

Agents E&O Standard of Care Project Tennessee Survey



To gain a deeper understanding of the differing agent duties and standard of care by state, the Big “I” Professional Liability Program and Swiss Re Corporate Solutions surveyed their panel counsel attorneys. Each attorney was asked to draft a brief synopsis outlining the agents’ standard of care in their state. They were also asked to identify and include a short summary of the landmark cases. In addition, many of the summaries include sample case studies emphasizing how legal duties and issues with standard of care effected the outcome. Finally, recent trends in errors in the state may also be included.

This risk management information is a value-added service of the Big “I” Professional Liability Program and Swiss Re Corporate Solutions. For more risk management information and tools visit www.iiaba.net/EOHappens. On the specific topic of agents’ standard of care check out this article from the Hassett Law firm, our E&O seminar module, and this risk management webinar.



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INSURANCE AGENTS AND BROKERS' STANDARD OF CARE IN TENNESSEE

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Summary of Standard of Care

An insurance agent in Tennessee who undertakes to procure insurance for another and unjustifiably, through fault or neglect, fails to do so will be held liable for any damages resulting therefrom. A failure to procure claim may be based on either negligence or breach of contract.

The Supreme Court of Tennessee, discussing a failure to procure claim based upon breach of contract, set out the essential criteria:

- (1) an undertaking or agreement by the agent or broker to procure insurance;
- (2) the agent's or broker's failure to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly of any such failure; and
- (3) that the agent's or broker's actions warranted the client's assumption that he or she was properly insured.

Morrison v. Allen, 338 S.W.3d 417, 426 (Tenn. 2011). The case involved a life insurance policy issued by American General upon a signed application indicating the insured had never been convicted of driving under the influence. American General denied payment of the \$1,000,000.00 benefit based upon a misrepresentation with regard to that question. The widow testified her husband would have provided correct information if asked and that he had signed the application completed by the agent without reading it. The Trial Court held the agent had breached the employment contract by failing to procure an enforceable life insurance policy and the holding was sustained by the Court of Appeals and the Supreme Court of Tennessee.

Additional Cases

- Allstate Insurance Company v. Tarrant, 363 S.W.3d 508 (Tenn. 2012). Customer testified he instructed his insurance agent to place his van on a commercial policy with a liability limit of \$500,000.00. The agent testified she received an instruction to move the van from the commercial policy to the personal policy with a liability limit of \$100,000.00. When an accident occurred, Allstate Insurance Company filed a declaratory judgment action seeking a ruling the personal policy coverage applied. The Court of Appeals held Allstate Insurance Company was bound by the customer's instruction to the insurance agent even though the customer had received a letter and premium bills showing the van was covered under the personal policy. That ruling was affirmed by the Tennessee Supreme Court.
- Wood v. Newman, Hayes & Dixon Insurance Agency, 905 S.W.2d 559 (Tenn. 1995). The Supreme Court discussed an insurance agent's duty to notify his client concerning a replacement policy which changed coverage. The insurance agent testified he was unable to

renew the customers' all risk policy for their marina but secured a named perils policy instead. When the marina was damaged by ice and snow, the customers learned there was no coverage. The agency was held liable on a negligence theory for failing to obtain a replacement policy with the same coverage or notify the customer it was not possible to do so.

- Ralph v. Pipkin, 183 S.W.3d 362 (Tenn. App. 2005) perm. app. denied December 5, 2005. Mr. Ralph was sued for patent infringement and breach of contract arising out of the use of saved seed which had been genetically altered. Grange Mutual refused to defend and indemnify. Ralph sued his insurance agent. The agent's Motion for Summary Judgment was sustained. The Court of Appeals affirmed finding there was no misrepresentation or fraud and that there was no negligence because Monsanto's patent infringement claim against Ralph was not foreseeable when the policy was issued.
- Weiss v. State Farm Fire and Casualty Company, 107 S.W.3d 503 (Tenn. App. 2001) perm. app. denied February 11, 2002. Mr. Weiss purchased an automobile insurance policy from State Farm with liability limits of \$100,000/\$300,000 and the same amount of U/M coverage. Mr. Weiss also purchased a personal liability umbrella policy in the amount of \$1,000,000 but specifically rejected U/M coverage with the umbrella policy. Mrs. Weiss was involved in a serious accident and Mr. and Mrs. Weiss sued State Farm and their insurance agent claiming the agent owed a duty to Mrs. Weiss to make sure she understood the availability of uninsured motorist coverage with the umbrella policy. The Trial Court dismissed the case on Motion for Summary Judgment which was sustained on appeal. The Court of Appeals noted the agent did not owe a duty to Mr. and Mrs. Weiss to sell them more coverage than they requested or selected.
- Bell v. Wood Insurance Agency, 829 S.W.2d 153 (Tenn. App. 1992). After a loss of inventory due to burglary of their video store, customers learned the policy provided only \$1,000.00 in coverage. Customer testified she had repeatedly told her agent the theft coverage must protect inventory worth \$30,000.00. Even though the policy had been provided to the customers, an award of damages against the agency by the Trial Court was affirmed by the Court of Appeals.
- Massengale v. Hicks, 639 S.W.2d 659 (Tenn. App.), perm. app. denied October 4, 1982. Customer received notice of non-renewal of his automobile policy procured by agent. Proof showed agent was advised of the non-renewal and indicated he would "take care of it." The Court of Appeals found there was an abundance of evidence from which the jury could find the agent had agreed to procure replacement insurance and was liable for damages sustained in an automobile accident when he failed to do so.
- Magnavox Company of Tennessee v. Boles & Hite Construction Company, 585 S.W.2d 622 (Tenn. App. 1979) cert. denied July 30, 1979. Gulf Insurance Company denied coverage to Boles & Hite based on a contractual liability exclusion. Where the agent was familiar with Boles & Hite's operations, including the existence and contents of contracts with Magnavox, and undertook to provide complete liability coverage, the agent had a duty to ascertain the required coverages and should have either secured coverage for contractual liability or called the exposure to the attention of the customer for acceptance or rejection.
- Sears, Roebuck & Co. v. W.H. Strey, 512 F.Supp. 540 (E.D. Tenn. 1981). Mr. Strey fully advised his agent concerning his contract with Sears and requested "general liability coverage." A policy was procured with a completed operations hazard exclusion. The Court

found the agent had failed to obtain the proper insurance and the insurance company was, accordingly, estopped to deny coverage.

Case Studies

Case Study 1

- a. **Line of coverage involved:** Property coverage
- b. **Position of person in the agency involved:** Producer
- c. **Personal or Commercial Lines:** Commercial Lines
- d. **Type of coverage involved:** Theft
- e. **Procedural or knowledge-based error:** Procedural error
- f. **Claimant Allegation:** Claimant alleged replacement policy contained theft exclusion not present in previous policies.
- g. **Settlement or Trial:** Settled
- h. **Description of alleged error:** Claimant sustained a theft loss. The insurance company denied coverage based upon a theft exclusion. The claimant alleged the exclusion was included in a replacement policy without his knowledge or permission.
- i. **Tip to avoid claim:** A discussion with the customer about the change in coverage followed by a confirming letter may have avoided the claim.
- j. **Summary of case:** The customer purchased a vacant commercial building and procured coverage through the agent. For several years, policies were provided which included theft coverage. A change in carriers resulted in a policy being issued with a theft exclusion. The agent failed to discuss the change with the customer and could not produce documentation the customer had been furnished a copy of the policy.

Case Study 2

- a. **Line of coverage involved:** Automobile and umbrella coverage
- b. **Position of person in the agency involved:** Producer
- c. **Personal or Commercial Lines:** Personal Lines
- d. **Type of coverage involved:** Uninsured motorist
- e. **Procedural or knowledge-based error:** Knowledge-based error
- f. **Claimant Allegation:** Claimant alleged a gap in the uninsured motorist coverage provided by the automobile policy and the umbrella policy.
- g. **Settlement or Trial:** Voluntarily dismissed by claimants
- h. **Description of alleged error:** Umbrella policy required automobile uninsured motorist coverage with a limit of \$1,000,000. Automobile U/M limit of \$300,000 created a gap in coverage.
- i. **Tip to avoid claim:** Clarification with the underwriter concerning limits required may have prevented the claim.
- j. **Summary of case:** Agent placed automobile policy and umbrella policy for customer. Automobile policy provided uninsured motorist coverage with a limit of \$300,000.

However, umbrella policy required uninsured motorist coverage of \$1,000,000. The customer was involved in a serious accident. The customer filed an action against the insurance company and agency upon being informed only \$300,000 in uninsured motorist coverage was available. Fortunately, the customer's tort action was settled for \$300,000 and the action against the insurance company and agency dismissed.

Case Study 3

- a. **Line of coverage involved:** Property coverage
- b. **Position of person in the agency involved:** Producer
- c. **Personal or Commercial Lines:** Commercial Lines
- d. **Type of coverage involved:** Builder's risk
- e. **Procedural or knowledge-based error:** Procedural error
- f. **Claimant Allegation:** Claimant alleged builder's risk policy was requested to insure the existing structure and improvements but policy only provided coverage for improvements.
- g. **Settlement or Trial:** Insurance company settled with customer and insurance company's indemnity action against agent dismissed.
- h. **Description of alleged error:** The claimant alleged the producer failed to procure a builder's risk policy providing coverage for the existing structure and any improvements. When the property was destroyed by fire, the insurance company offered to pay for the improvements.
- i. **Tip to avoid claim:** A discussion with the customer concerning the coverage needed and careful selection of an appropriate policy may have avoided the claim.
- j. **Summary of case:** The customer was in the business of purchasing houses and renovating them for resale. He had dealt with the agency for some years. He requested a builder's risk policy to cover a recently purchased house with the understanding that he would be renovating the house. The builder's risk policy was issued with coverage for improvements but no coverage for the existing structure. The insurance company filed a declaratory judgment action against the customer and the agency. The insurance company paid the customer in full for the loss and then sought indemnification from the agency. Fortunately, the insurance company acknowledged it would have provided coverage for the existing structure for a small additional premium and the court limited recovery to the additional premium.