

**AN OVERVIEW:
THE INSURANCE BROKER
WHOSE AGENT IS HE?**

BY:

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1994 SOUTHERN SURETY & FIDELITY CLAIMS CONFERENCE
ATLANTA, GEORGIA

APRIL 21 - 22, 1994

ISSUE

Under what circumstances does an insurance broker act as an agent for the insurer as opposed to the insured?

DISCUSSION

The Restatement 2d of Agency §§12-14 list three fundamental characteristics of an agency relationship:

- (1) An agent or apparent agent holds a power to alter the legal relations between the principal and third persons and between the principal and himself.
- (2) An agent is a fiduciary with respect to matters within the scope of his agency.
- (3) A principal has the right to control the conduct of the agent with respect to matters entrusted to him.

Of these three fundamental characteristics, the principal's right to control the agent has been described as the "touch stone" of the agency relationship. Government of Virgin Islands v. Richards, 618 F.2d 242, 244 (3rd Cir. 1980) (citing Restatement 2d of Agency §14).

"Agent" is a word used to describe a person authorized by another to act on his account and under his control. Included within its meaning are those who . . . act in business transactions and those who perform only manual labor as servants. An agent may be one for whose physical acts the employer is responsible and who is called an independent contractor in order to distinguish him from a servant, also an agent, for whose physical acts the employer is responsible. Thus, the attorney at law, the broker, the factor, the auctioneer, and other similar persons employed either for a single transaction or for a series of transactions, are agents, although as to their physical activities they are independent contractors.

Restatement 2d of Agency §1, Comment (e).

The Restatement 2d of Agency distinguishes agents for independent contractors in the following manner:

- (1) One who contracts to act on behalf of another and subject to the other's control except with respect to his physical conduct is an agent and also an independent contractor.

Restatement of Agency 2d §14N.

Comment (a) to §14N explains that the term "independent contractor" is antithetical to the word "servant," but is not contrary to the word "agent."

In fact, most of the persons known as agents, that is, brokers, factors, attorneys, collection agencies, and selling agencies are independent contractors as the term is used in the restatement of this subject, since they are contractors, but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performances of their services. However, they fall within the category of agents.

The Restatement asserts that if the independent contractor has a fiduciary obligation to the contracting party, an agency is established. See Restatement (2d) of Agency §14N, Comment (b). See, also, Tri-City Construction v. A.C. Kirkwood & Associates, 738 S.W.2d 925, 931 (Mo. App. 1987).

An insurance broker's role is that of middleman between the insured and the insurer who, acting under no employment with a particular company, solicits insurance from the general public and after securing an order, places it with any one of a number of companies. An insurance agent, on the other hand, represents an insurer under an employment agreement with it. The distinction

does not prevent a broker from acting in either capacity at different times. The question then often arises in a given matter as to whether the broker was acting on behalf of the insured or the insurer. 3 Couch on Insurance 2d (Rev ed) §§25.93, 25.94.

Under the general rule, an insurance broker is the agent of the insured in matters connected with the procurement of insurance and for the insurer for the purpose of collecting and remitting the premium and delivering the policy. See Peddy v. Pacific Employers Insurance Co., 246 F.2d 306 (5th Cir. 1956); Empire Fire and Marine Ins. Co. v. Koven, 402 So.2d 1352 (Fla. App. 1981)(general rule is that broker is agent of insured); AMI Insurance Agency v. Elie, 394 So.2d 1061 (Fla. App. 1981); Nationwide Mutual Insurance Co. v. Mason, 218 So.2d 185 (1969); cf., T&R Store Fixtures v. Travelers Ins. Co., 621 So.2d 1388 (Fla.App. 1993)(no actual or apparent authority where insurer merely accepts premium payments written on broker's check); 3 Couch on Insurance 2d (Rev ed) §25.94. Although the question whether a broker is the agent for the insured or the insurer is ordinarily one of fact for determination by the jury, the determination may include the following questions: (1) From whom did the broker's express or implied authority to do the act relied on originally proceed?; (2) Was the act one which the broker was expressly authorized to do, or was it an usual and necessary means to accomplish the execution of the authority conferred?; (3) Was the act done independently of the original employment, and, if so, for whom, or at whose instance?; (4) Which party could the broker hold

directly responsible for his remuneration at the time the act was done?¹; (5) Was there any limitation upon the broker's ostensible authority, of which the person dealing with him was, or ought to have been aware?; (6) Was there any ratification by the ostensible party of the claimed unauthorized act? Id.

The Florida Supreme Court has recently carved out an exception to the general rule when it comes to the obligation to obtain from the insured a proper written rejection of underinsured motorists ("UM") coverage.² The Court held as a matter of law that an independent agent is the insurance company's agent, and not the insured's broker, when the relevant insurance company is one of the agent's licensed companies for purposes of rejecting UM coverage.³

1. The mere fact that broker receives his compensation from a premium does not alter general rule that broker is agent of insured. See Auto-Owners Ins. Co. v. Yates, 368 So.2d 634 (Fla. App. 1979).

2. 627.72 **Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.**

(1) No motor vehicle liability insurance policy which provides bodily injury coverage shall be delivered or issued for delivery in this state with respect to any specifically insured or identified motor vehicle registered or principally garaged in this state unless uninsured motor vehicle coverage is provided therein or supplemental thereto for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness, or disease, including death, resulting therefrom. However, the coverage required under this section is not applicable when, or to the extent that, an insured named in the policy makes a written rejection of the coverage on behalf of all insureds under the policy.

3. Under Florida's insurance code, a general lines agent obtains a license that discloses the insurance company that he or she represents. §626.301(2), Fla.Stat. (1983). If an independent agent wishes to represent numerous insurance carriers, and they consent, the agent can obtain numerous licenses. §626.331(2), Fla.Stat. (1983). Thus an agent's licensed insurance companies know that the agent will represent them, and they can monitor the agent's conduct through contracts or otherwise. See, Quirk v. Anthony, 563 So.2d 710 (Fla. App. 1990).

This holding is a practical rule from the public's standpoint. If a customer turns to the yellow pages and selects an insurance company, companies with captive agents look like companies with independent agents. The customer is not advised that the risks are different if he or she calls a captive agent licensed to sell coverage for only one carrier, as opposed to an independent agent licensed to sell coverage for several carriers. To make one agent the customer's broker, and the other the carrier's agent, at least for purposes of UM rejection and selection, is illogical and unsupported by any meaningful distinction. Thus, at least for this limited purpose, an agent is not an insurance broker unless the application is sent to an insurance carrier that the agent is not licensed to represent.

Travelers Ins. Co v. Quirk, 583 So.2d 1026, 1029 (Fla. 1991).

In justifying the result, the Court's unanimous opinion stressed the "great care taken in the legislative scheme to assure that an insured appreciates the availability of UM coverage and makes a knowledgeable and deliberate decision to accept or reject it." While some of the above-quoted language is rather broad, it has not been expanded beyond the written UM waiver requirement. In fact, the Third District Court of Appeal has since cited Quirk for the "ordinary rule that an independent agent or broker acts on behalf of the insured." T&R Store Fixtures, Inc. v. Travelers Ins. Co., 621 So.2d 1388, 1389 (Fla. App. 1993).

A third consideration, outside of the traditional insured-insurer scenario, is the availability of relief by others against an insurance broker on a third-party beneficiary theory. See, e.g., Hamer v. Kahn, 404 So.2d 847 (Fla. App. 1981).

CONCLUSION

Although the determination of what role the broker was acting under at a particular point in time will necessarily depend on the facts of the case, Florida follows the general rule that a broker acts as the agent of the insured. Care should be taken to examine any applicable statutory definitions before beginning any analysis of the facts in any particular case.⁴

4. See, e.g., §626.031 Fla. Stat. (1993) et. seq.

