

# Agents E&O Standard of Care Project Massachusetts 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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## **A Quick Look At Massachusetts Principles Governing Insurance Agent and Broker Professional Liability**

**Robert P. Powers**  
**rpowers@melicklaw.com**  
**Melick & Porter, LLP**  
**One Liberty Square**  
**Boston, Massachusetts 02109**

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### **Caselaw**

The legal duty of a Massachusetts insurance agent or broker is measured by the skill and judgment reasonably expected from similarly situated professionals in similar circumstances. An agent ordinarily does not have a fiduciary (utmost) duty to ensure that a policy provides adequate insurance for his client's needs. *Martinonis v. Utica Natl. Ins. Group*, 65 Mass. App. Ct. 418, 420–421, 840 N.E.2d 994 (2006). The law requires that an agent place the desired insurance as instructed by the client, and to inform the client if the coverage cannot be secured promptly. *Rayden Engr. Corp. v. Church*, 337 Mass. 652, 655, 151 N.E.2d 57 (1958). A failure to place coverage as directed may result in liability to the client, and in limited circumstances, to a third-party on an implied beneficiary theory. *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 196, 435 N.E.2d 628 (1982).

An agent has a duty to make a diligent market search, which ordinarily may be fulfilled if the agent tries to place the risk with one of the insurers for which the agent or broker customarily acts. *Hartford Nat. Bank and Trust Co. v. United Truck Leasing Corp.*, 24 Mass. App. Ct. 626, 511 N.E.2d 637 (1987). Generally, the relationship between an agent or broker and its client does not impose a duty to investigate the customer's needs for particular coverage or to advise the customer about the availability of insurance products to meet those needs. *Robinson v. Charles A. Flynn Ins. Agency, Inc.*, 39 Mass. App. Ct. 902, 902–903; 653 N.E.2d 207 (1995). However, if an independent insurance agent or broker holds themselves out to the public as possessing special expertise or skill, they will likely be held to a greater duty. *Bicknell, Inc. v. Havlin*, 9 Mass. App. Ct. 497, 402 N.E.2d 116 (1980). This may include a duty to inquire into the accuracy of information provided by the client [*St. Paul Surplus Lines Ins. Co. v. Feingold & Feingold Ins. Agency, Inc.*, 427 Mass. 372, 377, 693 N.E.2d 669, 672 (1998)], or to inquire into the existence of information which may be relevant to insurance even if the client has not provided it. *Capital Site v. Inland Underwriters*, 61 Mass. App. Ct. 14, 806 N.E.2d 959, 963 (2004).

Massachusetts courts have ruled that agency clients are entitled to “rely very greatly on statements made . . . about insurance, a field in which [the agent is] expert and they [are] not.” *Rayden Engineering Corp. v. Church*, 337 Mass. 652, 658, 151 N.E.2d 57, 61 (1958). Such reliance must be reasonable in the circumstances. “[A]n insured cannot abandon all responsibility for

ascertaining the terms of the coverage his broker obtained.” *Campione v. Wilson*, 422 Mass. 185, 196, 661 N.E.2d 658, 664 - 665 (1996). One Massachusetts case indicates that a policyholder has a duty to read the policy and to bring to the agency's attention any omissions or exclusions of expected coverage. *Sarnafil, Inc. v. Peerless Ins. Co.*, 418 Mass. 295, 306–307, 636 N.E.2d 247 (1994). But if an agent elects to explain certain coverage provisions, it might be found to have assumed a duty to explain the significance of all material policy provisions. *HFS Holdings, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 520 F.Supp.2d 231, 237 -238 (D.Mass.,2007). Providing a client with a written comparison of differences between expiring and proposed replacement coverage has been found to satisfy such a duty. *Baldwin Crane & Equipment Corp. v. Riley & Rielly*, 44 Mass. App. Ct. 29, 687 N.E.2d 1267 (1997).

If an agency represents itself as an insurance specialist, consultant or counselor, and is being compensated in addition to commissions earned on the placement of coverage, it will be held to a higher duty of care. *Rapp v. Lester L. Burdick*, 336 Mass. 438, 146 N.E. 2d 368 (1957). “Special circumstances of assertion, representation and reliance” will also serve to establish a greater duty. *McCue v. Prudential Ins. Co.*, 371 Mass. 659, 358 N.E.2d 799 (1976). Factors relevant to this inquiry include (1) the existence of a long business relationship; (2) the complexity and comprehensiveness of the customer's insurance needs; (3) the frequency and nature of contact between a customer and agent, including coverage recommendations; and (4) the extent to which a customer has previously come to rely on the agent. *Construction Planners, In. v. Dobax Ins. Agency, Inc.*, 31 Mass.App.Ct. 672, 583 N.E.2d 255 (1991). Whether “special circumstances” exist is often a jury question that will preclude an agency from successfully moving for summary judgment. *Martinonis, supra*.

When a court concludes “special circumstances” exist, an agent or broker faces liability on a myriad of legal theories. Liability has been found when an agent failed to arrange renewal of coverage, even though ordinarily no duty to renew is imposed. *Construction Planners, supra*. An agency has faced liability where its longtime customer alleged that it relied upon it to acquire sufficient limits of coverage. *Martinonis, supra*. Liability for damages arising from a failure to process a claim or assist in the settlement process may be imposed if special circumstances exist. *Schwartz v. Travelers Indem. Co.*, 50 Mass. App. Ct. 672, 740 N.E.2d 1039 (2001). An agency might be held liable for legal fees incurred by its client in successfully pursuing coverage if its actions might fairly be viewed as having provided the insurer with plausible grounds for initially denying coverage. *Franchi v. Stella*, 42 Mass.App.Ct. 251, 676 N.E.2d 56 (1997). And, an independent insurance broker faces liability to an insurer which issued a policy based on material misinformation that the broker, negligently or with reckless disregard for the truth, placed on an insurance application, where the broker knew, or reasonably should have known, that disclosure of the truth would have led the insurer to reject the application. *St. Paul Surplus Lines Ins. Co., supra*.

Massachusetts permits a professional liability claim to be made against an agent or broker based upon either tort or contract law. Because Massachusetts law implies an obligation to meet the standards of the profession into contracts for professional services, tort and contract remedies are overlapping. A contract claim, governed by a longer statute of limitations (6 years vs. 3 years),

may accordingly remain viable even when a tort action against the agent or broker on the same facts would be time-barred. *Capital Site, supra*.

Massachusetts agents and brokers should also have an understanding about the Massachusetts Consumer Protection Act, G.L. c. 93A, which provides a statutory remedy for “unfair or deceptive acts or practices in the conduct of any trade or commerce.” G.L. c. 93A, § 2(a). Whether c. 93A has been violated depends on the facts and circumstances of each case. Liability is likely if the conduct of an agent or broker involves misrepresentation or seeks a benefit by other unfair or deceptive means. *See, e.g., Passatempo v. McMenimen*, 461 Mass. 279, 960 N.E.2d 275 (2012). Simple negligence or a breach of contract by an agent ordinarily does not warrant imposition of liability under c. 93A. However, a Massachusetts regulation provides that a failure to comply with a statute or regulation intended for the protection of the public constitutes a per se violation of c. 93A. This has led to imposition of liability where an insurance broker inadvertently violated a law governing unlicensed companies while trying to place coverage for a risk that was hard to insure because of underwriting reasons. *MacGillivray v. W. Dana Bartlett Ins. Agency of Lexington, Inc.*, 14 Mass. App. Ct 52, 436 N.E.2d 964 (1982). Violation of c. 93A may result in the imposition of double or treble damages, in the discretion of the trial judge, and requires the defendant to pay the plaintiff’s legal fees.

### Case Studies

#### **1. *Smith v. XYZ Realty v. Jones Agency***

- a. **Line of coverage involved** - Commercial General Liability
- b. **Position of person in the agency involved** - Owner and President of the Agency
- c. **Personal or Commercial Lines** - Commercial
- d. **Type of coverage involved** - Commercial General Liability
- e. **Procedural or knowledge-based error** - Combination of both
- f. **Claimant Allegation** - Agent negligently obtained policy subject to unexpected exclusion
- g. **Settlement or Trial** - Case settled for \$975,000.
- h. **Description of alleged error** - Client alleged that agency owner represented that he was an expert and familiar with the insurance needs of gas stations. Client contended that agency knew or should have known of risk of criminal activity at gas stations, including robbery and assaults of employees. Client claimed to have relied on assurance that proper coverage would be obtained, and sued agency when coverage was denied by insurer based upon an assault and battery exclusion.

i. **Tip to avoid claim** - Avoid making overly broad claims of expertise or assurances of coverage. Identify any unusual policy provision that might limit coverage for risks arising from ordinary business operations.

j. **Summary of case** - Plaintiff, a gas station employee, was shot in the head during a robbery and suffered permanent injuries. He sued the owner of the gas station property. The gas station was located in a high crime area. Owner's prior coverage had been cancelled for nonpayment. Owner sought replacement coverage through new agency based on agency president's representations about his expertise in placing coverage for gas station operations. Agency was unable to secure coverage with an admitted carrier, and resorted to the surplus lines market. Property Owner had informed Agency that he wanted the same coverage provided under his prior policy. That policy was not subject to an assault and battery exclusion. Agency president admitted that he was aware his new client wanted a general liability policy which included coverage for injuries arising from criminal activity. The Agency was unaware of the exclusion until the insurer denied coverage for the Plaintiff's claim. Plaintiff's claimed damages exceeded \$2.6 million. The policy would have provided \$1 million of coverage if the assault and battery exclusion had not applied. Based on problematic liability evidence and high damage exposure, case settled for \$975,000.

## 2. *Property Owner v. Jones Agency*

a. **Line of coverage involved** - Builder's Risk Policy

b. **Position of person in the agency involved** - Agency President and a CSR

c. **Personal or Commercial Lines** - Commercial

d. **Type of coverage involved** - Builder's Risk Policy

e. **Procedural or knowledge-based error** - This case involved a procedural error.

f. **Claimant Allegation** - Agency failed to obtain replacement coverage for a policy that was non-renewed.

g. **Settlement or Trial** - The case settled for \$130,000.

h. **Description of alleged error** - The Client's Builder's Risk coverage was non-renewed because of the failure to complete a project on a timely basis. The Client alleged that the Agency failed to properly notify it or procure replacement insurance, and as a result Client lacked coverage for a subsequent fire.

i. **Tip to avoid claim** - Although the prior insurer issued written notice of non-renewal, the Agency's communications with the insured were oral. Written confirmation confirming the conversation about the non-renewal and the Agency's inability to secure replacement coverage would have helped the defense.

**j. Summary of case** – Agency worked for Client for many years. Agency obtained a Builder’s Risk policy, which renewed automatically for two additional terms. The insurer sent the Client a notice of non-renewal when the construction project stalled for an extended period. The Client contacted the Agency by phone to request that the insurer reconsider. When the insurer declined, an Agency CSR called the Client to inform him that he would have to seek coverage elsewhere. There was no written follow-up. Coverage subsequently expired. Several months later a fire occurred. The Client sued the Agency alleging that it failed to provide proper notice of the non-renewal and failed to procure replacement coverage. Client denied receiving the CSR’s message. The expired policy provided \$300,000 of coverage. The Client was a sophisticated businessman, and likely understood no coverage existed for the stalled project. Comparative negligence was a significant issue. The case settled just prior to the start of trial.

### **3. Fireman v. Outta State Agency**

- a. Line of coverage involved** - Personal
- b. Position of person in the agency involved** - Sales Agent
- c. Personal or Commercial Lines** - Personal
- d. Type of coverage involved** - Homeowners
- e. Procedural or knowledge-based error** - Combination of both
- f. Claimant Allegation** - Agent negligently obtained improper policy form
- g. Settlement or Trial** - Case settled for nominal value
- h. Description of alleged error** - Agent placed coverage for out-of-state condominium on improper policy form resulting in limited recovery for a property loss.
- i. Tip to avoid claim** - Obtain and review prior policy when taking over account from another agency.
- j. Summary of case** - Client owned a free-standing vacation condominium unit in an out-of-state development. Property had been insured for many years through a local agency, but Client was unhappy with proposed renewal premium. Client approached Agent, a fellow member of a social club, at recommendation of mutual friend. Relying on Client description of property as a condominium, Agency procured a policy intended for a multi-unit condominium building. Subsequent to a fire loss, insurer advised Client that he only had limited coverage. Client sued Agent alleging that he obtained improper policy. Agent admitted at deposition that he should have obtained prior policy before arranging replacement. Case settled at a discount over full value because of comparative negligence. Client received copy of new policy without objection, and significant disparity in premium between old and new policy arguably merited further inquiry.