AGENT-BROKER NEGLIGENCE ACTIONS: PITFALLS FOR INSURANCE PROVIDERS AND AMMUNITION FOR CONSUMERS

*Jeffrey Lipman**
*Greg Noble***

TABLE OF CONTENTS

I. Introduction 835
II. Overview of *Sandbulte v. Farm Bureau Mutual Insurance Company* 835
III. Role of Broker or Agent 838
A. Duty of Broker/Agent in General 839
B. Agents Holding Themselves Out as Insurance Specialists, Consultants, or Counselors 841
C. Agent with Longstanding Relationship 842
IV. Licensing and Professional Responsibility 843
V. Causes of Action 845
A. Professional Negligence 845
B. Breach of Contract 846
C. Negligent Misrepresentation 847
D. Breach of Fiduciary Duty 848
VI. Insurance Agents vs. Other Professionals: To What Standard Should Agents Be Held? 849
VII. Conclusion 850

I. INTRODUCTION

Insurance agents are licensed professionals who should be held to a high standard of care and practice similar to attorneys, accountants, and physicians. This article examines the relationships between insurance providers and their insureds and the various causes of action or remedies available to consumers for recovery of losses sustained as a result of their agents' negligence.

II. OVERVIEW OF *SANDBULTE v. FARM BUREAU MUTUAL INSURANCE COMPANY*

Iowa law currently provides minimal protection for consumers who are victims of insurance agents who hold themselves out to be knowledgeable professionals, but who, in reality, are uninformed salespersons. The leading

* Attorney, Lipman Law Firm, P.C., Des Moines, Iowa. B.A., 1986, University of Arizona; J.D., 1989, William Mitchell College of Law.
** Partner, Murray, Jankins & Noble, Des Moines, Iowa. B.A., 1983, Creighton University; J.D., 1987, Creighton University School of Law.

case in Iowa examining insurance agent negligence is *Sandbulte v. Farm Bureau Mutual Insurance Co.*[1] The Iowa Supreme Court in *Sandbulte* stated the general standard of care for agents as "the duty to use reasonable care, diligence, and judgment."[2] In *Sandbulte*, an insured brought an action against Farm Bureau Mutual Insurance Company (FBM) and two of its insurance agents alleging breach of an implied expanded agency agreement.[3]

The dispute in *Sandbulte* arose out of a motor vehicle accident in the spring of 1976 resulting in the injury of a motorcyclist.[4] Wendell Sandbulte was ruled the negligent party because he failed to yield the right of way at an intersection.[5] The vehicle Sandbulte was operating belonged to his father.[6] The victim filed a lawsuit against both the owner and the operator.[7] At the time of the lawsuit, the owner had an automobile liability policy with a $50,000 limit and a farm liability policy with a limit of $300,000.[8] Both policies were issued by FBM.[9] FBM agreed to settle for the coverage limit on the $50,000 automobile policy, but denied coverage under the farm liability policy, claiming that the accident was not covered by the contractual terms.[10]

FBM filed a declaratory judgment action to establish what duty, if any, FBM had under the farm liability policy to cover the damages caused by Sandbulte.[11] The court found that the farm policy did not provide coverage for the accident.[12] Sandbulte settled with the victim for $375,000 following the declaratory judgment decision.[13] The terms of the settlement included the $50,000 coverage tendered by FBM under the automobile policy, a $25,000 cash payment by Sandbulte, and the remaining $300,000 entered as a consent

---

1. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984).

2. *Id.* at 464 (citing Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972)).

3. *Id.* at 460. The insured also brought a second claim against FBM alleging breach of an implied good faith duty to defend an insured against a third party claimant. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 461.

12. *Id.* (citing Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 106 (Iowa 1981) (Sandbulte I)). *Sandbulte I* arose out of the initial declaratory judgment action which dealt with the interpretation of Sandbulte's farm liability policy regarding coverage for the motor vehicle accident. In *Sandbulte I*, the district court declared that the farm liability policy covered Sandbulte for the accident, despite the fact that the vehicle was driven for off-premises use. Farm Bureau Mut. Ins. Co. v. Sandbulte, 302 N.W.2d 104, 106-07 (Iowa 1981). The Iowa Supreme Court held that the policy's language excluded coverage under the circumstances because the vehicle was driven between two separate tracts of land and not on the Sandbulte farm or on the immediately adjoining property. *Id.* at 109-10. The court indicated that it was not necessary for a buyer to establish that he advised the seller of the particular purpose when purchasing the goods, but that the buyer must prove the seller had reason to know of that purpose. *Id.* at 111 (citing Jacobson v. Benson Motors, Inc., 216 N.W.2d 396, 404 (Iowa 1974)).

13. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 461 (Iowa 1984).

judgment against the Sandbultes.[14] The Sandbultes sold their family farm to satisfy the judgment.[15]

The Sandbultes subsequently brought an action against their insurance agent for breach of an implied expanded agency agreement to advise them of the extent of their coverage and for failure to suggest and implement proper, complete, and adequate liability insurance coverage.[16] The trial court entered summary judgment against the Sandbultes on the issue of an implied expanded agency agreement, stating that they "failed to show as a matter of law any duty or breach of duty to perform in an expanded agency relationship, or of any duty to the [Sandbultes] in the acquisition of insurance."[17]

On appeal, the Iowa Supreme Court addressed the issue of when an agent assumes an elevated duty beyond that normally required of an insurance agent.[18] The court acknowledged the basic rule that the "general duty is the duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured."[19] There are, however, instances in which an insured can delegate to his agent the responsibility "of deciding for [the insured] both the type and amount of insurance to be provided."[20] Before this responsibility can be imposed, the agent and insured must enter into an "agreement or arrangement" for that purpose.[21] The agreement or arrangement is required in order to expand the agent's duty of care.[22]

In *Sandbulte*, the court did not find enough evidence in the record to impose an elevated duty of care upon the agent, even though the insured used these particular agents for several years, and asked for "sufficient coverage."[23] More importantly, the court set forth two circumstances under which agents assume additional responsibilities, imposing an elevated standard of care: (1) when agents hold themselves out as insurance specialists, consultants, or counselors[24] and are receiving compensation for consultation and advice

---

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* The court also held that the action was barred by the applicable statute of limitations. *Id.*

18. *Id.* at 464.

19. *Id.* (citing Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972)).

20. Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d at 859.

21. *Id.* at 857-58.

22. *Id.*

23. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 465 (Iowa 1984) (citing Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1168-69 (Ariz. Ct. App. 1980)). In *Nowell*, the court entered summary judgment in favor of the agent. Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168-69. The insured asked the agent to procure "the best policy," but the court held that such direction did not amount to a meeting of the minds so as to imply a contract to procure insurance covering all foreseeable risks. *Id.*

24. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464 (citing Hardt v. Brink, 192 F. Supp. 879, 880-81 (W.D. Wash. 1961). In *Hardt v. Brink*, the court held that the agent assumed a duty to advise the insured as to insurance needs when the agent held himself out to be a highly skilled insurance advisor and the insured relied upon him as such. Hardt v. Brink, 192

apart from premiums paid by the insured[25] or (2) the agent and insured have a longstanding relationship of entrustment from which it clearly appears that the agent appreciated the additional role of a counselor who gives comprehensive advice to the client on insurance needs.[26]

When an agent breaches the elevated duty of care under these limited situations, the agent may be liable to the insured for damages suffered because of the agent's failure to advise the insured of a potential source of loss and the agent's incompetence for failing to recommend the proper insurance and amount.[27]

III. ROLE OF BROKER OR AGENT

An insurance broker/agent's primary role is to procure insurance for the client.[28] A fiduciary relationship, a relationship in which the consumer places trust in the broker/agent's special skills and professional insights in procuring the right insurance, exists between a broker and a client.[29] This

---

F. Supp. 880-81; *see also* 16A JOHN ALAN APPLEMAN & JEAN APPLEMAN, INSURANCE LAW AND PRACTICE § 8836 (1981) (claiming that an agent who holds himself out to be a counselor and consultant has a duty to advise the insured as to insurance needs because he is acting as a specialist).

25. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464 (citing Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168). In *Nowell v. Dawn-Leavitt Agency, Inc.*, the court held that imposition of liability for failure to advise the client of need for coverage should be confined to situations in which the agent is receiving consideration for services apart from premiums to be paid. Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168.

26. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464 (citing Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168-69). In *Nowell v. Dawn-Leavitt Agency, Inc.*, the court held that imposition of liability for agent's failure to advise the insured of the need for coverage will be applied to hold the agent to an elevated standard of care where there is a long established relationship of trust between the agent and the insured from which it clearly appears the agent appreciated there was a duty to take the initiative in giving comprehensive advice of insurance needs. Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168-69.

27. *Id.* (citing 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836).

28. *See* 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8841 (stating that the primary function of the insurance broker relating to the insured is to procure insurance policies faithfully according to the client's wishes and is responsible for any loss resulting from the failure to exercise reasonable care); *see also* Century Boat Co. v. Midlands Ins. Co., 604 F. Supp. 472, 482 (W.D. Mich. 1985) (holding that an insurance broker agrees to negotiate a policy acceptable to the client and owes a duty to exercise reasonable skill, care, and diligence in procuring the policy); Kabban v. Mackin, 801 P.2d 883, 890 (Or. Ct. App. 1990) (stating that the insurance broker owes a duty of reasonable care in advising clients and the prospective insured regarding policies and coverage); Pittway Corp. v. American Motorist Ins. Co., 370 N.E.2d 1271, 1277 (Ill. App. Ct. 1977) (finding that the primary role of the insurance broker is to faithfully negotiate a policy according to the requirements set by the client and that the broker will be held liable for any breach of his duty of care).

29. *See* 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8841; 4 GEORGE J. COUCH, CYCLOPEDIA OF INSURANCE LAW § 26A:262 (2d ed. 1984); 1 GEORGE A. LAMARCA, IOWA PLEADING AND CAUSES OF ACTION 332-1 to 332-2 (1994); BARRY R. OSTRAGER & THOMAS K. NEWMAN, HANDBOOK ON INSURANCE DISPUTES § 16.04[a][2] (3d ed. 1990) (discussing the fiduciary relationship and imposition of liability); *see also* Butler v. Scott, 417 F.2d 471, 473 (10th Cir. 1969) (advocating that an insurance broker is a fiduciary to the insured and assumes

relationship brings with it greater exposure for damages resulting from a breach of the increased duty of care.[30] Labeling the broker's relationship to the insured is important because it recognizes the complexity of the insurance business and the expertise required to deal with its intricacies.[31]

A. *Duty of Broker/Agent in General*

The general duty of a broker/agent is "the duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured."[32] "An insurance agent generally assumes only those duties found in an ordinary agency relationship—to use reasonable care, diligence, and judgment in obtaining the insurance coverage requested by the insured party."[33] The duty flowing from the broker/agent to the insured is examined

---

additional scrutiny); Steinbrugge v. Haddock, 281 F.2d 871, 874 (10th Cir. 1960) (discussing how fiduciary relationships commonly arise from trust, reliance, and confidence the client has in broker's superior judgment, knowledge, or skill regarding complex insurance matters); Black v. Illinois Fair Plan Ass'n, 409 N.E.2d 549, 552 (Ill. Ct. App. 1980) (explaining that a broker has fiduciary obligation to an insured regardless of who compensates the broker); Browder v. Hanley Dawson Cadillac Co., 379 N.E.2d 1206, 1212 (Ill. Ct. App. 1978) (holding that a fiduciary duty exists between a broker and an insured regardless of whether a broker receives a commission from an insurer); Thomas v. House of Toyota, 286 So. 2d 504, 507 (La. Ct. App. 1973) (explaining that a broker owes a fiduciary duty to the insured and the insurer). *But see* Shultz Steel Co. v. Rowan-Wilson, Inc., 231 Cal. Rptr. 715, 719-21 (Ct. App. 1986) (discussing limits on fiduciary relationships).

30. Fiduciary relationships are created in numerous circumstances and frequently arise out of consensually placed confidence in the superior knowledge, skill, or judgment of another. *See* Butler v. Scott, 417 F.2d at 473 (citing Steinbrugge v. Haddock, 281 F.2d at 874). The fiduciary duty and liability for negligently performing that duty is one founded in the common law. Black v. Illinois Fair Plan Ass'n, 409 N.E.2d at 552 (citing Browder v. Hanley Dawson Cadillac Co., 379 N.E.2d at 1206). When the agent neglects to procure insurance, or if the policy the agent effects is materially defective through the agent's own fault, the agent should be found liable to the insured for any losses sustained through the neglect and be required to pay for the resulting damages. *Id.*; *see also* United Stores of Am., Inc. v. Insurance Consultants, Inc., 332 F. Supp. 640, 643 (E.D. Mo. 1971) (holding that a broker/agent "who undertakes to provide insurance for another, and by his own fault or neglect fails to do so, is liable in the amount that would have been due under the policy of insurance had it been obtained"), *aff'd*, 468 F.2d 1010 (8th Cir. 1972); Precision Castparts Corp. v. Johnson & Higgins, 607 P.2d 763, 767 (Or. Ct. App. 1980) (explaining that an agent who agrees to procure insurance for another and fails to do so may be liable for any damages resulting from the omission based on breach of contract, negligence, or both); Hursh Agency, Inc. v. Wigwam Homes, Inc., 664 P.2d 27, 32 (Wyo. 1983) (advocating that a "broker or agent who, with a view to compensation for his services, undertakes to procure insurance for another and through fault or neglect fails to do so, will be held liable for any damage resulting").

31. From the fiduciary relationship between the insured and the agent "arises a duty of the highest order, inuring to the benefit of the patron. An agent employed to effect insurance must exercise the skill and diligence fairly to be expected from one in his profession." Butler v. Scott, 417 F.2d at 473; *see* Soboter v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 739 (N.J. Super. Ct. App. Div. 1984).

32. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464 (Iowa 1984).

33. Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1094 (Me. 1991) (citing Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464 (Iowa 1984)); *see also* Sinex v.

on a case-by-case basis, specifically looking at the circumstances surrounding the transaction.[34] This case-by-case examination applies a "reasonable person" standard.[35]

The general duty is extremely limited and does not include the duty to obtain total coverage, or the duty to explain the policy obtained, its coverages, or its exclusions.[36] As stated, there are three primary circumstances under

---

Wallis, 611 A.2d 31, 33 (Del. Super. Ct. 1991) (holding that ordinarily an agent assumes only those duties found in an agency relationship which include the obligation to use reasonable care, diligence, and judgment in procuring the insurance requested by the insured); 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836.

34. The existence and extent of the duties of the agent to the principal are determined by the terms of the agreement between the parties, interpreted in light of the circumstances under which it is made. *See* RESTATEMENT (SECOND) OF AGENCY § 376 (1968).

35. *See, e.g.*, Gabrielson v. Warnemunde, 443 N.W.2d 540 (Minn. 1989); Rawlings v. Fruhwirth, 455 N.W.2d 574 (N.D. 1990). Courts have adopted the "reasonably prudent person" test when assessing the extent to which an agent owes an insured a certain duty of care and whether that care was carried out or breached. For example, Minnesota follows the general rule that the legal duty imposed on an agent is to "exercise the skill and care which a 'reasonably prudent person engaged in the insurance business [would use] under similar circumstances.'" Gabrielson v. Warnemunde, 443 N.W.2d at 543. Even under this standard, the Minnesota courts limit this duty of care to acting in good faith while following instructions. *Id.* North Dakota also adopted the "reasonably prudent person under similar circumstances" standard. Rawlings v. Fruhwirth, 455 N.W.2d at 577. *See generally* 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836 (examining the general rule and its exceptions).

36. *See* Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d 343 (S.C. Ct. App. 1988). The general duty of care under the reasonably prudent person standard has been severely limited by the courts. Courts reduced the standard of care required by agents below what the public perceives as the agent's primary purpose and, more importantly, what the agent and insurer advertise as their responsibility. The Iowa Supreme Court held in *Sandbulte* that the general duty is: "the duty to use reasonable care, diligence, and judgment in procuring the insurance requested by an insured." Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464. The court went on, however, to limit the agent's duty to acting merely in good faith absent special circumstances. *Id.*

Most courts have adopted this approach. *See* Jones v. Grewe, 234 Cal. Rptr. 717, 720 (Ct. App. 1987) (holding that the general duty of reasonable care which an insurance agent owes his client does not include an obligation to procure policy affording client complete liability protection); Sinex v. Wallis, 611 A.2d 31, 33 (Del. Super. Ct. 1991) (holding that an agent has no duty to advise an insured on specific insurance matters absent special circumstances); Robinson v. Charles A. Flynn Ins. Agency, Inc., 653 N.E.2d 207, 208 (Mass. App. Ct. 1995) (stating that insurance agents do not owe a duty to their clients "to inform and advise them as to [the] availability of uninsured or underinsured motorist coverage" up to the limits of their bodily injury liability coverage, absent a showing of special circumstances); Rawlings v. Fruhwirth, 455 N.W.2d at 580 (holding that an agent owes no duty to procure additional insurance to fill the gap between the insured's automobile liability policy and umbrella policy without a specific request by the insured to do so); Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d 343, 351 (S.C. Ct. App. 1988) (holding that agents generally owe no duty to advise an insured, and even when an insured requests "full coverage," the agent is under no duty to determine the insured's full insurance needs, to advise the insured about coverage, or to use discretion and expertise to determine what coverage the insured should purchase); Suter v. Virgil R. Lee & Son, Inc., 754 P.2d 155, 157 (Wash. Ct. App. 1988) (holding that an agent has no duty to advise an insured regarding the adequacy of auto liability coverage absent special circumstances); Nelson v. Davidson, 456 N.W.2d 343, 347 (Wis.

which the broker/agent will assume an enhanced duty of care to the insured or an expanded agency agreement, either express or implied: (1) when the agents hold themselves out as insurance specialists, consultants, or counselors; (2) when the agents receive compensation for consultation apart from premiums paid by the insureds; and (3) when the agents and the insureds have longstanding relationships of trust from which it clearly appears that the agents appreciated the additional role of counselor in giving comprehensive advice on insurance needs.[37]

B. *Agents Holding Themselves Out as Insurance Specialists, Consultants, or Counselors*

An insurance agent will be held to a higher standard of care when the agent presents himself as an insurance specialist, consultant, or counselor.[38] The theory behind holding the agent to a higher standard of care is that the agent has stepped away from his normal role as a salesman and into the role of professional counselor.[39]

1990) (holding that an agent has no "affirmative duty to advise its insureds of the availability or advisability of underinsured motorist (UIM) coverage," absent special circumstances); *see also* 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836.

37. *See* Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 465.

38. *See id.* at 464; Sinex v. Wallis, 611 A.2d at 33 (holding that an agent who appears to be a counselor or specialist may bring a higher duty of care to advise on insurance needs); Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 249 (Ky. 1992) (stating that when an agent presents himself to be a counselor or advisor, the duty to advise is commensurate with the obligation assumed by the selling agent); Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 741 (N.J. Super. Ct. App. Div. 1984) (holding that agents owe an extra duty to the insured when they present themselves as having a special expertise in the insurance business); Precision Castparts Corp. v. Johnson & Higgins, 607 P.2d 763, 765 (Or. 1980) (holding that an insured has the right to rely on the superior expertise of the agent, and to assume that his agent performed his duty); *see also* Dimeo v. Burns, Brooks & McNeil, Inc., 504 A.2d 557, 559 (Conn. App. Ct. 1986) ("[I]nsurance is a specialized field with specialized knowledge and experience, and . . . an agent has the duty to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client."). *But see* Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1167 (Ariz. Ct. App. 1980) ("[I]t is the insurance consumer's responsibility to educate himself concerning matters of insurance coverage.").

39. *See* Nelson v. Davidson, 456 N.W.2d at 345 (stating that the issue of what duty is owed by an agent to the insured is a "somewhat elusive concept"). The general rule of what duty is owed to an agent, and the exception that elevates the duty of an agent presented as possessing special skills and expertise, is a question of fact. A reading of the cases dealing with this issue suggests the duty rises in proportion with the facts that support the elevation of the duty of care. For instance, this general duty, not including the duty to advise, does not automatically jump from no duty to an all encompassing duty unless the agent is hired for that specific purpose. *See, e.g.*, Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d at 249 (finding that when the issue is one of an insurance company or agent "holding itself out" as a counselor or advisor, the scope of the duty to advise is commensurate with the obligation assumed by the insurance company or agent selling the insurance). In these limited instances, one would normally expect to see the agent compensated separately for his advice. *Compare* Dimeo v. Burns, Brooks & McNeil, Inc., 504 A.2d at 559 *with* Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d at 742. As these cases point out, the various courts addressing the

The distinction between an agent who advertises expertise and an agent who is presented as a counselor is somewhat vague.[40] For example, most agents as salespersons present and advertise themselves as experts and professionals. Most insurance agents advise their customers on insurance needs. Although each situation is decided on a case-by-case basis, taking into account the surrounding circumstances, the line between an agent as a salesperson and an agent as a counselor is extremely arbitrary.[41]

An agent/broker clearly assumes the position of a counselor, which elevates the duty of care owed to the insured, when the agent receives separate consideration for his role as a counselor.[42]

C. *Agent with Longstanding Relationship*

Liability may be imposed on an agent/broker for the failure to take the initiative and advise the insured about coverage needs.[43] The imposition of liability upon the insurance professional for failing to take the initiative attaches when there is a longstanding relationship of trust between the

---

issue of a higher duty or expanded agency relationship are inconsistent. As stated, the theory behind elevating the duty when agents hold themselves out to be more than salespersons is the public's reliance on this distinction. *See generally* 2A C.J.S. *Agency* § 52 (1972).

40. *See* Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d at 347. In *Trotter*, the insured testified that he saw several State Farm advertisements which in effect represented the insurer's agents as well trained and highly qualified with respect to assessing insurance needs. *Id.* The court ruled that the particular advertisements in *Trotter* did not amount to an express undertaking. More importantly, the court noted that "[o]rdinarily, an advertisement is a mere invitation to the public to contact the advertiser and request its services, as opposed to an offer to perform those services." *Id.* (citing Georgian Co. v. Bloom, 108 S.E. 813, 814 (Ga. Ct. App. 1921)).

41. In several cases, courts state the initial imposition of a certain duty of care is a question of law and "when the court resolves a question of duty the court is essentially making a policy determination." Nelson v. Davidson, 456 N.W.2d 343, 345 (Wis. 1990) (citing to Ollerman v. O'Rourke Co., 288 N.W.2d 95, 100 (Wis. 1980)). Nevertheless, "an insurance agent generally assumes only those duties found in an ordinary agency relationship—to use reasonable care, diligence, and judgment in obtaining the insurance coverage requested by the insured party." Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1094 (Me. 1991) (citing Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464).

42. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464 (holding that "[a]n expanded agency . . . relationship sufficient to require a greater duty from the agent than the general duty generally exists when the agent holds himself out as an insurance specialist, consultant, or counselor and is receiving compensation for consultation and advice apart from premiums"); Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d at 248 (stating that "[a]n implied assumption of duty may be present when the insured pays the insurance agent consideration beyond a mere payment of the premiums") (citing Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d at 1168); Nelson v. Davidson, 456 N.W.2d at 347 (holding that when an agent or insurer does not contract to assume additional duties of advice or consultation, and when there is no additional compensation, an expanded or special relationship will not be held to have existed); *cf.* Westrick v. State Farm Ins., 187 Cal. Rptr. 214, 218 (Ct. App. 1982) (holding that "while an agent who promises to procure insurance will . . . be liable for his negligent failure to do so . . . it does not follow that he can avoid liability for foreseeable harm" absent an express agreement).

43. *See* Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464.

insurance professional and the client.[44] In addition to requiring a longstanding relationship which produces trust between the agent/broker and the client, a consumer who brings suit against an insurance professional must prove that the insurance professional clearly appreciated there was a duty to take the initiative in giving comprehensive advice to the client on insurance matters.[45]

With respect to the general duty of care when the insured and agent have dealt with each other over an extended period of time to create entrustment, the common law is at best inconsistent. For example, it is clear the relationship between an agent and the client is always a fiduciary one.[46] The vast majority of cases hold, however, that more is needed to establish liability against an agent, even when the agent should have advised the client on coverage deficiencies.[47] The requirements in these cases suggest that the fiduciary duty does not impose a duty to take the initiative and advise the client on insurance coverage needs. But, it is confusing and inconsistent to call the agent a fiduciary and then not require the agent to advise the client and act in the client's best interests. Having a longstanding relationship, coupled with a history of reliance, does not always "kick in" this enhanced duty or expanded agency situation.[48]

IV. LICENSING AND PROFESSIONAL RESPONSIBILITY

An agent must have an Iowa insurance license before the agent may sell insurance in Iowa.[49] The Insurance Commissioner is responsible for licensing

---

44. *Id.* (citing 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836).

45. *Id.*

46. Black v. Illinois Fair Plan Ass'n, 409 N.E.2d 549, 552 (Ill. App. Ct. 1980).

47. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 465 (Iowa 1984); *see also* Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1168 (Ariz. Ct. App. 1980) (holding an expanded agency duty to advise may be found when the agent and insured have had a "long-established relationship of entrustment . . . from which it clearly appears that the insurance counselor appreciated that there was a duty to take the initiative in giving comprehensive advice to his client on insurance matters"); Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248 (Ky. 1992) (stating that an implied assumption of duty may be present when there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that the advice is being sought and relied on by the insured); Suter v. Virgil R. Lee & Son, 754 P.2d 155, 157 (Wash. Ct. App. 1988) (holding an expanded agency relationship may exist by proving a "longstanding relationship, some type of interaction on the question of coverage, coupled with the insured's reliance on the expertise of the insurance agent to the insured's detriment") (citing Bruner v. League Gen. Ins. Co., 416 N.W.2d 318, 320 (Mich. Ct. App. 1987)).

48. *See* Jones v. Grewe, 234 Cal. Rptr. 717, 721 (Ct. App. 1987) (finding that when the "insured has purchased insurance from [the broker] for several years and followed [the broker's] advice on certain insurance matters," and when the broker has assured the insured that liability coverage was adequate, such facts were insufficient to establish an enhanced duty upon the broker); Sinex v. Wallis, 611 A.2d 31, 33-34 (Del. Super. Ct. 1991) (citing Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 858 (Iowa 1972)) (holding that "an expanded duty of care is not created by an insured who deals with a particular agent over a period of years").

49. *See* IOWA CODE § 522.1 (1995).

insurance agents in the State of Iowa.[50] The rules set forth the requirements, procedures, and fees relating to the qualification, licensure, and appointment of insurance producers.[51]

> In order to qualify as an Iowa resident insurance producer, the applicant must satisfy the following requirements:
>
> a. Be at least 18 years of age;
> b. Be a resident of the state of Iowa;
> c. Be of good character and competency;
> d. Pass an examination determining the applicant's competence to sell any or all lines of insurance . . . ;
> e. File a license application with the division's outside testing service . . . ;
> f. File a letter of clearance from any other state in which the applicant has ever held a resident license . . . ; and
> g. Pay the appropriate license fee . . . .[52]

Upon obtaining a license, the agent should notify the company the agent intends to work for that he or she is licensed. If the company intends to have a contractual relationship with the agent, a producer's appointment for the agent should be requested from the Insurance Division by the company.[53]

An agent who sells insurance in Iowa without a license is guilty of a serious misdemeanor and may be liable for a civil penalty of up to $10,000.[54] If a claim of legal liability arising out of the negligence of an agent occurs, it is submitted to the agent's carrier, and the carrier is required to notify the Insurance Commissioner.[55] The Insurance Commissioner is then authorized to review or investigate the report concerning the licensee.[56] The Insurance Commissioner is authorized to impose sanctions upon the agent.[57] An agency hearing before an administrative law judge may result in the imposition of a fine, suspension of a license for a given period of time, or revocation of the agent's license.[58]

An agent who is qualified to sell property and casualty lines of insurance must obtain thirty credits of continuing education every three years in order to maintain a license.[59]

---

50. *Id.*
51. *See* IOWA ADMIN. CODE r. 191-10.1(1) (1995).
52. *Id.* r. 191-10.5(1).
53. *Id.* r. 191-10.15(1).
54. IOWA CODE § 522.5 (1995).
55. IOWA ADMIN. CODE r. 191-10.22 (1996).
56. IOWA CODE § 272C.3 (1995).
57. *Id.*
58. *Id.*
59. IOWA ADMIN. CODE r. 191-11.3(1) (1996).

V. CAUSES OF ACTION

A. *Professional Negligence*

When professional insurance agents hold themselves out as consultants, they have a duty to advise clients of their insurance needs. An insurance agent is expected to know the types of coverage available and the terms of the various policies.[60] Professional insurance agents should make sufficient inquiry to their principal in order to determine the need for coverage. While the professional agent may point out to the insured the advantages of additional coverage and ferret out additional facts from the insured, generally, there is no duty to do so.[61]

Once agents assume additional duties by an express agreement, they may be liable to the insured for losses which resulted in a breach of that special duty.[62] When insurance agents negligently perform services, they are liable for that negligence just as an attorney, architect, engineer, physician, or any other professional who negligently performed personal services would be.[63]

"The insured may sue for breach of the agreement, or . . . in tort for negligent breach of the duty imposed by the agreement."[64] Unfortunately, while other professionals have been held to the highest standard of care, the insurance agent has not.[65] An attorney or physician must use the degree of skill, care, and learning ordinarily possessed and exercised by other attorneys or physicians under similar circumstances.[66] The duty for attorneys and

---

60. 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8845.

61. Hill v. Grandey, 321 A.2d 28, 34 (Vt. 1974); *see also* Jones v. Grewe, 234 Cal. Rptr. 717, 721 (Ct. App. 1987) (holding that an insurer is not under a duty to provide complete liability protection for his clients).

62. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 464-65 (Iowa 1984).

63. McAlvain v. General Ins. Co., 554 P.2d 955, 957-58 (Idaho 1976); *see* United Stores of Am., Inc. v. Insurance Consultants, Inc., 332 F. Supp. 640, 643-44 (E.D. Mo. 1971) (holding that "an insurance agent or broker who undertakes to provide insurance for another, and by his own fault or neglect fails to do so, is liable in the amount that would have been due under the policy of insurance had it been obtained"), *aff'd*, 468 F.2d 1010 (8th Cir. 1972); *see also* Royal Ins. Co. v. Cathy Daniels, Ltd., 684 F. Supp. 786, 791-92 (S.D.N.Y. 1988) (stating that an insurance broker's procurement of a voidable insurance policy through failure to disclose to insured known material facts concerning risks amounted to a breach of the broker's duty and, therefore, the broker was liable to the insured for losses which the insured could have recovered if policy had been properly obtained).

64. Jones v. Grewe, 234 Cal. Rptr. at 720.

65. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464.

66. *See* Devine v. Wilson, 373 N.W.2d 155, 157 (Iowa Ct. App. 1985) (quoting Martinson Mfg. Co. v. Seery, 351 N.W.2d 772, 775 (Iowa 1984)) (ruling that legal malpractice consists of the failure of an attorney to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the task which they undertake); Speed v. State, 240 N.W.2d 901, 904 (Iowa 1976) (stating that a physician is liable for injury to a patient caused by failure of the physician to apply that degree of skill, care, and learning ordinarily possessed and exercised by other physicians in similar circumstances).

physicians also requires that the client or patient be informed.[67]

An insurance agent owes a duty to the principal to exercise reasonable skill, care, and diligence in effecting insurance.[68] Professional insurance agents need only prove that they followed instructions and acted in good faith in order to escape liability.[69] Procurement of almost any insurance policy in the proper line of coverage would provide a defense to a professional negligence action regardless of whether or not the coverage was appropriate or adequate.

B. *Breach of Contract*

With the standard for bringing a professional negligence claim against an agent/broker rather limited, the better approach for the insured may be to bring an action for breach of contract.[70]

When an agent fails to procure insurance for his client, contrary to an agreement to do so, the agent may be liable.[71] The real difficulty results from the manner in which many of the claims for failure to procure insurance arise. Typically, the agent and the insured have a friendly meeting when the need for coverage is discussed. The agent and the insured reach an agreement that the agent will get coverage for the insured. The agent may keep a few notes and ask the insured to sign the application. The agent assures the insured of the coverage. Premiums are paid, and the policy is delivered to the insured who stores it with other business papers without reading it. An accident occurs and the insured finds out the policy purchased does not cover the damages. The agent claims the insured never related the need for that particular type of coverage.

The Iowa Supreme Court has not indicated that the agent's duty to advise the insured of the need for coverage requires the payment of consulting fees.[72] A breach of contract claim should address the agent's

---

67. Pauscher v. Iowa Methodist Med. Ctr., 408 N.W.2d 355, 358 (Iowa 1987) (stating that a doctor who recommends a particular procedure generally has, among other obligations, a duty to disclose to patients all material risks involved in the procedure); *In re* Disciplinary Proceedings Against Des Jardins, 493 N.W.2d 63, 64 (Wis. 1992) (stating that a basic professional duty of an attorney is "to keep his clients informed of the status of the matter they had retained him to pursue").

68. 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8841; *see also* Collegiate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 857-58 (Iowa 1972).

69. Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn. 1989) (stating that an "insurance agent's duty is ordinarily limited to the duties imposed in any agency relationship, to act in good faith and follow instructions").

70. *See, e.g.*, Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 462-63 (Iowa 1984).

71. 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8836; *see also* Warnock v. Bonneville Gen. Agency, Inc., 533 P.2d 333, 335 (Or. 1975) (stating that an agreement by an insurance agent or broker to procure a policy for an applicant is a contract and may give rise to an action for breach of contract in the event the broker violates any duty imposed by the contract).

72. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d at 464. The court did cite, however, with apparent approval the proposition that imposing liability upon an agent for

breach of the agreement to procure the insurance as requested and the breach of the duty to inform the insured as to the need and adequacy of the insurance coverage. As described above, many claims may arise out of the oral agreement between the insured and the agent. Whether an oral contract existed, and whether it was breached, are ordinarily questions for the trier of fact.[73] In order for the insured to recover against the agent for breach of an oral contract, the following elements must be proved: 1) the parties were capable of contracting; 2) the existence of a contract; 3) the consideration; 4) the terms of the contract; 5) that the insured has done what he was to do under the contract; 6) the agent breached the contract; and 7) the amount of any damage the agent has caused.[74]

With the absence of any notes or even a questionnaire from the ill-fated meeting between the agent and the insured, it becomes very difficult for the insured to prove the elements. An insurance agent will usually claim that the terms of the oral agreement were properly reduced to writing in the insurance policy. An insurance agent will also state that the insured received a copy of the policy and never questioned the provided coverage. Unfortunately, this puts a tremendous burden on the insured to document the agreement with the agent and the scope of the coverage provided.

C. *Negligent Misrepresentation*

A broker may be liable to the insured for negligently misrepresenting the coverage obtained for the insured.[75] If the agent misrepresented to the insured that the policy delivered contained the coverage bargained for, the failure of the insured to read the policy issued is not ordinarily a defense to an action against the agent.[76] To recover for negligent misrepresentation in Iowa, the insured must prove the following elements:

1. The agent provided false information to the insured.
2. The agent had a financial interest in supplying the information.

---

failure to advise the insured of coverage needs should be confined to those instances when the insurance counselor is receiving consideration for services apart from premiums to be paid by the insured, or there exists a long-established relationship of entrustment between insurance counselor or agent and client, from which it clearly appears that the counselor recognized a duty to take the initiative in giving comprehensive advice to the client on insurance matters. *Id.*; Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1168 (Ariz. Ct. App. 1980).

73. Netteland v. Farm Bureau Life Ins. Co., 510 N.W.2d 162, 165 (Iowa Ct. App. 1993).

74. *See* Port Huron Mach. Co. v. Wohlers. 221 N.W. 843, 844-45 (Iowa 1928); Powell v. McBlain, 269 N.W. 883, 885-86 (Iowa 1936); Service Employees Int'l, Local No. 55 v. Cedar Rapids Community Sch. Dist., 222 N.W.2d 403, 407 (Iowa 1974).

75. Fli-Back Co. v. Philadelphia Mfrs. Mut. Ins. Co., 502 F.2d 214, 216-17 (4th Cir. 1974) (holding that proof the insurance agent misrepresented to clients the scope of coverage may support an action for damages).

76. Batesville Ins. & Fin. Co. v. Butler, 453 S.W.2d 709, 712 (Ark. 1970) (holding that insured who was advised by an agent that automobile policy provided coverage while driving state-owned vehicle had right to rely on such representations).

3. The agent intended to supply the information for the benefit and guidance of the insured.
4. The agent intended the information to influence the insured to purchase the policy.
5. The insured relied on the truth of the information supplied and was justified in his reliance.
6. The negligently supplied information was a proximate cause of the insured's damage.
7. The amount of damage.[77]

Insureds tend to assert negligent misrepresentation more often than fraud because negligent misrepresentation does not require intent.[78]

D. *Breach of Fiduciary Duty*

The relationship between the insurance agent and the insured is a fiduciary relationship.[79] Labeling the relationship as fiduciary is significant, because the breach of such a relationship may give rise to a cause of action on behalf of the insured.[80] In order to recover for breach of a fiduciary duty in Iowa, the insured must prove the existence of the fiduciary relationship.[81] To establish the fiduciary relationship, the insured should establish the agent's relationship, by virtue of: the agent's agreements and dealings with the insured; the trust and confidence placed in the agent by the insured; the agent's superior knowledge, training, expertise, and qualifications; and the insured's faith in and reliance upon the agent's assurances of fulfilling all of the insured's needs.[82] The insured must also prove he relied upon the agent's expertise, advice, and guidance, and the agent knew of this reliance.[83]

---

77. Beeck v. Kapalis, 302 N.W.2d 90, 94 (Iowa 1981). *But see* Conard v. Auto-Owners Mut. Ins. Co., 117 N.W.2d 53, 55 (Iowa 1962) (holding that in an action brought for misrepresentation, the plaintiff must show fraud, representation, falsity, scienter, deception, and injury) (citing Hubbard v. Weare, 44 N.W. 915 (Iowa 1890)).

78. OSTRAGER & NEWMAN, *supra* note 29, § 16.04[a][4].

79. *Id.* § 16.04[a][2].

> Any individual seeking insurance should be able to rely on the expertise of the agent, regardless of the prior contract between the parties. The fiduciary nature of such a relationship should not depend solely upon the length of the relationship. Because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between an insurance agent and a client is often a fiduciary one. Agents should be required to use their expertise with every client, not only those with whom they have a long-term relationship.

Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 741 (N.J. Super. Ct. App. Div. 1984).

80. *See supra* text accompanying note 30.

81. *See* Irons v. Community State Bank, 461 N.W.2d 849, 852 (Iowa 1990).

82. 1 LAMARCA, *supra* note 29, at 332-3.

83. 1 *id.* at 332-4.

VI. INSURANCE AGENTS VS. OTHER PROFESSIONALS: TO WHAT STANDARD SHOULD AGENTS BE HELD?

The world of insurance is confusing, even to the intelligent professional. One expert commentator noted: "The great majority of persons never read their policies, and ninety percent of those who do read them, including attorneys and jurists, would not understand them."[84] Although in reality insurance agents are not always sophisticated experts, society relies on them as experts.[85]

The Iowa Supreme Court in *Sandbulte* raised the argument against expanding an agent's duty of care.[86] The court stated that "[t]o permit [a conversation between an agent and the insured] to serve as the basis for an issue of fact leading to a finding of an expanded principal-agent relationship would in substance make the agent a blanket insurer for his principal."[87] Other courts have observed that "imposing liability on insurers for failing to advise clients of available coverage would remove any burden from the insured to take care of his or her own financial needs and expectations in entering the marketplace and choosing from the competitive products available."[88]

This line of thought reduces the profession of an insurance agent to little more than a retailer. If one were to compare this reasoning to attorneys, it would be analogous to preparing a simple will for a client who has a multi-million dollar estate with no consideration of the tax liabilities to the estate or the heirs. An attorney's failure to be familiar with the assets and financial planning needs of the client when drafting a will would be a clear case of professional negligence.[89]

An insurance agent needs the same information to procure the proper coverage for the client. In short, an insurance agent should be required to gain the information needed to advise the insured of insurance needs and competitive options. Such a standard reflects what the public perceives as the current standard of care. This is especially true when the insured asks the agent for the "best available coverage."

---

84. 16A APPLEMAN & APPLEMAN, *supra* note 24, § 8843.

85. In the case of an attorney or physician, the degree of skill, care, and learning ordinarily possessed and exercised by other professionals in the field elevates the standard expected of the profession. *See generally* Speed v. State, 240 N.W.2d 901 (Iowa 1976) (medical malpractice case in which physician was held to a standard of care practiced by physicians in similar localities); Devine v. Wilson, 373 N.W.2d 155 (Iowa Ct. App. 1985) (legal malpractice case in which the attorney was held to a standard of skill and capacity commonly exercised in the performance of that task).

86. Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 465 (Iowa 1984).

87. *Id.*

88. Nelson v. Davidson, 456 N.W.2d 343, 346 (Wis. 1990) (citing Dubreuil v. Allstate Ins. Co., 511 A.2d 300, 302 (R.I. 1986)). The *Dubreuil* court continued, stating that adopting such a rule would transform insurance companies from a competitive industry "into personal financial counselors or guardians of the insured, a result we believe goes well beyond anything required by law or dictated by common sense." *Id.* (quoting Gibson v. Government Employees Ins. Co., 208 Cal. Rptr. 511, 518 (Ct. App. 1984)).

89. Lorraine v. Grover, 467 So. 2d 315 (Fla. App. 1985).

> An insurance agent is expected to know the coverage available in the areas in which his principal seeks protection. If [the agent] has a duty to inform his client that the amount of coverage requested is not available, and he surely has that duty, no greater or dissimilar burden is imposed by requiring [the agent] to advise his client that coverage in increased amounts is available. . . . Acts of omission as well as acts of commission may give rise to a violation of a duty of due care. There is no basis to distinguish here between the misfeasance of giving erroneous information and the non-feasance of giving no information.[90]

VII. CONCLUSION

The role of an insurance agent is an evolving one. As insurance policies become more complex, agents need to adapt so they are able to educate the insured about insurance needs in a competitive market. Insurance agents should not be allowed to claim ignorance of the insured's needs merely because the legal system requires so little of agents in general. Insurance agents represent themselves as professionals. Unfortunately, the courts have treated them as if they were mere salesmen with no duty to their clients. Such treatment is contrary to the agent's role as a fiduciary, and contrary to the image they portray to their clients.

Courts should hold insurance agents to a higher standard of care. Agents not only need to investigate the proper policy for their clients, but also need to review the policy with the insured in order to educate the insured about the product being purchased. Permitting less of an agent is unfair to the consumer who is relying on the agent's skill, education, and expertise to protect them from devastating losses.

90. Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 741 (N.J. 1964) (quoting the opinion of the trial court).