A must-read article for agencies with branches in multiple states!

Do Insurance Agents have a DUTY TO ADVISE?

A summary of the law governing insurance agents' obligations to advise their customers.
By Myles P. Hassett, Esq. and Julie K. Moen, Esq.

Dave Garner, Senior Vice President of Swiss Re claims, asked the Hassett Law Firm of Phoenix, Arizona to provide a state-by-state analysis of insurance agents' duty to advise so that the standard of care, and any associated liability trends, could be better understood on a national level. To accomplish this, Myles P. Hassett, Esq. and Julie K. Moen, Esq. researched the law in all 50 states and Washington D.C., with assistance from Swiss Re lawyers practicing in each jurisdiction, and produced a comprehensive review of applicable standards. Lucas N. Frank, Esq. of the Hassett Law Firm's Albuquerque, New Mexico, office also assisted in the compilation of the summary.

Consumers expect independent insurance agents to be knowledgeable and professional, and increasingly rely on those agents to obtain the most appropriate policy based on their insurance needs. States also mandate the minimum level of knowledge and ability their agents must exhibit through statutes and regulations that govern agent licensing, solicitation and sales. Yet despite consumer expectations and a high level of regulation, the law in most states doesn't automatically consider insurance agents to be "professionals" with a duty to advise their customers, similar to attorneys or accountants.

However, in the context of a duty to advise the customer, there is a difference between what the law requires and what best practices dictate. Legal requirements establish minimum standards for agent conduct, while best practices go beyond mere compliance with the law and emphasize a higher level of performance. The duty to advise customers about their insurance needs, when it applies, provides a good example of the difference between legal standards and best practices. As outlined below, different states have established different legal standards for when insurance agents have a duty to advise. However, best practices generally require that independent agents advise customers about their coverage needs so that their choices are properly guided in the increasingly complex world of insurance. As a practical matter, offering coverage to meet all of the customers' insurable exposures helps to avoid E&O claims, while also maximizing potential agency revenue.

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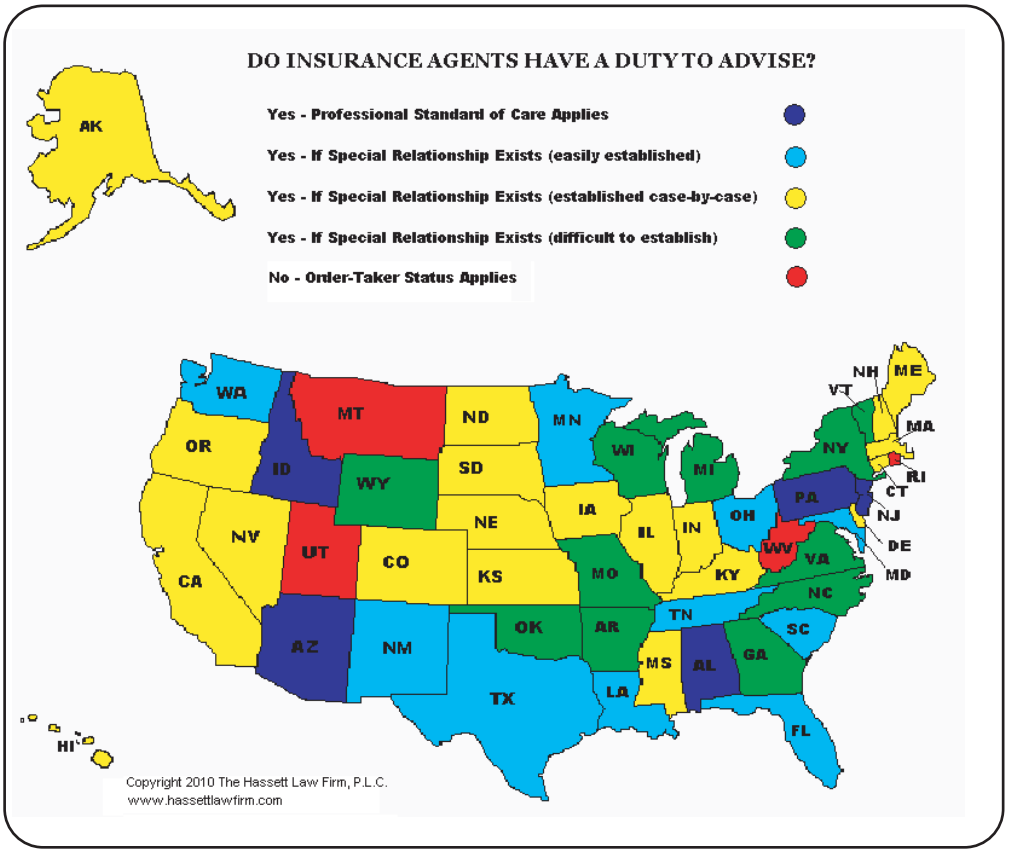
The legal standards for establishing an insurance agent's duty to advise differ from state to state. Some states hold agents to a professional standard of care that includes an affirmative duty to advise. At the other end of the spectrum, a few states use an order-taker standard that imposes only an obligation to procure requested coverage without any duty to advise. The vast majority of states apply a test that requires finding a "special relationship" before any duty to advise will be imposed on the agent. These states can be categorized into jurisdictions that make it more or less difficult to establish the predicate "special relationship" before the duty to advise arises. At right is a map that shows how each state regards the duty to advise.



1. The General Rule: Agents Must Use Reasonable Care, Skill and Diligence.

A review of the law in the 50 states and Washington, D.C. reveals that agents across the nation have a similar general duty to their customers to use the degree of care, skill and diligence that a reasonable insurance agent would in the same or similar circumstances to procure the insurance requested by the customer. If the agent cannot procure the insurance, the agent has a duty to notify the customer of this fact in a timely fashion.

Absent a special relationship, the general duty of care in most states does not include an affirmative duty to advise customers about additional types and limits of coverage. A customer's request for "full" or "sufficient" coverage rarely creates the kind of special relationship that imposes upon the agent a duty to give advice about the types and limits of coverage available, although some courts require agents to clarify the customer's request in those cases.

2. Professional Standard of Care States.

A few states have adopted a relatively stringent standard of care, in recognition of the fact that agents play an advisory role similar to that of an attorney or accountant. In order to comply with the standard of care in Alabama, Arizona, Idaho and New Jersey, an agent must inform the customer about the existence and advisability of additional types and limits of coverage.

To comply with the standard of care in Maryland and Washington D.C., agents must advise their customers about other types of available coverage. However, absent a special relationship, insurance agents have no duty to advise their customers about obtaining additional limits of coverage.

Pennsylvania splits the duty by line of coverage, requiring agents to advise personal lines customers about other types and limits of coverage. But, absent a special relationship, agents have no duty to provide advice to commercial lines customers.

Three states - Maryland, Michigan and Nevada - also divide the duties of various insurance professionals by licensing insurance counselors separately from insurance agents. Counselors are paid specifically to review a customer's insurance and provide information and advice about additional types or limits of coverage that would best suit the customer's needs.

3. The "Special Relationship" Test.

Many states agree that to impose a blanket affirmative duty on agents to advise about types and limits of available coverage would reward insureds for taking an "intellectual" gamble purchasing less insurance now (for less money), then later claiming they would have purchased better (and more expensive) coverage if only the agent had advised them to do so. This removes the burden from insureds for determining their own best interests and turns agents into financial guidance counselors. As a matter of public policy most states thus require that the insured first establish from the circumstances that the agent-customer relationship was "special" before any duty to advise can arise.

Courts generally define "special circumstances" as including one or more of the following factors: 1) the agent agrees to advise the customer; 2) the agent accepts additional compensation beyond the premium for the advice; 3) a (long-term) course of dealing between the agent and customer in which the agent is on notice that the customer seeks and relies upon the agent's advice;

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4) the agent holds himself out as an expert and the customer relies on that representation; 5) the customer specifically requests advice; and 6) the agent makes representations about the coverage upon which the customer relies. The states with no affirmative duty to advise, absent a special relationship, fall into three subcategories: states that tend to find a special relationship, states with no clear preference and states that rarely (if ever) find a special relationship.

A. States That Tend to Find a Special Relationship Between Agent and Customer.

The courts in Florida, Louisiana, Minnesota, New Mexico, Ohio, South Carolina, Tennessee, Texas and Washington liberally interpret the facts with the intention of finding a special relationship. South Carolina also requires agents to explain the coverage and limitations to customers.

Some Louisiana cases assume a limited fiduciary duty between an insurance agent and the insured. But Louisiana has not held that insurance agents have a "spontaneous" duty to advise, absent an agreement by the agent to advise the customer or the agent holding herself out as an advisor.

In Tennessee, an agent cannot omit or reject coverage because he thinks the insured does not need it or will not benefit from it. Instead, the agent must offer the coverage to the insured, advise of its usefulness (if any) and allow the insured to decide.

B. Independent View of the Special Relationship Test.

There are many middle-ground states with no clear preference for finding or not finding a special relationship. These include Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Massachusetts, Mississippi, Nebraska, Nevada, New Hampshire, North Dakota, Oregon and South Dakota. Illinois has a statutory duty of care that requires agents to use ordinary care to procure, renew, bind, or place coverage for an insured.

Nebraska and Oregon require agents to explain coverage and limits to customers, but Oregon has not yet ruled on whether agents must advise customers about which coverages or limits to purchase.

C. Conservative View of the Special Relationship Test.

Some states have conservatively set a high bar for finding a special relationship, rarely finding that the facts establish a special relationship. These states include Arkansas, Georgia, Michigan, Missouri, New York, North Carolina, Oklahoma, Vermont, Virginia, Wisconsin and Wyoming. In fact, New York courts have yet to find the existence of a special relationship establishing an agent's duty to advise his customers.

These states also generally require the insured to have specifically requested the insurance she claims the agent failed to procure. A request for "full" or "adequate" coverage, or the "best coverage available," does not generally create an obligation for the agent to seek out or procure a specific type of insurance for the customer.

4. Order-Taker States.

Some states do not impose an affirmative duty to advise and make no exception for the existence of a "special relationship." Instead, the agent's only obligation is to procure the coverage requested by the customer and timely notify the customer if the agent cannot obtain the insurance. Even the existence of a fiduciary relationship imposes no additional duty, so that the agent is still only responsible for procuring the coverage requested by the insured. These order-taker states are Montana, Rhode Island, Utah and West Virginia. Even in these states, however, agents may be liable if they provide incorrect or misleading information.

5. Conclusion.

Our research indicates that the general trend is moving toward the imposition of professional standards of care by the courts, guided in many instances by the use of a predicate "special relationship" test before imposing an affirmative duty to advise. Prudent agents are responding to this trend by promoting best practices and awareness of the insured's needs. Independent insurance agents should accordingly not content themselves with minimally-compliant conduct that merely satisfies legal standards, but should instead aim to provide service that exceeds these standards, consistent with the goals of earning and keeping customer trust and confidence.

About the Authors

Myles P. Hassett, was originally admitted to practice in Ireland and is licensed in Arizona and California. For over 20 years, Mr. Hassett's focus has been on litigating the defense of claims against insurance agents and brokers. He has appeared as lead counsel in numerous Arizona Supreme Court and Court of Appeals insurance cases, and has established leading precedent insulating agents from third-party liability.

Julie K. Moen earned her law degree from the University of Arizona in 2005. Ms. Moen practices with the Hassett Law Firm primarily in the area of insurance litigation and regulation. She is a member of the Arizona State Bar and the American Bar Association.

The Hassett Law Firm, P.L.C. (www.hassettlawfirm.com) is an AV-rated civil litigation law firm with offices in Phoenix, Arizona and Albuquerque, New Mexico.

For a list of the each state's most pertinent cases, visit the Big "I" Risk Management Website www.iiaba.net/eohappens and click on "Standard of Care."