

1 **WO**

2
3
4
5
6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Edward Fink,

10 Plaintiff,

11 v.

12 Brown & Brown Program Insurance
13 Services Incorporated,

14 Defendant.

No. CV-17-03869-PHX-DLR

ORDER

15
16 At issue is Defendant Brown & Brown Program Insurance Services, Inc.'s motion
17 to dismiss, which is fully briefed. (Docs. 9, 11, 12.) For the following reasons, the
18 motion is denied.¹

19 **I. Background**

20 On August 21, 2013, Plaintiff Edward Fink was injured in an accident caused by
21 non-party Cole Cantreel's negligence. (Doc. 1-1 at 8.) Cantreel was underinsured to pay
22 Plaintiff's damages, and Plaintiff's own underinsured motorist policy also was
23 insufficient. (*Id.*)

24 Before the accident, Plaintiff obtained insurance coverage from non-party James
25 LaVerdi, an insurance salesman for non-party All Insurance, LLC, which was owned and
26 operated by non-party Charles Fritsinger. (*Id.* at 6-8.) Plaintiff claims he requested

27
28 ¹ Defendant's request for oral argument is denied because the issues are
adequately briefed and oral argument will not aid the Court's resolution of the motion.
See Fed. R. Civ. P. 78(b); LRCiv. 7.2(f).

1 uninsured and underinsured motorist coverage equal to his liability coverage of two
2 million dollars, but LaVerdi did not procure such coverage. (*Id.* at 7.)

3 On August 10, 2015, Plaintiff sued Fritsinger and other defendants for negligence.
4 (*Id.* at 9.) He sought damages in the amount of the underinsured motorist coverage he
5 would have had but for Fritsinger’s negligence in adequately training, supervising, or
6 instructing LaVerdi. (*Id.* at 8-9.)

7 Fritsinger had purchased an error and omissions (“E&O”) policy from Defendant,
8 effective December 2012 through December 2013, and renewed the policy through
9 December 2014. (*Id.* at 9.) Defendant, however, did not recommend or address the need
10 for retroactive coverage when Fritsinger purchased the policy, nor did Defendant
11 recommend or address the need for tail coverage when Fritsinger cancelled his E&O
12 policy in October 2014. (*Id.* at 10.) Fritsinger consequently did not have E&O coverage
13 to defend against Plaintiff’s claim because his policy was effective after the date Plaintiff
14 procured his policy, and Fritsinger cancelled his E&O policy prior to the date Plaintiff
15 filed the initial lawsuit. (*Id.* at 9.) Fritsinger therefore agreed to assign his right to pursue
16 a professional negligence claim against Defendant to Plaintiff. (*Id.* at 10.)

17 Plaintiff, standing in Fritsinger’s shoes, filed this professional negligence action
18 against Defendant in Arizona state court on September 15, 2017. The complaint alleges
19 that Defendant negligently failed to “explain the need for or recommend” retroactive or
20 tail coverage when Fritsinger purchased and cancelled his E&O policy. (*Id.* at 10-11.)
21 Defendant removed the action pursuant to this Court’s diversity jurisdiction, and now
22 moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (Docs. 1, 9.)

23 **II. Legal Standard**

24 A successful Rule 12(b)(6) motion must show that the complaint lacks a
25 cognizable legal theory or fails to allege facts sufficient to support such a theory. *See*
26 *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1988). A complaint that
27 sets forth a cognizable legal theory will survive a motion to dismiss only where it
28 contains “sufficient factual matter, accepted as true, to ‘state a claim to relief that is

1 plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl.*
2 *Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). “A claim has facial plausibility when the
3 plaintiff pleads factual content that allows the court to draw the reasonable inference that
4 the defendant is liable for the misconduct alleged.” *Id.* (citing *Twombly*, 550 U.S. at
5 556). Although the court must take “the well-pled factual allegations in the complaint as
6 true, [it is] ‘not bound to accept as true a legal conclusion couched as a factual
7 allegation.’” *Id.* (quoting *Twombly*, 550 U.S. at 555).

8 **III. Discussion**

9 Defendant asserts that insurance brokers do not have a duty “to advise insureds
10 about the adequacy or appropriateness of the insurance coverage they purchase, or to
11 inform them about optional coverage that might be available.” (Doc. 9 at 4 (quoting
12 *BNCCORP, Inc. v. HUB Int’l Ltd.*, 400 P.3d 157, 166 (Ariz. Ct. App. 2017)). Instead,
13 Defendant contends that, as a matter of law, insurance brokers need only provide the
14 insurance coverage that the client requests. (*Id.*) Because Plaintiff’s complaint at most
15 alleges that Defendant failed to recommend additional coverage, Defendant argues that
16 Plaintiff has not pled facts that establish Defendant breached its duty of care under
17 Arizona law.

18 Defendant’s argument rests entirely on the Arizona Court of Appeals’ description
19 of the applicable duty in *BNCCORP*. Plaintiff asserts that, in relying on *BNCCORP*,
20 Defendant improperly conflates duty and breach. (Doc. 11 at 1, 5.) Specifically, in
21 Arizona a licensed insurance agent owes his or her client a duty “to exercise reasonable
22 care, skill and diligence in carrying out the agent’s duties in procuring insurance.”
23 *Darner Motor Sales, Inc. v. Universal Underwriters Ins. Co.*, 682 P.2d 388, 402 (Ariz.
24 1984). Plaintiff asserts that whether an insurance agent must explain the need for or
25 recommend retroactive or tail coverage in order to satisfy this duty is a question of fact
26 that cannot be resolved on a motion to dismiss. The Court agrees.

27 To establish negligence, Plaintiff must prove: (1) Defendant had a duty to conform
28 to a certain standard of care; (2) Defendant breached that standard of care; (3) a causal

1 connection between Defendant’s conduct and the resulting injury; and (4) actual
2 damages. *Gipson v. Kasey*, 150 P.3d 228, 230 (Ariz. 2007). “The first element, whether
3 a duty exists, is a matter of law for the court to decide,” but the other elements, including
4 breach, are factual issues typically decided by the jury. *Id.*

5 “[T]he existence of a duty is not to be confused with details of the standard of
6 conduct.” *Markowitz v. Ariz. Parks Bd.*, 706 P.2d 364, 367 (Ariz. 1985). Arizona courts
7 have acknowledged the difficulty in distinguishing these two concepts. *Coburn v. City of*
8 *Tucson*, 691 P.2d 1078, 1080 (Ariz. 1984); *Sw Auto Painting & Body Repair, Inc. v.*
9 *Binsfeld*, 904 P.2d 1268, 1270 (Ariz. Ct. App. 1995).

10 A duty exists when the relationship between the parties is “such that the defendant
11 was under an obligation to use some care to avoid or prevent injury to the plaintiff.”
12 *Markowitz*, 706 P.2d at 368. Plaintiff has alleged the existence of such a relationship,
13 and Defendant does not argue otherwise. (Doc. 9 at 4; Doc. 11 at 4.); *see Darner*, 682
14 P.2d at 402. The precise conduct required to comply with the applicable duty “ha[s] to
15 do with whether the defendant breached the applicable standard of care, not whether a
16 duty and attendant standard of care exist.” *Sw Auto*, 904 P.2d at 1271. For example, in
17 *Coburn*, the court distinguished the city’s duty to keep the streets reasonably safe from
18 the specific conduct—posting warning signs, installing traffic control devices, fixing
19 potholes—required to comply with that duty. *Coburn*, 691 P.2d at 1080. The court
20 reasoned that “[a]ttempting to define or evaluate conduct in terms of duty tends to
21 rigidify the concept of negligence—a concept which, by definition, must vary from case
22 to case, depending upon the relationship of the parties and the facts of each case.” *Id.*

23 In *BNCCORP*, the appeals court credited the trial court’s factual finding—
24 following a bench trial—that the applicable standard of care did not require the insurance
25 agent to “inform [insureds] about optional coverage that might be available.”
26 *BNCCORP*, 400 P.3d at 166. Contrary to Defendant’s argument, the court did not hold
27 as a matter of law that such conduct could never breach the duty applicable to the insurer-
28 insured relationship. Instead, the court recognized “the *general* rule is that ‘brokers have

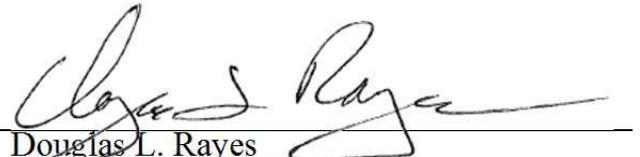
1 no [obligation] to advise insureds about the adequacy or appropriateness of the insurance
2 coverage they purchase, or to inform them about optional coverage that might be
3 available.” *Id.* (quoting 1-2 New Appleman on Insurance Law Library Edition §
4 2.05(5)(a)) (emphasis added). The court reiterated, however, that “[q]uestions as to the
5 applicable standard of care are for the trier of fact” and should be “determined on a case-
6 by-case basis.” *Id.* at 165; *see Coburn*, 691 P.2d at 1080 (“[T]he duty remains constant,
7 while the conduct necessary to fulfill it varies with the circumstances.”).

8 It therefore is inappropriate for the Court to rule as a matter of law that the
9 omissions Plaintiff has alleged constitute breaches of the general duty of care. Breach of
10 duty is a quintessential fact question not appropriate for disposition on a motion to
11 dismiss. Accordingly,

12 **IT IS ORDERED** that Defendant’s Motion to Dismiss (Doc. 9) is **DENIED**.

13 Dated this 11th day of April, 2018.

14
15
16
17
18
19
20
21
22
23
24
25
26
27
28



Douglas L. Rayes
United States District Judge