage for theft.

See also Morrison v. Allen, 338 S.W.3d 417, 426 (Tenn. 2011); *Allstate Insurance Company v. Tarrant*, 363 S.W.3d 508 (Tenn. 2012); *Wood v. Newman, Hayes & Dixon Insurance Agency*, 905 S.W.2d 559 (Tenn. 1995); *Ralph v. Pipkin*, 183 S.W.3d 362 (Tenn. App. 2005) perm. app. denied December 5, 2005; *Massengale v. Hicks*, 639 S.W.2d 659 (Tenn. App.), perm. app. denied October 4, 1982; Magnavox Company of Tennessee v. Boles & Hite Construction Company, 585 S.W.2d 622 (Tenn. App. 1979) cert. denied July 30, 1979; and *Sears, Roebuck & Co. v. W.H. Strey*, 512 F.Supp. 540 (E.D. Tenn. 1981).

Texas – Order Taker Standard

See Critchfield v. Smith, 2004 WL 948642, slip op. at 3, (Tex.App.-Tyler April 30, 2004, pet. denied):

> In 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. *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692 (Tex.App.-San Antonio 1998, no pet.) (citing *May v. United Servs.Ass'n of America*, 844 S.W.2d 666, 669 (Tex.1992)). 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. *Pickens v. Texas 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 also May v. United Servs. Ass'n of Am., 844 S.W.2d 666, 672–73 (Tex. 1992):

> Unquestionably, Wiley could have done a better job by ascertaining whether the Mays would have preferred to pay a higher premium for a nongroup policy without a comparable termination provision.
>
> However, under the facts of this case, we do not believe that this failure constitutes any evidence of negligence. There is no testimony that Faith May ever asked to see different policies or even expressed any dissatisfaction with the Double Eagle. Unlike the Sobotor customer, whose request for the "best available" policy implies a comparison to obtain the most complete coverage and makes the agent's failure to advise of policies with higher limits a material nondisclosure, the Mays conveyed no such wish to Wiley.
>
> Therefore, we hold that there is no evidence to support the Mays' first negligence theory.

See also Choucroun v. Sol L. Wisenberg Ins. Agency-Life & Health Div., Inc., No. 01-03-00637-CV, 2004 WL 2823147, at *7 (Tex. App. Dec. 9, 2004):

> In his petition, Choucroun alleged that "[a]s Plaintiffs' longstanding insurance agent, [WIA] had duties of trust and loyalty to Plaintiffs by [WIA]; they had a special relationship and fiduciary duties to Plaintiffs...." In its motion for summary judgment, WIA contended that it had no "special relationship" with Choucroun giving rise to a duty of good faith and fair dealing. We agree for two reasons.
>
> First, an insurance carrier owes its insured the duty of good faith and fair dealing because the contract between them is the result of unequal

> bargaining power and, by its nature, allows unscrupulous insurers to take advantage of their insured. *See Natividad v. Alexis*, 875 S.W.2d 695, 698 (Tex.1994). However, the "special relationship" created does not extend to those who are not parties to the insurance contract. *Id*.
>
> Second, there is no evidence in this case of a contract giving rise to a special relationship. Even though WIA was Choucroun's "long-standing insurance agent," there is no evidence in the record to warrant the extension of WIA's duties beyond that of any other insurance agent.
>
> In *Moore*, the plaintiff urged the court to extend his agent's liability beyond affirmative misrepresentations to the failure to disclose policy limitations. The court noted that, even if it were to extend the common-law duties of an agent beyond affirmative misrepresentations, it would not do so in that case because there was no evidence of any special relationship between *Moore* and his agent. 966 S.W.2d at 692. Specifically, the court noted that Moore could not recall discussing the contents of the policy with the agent and had merely renewed the policy year-to-year. *Id.*

See also Heritage Manor v. Peterson, 677 S.W.2d 689 (Tex. Civ. App. – Fort Worth 1984, writ ref'd n.r.e.); *Kitching v. Zamora*, 695 S.W.2d 553, 554 (Tex. 1985); *Higginbotham & Associates, Inc. v. Greer*, 738 S.W.2d 45 (Tex. App.–Texarkana 1987, writ denied); *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690 (Tex.App.–San Antonio 1998, no pet.); and *McCall v. Marshall* 398 S.W.2d 106, 109 (Tex. 1965).

Utah – Order Taker Standard

See Asael Farr & Sons Co. v. Truck Ins. Exch., 2008 UT App 315, ¶¶ 29-32, 193 P.3d 650, 660–61 (Agent did not owe a duty to procure insurance more than insured requested or to analyze insured's comprehensive needs).

See also Youngblood v. Auto-Owners, 2005 UT App 154, ¶ 21, 111 P.3d 829, aff'd 2007 UT 28, 158 P.3d 1088; and *Harris v. Albrecht*, 2004 UT 13, ¶ 30, 86 P.3d 728.

Vermont – Order Taker Standard

See Booska v. Hubbard Ins. Agency, Inc., 160 Vt. 305, 309–10, 627 A.2d 333, 335 (1993):

> The grant of summary judgment in favor of Hubbard and Wheeling was not error because neither the agency nor its employee had a duty to inquire about special circumstances within the insurance purchaser's control that might affect the quality or degree of protection available under a policy. Plaintiffs' argument makes clear that they expected defendant Wheeling to have foreseen the extent of the renovations, to have determined that the manner in which the renovations were conducted would at least temporarily reduce the amount recoverable under the policy, and to have foreseen that the result (actual-value coverage of the house during renovation) was one which, though not contrary to law or public policy, was such an unreasonable risk that it necessitated a special warning.
>
> Such far-reaching expectations would have imposed on Wheeling, not the duty of a reasonable insurance agent, but that of a soothsayer. The trial court correctly ruled that the duty of Hubbard and Wheeling was rather "to use reasonable *310 care and diligence to procure insurance that will meet the needs and wishes of the prospective insured, as stated by the insured." *Rocque v. Co-Operative Fire Ins. Ass'n*, 140 Vt. 321, 326, 438 A.2d 383, 386 (1981). Once a policy is procured as requested and is consistent with the applicable standard of care, no further duty is owed to the insured by the agent with respect to this insurance. *Id*. at 326-27, 438 A.2d at 386.
>
> Put another way, if we take all of plaintiffs' factual assertions about the length of time they were served by Hubbard and Wheeling as true, these circumstances do not support the legal theory of a "higher duty," in effect a fiduciary duty, between the agent and the purchaser.

See also Corbeil v. Pruco Life Ins. Co., 512 F. App'x 36, 38 (2d Cir. 2013); *Rocque v. Co-Operative Fire Ins. Ass 'n*, 140 Vt. 321, 326, 438 A.2d 383, 386 (1981); *Hill v. Grandey*, 132 Vt. 460, 321 A.2d 28 (1974); and Dodge v. Aetna Cas. & Sur. Co., 127 Vt. 409, 411, 250 A.2d 742, 744 (1969)

Virginia – Strict Breach of Contact Standard – No claims for negligence or breach of fiduciary duty.

See Filak v. George, 267 Va. 612, 618–19, 594 S.E.2d 610, 613–14 (2004):

> Further, contrary to the plaintiffs' assertion, George did not have a common law duty to the plaintiffs arising out of the parties' dealings. The law of torts provides redress only for the violation of certain common law and statutory duties involving the safety of persons and property, which are imposed to protect the broad interests of society. See Ward, 246 Va. at 324, 435 S.E.2d at 631; Sensenbrenner, 236 Va. at 425, 374 S.E.2d at 58; Blake Constr. Co. v. **614 Alley, 233 Va. 31, 34–35, 353 S.E.2d 724, 726 (1987); Kamlar Corp. v. Haley, 224 Va. 699, 706, 299 S.E.2d 514, 517 (1983). Therefore, we hold that the plaintiffs did not assert a valid claim of constructive fraud against George because whatever duties George may have assumed arose solely from the parties' alleged oral contract.

Washington – Order Taker Standard

See Lipscomb v. Farmers Ins. Co. of Washington, 142 Wash. App. 20, 28, 174 P.3d 1182, 1186 (2007) (footnotes and quotations omitted):

> For a claim of negligence, the plaintiff must establish duty, breach, causation, and damages. The existence of a duty is a question of law for the court, to be considered in light of public policy considerations. In the insurance context, an agent does not have a duty to procure a policy that affords the client complete liability protection. But such a duty may arise when there is a special relationship between the agent and the insured.

See also McClammy v. Cole, 158 Wash. App. 769, 773–74, 243 P.3d 932, 934 (2010):

> In a negligence action, a determination of whether a legal duty exists is initially a question of law for the court." *Gates v. Logan*, 71 Wash.App. 673, 676, 862 P.2d 134 (1993). Ordinarily, an insurance agent does not have a duty to advise the insureds as to the adequacy of their insurance policy coverage. *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wash.App. 524, 528, 754 P.2d 155 (1988). " '[T]he general duty of [reasonable] care which an insurance agent owes his client does not include the obligation to procure a policy affording the client complete liability protection.' " *Id.* (*quoting Jones v. Grewe*, 189 Cal.App.3d 950, 956, 234 Cal.Rptr. 717 (1987)). But, where there is a special relationship between the agent and the insured, such duty may arise. *Gates*, 71 Wash.App. at 677, 862 P.2d 134; *Lipscomb*, 142 Wash.App. at 28, 174 P.3d 1182. Absent this special relationship, "an insurance agent has no obligation to recommend ... liability limits higher than those selected by the insured." *Gates*, 71 Wash.App. at 678, 862 P.2d 134.

See also Gates v. Logan, 71 Wash. App. 673, 678, 862 P.2d 134, 136 (1993):

> Ordinarily the insured knows the extent of his personal assets and ability to pay increased premiums better than the insurance agent. *Suter*, 51 Wash.App. at 528, 754 P.2d 155. Another policy reason is that it is unrealistic to expect an agent to advise an insured as to every possible insurance option, a logical requirement if there is a general duty to advise as to specific policy limits. *See Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343 (1990).
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> * * *
>
> Mere knowledge of the insureds' annual income or notion as to their net worth does not constitute a "special circumstance" which imposes a duty on an insurance agent to advise as to increased policy limits. The amount of protection an insured wishes to obtain against any specific risk concerns the allocation of personal resources. It is a matter uniquely within the province of the insured.

See also Hellbaum v. Burwell and Morford, 1 Wn. App. 694, 463 P.2d 225 (1969); *Bates v. Bowles White & Co.*, 56 Wn.2d 374, 353 P.2d 663 (1960); *American States Ins. Co. v. Breesnee*, 49 Wn. App. 642, 745 P.2d 518 (1987); *Suter v. Virgil R. Lee & Son, Inc.*, 51 Wn. App 524, 754 P.2d 155 (1988); *Shows v. Pemberton*, 73 Wn. App. 107, 868 P.2d 164 (1994); *American Commerce Ins. Co. v. Ens*ley, 153 Wn. App. 31, 220 P.3d 215 (2009); *AAS-DMP Mgmt., L.P. Liquidating Trust v. Accordia Northwest, Inc.*, 115 Wn. App. 833, 63 P.3d 860 (2003); *Shah v. Allstate Ins. Co.*, 130 Wn. App. 74, 121 P.3d 1204 (2005); and *Peterson v. Big Bend Ins. Agency, Inc.*, 150 Wn. App. 504, 202 P.3d 372 (2009).

West Virginia – Order Taker Standard [Arguably No Special Relationship Exclusion]

See Aldridge v. Highland Ins. Co., No. 15-0658, 2016 WL 3369562, at *5 (W. Va. June 17, 2016), "We agree with the circuit court's conclusion that this Court has never recognized an insurance agent's 'duty to advise' an insured about coverage nor the 'special relationship' exception that would trigger such a duty."

See also Wilson Works, Inc. v. Great Am. Ins. Grp., No. 1:11-CV-85, 2012 WL 12960778, at *4 (N.D.W. Va. June 28, 2012); *Hill, Peterson, Carper, Bee & Deitzler v. XL Specialty Ins. Co.*, 261 F. Supp.2d 546 (S.D.W. Va. 2003); *Am. Equity Ins. Co. v. Lignetics, Inc.*, 284 F. Supp. 2d 399 (N.D.W. Va. 2003); and *American States Ins. Co. v. Surbaugh*, 745 S.E.2d 179 (W. Va. 2013).

Wisconsin – Order Taker Standard

See Poluk v. J.N. Manson Agency, Inc., 2002 WI App 286, ¶ 13, 258 Wis. 2d 725, 733–34, 653 N.W.2d 905, 909:

> We first address Manson's contention it owed no duty to the Estate. In order to sustain a claim for negligence, a plaintiff must show a duty owed by the defendant. *Lenz Sales & Serv. v. Wilson Mut. Ins. Co.*, 175 Wis.2d 249, 254, 499 N.W.2d 229 (Ct.App.1993). The question of an insurance agent's duty to an insured presents an issue of law we decide de novo. *Id*. An insurance agent has the duty to act in good faith and carry out the insured's instructions. *Nelson v. Davidson*, 155 Wis.2d 674, 681–82, 456 N.W.2d 343 (1990). This duty does not, however, impose the affirmative obligation, absent special circumstances, to advise a client regarding the availability or adequacy of coverage. *Id*. at 685, 456 N.W.2d 343.

See also Meyer v. Norgaard, 160 Wis.2d 794, 467 N.W.2d 141, 142 (Ct.App.1991) (the nature of an insurance agent's duty does not impose upon the agent the affirmative obligation, absent special circumstances, to inform about or recommend policy limits higher than those selected by the insured).

See also Nelson v. Davidson, 155 Wis.2d 674, 456 N.W.2d 343, 344 (1990); *Tackes v. Milwaukee Carpenters District Council Health Fund*, 164 Wis. 2d 707, 717, 476 N.W.2d 311 (Ct. App. 1991); *Lenz Sales & Service, Inc. v. Wilson*, 175 Wis. 2d 249, 257, 499 N.W.2d 229 (Ct. App. 1993); *Appleton Chinese Food Service, Inc. v. Murken Insurance, Inc.*, 185 Wis. 2d 791, 805, 519 N.W.2d 674 (Ct. App. 1994); and *Avery v. Diedrich*, 2007 WI 80, 301 Wis. 2d 693, 734 N.W.2d 159, 164.

Wyoming – Order Taker Standard

See Gordon v. Spectrum, Inc., 981 P.2d 488, 492 (Wyo. 1999):

> Wyoming recognizes that insurance agents have a general duty to act reasonably toward their insureds. If an agent fails to use reasonable care, the agent may be liable for negligence and any resulting damages. *Arrow Construction Co., Inc. v. Camp*, 827 P.2d 378, 381 (Wyo.1992); *Hursh Agency, Inc. v. Wigwam Homes, Inc.*, 664 P.2d 27, 32 (Wyo.1983). This court, however, has never addressed the issue of whether an agent or a broker has an ongoing duty to advise. Other jurisdictions have held that after an insurance agent or broker has secured insurance coverage for an insured, an agent or a broker has no continuing duty to advise, counsel, or direct the insured's coverage and generally has no affirmative duty to uncover or give advice regarding possible gaps in coverage. *See Blonsky v. Allstate Ins. Co.*, 128 Misc.2d 981, 491 N.Y.S.2d 895, 897-98 (N.Y.1985); *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 542 (Minn.1989).
>
> Despite that broad pronouncement, these courts recognize that an agent may have an increased duty to clients where a special relationship exists. *Blonsky v. Allstate Ins. Co.*, 491 N.Y.S.2d at 897; *Gabrielson v. Warnemunde*, 443 N.W.2d at 543-44; *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569-70 (Minn.App.1986). No one set of factors has emerged from the courts on the elements of a special relationship, yet there is agreement that the ordinary agent-insured relationship is not sufficient to constitute a special relationship which raises the agent's duty to a higher level. *Gabrielson v. Warnemunde*, 443 N.W.2d at 543, 545; *Nelson v. Davidson*, 155 Wis.2d 674, 456 N.W.2d 343, 346-47 (1990). Nucor directs us to no evidence showing the existence of anything other than an ordinary agent-insured relationship with its agent. Absent a special relationship, Nucor has failed to show that a genuine issue of material fact exists.

See also Hursh Agency, Inc. Wigwam Homes Inc., 664 P.2d 27, 32 (Wyo. 1983).

4) Recommendations to Prevent E&O Issues

Even though the standard of care applicable to insurance agents in most jurisdictions 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 and 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

5) *Summary Insurance Agent Standard of Care*

State	Standard	Other Considerations
Alabama	Order Taker Standard	
Alaska	Order Taker Standard	
Arizona	Case by Case Duty – No Standard Duty – Possibly heightened duty to advise on appropriate coverages	
Arkansas	Order Taker Standard	
California	Order Taker Standard	
Colorado	Order Taker Standard	
Connecticut	Heightened Duty to Advise of "kind and extent of desired coverage"	
Delaware	Order Taker Standard	
Florida	Order Taker Plus – Sometimes Heightened Duty to Advise Included	
Georgia	Order Taker Plus – Sometimes Heightened Duty to Advise Included	
Hawaii	Heightened Duty to Advise Sometimes Imposed	
Idaho	Heightened Duty to Advise	
Illinois	Order Taker Standard	Common law duty codified by statute
Indiana	Order Taker Standard	
Iowa	Order Taker Standard	Common law duty codified by statute
Kanas	Order Taker Standard	
Kentucky	Order Taker Standard	
Louisiana	Order Taker Standard	
Maine	Order Taker Standard	
Maryland	Order Taker Standard	
Massachusetts	Order Taker Standard	
Michigan	Arguably Heightened Duty to Advise if Independent Insurance Agent (Not Captive)	Conflicting Case Law – Law not settled
Minnesota	Order Taker Standard	
Mississippi	Order Taker Standard	
Missouri	Order Taker Standard	
Montana	Order Taker Standard	
Nebraska	Order Taker Standard	
Nevada	Order Taker Standard	
New Hampshire	Order Taker Standard	
New Jersey	Arguably Heightened Duty to Advise	2018 *Luzzi* case may have expanded duty

New Mexico	Order Taker Standard	limited case law
New York	Order Taker Standard	
North Carolina	Order Taker Standard	
North Dakota	Order Taker Standard	
Ohio	Order Taker Standard	
State	**Standard**	**Other Considerations**
Oklahoma	Order Taker Standard	
Oregon	Order Taker Standard (likely)	limited case law
Pennsylvania	Heightened Duty to Advise	
Rhode Island	Order Taker Standard (likely)	limited case law
South Carolina	Order Taker Standard	
South Dakota	Order Taker Standard	
Tennessee	Order Taker Standard	
Texas	Order Taker Standard	
Utah	Order Taker Standard	
Vermont	Order Taker Standard	
Virginia	Strictly Breach of Contract	
Washington	Order Taker Standard	
West Virginia	Order Taker Standard	Arguably No Special Relationship Exclusion
Wisconsin	Order Taker Standard	
Wyoming	Order Taker Standard	

Notes:

40 States have the Order Taker standard, with most having special relationship exclusion.

Six States arguably have automatic heightened duty applied (**Arizona** - case by case duty and there is no standard duty – possible heightened to advise on appropriate coverage**, Connecticut, Idaho, Michigan, New Jersey, Pennsylvania**).

Three States have middle of road sometimes automatic heightened duty applied (**Florida, Georgia, and Hawaii**).

Virginia has a strictly breach of contract standard of care.

Washington D.C. has a potential heightened duty to advise standard. *See Saylab v. Don Juan Rest., Inc.*, 332 F. Supp. 2d 134, 146-147 (D.D.C. 2004) (noting that "an insurance broker in the District of Columbia is held to a higher standard than the average salesman and may be required in some instances to be proactive in assisting a client").*See also Zitelman v. Metro. Ins. Agency, 482 A.2d 426, 427 FN1 (D.C. 1984); and Adkins & Ainley, Inc. v. Busada*, 270 A.2d 135, 136 (D.C. 1970) (quoting *Shea v. Jackson*, 245 A.2d 120, 121 (D.C. 1968). *Morrison v. MacNamara*, 407 A.2d 555, 560 (D.C. 1979).