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## Agents & Brokers

**Under Colorado Law, Absent a "Special Relationship" Between an Insurer's Agent and a Customer, that Agent Has No Duty to Advise or Warn the Customer Regarding Provisions in the Policy Being Sold**

*Whether a "Special Relationship" Has Been Formed, Turns on Whether There Has Been "Entrustment," i.e., Whether the Agent or Broker Has Assumed Duties In Addition Those which Usually Attach*

*Sewell v. Great Northern Insurance Co., \_\_\_ F.3d \_\_\_, 2008 WL 2926226 (10th Cir., July 31, 2008)*

### Case at a Glance

A widowed mother and her daughter sued their auto carrier and an intermediary for failure to advise the adult that they needed more UM/UIM coverage in the family's umbrella policy. The husband and father had been killed when an escaping felon drove into his car, as he waited for a traffic light to change during a high speed police chase. The issue was whether an insurance broker has the responsibility to advise an insured (or insurance customer?) to procure excess UM-UIM coverage in an umbrella policy, in addition to that obtained in the underlying auto policy. The district court answered "No," and the circuit panel affirmed—both with respect to several causes of action.

### Summary of Decision

Maria Sewell was in charge of procuring the family's insurance. In August 2001 she sought three policies: homeowner's, car, and umbrella. She did not specifically request any information with respect to UM/UIM coverage, and she did not ask to have UM/UIM coverage included in the umbrella policy. A representative of the agency sent Maria, a number of quotations, and she eventually selected \$300,000 in UM/UIM coverage. Maria did not ask about extending UM/UIM coverage into the umbrella policy. In

November 2001 another employee of the agency sent Maria an application for umbrella coverage, together with a form policy. It contained blank lines which—if filled it—probably would procure UM/UIM coverage in the umbrella policy. Maria left them blank. No one ever discussed UM-UIM coverage with Maria. This application and policy form came with a letter advising the recipient to "review the policy before signing it and returning it." According to her, Maria did exactly this. The limits of the policy were \$1million but nothing for UM/UIM. No one at the agency ever discussed UM/UIM insurance with Maria, and she never asked.

In 2003, however, there was a significant event. Colorado eliminated its no-fault auto liability law. Consequently, the insurer announced that it intended to eliminate PIP coverage from its auto policies. Maria inquired of the agency about her situation. According to the opinion of the district court, Maria contacted the agency "to ensure that here primary automobile coverage was adequate in the light of the changes." (This quotation is from the district court summary judgment opinion. 2007 WL 1458133.) Maria was told by the second employee she dealt with that she did not need to increase any of her family's coverages. Maria was also told that the umbrella coverage would "kick in" if her auto policy was exhausted.

When it turned out that the umbrella policy contained no UM-UIM coverage and after her husband was killed, Maria sued the insured and its agent for breach of contract, reformation of the contract, negligent misrepresentation, breach of fiduciary duty, violation of the duty of good faith and fair dealing, and violation of the Colorado statute governing deceptive trade practices.

The panel summarily blew away the last two of these issues. The only Colorado statutes governing good faith and fair dealing are two. One of them creates no private cause of action, while the other applies only to insurers and hence not to intermediaries. The statute governing deceptive trade practices does not apply. That statute applies only if the alleged activity "significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property[.]" *Curragh Queensland Minding Ltd v. Dresser Indus., Inc.*, 55 P.3d 235, 240 (Colo. App. 2002). This requirement cannot be proved, however, without proof that a relatively large number of citizens are directly affected, the relative

level of sophistication and bargaining power of the consumers, and/or evidence of previous impacts on consumers or evidence of “significant potential to do so in the future.” *Rhino Linings USA, Inc. v. Rock Mountain Rhino Lining, Inc.*, 62 P3d 142,149 (Colo. 2003). Thus, wrongs which are private in nature and do not affect the public may not be pursued under the Colorado Consumer Protection Act.

Similarly, the breach of fiduciary action was summarily rejected. The court was less than crystal clear on this point, but it appeared to articulate two independent propositions. The first one was that the intermediary was not a fiduciary of its customer. The second one was that even if it was, it did not violate any fiduciary duty. This agency’s only duties were to obtain the policies Maria asked for and to answer any questions she put to it, and it did both of these things. Insurers are not financial advisors or counselors, and they are not risk managers “approaching guarantor status, and it is well settled that agents have no continuing duty to advise, guide, or direct a client to obtain additional coverage.” *Bayly, Martin & Fay, Inc. v. Pete’s Satire, Inc.*, 739 P3d 239, 243 (Colo. 1987). See also *Kaercher v. Sater*, 155 P3d 437 (Colo. App. 2006), *cert. denied*, 2007 WL 807272 (Colo. Mar.19, 2007). In any case, the agency was not required to advise Maria in the absence of a special relationship.

There was no negligent misrepresentation. This can occur only if the person accused of *misrepresentation* asserts a false proposition. This did not happen, said the court. Maria asked whether the umbrella policy would “kick in” if the primary policy was exhausted, and at that time it certainly would have kicked in if the liability component of the umbrella had been exhausted. The agency made no false statements, and it was under no duty to make sure that the Sewells had “any particular coverage other than what they specifically had requested.”

Similarly, there was no breach of contract. An insured’s contract with an intermediary is nothing more than an ordinary service contract containing nothing more than an ordinary agency agreement in which the intermediary agrees to try diligently to obtain what the insured requested and let him know if it cannot be found. In such a contract an insurance middle person has “no affirmative duty to advise or warn his or her customer of provisions contained in an insurance policy.” And the intermediary has no

duty to conceive his relationship with the insurance customer as one involving “entrustment,” i.e., a special relationship in which the intermediary “assumes additional responsibilities beyond those which attached to an ordinary reasonable agent possessing normal competencies and skills.”

Significantly, the panel found that the agency’s ads or pricing did not even suggest the existence of a “special relationship.” On this basis, it held that there was no evidence supporting the plaintiff’s reformation argument.

### Comment

The granting of summary judgment in this case was a mistake. Maria asked a direct question about the relationship between an underlying auto policy and an umbrella policy which “sat” above the auto policy, in part. Maria asked the agency whether the umbrella policy would “kick in” if the auto policy was exhausted. The correct answer to this question is “Yes, in part, and No, in part. For example, if the UM-UIM coverage in the underlying policy is exhausted, your umbrella policy will not kick in, since there is no coverage at all of that type in the umbrella policy.” The employee of the agency might then ask, “Are you satisfied with \$300,000?” Of course the question is not what is at issue here; only the correct answer matters.

The court took the view that Maria’s question was restricted to liability coverage. There is no reason to believe this. Maria did not restrict her question to liability coverage, although the question was triggered by the insurer’s cutting off PIP coverage. If she asked, “Will the umbrella coverage ‘kick in’ if the primary policy is exhausted?” this question would include UM/UIM coverage, and the answer would be false. It therefore constitutes a misrepresentation.

The panel stated that an agency can have more than the usual range of liability for agents only if it entrusts (to itself, as it were) greater responsibilities than are usually required by the law. Colorado apparently has different criteria for “entrustment” than at least a good number of other jurisdictions have. In many places, actual entrustment means that A had handed over a job to B, and B had accepted the “hand over.” In Colorado, “entrustment” means that B has undertaken to do something for A, perhaps, which is not within the scope of their normal relationship and A knows it, perhaps as the result of

A's requesting it. It is hard to see why the agency's answer to Maria's question was not an "entrustment," in the unusual Colorado sense of that term. If so, then the matter the panel decided by affirming a summary judgment favoring the agency, should have been tried.

The same answer would result if the usual definition of "entrustment" applied, contrary to the wording of the panel. Maria asked the agency a question. It trusted the agency to give it a correct answer, if it answered at all. It did answer. It did not warn Maria not to trust it but to study the policies for her self. Thus, Maria entrusted something to the agency. It failed to do correctly what was entrusted to it. This failure occurred as the result of a negligent misrepresentation. The failure deprived Maria of a benefit, upon the death of her husband. The employee at the agency should not have made this mistake. Hence, the agency should be liable for a negligent misrepresentation. // Quinn

## **Under Massachusetts Law, Insurance Agents Have No General Duty to Make Sure that Contracts of Insurance They Procured Provide Coverage that is Adequate for the Needs of Their Individual Customers**

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*If such a Duty Exists, It Arises from the Existence of "Special Circumstances" between the Agent and the Customer, Based upon "Assertion, Representation, and Reliance"*

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*AGA Fishing Group, Ltd v. Brown & Brown, Inc., 533 F.3d 20 (1st Cir. 2008)*

### **Case at a Glance**

A family scallop business carried \$1 million in P & I (including liability) coverage on its business and boat for a number of years. During a fishing trip in 2003, a crewman was severely injured, and the coverage was too small. The boat and business were seized, and the insured sued its insurer and the intermediary for negligence, among other causes of action. The district court granted all defendants summary judgment. The plaintiff had not proved the existence of "special circumstances" which would require either the insurer or the intermediary to even advise an insured-to-be or customer as to genuinely needed insurance

coverage, much less seek to procure it. The court's list and discussion of the routinely probable components of "special circumstances" is particularly instructive from two significant points of view: insurance jurisprudence and practical lawyering.

### **Summary of Decision**

The plaintiff AGA Fishing Group ("AGA") was forced to sell its boat, the *Georgie J*, a scallop fishing vessel, and its scallop license in order to settle a personal injury claim against it, after a crewman sustained debilitating injuries while working aboard the vessel and recovering large damages under the Jones Act. The award far exceeded the \$1million limit of AGA's Protection & Indemnity policy issued by Flagship Insurance, Inc., some sort of an insurer entity owned by Brown & Brown. AGA had carried this amount of P&I insurance since 1987.

Mariners Insurance had first insured AGA; it was followed by Neptune Mutual; and ultimately by Flagship. AGA had followed an agent who had worked with AGA for a considerable period of time. He had never suggested that policy limits be increased, although he conceded that the couple who owned AGA required more attention than other customers. Significantly, AGA had never asked about increasing the limit. The couple that owned AGA had assumed that the agent would recommend any necessary increase in coverage.

Flagship's website advertised Flagship as having "the expertise necessary to offer the appropriate insurance services for the maritime industry" and claimed to 'systematically and comprehensively examine [its clients'] maritime exposures.'" Perhaps significantly, the owners of AGA never viewed the website. Furthermore, the enduring agent of AGA left Flagship in 2000, but recommended that AGA stay where it was. AGA's owner was concerned that he was getting lesser service thereafter, but the Flagship representative reassured AGA that he would "take care of them [,]" even though he was working from Virginia and Massachusetts, much less New Bedford, AGA's home port. Significantly, beginning in 2000 there was a boom in scallop fishing, so per ship revenues went way up. Scallop-fishing ships similar to that of AGA, based in the same place, routinely carried \$5million in P & I coverage.

AGA sued B&B plus Falstaff for not recommend-