SHINING A LIGHT ON INSURANCE MARKETING MALPRACTICE

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Summary

When there is not enough insurance to fully compensate an injured party, trial lawyers should examine why commercially available insurance wasn't in place. Learn how to identify compensable insurance marketing malpractice claims. Such a cause of action not only arises out of a first-party claim between an insured/client against a negligent insurance marketer but also on assignment from a tortfeasor for the benefit of a third-party claimant.

I. (A) Duty of Care vs. (B) Legal Duty and Standard of Care.

A. Duty of Care Analysis.

It has long been recognized that an insurance consumer may be harmed if a marketer of insurance made an "error" or committed and "omission" when soliciting, negotiating, procuring or effectuating insurance policies. As the law first developed remedies that balanced the interests of the insurance industry with fairness toward insurance consumers, many states announced that marketers owed a "duty of care" to their clients. *Gay v. Lavina State Bank*, 61 Mont. 449, 202 P. 753 (1921). This usually resulted in the trial court judge (guided by the thinking of other fair-minded judges) making an ad hock pronouncement of a "duty of care" to be applied to each case. The jury[2] was then instructed about the judge's pronouncement and asked to determine whether the marketer breached the "duty of care" and, if so, whether and in what amount the plaintiff was damaged. This approach conflates legal duty and standard of care and allows the judge but not the jury to decide the standard of care[3].

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Under "duty of care" analysis, a court looks at three questions as it resolves an insurance producer or marketing malpractice dispute:

1. What is the "duty of care" to be applied to the insurance producer or marketer? (Decided by Judge.)

2. Was there a breach of the "duty of care"? (Decided by Jury.)

3. Did the breach of the "duty of care" cause damage to the client and, if so, in what account? (Decided by Jury.)

B. Legal Duty and Standard of Care Analysis.

The better approach is to recognize that high information insurance producers and marketers interact with almost always low information consumers concerning complex financial service contracts. Unlike a person ordering pizza knowing that she likes anchovies, insurance consumers hardly ever have more than a basic understanding of what kind of insurance (i.e. auto, property, health or life) are available to protect their insurable interests. This is because consumers have very little knowledge of the insurance marketplace and how commercially available insurance policies work in the real world[4].

Ordinary negligence is based on a reasonable care standard. All persons should exercise reasonable care not to harm another. There are special rules for different relationships. For example, an owner of land owes different duties depending on whether the third-party is a business invitee, an ordinary invitee or a trespasser. The vendor of the tangible goods may be

obligated to provide a warranty or merely owe no more than a legal duty to provide the goods ordered by the customer.

In the American system of divided government, all power of self-government is divided between the legislature, executive and judiciary. Judicial power is further divided between a judge who decides the common law and rules of procedure while the jury decides issues of facts in dispute.

Whether a civil claim against an insurance marketer has merit should mostly be evidenced based. Each state Supreme Court should continue to establish the legal duty of an insurance marketer but the standard of care of a marketer depends on the facts of each case. Recognizing that (1) legal duty and (2) standard of care are and should be separate issues, the four questions presented in insurance marketing malpractice disputes are:

1. What legal duty does the insurance producer or marketer owe to the client? (Decided by Judge.)

2. What is the standard of care of the insurance producer or marketer? (Decided by Jury.)

3. Was there a breach of the standard of care? (Decided by Jury.)

4. Did a breach of the standard of care cause damage to the client and, if so, in what amount? (Decided by Jury.)

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II. Legal Duty of Insurance Marketer.

In Montana, "Four elements are required to prove a claims for negligence: (1) duty; (2) breach of duty; (3) causation; and (4) damages." *Dulaney v. State Farm Fire and Casualty Insurance Company*, 375 Mont. 117, 324 P.3d 1211 ¶4 (2014) (Summary Judgment sustained in favor of insurance producer where client-insured failed to present expert evidence regarding producer's standard of care when selling and servicing business insurance). In Arizona, a marketer of insurance to consumers (including a licensed insurance producer) owes "a duty of 'reasonable care, skill and diligence' in dealing with clients." *Webb vs. Gittlen*, 217 Ariz. 363, 369, 174 P.3d 275, 279, ¶20 (2008) (quoting *Darner Motor Sales, Inc., vs. Universal Underwriters Insurance Company*, 140 Ariz. 383, 397, 682 P.2d 388, 402 (1984). *Accord, Wilks v. Manobianco,* 237 Ariz. 443, 445, 352 P.3d 912, 914 ¶6 (2015), *see also*, Restatement (Third) of Agency § 8.08 ("If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge."). The words, "marketer," "agent," and "producer" are used interchangeably.

The legal duty of an insurance producer as announced in *Darner* and as affirmed in *Webb v. Gittlen* and *Wilks v. Manobianco* has been established by the Supreme Court of Arizona. This legal duty should be distinguished from the standard of care for insurance producer. The distinction between (1) legal duty and (2) standard of care, "long has been a source of confusion." *Southwest Auto Painting & Body Repair, Inc. vs. Binsfield*, 183 Ariz. 44, 46-47,

904 P.2d 1268, 1270-71 (App. 1995). In Arizona, *Darner* is the seminal controlling authority concerning insurance producer malpractice. In that case, Justice Feldman stated that, "When an insurance agent performs his services negligently, to the insured's injury, he should be held liable for that negligence just as would an attorney, architect, engineer, physician or any other professional who negligently performs personal services. [citations omitted] The principle involved here is simply that a person who holds himself out to the public as possessing special knowledge, skill or expertise must perform his activities according to the standard of his profession. If he does not, he may be held liable under ordinary tort principles of negligence for the damage he causes by his failure to adhere to the standard. [citation omitted] Proof of the standard in this type of case may require expert testimony at trial."[5] *Darner*, 140 Ariz. at 397-8, 682 P.2d at 402-3[6].

III. Standard of Care – A Finding of Fact for Jury Aided by Expert Testimony

As an insurance expert witness, I testify that the standard of care for a producer or marketer of insurance is for the insurance producer or marketer to ascertain and understand the needs of his/her/its client (the insurance consumer) and provide that advice which, under similar circumstances, the marketer would provide to him/her/itself. This standard of care requires the marketer to communicate such advice in a manner that is known to actually gain the attention and understanding of the client.

My opinion concerning this statement of the standard of care for insurance professionals is derived from my education, training and experience in insurance, insurance standards,

insurance law, and how virtually all insurance producers view themselves as insurance professionals[7] having specialized knowledge[8], education and training concerning insurance and the business of insurance and their role as advising insurance consumers who almost always present themselves with significant lower information on the subjects than the insurance professional. I also developed this opinion with knowledge of insurance commitments that almost all insurance companies and insurance marketing organizations adopt as their code of ethics or commitment to constituents. In addition, there are a number of professional designations awarded by independent organizations serving the insurance industry (including insurance marketers) who require designees to subscribe to a professional commitment. The designation may also require the taking courses and passing examinations. Before being allowed to matriculate to take any such examination, the authority awarding the designation will almost always require the person to pledge to conduct her/his professional affairs in conformity with a commitment.

For Chartered Property and Casualty Underwriters (CPCU) awarded by The American Institute for Property and Casualty Underwriters [closely affiliated with The Insurance Institute of America, Inc. whose interlocking boards of directors are made up of CEOs from all the major insurers and national producers (known collectively as "The Institutes")] the commitment is:

"As a Chartered Property Casualty Underwriter: I shall strive at all times to live by the highest standards of professional conduct; I shall strive to ascertain and understand the needs of other and place their interests *above* my own; and I shall strive to maintain and uphold a standard

of honor and integrity that will reflect credit on my profession and on the CPCU designation." [Emphasis added].

Significantly, The Institutes own the CPCU Society. Effective January 1, 2017 The Institutes reference the CPCU Society as "The Institutes CPCU Society." Because of The Institutes' broad influence in the entire U.S. property and liability insurance industry, I believe the insurance industry is accepting an expanded standard of care for marketers/producers/agents toward clients from an equal consideration standard to a fiduciary standard. This is consistent with the fiduciary standard that has been advanced by the U.S. Department of for insurance advisors to Employee Benefit Plans.

For people who have the Chartered Life Underwriter (CLU) designation awarded by The American College, the required pledge is: "In all my professional relationships, I pledge myself to the following rule of ethical conduct: I shall, in light of all conditions surrounding those I serve, which I shall make every conscious effort to ascertain and understand, render that service which *in the same circumstances, I would apply to myself.*" [Emphasis added].

An insurance industry designation Fellow of the Life Management Institute (FLMI) that is prestigious in the life and disability industry is awarded by the Life Management Institute. I could not find any professional commitment requirement for a Fellow of the Life Management Institute but I believe the non-public web presence of LMI discloses the professional standard to which Fellows are required to adhere.

Those people who have the Certified Financial Planner (CFP) designation are required to subject themselves to the jurisdiction of the CFP Board and must agree to a Code of Ethics which include general statements expressing the concept that CFP's "owe to the client the duty of care of a *fiduciary* as defined by the CFP Board: one who acts in utmost good faith, in a manner he or she *reasonably believes to be in the best interest* of the client". [Emphasis added].

I note that the concept of "utmost good faith" or *uberrima fides* is well known in the British Brokerage System of insurance marketing and sets a fiduciary standard for insurance marketers.

I am also mindful of the trend toward moving the standard of care for insurance professionals from providing the same good advice the professional would give to him/her/itself to placing the interests of the client-consumer above the interests of the insurance professional. Placing the interests of others above the interests of the professional has always has been the professional commitment of the CPCU Society. Moreover, Department of Labor Regulation changed the definition of the word "fiduciary" and require persons who serve as advisors to employee benefit plans to put the interests of others ahead of the interests of the advisor. 29 CFR 2510.3-21(c) [announced in U.S. Department of Labor reference RIN: 1210-AB32] under the authority of 29 USC § 1002, ERISA § 3(21); 29 USC § 1135 and ERISA § 505]. These Department of Labor regulations were put in force effective June 9, 2017. 81 Fed. Reg. No. 68 (Regarding 29 CFR Parts 2509, 2510, and 2550)[9].

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The standard of care for insurance marketers also requires that they deal with the insurance client honestly and in good faith. Producers should not misrepresent the terms of any insurance contract or present information about the contract that is deceptive or misleading. *Mont. Code Anno.* §§33-18-201 to 204; *Ariz. Rev. Stat.* §§20-442 to 444 and 461. Moreover, the standard of care for producers requires them to be knowledgeable about the insurance contract that is being presented to the client as well as generally being knowledge about the types of insurance that are available in the market place (even from competing insurance marketers or companies). Producers should also honestly, thoroughly and accurately answer questions from the insurance client. If the producer does not have the knowledge to provide an accurate and complete answer, the producer should so state an offer to do the research necessary to accurately, thoroughly and fairly respond to the inquiry or state that the research will not be done. If the client's needs require that they purchase insurance coverage that the producer cannot sell (because of marketing restrictions or because the coverage is not commercially available), the producer should truthfully explain the situation to the client. Producers are high information professionals giving insurance advice to almost always low information clients regarding complex financial service transactions. Producers are not mere order takers. Clients look to producers to get insurance advice – not just expecting the producer to correctly take down and dispatch the client's order for a particular insurance policy and deliver the correct order to the client. Almost always the client only knows in a general way what kind of insurance they want (i.e.: auto insurance, business insurance, homeowners insurance, health insurance).

The standards of care must be met not only when insurance is placed but also when the same insurance is renewed or once a year whichever is a shorter period of time. Insurance marketers should conduct at least an annual review of all insurance sold to a client. This is usually done at or near the anniversary date of the policies. It is an opportunity for the producers to learn of changes in the clients' insurable risks. This review should be reasonably comprehensive and include inquiry by the marketers regarding both liability exposures as well as property exposures. Most certainly, coverage gaps must be brought to the attention and understanding of the client on such occasions – even when redundant with the advice given on many prior occasions.

> "Producers may not market, distribute or sell insurance in a given state without a license from that state. States have an application process that typically requires providing personal information, completing required education and training, satisfying a background check, and passing a licensing examination. Regulating producers is an important activity for states. Producers often are the principal insurance point of contact for consumers and, therefore, regulating producers' qualifications directly bears on consumer protection. Producer licensing also generates revenue for the states and state insurance departments." Federal Insurance Office, U.S. Department of the Treasury, *Completed pursuant to Title V of the Dodd-Frank Wall Street Reform and Consumer Protection Act [2010],* (December 2013) at 46.

IV. **Examples of Insurance Marketing Below the Standard of Care.**

A. **Auto Insurance**

1. Primary BI auto liability mismatched with UM/UIM.
2. Excess or umbrella UM/UIM not covered by excess or umbrella policy.
3. Replacing marketer overlooks or ignores coverage gaps on replacement.
4. Marketer effectively communicates little or no explanation of "damages" covered by UM/UIM.

5. Marketer assures client of "full" or "complete" coverage but omits UM/UIM or provides no more than minimum coverage required by auto lender, lessor or state financial responsibility law.

6. Online, mail or telephone marketer provides incorrect, inadequate or misleading description of insurance.

7. Marketer omits UM/UIM in response to client's request for lower premium while retaining other coverages that are more profitable to insurer or marketer but less valuable to client (i.e.: rental car reimbursements, towing, no deducible glass, low deductible collision and comprehensive auto med pay and physical damage to low value vehicle.

B. <u>Property Insurance</u>

1. Marketer sells replacement cost value (RCV) property insurance (*i.e.:* HO3) with limits that are inadequate to actually rebuild or replace property or results in activation of co-insurance penalty.

2. Marketer omits property coverages that client does not expect or intend such as law and ordinance with RCV coverage.

3. Marketers omits effective communication about property coverage that are not expected or intended such as a $10,000 limit for water damage.

C. <u>Liability Insurance</u>

1. Liability coverage mismatched with all property insurance procured from same marketer.

2. Liability coverage mismatched with all property insurance procured from multiple marketers.

3. Marketer omits effective communication about liability coverage that is not expected or intended such as punitive damages.

D. <u>Life and Disability Insurance</u>

1. Marketer incorrectly tells applicant that insurer doesn't care about a fact or condition.

2. Marketer incorrectly tells applicant that she is bound when there are unmet conditions precedents to coverage.

E. <u>Business Insurance</u>

1. Marketer omits non-owned auto coverage from business Commercial General Liability (CGL) policy.

2. Marketer omits adding business owner as additional named insureds on business insurance.

3. Marketer omits effective communication about business property coverages such as employee dishonesty, theft, bailment, extra expense, loss of business income.

F. <u>All Insurance</u>

1. Marketer fails to alert client as to coverage gaps at each personal contact point with client.

2. Marketer omits conducting annual insurance review of all coverage to identify client's uninsured but insurable risk for property and liability.

3. Marketer omits presenting coverage options that marketer buys herself because it's a good idea.

4. Marketer declines to assist with claim questions or actively discourages client from filing a claim in a way that causes damage or provides avoidable defenses for insurer.

5. Marketer binds coverage but does not make sufficient notation of which insurer is bound and all insurers deny claim.

6. Marketer fails to follow up with notice of cancellation or upcoming laps where marketer has reason to know that either insured or insurer intends or expects preservation effort.

V. <u>Independent, Captive or Direct Marketing</u>

In order to understand how the legal duty "to exercise reasonable care, skill and diligence in procuring insurance" should apply to all insurance marketing endeavors, it may be helpful to examine the three basic methods by which insurance companies market insurance policies. Traditionally, insurance companies were only interested in selecting and pricing risk (underwriting). These insurance companies were not interested in selling insurance policies and relied upon "independent" persons and enterprises to perform this function. "Independent"

"agents" were usually third-party contractors who had an express agency contract[10] with the insurance company or were allowed to establish sub-agent express contracts with "brokers."

As insurance marketing developed in the 20th century, an increasing number of insurers utilize the services of "captive agents" to solicit and procure insurance. "Captive agents" were also typically created by an express agency agreement but agents were obligated to only market insurance policies that were issued by a single group of insurance companies. Independent and captive marketers are compensated by commission earned as a percentage of premium earned.

The third kind of insurance marketing is accomplished on a direct basis. Direct marketing does not rely upon the use of insurance producers licensed by state insurance departments but, instead, utilizes employees of the insurer who are compensated by salary and not on the basis of a sale commission.[11]

State insurance departments do have an interest in protecting the public as they engage in insurance transactions. An important part of DOI function generally requires all persons and enterprises who engage in insurance marketing to be licensed. The licensing process usually includes an investigation of the applicant's background to make sure the person does not have an adverse criminal history that may endanger the public and requiring the applicant for licensure to demonstrate competent knowledge of the business of insurance usually by taking and passing licensing examinations.

Traditionally, life and disability insurance companies on the one hand and property and liability insurance companies on the other hand have had different interests in maintaining or

easing barriers for persons and enterprises seeking to become licensed insurance marketers. Life and disability insurance companies are generally interested in easing the licensing process so that greater numbers of persons can lawfully engage in the selling of life and disability insurance. In the past, a life and disability insurer could quickly arrange for people to obtain temporary licensure without a final background check or even passing an examination provided that the person had an express agency appointment and was presumptively being appropriately supervised by the insurance company. Life and disability insurers relied upon their own underwriting process to ensure that applicants met their standards before issuing coverage. Property and liability insurers, on the other hand, were required to meet the demands of the marketplace by inviting consumers to be instantly bound for coverage. Property and liability insurers were more keenly interested in their sales people successfully completing a state licensing examination and being vetted by an insurance department criminal history and criminal background investigation.[12]

VI. Limits on the Scope of an Insurance Marketer's Liability

In order for an insurance marketer to have civil liability for his/her/it's malpractice, the claimant must be a client (directly or indirectly) of the marketer. A privity or nexus may be established either (1) by direct contract to (i.e.: insured gets incorrect advice from marketer causing a coverage gap) or (2) lawful assignment[13] of the client's malpractice claim to a party claiming damages against the client (usually as the result of a settlement agreement between the

client and a claimant). There is no cause of action upon which relief may be granted for negligence without privity between the marketer and the claimant.

As an additional limitation on the scope of an insurance marketer's civil liability for malpractice, the insurance marketing malpractice claim must concern a contract of insurance that is commercially available in the marketplace. Insurance is the paid transfer of an event risk. It is a widely understood as such by consumers. Among risk managers, however, insurance is but one of several risk-management tools that include risk control, risk avoidance, noninsurance risk transfer, risk financing and risk retention. Although non-insurance risk manager malpractice is an intriguing subject, the scope of this paper is limited to transactions of insurance.

VII. Marketers are Dual Agents

Insurance marketers are dual agents of both the client-insured, as well as the insurer. This is known as a "dual agency" within the American Agency System. With respect to the nature and scope of the agents' relationship with an insurer, there may exists one or more written contracts between the producers and an insurer. If there is any limitation in the scope of a producer's authority to act on behalf of an insurer, that limitation is not binding upon the client-insured unless the nature and extent of the limitation was effectively communicated to the client-insured in a manner that was known to have gained their attention and understanding. This is consistent with the American Agency System. In other words, the agency relationship between the producers on the one hand and the insurer on the other hand is not defined by any written

contract between or among the producers and insurer but, instead, is governed by the expectations of the client-insured arising from the American Agency System including the concepts that (1) an insurance producer can bind coverage on behalf of the insurer and (2) knowledge of a fact by a producer is imputed to the insurer. Hodosh, The Legal Environment of Insurance, American Institute for Property and Liability Underwriters, Inc., (3d ed., 1987) at 271-272.

VIII. American Agency System vs. British Brokerage System.

The American Agency System can be contrasted to the British Brokerage System. Under English law, an agent owes allegiance to the insurance company but not the insurance consumer. The agent makes the insurer's policies available to brokers who, in turn, sell them to clients. In England, the broker owes allegiance to the client. This legal fiction results in there being a legal barrier between the broker and agent preventing a client from recovering damages for malpractice committed by the agent; the client may only recover damages for the malpractice committed by the broker. This antique insurance marketing system is not consistent with the reasonable expectations of American consumers who expect that assurances given by an insurance marketer are binding on the insurer. In the mid-20th Century, British insurers began to sell more commercial insurance in the United States and often did so as non-admitted insurers or as a "surplus line." Because these non-admitted insurers did not have to obtain a Certificate of Authority from and pay premium tax directly to the state regulator, states developed a license that imposed on the producer the obligation to collect premium tax and remit the tax to state insurance departments. The marketer was and is called a "surplus lines broker."

The existence of licensure for "agents" and "brokers" was confusing to consumers and the distinction was abolished in favor of a single word, "producers." This statutory change was done as a uniform state law by the National Association of Insurance Commissioners ("NAIC"). *See, i.e.: Mont. Code Anno.* §33-17-102(10); *Ariz. Rev. Stat.* §20-281(5) ("Insurance producer [...] means a person required to be licensed under [this article] to sell, solicit or negotiate insurance.")[14]. An employee of an insurer is not required to be licensed as an insurance producer if the "employee does not receive any commission on policies written or sold to insurer risks residing, located or to be performed in this state ...." *Ariz. Rev. Stat. §20-283(B)(1).*

It is well known in the insurance industry that "insureds generally do not read their policies, and even if they do, the nature and extent of their coverages are not often fully understood." Markham, The Claim Environment (Insurance Institute of America (1st ed., 1993) at 12.

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1 Frederick Berry has a Bachelor of Science degree in Insurance (1969) and a Juris Doctor degree (1973) from Arizona State University. Mr. Berry served as the Deputy Director of Insurance of the State of Arizona from July 1, 1976 through September 30, 1978 and attained his professional insurance designations of Chartered and Property and Casualty Underwriter (CPCU) in 1981 and Chartered Life Underwriter (CLU) in 1983. He served as a member of the State Bar of Arizona Insurance Committee for many years, including six years as Chairman, and was a member of the Arizona Supreme Court Committee on Character and Fitness from June 14, 2011 to October 31, 2014. Mr. Berry has testified as an expert witness in State and Federal Court concerning insurance matters on numerous occasions and is a licensed insurance producer in Arizona for life, health, disability, property, and liability insurance.

2 References to a "jury" included the trier of fact what would be the judge where trial by jury is not available or has been waived.

3 That principal historic legal encyclopedia and insurance treatises to this day fall back on authority that the insurance marketer has specific legal duties to market insurance in a certain way. For example *Appleman* advances as a "general rule is that 'brokers have no [obligation] to advise insureds about the adequacy or appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available.'" (1 *New Appleman on Insurance Law Library Edition* § 2.05[5][a] (Dec. 2016) Since 1984, Arizona law has never held that the "duty" of an insurance broker or agent is as constricted as *Appleman* proposes. Indeed, the proposition that an insurance broker or agent supposedly has *no duty* to advise insureds about the adequacy or appropriateness of requested insurance coverage or to tell insureds about optional coverage that might be available is inconsistent with the duty to procure insurance coverage

stated in *Darner* (1984), *Southwest Auto* (1995), *Premium Cigars* (2004), *Webb* (2008), and *Wilks* (2015). In the opinion of the author, that the historic legal encyclopedia and insurance treatises cling to "duty of care" analysis when approaching an insurance producer or marketer malpractice case it likely the result of these publications succumbing to the corrupting influence of the insurance industry.

4 Markham, The Claim Environment (Insurance Institute of America (1st ed., 1993) at 12.

5 Footnote 14 provided in *Darner* at this point in the opinion is illuminating. ("We take note that Doxsee was not an independent agent, but was employed by Universal. We do not imply, by this opinion, that the standard of care is the same. It may be that "company agents" are held to a somewhat lower standard than "independent agents"; this, of course, is a *matter of evidence*.") [emphasis added]

6 There is nothing remarkable in the proposition that the standard of care for an insurance marketer will vary based on a case's facts. Some states, however, suggest that the duty itself varies. But the duty to procure insurance for an insured remains constant. It is the same duty Arizona appellate courts stated and applied in *Darner* (1984), *Southwest Auto* (1995), *Premium Cigars* (2004), *Webb* (2008), and *Wilks* (2015). As expressed in those cases, the duty is direct, clear, and positive:

- "'An insurance agent owes a duty to the insured to exercise reasonable care, skill and diligence in carrying out the agent's duties in procuring insurance.'" *Darner Motor Sales, Inc. v. Univ. Underwriters Ins. Co.*, 140 Ariz. 383, 397 (1984) (quoting *Quality Furniture v. Hay*, 595 P.2d 1066, 1068 (Haw. 1979)).

- An insurance agent owes a duty "to exercise reasonable care, skill, and diligence in procuring insurance coverage." *Southwest Auto Painting & Body Repair, Inc. v. Binsfeld*, 183 Ariz. 444, 448 (App. 1995).

- Insurance agents owe a duty to exercise reasonable care, skill, and duty in procuring insurance. *Webb v. Gitlin*, 217 Ariz. 363, 367 ¶ 18 (2008).

- "Under Arizona's common law, insurance agents owe a duty of reasonable care when obtaining insurance on behalf of their clients." *Wilks v. Manobianco*, 237 Ariz. 443, 445 ¶ 6 (2015).

Since 1984, an insurance agent's duty has been to exercise reasonable care, skill, and diligence in procuring insurance coverage. *See also Restatement (Third) of Agency* § 8.08 at 343 (2006) ("If an agent claims to possess special skills or knowledge, the agent has a duty to the principal to act with the care, competence, and diligence normally exercised by agents with such skills or knowledge.").

An insurance agent's duty to use "reasonable care when obtaining insurance" for the agent's customers is also "founded on an agent's status as one with 'special knowledge,' who 'undertakes to act as an advisor' to a client." *Wilks*, 237 at 445 ¶ 6 (quoting *Darner*, 140 Ariz. at 398).

The focus is on the agent's duty to get the insurance coverage the customer needs—with needed advice. Or as was more fully appeared in a 2015 decision: "Insurance agents perform a personal service for their clients, advising them about the types and extent of coverage available; accordingly, insureds often rely, not unreasonably, on the agent's expertise when choosing an appropriate insurance contract." *Hague v. Bill Houston Ins. Agency*, No. 1 CA-CV 13-0613, 2015 WL 5209254 at *5 ¶ 21 (Ariz. App. Sep. 8, 2015). An insurance agent has a duty "to advise" the client on the insurance the client wants. *Darner*, 140 Ariz. at 397.

The standard of care—that is, what an insurance agent technically and actually must do to procure the insurance the customer needs—poses an issue of fact for the trier of fact to resolve on a case-by-case basis. *Gipson v. Kasey*, 214 Ariz. 141, 143 ¶ 10 (2007) ("Whether the defendant has met the standard of care—that is, whether there has been a breach of duty—is an issue of fact that turns on the specifics of the individual case.").

[7] The public web presence of the Office of the Montana State Auditor, Commissioner of Securities and Insurance is displayed, "For Incensed Professionals."

[8] The public web presence of the Office of the Montana State Auditor, Commissioner of Securities and Insurance provides links to the outside vendor that administers the license examinations for Montana insurance producers and presents "Examination Content Outlines" presenting the many areas over which an applicant can be expected to be examined.

[9] It is reported in the press that the 5th Circuit has voted 2 to 1 to overturn the change in the Fiduciary Rule. 59 AARP Bulletin 5 (June 2018). Elsewhere, some trade press reports the opposite result was handed down by the 10the Circuit. https://www.planadviser.com/dol-fiduciary-rule-gets-another-successful-defense-appeals-court/

[10] Creation of an insurance agency relationship with an insurance company can also be accomplished by estoppel (or apparent authority) or by ratification.

[11] Some states require all persons who engage in sales activity to be licensed by the insurance department whether or not they receive compensation by commission or salary. *Mont. Code Anno*. §33-17-103(1) references a producer licensing exemption for "a regularly salaried offer or employee of an insurer and who is engaged in the performance of usual and customary executive, administrative, or clerical duties and whose duties do not include the negotiation, sale, or solicitation of insurance."

[12] In the mid-20th century it was very difficult for insurance companies to conduct effective background checks regarding insurance marketers. They relied upon state insurance departments and their access to FBI fingerprint based investigation tools for comprehensive criminal history investigations.

[13] *See, i.e., Webb v. Gittlen*, 217 Ariz. 363, 174 P.3d 275 (2008).

[14] This change in Montana, Arizona and elsewhere throughout the United States was mandated by the Gramm–Leach–Bliley Financial Modernization Act of 1999, Pub. L. No. 106–102, 113 Stat. 1338 (1999). In response to that Act, the National Association of Insurance Commissioners adopted the *Producer Licensing Model Act* ("model act"), which set qualifications and procedures for licensing insurance producers. In 2001, the Arizona Legislature adopted its version of the model act. Ariz. Laws 2001, ch. 205, SB 1366, 45th Legis., First Reg. Sess. The 2001 version, among other things, created "a single category of insurance producer license which includes agents and brokers." House Summary, SB 1366, "Insurance Producer Licensing," Committee on Financial Institutions and Licensing, 45th Legis., First Reg. Sess. (Apr. 3, 2001). The 2001 version retained the usual definitions of "agent" and "broker," but had no definition for "insurance producer."

The Arizona Legislature amended Arizona's form of the model act in 2008. Ariz. Laws 2008, ch. 163, HB 2031, 48th Legis., Second Reg. Sess. The 2008 amendment added the present version of A.R.S. § 20-281(5), which provides that: "'Insurance producer' means a person required to be licensed under this article to sell, solicit or negotiate insurance." The committee reports for the 2008 statute also explained that an "insurance producer is a person who sells, solicits, or negotiates insurance." *See*, *e.g.*, House Summary, HB 2031, "Insurance; Technical Changes; Definitions," Committee on Financial Institutions and Insurance, 48th Legis., Second Reg. Sess. (March 5, 2008). Because there was now only an "insurance producer" to be licensed, the statutory definitions of, and provisions about, licensing insurance "agents" and "brokers" was no longer needed and vanished.

Many states now have similar laws. In Illinois, for instance, as in Arizona, an "insurance producer" is a "person required to be licensed under the law of [Illinois] to sell, solicit, or negotiate insurance." 215 ILCS 5/500-10. In Illinois, an insurance producer's duty is "to exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured." *Moje v. Federal Hockey League, LLC*, 207 F.Supp.3d 833, 835 (N.D. Ill. 2016). That matches Arizona's approach.

"Insurance producers" owe a strong duty to their clients, and can make many actionable errors, including failing to disclose available coverage, failing to ascertain an insured's risks and exposures, and failing to determine and recommend adequate coverage for the insured's needs. Michael Childress, *A Matter of Trust: The Duties and Liabilities of Insurance Producers*, 19 Chicago B. Ass'n Rec. 30, 31 (Oct. 2005).

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