


Monkey In The Middle: The Anatomy Of An Insurance Agent Errors & Omissions Claim

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Key Principles from this Article

- Many duties owed by Michigan insurance agents hinge on whether they are independent or captive / exclusive agents.
- The failure of the policyholder to read the policy goes to the defense of comparative negligence as opposed to proximate cause, but could defeat a misrepresentation cause of action against an insurance agent.
- Duties of insurance agents have been recently extended by the Sixth Circuit Court of Appeals to include additional insureds, but not injured third parties.
- The failure to place or procure coverage must be distinguished from the duty to advice in assessing a potential cause of action against an insurance agent.
- It is now settled that the negligence statute of limitations is three years, not two, for insurance agent professional liability.

The typical licensed insurance agent is sandwiched between duties owed to the insurer and the insured. Yet who is the agent's master? Is the insurer liable for the acts of the agent? Is the agent responsible for the acts of the insurer? What duties does the Michigan agent owe to the insured to procure coverage or to advice of a policy's adequacy?

When an insurer denies an insurance claim, many insureds are quick to blame the insurance agent. These errors and omissions claims are more common than the practitioner might think, particularly in that many insureds do not read their policies, and if they do, it is questionable whether they understand the intricacies of the coverages, exclusions and conditions. Although the agent did not write the policy, he or she is often perceived by the insured to be the culpable party when a claim is not covered by the insurer. After all, the agent sold the policy to them.

Michigan law is somewhat in a state of flux on the issue of the duties owed by an independent agent versus that of a captive agent. The trend of the decisions out of the Michigan Court of Appeals seems to be that where the agent is the agent for the insured, a heightened duty is owed to that insured. However, in the 1999 seminal case regarding agent liability, *Harts v Fire Insurance Exchange*,[1] the Michigan Supreme Court did not draw a particular distinction between types of agents and who they represent, leaving many to wonder what the law is.

New causes of action against insurance agents have recently been recognized by the Michigan Court of Appeals in the area of negligent appraisal in determining values for buildings and contents.

This article examines the roles and legal responsibilities of the independent agent, the captive or exclusive agent, and the insured.

Michigan Insurance Agent Causes of Action

Michigan case law recognizes two broad categories of professional liability claims – failure to procure and failure to advise of coverage adequacy. It is important to distinguish the two as they involve different standards. As to either, however, the Michigan Court of Appeals recently determined that a three-year statute of limitations applies, rather than the two-year statute in professional liability cases.[2]

The cause of action for failure to procure coverage invokes common law negligence theories and defenses.[3] For example, if an agent forgets to bind coverage and a loss occurs, this does not trigger an analysis of whether coverage was adequate as coverage was never procured in the first place.

The more common negligence cause of action involves the agent placing coverage which is later determined to be inadequate. Despite being the seminal case on agent liability, *Harts, supra,* leaves something to be desired in the scope of determining whether a duty exists, with numerous appellate courts analyzing such lawsuits in various ways.

Harts, however, does make it clear that a distinction exists between insurance *counselors* and insurance *agents,* each of which require a separate state license in Michigan. By statute, only licensed counselors are permitted to advise on coverage benefits, make comparisons between policies, and perform other tasks that involve more than simply explaining a proposal or policy being sold.[4] Counselors certainly owe different duties than do agents.

The *Harts* case imposes a four-prong analysis as to whether an insurance agent owes a duty to the insured to advice of the adequacy of coverage, holding that there is such a duty if one of the following exists:

> (1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives advice that is inac-

> curate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.[5]

Some of these four factors tend to bleed over into the others, sometimes making it difficult to determine whether a duty is owed. However, some courts appear to be looking through a conservative lens in analyzing whether the pending claim meets any of these factors. For example, at least one Michigan court has determined that the failure to advise the insured of a notice of cancellation was not a breach of duty under *Harts*.[6]

The trend over the last few years is for courts to look at the legal relationship between the parties to determine duty and liability. In the published decision of *Genesee Foods Services, Inc v. Meadowbrook, Inc*[7] the Michigan Court of Appeals put an emphasis on the insurance agency's status as an independent agency, meaning that it represented numerous insurance companies in placing accounts. *Genesee Foods* distinguished *Harts* and its four-prong test in holding that *Harts* only applied to captive or exclusive agents where the agent is typically the agent for the insurer. This often involves situations where the agent is an employed salesperson for the insurer.

Independent Agent as Fiduciary to the Insured

Citing long-established Michigan case law that such an independent agent is the agent for the insured rather than the insurer,[8] the court in *Genesee Foods* applied a fiduciary duty standard, holding that the "agent has the obligation to obtain the most comprehensive coverage available for the insured."[9] The fiduciary duty standard exposes the independent insurance agent to major risk given the court's reference to "the primary fiduciary duty of loyalty" and "the most comprehensive coverage available."

In looking to basic principles of fiduciary law in Michigan, a fiduciary duty arises when the relationship between the two parties is "of such character that each must repose trust and confidence in the other and must exercise a corresponding degree of fairness and good faith."[10] This fiduciary relationship factor has been a consideration weighed by numerous recent courts in analyzing insurance agent duties.

Since *Genesee Foods*, a number of unpublished cases have attempted to further refine the standard.

In the 2011 case of *Nokielski v Colton*[11] the Michigan Court of Appeals expressly held that the *Harts* standard applies equally to the independent agent and to the captive agent. Another panel reached the same conclusion in the 2014 case of *Richardson v Grimes*.[12]

Other courts have stressed that independent agents owe fiduciary duties as enunciated in *Genesee Foods* but that such a duties are not unlimited. For example, in *Deremo v TWC & Associates, Inc.,*[13] the court determined that although such a broad sweeping duty of fiduciary care was owed by the agency, it satisfied that duty by asking the insured for additional information which was never provided.

In a November 3, 2015 opinion, *John Hohensee v Nassar Insurance Agency, Inc,*[14] the Michigan Court of Appeals considered a claim that an insurance agent misrepresented the scope of coverage resulting in a substantially lesser payment from the insurer than should have been made following a fire. In that case, the limit of insurance for the building was $500,000 yet the reconstruction costs were determined to be $842,948. After the insured decided not to rebuild, the insurer paid $236,148 which was less than it would have paid had the insured rebuilt. The insured sued the agent claiming that the terms of the policy had been misrepresented in that "agreed value" ultimately did not mean he would get the full $500,000 policy limit.

The court held that a negligence cause of action was not viable because no duty was owed nor was the loss the proximate cause of any negligence by the agent. Although the defendant was an independent agent, the court applied the *Harts* standards and determined that there was no duty to advise of coverage adequacy as there was no special relationship.[15]

In addition to applying *Harts*, the court also looked to whether there was a fiduciary duty owed, *i.e.* did the agent use "reasonable diligence and care to procure insurance as requested by the insured."[16] The court did not reference in its opinion the principle of *Genesee Foods*[17] that the fiduciary duty required the agent to obtain the most comprehensive insurance available for the insured.[18]

Extending the Duty to an Additional Insured

Insurance agents may also owe duties to parties which are not their clients. In a vigorously defended case that was ultimately decided by the Sixth Circuit Court of Appeals, it was held that an insurance agent could also owe a duty to an additional insured listed on the policy.[19] Recently, however, the Sixth Circuit Court of Appeals declined to extend this rationale to a duty of an insurance agent to an injured third party claimant.[20]

Should the Insurer Be Included as a Defendant?

In cases involving errors or omissions of independent insurance agents, the insurer is usually not a viable defendant absent an independent theory for breach of contract or in unusual circumstances, for an independent tort. The reason for this is the principle previously discussed that the independent agent is the agent for the insured. This means that acts or omissions of the agent are generally not binding upon the insurer, even though there is a separate contract between the insurer and the agent.

The acts of omissions of exclusive or captive agents are generally binding upon the principal insurer and, in such cases, the insurer should be included as a defendant.

Types of Causes of Action

Negligence. The typical underinsured loss analysis of captive agent liability will invoke the four-prong *Harts*[21] test as to whether a duty exists to advise of coverage adequacy. As noted above, this may also be part of the analysis when an independent agent is involved but this has not been settled to date. It is advisable to plead such factually supported claims specifically in the negligence count.

Fiduciary Duty. Pleading in the alternative, it is advisable to consider a separate claim for fiduciary duty where the defendant is an independent insurance agent. This is consistent with *Genesee Foods*.[22] One potential advantage of a fiduciary cause of action is that it may not be subject to a defense of comparative negligence, although the authors are aware of no appellate decisions which have squarely addressed this. It is noted, however, that some Michigan courts analyzing the fiduciary duty of independent insurance agents have done so in the context of "duty" and "negligence," implying that there would be the potential for a comparative negligence defense.

Breach of Contract. Michigan courts have held that a claim for an insurance agent's failure to advise is in tort rather than for breach of contract.[23] Furthermore, when a contracting party is sued by a non-contracting third-party for negligence, the inquiry is whether defendant owed any independent legal duty to the plaintiff.[24] Thus, the breach of contract cause of action will usually be superfluous.

Misrepresentation. Something of a misnomer in the context of an agent case, the misrepresentation count tends to be a weaker theory in the scope of causes of action. Already included as an element in the *Harts*[25]analysis, it typically has fewer teeth given its element of reasonable reliance[26] which can often be derailed to the extent of an admitted failure of the plaintiff to read the policy.

Defenses

No duty. The issue of duty is typically the primary defense asserted by insurance agents and *Harts*[27] is often the basis for the defense.

However, courts have also looked to whether an insurance agent has a duty in more remote situations. For example, in *Theriault v Al Bourdeau Insurance Service, Inc*.[28] the Michigan Court of Appeals addressed a fact pattern where the insurance agent for a bar owner did not advise the insured to file a claim with another agency which wrote a separate policy, holding: "It would be inconsistent with that limited duty to hold an insurance agent such as defendant liable in connection with an insurance policy it did not write and an insurance company with which it had no relationship."[29]

No Third Party Beneficiary. Generally, insurance agents owe no contractual duty to an injured third party claimant and, for this reason, the third party lacks standing to sue the agent. However, courts have not applied this no duty rule to cases involving automobile accidents, finding that such injured victims *are* third-party intended beneficiaries of an auto-insurance policy.[30]

Proximate Cause. Michigan courts have determined that where a plaintiff fails to show that coverage was available to address the coverage gap at issue, causation is lacking, defeating the negligence theory.[31] Expert testimony may be needed to establish the availability of coverage.

At least one other court has held that where an insured elected not to rebuild and received a lesser sum from the insurer, causation was also lacking.[32]

A key defense usually interposed by agents is that the insured should have read the policy and raised any questions within a reasonable period of time. Along these lines, agents have argued that where the insured does not read the policy, it, not the agent, is the proximate cause of any loss. However, the published opinion of *Zaremba Equipment, Inc v Harco National Insurance Company*[33] held that failure to read the policy is not dispositive on the issue of negligence and instead goes to comparative negligence.

Misrepresentation. The insured, being bound to the knowledge of the terms and conditions of the insurance policy,[34] usually fails to prevail on a misrepresentation claim given that there can be no reasonable reliance where the insured failed to read the policy.[35] This analysis likely also applies to cases where the insurer rescinds the policy for a misrepresentation on the application that the insured signed but did not complete or read.

Other Litigation Considerations

Discovery. Discovery in an agent errors and omissions case follows general procedures, subject to a few nuances.

Agents often maintain detailed computerized activity logs which should be requested by name (an expert can assist you with this). These logs may contain vital information on what transpired in a particular case. The underwriting and claims files of the insurer provide relevant documentary discovery as they usually include correspondence from the agent, applications, etc.

Experts. Whether an expert is needed to support an insurance agent errors and omissions claim typically involves determining if something more than an interpretation of the policy language is required. Instead, a case usually warrants an expert where the fact finder requires additional assistance in the explaining of the standard of care of a reasonably prudent insurance agent.

However, even where the practitioner chooses not to retain a testifying expert, a retained advisory expert can provide valuable assistance with formulating causes of action or defenses, seeking appropriate discovery and explaining the availability of coverage.

Conclusion

Whether independent or captive, the insurance agent in Michigan is often the monkey in the middle, appearing to have to please two masters while primarily owing duties to represent the interests of only one.

While the case law is somewhat in a state of flux, it is anticipated that the issue of who the insurance agent represents will ultimately play a key role in the case law governing such errors and omissions cases. Depending on the nature of the relationship and the interaction on coverages, the current state of the law can assign to the agent, and in particular the independent agent, considerable liability exposure. The intricacies and options regarding coverages make the process of purchasing insurance a complicated one to say the least. ■

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Endnotes

1 *Harts v Fire Ins Exchange,* 461 Mich 1, 6; 597 NW2d 47 (1999).

2 *Stephens v Worden Ins Agency, LLC*, 307 Mich App 220; 859 NW2d 723 (2014); MCL 600.5805(10).

3 *Haji v. Prevention Ins Agency, Inc.*, 196 Mich App 84; 492 NW2d 460 (1992). 3 Couch, Insurance, 3d, cited by *Micheau v. Hughes & Havinga Ins* Agency, unpublished opinion per curiam of the Court of Appeals, issued May 21, 2013 (Docket No. 307914).

4 MCL 500.1201(a); MCL 500.1232; MCL 500.1234; MCL 500.1236; *Harts*, 461 Mich 1.

5 *Harts*, 461 Mich at 6-7.

6 *Triangle Business Center, Inc v Hartford Casualty Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2012 (Docket No. 305504).

7 *Genessee Foods Services, Inc v Meadowbrook, Inc,* 279 Mich App 649; 760 NW2d 259 (2008).

8 *West American Ins Co v. Meridian Mut Ins Co*, 230 Mich App 305; 583 NW2d 548 (1998).

9 *Genesee Foods,* 279 Mich App 649.

10 *Portage Aluminum Co v Kentwood Nat'l Bank,* 106 Mich App 290; 307 NW2d 761 (1981); see also *Meyer & Anna Prentis Foundation, Inc v Barbara Ann Karmanos Cancer Institute,* 266 Mich App 39, 43; 698 NW2d 900 (2005); lv den 474 Mich 871 (2005).

11 *Nokielski v. Colton*, unpublished opinion per curiam of the Court of Appeals, issued January 4, 2011(Docket No 294143).

12 *Richardson v. Grimes,* unpublished opinion per curiam of the Court of Appeals, issued January 21, 2014 (Docket No. 312782).

13 *Deremo v TWC & Assoc, Inc,* unpublished opinion per curiam, issued August 30, 2012 (Docket No. 305810).

14 *Hohensee v Nasser Ins Agency, Inc,* unpublished opinion per curiam of the Court of Appeals, issued November 3, 2015 (Docket No. 321434).

15 *Bruner v. League General Ins Co*, 164 Mich App 28; 416 NW2d 318 (1987) has long been cited in agent cases for its proposition that in order to create a duty there must be an interaction on a question of coverage i.e. a special relationship.

16 *Hohensee,* unpub op Citing *Zaremba Equipment, Inc v Harco Nat'l Ins Co,* 280 Mich App 16; 761 NW2d 151 (2008).

17 *Genesee Foods,* 279 Mich App 649.

18 *Id.*

19 *Cleveland Indians Baseball Co, LP v. New Hampshire Ins Co*, 727 F3d 633 (CA 6, 2013).

20 *Johnson v. Doodson Ins Brokerage, LLC*, 793 F3d 674 (CA 6, 2015).

21 *Harts,* 461 Mich 1.

22 *Genessee Foods,* 279 Mich App 649.

23 *Holten v. A+ Ins Assoc, Inc,* 255 Mich App 318; 661 NW2d 248 (2003). See also *Zaremba,* 280 Mich App 16.

24 *Loweke v. Ann Arbor Ceiling & Partition Co*, 489 Mich 157; 809 NW 2d 553 (2011).

25 *Harts,* 461 Mich 1.

26 *Novak v. Nationwide Mut Ins Co*, 235 Mich App 675, 688; 599 NW2d 546 (1999).

27 *Harts,* 461 Mich 1.

28 *Theriault v. Al Bourdeau Insurance Service, Inc,* unpublished opinion per curiam of the Court of Appeals, issued October 14, 2008 (Docket No. 278643).

29 *Id.*

30 *Auto-Owners Ins Co v Michigan Mut Ins Co*, 223 Mich App 205; 565 NW 2d 907 (1997).

31 *Micheau,* unpub op.

32 *Hohensee,*unpub op.

33 *Zaremba,* 280 Mich App 16.

34 *Casey v. Auto Owners Ins Co*, 273 Mich App 388; 729 NW2d 277 (2006).

35 *Hohensee,* unpub op, citing *Zaremba*, 280 Mich App 16.