

Agents E&O Standard of Care Project Florida 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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Florida Insurance Agent Standard of Care

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Florida Insurance Agent Standard of Care

A Florida insurance agent has the following standard of care: An insurance agent¹ owes a duty 1) to use reasonable skill and care to procure insurance that the insured specifically requests or to timely notify the insured if such coverage is unavailable, 2) when providing insurance-related advice, to do so in a non-negligent manner, 3) to obtain insurance coverage which is clearly warranted by the insured's expressed needs, and 4) as a fiduciary, to inform and explain the coverage secured at the insured's direction and to make no unilateral changes without advising the insured. In addition, a recent decision from a federal court has articulated a duty to advise where the agent and insured share a "special relationship." An insurance agent may also owe a standard of care to the insurer to act within the scope of authority granted by the insurer.

I. LANDMARK DECISIONS: THE STANDARD OF CARE TO THE INSURED

Seascope of Hickory v. Associated Insurance Services

The court in *Seascope of Hickory Point Condo. Ass'n, Inc., Phase III v. Associated Ins. Serv., Inc.*, 443 So. 2d 488 (1984) first expanded the duty of an insurance agent beyond the "order-taker" standard.² The insured condominium had for years purchased all of its insurance through an agency that marketed itself as, "providing professional insurance planning." On several occasions, the insured asked the agency for seawall coverage and, on each occasion, was told that seawall coverage was not available. Later, the uninsured seawall was destroyed in a storm. After the loss, the insured learned that seawall coverage was widely available. The insured sued the agency alleging that, but for the agency's negligent advice, it would have had coverage. Relying on decisions from other jurisdictions, the appellate court held that under certain circumstances an agent may have a duty to volunteer advice. The court found that the relationship between the agency and the insured was "not materially different from that which exists when an injured person seeks advice from a lawyer with respect to whether or not he has a cause of action for damages", holding that the insured sufficiently alleged a relationship that created a duty to use reasonable care in rendering insurance advice.

Seascope fundamentally expanded the Florida agent's standard of care by creating a duty to render accurate advice. *Seascope* held that the scope of the agent's duty would be dependent upon the relationship between the parties. While the court did not elaborate specific criteria for the requisite relationship to exist, it emphasized the long-standing relationship with the agent and the agent's marketing of "professional" services.

Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc.

The court in *Warehouse Foods, Inc. v. Corporate Risk Management Services, Inc.*, 530 So. 2d 442 (Fla. 1st DCA 1988) held that an agent may be liable for a negligent failure to obtain coverage which is specifically requested or clearly warranted by the insured's expressed needs. The insured alleged that it had relied upon the agent's expertise and that the agent had advised that it was "fully covered ... and did not need any other coverage." Nonetheless, the insured suffered uncovered damages from a power failure during a hurricane because the policy only provided coverage in conjunction with physical damage to buildings, which did not occur. In finding a duty, the court noted that the insured had expressed a desire to be "fully insured" and specifically asked about acts of God, and the agent repeatedly advised that the insurance contained all the coverages they needed, which representation the insured relied upon. Expanding on *Seascope*, the court held that when an insured reasonably relies upon an agent's claimed expertise and advice, liability may be based upon the agent's negligent failure to properly advise the insured. The *Warehouse Foods* decision created, under certain circumstances, a duty to procure coverage "clearly warranted by the insured's expressed needs."

¹ Although there are distinctions under Florida law between an insurance agent and an insurance broker, this article will use the term "agent" universally. This article will also use the term "insured" universally to include "client."

² Under the "order taker" standard, an agent was only liable to an insured if the agent failed to procure insurance specifically requested by the insured or failed to notify the insured that such insurance was unavailable. *Cat 'N Fiddle, Inc. v. Century Ins. Co.*, 200 So. 2d 208, 210-211 (Fla. 3d 1967).

Adams v. Aetna Casualty & Surety

The court in *Adams v. Aetna Cas. & Sur. Co.*, 574 So. 2d 1142 (Fla. 1st DCA 1991) further expanded the insurance agent's duties to include the duty to recommend limits. The agent procured a motor vehicle policy. The insured was involved in an accident with an underinsured driver and made a UM claim; however, the policy's UM limits were significantly lower than the bodily injury limits. The insured sued the agent alleging the agent should have advised of the availability and advisability of higher UM limits.

The agent's defense relied on four signed UM selection/rejection forms which arguably established a knowing selection of lower UM limits.³ The court disagreed, holding that the forms did not prove that the insured understood the scope and purpose of UM coverage. The court held that, even if the insured were found to have intentionally selected the lower limits, the agent could still potentially be liable for failing to advise of the appropriate limits and the need for the coverage. The court's expansive holding states: "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 agent's undertaking."

As in *Seascope* and *Warehouse Foods*, the Adams court did not articulate a test or set of criteria that would elevate the agent's standard of care to include a duty to advise of particular insurance and the desirability of higher limits.

Wachovia Ins. Services v. Toomey

In *Wachovia Ins. Services, Inc. v. Toomey*, 994 So. 2d 980 (Fla. 2008), the Florida Supreme Court held that an insurance agent has fiduciary duties to the insured. While the primary issue in *Wachovia* was whether the claims against the agent were properly assigned, the court nonetheless discussed the duties an agent owes the insured. The court noted that the relationship between an insurance agent and its insured is similar to that of an attorney and a client (although less personal), holding that insurance agents will often have both a fiduciary duty to their insured and a common law duty to properly procure requested insurance coverage. The fiduciary duty imposes an obligation on the agent to inform and explain the coverage it has secured at the insured's direction and, in the event the agent makes unilateral changes to coverage, the agent is obligated to advise the insured of those changes. The court concluded that while the fiduciary and common law duties sometime overlap, they are two distinct causes of action and are not necessarily co-extensive.

Tiara Condominium Ass'n v. Marsh

The United States District Court for the Southern District of Florida in the case of *Tiara Condominium Ass'n v. Marsh, USA, Inc.*, --- F. Supp. 2d ---, 2014 WL 109140, in January 2014, held for the first time that a Florida insurance agent could have an affirmative duty to advise of the types and amounts of insurance "reasonably and prudently needed to meet the insured's complete needs". No court applying Florida law had previously imposed a specific duty to advise nor provided a list of the factual criteria which might establish the "special relationship" (though the "special relationship" standard had previously been articulated in numerous other jurisdictions). Under *Tiara*, if there is a "special relationship," then the agent may have an affirmative duty to recommend the amounts and types of insurance reasonably necessary to protect the insured's interests.

³ Subsequent to *Adams*, the Florida legislature amended Fla. Stat. 627.727 such that now, if an insured executes a UM/UIM selection form, it creates a conclusive presumption that the selection was knowing and informed. See *Mitleider v. Brier Grieves Agency, Inc.*, 53 So. 3d 410 (Fla. 4th DCA 2011). Fla. Stat. 627.727 only applies to UM/UIM coverage; therefore, *Adams* has not been overruled except as to UM coverage.

In 2004, an agent procured a windstorm policy for an ocean front condominium with a limit of almost \$50 million. When several severe storms caused over \$100 million in damages, the insured condominium filed suit against the agent asserting claims for breach of fiduciary duty and negligence. The agent argued that it was simply acting on the insured's orders when it procured the windstorm policy and could not be liable because it had no duty to advise regarding prudent policy limits. Importantly, it was undisputed that the agent relied upon the insured's appraisal when recommending limits of coverage.

The court addressed what it described as a “novel question” of Florida law: When an insurance agent shares a “special relationship” with its insured, is the agent subject to an extra-contractual enhanced duty of care to advise its insured about the amount of coverage prudently needed to meet its complete insurance needs? The court answered the question affirmatively. Noting that there was not any Florida case on point, the *Tiara* court looked to a “well-developed” law from other jurisdictions, which finds a duty to advise regarding proper limits can arise if the agent and insured have a “special relationship.” The court found that a “special relationship” that gives rise to an enhanced duty to advise can arise under a number of non-exclusive factual scenarios including:

- 1) Where the agent assumes the responsibility of selecting the appropriate insurance policy for the insured (by express agreement or promise);
- 2) Where the agent holds itself out as having an expertise in a given field and the insured relies upon that expertise;
- 3) Where the agent exercises broad discretion over the insurance needs;
- 4) Where the agent is intimately involved in the insured's business affairs or regularly gives the insured advice or assistance in maintaining proper coverage;
- 5) Where there is a substantial length and depth to the relationship;
- 6) Where the agent volunteers information about the insured's needs; and
- 7) Where the agent is paid additional compensation for advisory services.

Even before *Tiara* it was clear that Florida law imposed a duty to advise an insured under certain factual circumstances. The *Tiara* decision arguably expands the duty incrementally by declaring a duty to advise where there is a “special relationship”. *Tiara* also, for the first time in Florida, provides a non-exclusive list of criteria a fact-finder might consider in determining whether a “special relationship” exists. It remains an open question whether the state courts of Florida will now adopt and follow *Tiara*.

II. STANDARD OF CARE TO AN INSURER

A Florida agent also owes a duty to the insurer. *Crawford v. DiMico*, 216 So. 2d 769 (Fla. 4th DCA 1968). If an insurer suffers a loss as a result of the agent's negligence, the agent must indemnify the insurer for the full amount of those damages. An agent's obligation to indemnify an insurer typically arises where the agent exceeds the scope of the authority granted by the insurer. For example, in *Crawford*, an insurer authorized an agent to bind insurance on boats if the value was under \$5,000 and the boat was less than 3 years old. Notwithstanding this limitation, the agent bound a policy on a boat that met neither criteria. The boat subsequently sank and a jury determined that coverage existed despite the carrier's denial. Although the jury returned a verdict in favor of the agent, on appeal the court held that if an agent binds a contract of insurance without authorization, the agent must fully indemnify the insurer for the loss.⁴

An insurer does not, however, have an unlimited right to indemnification. Instead, Florida courts note that the agent is only liable for that portion of the damages caused by the agent's unauthorized act. *American Chambers Life Ins. Co. v. Power*, 690 So. 2d 683 (Fla. 4th DCA 1997).

⁴ In addition to arising from the principal agent relationship, a duty to indemnify also commonly arises from a contractual agreement between the agent and insurer.

The insurer remains liable for any additional damages caused by its own actions. *Id.* (although agent had duty to indemnify, insurer remained liable for its own bad faith conduct); *see also Bankers Ins. Co. v. American Team Managers, Inc.*, 2012 WL 2179117 (M.D. Fla.).

IV. CONCLUSION

Whether the Florida state courts will adopt *Tiara's* “special relationship” test remains an open question, but this seems likely given historical trends. Nevertheless, Florida agents are no longer protected by the “order taker” standard, e.g. the agent was merely complying with the insured’s specific request for coverage. Agents need to understand that they can create a “special relationship” by holding themselves out as “professionals” through marketing efforts, websites and other social media, by routinely providing insurance advice, by collecting additional fees for risk management services and even (innocently) by enjoying a long-term relationship with their insured. Those agents in a “special relationship” will likely be found to have an enhanced duty to advise their insureds regarding the availability and desirability of particular insurance coverage and the appropriate limits necessary to protect the insured. Such agents should protect themselves by maintaining clear documentation of the insurance offered and the insured’s rejection of the same. Agents must also consistently follow through on their promise of professional care by refusing to delegate responsibility and remaining engaged in the marketing efforts and personally communicating with clients at each renewal.

III. CASE STUDIES

Case Study #1

- a. **Line of Coverage Involved:** Commercial Property.
- b. **Position of the Person in the Agency Involved:** Agent (220 License).
- c. **Personal or Commercial Lines:** Commercial Lines.
- d. **Type of Coverage Involved:** Commercial Property.
- e. **Procedural or Knowledge-Based Error:** Agent allegedly failed to recommend “adequate” property limits for a commercial building.
- f. **Claimant Allegation:** Negligent Procurement.
- g. **Settlement or Trial:** Dismissal on dispositive motion in favor of agency.
- h. **Description of Alleged Error:** After a commercial building was destroyed by fire, the agency was sued for the difference between the “true” value of the building and the amount of coverage actually procured by the agency.
- i. **Tip to Avoid the Claim:** Agents should clearly communicate to the insured that they will not assist in valuing the property for the purposes of insurance coverage amounts and advise the insured of the availability of additional coverage.
- j. **Summary of the Case:** After a commercial building was destroyed in a fire, the owners sued their agency claiming the coverage procured was inadequate to replace the building. Evidence developed in discovery demonstrated that the decision regarding the amount of coverage was made by the insured and not based on a recommendation from the agent. The Court granted judgment in favor of the agency based on a lack of duty to procure adequate coverage. This case was decided before the recent decision in *Tiara* suggested that there might be a broader duty on the part of an agency to recommend limits if there was a “special relationship” between the agency and the insured. If the court had followed *Tiara*, it is likely that a trial would have been required to determine whether a “special relationship” sufficient to trigger an enhanced duty existed.

Case Study # 2

- a. **Line of Coverage Involved:** Professional Liability.
- b. **Position of the Person in the Agency Involved:** Agent (220 License).
- c. **Personal or Commercial Lines:** Commercial Lines.
- d. **Type of Coverage Involved:** Professional Liability.
- e. **Procedural or Knowledge-Based Error:** Agent allegedly failed to accurately explain the application for professional liability policy such that insured’s misrepresentations resulted in coverage denial.
- f. **Claimant Allegation:** Alleged negligence and breach of fiduciary duty.
- g. **Settlement or Trial:** Dismissal on dispositive motion in favor of the agency.
- h. **Description of Alleged Error:** Insured claimed that the agency failed to accurately explain the application and alleged it was the agency’s fault that the carrier denied coverage for application misrepresentation.
- i. **Tip to Avoid the Claim:** The agency had a well-documented file that contained a signed copy of the application and other documentation that established the insured’s involvement in and approval of the submitted application.
- j. **Summary of the Case:** The insured professional failed to accurately respond to several questions on an application for professional liability insurance and failed to disclose the existence of a possible claim for malpractice. When suit was subsequently filed, the carrier denied coverage due to these misstatements on the application. The insured professional sued the agency claiming the agency’s negligence caused the denial. The agency obtained an abatement pending resolution of the coverage action and thereafter a dismissal because the Court in the coverage suit determined it was the insured’s fault for failing to disclose the potential claim on the application.

Case Study # 3

- a. **Line of Coverage Involved:** Automobile Liability.
- b. **Position of the Person in the Agency Involved:** Agent (220 License).
- c. **Personal or Commercial Lines:** Commercial Lines.
- d. **Type of Coverage Involved:** Uninsured/Underinsured Motorist (UM/UIM).
- e. **Procedural or Knowledge-Based Error:** Agent allegedly failed to procure stacked UM/UIM coverage for a newly acquired personal motorcycle.
- f. **Claimant Allegation:** Negligent procurement and breach of fiduciary duty.
- g. **Settlement or Trial:** Settlement.
- h. **Description of Alleged Error:** Insured's widow alleged that the agency failed to procure stacked UM/UIM coverage for a personal motorcycle on the insured's commercial automobile policy.
- i. **Tip to Avoid the Claim:** Agents should follow up with clients at each renewal in writing to determine if new vehicles were purchased and to confirm existing coverages.
- j. **Summary of the Case:** The agency procured personal and auto insurance for the insured for many years. The insured's motorcycles were placed on a different policy from his other vehicles for cost savings. The auto policy renewed automatically from the carrier and over the years the insured disclosed additional motorcycles to the auto carrier without informing the agent. When the insured was killed in a motorcycle accident with a UM driver, the widow sued for negligence claiming the agency failed to list the motorcycle on the auto policy and to obtain stacked benefits. A lack of documentation combined with the threat of significant damages led to a settlement of this suit.

Case Study # 4

- a. **Line of Coverage Involved:** Commercial Property and Casualty.
- b. **Position of the Person in the Agency Involved:** Agent (220 and 440 Licenses).
- c. **Personal or Commercial Lines:** Commercial Lines.
- d. **Type of Coverage Involved:** Liability.
- e. **Procedural or Knowledge Based Error:** Agent allegedly failed to obtain insurance necessary to protect the insured from liability.
- f. **Claimant Allegation:** Negligent procurement, fraud, and breach of fiduciary duty.
- g. **Settlement or Trial:** Settlement.
- h. **Description of Alleged Error:** Agent allegedly failed to advise insured regarding the availability of coverage necessary to protect the insured's interests that the agent should have known was necessary due to Certificates of Insurance issued in connection with the policy.
- i. **Tip to Avoid New Claim:** Carefully review all Certificates of Insurance issued to ensure accuracy and to ensure they are consistent with the policy coverage.
- j. **Summary of the Case:** The agent procured coverage for a commercial client who incorrectly described his line of business. The insured settled with the injured party and assigned his claims against the agent. The assignee sued alleging that that the agent failed to advise of appropriate coverage when the agent should have known such coverage was necessary because of several Certificates of Insurance issued potentially gave the agent notice that the coverage procured was incomplete. The case ultimately settled, in part because of questions about the Certificates of Insurance and in part, because the underlying facts were tragic and trial would have been a considerable risk.

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