

Agents E&O Standard of Care Project Montana 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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STANDARD OF CARE FOR INSURANCE AGENTS IN MONTANA

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1. Summary of Standard of care in Montana

Montana law is well established that an insurance agent owes an absolute duty to obtain the insurance coverage which a customer directs the agent to procure. *Monroe v. Cogswell Agency*, 2010 MT 134, ¶ 32, 356 Mont. 417, 234 P.3d 79. Absent being specifically hired to provide advice, an agent does not have a duty to advise a person or entity concerning their specific coverage needs. *Id.*, at ¶ 31. Montana does not recognize a fiduciary relationship between insurance agent and a customer. *Bailey v. State Farm Mut. Auto. Ins. Co.*, 2013 MT 119, ¶ 17, 370 Mont. 73, 300 P.3d 1149.

If an insurance agent is instructed to procure specific insurance and fails to do so, he is liable for damages suffered due to the absence of such insurance. *Fillinger v. Northwestern Agency*, 283 Mont. 71, 83, 938 P.2d 1357 (1997); *Lee v. Andrews*, 204 Mont. 527, 532, 667 P.2d 919 (1983). The duty to procure is created by the existence of two elements: (1) the customer must request to the agent to procure certain insurance, and (2) the agent must commit to do the same. *R.H. Grover, Inc. v. Flynn Ins. Co.*, 238 Mont. 278, 284, 777 P.2d 338 (1989). Without

the existence of both elements there can be no negligent failure to procure insurance. *Id.* The agent has the obligation to exercise good faith and reasonable diligence in procuring the correct insurance requested by the customer. *Seal v. Hart*, 2002 MT 149, ¶ 34, 310 Mont. 307, 50 P.3d 522. The agent should notify the customer if the particular insurance requested is not available.

Once a customer informs an insurance agent of his insurance needs and the agent's conduct permits a reasonable inference that the agent is highly skilled in this area, the customer is justified in relying on an insurance agent to obtain the coverage that the agent has represented he will obtain. *Bailey v. State Farm Mut. Auto. Ins. Co.*, ¶ 22. An insured's failure to read his insurance policy may constitute comparative negligence but does not operate as a bar to a claim against an agent. *Id.* An insured does not have an absolute duty to read an insurance policy; instead, the extent of an insured's obligation to read the policy depends upon what is reasonable under the facts and circumstances of each case. *Thomas v. Northwestern Nat'l Ins. Co.*, 1998 MT 343, ¶ 28, 292 Mont. 357, 973 P.2d 804.

A soliciting agent of an insurance company is the agent of the insurer and not of the insured for the purpose of soliciting and procuring the insurance and preparing the application. *Marie Deonier & Assoc. v. Paul Revere Life Ins. Co.*, 2000 MT 238, ¶¶ 57-58, 301 Mont. 347, 9 P.3d 622. While an agent who accesses the policies of several insurance companies and who is solicited by the client to investigate and select the appropriate insurance company is acting as the agent of the client, once the agency has solicited and procured a specific policy, that agency becomes an agent of the insurer. *Id.*; *Monroe*, 2010 MT 134 at ¶ 39.

2. Landmark Cases.

***Lee v. Andrews*, 204 Mont. 527, 667 P.2 919 (1983):**

Plaintiff had leased a car from a dealership and told the dealer to call his insurance agency. Plaintiff had already called agency and informed agent that he would be leasing a car and would need insurance. Plaintiff testified that the agent informed him that “he would take care of it.” No coverage terms were discussed. The dealer called the agent and verified coverage with agent’s assistant, who took notes regarding type of insurance needed and left the note on the agent’s desk. The plaintiff never paid premiums or completed an insurance application. The Court found that the evidence supported the jury’s finding that agent failed to procure insurance and that agent was liable for all damages that insurer would have paid if the agent had properly procured the requested insurance.

Bailey v. State Farm Mut. Auto. Ins. Co., 2013 MT 119, 370 Mont. 73, 300 P.3d 1149:

Plaintiffs moved from Oregon to Montana and sought agent’s assistance in transferring Oregon policy to Montana. Plaintiffs specifically requested the same coverage they carried in Oregon and requested full coverage. The agent failed to procure UIM coverage which plaintiffs had under Oregon policy. Plaintiffs accepted and signed the application without reading the terms and did not read the insurance policy upon receipt. The Supreme Court reversed the trial court’s entry of summary judgment for the agent and remanded to try issues of fact. The Court held that the insured’s failure to read policy did not bar a claim for negligence against the agent but could be evidence of comparative negligence. Court also noted that insured’s reliance on the agent’s representations must be reasonable, which is a fact issue to be determined by the jury.

Monroe v. Cogswell Agency, 2010 MT 134, 356 Mont. 417, 234 P.3d 79:

Plaintiffs alleged negligence against agency for failure to obtain sufficient motor vehicle coverage. Plaintiffs alleged that agent failed to advise them that they had inadequate coverage, explain how an umbrella policy worked, and explain the UIM coverage limits. They further

alleged that the agent acted as an expert for purposes of procuring insurance and failed to assess plaintiffs' financial status in procuring insurance. The Court held that the agent was properly granted summary judgment as to these claims because no heightened duty of care has been recognized in Montana on the part of an agent.

3. Case Study No. 1

- a. **Line of coverage involved:** Commercial Inland Marine
- b. **Position of person in agency involved:** Producer/advising agent
- c. **Personal or commercial lines:** Commercial
- d. **Type of coverage involved:** Property/blanket coverage
- e. **Procedural or knowledge-based error:** Procedural
- f. **Claimant allegation:** Negligent misrepresentations of fact with regard to type and amount of coverage provided by policy constituting constructive fraud and breach of fiduciary duty
- g. **Settlement or Trial:** Settlement
- h. **Description of alleged error:** Failure to review proposal provided by insurance company in drafting proposal for insured
- i. **Tip to avoid claim:** The agent should carefully review insurance company's proposal and not rely on standard provisions
- j. **Summary of case:** Insurance agent, in renewing policy for property coverage, did not use insurer's standard proposal but wrote his own proposal and did not note specific limitations on blanket coverage included in insurer's proposal. Thus, insured was not provided with a proposal that mirrored insurer's proposal and therefore insured did not have appropriate coverage. Insured filed claim and was

denied benefits due to specific limitation on blanket coverage that insured was not informed of by agent. Insured filed claims against agent for negligence and breach of contract and against insurer for declaratory judgment, breach of contract, constructive fraud, promissory estoppel, breach of implied covenant of good faith and fair dealing, reformation of insurance contract, unfair claims settlement practices. Insurer and agent cross-claimed.

4. Case Study No. 2

- a. **Line of coverage involved:** Commercial Property
- b. **Position of person in agency involved:** Producing Agent
- c. **Personal or commercial lines:** Commercial
- d. **Type of coverage involved:** Property – fire loss
- e. **Procedural or knowledge-based error:** Failure to cancel insurance policy
- f. **Claimant allegation:** Plaintiff, insurance company, claimed that agent had a duty under the facts of the case to cancel the insurance policy as requested by the insured prior to loss
- g. **Settlement or Trial:** Trial – Directed Verdict in favor of agent
- h. **Description of alleged error:** Alleged failure to cancel insurance policy
- i. **Tip to avoid claim:** The agent documented its efforts to obtain a signed cancellation from the insured. The insured did not sign a cancellation form prior to loss and decided to collect on the policy.
- j. **Summary of case:** The Court decided that in the absence of a written agency agreement between the agent and the insurance company no duty existed on the part of the agency to obtain cancellation of the policy. The cancellation was

ostensibly requested by the insured and therefore any duty owed by the agent was to the insured not the insurance company.

5. Case Study No. 2

- a. **Line of coverage involved:** Commercial Property
- b. **Position of person in agency involved:** Producing Agent
- c. **Personal or commercial lines:** Commercial
- d. **Type of coverage involved:** Property – wind and water damage
- e. **Procedural or knowledge-based error:** Failure to obtain adequate coverage
- f. **Claimant allegation:** Plaintiff claimed that agent failed to obtain the insurance coverage requested on a building she purchased. She claimed wind and water damage as a result of a storm. She claimed that she purchased special coverage that should have covered the loss. The insurance company denied the claim on the basis that the damage was old and existed prior to the storm.
- g. **Settlement or Trial:** Settlement with contribution from the insurance company and agent.
- h. **Description of alleged error:** Alleged failure to obtain adequate insurance policy
- i. **Tip to avoid claim:** If possible the agent should either send a letter to insured discussing coverage requested and obtained or document the discussions in the file.
- j. **Summary of case:** The agent did not document his conversations with the insured concerning the type and nature of coverage available. There is no indication that he discussed the condition of the building and potential restrictions on coverage

relating to pre-existing conditions in the event of a loss event. The agent passed away before the claim was made and left little documentation in the file.

6. Case Study No. 3

- a. **Line of coverage involved:** Commercial Property
- b. **Position of person in agency involved:** Producing Agent
- c. **Personal or commercial lines:** Commercial
- d. **Type of coverage involved:** Property – fire loss
- e. **Procedural or knowledge-based error:** Failure to cancel insurance policy
- f. **Claimant allegation:** Plaintiff, insurance company, claimed that agent had a duty under the facts of the case to cancel the insurance policy as requested by the insured prior to loss
- g. **Settlement or Trial:** Trial – Directed Verdict in favor of agent
- h. **Description of alleged error:** Alleged failure to cancel insurance policy
- i. **Tip to avoid claim:** The agent documented its efforts to obtain a signed cancellation from the insured. The insured did not sign a cancellation form prior to loss and decided to collect on the policy.
- j. **Summary of case:** The Court decided that in the absence of a written agency agreement between the agent and the insurance company no duty existed on the part of the agency to obtain cancellation of the policy. The cancellation was ostensibly requested by the insured and therefore any duty owed by the agent was to the insured not the insurance company.

