

Agents E&O Standard of Care Project Nebraska 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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Nebraska

Summary of Insurance Producer's Standard of Care

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In Nebraska, an insurance agent or a broker has a general duty to use reasonable care in procuring insurance for an insured. However, an agent or broker has no affirmative duty to advise the insured absent a "special circumstance." The Nebraska Supreme Court has not provided an exhaustive list of "special circumstances" but has left the list to be developed on a case-by-case basis. One special circumstance that has been identified by the Nebraska Supreme Court is when the agent knows that a material change has been made to the insurance policy. Another is when an agent or broker undertakes to advise the insured. In both instances, Nebraska law requires the agent or broker to exercise reasonable care to provide accurate information.

The following cases are the landmark Nebraska decisions concerning the applicable standard of care in Nebraska:

1. *Flamme v. Wolf Insurance Agency*, 239 Neb. 465, 476 N.W.2d 802 (1991).

Plaintiff brought suit alleging that the insurance agent negligently misrepresented that Plaintiff's underinsured motorist coverage provided \$50,000 over and above the coverage available. On appeal, the Nebraska Supreme Court reversed the trial court's grant of summary judgment in favor of defendants, and remanded for further proceedings. In its opinion, the Nebraska Supreme Court stated five important legal propositions that now serve as the framework for insurance agent and broker liability in Nebraska:

- If an insurance agent or broker agrees to obtain insurance for another, the insurance agent is liable if they negligently fail to obtain the insurance.
- An insurance agent, however, does not have a duty to anticipate what coverage an individual should have.
- If an insurance agent or broker undertakes to advise an insured, the agent or broker must use reasonable care to provide accurate information.
- An insurance agent or broker may be held liable for a negligent misrepresentation made to an insured.
- An insured has the right to rely upon an agent's interpretation that is plausible and not in patent conflict with printed policy although the representation is legally untenable.

2. *Dahlke v. John F. Zimmer Insurance Agency*, 245 Neb. 800, 515 N.W.2d 767 (1994).

Plaintiff's hazard insurance originally had a single "per-occurrence" deductible. Plaintiff alleged that the insurance agent changed it, without the knowledge of plaintiff, to a "per-claim" deductible. After a single hazard occurred resulting in 25 separate claims, plaintiff brought suit alleging his insurance agent was negligent for failing to disclose the change in the deductible. In reversing the trial court's grant of summary judgment, the Nebraska Supreme Court held:

- When an insured requests an insurance policy, the insured has a duty to advise the insurance agent or broker as to the desired insurance.
- An insurance agent or broker has no affirmative duty to advise the insured absent certain special circumstances.
 - "Special circumstances" must be developed on a case-by-case basis.
- A special circumstance exists when the agent knows that a material provision of the insured's policy has been changed. In such circumstances, the insurance agent has a duty to explain the changes to the insured.
 - However, if a policy provision is clear and unambiguous, then the insured's failure to read the policy provision will insulate the agent from liability for failure to explain that provision.

3. *Broad v. Randy Bauer Insurance Agency, Inc.*, 275 Neb. 788, 749 N.W.2d 478 (2008).

In this opinion, the Nebraska Supreme Court provided clarification on the distinction between an "insurance broker" and an "insurance agent." This distinction is important to determining to whom an agent or broker owes a duty.

- An insurance broker is the insured's agent by acting as a middleman between the insured and insurer.
- An insurance agent is an agent for the insurer.
- In the absence of an express undertaking of a broader duty, an agent of the insurer who acts in an authorized manner is not personally liable to the insured because the promises made are clearly within the scope of the agent's authority.
- There is a cause of action for breach of contract to procure insurance against a broker because the broker is the insured's agent.

Case Studies

Prepared By: Patrick Vipond and Michael Storey - Lamson, Dugan and Murray, LLP - Omaha, NE

	Case Study 1	Case Study 2	Case Study 3
a. Line of Coverage	Property/ Casualty	Property/ Casualty	Property/ Casualty
b. Position of Person at Agency	Insurance Agent	Insurance Agent	Insurance Agent
c. Personal or Commercial Lines	Commercial	Commercial	Commercial
d. Type of Coverage	Theft	Commercial Property	Commercial Property
e. Procedural or Knowledge-based error	Knowledge	Knowledge	Procedural
f. Claimant Allegation	Plaintiff alleged that insurance agent failed to procure requested theft coverage and failed to inform Plaintiff of the existence and effect of a co-insurance provision.	Plaintiff alleged that insurance agent failed to provide proper insurance and negligently misrepresented that plaintiff had sufficient coverage.	Plaintiff alleged that insurance agent failed to produce the requested coverage for dwelling damaged by wind.
g. Settlement or Trial	Trial	Favorable Settlement for Agent	Settlement
h. Description of Alleged Error	The theft policy provided insufficient coverage for replacement value of business' s tools. Co-insurance provision reduced the payment owed by the insurer.	Insurance agent failed to procure insurance that covered losses from collapse of confinement building.	Insurance agent failed to "catch" an error made by insurer that reduced the coverage from fire, wind, and hail to just fire and hail.
i. Tip to Avoid Claim	Do not agree to provide advice on the amount of coverage for a client. If advice is given, be sure to use reasonable care to provide accurate information.	Keep detailed records of what coverage was requested by the insured and take note of the coverages specifically rejected by the insured.	Do not assume the insurer is going to issue the policy requested. Create internal procedures to double check that the insurance issued is identical to the insurance requested.
j. Summary of Case	Insurance agent solicited business from unsophisticated business owner and provided a \$20,000 theft policy for the business's tools. The evidence indicated that the insurance agent came up with the \$20,000 value on his own. The actual value of the tools was \$60,000. After a theft occurred, the insurance claim was reduced from \$16,000, which was the replacement value, to \$7,000 because of a co-insurance clause.	Plaintiff alleged that he was under the mistaken belief that his cattle confinement was covered for losses sustained by collapse because of a representation made by the agent. Change orders written by agent detailed how the agent and plaintiff talked specifically about collapse coverage and how the insured understood that a garage was the only building with that coverage.	A house was destroyed during a tornado. The claim was denied. The agent had originally requested a policy covering fire, wind, and hail. However, the insurer issued a policy that excluded wind and did not inform the agent. Admittedly, the agent failed to properly review the declaration sheet and the policy provided. The agent also failed to discuss the difference between the requested policy and the policy issued with the insured.