CAN THE PUBLIC REALLY COUNT ON INSURANCE AGENTS TO ADVISE THEM? A CRITIQUE OF THE "SPECIAL CIRCUMSTANCES" TEST

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I. INTRODUCTION

Many major court decisions in modern American society are based, at least in part, on the public's concerns about potential liability costs and insurance options.[1] For example, today's citizens often are required to carry automobile insurance, and employers are given tax incentives to offer health and life coverage to their employees. Additionally, insurers have expanded the scope of these and other coverages beyond their initial, limited offerings. The result is a complex and ever-changing industry in which insurers increasingly rely upon skilled agents[2] to market their products.

In order to secure a larger segment of the insurance market, insurers and agents bombard the airwaves with commercials indicating that their clients "are in good hands" or that they are there when you need them. For example, Farmers Insurance Group agents recently asked their clients[3] to review their insurance

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1. *See* Roger C. Henderson, *The Tort-Liability Insurance System and Federalism: Everything in Its Own Time*, 38 ARIZ. L. REV. 953, 957 (1996) (arguing that the tort system does not stand separate from the insurance system but rather the two form a hybrid system).

2. For the purposes of this Note, unless otherwise stated, the term "insurance agent" is used to refer to the individual, either company agent, independent agent, or broker, who services the insurance needs of a client. The use of this generic term is consistent with the Author's argument that all insurance agents, including company agents, should be held to a professional duty. If specifically identified, a "company agent" refers to an agent who is directly employed by a single company while an "independent agent" or "broker" is one who can insure individuals with various companies.

3. For the purposes of this Note, the term "client" is used to refer to prospective policyholders and policyholders who seek the assistance of insurance agents in procuring their insurance needs.

needs.[4] In a standard brochure that was mailed to all clients, the agents also asked the clients not to think of a Farmers' agent "as just a salesperson" but as a skilled professional whom the clients could "count on and turn to."[5] Since insurance agents increasingly ask their clients to trust them in navigating the complexities of modern insurance, the insuring public assumes its agents are professionals. Unfortunately for frustrated clients, the courts generally have not acknowledged a coherent professional tort duty that recognizes the agents' new role in society.

Despite this fact, disappointed clients, insurers, and even third-party accident victims have continued in their attempts to hold insurance agents to a true professional standard of care.[6] For example, clients have most frequently brought claims after sustaining a loss and then discovering that they were not insured for that loss.[7] Clients bring these suits because insurance agents are arguably responsible in tort for all damages resulting from the agent's tortious conduct[8] and also because agents are likely to be able to pay any judgment from broad-scope errors and omissions policies.[9]

For frustrated clients, the potential recovery often justifies bringing such actions. For example, in cases involving third-party liability policies, agents can be responsible for at most "any resulting damages"[10] or, at a minimum, for standing in the shoes of the insurer[11] and indemnifying their clients "for any judgment which [sic] would have been covered by the policy."[12] In cases involving first-party policies, agents often are responsible for the amount of "proper" coverage[13] with an offset for any amounts paid by the insurer under the disputed coverage.[14]

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4. *See* Farmers Insurance Group, *The Friendly Review*, Vol. 9, No. 4 (1999) (on file with Author).

5. *Id.*

6. *See* Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability: Claims by Policyholders, Insurers, and Third Parties*, 25-SUM BRIEF 34 (1996) (detailing increase in claims filed against insurance agents by their clients); *see also* Joyce C. Wang, *Do We Still Have Policy Limits? Expansion of Coverage Through Agency Commitment*, 25-SPG BRIEF 20, 22 (1996) (arguing that insurers should be especially wary of agents' promises of full coverage following a catastrophe).

7. *See* R.D. Blanchard, *An Insurance Agent's Legal Duties to Customers*, 21 HAMLINE L. REV. 9, 9–10 (1997).

8. *See* McAlvain v. General Ins. Co., 554 P.2d 955, 959 (Idaho 1976).

9. *See* Eileen B. Eglin & Joan M. Gilbride, *Agents' and Brokers' Liability: Understanding their Integral Roles*, 602 PLI/LIT 477, 545–552 (1999).

10. Gordon v. Spectrum, Inc., 981 P.2d 488, 492 (Wyo. 1999).

11. *See, e.g.*, Island Cycle Sales, Inc. v. Khlopin, 126 A.D.2d 516, 518 (N.Y. 1987).

12. *Id.; see also, e.g.*, Dahlke v. John F. Zimmer Ins. Agency, Inc., 515 N.W.2d 767, 770 (Neb. 1994).

13. *See* Pete's Satire, Inc. v. Commercial Union Ins. Co., 698 P.2d 1388, 1390–91 (Colo. App. 1985), *affirmed by* Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239 (Colo. 1987); *see also* Dimeo v. Burns, Brooks, & McNeil, Inc., 504 A.2d 557, 559 (Conn. App. 1986), *cert. denied* 508 A.2d 31 (Conn. 1986) (applying policy limits cap to damages in uninsured motorist case).

14. *See, e.g.*, Eddy v. Republic National Life Ins. Co., 290 N.W.2d 174, 177 (Minn. 1980); Kearney Convention Center v. Anderson-Divan-Cottrell Ins., Inc., 370

Additionally, in some jurisdictions, agents also can be liable for a client's attorney fees and costs incurred in pursuing the tort claim.[15]

In response to these client-initiated lawsuits, courts "have carved different, often conflicting, obligations" for insurance agents.[16] These obligations often depend on whether the insurance agent has fallen into a "special circumstance," such as holding himself out as an expert, which creates a duty to advise where otherwise none would exist.[17] The courts' fractured response has helped to create an insurance system in which clients are not receiving the advice, information, and coverages that they need, and agents often have little incentive to provide any advice.[18] After reviewing the various judicial approaches to the insurance agent-client relationship, this Note argues that the courts should reject the outdated "special circumstances" test in favor of an all-encompassing professional tort duty so that frustrated clients might be able to recover money damages if a jury determines that their insurance agents should have advised them.

II. THE BASIC DISPUTE: ARE INSURANCE AGENTS SALESPERSONS OR PROFESSIONALS?

While courts have disagreed about whether agents must advise their clients, every court, without dissent, starts from the basis that insurance agents have a duty to exercise the skill and care that a reasonably prudent person engaged in the insurance business would use under similar circumstances.[19] While this clear statement of an insurance agent's duty might sound like a professional duty, it is at best imprecise and at worst fails to resolve the ongoing dispute as to whether insurance agents are truly professionals or merely salespersons.

A. The Majority Approach: Insurance Agents Are Salespersons

Despite the increasing complexity of insurance coverages and policies, the majority of courts still insist that clients can understand their insurance options and policies without assistance and that insurance agents are merely salespersons.[20] As salespersons, insurance agents are merely responsible "to obey

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N.W.2d 86, 89 (Neb. 1985) (holding that agent is entitled to a credit for any amounts paid by life insurer).

15. *See Pete's Satire*, 698 P.2d at 1391.

16. PETER J. KALIS, THOMAS M. REITER, AND JAMES R. SEGERDAHL, POLICYHOLDER'S GUIDE TO THE LAW OF INSURANCE COVERAGE, §19.03[A] (2000 Supp.).

17. *See infra* Part III.

18. *See* Ken Swift, *How Special Is Special? An Insurance Agent's Duty to Advise*, 21 HAMLINE L. REV. 323, 331–333 (1998).

19. *See, e.g.*, Blackburn, Nickels & Smith, Inc. v. National Farmers Union Prop. & Cas. Co., 482 N.W.2d 600, 605 (N.D. 1992); Rawlings v. Fruhwirth, 455 N.W.2d 574, 577 (N.D. 1990).

20. *See, e.g.*, Trammell v. Prairie States Ins. Co., 473 N.W.2d 460, 462 (S.D. 1991); *see also* Blanchard, *supra* note 7, at 12 and accompanying text (explaining that an insurance agent is like a gas station attendant under this view).

[the clients'] instructions in good faith and with reasonable professional skill."[21] In so holding, these courts generally limit the agents' duties to those actions directly related to procuring the requested insurance policy. For example, agents are required to procure the requested policy,[22] notify the client if the requested coverage is unavailable,[23] inform the client if they are unable to continue the previous coverage,[24] and notify the client if the policy is canceled.[25] After having procured the policy, insurance agents generally have no additional duty to inquire further or advise a client as to any coverage.[26] Therefore, as a general rule in almost every jurisdiction, insurance agents have no duty to advise absent a so-called "special circumstance."[27] Two jurisdictions, however, have gone further and held that insurance agents never or virtually never owe a duty to advise their clients.[28]

As a result of minimizing the duties owed by agents to their clients, these same courts necessarily have expanded the clients' duties and obligations. At a bare minimum, these courts hold that clients are obligated to educate themselves as to available coverages[29] and their own policies. [30] One commentator, however, has noted that the clients' obligations are really much more expansive:

> [T]he insured bears the responsibility to seek advice from his or her agent by asking a more specific question than one about "sufficient coverage" and to ensure that there is no gap in coverage. It is up to the insured to decide how much insurance to carry, even when the agent represents that a particular limit is adequate. It is also the insured's responsibility to bring changed circumstances to the attention of the agent.[31]

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21. *Trammell*, 473 N.W.2d at 462.

22. For a general discussion of this duty and cases, see Gary Knapp, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured As To Coverage Needs*, 88 A.L.R. 4th 249 (1991).

23. *See, e.g.*, Bell v. O'Leary, 744 F.2d 1370, 1372 (8th Cir. 1984).

24. *See, e.g.*, Wood v. Newman, Hayes & Dixon Ins. Agency, 905 S.W.2d 559, 562 (Tenn. 1995).

25. *See, e.g.*, Kelley v. Shelter Mut. Ins. Co., 748 S.W.2d 54, 57 (Mo. App. 1988).

26. *See, e.g., Trammell*, 473 N.W.2d at 462.

27. *See infra* Part III.

28. *See* Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82, 85 (Mo. App. 1994); Murphy v. Kuhn, 682 N.E.2d 972, 974 (N.Y. 1997).

29. *See, e.g.*, Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1167 (Ariz. Ct. App. 1980), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995).

30. *See, e.g.*, Scott-Huff Ins. Agency v. Sandusky, 887 S.W.2d 516, 517 (Ark. 1994).

31. C. Edward Speidel, *An Insurance Agent's Duty to Advise: Is There a "Special Relationship"?*, 24-WTR BRIEF 32, 38 (1995); *see also* Jeffrey Lipman & Greg Noble, *Agent-Broker Negligence Actions: Pitfalls for Insurance Providers and Ammunition*

If the clients' duties are truly this expansive, insurance agents are truly just salespersons with little or no duties.

B. The Growing Minority: Insurance Agents Are Professionals

Some commentators have rejected the majority's underlying assumptions and find it unreasonable to assume that clients "have [a] sophisticated knowledge of insurance to understand the myriad of policy options and exclusions and to recognize when a life change alters their insurance needs."[32] Some courts have adopted this dissenting view and find that in today's society insurance is a complicated field, such as medicine, accounting, and law.[33] They also find that insurance agents are, in reality, more than mere salespersons.[34] These courts, therefore, hold that insurance agents are professionals[35] and actually should be viewed as insurance "counselors" or "advisors"[36] with more abilities than simply being able to fill out an application form.[37] Only a handful of jurisdictions, however, have considered seriously the implications of holding insurance agents to a true professional duty that might include a responsibility to advise their clients.[38]

While the underlying issue of the legal status of insurance agents in today's society remains unresolved, the majority of courts have agreed that, at a minimum, there are certain judicially created "special circumstances" that might impose on an agent a duty to advise a client.[39] On a case-by-case basis, courts are likely to view the agent as a professional with a legal duty to advise if the agent fits within one of the judicially created "special circumstances."[40] By showing what the courts have referred to as "special circumstances," frustrated clients have been able to avoid the general rule that an agent has no duty beyond carrying out the client's specific requests, and courts also have been able to avoid the underlying debate over the professional role of today's insurance agents.

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for Consumers, 44 DRAKE L. REV. 835, 849 (1996) (noting that this conception of an agent is equivalent to that of a retailer).

32. Swift, *supra* note 18, at 334 and accompanying text.

33. *See* Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961).

34. *See id.*

35. *See, e.g.*, Bell v. O'Leary, 744 F.2d 1370, 1372 (8th Cir. 1984); *see also* Lipman, *supra* note 31, at 849–50 and accompanying text (arguing that an insurance agent's role is more akin to a lawyer than a salesperson).

36. *See* Knapp, *supra* note 20 and accompanying text.

37. *See Bell*, 744 F.2d at 1372.

38. *See generally* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); Dimeo v. Burns, Brooks, & McNeil, Inc., 504 A.2d 557 (Conn. App. 1986), *cert. denied.* 508 A.2d 31 (Conn. 1986); Sobotor v. Prudential, 491 A.2d 737 (N.J. Super. A.D. 1984), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

39. *See infra* Part III.

40. *See id.*

III. THE RISE OF THE "SPECIAL CIRCUMSTANCES" TEST

A. The Cornerstone: Hardt v. Brink

Confronted with a case history that had never recognized an insurance agent's duty to advise a client, the United States District Court for the Western District of Washington rendered its decision in 1961 in the case of *Hardt v. Brink.*[41] Although only a trial court decision, this opinion has formed the judicial cornerstone for the construction of an insurance agent's duty to advise a client.[42]

In *Hardt*, the court considered the underlying question of whether insurance agents should be considered professionals who assume additional duties to their clients.[43] The case arose after a client suffered fire damage to a building that was not covered by his existing insurance policy.[44] The client claimed that the agent had held himself out as an insurance expert and, therefore, had assumed a duty to advise the client of his insurance needs.[45]

In considering the professional status of insurance agents, the court noted, "This is an age of specialists and as more occupations divide into various specialties and strive towards 'professional' status the law requires an ever higher standard of care in the performance of their duties."[46] Looking to the evidence in *Hardt*, the court noted specific instances where the agent had selected insurance or settled claims for the client.[47] Based on this evidence, the court found that the client, in fact, had placed "great confidence in the [agent's] ability and relied upon and followed his recommendations."[48] Furthermore, the court believed the agent, through his letterheads and stickers, had represented himself as an insurance expert.[49] Based upon this specific evidence and more generally on its recognition of the professional status of insurance agents, the court held that the client was entitled to infer that the agent "was a person highly skilled as an insurance advisor" and that the agent had assumed a duty to advise.[50]

While many have criticized *Hardt* for making a radical change in the duties of insurance agents and eliminating the public's traditional "duty of self education,"[51] many courts have used *Hardt* as the cornerstone of the "special

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41. 192 F. Supp. 879 (W.D. Wash. 1961).

42. *See* Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 739 (N.J. Super. A.D. 1984) (noting *Hardt* as "the seminal case"), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

43. *See Hardt*, 192 F.Supp. at 881.

44. *See id.* at 880.

45. *See id.*

46. *Id.* at 881.

47. *See id.*

48. *Id.*

49. *See id.*

50. *Id.*

51. Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1168 (Ariz. Ct. App. 1980), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repair, Inc. v.

circumstances" test.[52] Even though the *Hardt* decision never uses the term "special circumstances," courts have interpreted the decision as pointing to certain "special circumstances" that trigger the transformation of an insurance agent from mere salesperson into a professional insurance counselor with a duty to advise.[53]

B. Building the Test: The Courts Define "Special Circumstances"

Before evaluating the "special circumstances" test that courts have recognized since *Hardt*, it must be remembered that insurance agents generally have no duty to advise, and in a majority of jurisdictions, such a duty only arises when a client can plead and prove certain facts demonstrating a special circumstance.[54] This rule of no duty without "special circumstances" changes the basic rules of most tort and malpractice actions. Generally, when a person acts, the person has a duty to act as a reasonably prudent person.[55] Similarly, a professional defendant generally has a duty to act with the degree of skill and care as a reasonable professional in that field.[56] Such duties require no factual predicates and are imposed automatically on a defendant. In a claim against an insurance agent, however, the client, in almost every jurisdiction, must prove certain facts, or the tort lawsuit will be dismissed for failure to state a duty.[57] As a result, while the client may be able to have a jury decide certain factual disputes involving a particular special circumstance,[58] the question of whether a duty to advise exists at all is always a question of law.[59] Trial judges, therefore, carry tremendous power to dismiss clients' tort claims at trial or even after a verdict in jurisdictions that have adopted a "special circumstances" test.

1. The Easy Cases: An Agent Agrees to Advise or Accepts Additional Compensation

While *Hardt* based its imposition of a duty to advise on a long-standing relationship between the agent and the client, courts generally have not hesitated in recognizing that insurance agents also have a duty to advise when they expressly agree to advise a client or when they accept additional compensation

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Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); *see also* Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82, 86 (Mo. App. 1994).

52. *See* Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 739 (N.J. Super. A.D. 1984) (noting *Hardt* as "the seminal case"), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

53. *See* Blanchard, *supra* note 7, at 22–24 and accompanying text (listing factors in determining whether or not a special circumstance exists); *see also* ROBERT H. JERRY II, UNDERSTANDING INSURANCE LAW §35[ii] (2d ed. 1996).

54. *See, e.g.*, American Family Mut. Ins. Co. v. Dye, 634 N.E.2d 844, 848 (Ind. App. 1984).

55. *See, e.g.*, DAN B. DOBBS, THE LAW OF TORTS § 117 (2000).

56. *See, e.g., id.* §§ 117 (regarding increased standard of care generally), 242 (regarding health care providers) & 485 (regarding lawyers).

57. *See infra* Part III.

58. *See, e.g., Dye*, 634 N.E.2d at 848.

59. *See, e.g., id.*

beyond the policy premium from a client.[60] While courts have recognized these separate agreement or payment cases as "special circumstances," they are, in reality, nothing other than oral contract cases in which the client and agent enter into a separate contract for services beyond the mere procurement of the policy. The courts' recognition of a separate contract representing a special circumstance has allowed clients to recover additional damages in tort that would not be available in a contract action.[61]

Insurance agents, however, need to be aware that they might owe a duty to advise even when there is no separate contract. For example, some courts have held that an agent assumes a duty to advise by agreeing to find the best policy at the lowest price for a client.[62] In these cases, even though the agent does not agree to advise the client, courts still have held that the agent assumed a limited duty to advise and particularly a duty to highlight and explain any significant differences between the proposed policies.[63] Because courts have been willing to recognize an implied agreement to advise, insurance agents need to be cognizant of the fact that their promises and actions can create a duty to advise.

2. An Agent Provides Inaccurate Information to the Client

In *Hardt*, the court also emphasized the fact that the client had relied on the agent's previous recommendations.[64] As a result, courts have used this specific evidence in *Hardt* to develop another special circumstance that imposes a duty to advise. Namely, courts are more willing to impose a duty if the agent and the client have discussed particular coverages in the past and especially willing when an agent provides a client with inaccurate information in response to a *specific* inquiry.[65]

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60. *See generally, e.g.*, Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164 (Ariz. Ct. App. 1980), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repeair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995). While *Nowell* has been abrogated in Arizona, many other courts that accept a special circumstances test still look to *Nowell* for guidance. *See, e.g.*, Scott-Huff Ins. Agency v. Sandusky, 887 S.W.2d 516, 517 (Ark. 1994); Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 740 (N.J. Super. A.D. 1984), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994); Murphy v. Kuhn, 682 N.E.2d 972, 975 (N.Y. 1997).

61. *See* KALIS, *supra* note 16 at §19.03[B] (2000 Supp.).

62. *See, e.g.*, First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., Inc., 899 F.2d 1045 (11th Cir. 1990) (holding agent liable for failing to advise client that the proposed errors and omissions policy did not include prior acts coverage); Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 607 P.2d 763 (Or. App. 1980) (holding agent liable for failing to explain significant loss ratio and loss limitation features in various worker's compensation policies).

63. *See, e.g.*, *Precision Castparts*, 607 P.2d at 765.

64. *See* Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961).

65. *See, e.g.*, Free v. Republic Ins. Co., 8 Cal. App. 4th 1726 (1992) (holding agent liable after misinforming client that his homeowner's limits were sufficient);

Even if one believes that insurance agents are merely salespersons, one can still hold agents responsible for giving clients accurate information in response to a direct request. If a salesperson misrepresents a product and damages result, virtually no one would have a problem holding the salesperson liable. Similarly, courts believe that an insurance agent should give correct and informed answers. For example, one court has held that "once [the agents] elected to respond to [the client's] inquiries, a special duty arose requiring them to use reasonable care."[66] Another court has held an agent liable for volunteering inaccurate information to a client on the grounds that "if an insurance [agent] has a duty to volunteer advice to a client, he has a duty to render correct advice."[67] Again, like the separate contract cases, courts have created another special circumstance where they arguably could have allowed frustrated clients to sue on a more traditional legal theory. Therefore, while these courts might argue that they are making new law and creating a limited duty to advise, they really are not. Moreover, by continuing within the "special circumstances" test, they continue to fail to recognize the fundamental changes that have taken place in the insurance industry.

3. An Agent Holds Himself Out As an Expert

While the separate agreement and misrepresentation cases are founded arguably upon the existence of other viable legal claims, *Hardt* was based in large part on the agent holding himself out to the public as an expert and thereby assuming additional responsibilities.[68] While the *Hardt* decision noted that the agent had held himself out as an expert on his letterhead and stickers,[69] the court failed to provide any real description of these representations. With no real guidance from *Hardt* in this area, insurance agents and frustrated clients have debated what "holding oneself out as an expert" actually means.[70]

In coming to some consensus, the "special circumstances" courts have held agents liable only for specific representations of their abilities and not liable for mere general puffing about their abilities or for general representations made by the insurer.[71] For example, courts have rejected clients' claims based solely upon an agent's general advertisements that he offered "insurance of all kinds" or

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Louwagie v. State Farm Fire and Cas. Co., 397 N.W.2d 567 (Minn. App. 1987) (holding agent liable for misinforming client about her need for worker's compensation coverage).

66. *Free*, 8 Cal. App. 4th at 1729.

67. *Louwagie*, 397 N.W.2d at 568.

68. *See Hardt*, 192 F.Supp. at 880.

69. *See id.* at 881.

70. *See* Swift, *supra* note 18, at 329 and accompanying text.

71. *See, e.g.*, Tackes v. Milwaukee Carpenters Dist. Council Health Fund, 476 N.W.2d 311, 313 (Wis. App. 1991) (holding that status as an independent agent and membership in voluntary insurance agents professional organization is insufficient to create a special circumstance); Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc., 511 N.W.2d 849, 853–54 (Wis. 1994) (holding agent's representations that as an independent agent he "would attempt to select the best policy at the best price" insufficient to trigger a duty to advise).

that "after the sale it is the service that counts."[72] Furthermore, courts have refused to find a duty when the advertisements speak of insurance agents' expertise in general but fail to mention the particular expertise of the defendant agent.[73]

However, sometimes an agent will be forced to assume the expertise he alleges to have. For example, the United States Court of Appeals for the Eleventh Circuit addressed a case in which a local bank retained the services of an independent insurance agency to render various insurance services.[74] The agency represented its agents to be "specialists" and "particularly skilled in the handling of insurance problems for banks."[75] In finding the insurance agency liable for failing to advise that it had not procured a specifically requested coverage, the court based the agency's duty, in part, on the fact that it had held its agents out as experts and also because the agency had agreed to "look to all available sources" for coverage.[76] As in *Hardt*, the agency's representations clearly indicated to the public that the particular agency had specific knowledge and abilities to assist its clients.[77] Frustrated clients, however, need to be aware that very few courts have held agents to a duty to advise based upon their representations.

4. The Agent and Client Have Had a Substantive Long-Term Relationship

In addition to the fact that the agent had held himself out as an expert, *Hardt* was also based in part on the long-term, substantive relationship between the agent and the client.[78] In *Hardt*, the court thought it was obvious that the agent had assumed a position of trust with the client regarding insurance matters over a period of several years.[79] Other courts have been willing to adopt such a justification for imposing a duty to advise;[80] especially when an agent assumes special duties[81] or assumes broad discretion in serving the client's needs during the relationship.[82]

It would be a mistake, however, to assume that a long-term relationship with an agent, standing alone without some type of quasi-fiduciary or truly unique relationship,[83] is sufficient to create a duty to advise.[84] No "special circumstances"

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72. *Tackes*, 476 N.W.2d at 315.
73. *See Lisa's Style*, 511 N.W.2d at 853.
74. *See* First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., Inc., 899 F.2d 1045 (11th Cir. 1990).
75. *Id.* at 1050–51.
76. *Id.* at 1067–68.
77. *See* Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961).
78. *See id.* at 880–81.
79. *See id.* at 881.
80. *See, e.g.*, United Farm Bureau Mut. Ins. Co. v. Cook, 463 N.E.2d 522, 528 (Ind. App. 1984).
81. *See id.*
82. *See id.* at 528.
83. *See* Carlson v. Mutual Serv. Ins., 494 N.W.2d 885, 887–88 (Minn. 1993) (holding that agent had assumed duty to advise based upon several face-to-face meetings with client and extensive efforts to procure a specialized liability policy for crane).

decision has held that mere time is a special circumstance. For example, if a client never has a discussion with the agent about the policy, the agent will not be liable for the client's losses no matter how long the relationship between the two.[85] On the other hand, a lengthy relationship between the agent and the client coupled with substantive conversations about policy provisions can create a duty to advise.[86] In light of the previous discussion, this conclusion is not really anything new. It is, however, suggestive of the fact that the "special circumstances" test is more accurately a multi-factored analysis in which time can play a critical role in determining whether a judge will impose a duty on the insurance agent and whether the client can get to the jury on the issue of the agent's breach.

5. The Client Makes an Ambiguous Request

An increasing majority of cases brought by frustrated clients, however, are not so simple. With the increasing complexity of modern-day insurance coverages, clients often do not know what coverages they should buy or even what questions they should ask their agents.[87] As a result, clients often make ambiguous requests for coverage.[88] For many courts, an automobile client's request for "full coverage" is one of the most vexing problems.[89] Despite their alleged concerns for clients, most courts have been unwilling to impose a duty to advise based solely on a client's request for "full" or "sufficient" coverage;[90] however, at least one

84. *See* Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984); Booska v. Hubbard Ins. Agency, 627 A.2d 333 (Vt. 1993); *see also* Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1094 (Me. 1991) (finding twelve-year relationship insufficient as client had never requested agent to give advice as to adequate coverage); Moore v. Whitney-Vaky Ins. Agency, 966 S.W.2d 690 (Tx. App. 1998) (finding that seven-year relationship with commercial client did not create a duty to advise); Suter v. Virgil R. Lee & Son, Inc., 754 P.2d 155 (Wash. App. 1988), *review denied by* 1998 WL 631961 (Wash. 1988).

85. *See* Madsen v. Allstate Ins. Co., 760 F.Supp. 1389 (D. Or. 1991), *aff'd* 972 F.2d 1340, 1393 (9th Cir. 1992), and *cert. denied,* 507 U.S. 913 (1993); Macabio v. TIG Ins. Co., 955 P.2d 100, 112 (Haw. 1998), *Szelenyi*, 594 A.2d at 1094–95.

86. *See, e.g., Macabio*, 955 P.2d at 112; Polski v. Powers, 377 N.W.2d 106 (Neb. 1985) (holding that agent did not have a duty to advise pig farmer client of the availability of coverage for loss due to suffocation based upon viewing the farmer's new building).

87. *See* Sobotor v. Prudential Property & Cas. Ins. Co., 491 A.2d 737, 741–42 (N.J. Super. A.D. 1984), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

88. *See e.g., Sobotor*, 491 A.2d at 741–42.

89. *Compare* Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457, 465 (Iowa 1984) *with* Harts v. Farmers Ins. Exch., 597 N.W.2d 47 (Mich. 1999).

90. *See, e.g.*, Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1168–69 (Ariz. Ct. App. 1980), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); *Sandbulte*, 343 N.W.2d at 465.

court has held that an agent has a duty to advise when confronted with such an ambiguous request.[91]

In declining to impose a duty to advise based on an ambiguous request, the majority of courts has retreated to basic contract principles yet again. They hold that if a client makes an ambiguous request, there is no contract, because the agent and the client have not agreed on what coverage is to be procured.[92] However, one court that refuses to impose a duty to advise has created a legal presumption that a request for "full coverage" is merely a request for the legally mandatory coverages.[93] Instead of requiring the agent to clarify the request and educate the client, the majority of courts have placed the burden on the client to know potential coverages and ask for a particular coverage.[94]

On the other hand, the Michigan Supreme Court recently responded to the "full coverage" debate in *Harts v. Farmers Insurance Exchange*[95] and noted that such an ambiguous request most likely imposes a duty to advise on the agent.[96] In rejecting the agent's argument that an agent should never have a duty to advise,[97] the court modified its "special circumstances" test and held that an agent has no duty to advise a client unless:

> (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 inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.[98]

In an explanatory footnote, the court noted that a request for "full coverage" could satisfy the second element.[99]

If one believes that the "special circumstances" test is the proper approach to the duty to advise cases, the *Harts* decision represents a common-sense resolution to this ongoing dilemma. Again, even though courts require the insuring public to be aware of the law and insurance requirements, it is unlikely that every client will be knowledgeable about new and ever-changing coverages. As a result, these cases will become more frequent. When confronted with these cases, courts should consider the scenario in which a customer would ask a

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91. *See, e.g., Harts*, 597 N.W.2d at 52 n.11 (holding that a client's ambiguous requests can create a special circumstance); *Sobotor*, 491 A.2d at 742 (holding that agent had duty to advise based upon request for "best available" policy), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

92. *See, e.g., Nowell*, 617 P.2d at 1168–69; Swift, *supra* note 18, at 327–28.

93. *See* Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245, 248–49 (Ky. 1992).

94. *See, e.g.*, Banes v. Martin, 965 S.W.2d 383, 385 (Mo. App. 1998).

95. 597 N.W.2d 47 (Mich. 1999).

96. *See id.*

97. *See id.* at 52.

98. *Id.*

99. *See id.* at 52 n.11.

salesperson an ambiguous request. In response to such a request, the salesperson most likely would clarify the request and educate the customer in order to make a sale and ensure continued business in the future. Even "special circumstances" courts should impose no less a duty upon insurance agents.

6. The Agent's Employment Status: Company Agent vs. Broker

In addition to the ambiguous request cases, the other major area of litigation within the "special circumstances" test is whether an agent's employment status should be considered a special circumstance. More specifically, the two major questions that have arisen are whether insurance brokers are always required to advise their clients and whether company agents can ever be required to advise their clients.[100]

In order to understand the cases addressing these questions, one must understand the basic difference between a company agent and an insurance broker. A company agent is most often a salaried employee of an insurer.[101] By contrast, an insurance broker generally is not employed by the insurer[102] and is an independent "middle-man" between the insurer and the insured.[103] Even though courts often tend to "blur, or disregard, the distinction,"[104] the distinction between a company agent and a broker is critical in "special circumstances" jurisdictions because the outcome of a client's tort claim often hangs in the balance.[105]

An insurance agent's designation as a broker often carries with it a "special circumstance" and a resulting duty to advise. Some courts and commentators believe that a broker has a general duty "to 'canvass the market' and to be informed about 'different companies and terms available.'"[106] Therefore, because of this duty, the broker should be assumed to have more expertise than a company agent.[107] Furthermore, courts require brokers to represent the interests of the client.[108] The brokers' additional expertise and representation duties carry with them, according to the courts, a duty to advise.[109] Some courts, however, have criticized these cases because they believe that such reasoning "largely

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100. *See* KALIS, *supra* note 16, § 19.03[A].

101. *See* Benevento v. Life USA Holding, Inc., 61 F. Supp. 2d 407, 415 (E.D. Pa. 1999); *see also* JERRY, *supra* note 53, § 35.

102. *See Benevento*, 61 F. Supp. 2d at 415; JERRY, *supra* note 53, § 35.

103. *See Benevento*, 61 F. Supp. 2d at 415; JERRY, *supra* note 53 and accompanying text.

104. Eglin, *supra* note 9, at 545 and accompanying text.

105. *See* O'Donnell, *supra* note 6, at 35 and accompanying text.

106. First Alabama Bank of Montgomery, N.A. v. First State Ins. Co., Inc., 899 F.2d 1045, 1068 (11th Cir. 1990) (quoting Zeff Distrib. Co. v. Aetna Cas. & Sur. Co., 389 S.W.2d 789, 795 (Mo. 1965)).

107. *See* JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES § 6.01 (2000 Supp., 2d. ed. 1994).

108. *See Benevento*, 61 F. Supp. 2d at 415–16; JERRY, *supra* note 53 and accompanying text.

109. *See* STEMPEL, *supra* note 107 and accompanying text.

eviscerates" the normal "special circumstances analysis" for "a significant segment of the industry."[110]

On the other end of the spectrum, some courts hold that company agents should never be obligated to advise their clients because the company agents' obligations are to represent the insurers' interests and not the clients' interests.[111] In order to proceed with a duty to advise claim, many "special circumstances" courts require, therefore, that clients plead that the agent was their actual agent[112] and prove at trial this agency relationship in order to recover in tort.[113] The result of this actual agency requirement is a type of judicially created tort immunity for pure company agents, as clients often are unable to prove this agency relationship.

In an attempt to remove this impediment to clients' tort claims, the majority of courts have adopted a "dual agency" approach in which a company agent can represent both the insurer and the client[114] and be liable to both in tort.[115] These courts hold that company agents become agents of the client when they attempt to secure insurance for the client in order to receive a commission.[116] If frustrated clients bring suit in such a jurisdiction, they can still proceed with their duty-to-advise claims against a company agent if they can plead and prove another one of the "special circumstances."[117]

Even in these "dual agency" jurisdictions, a problem arises where the court is required to make at least one additional factual determination before it can decide whether a duty exists. Furthermore, frustrated clients may have no legal remedies merely because they contacted a company agent rather than a broker. Such a result can only be premised on the assumption that insurance agents are something less than professionals.

C. An Agent's Defenses to a "Special Circumstances" Duty-to-Advise Claim

As a result of the "special circumstances" test, frustrated clients not only must prove a "special circumstance," but they must also pass safely through a

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110. *See* Tackes v. Milwaukee Carpenters Dist. Council Health Fund, 476 N.W.2d 311, 314 (Wis. App. 1991) (holding that status as an independent agent and membership in voluntary insurance agents professional organization insufficient to create a special circumstance).

111. *See Benevento*, 61 F. Supp. 2d at 415; JERRY, *supra* note 53 and accompanying text.

112. *See, e.g.*, Sutker v. Pennsylvania Ins. Co., 155 S.E.2d 694 (Ga. App. 1967).

113. *See, e.g.*, Charlin v. Allstate Ins. Co., 19 F. Supp. 2d 1137, 1140–41 (C.D. Cal. 1998); Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092 (Me. 1991).

114. *See* STEMPEL, *supra* note 107 and accompanying text.

115. *See id.*

116. *See, e.g.*, Bell v. O'Leary, 744 F.2d 1370 (8th Cir. 1984); Anderson v. Redwal Music Co., 176 S.E.2d 645 (Ga. App. 1970); Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82 (Mo. App. 1994).

117. *See* STEMPEL, *supra* note 107 and accompanying text; *see also, e.g.*, *Charlin*, 19 F. Supp. 2d at 1141 n.2 (holding that an agent can only be an agent of the insured and the company if the agent is an independent agent or satisfies one of the traditional "special circumstances" such as having "a long-term, special relationship with the insured").

minefield of potential comparative negligence defenses and affirmative defenses held by the agent.

1. Defenses Based Upon the Client's Comparative Negligence

As mentioned earlier, courts that adhere to the "special circumstances" test believe fundamentally that clients can understand their insurance options without assistance and that insurance agents are merely salespersons.[118] As a result, many of these courts hold that a client is guilty of comparative negligence for failing to read the policy[119] or for failing to object to a troublesome policy provision.[120] Furthermore, an agent generally has not been found liable for a frustrated client's losses when the client did not inform the agent of critical facts affecting coverage.[121] Finally, "special circumstances" courts are unwilling to impose a duty to advise when a client asks for a specific coverage[122] or when the client is merely interested in the lowest available premium.[123] Again, all of these defenses rest upon the "special circumstances" test and the assumption that today's insurance client is a knowledgeable purchaser and needs no advice.

While not a defense that is peculiar to "special circumstances" jurisdictions, insurance agents should be aware that they can successfully defend a

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118. *See supra* Part II.A.

119. *See, e.g.*, Mate v. Wolverine Mut. Ins. Co., 592 N.W.2d 379, 383 (Mich. App. 1999) (holding that client caused her own losses because she failed to read an unambiguous policy); *see also, e.g.*, Baldwin Crane & Equip. Corp. v. Riley & Rielly Ins. Agency, Inc., 687 N.E.2d 1267 (Mass. App. 1997) (holding that client is responsible for knowing the differences between a minimum and refundable premium contained in his different policies); Dahlke v. John F. Zimmer Ins. Agency, Inc., 567 N.W.2d 548 (Neb. 1997) (providing immunity to an agent based upon client's failure to read the policy); Dahlke v. John F. Zimmer Ins. Agency, Inc., 515 N.W.2d 767 (Neb. 1994)); Small v. King, 915 P.2d 1192 (Wyo. 1996) (holding client's misrepresentation claim could not be maintained because she read the policy and knew it was not what she wanted but failed to object). *But see, e.g.*, Precision Castparts Corp. v. Johnson & Higgins of Oregon, Inc., 607 P.2d 763, 765–66 (Or. App. 1980) ("[Client] had a right to rely on the superior expertise of its agent and had the right to assume that its agent performed its duty. Thus, contrary to [agent's] contention, the [client] had no duty to read the policy.").

120. *See, e.g.*, Clifton v. Allstate Ins. Co., 995 S.W.2d 38, 39 (Mo. App. 1999) (noting that the client had received semi-annual declaration sheets and had not purchased the available coverage); Lisa's Style Shop, Inc. v. Hagen Ins. Agency, Inc., 511 N.W.2d 849, 854 (Wis. 1994) (finding that client was sophisticated and knew her insurance needs yet failed to object to the coverage provided).

121. *See, e.g, Mate*, 592 N.W.2d at 379 (holding agent not responsible because client never informed agent of son's residence within household); Tollefson v. American Family Ins. Co., 226 N.W.2d 280 (Minn. 1974) (holding agent not liable because client failed to inform agent that she moved out of her parent's household).

122. *See, e.g.* Trammell v. Prairie States Ins. Co., 473 N.W.2d 460 (S.D. 1991) (holding agent not liable because client did not ask for advice and only gave a direct instruction to agent to remove driver from policy).

123. *See, e.g.*, Scott-Huff Ins. Agency v. Sandusky, 887 S.W.2d 516 (Ark. 1994); *Lisa's Style Shop*, 511 N.W.2d at 854.

tort suit by the client if the client was otherwise uninsurable.[124] Most of these cases have specifically involved life insurance, and some courts have refused to recognize this defense in homeowner's insurance cases[125] because of the wide array of choices, such as moving or not insuring, available to the homeowner.[126] While there are no reported cases involving automobile insurance or health insurance, a frustrated client could argue that such a defense should not be available to agents when automobile insurance is mandatory or, as in the case of health insurance, when the client has few opportunities to change a health condition in order to obtain coverage.

2. Defenses Based Upon an Agent's Actions

Insurance agents, however, do not need to rely solely upon the possible negligence of their clients because they can protect themselves against a failure to advise claim by taking a few basic steps. First, the agent can offer all available coverages. Courts often find that *any* offer may satisfy the agent's duty to advise.[127] One court has even gone so far as to hold that a renewal marketing insert mailed with a payment notice can be a sufficient offer.[128] Second, agents can inform their clients that they might still be exposed to a risk despite their insurance purchase and that they can get additional coverage elsewhere.[129] Finally, agents arguably should recommend coverages and document the recommendations, as courts are unwilling to entertain clients' actions when the insurance agent has offered advice in the past which has been rejected by the client.[130]

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124. *See, e.g.*, Bias v. Advantage Int'l, Inc., 905 F.2d 1558 (D.C. Cir. 1990) (dismissing suit because basketball player Len Bias was not insurable with any insurer because of drug use); *see also, e.g.*, Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239, 243 (Colo. 1987) (holding that coverage must be available in order for client to recover); Klimstra v. State Farm Auto Ins. Co., 891 F. Supp. 1329 (D. Minn. 1995) (holding an agent not liable for failing to advise client of miss and run coverage since no other insurance company in the state provided such coverage), *aff'd* Klimstra v. Granstrom, 95 F.3d 686 (8th Cir. 1996).

125. *See, e.g.*, Bell v. O'Leary, 744 F.2d 1370 (8th Cir. 1984); Wood v. Newman, Hayes & Dixon Ins. Agency, 905 S.W.2d 559 (Tenn. 1995).

126. *See Bell*, 744 F.2d at 1373 (quoting Boothe v. American Assurance Co., 327 So. 2d 477, 481–82 (La. App. 1976)).

127. *See* Szelenyi v. Morse, Payson & Noyes Ins., 594 A.2d 1092, 1095 (Me. 1991); Clifton v. Allstate Ins. Co., 995 S.W.2d 38 (Mo. App. 1999) (holding agent not liable based in part on the agent's two separate offers to increase client's policy limits).

128. *See Clifton*, 995 S.W.2d at 40.

129. *See, e.g.*, Rawlings v. Fruhwirth, 455 N.W.2d 574 (N.D. 1990) (holding agent not responsible because agent informed client about gap between his liability and umbrella coverages).

130. *See, e.g.*, Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164, 1166 (Ariz. Ct. App. 1980) (holding agent not liable in part based upon client's failure to follow agent's previous advice to purchase floater policy for her jewelry), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); Johnson v. Farmers and Merchants State Bank of Balaton, 320 N.W.2d 892 (Minn.

IV. OTHER POSSIBLE CONSTRUCTIONS OF AN AGENT'S DUTY TO ADVISE

As one can see, the "special circumstances" test is unwieldy as it has created a seemingly multi-factored analysis that a court must address before imposing a duty to advise on an agent. Even after concluding such an analysis, the court is still required to examine any number of possible defenses that are based upon an outdated assumption that a client can understand the policy. While some courts argue that the test falls under the general professional duty owed by insurance agents, it is clear that the "special circumstances" formulation of an insurance agent's duty to advise is not consistent with the duties owed by other professionals. Furthermore, the "special circumstances" test is inefficient because courts are often required to resolve factual issues and, therefore, impanel a jury before making a baseline determination that a duty exists. In response to this approach, some courts have opted to impose a duty to advise as a matter of law, impose a true professional duty, or declare that an insurance agent never has a duty to advise.[131]

A. New Jersey: An Absolute Duty to Advise and Statutory Immunity

If *Hardt* signaled the birth of a duty to advise, the agents' responsibilities arguably were brought to full maturity in the New Jersey Superior Court's decision in *Sobotor v. Prudential.*[132] In a decision that required insurance agents to recommend optional automobile coverage based solely on a brief, initial visit at which the client asked for the "best available coverage,"[133] the court expanded upon *Hardt.* The court justified this expansion by recognizing the complexity of modern insurance and the disparate knowledge held by the agent in contrast to that held by the client.[134] As a result of these two key factors, the court was willing to require that insurance agents "deal with laypeople as laypeople and not as experts in subtleties of the law."[135] In addition, the court opined that insurance agents automatically became fiduciaries with a duty to "to use their expertise with every policyholder."[136] Furthermore, such a fiduciary duty does not rest on whether the agent is a broker or a company agent, because that distinction affects the agent's duty to the insurer, not to the client.[137] As a result, the New Jersey court, unlike

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1982) (holding agent not liable because client had refused to purchase additional credit life insurance despite agent's recommendations).

131. *See infra* Parts IV.A–IV.C.

132. 491 A.2d 737 (N.J. Super. A.D. 1984), *superseded by statute as stated in* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

133. *Sobotor*, 491 A.2d at 742.

134. *See id.*

135. *Id.*

136. *Id.*

137. *See id.* at 739 n.1.

every other jurisdiction, was willing to impose as a matter of law a duty to advise based solely upon one transaction between the agent and the client.[138]

For many, including the New Jersey legislature, *Sobotor* went too far.[139] It seemingly placed an unconscionable burden on insurance agents. As is evidenced in some of the cases cited above,[140] there are certain occasions when the client does not want the agent's advice and should not be able to recover uninsured losses after the fact. Also, economic efficiency concerns also weigh against such an absolute duty. For example, if an agent had to explain each and every possible coverage to every client who called in for a binder policy, the insurance industry would be inundated with countless claims of agents failing to explain.[141]

In response to the "explosion of litigation" involving claims against insurance agents after *Sobotor*,[142] the New Jersey legislature provided blanket immunity to agents for failure to advise clients of potential coverages as long as (a) the agent provides the minimum mandatory coverages and (b) the agent is not guilty of "willful, wanton, or gross negligence."[143]

As no jurisdiction has gone as far as New Jersey in imposing a duty to advise, neither has any jurisdiction followed suit in providing blanket immunity to insurance agents. While most jurisdictions now have some type of mandatory-offer statute, such as Arizona's statute governing uninsured and underinsured motorist coverage,[144] at least one court has noted that these laws, by themselves, do not immunize the agent from a failure-to-advise claim.[145] This decision is correct because it is conceivable that an agent's duty to advise might encompass a responsibility to give the client more information than is required by the mandatory offer. In light of the increasing number of claims by frustrated clients, some insurance agents likely will argue that legislatures[146] and the courts should view these mandatory offer statutes as absolute defenses to failure to advise claims.

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138. *Compare id.* at 741 *with* Robinson v. Charles A. Flynn Ins. Agency, Inc., 653 N.E.2d 207 (Mass. 1995) (rejecting an insurance agent's duty to advise a client of uninsured motorist coverage absent special circumstances).

139. *See* Strube v. Travelers Indem. Co. of Illinois, 649 A.2d 624 (N.J. Super. A.D. 1994).

140. *See supra* Part III.C and cases cited therein.

141. *See e.g.*, Tallent v. National General Ins. Co., 915 P.2d 665, 667 (Ariz. 1996) (noting court's unwillingness to attach a duty to explain underinsured motorist coverage to agent's duty to offer).

142. *Strube*, 649 A.2d at 627.

143. *See* N.J. STAT. ANN. § 17:28-1.9a (2000).

144. *See* ARIZ. STAT. ANN. § 20-259.01 (2000).

145. *See* American Family v. Dye, 634 N.E.2d 844 (Ind. App. 1994).

146. *See* Mullins v. Commonwealth Life Ins. Co., 839 S.W.2d 245 (Ky. 1992) (holding that the legislature needs to act if an agent will be held to a higher duty based upon his "holding himself out"); *see also* Farmers Ins. Co., Inc. v. McCarthy, 871 S.W.2d 82 (Mo. App. 1994) (arguing that legislatures are more appropriate than courts to resolve these issues).

B. New York and Missouri: Agent Has a Very Limited Duty or No Duty to Advise

At the opposite end of the spectrum, the New York Court of Appeals has seriously questioned whether an automobile insurance agent should ever have a duty to advise, and the Missouri Court of Appeals has declared that an agent has no duty to advise a client of optional automobile coverages.[147]

1. New York

In *Murphy v. Kuhn,*[148] the New York Court of Appeals addressed a case in which a client had an eighteen-year relationship with an agent regarding both his business and personal insurance needs.[149] The client sued his agent after his son caused an automobile collision that resulted in the client having to pay over $200,000 beyond his policy limits.[150] The client's claim rested upon the agent's alleged failure to advise him to obtain additional liability coverage for his personal and family vehicles.[151]

After beginning with the generally accepted rule that an insurance agent has "no continuing duty to advise, guide[,] or direct a client to obtain additional coverage,"[152] the court then addressed the possibility that an insurance agent may have a duty to speak based upon his "unique or specialized expertise...[or his] special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified."[153] Up to this point of the court's analysis, *Murphy* is a simple "special circumstances" case.

The court, however, refused to apply such a duty to automobile insurance agents based upon the facts of this case.[154] In recognizing that the client had never requested higher liability limits and had never even asked about his limits, the court saw this agent-client relationship as a "standard consumer-agent insurance placement relationship" in which the client showed a "lack of initiative or personal indifference."[155] Further supporting the court's decision was its belief that clients are in "a better position" to know their insurance needs and that clients, unlike patients and attorneys' clients, are "not at a substantial disadvantage to question the actions of the provider of services."[156]

While not imposing a duty on insurance agents, the court cautioned agents not to be too euphoric over its decision, noting that there may be

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147. *See McCarthy*, 871 S.W.2d 82; Murphy v. Kuhn, 682 N.E.2d 972 (N.Y. 1997).
148. 682 N.E.2d 972.
149. *See id.* at 973.
150. *See id.*
151. *See id.*
152. *Id.* at 974.
153. *Id.*
154. *See id.* at 974–75.
155. *Id.* at 975.
156. *Id.* at 976.

"exceptional and particularized situations...in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law."[157] Such determinations, however, will have to be made on a "case-by-case basis," balancing public policy considerations against the general rule that an insurance agent has no continuing duty to advise.[158]

While *Murphy* changed "special circumstances" to an even more ambiguous "exceptional circumstances," at least in claims involving automobile coverage, it is questionable how far the opinion will reach. To date, *Murphy* has not been cited outside of New York; however, commentators have pointed to it as a decision breaking from the normal "special circumstances" test even though it employs much of the same logic.[159] In that regard, like *Hardt*, it has provided some judicial precedent for future decision in this area.

2. Missouri

In *Farmers Insurance v. McCarthy*,[160] the Missouri Court of Appeals addressed a case in which a client brought suit against her agent for failing to advise her of underinsured motorist coverage.[161]

The court rejected the basic principles enunciated originally in *Hardt* as being inconsistent with current public policy.[162] The court stated six reasons why "insurance agents in Missouri have no general duty to advise potential customers of optional coverages that may be available."[163] First, such liability would remove any obligation for clients to assure themselves of their own financial security.[164] Second, such liability would change the insurance industry from a "competitive marketplace" into "financial counselors."[165] Third, clients know their financial condition better than the agents do and even could know.[166] Fourth, such liability would obligate agents to "advise their own customers of every possible insurance option available through the company or even, possibly, a better package of insurance offered by a competitor."[167] Fifth, such liability would turn "the entire theory of insurance on its ear" by allowing clients to secure "coverage, post-

157. *Id.* at 975; *see also*, Eglin, *supra* note 9, at 509–10 ("While the Murphy decision is helpful, it is not a panacea for all claims that a broker failed to obtain additional coverage on behalf of its [policyholders]....Thus far, no court outside New York has cited the decision.").

158. *Murphy*, 972 N.E.2d at 975–76.

159. *See* Eglin, *supra* note 9, at 509–10.

160. 871 S.W.2d 82 (Mo. Ct. App. 1994).

161. *See id.* at 84.

162. *See id.* at 85.

163. *Id.* at 86.

164. *See id.* at 85.

165. *Id.*

166. *See id.*

167. *Id.* at 85–86.

occurrence."[168] Finally, the court believed that the legislature has dominated the field of insurance law and has not imposed such duty on the agents.[169]

Like *Murphy*, the *McCarthy* decision has not sparked a broad revolt against an insurance agent's duty to advise, but it is worthy of note as it represents another rejection of *Hardt* and its progeny. Ultimately, however, these cases should be rejected because they are out of touch with today's insurance market. For better or for worse, insurance agents increasingly are assuming the role of professionals in today's society. In fact, they are asking that the public view them as such. Like physicians and lawyers, they possess a specialized knowledge and are asking that their clients trust them. In large measure, clients place their trust in the agent because the agent has asked them to do so. If courts were to follow the *Murphy* and *McCarthy* decisions, they would be carving out judicial immunity for a particular professional class without any compelling justification.

C. Connecticut and Arizona: An Agent Has a General Tort Duty to Be a Professional, Which Might Include a Responsibility to Advise

The proper approach to the duty-to-advise cases is a middle ground between New Jersey and Missouri approaches. For example, Connecticut and Arizona courts have rejected the "special circumstances test" in favor of imposing a true professional tort duty on their insurance agents, which may or may not include a responsibility to advise their clients.[170] Unlike New Jersey, the question of whether an agent should advise a client is determined on a case-by-case basis, and unlike the "special circumstances" jurisdictions, the question is decided by the jury as the finder of fact.

1. Connecticut

In *Dimeo v. Burns, Brooks, & McNeil, Inc.*,[171] the Connecticut Court of Appeals addressed a case in which the client, who had insured his home with an agent, asked the agent to insure his automobile as well.[172] Based upon the agent's advice, the client raised his automobile liability insurance limits from $100,000 to $300,000 but left his uninsured motorist coverage at $20,000.[173] After a collision caused by an uninsured motorist in which the client suffered losses beyond his uninsured limits, he brought suit against his agent for failure to advise.[174]

Even though the court affirmed a jury's determination that the agent was not liable, it recognized, like *Hardt*, that "insurance is a specialized field with

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168. *Id.* at 86.
169. *See id.*
170. *See* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); Dimeo v. Burns, Brooks, & McNeil, Inc., 504 A.2d 557 (Conn. App. Ct. 1986).
171. 504 A.2d 557 (Conn. App. Ct. 1986).
172. *See id.* at 558.
173. *See id.*
174. *See id.*

specialized knowledge and experience," and that an insurance client "ordinarily looks to his agent and relies on the agent's expertise in placing his insurance problems in the agent's hands."[175] Arguably expanding on *Hardt*, however, the court imposed a general tort duty such that "an agent has the duties to advise the client about the kind and extent of desired coverage and to choose the appropriate insurance for the client." [176] The court folded this duty into a larger professional duty in holding that the agent, like a normal professional, had a duty to conform to the "knowledge, skill and diligence" of other Connecticut insurance agents at the time of the transaction.[177] Based upon expert testimony, the court found that the agent was obliged to "explain uninsured motorist coverage, [] explain the consequences of not having a sufficient amount of such coverage, [] recommend the proper amount, and to attempt to procure that amount and offer it to the client."[178]

2. Arizona

While Connecticut never adopted the special circumstances test, Arizona briefly followed the majority position.[179] Initially in *Nowell v. Dawn-Leavitt Agency, Inc.*,[180] Arizona limited an insurance agent's duty to advise to circumstances in which the agent either received additional consideration beyond the policy premiums for giving advice or when the agent clearly appreciated an obligation as an "insurance counselor" to advise based upon a "long-established relationship of entrustment."[181]

Only four years later, the Arizona Supreme Court brought into question the limited duty to advise outlined in *Nowell*.[182] In *Darner Motor Sales, Inc. v. Universal Underwriter Ins. Co.*,[183] the court addressed a case in which a commercial client brought suit against its agent for failing to advise it of the limitations contained in its umbrella liability policy.[184] The court held that if an insurance agent "holds himself out to the public as possessing special knowledge, skill or expertise[,] [he] must perform his activities according to the standard of

175. *Id.* at 559. *See generally*, Stewart M. Casper & Renee Mayerson, *The Changing Landscape of Uninsured/Underinsured Motorist Insurance Law in Connecticut*, 68 CONN. B.J. 129, 150–155 (1994) (discussing the importance of *Dimeo* in Connecticut's insurance law).

176. *Dimeo*, 504 A.2d at 559.

177. *Id.*

178. *Id.*

179. *See* Nowell v. Dawn-Leavitt Agency, Inc., 617 P.2d 1164 (Ariz. Ct. App. 1980), *questioned by* Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co., 682 P.2d 388 (Ariz. 1984) and *abrogated by* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995).

180. 617 P.2d 1164.

181. *Id.* at 1168.

182. *Darner*, 682 P.2d at 403.

183. 682 P.2d 388.

184. *See id.* at 389.

his profession."[185] The court went further and noted that if insurance agents wished to be considered professionals they had to assume the "responsibilities and duties generally associated with such a status [including a duty]...to exercise that degree of care ordinarily to be expected from others in their profession"[186] including the "duty to speak without negligence."[187]

If *Darner* had stopped there, it could have been penned by the highest court in many of the "special circumstances" jurisdictions. *Darner*, however, went further and embraced the general professional duty of an agent by questioning *Nowell*'s "excessively narrow" duty.[188] *Darner* held that normal Arizona tort principles should apply[189] so that a general duty is imposed on a defendant agent and that questions of whether the agent breached a particular standard of care are addressed by the jury. The court noted that an agent may breach his standard of care by failing to advise a client; however, such a determination is for the jury after it has considered various factors including the agent's employer[190] and whether the client had read the policy.[191]

In 1995, the Arizona Court of Appeals abrogated *Nowell* in light of *Darner*'s criticism.[192] In *Southwest Auto Painting and Body Repair, Inc. v. Binsfeld*,[193] the court addressed a claim by a commercial client against an agent for failing to advise it of employee dishonesty coverage.[194] The suit was brought after the client suffered over $150,000 in losses from an employee's embezzlement.[195] Relying on *Darner*, the court held that an insurance agent's professional duty is to "exercise reasonable care, skill, and diligence in procuring insurance for the [client],"[196] which may include an obligation to advise a client.[197] Furthermore, such a determination, as a standard of conduct issue, is usually a question for the jury as trier of fact.[198] Because the case reached the court on summary judgment and since the client had presented expert testimony in his favor on the duty-to-

185. *Id.* at 403.
186. *Id.*
187. *Id.*
188. *Id.*
189. *See id.* at 402.
190. *See id.* at 403 n.14 (noting further that the standard of care of a company agent and independent agent may be different but that such a difference "is a matter of evidence").
191. *See id.* at 403.
192. *See* Southwest Auto Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268 (Ariz. Ct. App. 1995); *see generally*, Napier v. Bertram, 954 P.2d 1389, 1395 (Ariz. 1998) (refusing to extend an insurance agent's duty to third parties yet noting that the decision "has no effect on the insurance agent's existing duty owed to the [policyholder]").
193. 904 P.2d 1268.
194. *See id.* at 1270.
195. *See id.*
196. *Id.* at 1271.
197. *See id.*
198. *See id.* at 1272.

advise claim, the court believed that the client had raised a question of fact for the jury to decide.[199]

The Arizona approach is preferable to the majority's "special circumstances" test for a number of reasons. First, agents' duties do not turn on whether they are company agents or brokers. All insurance agents are held to a general professional duty. Second, an agent's liability turns not upon some dictate by the court but, rather, upon the conduct of the agent's colleagues and a jury's determination.[200] If both their colleagues and a jury believe it reasonable for an agent not to have advised a client, the agent will not be found liable. Third, agents gain some certainty in knowing that they must keep up with industry customs rather than hoping that a judge does not create some new type of "special circumstance." Fourth, courts are open to clients who truly entrust their insurance concerns to their agents and seek their agents' advice. Fifth, the Arizona approach does not decrease judicial efficiency, as the "special circumstances" rule still requires a jury trial before the judge can determine whether a duty exists. Finally, if a client's damages are limited to the policy limits of a policy that should have been recommended, there is no danger of subverting the fundamental purpose of insurance in allocating risk.

V. CONCLUSION

In 1961, the *Hardt* decision noted that insurance agents were striving towards professional status, and that the courts should respond by requiring "an even ever higher standard of care" from them.[201] While citing the *Hardt* decision as support for a "special circumstances" test, jurisdictions across the country have failed to heed *Hardt*'s underlying realization that insurance agents are and hold themselves out to be professionals in today's society. Instead of holding these agents to a higher standard of care, the courts have created a test that frees them of much of their responsibilities.

The "special circumstances" test has allowed insurance agents to remain, in the eyes of the law, mere salespersons while they have become, in reality, professionals. Unlike other professionals whose duties are prescribed generally, an agent may or may not have a duty to advise. The result is that the law "advises the agent to stay out of the transaction as much as possible, in order to avoid unwittingly becoming an "advisor" to their [sic] client."[202] In light of continuing public policy concerns, such a counterintuitive result demands that the "special circumstances" test be abandoned in favor of a general professional duty as adopted in Arizona.[203]

If insurance agents truly wish to become trusted professionals, they should agree to assume the same duties as other professionals and not hide behind

199. *See id.*
200. *See* Swift, *supra* note 18, at 333 and accompanying text.
201. Hardt v. Brink, 192 F. Supp. 879, 881 (W.D. Wash. 1961).
202. Swift, *supra* note 18, at 332 and accompanying text.
203. *See id.* at 332–33.

the outdated judicially created "special circumstances" test. Only when all their interactions with their clients are evaluated according to the standards of their profession will agents truly to able to get what they desire—clients who count on them and turn to them for advice.