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2020 Minnesota Insurance Agent E&O and Standard of Care Update

MINNESOTA EDITION

Brownson PLLC's annual summary of Minnesota Insurance Agent E&O and Standard of Care

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2020 Minnesota Insurance Agent E&O and Standard of Care Update By Aaron Simon[1]

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

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

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

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

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

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

See 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*.

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

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

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

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

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

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

TCI denied liability and moved for summary judgment, claiming that APM did not specifically request the additional coverage for lost rent and soft costs and that TCI and Gaard were not required to offer the additional coverage to APM. The district court granted TCI's motion, determining only one conclusion could be drawn from the facts. The court concluded APM failed to raise a genuine issue of material fact as to whether Gaard breached his duty to APM. The court also concluded Gaard's duty was not enhanced because APM failed to establish a genuine issue of material fact indicating a special relationship existed between APM and TCI. The North Dakota Supreme Court affirmed the district court on appeal.

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

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

2) *The Special Relationship Heightened Standard of Care Continues to be Rarely Invoked.*

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

> Factors to consider in determining whether special circumstances exist include whether: (1) the insurer knew the insured was unsophisticated in insurance matters; (2) the insurer knew the insured relied upon the insurer to provide appropriate coverage; and (3) the insurer knew the insured needed protection from a specific threat. *Gabrielson*, 443 N.W.2d at 544. The existence of a heightened duty is a question of law. *Id*. at 543 n.1.
>
> 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.

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

> First, this is not a situation involving disparate business experience. As the district court cogently observed, Grounded Air successfully managed its

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

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

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

> Appellants also argue that respondents agency and agent were negligent in selling a policy that lacked coverage for their office space. In establishing negligence, appellants must show (1) the existence of a duty; (2) a breach of the duty; (3) causation; and (4) damages. *Johnson v. Urie*, 405 N.W.2d 887, 891 (Minn.1987). An insurance agent has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn.1989) (alteration in original) (quotation omitted). This duty is limited to acting in good faith and following the insured's instructions. *Id.*

> Under special circumstances an agent may have a "duty to take some sort of affirmative action, rather than just follow the instructions of the client." *Id*. at 543–44. The facts of each case will dictate whether special circumstances create this extra duty. *Id*. at 543 n. 1. Facts to consider in determining whether special circumstances exist include whether the agent knew that the insured (1) was unsophisticated in insurance matters, (2) was relying on the agent to provide appropriate coverage, and (3) needed protection from a specific threat. *See id*. at 544.
>
> Appellants allege two acts of negligence: failure to inspect the property and failure to inform of no coverage due to vacancies. The district court correctly determined that respondents sold appellants the policy that they sought. This decision is supported by the record, as appellants sought a policy that was nearly identical to their previous policy and respondents sold appellants such policy. Therefore, respondents followed appellants' instructions. *See Gabrielson*, 443 N.W.2d at 543 (stating that an insurance agent must act in good faith and follow his client's instructions).
>
> Also, there are no special circumstances presented here. Kharbanda is a sophisticated property owner who is experienced with insurance matters. *Id*. at 544. Kharbanda was not relying on respondents to provide protection from a particular threat. *Id*. Kharbanda asked only for a policy that provided coverage identical to that of appellants' previous policy. Further, respondents are assumed to have knowledge of the policy's vacancy condition because Kharbanda provided the profit-loss statement that showed that much of the office space was vacant. Kharbanda did not indicate that there was concern that the office-structure basement might flood, especially when the record indicates that piping was sound and compliant. There are no coverage gaps in the policy provided for appellants.

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

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

> The primary issue in this case is whether respondent had a duty to inform appellant that workers' compensation insurance is mandatory in Minnesota. Generally, an insurance agent has a duty to exercise the skill and care which "a reasonably prudent person engaged in the insurance business [would] use under similar circumstances." *Gabrielson v. Warnemunde*, 443 N.W.2d 540, 543 (Minn.1989) (alteration in original). Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured's instructions. *Id*. An insurance consumer is typically responsible to educate himself concerning matters of insurance coverage. *Louwagie v. State Farm Fire & Cas. Co.*, 397 N.W.2d 567, 569 (Minn.App.1986), review denied (Minn. Feb. 13, 1987).

> But a special circumstance or relationship may impose a heightened duty on the agent to take some sort of affirmative action, rather than just follow the insured's instructions. *Gabrielson*, 443 N.W.2d at 543–44; *see Johnson*, 405 N.W.2d at 889 (holding a duty to "offer, advise or furnish insurance coverage" may arise from the "circumstances of the transaction and the relationship of the agent vis-a-vis the insured"); *see also Osendorf v. Am. Family Ins. Co.*, 318 N.W.2d 237, 238 (Minn.1982) (stating that agent's admitted obligation to update insurance contract supported finding of negligence); *Atwater Creamery Co. v. W. Nat'l Mut. Ins. Co.*, 366 N.W.2d 271, 279 (Minn.1985) (holding that facts may give rise to a duty to offer additional coverage).
>
> Whether respondent had a duty to advise appellant that workers' compensation insurance is required in Minnesota is a question of law. *See Johnson*, 405 N.W.2d at 891 n. 5. When the existence of a duty turns upon disputed facts, the fact-finder must determine the underlying facts. Gabrielson, 443 N.W.2d at 543 n. 1.

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

In ***Philter***, the Minnesota Court of Appeals went on to find no special relationship existed stating that the "record does not support that the agent knew appellant needed protection from the specific risk that resulted in the loss, and appellant never asked respondent to examine its exposure. Because appellant's lack of sophistication as to insurance matters and its reliance on respondent also do not support the legal determination that special circumstances existed, respondent **did not owe appellant a heightened duty of care.**" *Id.* at *6. (Emphasis added).

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

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

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

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

vii. 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 can provide additional sales opportunities.