# Agents E&O Standard of Care Project

## Maine 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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**Legal Duties of Insurance Agents in Maine: Standards of Care, Potential Legal Pitfalls, and Best Practices for Avoiding Litigation**

The legal duties of an insurance agent in Maine depend on the nature of the relationship between agent and insured, and on the terms of any agreements between them. Generally speaking, in the absence of a "special agency relationship," an insurance agent's duty to its customer is to use reasonable care, diligence, and judgment in obtaining the requested insurance coverage. *Szelenyi v. Morse, Payson & Noyes Insurance*, 594 A.2d 1092, 1094 (Me. 1991). This means that, at a minimum, an insurance agent must either promptly pursue the requested insurance or state that the request will not be pursued.[1] If the request is pursued but the agent's attempts to procure the desired coverage are unsuccessful, the agent must also promptly notify the insured that the requested insurance cannot be obtained.

If an agent promises to procure the requested insurance but fails to do so, and then fails to promptly notify the insured of that fact in writing, the agent is personally liable for the amount of coverage that would have existed if the insurance had been procured.[2] *Bramson v. Chester L. Jordan & Co.*, 379 A.2d 730, 732 (Me. 1977). However, unless a special agency relationship exists, an insurance agent is not obligated to provide insurance advice and will not be liable if the requested coverage is inadequate. *Szelenyi*,

[1] *See County Forest Products, Inc. v. Green Mountain Agency, Inc.*, 2000 ME 161, ¶¶ 9-10 & 45-46, 758 A.2d 59 (insurance agency that failed to inform insured that requested increase in coverage was either denied or could not be obtained was secondarily liable for lost coverage and independently liable for breach of its duty to procure the increased limits); *see also Depositors Trust Co. v. Farm Family Life Ins. Co.*, 445 A.2d 1014, 1019 (Me. 1982) (insurer's unreasonable delay in processing insurance request is sufficient to bar insurer from denying coverage because insurance applicant is preempted from seeking insurance elsewhere).

[2] An agent who misrepresents that coverage exists when it does not, or who wrongfully denies that she agreed to procure certain coverage may also be liable for any consequential damages that result from the lack of expected coverage. *County Forest Products, Inc.*, 2000 ME 161, ¶¶ 47-51, 758 A.2d 59.

594 A.2d at 1094.

On the other hand, if an insured expects or asks an agent for insurance advice, or if the agent actually offers advice or information about adequate coverage, a special agency relationship may arise between them and give rise to additional liability. *Id.* Because the relationship between insurance agent and insurance customer is grounded in the law of both agency and contract, the question of whether a special agency relationship exists depends on the specific terms of any agreements, and on the expectations and actual conduct of each party. *Id.* The length of the relationship between agent and insured is relevant but not dispositive to the question of whether a special agency relationship exists.

Thus, for example, although a physician had a twelve-year relationship with an insurance agency, the Maine Supreme Court held that there was no evidence of a special agency relationship between them and no duty owed by the agent to provide advice about the adequacy of malpractice insurance coverage. *Id.* Specifically, the Court noted that, in spite of the lengthy course of dealings between the parties, there was "no evidence that [the physician] ever manifested a desire for [the agent] to give him advice or information about adequate coverage limits." *Id.* There was also no evidence "that [the agent] gave [the physician] advice or information about what it considered to be adequate coverage limits." *Id.*

The precise nature and scope of an insurance agent's duty within the context of specific transactions and relationships may be more fully understood through the following case studies:

## I. ***Bates v. Anderson***[3]

a. **Line of coverage involved:** Property.
b. **Position of person in agency involved:** Agency employee—not licensed insurance agent.
c. **Personal or Commercial Lines:** Personal.
d. **Type of coverage involved:** Flood insurance.
e. **Procedural or knowledge-based error:** Both.
f. **Claimant Allegation:** Breach of contract, negligence.
g. **Settlement or Trial:** Trial.
h. **Description of alleged error:** Agency employee failed to inform insured about special requirements for obtaining flood insurance and failed to procure flood insurance or notify insured that it had not been obtained.
i. **Tip to avoid claim:** Provide accurate information to the insured about what steps are necessary to obtain the desired insurance coverage, follow through with an agreement to procure requested insurance, and notify the insured promptly in writing if insurance cannot be obtained.
j. **Summary of case:** Insured visited office of general insurance agency and met with agency employee about securing homeowner's and flood insurance on newly purchased home. Agency employee filled out separate application forms for flood insurance and homeowner's insurance, noting on application forms that insured would be billed for the premium. Insured was not informed that flood insurance was available only through National Flood Insurance Program or that application form must be signed by licensed insurance agent and accompanied by prepayment of premium. Agency employee also did not tell insured that she was not a licensed insurance agent. Insured left agency with the understanding that property was covered by both flood and homeowner's insurance, and that she would soon receive a policy evidencing such coverage and a bill for the premium.

   Sometime thereafter, the insured received a homeowner's policy with a bill for the premium. She paid the premium but did not read the policy. When her home was later damaged by flooding, she contacted the insurance agency and was told that she did not have flood insurance on the property. Consequently, she brought suit against the insurance agency for breach of contract to secure flood insurance and negligent failure to explain the

[3] 614 A.2d 551 (1992).

requirements necessary to secure flood insurance. Jury verdict for insured was upheld on appeal.

## II. ***County Forest Products, Inc. v. Green Mountain Agency, Inc.***[4]

**a. Line of coverage involved:** Surplus and excess.
**b. Position of person in agency involved:** Vice President.
**c. Personal or Commercial Lines:** Commercial.
**d. Type of coverage involved:** Fire Insurance, Liability.
**e. Procedural or knowledge-based error:** Procedural.
**f. Claimant Allegation:** Breach of contract, negligence.
**g. Settlement or Trial:** Both (see summary below).
**h. Description of alleged error:** Failure to procure requested increase in coverage limits.
**i. Tip to avoid claim:** Follow through with an agreement to procure requested insurance, and notify insured promptly in writing if insurance cannot be obtained. Also, if you are working with another agency to secure requested coverage for a client, be sure to document your contact with that agency and to follow up on whether the coverage is actually obtained. Do not assume that a promise followed by silence means confirmation.
**j. Summary of case:** A corporation operating a sawmill in Maine had a longstanding relationship with an insurance agency, which arranged for a fire insurance policy for the business through a second insurance agency that specialized in surplus and excess lines. Shortly after the policy was issued, the corporation's president asked the first agency to obtain an increase in the liability limits of the policy. The specific request was to increase the limits on the sawmill building and on the contents of the building. An insurance agent employed by the first agency requested the increased coverage to the second agency through both a telephone call and a faxed document. The agent making the request spoke with the vice president of the second agency, who responded by saying that there "should be no problem, should be fine." However, the increased coverage was never obtained, and neither the first agency nor the insured corporation was ever informed of this. In fact, no further communication was forthcoming from the second agency.

[4] *Supra*, n. 1.

When the sawmill was damaged by fire, the second agency was promptly notified of the loss. However, the agency denied that the coverage limits had been increased, and so the corporation brought suit for damages against both insurance agencies for failure to procure the increased coverage limits. The insured corporation settled with the first agency before trial. The corporation also sued the two insurers that had issued the fire insurance policy, claiming that they breached the insurance contract and the covenant of good faith and fair dealing.

Relying on evidence that it was standard in the insurance industry to assume that a requested increase in coverage goes into effect unless the request is denied in writing, the court ruled that both the insured and the first insurance agency were entitled to rely on the statements made by the vice president of the second agency that obtaining the increased coverage would be "no problem." Furthermore, because the policy contained the names of both insurers and the name of the second insurance agency, the trial court found that the agency was acting as agent for the insurers and its actions were therefore binding on them. Accordingly, the insurers were barred from denying the increased coverage limits.

However, the court also ruled that the second agency was jointly and severally liable with the insurers, rejecting the agency's argument that it could not be independently liable to the insured corporation because it was not a party to the insurance contract. According to the court, the contract breached by the second agency was a contract to procure insurance. Alternatively, the agency was liable in tort for its negligent failure to procure the increased insurance limits. Finally, because the second agency had wrongfully persisted in denying its error and had engaged in obfuscation after it received notice of the claim, the court ruled that the agency was liable for the insured corporation's consequential damages in addition to the amount of the lost insurance coverage.

## III. ***Ames v. Cole-Harrison Agency***[5]

**a. Line of coverage involved:** Homeowners

[5] 2007 WL 21737778 (Me. Super. April 30, 2007) (order denying summary judgment for defendants); *see also* 2007 WL 4137980 (Nov. 5, 2007) (judgment for defendants after trial).

b. **Position of person in agency involved:** Broker.
c. **Personal or Commercial Lines:** Personal.
d. **Type of coverage involved:** Replacement cost guarantee coverage.
e. **Procedural or knowledge-based error:** Procedural.
f. **Claimant Allegation:** Breach of contract, negligence, negligent misrepresentation.
g. **Settlement or Trial:** Trial.
h. **Description of alleged error:** Failure to procure "very best insurance" or "best insurance available" by obtaining replacement cost guarantee coverage.
i. **Tip to avoid claim:** Clarify the insured's exact expectations and put any and all promises or agreements in writing. Vague requests from an insured can lead to future litigation if both parties are not clear about the coverage that is being sought by the insured. If an insured's expectations cannot be satisfied (in whole or in part) inform the insured of this in writing.
j. **Summary of case:** Plaintiffs were a married couple who obtained a homeowner's insurance policy through a broker for an insurance agency. The broker and insured wife had multiple telephone conversations before the policy was issued, and the insured asked for the "very best insurance" and/or the "best insurance available." The broker understood this to mean replacement cost guarantee coverage. However, because of the age of the structure, he was only able to obtain non-guaranteed replacement cost coverage.

   When the plaintiffs began renovations on their house, they reviewed their policy to see if the renovations were covered. Because the policy documents sent to the insureds included an optional endorsement for replacement cost guarantee coverage, they mistakenly assumed that the renovations were covered even though they exceeded the limits of the policy. However, when the house was damaged in a fire, they learned that the policy did not include coverage for the renovations, and they sued both the insurance agency and the insurer.

   The defendants moved for summary judgment, but were unsuccessful. According to the court, the inclusion of the optional endorsement in the policy was sufficient to raise an issue of fact about whether the plaintiffs reasonably relied on the endorsement. Furthermore, while the plaintiffs had

not specifically asked for replacement cost guarantee coverage, there was a triable issue as to whether their request for "the very best insurance" was sufficiently definite to give rise to an oral contract to procure the desired coverage. This was particularly true where the broker had previously testified that it was his typical practice to seek replacement cost guarantee coverage because he believed it to be the best coverage available, but that he never even attempted to obtain it in this case because he believed that the plaintiffs were not eligible for this type of coverage.

However, though the defendants did not prevail on summary judgment, they did ultimately prevail at trial based on the following reasons: (1) the broker had in fact procured the "best insurance available," since the insurer would not have issued the plaintiffs a policy with replacement cost guarantee coverage due to the age and location of their home[6]; (2) a public adjuster hired by the plaintiffs testified that it was standard practice in the insurance agency to include both mandatory and optional endorsements within the policy documents, with highlighted notices to policyholders directing them to consult the policy's Declarations Page to determine which endorsements were actually in effect; and (3) the plaintiffs themselves were fairly sophisticated consumers and a reasonably careful reading of the policy should have put them on notice that they did not have the coverage that they desired or should have at least prompted them to call the insurance agency for clarification.

~ Wendell G. Large and Heidi J. Hart

Richardson, Whitman, Large & Badger
465 Congress Street
P.O. Box 9545
Portland, ME 04112-9545
(207) 774-7474
www.rwlb.com

[6] Because an agent's failure to procure requested insurance must be the proximate (or legal) cause of a plaintiff's harm, it is possible to defeat liability by demonstrating that the desired insurance was not actually available for purchase by the plaintiff. Moreover, although the Maine Supreme Court has yet to issue a definitive ruling on the topic, it has suggested that it is the plaintiff's burden to establish proximate cause by demonstrating the market availability of the requested insurance. *See Tri-Town Marine, Inc. v. J.C. Milliken Agency, Inc.*, 2007 ME 67, ¶¶ 8-10, 924 A.2d 1066. In other words, if the plaintiff cannot show that the desired coverage could have been procured on the insurance market, he also cannot show that an agent's failure to procure that coverage was the legal cause of his harm.