

TALES FROM THE TRENCHES

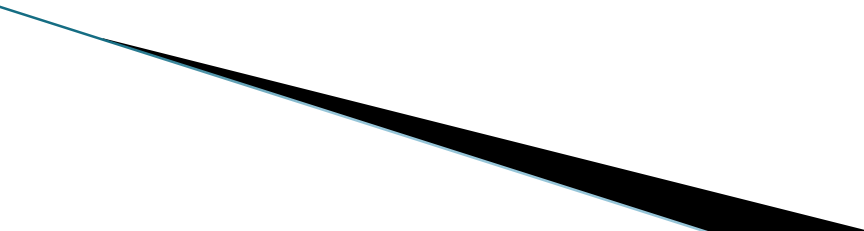
Agents and Brokers
Errors and Omissions



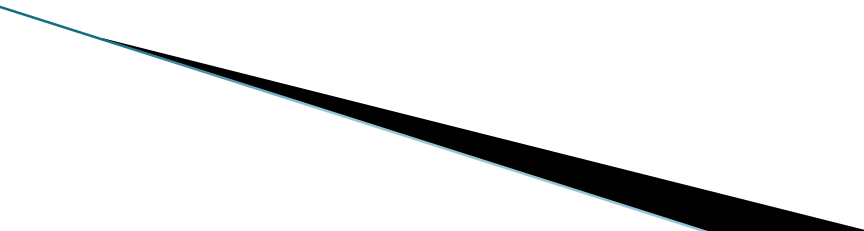
OIC NEWS RELEASE

“Kreidler fines insurers and agents more than
\$750,000.”

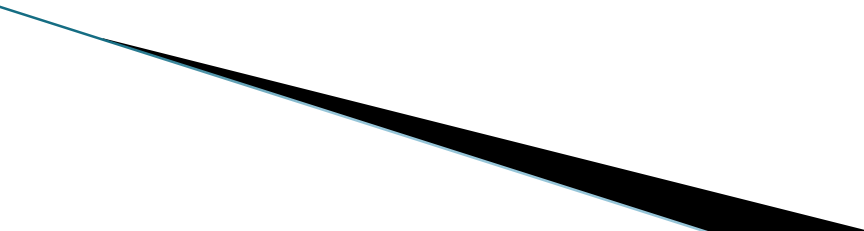
Some examples

- ▶ Agent failed to provide proper advice regarding requirements for changing beneficiary of an annuity policy.
 - ▶ Agent did not fully describe nature of a policy provision and did not procure a policy with terms insured expected.
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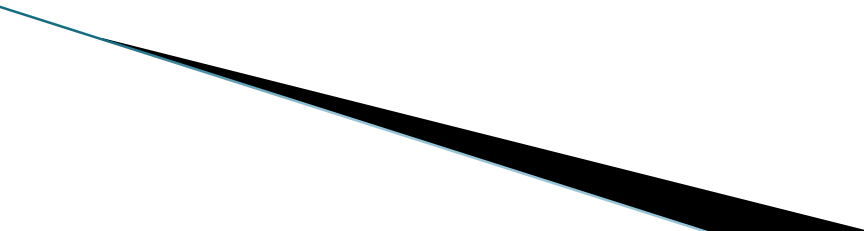
More examples

- ▶ Agent failed to advise of all material information relevant to switching policies.
 - ▶ Agent failed to inform insurer of accident involved insured and a snowmobile. \$1.2 million judgment against agent when insurer refused to pay.
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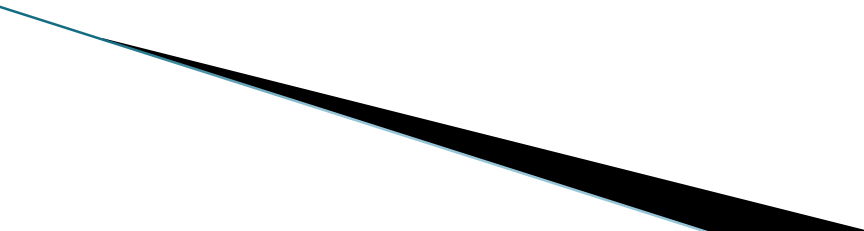
Basic elements of the tort action.

- ▶ Duty
 - ▶ Breach of the duty
 - ▶ A resulting injury
 - ▶ The breach was the proximate cause of the injury
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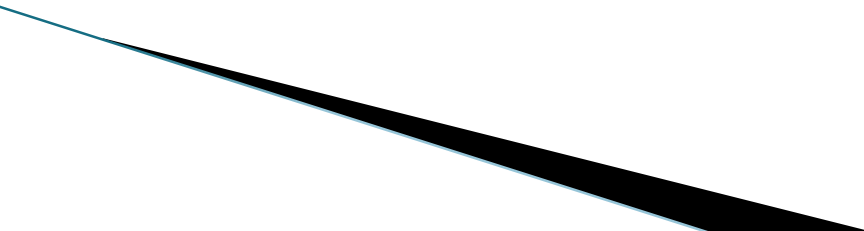
The Letter of the Law

- ▶ “An insurance agent owes a duty of reasonable care to one for whom the agent undertakes to secure insurance coverage.”
 - ▶ “An insurance agent or broker assumes only those duties normally found in any agency relationship: the obligation to exercise good faith and carry out instructions.”
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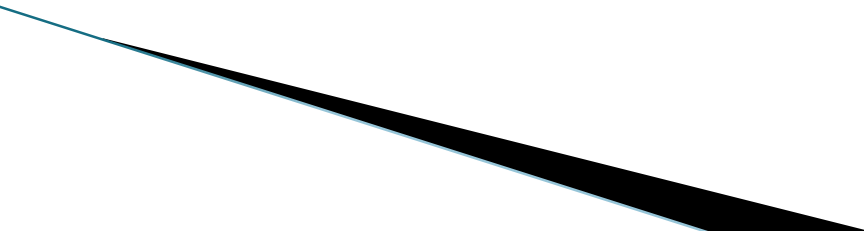
“This is an age of specialists and as more occupations divide into various specialties and strive toward professional status the law requires an ever higher standard of care in the performance of their duties.”



Was there a duty?

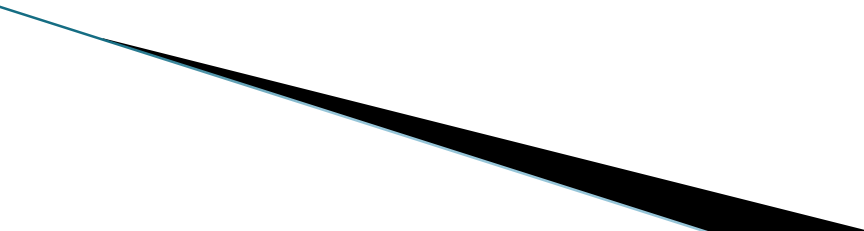
- ▶ Purchase of restaurant business financed by building owner.
 - ▶ Agent was told that building owner must be insured under business owner's policy.
 - ▶ Aug. 6 fire.
 - ▶ Aug. 8 agent sends building owner COI listing owner as loss payee, "eff. July 6"
 - ▶ Insurer refuses to pay.
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Was there a duty?

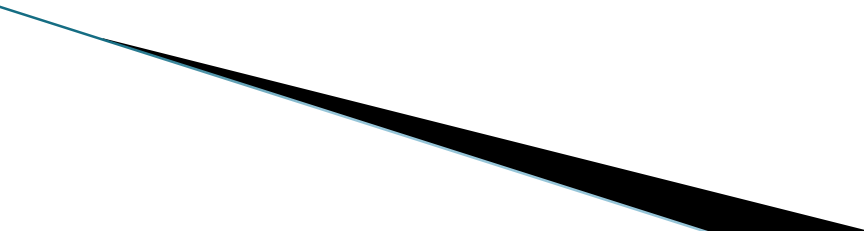
- ▶ Building owner sued the agent.
 - ▶ Building owner did not buy the policy.
 - ▶ Issue: was the agent who procured the policy for the business owner also the agent for the building owner who was to be the loss payee?
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Scope of duty

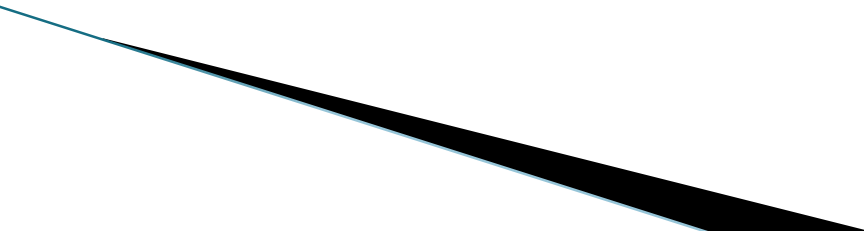
“It is particularly significant that plaintiff’s expert witness testified that a prudent insurance agent, when advising a client known to be occupying premises as a lessee, would examine or recommend an examination of the lease to ascertain possible liability there under and advise insurance coverage if necessary.”



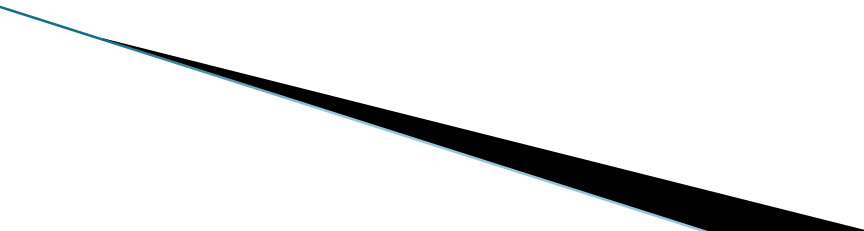
Is there a SPECIAL RELATIONSHIP?

1. Agent holds self out as an insurance specialist and receives compensation for consultation and advice apart from premiums paid.
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Is there a SPECIAL RELATIONSHIP?

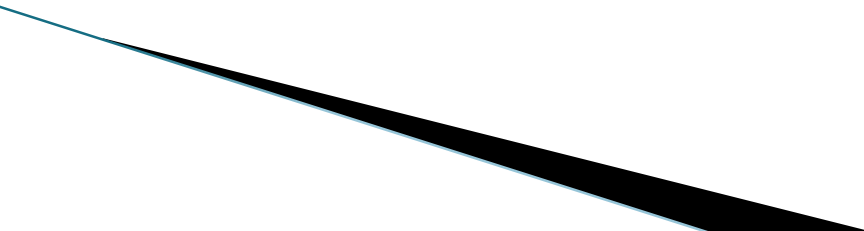
2. A longstanding relationship, some type of interaction on coverage, coupled with insured's reliance on agent's expertise to the insured's detriment.
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SPECIAL RELATIONSHIP?

- ▶ Almost daily discussions about insurance for 16 years. Agent advised no time limit on lost profit claim after a fire.
 - ▶ Agent assisted insured with reinstating different policies on several occasions after lapse for non-payment of premium.
 - ▶ Knowledge of the insureds' annual income and net worth?
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Nature of duty

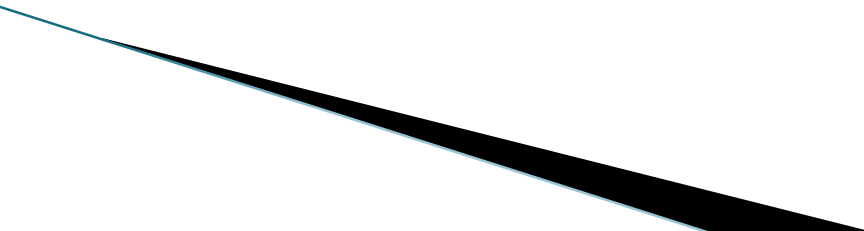
Absent special circumstances, does an agent owe an insured a duty to recommend auto liability limits higher than those selected by the insured?



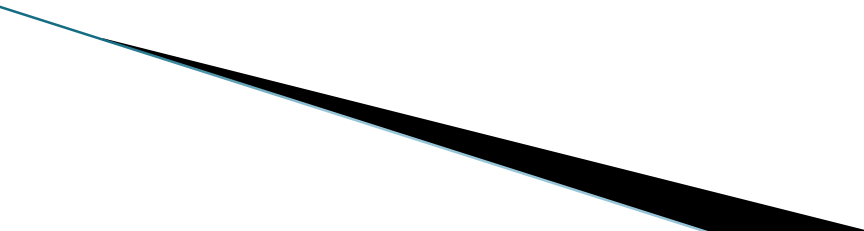
“Trust me.”

- ▶ Agent’s statements of “trust me” and other reassurances lulled insured on a life insurance contract into inaction, thereby tolling statute of limitations. ...

“Ostensible authority.”

- ▶ Broker issued COI identifying X as an additional insured.
 - ▶ Carrier denied coverage because policy was not endorsed & exclusion.
 - ▶ Broker was “ostensible agent” of the insurer where insurer “knows the agent holds self out as clothed with certain authority, and remains silent.”
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Applications

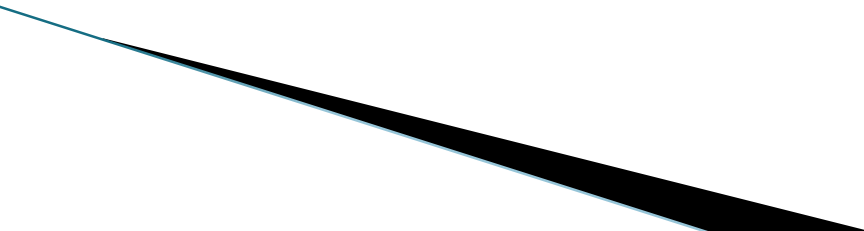
- ▶ Application for life ins. contract failed to disclose MD visits for heart attack scare.
 - ▶ No damages.
- 

Binder vs. policy

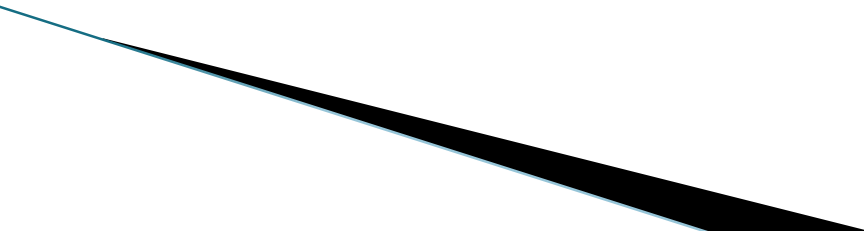


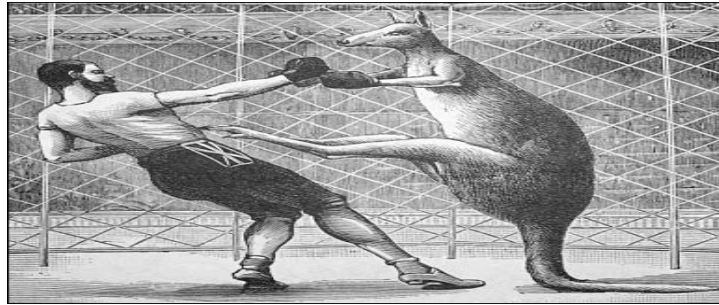
Binding receipt

“Temporary insurance contract providing interim coverage from the date of application until the issuance of the formal policy.”



- ▶ New residential construction.
- ▶ Course-of-construction coverage requested.
- ▶ “Safety net” “catch basin” “in all instances that something goes wrong.”
- ▶ Agent agreed and communicated no limitations.
- ▶ Owner didn’t require contractor to insure.
- ▶ Exposure to elements loss Jan. ‘04.
- ▶ March ‘04 Dec Page from agent shows coverage for “dwelling under construction”

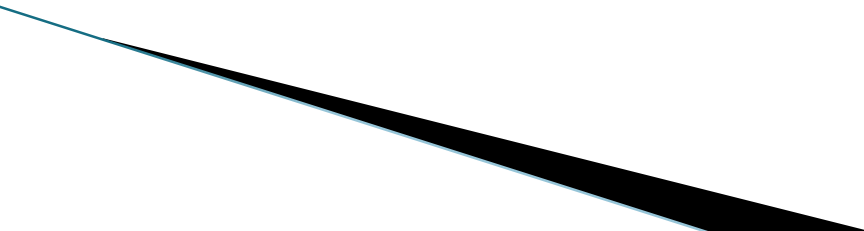
- ▶ Policy required direct physical loss
 - ▶ Exclusions for faulty workmanship, mold, water damage, etc.
 - ▶ Insured brought action for **breach of the oral binder and failing to deliver copy of policy within reasonable time.**
 - ▶ Jury: Agent entered into oral contract for insurance that eliminated physical loss requirement and exclusions.
- 



- ▶ OR statute: “Binder shall include all usual terms of the policy *except as superseded by clear and express terms of the binder.*”
- ▶ “Safety net” “catch basin” “in all instances that something goes wrong.”

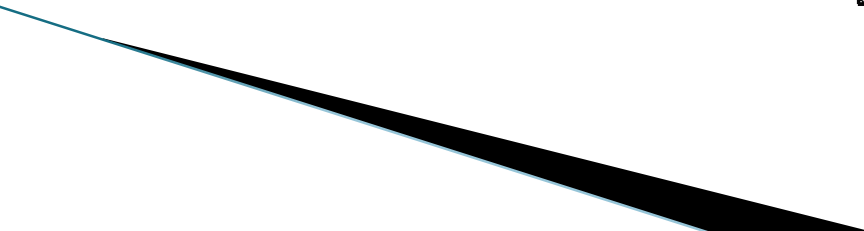
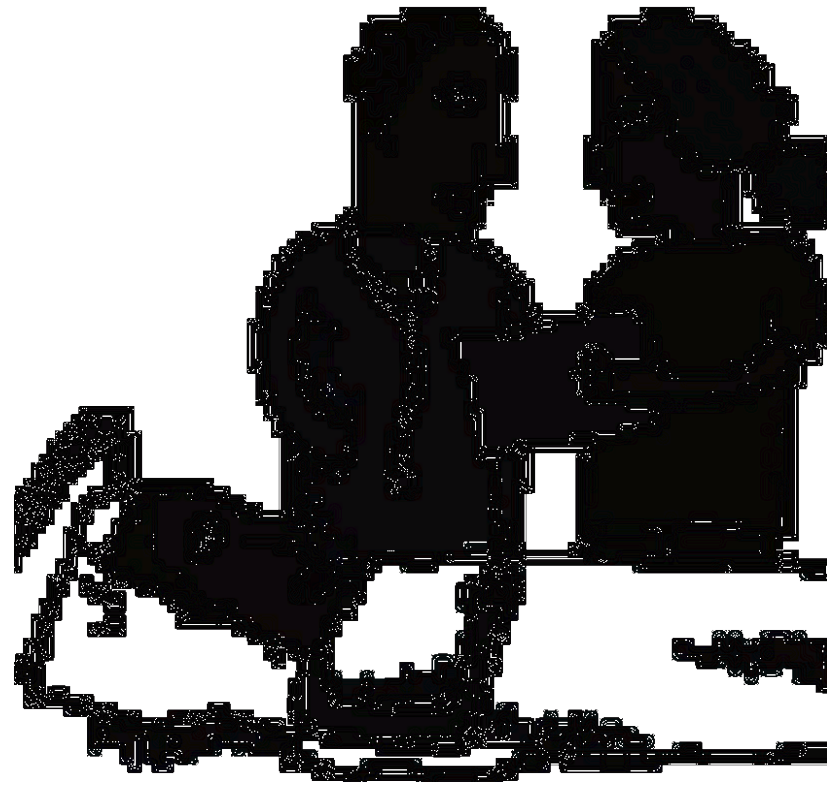
Bryant v. Country Life

“Most importantly, life insurance cannot be issued to people who have already died.”



Bryant v. Country Life





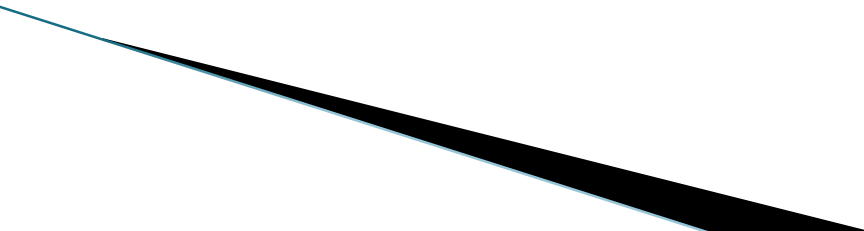


I TOLD YOU
I WAS SICK

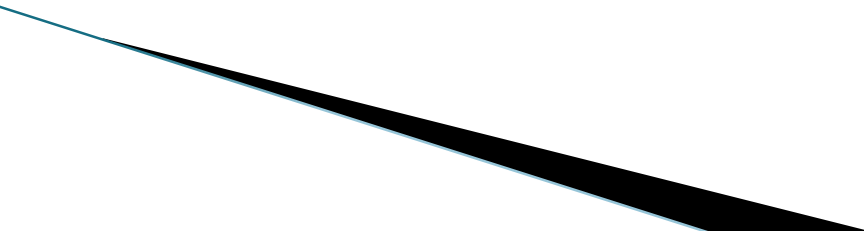
NEXT TIME YOU
WILL BELIEVE ME

“Complicating factor”

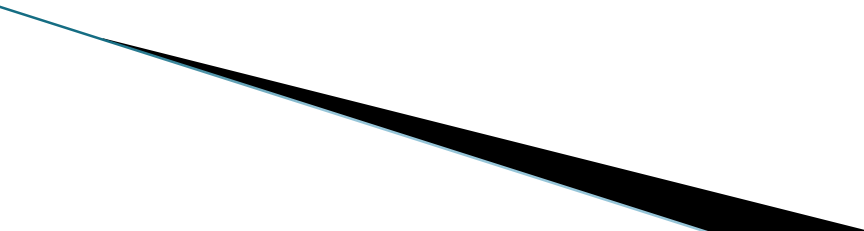
The insured was both the individual applying for insurance and the agent who received the application.



Two questions:

- ▶ Was the insured acting outside the scope of his agency?
 - ▶ Was the agent “self-dealing” such that his actions cannot be imputed to his principal?
- 

Contract formation analysis.

- ▶ No contract for the policy itself.
 - ▶ But – what of the binding receipt?
 - ▶ “If beneficiary can show Country Life authorized its agents to submit and accept applications for policies on their own lives...”
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Excess carrier sues primary's agent asked to procure annuity.

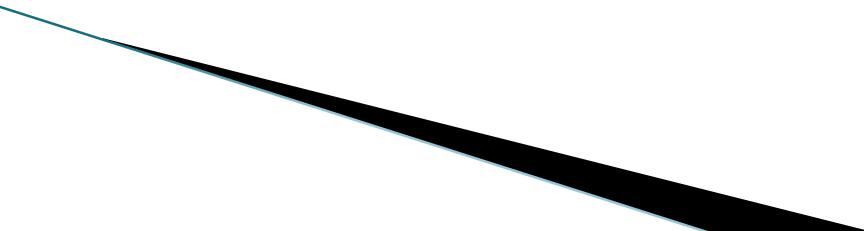


- ▶ “A jury might conclude that given the size of the commission Rask only agreed to use best efforts but did not promise to deliver.”
OR
- ▶ “Perhaps Rask was so anxious to earn commission and so sure annuity would issue that he unconditionally promised to deliver.”

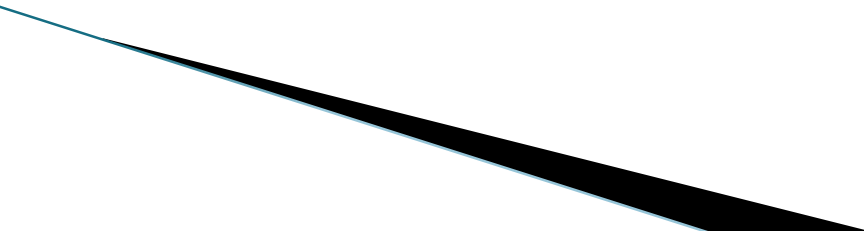
“Insurance Agents Liable for Submitting Application With Incorrect Information That Client Signed Without Reading”

Morrison v. Allen, Supreme Ct. of Tenn., 2011

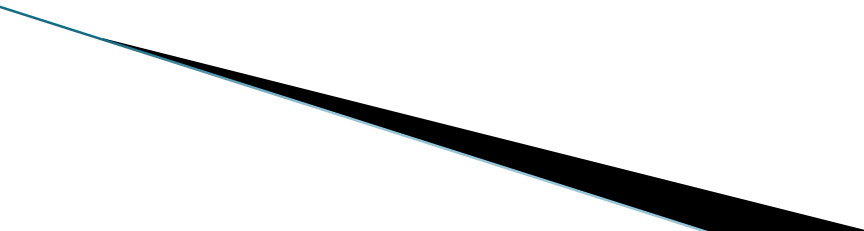
Some facts:

- ▶ Agent recommended a \$1 million life insurance policy.
 - ▶ Existing \$300K policy incontestable.
 - ▶ Insured had a DWI.
 - ▶ Application, completed by agent: “No.”
 - ▶ Visiting nurse: “Yes.”
 - ▶ Prior policy lapsed.
 - ▶ Insured died in one-car accident.
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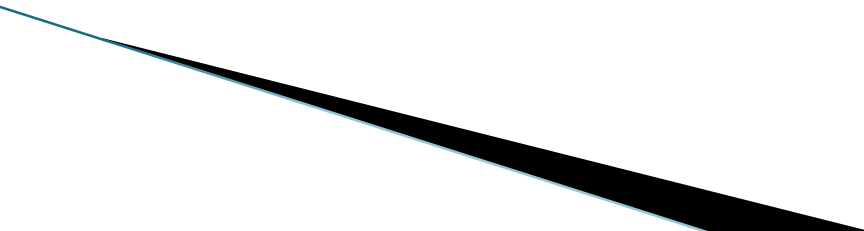
What happened?

- ▶ Agent not liable for lapsed policy.
 - ▶ Was liable for the face value of replacement policy.
 - ▶ “Claim for failure to procure may arise when coverage denied on policy that’s still contestable as a result of agent’s errors and omissions.”
 - ▶ Insured’s failure to read not a bar to claim.
- 

Considerations

- ▶ Insured would have told truth if asked.
 - ▶ Agent cannot shield his own negligence with insured's signature.
 - ▶ Agent failed to ask about driving history.
 - ▶ Did not review with applicant.
 - ▶ Agent answered other questions inaccurately though he knew the truth.
- 

“Thus, contrary to the agent’s contention, the insured had no duty to read the policy.”

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Civil conspiracy and constructive fraud.

Section 412(i) Plan.

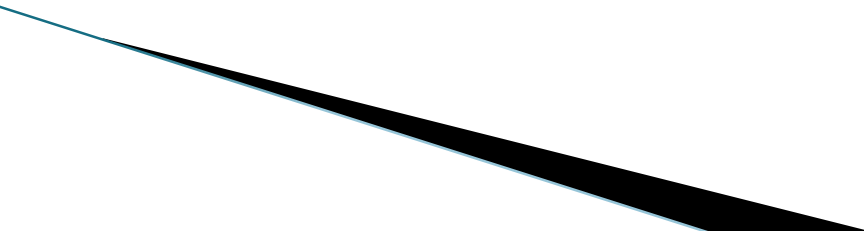
Annual premium \$84,000 / \$70,000 commission

Plaintiff was audited—\$100,000 fine for each tax year + 10% excise tax on non-deductible contributions

Sued Bank of America and agent/employee

Can an agent be liable as a co-conspirator with principal?

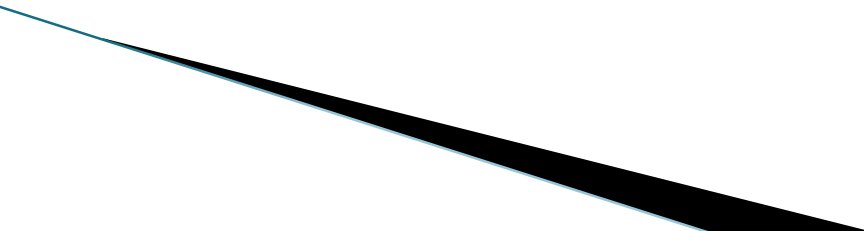
Insurance statutes and regulations may be a source of duty.

- ▶ Sale of replacement life insurance policies.
 - ▶ Surplus lines.
 - ▶ UM / UIM.
- 

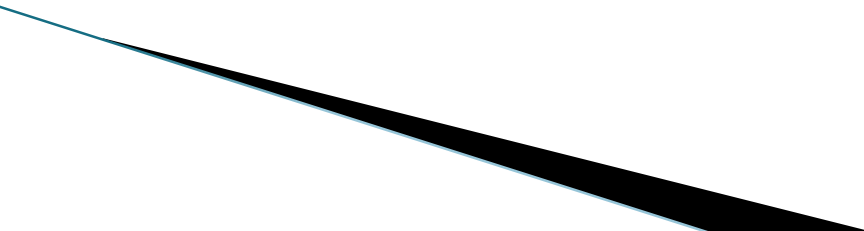
Surplus lines

- ▶ NRRA sections preempt state laws.
- ▶ Suits against brokers for non-admitted insurance placed through non-resident whole-sale brokers
- ▶ “Failure to comply with applicable statutes and regulations governing the selling of insurance, specifically the Surplus Lines Law may provide a basis for finding *negligence per se.*”

Contract vs. Tort

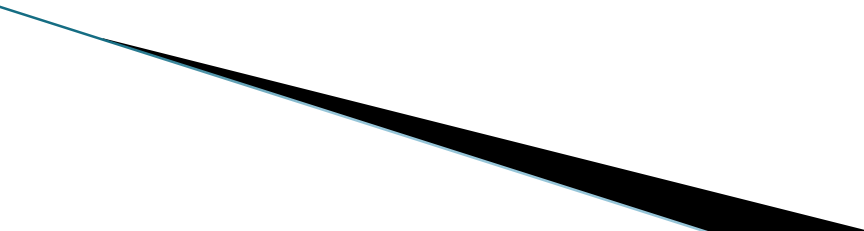
- ▶ WSADIT v. AON Consulting
 - ▶ Contract to procure excess coverage
 - ▶ AON failed to provide information about one high risk claimant
 - ▶ “Allegations do no concern AON’s expertise or professional judgment.”
 - ▶ Contract damages only.
- 

Insurer's right to indemnity.

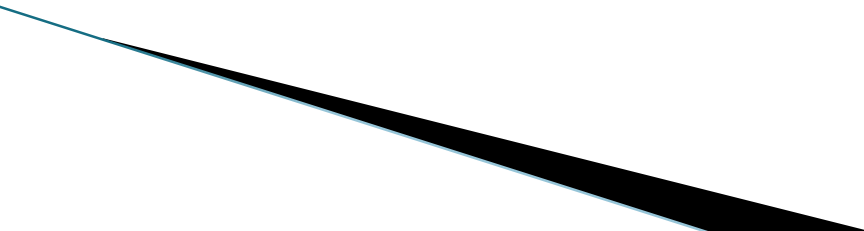
- ▶ Agent assured parent that son's new car was covered.
 - ▶ ACCIDENT!!!
 - ▶ Agent discovered misfiled application.
 - ▶ Insurer issued policy 2 days later.
- 

No indemnity in this case.

“The default of the agent was not the proximate cause of any damage to West American. The company chose to issue a policy with a post accident effective date without conducting an investigation, and failed to show it would have rejected the application ...”



Your Insurance

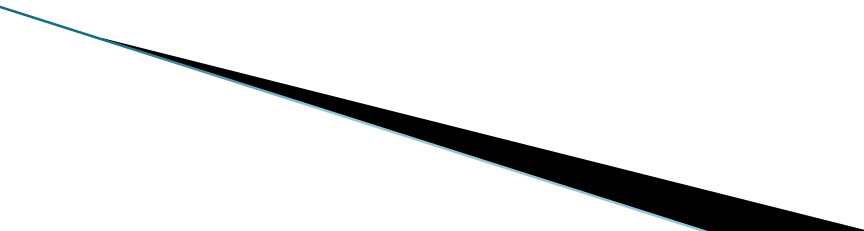
- ▶ Agency sued when one of its surplus lines carriers failed to pay claims due to insolvency.
 - ▶ Professional negligence, fraud and deceit
 - ▶ E & O carrier refused to defend.
 - ▶ Exclusion: “Any claims resulting from the insolvency or bankruptcy of insurance companies.”
- 

Your Insurance

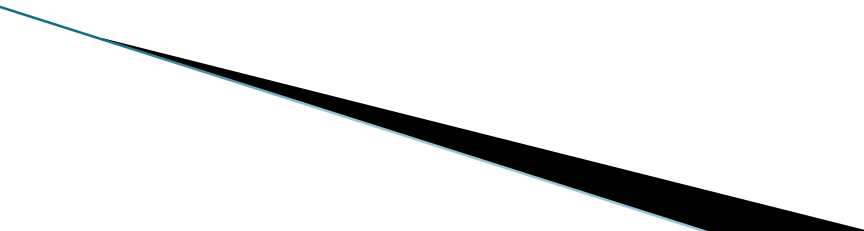
When to report “circumstances” at renewal?



Replacement life insurance policy.

- ▶ Agent proposed a new policy.
 - ▶ Insureds: Agent said their attorney approved.
 - ▶ Agent: Insureds' attorney failed to return his calls; assumed insureds conferred.
 - ▶ Ultimately new policy cancelled, unable to reinstate prior policy.
- 

Circumstances.

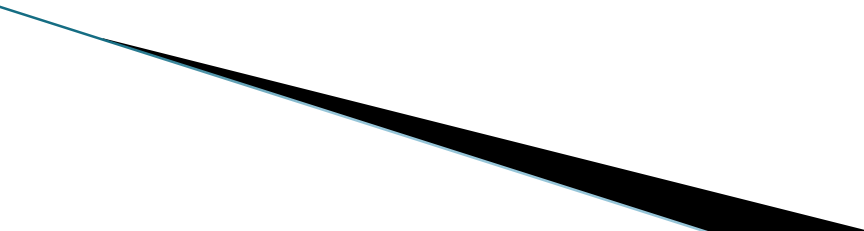
- ▶ 11 / 85 Agent advised “refer matter to Ins. Commissioner.”
 - ▶ Attorney responded on agent’s behalf.
 - ▶ 2 / 7 / 86 Agent advised “policy not adequately represented ... would not have purchased...”
 - ▶ 2 / 19 / 86 Agent applied for insurance w/ different carrier:
- 

Application Q & A

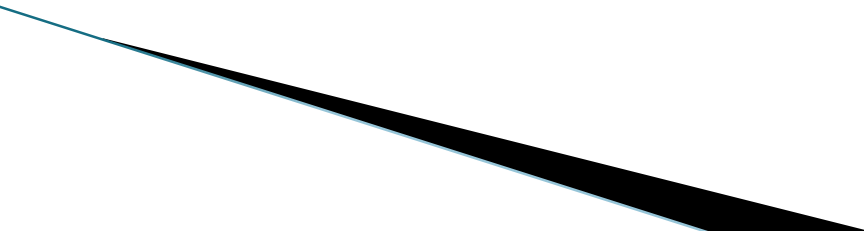
“Any reason to anticipate any claim against you?”



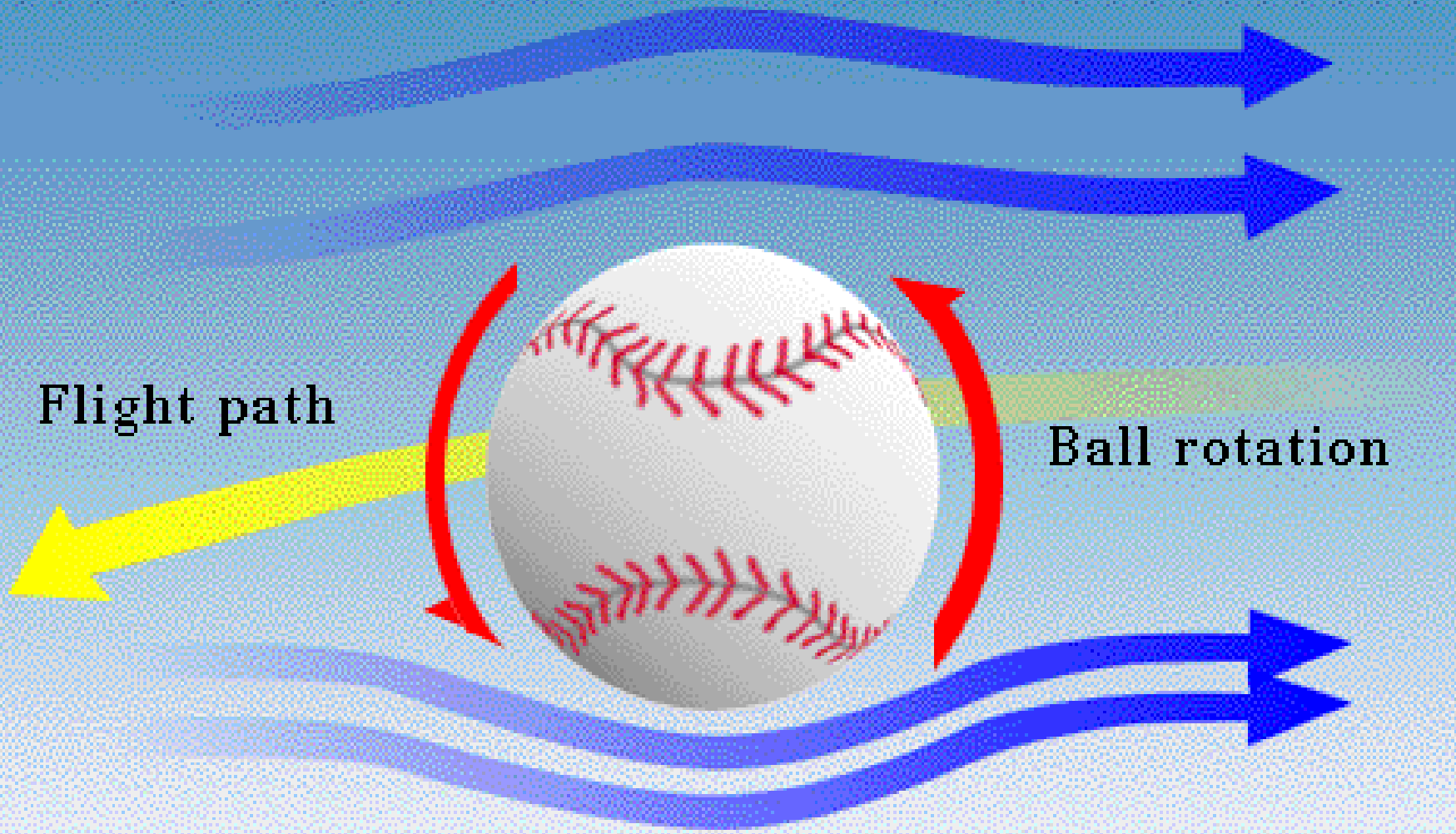
Circumstances

- ▶ Discussions b/w agent & insureds stopped March '86.
 - ▶ Existing policy was to renew April '86.
 - ▶ Agent went with new carrier in March '86.
 - ▶ Declined automatic free 1 year extension and option to purchase 5-year extended reporting from expiring carrier.
 - ▶ Same Q & A on January '87 renewal app.
 - ▶ Agent sued Dec. 87.
- 
- A decorative graphic element consisting of a diagonal line that starts as a thin blue line at the top left and transitions into a thick black line at the bottom left.

“Whether these facts are acts, occurrences, errors or omissions—knowledge of which would give rise to a reasonable expectation of a claim—is for the Trier of fact.”



Higher air pressure



Flight path

Ball rotation

Lower air pressure

▶ **Spitball and Vaseline Ball**

A knuckleball is hard to learn. One dirty trick is to put spit or vaseline on the baseball. The shiny ball tricks the batter's eyes.

- ▶ If the pitcher spits on his fingers first, it is easier to throw the ball without spinning it. Pitchers also sometimes scuff the surface of the ball or make it smoother to make it harder to hit.
- ▶ The ball can be thrown very hard. The ball moves very fast. It does not spin. It is very hard to hit. Strike!



TM