DUTIES AND OBLIGATIONS OF INSURANCE AGENTS AND BROKERS

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One area of civil litigation which has gained momentum over the years is against insurance agents and brokers. Gone are the days when agents and brokers were sued for simply failing to follow instructions. Today, agents and brokers are sued by policyholders for not advising them of their coverage needs and for failing to secure for them "full" or the "best" coverage. Not only are agents and brokers getting sued for this, but they are also being found liable for these omissions as well. In order to provide a guide as to when agents and brokers can be held liable, this article will provide a general, multi-jurisdictional overview of the duties of agents and brokers.

Section One addresses the general distinction between insurance agents and insurance brokers, and the effect, if any, this has on determining what duties are owed. Section Two discusses the duties and obligations owed to policyholders, including general duties and so-called "heightened" duties which arise under specific circumstances. Section Three addresses the duties owed to the insurer, while Section Four discusses when and what duties agents and brokers owe to third parties. Section Five discusses the duties of agents procuring insurance through surplus lines insurers.

Section One: Insurance Agent vs. Insurance Broker

Before any meaningful discussion is possible, the traditional distinction between "agent" and "broker" must be noted. Generally, an agent is affiliated with and sells insurance for one particular insurer. A broker, on the other hand, may attempt to place

coverage for a client with any of several insurers.[1] The main difference between an agent and a broker is the principal. Generally speaking, an agent's principal is the insurer, while the broker's principal is the insured.

The distinction between agent and broker used to be crucial when determining whom a duty is owed. Traditionally, if the representative was an agent, then he or she generally did not owe any duty to the policyholder,[2] whereas, brokers, who were considered agents of the policyholder, owed duties to the policyholder.[3] For example, a federal court, applying Oregon law, granted summary judgment to an agent, who allegedly failed to include specific property in a policy schedule in accordance with the policyholder's instructions, when neither the evidence established, nor the policyholder alleged, an agency relationship between them. *Albany Ins. Co. v. Rose-Tillman, Inc.,* 883 F.Supp.1458, 1459 (D. Or. 1995). Similarly, in *Mackinac v. Arcadia Nat'l Life Ins. Co.*, 648 N.E.2d 237, 240 (Ill. Ct. App. 1995), an Illinois appellate court, in dismissing an action against an agent, held that "absent an agency relationship between the insured and an insurance agent, an insurance agent has

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[1] *See, e.g., Lazzara v. Howard A. Esser. Inc.,* 802 F.2d 260 (7th Cir. 1986) (Illinois law); *Wright Body Works Inc. v. Columbus Interstate Insurance Agency*, 210 S.E.2d 801 (Ga. 1974) *conformed to* 213 S.E.2d 25 (Ga. 1975); *Stockberger v. Meridian Mutual Insurance Co.*, 395 N.E.2d 1272 (Ind. 1979); *Naulty v OUPAC Inc.*, 448 So.2d 1322 (La. App. 1984); *Eddy v Republic National Life Insurance Co.*, 290 N.W.2d 174 (Minn. 1980). For a discussion of various types of agents, *see* Holmes, Eric Mills, Appleman on Insurance Vol. 7, §§44.1, 44.2 (2nd ed. 1999).

[2] Appleman on Insurance, § 44.2. *See also Creative Underwriters Inc. v. Heilman*, 234 S.E.2d 371 (Ga. 1977); *Bellmer v Charter Security Life Insurance Co.*, 433 N.E.2d 1362 (Ill. App. 1982); *Buxton v Fireman's Fund Insurance Co.*, 422 So.2d 647 (La. App. 1982); *Citta v Camden Fire Insurance Association*, 377 A.2d 779 (N.J. 1977); *McNeill v McDavid Ins. Agency*, 594 S.W.2d 198 (Tex .Civ. App. 1980).

[3] *Moore ex rel. Moore v. Johnson County Farm Bureau,* 798 N.E.2d 790 (Ill. App. 2003) (holding that captive agents of an insurer do not have the same fiduciary duty as an insurance broker to provide an adequate type and amount of coverage to an insured).

no general obligation to apprise the insured of facts detrimental to her coverage." Under these decisions, only a representative who would be traditionally labeled as a "broker" can be held liable for insurance-related losses sustained by the policyholder.[4]

However, insurance representatives have been increasingly unable to escape liability to policyholders by arguing that they are "agents" instead of "brokers." This is because many courts blur the distinction between agents and brokers, depending on the circumstances of the specific case.[5] When faced with the agent-broker dichotomy, the Minnesota Supreme Court held that "a person who procures insurance for others can be an insurance agent, an insurance broker, or both." *Eddy v. Republic Nat'l Ins. Co.,* 290 N.W.2d 174, 176 (Minn. 1980).

Furthermore, courts may also hold that an insurance representative serves in a dual capacity as both an agent and a broker.[6] Some holdings have been based on state statutes which provide that both an agent and a broker are an insurer's agent for purposes of receiving premium payments.[7] For instance, a federal court relied on a similar provision in

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[4]Appleman on Insurance, § 44.2.

[5]*Id.*

[6]*Id.*

[7] *Id.* (*citing* Mass. Gen. Laws ch. 175, § 169). *See also* W. Va. Code § 33-12-22 ("Any person who shall solicit within this state an application for insurance shall, in any controversy between the insured or his or her beneficiary and the insurer issuing any policy upon such application, be regarded as the agent of the insurer and not the agent of the insured."). It is unclear whether Section 33-12-22, which does not specifically mention them, also applies to surplus lines producers as well. The statutes specifically governing surplus lines producers (W. Va. Code. §33-12C-1, *et seq.*) does not contain a similar provision. Furthermore, the U.S. District Court for the Northern District of West Virginia held that under West Virginia law, the statute making person who solicits application for insurance the agent of insurer, not insured, does not apply to specialized market of surplus lines insurance. *American Equity Ins. Co. v. Lignetics, Inc.*, 284 F.Supp.2d 399, 410 (N.D.

the New York Insurance Code in finding that a broker not only served both the insured and the insurer, but also that the broker served as a fiduciary for both the insured and insurer. *Evvtex Co. v. Hartley Cooper Asscs.*, 911 F.Supp. 732 (S.D. N.Y. 1996).

Other courts have found a common law dual agency relationship, based on the specific facts and circumstances surrounding the parties. For instance, a court may hold that dual agency is established by evidence that the defendant, although an agent of an insurer, undertook to procure insurance coverage for a person seeking it.[8] In some circumstances, it may be possible to show that the defendant agent also became the agent of a policyholder merely by accepting an application for insurance coverage from the policyholder.[9] When a court does find a dual agency relationship, the agent will have duties to both principals.[10]

Thus, whether an individual is titled "agent" or "broker" is somewhat irrelevant and misleading when of determining what duties these representatives owe to whom.[11] What

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W.Va. 2003).

[8] *See, e.g., Anfinsen Plastic Molding Co. v. Konen*, 386 N.E.2d 108 (Ill. App. 1979); *Eddy v. Republic National Life Insurance Co.*, 290 N.W.2d 174 (Minn. 1980); *Riedman Agency Inc. v. Meaott Construction Corp.*, 456 N.Y.S.2d 553 (1982); *Kairys v. Aetna Casualty & Surety Co.*, 461 A.2d 269 (Pa. 1983).

[9] *See, e.g., Afford v Tudor Hall & Associates Inc.*, 330 S.E.2d 830 (N.C. App. 1985). *But see McNeill v McDavid Insurance Agency*, 594 S.W.2d 198 (Tex. Civ. App. 1980) (defendant's actions in providing application form and helping applicant complete it were taken in defendant's capacity as insurer's agent as accommodation to applicant, and did not constitute undertaking to represent applicant). *But see* W. Va. Code § 33-12-22.

[10] *See, e.g., Stewart v Boykin*, 303 S.E.2d 50 (Ga. App. 1983); *Naulty v OUPAC Inc.*, 448 So.2d 1322 (La. App. 1984); *Wright Body Works Inc. v Columbus Interstate Ins. Agency*, 210 S.E.2d 801 (Ga. 1974).

[11] *See, e.g., American Ins. Co. v. Freeport Cold Storage, Inc.*, 703 F.Supp. 1475 (D. Utah 1987) (calling a person a broker does not mean that he cannot act as an agent of the insurer for certain purposes); *Gulf Gate Mgt. Corp. v. St. Paul Surplus Lines Ins. Co.*, 646 So.2d 654 (Ala. 1994).

matters are the facts and circumstances surrounding the specific transactions of each case, not if the representative is technically an "agent" or technically a "broker."[12] Therefore, for purposes of this article, "agent" will refer to both agents and brokers, unless otherwise specified.

Section Two: Duties Owed to Policyholders

Much of the litigation involving agents is initiated by policyholders, which raises the question of what duties, if any, does an agent owe to a policyholder? A general answer can be gleaned from statutes, codes of agents' professional societies, and common law, although statutes and professional codes are fairly limited in defining specific duties.[13] One example of a statutory duty is found in Section 33-12-21 of the West Virginia Code, which mandates that "[n]o agent, or excess line broker shall knowingly place any coverage in an insolvent insurer." Some professional societies also have promulgated duties for their members. According to the Ethics Code for the Chartered Property Casualty Underwriter Society, members are prohibited from "willfully misrepresenting or concealing a material fact in insurance and risk management dealings; breaching the confidential relationship with the principal or client; misrepresentation; failing to use due diligence in ascertaining the needs of clients and principles; and undertaking assignments which cannot be adequately or professionally performed."[14]

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[12] *See e.g., Electro Battery Mfg. Co. v. Commercial Union Ins. Co.*, 762 F.Supp. 844, 848 (E.D. Mo. 1991); *Damon's Missouri Inc. v. Davis*, 590 S.E.2d 254 (Ohio 1992); *Galiher v. Spates*, 262 N.E.2d 626 (Ill. App. 1970).

[13] *Evvtex Co., Inc. v. Hartley Cooper Associates Ltd.*, 911 F.Supp. 732, 738 (S.D.N.Y. 1996).

[14] The CPCU Society Ethics Code can be found at www.cpcusociety.org.

Common law, on the other hand, proves an ample source when attempting to ascertain the duties of agents. These duties can be classified as either a general duty of ordinary care, or as a heightened duty of care which arises under special circumstances. A general duty of care is the notion that, absent special circumstances, it is the agent's duty to exercise reasonable skill, care, and diligence in procuring the insurance requested by the policyholder.[15] Generally speaking, this duty typically includes four mandates. First, the agent must carry out the policyholder's specific requests and instructions.[16] Often, these instructions relate to negotiating and procuring an insurance policy according to the wishes and requirements of the insured.[17] In other words, if a policyholder requests a $100,000 life insurance policy, the agent has an obligation to obtain a $100,000 life insurance policy, not a $50,000 life insurance policy or a $100,000 homeowners' policy.[18]

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[15] *See* Thomas R. Trenkner, *Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance*, 64 A.L.R. 3d 398 (1975).

[16] *AAS-DMP Management, L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 63 P.3d 860, 863 (Wash. App. 2003) ("Generally, an insurance agent or broker assumes only those duties normally found in any agency relationship. Those duties include the obligation to exercise good faith and carry out instructions.").

[17] *Nielsen v. United Servs. Auto. Ass'n*, 612 N.E.2d 526, 531 (Ill. App. 1993); *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 265-66 (7th Cir.1986) (Illinois law)("The primary function of an agent or broker acting in an agency relationship for an insured is faithfully to negotiate and procure an insurance policy according to the wishes and requirements of the insured."); *Dickerson v. Conklin*, 235 S.E.2d 450 (Va. 1977) (acknowledging a cause of action for failure to obtain insurance); *Rawlings v. Fruhwirth*, 455 N.W.2d 574 (N.D.1990)(Insurance agent must exercise skill and care which reasonably prudent person engaged in an insurance business would use under similar circumstances; this duty is ordinarily limited to duties imposed in any agency relationship to act in good faith and follow instructions).

[18] For overviews of an agent's liability for procuring inadequate coverage, see Robin Cheryl Miller, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability Insurance Coverage Procured,*" 60 A.L.R. 5th 165; Thomas J. Goger, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Life, Health, or Accident Insurance Coverage*

Furthermore, a court may treat an agent's failure to reinstate a cancelled insurance policy as the same as the failure to procure an insurance policy for purposes of agent liability. *See, e.g., Adkins & Ainley, Inc. v. Busada,* 270 A.2d 135, 136-137 (D.C. App. 1970). In *Adkins*, a policyholder brought an action against an insurer's policy-writing agent to recover damages for an alleged breach of duty. The policyholder sought new and increased fire insurance on his property, and had his son, an insurance broker, procure the insurance. The son contacted the defendant, a policy-writing agent, and the defendant issued two policies from two different insurers. One insurer sent a notice of cancellation to the policyholder, who then called the agent. The agent told the policyholder that the cancellation would be looked into, and that the policyholder should forget about matter unless he heard from the agent. The District of Columbia appellate court held that the agent, via the phone call, became a broker for the policyholder and had therefore obligated himself to use reasonable care in performing the undertaking of procuring new fire insurance or having old fire insurance reinstated. The Court reached its decision on the reasoning that 1) an insurance broker who undertakes to procure insurance and fails to do so is liable, 2) the reinstatement of a cancelled policy is essentially a form of procuring insurance, and 3) a negligent undertaking in this situation should be governed by the same reasoning as a negligent attempt to procure insurance.

The second mandate under the general duty of ordinary care is to procure insurance in a timely manner. *See, e.g., Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 858 (7th Cir. 1997) (Illinois law) (In Illinois, one of the basic duties of an insurance broker is "to procure insurance in a timely manner"). However, courts have typically failed to

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Procured," 72 A.L.R. 3d 735.

specify what constitutes a timely manner. *See, e.g., Santaniello v. Interboro Mut. Indem. Ins. Co.*, 700 N.Y.S.2d 230 (1999) (in holding that insurance agents have a common-law duty to obtain requested coverage for their clients "within a reasonable time," the court did not define a "reasonable time"). Third, agents must notify policyholders if the requested coverage could not be obtained.[19] The last mandate included in the general duty of ordinary care is that an agent must not mislead the policyholder.[20] Most of the litigation alleging misrepresentation involves misrepresentation related to the nature, extent, or scope of the coverage offered or provided.[21]

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[19] *See, e.g., Writers Inc. v West Bend Mutual Ins. Co.*, 465 N.W.2d 419 (Minn. 1991)(An insurance agent must exercise the skill and care which a reasonable and prudent person in the business would exercise under the circumstances. In an appropriate situation, this might include a duty to affirmatively notify the insured of the agent's inability or failure to obtain the coverage requested); *Riedman Agency, Inc. v. Meaott Const. Corp.*, 456 N.Y.S.2d 553 (4th Dept. 1982); *Rider v. Lynch*, 201 A.2d 561 (1964) (failing to notify of failure to procure); *United Capitol Ins. Co. v. Kapiloff*, 155 F.3d 488 (4th Cir. 1998) (Under Maryland law, when an agent undertakes to procure insurance and fails to do so, or when he fails to inform the principal of the nonavailability of insurance from a prospective insurer so that the principal can obtain insurance from another insurer, the agent may be liable); *Breck Const. Co., LLC v. Thomas, Farr & Reeves Agency, Inc.*, 852 So.2d 1151 (La. App. 2003) (An insurance agent who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he has failed to obtain the requested insurance); *Santaniello v. Interboro Mut. Indem. Ins. Co.*, 700 N.Y.S.2d 230 (N.Y. App.1999) (Generally, insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of their inability to do so).

[20] Some courts appear to consider this to be a heightened duty. *See, e.g., Hill, Peterson, Carper, Bee & Deitzler, PLLC v. XL Specialty Ins. Co.*, 261 F.Supp.2d 546, 548 (S.D. W.Va. 2003) (citations omitted).

[21] *See, e.g., Plumb v. Fluid Pump Service, Inc.*, 124 F.3d 849, 858 (7th Cir. 1997) ("A broker . . . is obligated not to mislead the insured"); *Free v. Republic Ins. Co.*, 11 Cal. Rptr. 2d 296 (Cal. App. 1992) (agent held liable for assurances concerning the adequacy of coverage limits); *Harts v. Farmers Ins. Exchange*, 597 N.W.2d 47, 51-52 (Mich. 1999) (holding that general "no duty" rule will not apply if, inter alia, the agent misrepresents the nature, extent, or scope of the coverage being offered or provided). *See also Southtrust Bank and Right Equipment Co. of Pinellas County, Inc. v. Export Ins. Services, Inc.*, 190 F.Supp.2d

Besides a general duty of ordinary care, courts have begun to impose a heightened standard of care on agents. A heightened standard of care, as its name implies, arises only in special circumstances. Although these "special circumstances" have been described as somewhat "nebulous"[22], "special circumstances" appears to be another way of saying that the evidence tends to show an agency or fiduciary relationship exists between the agent and the policyholder. Courts have enunciated various factors in determining when these "special circumstances" arise.[23] For instance, a court may find that special circumstances arise where: (1) the agent expressly undertakes or agrees to assume certain duties,[24] (2) the client makes a clear request for advice,[25] (3) the policyholder makes an

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1304 (M.D. Fla. 2002) (Under Florida law, allegation that insurance broker misinformed shipper as to effective dates of coverage was sufficient to state claim for negligence, even though insured would have been aware of truth if it had read underlying documentation.).

[22]Appleman on Insurance §44.2.

[23] *See Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 487 (Alaska 2001); *Gunnells v. Healthplan Services, Inc.,* 348 F.3d 417 (4th Cir. 2003) (applying South Carolina law); *AAS-DMP Management, L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 63 P.3d 860, 863 (Wash. App. 2003); *Sadler v. Loomis Co.*, 776 A.2d 25 (Md. App. 2001); *Marlo Beauty Supply, Inc. v. Farmers Ins. Group of Cos.*, 575 N.W.2d 324, 327 (Mich. App. 1998); *Fitzpatrick v. Hayes*, 57 Cal.Rptr.2d 445, 452 (Cal. 1997); *Sintros v. Hamon*, 810 A.2d 553, 556 (N.H. 2002). *See also Hill, Peterson, Carper, Bee & Deitzler, PLLC v. XL Specialty Ins. Co.*, 261 F.Supp.2d 546, 548-49 (S.D. W.Va. 2003) (predicting West Virginia law)..

[24] *See, e.g., Harts*, 597 N.W.2d at 52 (holding that general "no duty" rule will not apply if the agent assumes an additional duty by either express agreement or a promise to the insured); *Carolina Prod. Maint., Inc. v. United States Fid. & Guar. Co.*, 425 S.E.2d 39, 43 (S.C. 1992) (a court will impose a duty to advise if the agent undertakes to advise the insured).

[25] *See, e.g., Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003); *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 487 (Alaska 2001); *Fitzpatrick*, 67 Cal.Rptr.2d at 452 (holding that general "no duty" rule will not apply if there is a request or inquiry for a particular type or extent of coverage).

ambiguous request,[26] (4) the agent accepts additional compensation other than premium payments from the policyholder,[27] (5) the agent holds himself out as an insurance expert or specialist, sometimes coupled with reliance by policyholder,[28] or (6) there is a special relationship or course of dealing which puts the agent on notice that his advice is being sought and relied upon.[29] However, a long-term relationship or course of dealing, by itself, may not be sufficient to show special circumstances requiring the agent to perform heightened duties. For instance, in *Trupiano v.Cincinatti Ins. Co.*, 654 N.E.2d 886, 888 (Ct. App. Ind. 1995), the court did not find a heightened standard of care, even though the agent and policyholder had a long-term relationship, because there was no "interaction on a question of coverage, with the insured relying on the expertise of the insurance agent to the insured's detriment." The court specifically held, "There must be something more than the ordinary insured-insurer relationship, and a longstanding relationship alone is insufficient to

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[26] *Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 487 (Alaska 2001) (an insurance agent may have a duty to clarify an ambiguous request before providing coverage); *Harts*, 597 N.W.2d at 52 (holding that general "no duty" rule will not apply if, inter alia, an ambiguous request is made that requires clarification).

[27] *See Peter v. Schumacher Enterprises, Inc.*, 22 P.3d 481, 487 (Alaska 2001); *Gunnells v. Healthplan Services, Inc.,* 348 F.3d 417 (4th Cir. 2003) (applying South Carolina law); *AAS-DMP Management, L.P. Liquidating Trust v. Acordia Northwest, Inc.*, 63 P.3d 860, 863 (Wash. App. 2003); *Sadler v. Loomis Co.*, 776 A.2d 25 (Md. App. 2001); *Marlo Beauty Supply, Inc. v. Farmers Ins. Group of Cos.*, 575 N.W.2d 324, 327 (Mich. App. 1998); *Fitzpatrick v. Hayes*, 57 Cal.Rptr.2d 445, 452 (Cal. 1997); *Sintros v. Hamon*, 810 A.2d 553, 556 (N.H. 2002). *See also Hill, Peterson, Carper, Bee & Deitzler, PLLC v. XL Specialty Ins. Co.*, 261 F.Supp.2d 546, 548-49 (S.D. W.Va. 2003) (predicting West Virginia law).

[28] *See* fn 27. *See also Bates v Gambino*, 370 A2d 10 (N.J. 1977) (If the plaintiff can show that the defendant represented or held out that he or she had a certain level of expertise, the defendant may have a duty to conform to those representations as a matter of law).

[29] *See* fn. 24. *See also Gunnells v. Healthplan Services, Inc.*, 348 F.3d 417 (4th Cir. 2003).

create a special relationship." *Id.*

Once a heightened standard of care is found to exist, an agent is required to perform duties other than just diligently and faithfully carrying out a policyholder's instructions. Depending on the facts of a given case, these duties *may* include: (1) renewing insurance without a specific request by the policyholder; (2) advising a policyholder about coverage issues and needs [30]; (3) procuring the best available coverage [31]; and (4) a duty to monitor compliance with policy provisions.[32]

Despite the emphasis on the agent's duties, it would be remiss to not discuss the policyholder's duty to read. Although the courts are split on this issue, the trend is to allow the policyholder to sue even if the holder has not read the policy.[33] Nevertheless, the

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[30] *See generally* Gary Knapp, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R. 4th 249. *See also Hartford Fire Ins. Co. v. Chata Coating and Laminating, Inc.*, 2005 WL 1490468 (D. N.J. 2005) (Both agents and brokers are obliged under New Jersey law to inform insureds of available coverage); *Hardt v. Brink*, 192 F.Supp. 879 (1971) (agent who held himself out as expert had duty to advise).

[31] *See, e.g., Free v. Republic Ins. Co.*, 11 Cal Rptr. 2d 296 (Cal. App. 1992) (agent has a duty to obtain coverage at most favorable rate).

[32] *See Hill, Peterson, Carper, Bee & Deitzler, PLLC v. XL Specialty Ins. Co.*, 261 F.Supp.2d 546, 548-49 (S.D. W.Va. 2003) (predicting West Virginia law) (suggesting a possible duty to monitor compliance with policy requirements) (*citing Northern Assur. Co. v. Stan-Ann Oil Co.*, 603 S.W.2d 218 (Tex. Civ. App. 1979).

[33] *See, e.g., Flamme v. Wolf Insurance Agency,* 476 N.W.2d 802 (Neb. 1991) (insured's failure to read policy did not preclude recovery in action against agent). *But see MacIntyre & Edwards, Inc. v. Rich*, 599 S.E.2d 15 (Ga. App. 2004) (Insureds had duty to read renewal documents indicating cap on guaranteed replacement cost coverage under homeowners' insurance policy, and, thus, their failure to fulfill that obligation barred any recovery from agent on theory of negligent failure to inform insureds of the coverage change, even if the insureds relied on agent as expert; the change was readily apparent from memorandum and declaration); *Island House Inn, Inc. v. State Auto Ins. Cos.*, 782 N.E.2d 156 (Ohio. App. 2002) (insureds breached their duty by failing to read commercial insurance policy to see whether it contained coverage for boiler failure, and thus insurance agent was not liable for breach of any duty to exercise reasonable care to advise them of their insurance

right to sue does not equal the right to payment, especially in contributory negligence states. In those states, failure to read may "bar recovery altogether and, in suit on contract, it may reduce recovery to nominal damages under the doctrine of avoidable consequences." *Fli-Back Co., Inc. v. Philadelphia Mfrs. Mut. Ins. Co.*, 502 F.2d 214, 217 (4th Cir.1974) (applying North Carolina law). However, a condition precedent is a "factual determination that failure to read the policy was negligence under the circumstances." *Id.* Despite the failure to read defense, agents often find themselves facing actions for negligence[34], breach of contract[35] or fiduciary duty, and misrepresentation.[36]

Section Three: Duties Owed to Insurers

Not only must agents be cognizant of the duties owed to policyholders, but agents also owe certain duties to insurers. Generally speaking, when acting for an insurer, an agent must act in good faith, carry out the insurer's instructions faithfully, diligently, and in the exercise of due care, and confine his or her actions to the scope of the agent's delegated

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needs; insured held a degree in business and finance; insured had owned numerous business, including a 30-unit franchise chain; policy provisions regarding boiler coverage were in insured's possession for a substantial time, and insured was aware that inn had boiler problems before owner obtained coverage).

[34]*See, e.g., Albany Ins. Co v. Rose-Tillman Inc.*, 883 F.Supp. 1459, 1468 (D. Or. 1995).

[35]*See, e.g., Khalaf v. Bankers & Shippers Ins. Co.*, 273 N.W.2d 811 (Mich. 1978) (noting that an agent, by reason of contractual relationship with insured, owed duty to exercise due care in performance of contract).

[36]*See, e.g., Burroughs v. Jackson National Ins. Co.*, 618 So.2d 1329 (Ala. 1993); *Clement v. Smith*, 19 Cal. Rptr. 2d 676 (Cal. App. 1993); *Huff v. Harbaugh*, 435 A.2d 108 (Md. App. 1981).

authority.[37] An agent must also report the issuance of all policies and fully disclose all risks concerning an insured interest to the carrier.[38] Besides facing tort liability, an agent may also be held liable in contract for breaching the provisions of any agency agreement with the insurer. [39]

As mentioned above, an agent can be held liable for failing to implement an insurer's instructions. For instance, an agent who failed to deliver an endorsement limiting the hauling area of an insured truck was required to indemnify the insurer for an accident occurring in an area for which coverage would have been excluded by the undelivered endorsement. *Transamerica Ins. Co. v. Parrott*, 531 S.E.2d 306 (Tenn. App. 1975). Courts have imposed liability on agents for failing to notify the insurer of the assertion of claims against the insured. For example, a Georgia court held that an insurer was entitled to compensatory damages from an agent who negligently failed to timely forward complaints against the insured to the insurer, which had resulted in a default. *Byrne v. Reardon*, 397 S.E.2d 22 (Ga. App. 1990).

An agent can also be held liable for failing to disclose material information

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[37]Daniel M. Bianca, "Broker Liability," 369 Practising Law Institute 503, 526 (1989); Appleman on Insurance § 68.1. For an overview of one example of an agent's liability to an insurer, *see generally* Paul G. Reiter, *Liability of Insurance Agent for Exposure of Insurer to Liability Because of Failure to Fully Disclose or Access Risk Cancel or to Report Issuance of Policy*, 35 A.L.R. 3d 821.

[38]*Id.* at 532-33. *See also* Appleman on Insurance § 68.1.

[39]*See, e.g., Lawyers Title Ins. Corp. v. Tex Title Corp.,* 2002 WL 266825 (4th Cir. 2002) (Under Maryland law, an insurance agent owes an independent duty to the insurer as his principal, so that the insurer can sue the agent not only for breach of contract, but also for negligent breach of that independent duty); *Grode v. Mutual Fire, Marine & Inland Ins. Co.*, 623 A.2d 1143 (Pa. 1993) (agent can be liable in tort for misfeasance of contractual duties); *Passiatore v. Hartford Life & Accident Co.*, 394 So.2d 1132 (Fla. Dist. Ct. App. 1981).

bearing upon the character of the risk, the identity of the insured, the expiration of the policy, or other matters of reasonable concern to the insurer.[40] For instance, because he failed to inform a life insurer of an applicant's deteriorating health, an agent was required to pay an insurer the amount of policy proceeds the insurer paid to the beneficiary, along with pre-judgment and post-judgment interest, and reasonable attorney's fees incurred by the insurer in defending the claim by the insured. *Jackson Nat. Life Ins. Co. v. Receconi,* 827 P.2d 118 (N.M. 1992). A Pennsylvania court found an agent negligent in failing to obtain all necessary information needed to properly advise the insurer regarding the addition of the insured's mother to an automobile policy. Because the agent, who informed the insured that her mother would be covered under the policy, bound the insurer to coverage, the agent was held jointly and severally liable with insurer for benefits under an automobile insurance policy when he failed to determine that mother was non-resident who was excluded from coverage. *Pressley v. Travelers Property Cas. Corp.*, 817 A.2d 1131 (Pa. 2003).

An agent is required to promptly carry out instructions to cancel a policy[41] or to reduce the covered risk, and failure to do so will expose the agent to liability for all

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[40] *See, e,g,, Holz Rubber Co., Inc. v. American Star Ins. Co.*, 533 P.2d 1055 (Cal. App. 1975); *Jackson Nat. Life Ins. Co. v. Receconi,* 827 P.2d 118 (N.M. 1992) (duties that agent owed to life insurer included disclosing any fact that might affect insurer's interest).

[41] *See, e.g., Douglass v. Koontz,* 71 S.E.2d 319 (W. Va.1952) (Local agent of insurance companies, clothed with general powers, was under duty to cancel policies at direction of any company having right of cancellation, and failure to execute such direction would render him liable in damages to such company, notwithstanding failure of agency agreements to mention cancellation specifically); *National Grange Mut. Ins. Co. v. Wyoming County Ins. Agency, Inc.*, 195 S.E.2d 151 (W. Va. 1973) (Breach of duty by insurance agency, which accepted a premium from insured after policy had been cancelled, was the equivalent of simple negligence, rather than gross negligence, and standing alone was sufficient to impose liability on the agent in an action against it by the insurer after insured paid a fire loss suffered by insured).

amounts which the insurer is required to pay under the non-cancelled policy.[42] For example, a Washington court directed an agent to reimburse an insurer for fire losses paid as a consequence of the agent's failure to immediately cancel the insurance after the insurer unequivocally demanded cancellation. The agent waited twelve days, during which time the loss occurred. The court found that the agent failed to use due care in following instructions and held him liable to the insurer. *National Union Fire Ins. Co. of Pittsburg v. Dickenson*, 159 P. 125 (Wash. 1916). In a New Jersey Case, a fire insurer instructed a defendant-agent to cancel a hotel's fire insurance policy. Three months later, a fire destroyed the hotel, and the insurer was held liable under the policy. The insurer sued its agent, who said that it had canceled the policy by giving notice to the hotel owner's broker, which had initially placed the insurance with it. The court found the notice legally insufficient, and held the agent liable to the insurer for the loss. *Northwestern Nat'l. Ins. Co. v. Albert Robbins, Inc.*, 122 A. 438 (N.J. 1923).

Section Four: Duties Owed to Third Parties

There are also limited circumstances where an agent will owe a duty to, and therefore be liable to, a third party who is not technically a party to the insurance contract. These situations typically arise when a third party is a beneficiary to a contract[43] or when the third party is a foreseeable injured party.[44] For example, a third party could bring a claim for

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[42] *Cameron Mutual Ins. Co. v. Bouse*, 635 S.W.2d 488 (Mo. App. 1982).

[43] *Shea v. Jackson*, 245 A.2d 120 (1968) (holding that third party beneficiaries to a contract can bring suit against agent).

[44] *Eschle v. Eastern Freightways, Inc.*319 A.2d 786 (1974) (holding that foreseeable injured party can bring suit against agent); *Impex Agricultural v. Parness Trucking*, 576 F.Supp. 587 (N.J. 1983) (same). *See also* Margaret E. Vroman, *Liability of Tortfeasor's Insurance Agent or Broker to Injured Party for Failure to Procure or Maintain Liability*

negligent failure to designate the plaintiff as the beneficiary.[45] In *Costello v. Costello*, 465 S.E.2d 620 (W.Va. 1995), the West Virginia Supreme Court of Appeals held that an agent's conduct during an application process concerning coverage for an automobile owned jointly by a husband and wife may have created a reasonable expectation of insurance coverage on the part of the wife so as to support recovery against the agent in tort for negligence in failing to include the wife as a named insured on a policy issued only to the husband. Besides West Virginia, other states have upheld a third party's right to recover against an agent as well.[46] However, a third party may have to show that a special relationship existed between the insured and the agent in order obtain recovery against the agent.[47]

Section Five: Duties of Surplus Lines Brokers

It would be remiss not to provide an overview of the duties which may be imposed on brokers procuring insurance through surplus lines insurers. A surplus line

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Insurance, 72 A.L.R. 4th 1095.

[45] *Parlette v. Parlette*, 596 A.2d 665, 670 (Md. Ct. Spec. App. 1991) (third party could bring claim for negligent failure to designate plaintiff as beneficiary).

[46] *Bay Fireworks, Inc. v. Frenkel & Co., Inc.*, 2005 WL 517534 (E.D. N.Y. 2005) (Under New Jersey law, insurance broker or agent is a professional who owes a duty of care not only to the insured with whom the broker or agent contracts, but also to other foreseeable parties injured by broker's or agent's negligence); *Werrmann v. Aratusa, Ltd.*, 630 A.2d 302 (N.J. App. 1993) (New Jersey court reinstated a loss payee's claims against broker where (a) carrier was insolvent and unable to fully pay policy proceeds, and (b) loss payee could not recover from the state's insurance guaranty fund because carrier was not authorized to conduct business in the state); *Workman v. McNeal Agency, Inc.*, 458 S.E.2d 707 (1995); *Pressman v. Warwick Ins. Co.*, 213 A.D.2d 386 (N.Y. 1995); *Rihon v. Wilson*, 415 So.2d 94 (Fla. Dist. Ct. App. 1982), *rev. denied*, 424 So. 2d 762 (Fla. 1982); *Flattery v. Gregory,* 397 Mass. 143 (1986).

[47] *See, e.g., Ferguson v. Cash, Sullivan & Cross Ins. Agency, Inc.*, 831 P.2d 380 (Ariz. App. 1991) (injured third party may not bring negligence action against agent for failure to recommend higher policy limits absent special relationship between insured and agent).

insurer is generally defined by state statute as an insurer who is not licensed or authorized to sell insurance in the particular state.[48] Before an agent can place insurance with a surplus line insurer, the agent may have to conduct a diligent search to make sure the requested coverage could not be procured from authorized insurers.[49] Like other agents, a surplus lines broker can be held liable for failing to carry out the policyholder's specific request for coverage. For instance, in *County Forest Products v. Green Mountain Agency, Inc.*, 758 A.2d 59 (Me. 2000), a surplus lines broker was held liable to the insured for failing to procure an increase in the property insurance policy limits requested by the insured.

Furthermore, a surplus lines broker may have duties concerning the investigation into a surplus lines insurer's financial stability, a duty which is typically established by state statute. For instance, the West Virginia Code[50] prohibits a surplus lines broker from placing coverage with a nonadmitted insurer, unless the broker has determined at the time of placement, that the nonadmitted insurer has established "satisfactory evidence of good repute and financial integrity." W. Va. Code § 33-12C-5(c)(1).[51] On the other hand, a Louisiana appellate court held that surplus lines brokers have no duty to investigate

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[48]*See, e.g.*, W. Va. Code, § 33-12C-3(s), (n) (" 'Surplus lines insurance' means any property and casualty insurance in this state . . . permitted to be placed through a surplus lines licensee with a nonadmitted insurer eligible to accept such insurance"; " 'Nonadmitted insurer' means an insurer not licensed to do an insurance business in this state"). *See also* Mich. Comp. Laws § 500.1901, *et seq*; N.J. Stat. Ann. § 17: 22-16.41.

[49]*See, e.g.*, W. Va. Code §33-12C-5(a)(3); N.J. Stat. Ann..§ 17: 22-6.43.

[50]Section 33-12C-5 of the West Virginia Code also prohibits surplus lines brokers from knowingly placing any coverage in an insolvent insurer. This provision is also found in Section 33-12-21, the section governing statutory agents.

[51]Subsection (c)(2) of Section 33-12C-5 also imposes further criteria a nonadmitted insurer must meet before the broker can place coverage with them.

the financial soundness of a nonadmitted insurer, and, therefore, cannot be held liable to the insured for not investigating. *See Popich Bros. Water Transport, Inc. v. Gulf Coast Marine, Inc.*, 705 So.2d 1267 (La. App. 1998). Because a state statutory amendment removed the duty to investigate, the court held the surplus lines broker's duty to investigate was limited to ascertaining that the insurer was on the state Insurance Commissioner's list of approved nonadmitted insurers. However, the court cautioned that surplus lines brokers may be held liable if they had actual knowledge of insurer's financial problems.

At least one court has enunciated specific standards for surplus lines brokers. In *Al's Café, Inc. v. Sanders Ins. Agency*, 820 A.2d 745 (Pa. 2003), the Superior Court of Pennsylvania found that by synthesizing common law and statutory standards of care, insurance agents and brokers possessed the following duties when dealing with the Pennsylvania Surplus Lines Law: 1) to act with reasonable care, skill, and judgment in the selection of insurer; 2) to ascertain whether the insurer is reputable and financially sound; and 3) to inform the insured of findings if investigation reveals evidence of financial infirmity, where agent or broker nonetheless intends to place a policy with that insurer. *Id.* at 751. Failure to comply with such duties may render the agent or broker liable in the event the insurer is unable to satisfy a claim due to its insolvency. *Id.* The court further held that "at least with respect to placement of insurance with a surplus lines insurer, it is clear that Pennsylvania law is in step with those jurisdictions recognizing that an insurance agent/broker has an obligation to investigate the financial soundness of the insurance carrier with which the agent/broker places insurance and to refrain from placing insurance with a carrier that the agent/broker knows or should know to be financially unsound." *Id.* (citations omitted).

Conclusion

The duties and obligations of insurance agents and brokers can run to policyholders, insurers, and third parties. Unfortunately, there is no blanket rule establishing what these duties are, when these duties are owed, and to whom these duties are owed. The answer to these questions will depend on the facts and circumstances of each case. Although the duties and obligations may change or remain unclear, one trend remains abundantly clear: Courts have been increasingly willing to hold agents and brokers liable for more than simply not following instructions. In an effort to insulate themselves from liability, agents and brokers should be cognizant of this trend.