

# Agents E&O Standard of Care Project Pennsylvania 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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## Summary of Law of Insurance Agent/Broker Standard of Care Pennsylvania

Under Pennsylvania law a plaintiff may have a claim against his insurance agent/broker when the broker fails to procure the insurance coverage requested, does not follow the instructions of the client, or where the policy is void or materially defective through the broker's fault. The duty of care owed is to obtain the coverage that a reasonably prudent professional insurance broker would have obtained under the circumstances. The broker's duty of care is subject to the client's contributory negligence such as failing to provide the requisite information for the broker to procure coverage which may bar the client's claim. Pennsylvania does not impose a general duty to advise. Such a duty may be imposed, however, where the broker undertakes to act and does so negligently or where a special/confidential relationship with the client exists. The determination of whether a special relationship exists is fact-driven and turns on whether the broker acted as an insurance advisor/consultant, or as an intermediary to facilitate the purchase of insurance selected by the client.

### Pennsylvania Cases

*Laventhol & Horwath v. Dependable Ins. Assoc. Inc.*, 579 A.2d 388, 391 (Pa. Super. 1990) (plaintiff may acquire cause of action against insurance broker where the broker neglects to procure insurance, or does not follow instructions of the client, or where the policy is void or materially defective through broker's fault).

*Berlin v. Md. Cas. Co.*, No. 99-09597, 2002 Pa. D&C Cnty. Dec. Lexis 168 (Dec. 19, 2002) (standard of care is to obtain coverage reasonably prudent professional would under circumstances but where insured fails to provide information necessary to procure coverage failure may constitute contributory negligence and bar negligence claim; liability for gap in coverage under builder's risk policy for special project lies with plaintiff who after inquiring failed to respond to broker's questionnaire and other follow-up regarding high value construction project).

*Northwest Mut. Life Ins. Co. v. Babayan*, Civ. A. Nos. 03-717, 03-1622, 2004 U.S. Dist. Lexis 17155 at \*59-60 (E.D. Pa. Aug. 25, 2004) (standard of care is to provide professional services consistent with those expected of the profession; allegations that broker failed to properly record answers to medical questions on disability policy not actionable; plaintiff

knowingly withheld medical information on application which cause carrier to rescind policy).

*Wisniski v. Brown & Brown Ins. Co. of PA*, 2006 Pa. Super 216, 906 A.2d 571, 579 (Pa. Super. 2006) (insurance broker is middle-man between insured and insurance company and relationship is arm's-length; broker/client relationship is not always or even generally confidential but for great majority of cases is not; in arm's-length insurance transaction, insured is presumed to know type of insurance coverage needed); (broker is not under affirmative duty to inspect a property and recommend flood insurance for commercial building).

*Allegrino v. Conway E&S, Inc.*, Civ. Action No. 09-1507, 2010 U.S. Dist. Lexis 106734 (W.D. Pa. Oct. 6, 2010) (applying Pa. law and citing *Wisniski* -- no general duty to advise as to appropriate commercial insurance to protect plaintiff's business interests; plaintiff alleged sufficient facts for claim that broker undertook to procure/add certain coverages but not to show breach of duty to recommend appropriate insurance).

*Stern Family Real Estate Partnership v. Pharmacists Mutual*, Civ. A. No. 06-130, 2007 U.S. Dist. Lexis 22296 (W.D. Pa. Mar. 27, 2007) (applying Pa. law and citing *Wisniski*; no general duty to provide insurance advice absent a special relationship; agent who undertakes to provide advice regarding coverage by conducting review, including visiting property, meeting and consulting with client, measuring building, and recommending policy limits, assumes a duty by affirmative actions and may be liable for negligent performance).

*Dardzinski v. Foley Ins. Agency, Inc.*, No. 04141, 2009 Phila. Ct. Com. Pl. Lexis 178 (Aug. 25, 2009) (noting distinction between allegations of reliance on specialized skill of professional broker and special/confidential relationship; plaintiff failed to alleged sufficient to show special relationship for claim of breach of fiduciary duty even though agency held itself out as insurance counseling and brokerage business).

### Case Study No. 1

#### DO YOU KNOW ENOUGH ABOUT YOUR CLIENT'S BUSINESS?

- |    |   |  |
|----|---|--|
| a. | Line of coverage involved                 | General Liability/Commercial Auto              |
| b. | Position of person in the agency involved | Licensed Producer and CSR                      |
| c. | Personal or Commercial Lines              | Commercial                                     |
| d. | Type of coverage involved                 | Non-owned/hired auto                           |
| e. | Procedural or knowledge-based error       | Both   |
| f. | Claimant Allegation                       | Failure to recommend, advise, explain          |
| g. | Settlement or Trial                       | Settlement                                     |
| h. | Description of alleged error              | Failure to offer non-owned hired auto          |
| i. | Tip to avoid claim                        | Know your client's business; document the file |
| j. | Summary of case                           |  |

A CSR took an unsolicited call from a business owner who bought and sold used steel pipe. The business owner had operated for over 17 years without business insurance. He was in immediate need for commercial general liability coverage with \$1M limits to satisfy the insurance requirements of a large company with whom he was doing business. The business owner had no employees, worked in an office in his home, had telephone calls with various companies to buy used pipe and contracted the loading, transport, and delivery of the pipe to the buyer. What he failed to tell the agency at the time insurance was initially sought, was that he did go on site to oversee the loading of pipe onto the hired tractor-trailers.

The agency obtained CGL policy for its new client for the year at issue and renewed the coverage for a number of years thereafter without incident. At the time of the second policy renewal the client advised the agency that he had purchased trailers that would be used by the contract carriers he engaged to haul the pipe and requested coverage for the trailers. The agency obtained coverage under the CGL policy advising the client that coverage was only for the time the trailers were stationary and communicated this to the insured. Eventually, the trailers were all sold and the coverage dropped. The CSR told the client that there would be coverage for the trailers while “on the road” through the contract carrier’s insurance and that he must obtain certificates of insurance from their carriers to show that his company was listed as an additional insured. There was no follow up on this issue.

The E&O claim against the agency arose following a tragic automobile accident involving the death of a mother and her adult daughter when a tractor-trailer loaded with used pipe being transported by a contract carrier decoupled due to a malfunction or alleged overloading. The client was sued in the wrongful death actions brought on behalf of the women’s estates and tendered his defense to the CGL carrier which denied coverage based upon the auto exclusion. The carrier was a non-admitted carrier that drafted its own exclusionary provision that had changed several times over the years including with regard to “loading and unloading.” The client sued the CGL carrier and, in the alternative, the agency for failing to provide suitable and appropriate coverage for his business and to advise the business owner of the effect of the carrier drafted exclusion. The case was defended on the basis that there is no general duty in Pennsylvania imposed upon an insurance broker to advise of or recommend specific coverages or explain standard exclusions under Pennsylvania law and because there was no request for or failure to procure a specific type of coverage. Contributory negligence was asserted as a complete bar based upon the client’s failure to provide requisite information for the broker to procure the correct coverage.

*What helped the defense:*

➤ The description of the client’s business was documented in the file sufficient to show that the client gave inconsistent testimony regarding what he told the agency about his business.

➤ The agency prepared a written proposal for insurance that the agency was only quoting commercial general liability coverage. The proposal had adequate disclaimer language.

➤ The agency transmitted the policy to the client in a timely fashion and noted each year the changes to the policy including the amended auto endorsement exclusion when it was first added to the policy. The transmittal letter also asked the client to contact the agency if he had any questions regarding the endorsement.

*Teachable moments:*

➤ Ask the hidden questions behind the information volunteered by the client about their business.

➤ Having suggested that the client require additional insured status, the agent failed to follow up with the client. The suggestion was not documented in the file to the client but was in correspondence to a third party. The better practice would have been a letter to the insured or note to the file with follow up.

➤ No inquiry was made, prior to the accident, or after the client purchased trailers, to determine whether the insured maintained commercial auto coverage with non-owned hired endorsement or whether non-owned hired coverage could be endorsed to the CGL policy.

➤ When the carrier first amended the exclusionary language the producer asked the CSR to request that the carrier remove the amendatory endorsement. The carrier replied that the change was mandatory for all policies. This inquiry raised an inference in the case that the agency had undertaken to act. The request and carrier determination was not communicated to the insured.

➤ After the claim was made the agency learned the client had commercial auto coverage through another agent and carrier for his personal autos. The CSR told the client to call the agent and ask whether the auto policy included non-owned hired coverage. This post-claim communication was documented in the file and pointed to the agency's knowledge that such coverage might have been considered earlier in time. Best practices are to provide notice of the claim and not comment on or provide opinions or advice after a claim is filed.

**Case Study No. 2**

**DO YOU KNOW ENOUGH ABOUT YOUR CLIENT'S PROPERTY?**

- |    |   |  |
|----|---|--|
| a. | Line of coverage involved                 | Homeowners/Travel Trailer                          |
| b. | Position of person in the agency involved | Licensed CSR                                       |
| c. | Personal or Commercial Lines              | Personal   |
| d. | Type of coverage involved                 | Flood  |
| e. | Procedural or knowledge-based error       | Both   |
| f. | Claimant Allegation                       | Failure to obtain full coverage, explain exclusion |

- |    |                              |   |
|----|------------------------------|---|
| g. | Settlement or Trial          | Trial/Non-Suit                                |
| h. | Description of alleged error | Failure to recommend flood/proximity to creek |
| i. | Tip to avoid claim           | Ask questions; document your file             |
| j. | Summary of case              |   |

A 20+ year homeowner's insurance client of the agency purchased a trailer and contacted the agency about obtaining insurance for the trailer which would be permanently parked at a campground and used as a seasonal home on weekends and in the summer. The trailer would be located within close proximity to a creek that traversed the property. Following this first inquiry for insurance, the agency received calls from three of the client's relatives who also had trailers at the campground. Based upon the information provided by the clients, the agency procured "manufactured home" insurance policies written by a carrier who specialized in such insurance. The policies provided coverage similar to homeowner's insurance and like homeowner's insurance contained a flood exclusion.

Not long after the coverage was in place, three of the trailers were damaged beyond repair and one swept away in flood water following a 100 year-flood event. Plaintiffs tendered their claims to the insurance carrier which denied coverage based upon the flood exclusion. Plaintiffs brought suit against the insurance carrier, the insurance agency, and others. After the flood, the clients learned that some of the other trailer owners had "travel trailer" insurance that provided comprehensive auto coverage for trailers that were taken "on the road" and did not exclude flood. One trailer owner had insurance for his stationary trailer that did not exclude flood coverage.

Plaintiffs brought suit against the carrier and agency. At trial, plaintiffs testified that they requested insurance for their "travel trailers" and "full coverage" in their communications with the agency. This testimony conflicted with notations in the client files that the trailers would be stationary or permanently parked. Plaintiffs also admitted that they were aware of the proximity of the creek to their trailers but did not request or make inquiry about flood insurance.

The agency files had applications for the policies signed by the insureds that showed plaintiffs applied for "manufactured home" (not travel trailer) policies. The plaintiffs testified that after filling out and returning the applications some received a declarations page and some the policy which referred to the insurance as a "manufactured home policy." To varying degrees the plaintiffs read the declarations and the policy, but didn't notice the exclusion, received the declarations and the policy but did not read them, or claimed not to have received them at all. The agency file did not contain policy transmittal letters. Plaintiffs asserted that the agency owed a duty to them to disclose that the insurance policies did not provide "full coverage." According to plaintiffs, they had a reasonable expectation that they would receive insurance coverage for any occurrence/peril.

At the conclusion of the plaintiffs' case, the carrier and agency moved for and were granted a nonsuit. The trial court's nonsuit was affirmed on appeal. Key to the decision

was the fact that the plaintiffs did not request flood coverage. The court also found that it was unnecessary for the declarations page to note the flood exclusion because there was a reference to the policy form which contained the exclusion. For those plaintiffs who claimed they did not receive or read the policy, the court held that they were nonetheless responsible for knowing its provisions. As to the agent's duty to inspect and recommend flood insurance, the Court stated that the *Wisniski* case was properly applied.

*What helped the defense:*

- The agency files were documented with notes from the telephone calls with the clients showing that they requested insurance for trailers that would be stationary or permanently parked and used as seasonal homes.
- The declarations issued by the carrier upon which the agency added typewritten information regarding policy forms and endorsement contained an adequate disclaimer that the insured should review the policy.
- Plaintiffs' testimony that full coverage means without any exclusions was not credible.
- The seminal *Wisniski* decision was rendered during the course of the litigation and applied to the effect that there was no agency duty to inspect the property and recommend flood insurance.

*Teachable moments:*

- The agency file did not contain policy transmittal letters or other documentation telling the insured to read their policy and call with any questions or if they needed additional coverage.
- The CSRs involved did not read the policy nor was it their practice to tell clients to do so.
- The agency followed a protocol in asking certain underwriting questions for the application, but did not inquire as to whether these vacation trailers were located near a body of water.
- To the extent the agency added typewritten notations on the declarations that certain perils were excluded from the policy, the better practice was to include the flood exclusion.

### **Case Study No. 3**

#### **DO YOU HAVE ACCESS TO SPECIAL MARKETS FOR NEW LAST MINUTE CLIENT?**

- |    |   |                         |
|----|---|-------------------------|
| a. | Line of coverage involved                 | Commercial Package      |
| b. | Position of person in the agency involved | Licensed Agent/Producer |
| c. | Personal or Commercial Lines              | Commercial              |

d.	Type of coverage involved	Garage/Repossessor's Liability/"On Hook"
e.	Procedural or knowledge-based error	Procedural
f.	Claimant Allegation	Failure to timely/costly effect coverage
g.	Settlement or Trial	Settlement
h.	Description of alleged error	Untimeliness, lack of available markets
i.	Tip to avoid claim	Don't procrastinate; update client
j.	Summary of case.	

A business owner with specialized insurance needs, in a very limited market, contacted an agent in response to an agency marketing brochure that stated the agency's experience in providing business insurance. Unbeknownst to the agent, the business owner was in a dispute with his current agent for not helping him with a large claim and was told that the agent no longer wanted to do business with him and would not renew the insurance. The existing coverage was set to expire in less than two months. The agency agreed to assist the new client. The client supplied the agent with a certificate of insurance that listed the coverages he needed, but the agent was unable to find a carrier to write the coverage. The day before the existing package policy was to expire, the agent met the client with a proposal for commercial auto coverage only, at a cost far in excess of the auto coverage for the prior year. The client accepted the proposal, knowing that the other coverages would not be supplied in time and agreed to allow the agent to continue looking for a package policy. The agent had the client sign the insurance proposal and an application for commercial auto coverage only.

A few months later the agent found a carrier willing to write a package policy, again, at a cost well in excess of the prior year. The client accepted the high cost coverage but then went to a specialty broker he found on the Internet and was able to obtain replacement coverage at a much cheaper premium. The client sued the agency claiming it was negligent in failing to obtain adequate coverage at a competitive price seeking damages for his out-of-pocket premium costs and lost profits for business suspended by his customers due to lack of evidence of adequate insurance coverage. The case was settled after a jury was selected for the out-of-pocket loss only.

*What helped the defense:*

- The agent obtained the client's signature on both the application and proposal for insurance for commercial auto coverage only, which called into question the client's oral testimony that he thought that he was receiving all of the coverages necessary for his business.

*Teachable moments:*

- No one at the agency had any prior experience with a client in this line of business and had no access to specialty carriers.
- The agent did not maintain contact with the client and communicate with him about the difficulty she was having finding a carrier willing to write the coverage.



- To the extent there were communications with the client prior to the day before the expiration of the prior policy there was no documentation in the file reflecting such communications.