

# Agents E&O Standard of Care Project

## Georgia 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](http://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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## **Agent Liability In Georgia**

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Under Georgia law, the insured is bound by what he signs. Prudential Ins. Co. v. Perry, 121 Ga. App. 618, 622 (1970) (the applicant is bound by the information recorded on the application, whether written by him or by the agent). As a practical matter, this is also the best evidence of what the insured sought from the agent, preventing opportunistic insureds from later claiming they sought different coverage than appears on the application. As long as the agent procures the policy requested, Georgia does not hold the agent liable for failure to procure any other coverage. Georgia law does not permit insureds to cherry-pick their insurance coverage after the fact.

Furthermore, agents are not liable to insureds even when they fail to procure the coverage sought because insureds are under a duty to read the policy to insure the coverage procured was what they sought. In order to sustain a claim for failure to procure insurance, an insured first has the duty to read and examine the insurance policy to determine whether the coverage requested as procured. Greene v. Lilburn Ins. Agency, Inc., 191 Ga. App. 829 (1989). Where an agent procures a policy and the insured fails to read it, the agent is insulated from liability even though he may have undertaken, and failed, to obtain ‘full coverage.’ Atlanta Women’s Club v. Washburne, 207 Ga. App. 3, 4 (1992). Insureds who fail to read the policy cannot claim the agent failed to procure coverage, unless they can demonstrate an exception to the duty-to-read rule applies. See England v. Georgia-Florida Co., 198 Ga. App. 704 (1991) (summary judgment to agency affirmed in insured’s failure to procure claim, where insured failed to read the policy and no exception applied).

There are two limited exceptions to the duty-to-read rule. First, under the so-called expert exception, if the agent (1) holds himself out as an expert; (2) performs expert services for the insured (3) upon which the insured actually relies, then the insured is relieved of the duty to minutely examine the policy language, unless such an examination would make it readily apparent that the coverage requested was not issued. MacIntyre & Edwards, Inc. v. Rich, 267 Ga. App. 78, 80 (2004). The second exception may arise where there is a “special relationship of trust” between the agent and insured that prevents or excuses the insured of his duty to exercise ordinary diligence. Canales v. Wilson Southland Ins. Agency, Inc., 261 Ga. App. 529, 531 (2003).

Where the agent acting in a fiduciary relationship with the insured holds himself out as an expert and performs expert services on behalf of the insured under circumstances in which the insured must rely upon the expertise of the agent, an exception to the duty-to read rule may exist. Washburne, 207 Ga. App. at 4. The expert exception requires evidence that the agent performed expert services, in addition to evidence that he held himself out as an expert. Greene, 191 Ga. App. at 829. Where the agent held himself out as an expert and performed expert services on behalf of the insured, such that the insured had to rely on the agent’s expertise, the agent could be liable for negligently performing those expert services undertaken. See Wright Body Works v. Columbus Interstate Ins. Agency, 233 Ga. 268 (1974). The rule in Wright, however, requires

action and a meeting of the minds about expert services. Id. at 270. The Court held that where the agent had agreed to and had undertaken to do more than just issue a policy, the agent had a duty not to carry out the additional actions negligently. Id. at 271; cf. Jim Anderson & Co. v. ParTraining Corp., 216 Ga. App. 344, 345 (1995) (where agent was provided financial information to determine requested coverage and then failed to procure requested coverage, summary judgment for agent was inappropriate).

In McCoury v. Allstate Ins. Co., 254 Ga. App. 27 (2002), the court held the expert exception could apply where the evidence showed insured relied on agent's expertise to determine coverage. There, the insured presented evidence that he requested full or adequate replacement coverage. Id. at 27, 29; see e.g., Underwriters Adjusting Co. v. Knight, Morris & Templeton Ins. Agency, Inc., 193 Ga. App. 759 (reversible error not to grant summary judgment where agent did not provide any expert service and insured agreed to policy limit).

A special relationship of trust exists "where one party is so situated as to exercise a controlling influence over the will, conduct, and interest of another or where, from a similar relationship of mutual confidence the law requires the utmost good faith." Canales, 261 Ga. App. at 531 (confidential relationship not shown where plaintiff claimed he was unsophisticated about insurance, had prior dealings with the defendant, and did not speak English). The mere fact that one reposes trust and confidence in another does not create a special relationship; a confidential relationship exists where one party must rely on another's judgment. Id.

In Traina Enterp. v. Cord & Wilburn, Inc., 289 Ga. App. 833 (2008), the Court held that a special relationship of trust could exist based of the agent's voluntary undertaking. Consistent with Wright, where the agent does something more, the agent must do it non-negligently. In Traina, there was evidence that the agent had a voluntary practice of preparing a policy summary. Id. at 838. When the carrier made the coverage change, the agent failed to change his policy summary, so that when the insured reviewed the policy summary, he thought he still had the coverage. This court found that a special relationship of trust existed. because of the agent's voluntary practice of preparing policy summary. "Once [the agent] undertook that obligation, he was required to perform it in a nonnegligent manner." Id. at 838.

Even if agents are considered experts or a special relationship exists, this fact does not relieve insureds of their duty to read the policy. If an examination of the policy would have made it readily apparent that the allegedly requested coverage was not contained in the policy, the exception does not apply. Washburne, 207 Ga. App. at 4-5. A policy provision is readily apparent upon examination if it is "plain and unambiguous." MacIntyre & Edwards, 267 Ga. App. at 81 (plain and unambiguous policy change decided as a matter of law where insured admitted he could read it).

Insureds in Georgia are under a duty to read the policy, and their failure to do so, even if agents are considered to have acted as experts, is fatal to a claim for failing to procure insurance. Epps v. Nicholson, 1897 Ga. App. 246, 248 (1988) (despite her 'limited education,' plaintiff was under a duty to read her policy and accept or reject the coverage; agency entitled to summary judgment where plaintiff failed to read her policy); see also MacIntyre & Edwards, 267 Ga. App.

at 81 (insured who failed to read the policy could not rely upon agent's word that he had unlimited replacement coverage).

Likewise, negligent misrepresentation claims by insureds fail if they did not read the policy and cannot show reliance on the misstatement as a matter of law. A claim for negligent misrepresentation may lie in the context of procuring insurance, where the insured reads the policy, but the agent's erroneous representation that the proposed policy will provide coverage creates a question of fact on the whether the insured reasonably relied on the statement. See Heard v. Sexton, 243 Ga. App. 462 (2000) (plaintiff read the policy and then inquired as to its meaning and coverage provided. Defendant's explanation created a question of fact). Where the insured in a negligent misrepresentation claim fails to read the policy, it is reversible error not to grant summary judgment to the agency. MacIntyre & Edwards, 267 Ga. App. at 83 (Georgia law does not allow the insured "to shift blame (to the agency) for their own failure to read...").

#### Case No. 1

- a. Surplus line coverage
- b. Commercial agent
- c. Commercial line
- d. Building and personal property coverage
- e. Knowledge-based error
- f. Allegation that agent failed to advise that higher limits were needed to cover bar/theatre property for "full replacement"
- g. Summary judgment granted
- h. Claimant alleged that agent had duty to advise that higher limits were needed to ensure replacement in event of destruction of property to ensure replacement cost coverage
- i. Confirm in writing that no expert services requested or offered, particularly where customer is unsophisticated. Where an insured makes a "full coverage" claim, which claims are typical, the agent will principally need documentation showing (1) the insurance applied for signed by the insured and (2) that the policy was sent to the insured. Additionally, in cases where it appears the insured is underinsuring, get the insured to sign a form saying they provided the coverage amount and type of coverage requested. We argued successfully that the application signed by the insured indicated just that. An agent should also consider getting the insured to execute coverage rejection notices. If an agent undertakes to do more than simply issue a policy, the agent should be certain to indicate in writing signed by the insured the exact scope of the additional services provided
- j. Summary.

This lawsuit was filed in state court and concerned the placement of Commercial Property insurance for a business. The agent involved was a very experienced commercial property agent for a large local agency.

Fire consumed a commercial property, a converted movie theatre operating as a bar and live music venue. The property was a well-known and long-standing establishment in Athens, Georgia. The agent had obtained policies for the property's prior owners. When the insured purchased the property, the sellers referred him to the agent for insurance. The agent told the insured that the former limit was not enough insurance. Insured consulted the bank and business partner to discuss the amount of insurance needed and informed agent to obtain \$900,000 coverage. Insured claimed the agent told him that \$900,000 was the maximum amount he could get because it was the mortgage amount. The agent denied this.

The insured claimed the agent held himself out as an expert in property insurance and an expert regarding property insurance for this specific property. The insured based this on agent's designation as CIC and agency's website. The insured claimed he had never purchased commercial property insurance before and had to rely on the agent to get the proper policy. The insured also claimed that the agent placed the policy with an unrated carrier in violation of certain statutory duties. The carrier in fact paid the full policy limits of \$900,000.

The issues in the case concerned the extent of coverage regarding limit of insurance (who recommended the amount) and type of coverage (replacement cost value definition). The tacit claim was that the agent had the duty to advise the insured of how much and the nature of the coverage procured. The alleged error was in underinsuring the property and/or failing to explain or wrongly explaining the nature of the coverage. The insured claimed that the agent recommended the limit amount and that he thought he had replacement cost coverage unbounded by the limits.

The trial court granted summary judgment to the agent. The case is now on appeal.

#### Case No. 2

- a. Surplus line coverage
- b. Owner/agent
- c. Commercial line
- d. Commercial general liability coverage
- e. Knowledge-based error
- f. Allegation by plaintiff under assignment from insured that agent failed to advise insured of the need for hired/non-owned coverage for his courier business
- g. Settled while summary judgment motion pending
- h. Claimant/assignee alleged that agent had duty to advise insured that hired/non-owned coverage was necessary for a courier business and then to obtain such coverage.

- i. In addition to documentation regarding coverages offered and rejected and documentation concerning the precise scope of any additional services offered by the agent, the agent should retain a copy of the file at least for the statutorily-required length of time (here five years). Assigned claims are becoming more popular where insureds either lack coverage or are underinsured. This has the effect of causing failure to procure claims to arise well after the typical first-party claim arises.
- j. Summary. The case arose from an underlying automobile accident. The plaintiff in our case sued the insured and others regarding her injuries suffered in the accident involving a courier driver of the insured. The insurer denied coverage. In turn, the insured stipulated to liability and a perfunctory hearing was held on damages. The plaintiff took an assignment of the insured's claim against the agent for failure to procure. The plaintiff argued that the judgment in the underlying case was the measure of damages in the assigned procurement claim.

The agent placed insurance for the insured, a mom-and-pop courier service. The plaintiff claimed that the agent should have procured hired/non-owned coverage for the insured. This type of coverage could be provided in a CGL policy or in a commercial automobile or fleet policy. However, the agent was not asked to provide any automobile insurance. Plaintiff argued that the agent had a duty to recommend this coverage in addition to the policy issued. .

The insured contacted the agent and alleged he asked for insurance for his business. The agent took down information and began searching for carriers, but found none in the standard market that would write general liability for a courier company. He then contacted several brokers to determine if there was any surplus lines carrier that would underwrite the risk. The broker's representative located a policy. The agent inquired whether hired/non-owned coverage was available for this courier company and the broker said it was not. The agent took an application for Commercial General Liability coverage from the insured, who signed the application. The policy was a typical ISO form commercial general liability policy. It excluded coverage for bodily injury or property damage arising out of any auto use. The policy did not include coverage for hired/non-owned claims. A copy of the policy was sent to the insured.

The agent denied that the insured requested hired/non-owned coverage. However, agent nevertheless proceeded to determine whether such coverage was available and told the insured he could not obtain this coverage endorsement and explained what it was. The agent says the insured did not ask for the coverage, and the insured claimed he never discussed the subject with the agent at all. The agent had almost no records as the files had been destroyed in a flood.

The primary problem stemmed from the lack of documentation. This allowed an apparent question of fact to develop concerning what coverage was requested. We were able to get the insured to admit he never requested hired/non-owned coverage, so that the case proceeded as a duty to advise claim. We filed summary judgment on that issue. The case settled at mediation prior to a ruling on the motion.

Case No. 3

- a. Standard coverage
- b. Owner/agent
- c. Personal line
- d. Homeowners property coverage
- e. Procedural error
- f. Allegation by plaintiff that agent prepared application with misinformation about occupancy of home, leading to denial of claim
- g. Settled
- h. Plaintiff alleged that agent incorrectly filled out application representing that the insured home was his primary rather than secondary residence and that he accepted a forged application for the policy that he received in the mail.
- i. Agents should be careful in the application process, especially if not performed face-to-face, to make all inquiries contained on the application and not assume facts or answers. Additionally, unusual facts, such as non-related persons living at a residence of an insured, should raise red flags and the agent should be mindful to inquire of all application facts and get the insured to sign all documentation.
- j. Summary. This case arose from a fire that destroyed a residence. The carrier denied coverage on the ground that the dwelling was not the insured's primary residence. The insured sued the carrier and the agent, alleging that the agent made misrepresentations in the application causing the denial.

Insured was the owner of a residence which he bought from a friend whom the insured then allowed to continue to live there. The insured did not rent the house to the friend; he simply allowed them to live there and care for the property. The insured lived at the house intermittently, because he traveled through Atlanta frequently and would be present two or three days per week.

The agent took the insured's application over the phone. The insured advised that he was the owner of the property and stated that he lived at the premises, but traveled a lot. He indicated that other persons lived there, who would look after the property when the insured was traveling. The application required information regarding whether the premises was a primary or secondary residence. The agent checked primary, but could not recall if he specifically asked the insured that or simply assumed it to be true.

The agent mailed the application to the insured property address as the insured requested. The application was signed and returned to the agent. The agent submitted the application to the

carrier which underwrote the policy. Apparently the friend living at the premises signed the application and returned it; the insured claimed he did not review or sign the application. After fire heavily damaged the house, the insured made a claim directly to the carrier. The carrier denied the claim on the basis that the application contained a material misrepresentation that voided the policy regarding the residence of the owner.

The insured claimed he told the agent that the premises was a second home and that he wanted “comprehensive coverage.” The insured claimed he never received the application and the signature on it was a forgery, although he later admitted under oath that he did get a copy of the application and the policy, neither of which he read.

This case presented an apparent question of fact regarding what the insured told the agent during the application process. Georgia law would bar the insured’s claim where he did not read the policy. This case was factually unique in that the insured claimed someone else reviewed and signed the application, which may have actually been true. This case settled at mediation.

Case No. 4

- a. Standard line
- b. Commercial agent
- c. Commercial line
- d. Commercial property coverage
- e. Knowledge-based error
- f. Allegation by plaintiff agent failed to procure coverage for damage to property from alleged vandalism
- g. Settled
- h. Plaintiff alleged that agent incorrectly marketed the hotel at issue for coverage in a blanket property policy and failed to advise that a builders risk policy was needed for that hotel site that would have covered vandalism loss despite vacancy of the property.
- i. Agents should take care in the application process to ensure all information gathered and submitted to market is either obtained from or approved by insured and not assume facts. The agent should ensure all applications and submissions are signed by the insured, even if not required by the carrier. Agencies should ensure that policy manuals are up to date and distributed and followed, especially to the extent that they are mandatory policies.
- j. Summary. This suit arose from the denial by the carrier of a vandalism claim on a hotel property covered under a blanket policy. The insured submitted a statement of values indicating certain properties as vacant, but not the subject property. A

market submission was prepared by the agent with some information provided by the insureds including the SOV and additional estimated data based on insured's information and market data. Plaintiff alleged information was fabricated by the agent based on some poorly worded emails among the agent and staff. Insured was presented with a proposal from a carrier which included coverage for all properties on the blanket with an exclusion for vacant property. Properties under renovation were expressly excepted from the vacancy exclusion. Insured accepted the policy after certain changes were made, but never signed an application or submission. Insured had previously had a builders risk policy on the subject property and others. The objective of the new policy was to consolidate all properties into a single blanket policy to save premium.

During the policy, carrier inspected the property and raised question about whether it was vacant. Insured denied that property was vacant and insisted that it was under renovation with an expected completion date. Carrier expressed desire to move property to builders risk but continued to cover the property. Later, a claim was submitted by insured during the policy period for alleged loss resulting from a break-in. Carrier denied claim based on vacancy exclusion. Insured consistently claimed that the property was not vacant but was renovating, but contended that seeking a franchise agreement and financing arrangements constituted renovation to avoid the vacancy exclusion.

Agent's position was that insured failed to advise that the property was under construction, if it was in fact being renovated, and did not ask for a builders risk policy, but accepted the property insurance coverage that was obviously not a builders risk. Important to the case was the fact that the insured property would have been covered if the insured's contention that the property was under renovation had been true, raising a significant proximate cause defense. Though the insured had not signed any application or submission for this property coverage, contrary to the agency's manual, the insured had accepted the policy after receiving the written proposal from the carrier with the coverage for review, and in fact received the policy shortly after it was issued.

The carrier first settled out at mediation. Subsequently, another mediation was held and the agent and insured reached settlement.