

## Utica Acts on Behalf of Agents in Landmark Decision

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Recently, there was an E&O case that had the potential to change the accountability of agents so dramatically that many may have incurred significant financial burden in order to comply. It's fair to say that many agents may have lost everything they worked to establish.

The following case, captioned Wisniski vs. Brown & Brown Insurance, was filed in the Court of Common Pleas, Dauphin County, Pennsylvania. Thanks, in large part, to Utica Mutual, it resulted in a court decision that protects agents in that state and beyond.

The origin of this case dates back to an incident on September 7, 1999, wherein the plaintiffs' business property, Saturn Surplus, a military surplus supply store, was flooded. The plaintiffs allege that they had contacted the Brown agency in 1994 to obtain commercial business insurance for their recently purchased property located in Millersburg, Pennsylvania. The parties allege a pre-existing relationship dating back to 1991, and the plaintiffs contend that they asked the agency for "complete coverage" for the property.

The plaintiffs claim that agency representatives requested information about the building during telephone conversations, and subsequently recommended commercial property and liability coverage. Agency representatives made these recommendations without inspecting the property. The plaintiffs purchased the policies in September of 1994.

The plaintiffs allege that the agency did not inform them that their insurance plan contained an exclusion for damage caused by flooding. In addition, they claim that they were not informed that flood insurance was available for an additional premium. From 1994 to 1998, the plaintiffs renewed their commercial property policy.

Sometime during 1995 the carrier's loss control department inspected the plaintiffs' property and subsequently made recommendations for reducing various risks that were identified. This inspection also identified the property's proximity to the Susquehanna River, and the existence of an underground stream that traversed the plaintiffs' property directly beneath the building. However, there was no recommendation made to the plaintiff to obtain flood insurance.

On September 7, 1999, the plaintiffs allegedly suffered damages exceeding \$375,000 to the building and its contents when the stream traversing the property flooded the plaintiffs' building. When the plaintiffs notified the agency of the loss, they learned that no coverage existed for the loss, due to a flood exclusion.

The plaintiffs commenced a lawsuit against both the agency and the carrier, alleging that the defendants breached a "duty to exercise the skill and knowledge normally possessed by members of the insurance profession in good standing in similar communities." In layman's terms, the plaintiffs claimed that the defendants breached their duty by failing to assess the plaintiffs' insurance needs, inspect the property, and recommend that the plaintiffs purchase flood insurance.

This case posed a significant threat to agents and brokers in Pennsylvania, with the potential to impact agents in every other state as well. The debate centered on an agent's duty to make inspections and recommend coverage.

The Court of Common Pleas granted summary judgment in favor of the insurance agency, stating that no duty existed. The plaintiff, Wisniski, filed an appeal with the Superior Court, which overturned the Summary Judgment Motion, stating that "a duty of an insurance agent may include inspection and recommendation."

Ultimately, the case was heard in the Supreme Court of Pennsylvania. The Supreme Court remanded the case back to the Superior Court, ordering the Superior Court to rule on the existence of such a duty by applying established case law in Pennsylvania.

Clearly, a negative ruling by the Superior Court would have grave ramifications for agents, who would be faced with a near "strict liability" for claims involving improper placement of property insurance. In an effort to prevent bad case law for agents in Pennsylvania—and possibly beyond—Utica secured the support of both the IAB of Pennsylvania and PCI (*Property and*



*Casualty Insurers Association of America*), a trade group representing more than 1,000 P&C companies (including *Utica Mutual*) from all 50 states, to file an amicus brief.

The amicus brief argued against the existence of an agent/broker's "duty" to inspect and recommend coverage. Utica chose the law firm of Burns, White & Hickton to handle preparation and filing of the brief, with attorney John Cromer as the point person.

In its ruling, filed August 15, 2006, the Superior Court of Pennsylvania concluded that such a duty does not exist. As a result, the court ruled that Brown & Brown Insurance was not liable in the Wisniski case. The amicus brief's impact is evident throughout the ruling, with the court citing our findings in its conclusion. Although the plaintiff can petition the Supreme Court of Pennsylvania for review, the Superior Court ruling, as it currently stands, will be an excellent tool in defending insurance agents/brokers against errors and omissions claims.

By partnering with IAB of Pennsylvania and PCI, Utica took aggressive measures to protect agents & brokers, not only in Pennsylvania but likely in many other states as well. As a recognized leader in Agents E&O, Utica has the expertise agents need to ensure their long-term success. This case clearly demonstrates our commitment to customer service for our 11,000+ policyholders, as well as our promise to take a stand against legal threats to their future.