

Agents E&O Standard of Care Project Survey Maryland



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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I. SUMMARY OF THE STANDARD OF CARE IN MARYLAND

In Maryland, “an insurance agent or broker owes a duty to ‘exercise reasonable care and skill in performing his duties. And if such a representative fails to do so, he may be liable to those . . . who are caused a loss by his failure to use standard care.” *Sadler v. Loomis Co.*, 776 A.2d 25, 38 (Md. Ct. Spec. App. 2001); *Insurance Co. of No. America v. Miller*, 765 A.2d 587 (Md. 2001); *Bogley v. Middleton Tavern, Inc.*, 421 A.2d 571 (Md. 1980); *Jones v. Hyatt Ins. Agency, Inc.*, 741 A.2d 1099 (Md. Ct. Spec. App. 1999). Stated somewhat differently,

An agent, employed to effect insurance, must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation, in doing what is necessary to effect a policy, in seeing that it effectually covers the property to be insured, in selecting the insurer and so on.

Lowitt & Harry Cohen Ins. Agency, Inc. v. Pearsall Chem. Corp. of Md., 219 A.2d 67, 73 (Md. 1966) (internal citations omitted. As is the case in the District of Columbia, a plaintiff may pursue an action against an insurance broker in either contract or in tort. *Int’l Bhd. of Teamsters v. Willis Corroon Corp.*, 802 A.2d 1050, 1058 (Md. 2002). In the context of an economic loss, a tort claimant against the insured will not have a viable direct cause of action in tort against the insurance agency (but may as third-party beneficiaries in contract). *Jones v. Hyatt Insurance Agency, Inc.*, 741 A.2d 1099 (Md. 1999).

As to the nature of the duty owed, Maryland imposes a “heightened duty” on insurance agents. See *Cooper v. Berkshire Life Ins. Co.*, 810 A.2d 1045, 1073 (Md. 2002) (noting that

insurance agents and brokers are professionals, and owe a heightened duty to an insured). When an insurance broker is hired to obtain a policy that covers certain risks, and fails to obtain such a policy and fails to inform the insured that the policy that the risks are not covered, the broker will be liable in contract or tort. *Int'l Bhd. of Teamsters*, 802 A.2d at 1057 (citing 3 LEE R. RUSS & THOMAS SEGALLA, *COUCH ON INSURANCE* 3d § 46:59 (1997); 16A J.A. APPLEMAN & S. APPLEMAN, *INSURANCE LAW & PRACTICE* § 8831 (1981 & 2002 Supp.); and Robin C. Miller, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability-Insurance Coverage Procured*, 60 A.L.R. 5th 165 (1998).

While an agent or broker may have an affirmative duty (as stated in *Pearsall Chem. Corp.*, *supra*) to ensure that the policy procured will actually provide effective coverage, an agent or broker—barring a “special relationship” with the insured—does not have an affirmative duty to advise as to the available limits of coverage. *See Cooper*, 810 A.2d at 1069, FN6 (noting that “[t]he duty of an insurance agent does not extend to the obligation to advise the purchaser regarding the adequacy of coverage on her liability insurance, in the absence of a special relationship or a request to do so.”). Stated differently, “in the absence of a special relationship, an insurance agent or broker has no affirmative, legally cognizable tort duty to provide unsolicited advice to an insured regarding the adequacy of liability coverage.” *Sadler*, 776 A.2d at 59.

A “special relationship” in this context requires more than the ordinary insurer-insured relationship; it may be shown when an agent or broker holds himself or herself out as a skilled insurance expert, and the insured relies on that expertise; or it may be shown via a “long term relationship of confidence, in which the agent or broker assumes the duty to render advice, or has

been asked by the insured to provide advice, and the adviser is compensated . . . above and beyond the premiums customarily earned.” *Id.* at 35.

II. LANDMARK CASES

Sadler v. Loomis, 776 A.2d 25 (Md. 2001)

In *Sadler*, the insured struck a motorcyclist in a motor vehicle accident, causing the motorcyclist’s leg to be amputated. The motorcyclist’s lawsuit against the insured was settled for the one million dollars, which was in excess of the insured’s \$100,000.00 policy. The insured sued her insurance agent for negligence, alleging that the insurance agent knew of the insured’s financial position—that the insured owned substantial assets— but failed to provide her with periodic quotes as to the cost of additional insurance or information to enable her to make an informed decision as to the appropriate level of liability coverage. The insurance agent moved for summary judgment, arguing that an insurance agent owes no duty to his or her client, which motion was granted by the trial court.

On appeal, the Maryland Court of Special Appeals upheld the grant of summary judgment, finding that while an insurance agent may have a duty to procure particular coverage when specifically requested, an insurance agent or broker has no affirmative duty to provide the insured with unsolicited advice regarding the suitability or advisability of the amount of coverage selected by the insured, barring a “special relationship” as discussed *supra*.

Jones v. Hyatt Insurance Agency, Inc., 741 A.2d 1099 (Md. 1999)

In *Jones*, the insured motor vehicle struck the plaintiff’s vehicle, and the plaintiff alleged that he suffered serious personal injuries as a result of the accident. The insured understood that liability insurance had been obtained by the insurance agency, but in fact the vehicle was uninsured due to an alleged error by the insurance agency. As such, the plaintiff’s own

uninsured motorist coverage provided only \$20,000.00, while a bench trial resulted in a judgment against the insured for \$450,000.00. The insured assigned its claim against the agency to the plaintiff, who sued the insurance agency for breach of contract and negligence for failing to procure the requested insurance for the insured, and asserted, *inter alia*, that the insurance agency was directly liable to the plaintiff for its negligence. A jury awarded \$1.4 million to the plaintiff, and the insurance agency appealed.

On appeal, the Court of Appeals found that the causes of action sounding in contract were barred by the statute of limitations, as the contract cause of action accrued—and the statute of limitations began to run—when the insurance agency breached its contract and when the breach was or should have been discovered, which was more than three years prior to the plaintiff’s suit against the agency. Additionally, the Court of Appeals found that while the plaintiff may have been a third-party beneficiary under the contract, that fact, in and of itself, was insufficient to create a tort duty owed by the insurance agency to a third-party claimant. The Court reasoned that there was no relationship of trust and confidence between the plaintiff, a third-party claimant, and the insurance agency, and found that as the only risk to the plaintiff was of economic loss, absent an “intimate nexus” between the insurance agency and the plaintiff, no tort duty was owed to the plaintiff.

III. CASE STUDIES

CASE A: A vehicle owned by the insured, a trucking business, was involved in an automobile accident while carrying goods in interstate commerce. While the insured had a valid insurance policy, the vehicle involved in the accident was not listed on the policy at the time of the accident. The insured alleged that it had specifically requested that the vehicle be added to the policy shortly before the accident, which the insurance agency denied.

Because the insurance policy contained a provision requiring that the insurance company pay damages as the result of an accident with the general public, subject to the insurance company's right to recover any amounts paid from by the insurance company from the insured, the insurance company sued the insured, and the insured in turn filed a third-party complaint against the insurance agency, alleging breach of contract and indemnification.

The trial court held that the breach of contract claim was barred by the statute of limitations. In Maryland, a cause of action for breach of contract accrues when the breach occurs and was, or should have been, discovered. As Maryland does not recognize the maturation of harm rule, the insured suffered at least nominal damages as soon as it became aware of the breach, and as the third-party complaint was filed more than three years after the date of accrual, the breach of contract claim was time barred.

As for the indemnification claim, the trial court noted that Maryland only recognizes a right to indemnification under three circumstances: (1) express contractual indemnity, (2) implication by fact or law, or (3) equitable, or tort-based, indemnification. As there was no contract providing indemnification to the insured, the first modality was inapplicable. With respect to equitable, or tort-based, indemnification, such indemnification was inapplicable as the insurance agency could not have been directly liable to the insured. Finally, there could be no implied indemnification by fact or law, as there were no "unique special factors" indicating that the insurance agency was intended to bear responsibility for any loss, and because the relationship between and insurance agency and insured is not a "generally-recognized special relationship" in Maryland.

CASE B: The insured contacted the insurance agency when the insured was first organized and requested "bare-bones" coverage sufficient to allow the insured to become

licensed in Maryland. The insured alleged that several years later, after renewing the policy without changes, and after the business had grown, the insurance carrier became aware that the insured was operating beyond the description of business in the application for coverage, and terminated liability coverage as of that date. The insured obtained coverage through a different company, which was substantially more expensive than the coverage initially obtained. The insured filed suit, seeking to recover the value of all premiums paid to the original insurance company, and for the difference in premiums between the initial insurance company and the successor insurance company.

Following a bench trial, the court found in favor of the insurance agency. First, the court noted that the agency did not have an obligation to continually monitor the business activity of the insured, nor to offer unsolicited advice as to coverage. Second, the court found that even if the insured could demonstrate such an obligation, the insured had not suffered any damages, as there was no evidence that the original insurance company would not have provided coverage as to any claim made during the policy period (and prior to the cancellation). Further, there was no evidence that there would have been a difference in premiums paid by the insured had the insured updated the insurance company as to the nature and scope of its business.