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**“WHOSE AGENT IS IT ANYWAY?
THE CONSEQUENCES OF AN AGENT’S ACTIONS”**

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The issuance of a bond, whether a payment or performance bond, or the issuance of a financial institution bond or directors' and officers' liability policy no longer is a simple matter. Numerous people are involved in the issuance of these contracts from underwriters to agents and brokers and their actions can significantly impact the liability of the insurer. Liability, however, depends on the relationship of the insurer to these individuals, referred to as intermediaries in this paper. This paper reviews these relationships, in particular, the relationship of the broker and agent.

I. Effect of the Actions of the Intermediary

A. Broker or Agent

Whether an intermediary's actions and possible omissions will bind an insurer turn on whether the intermediary is considered an agent for the insured or the insurer. In Louisiana as is true elsewhere, an intermediary between an insurer and an insured is classified as either an agent of the insurer or a broker of the insured. An insurance agent is employed by a particular insurance company to solicit risks and effect insurance for that company, whereas a broker solicits insurance from the public generally and places the insurance with any company he or she chooses based on the prospective insured's requests and needs. Karam v. St. Paul Fire & Marine Ins. Co., 265 So. 2d 821, 824 (La. App. 3d Cir. 1972), affirmed, 281 So. 2d 728 (La. 1973). See also Couch on Insurance 3d §45:1.

There are statutory definitions of insurance agent and insurance broker.¹ These definitions, however, frequently are not determinative of whether an agency relationship exists between the intermediary and the insurer, the insured or another intermediary. Rather, this determination is based on the general laws of agency. Tiner v. Aetna Life Ins. Co., 291 So. 2d 774, 777 (La. 1974). See also Couch on Insurance 3d § 45:2. As explained by the Louisiana Fifth Circuit Court of Appeal in Ford v. Golemi, Albrecht Ins., 522 So. 2d 1283 (La. App. 5th Cir. 1988), writ denied, 530 So. 2d 83 (La. 1988), the statutes "pertaining to the licensing of insurance agents, brokers and solicitors do not prohibit a finding that the legal relationship of principal and agent exists, so as to bind the insurer, despite the failure of the

¹ An insurance agent is defined as a person (including individuals, partnerships, associations, trusts or corporations) "appointed in writing by an insurer to solicit applications for a policy of insurance or to negotiate a policy of insurance on its behalf. A person not duly licensed as an agent, insurance broker, or surplus lines broker, who solicits a policy of insurance on behalf of an insurer, shall be an insurance agent within the definition herein and any company by compensating such person through any of its officers, agents, or employees for soliciting policies of insurance shall thereby accept and acknowledge such person as its agent in such transaction. Insurance agent shall also include a duly licensed agent representing the insured, aiding in any manner in negotiating contracts of insurance, or in placing risks or effecting insurance as agent for an insured although not a licensed agent of the insurer." La. R.S. 22:1112(1). An insurance broker is defined as an individual, partnership, association, trust or corporation who "for compensation, acts or aids in any manner in negotiating contracts for insurance or placing risks or effecting insurance for a party other than himself or itself. A person not duly licensed as an insurance broker or surplus lines broker who solicits a policy of insurance on behalf of others or transmits for others an application for a policy of insurance, shall be an insurance broker within the definition herein." La. R.S. § 22:1112(2).

person acting for the insurer to have been specifically licensed as its agent.” Id. at 1286 (citing Raymond v. Zeringue, 422 So. 2d 534 (La. App. 5th Cir. 1982). Accord North American Capacity, Ins. Co. v. Brister’s Thunder Karts, Inc., 1998 U.S. Dist. Lexis 7880 (E.D. La. 1998).

A source of confusion in this area stems from the fact that people involved in the insurance business, as well as lawyers and courts, often use the terms agent and broker interchangeably. Also, an intermediary may be considered an agent with respect to one particular insurer but a broker with respect to other insurers. Ackel v. Mid-South Underwriters, Inc., 377 So. 2d 496, 499-500 (La. App. 3d Cir. 1979), writ denied, 378 So. 2d 1389 (La. 1980); Thibodeaux v. Lumbermen’s Mutual Casualty Co., 448 So. 2d 888 (La. App. 3d Cir. 1984). In addition, an intermediary may be considered a dual agent of both the insured and the insurer. Kieran v. Commercial Union Ins. Co. of New York, 271 So. 2d 889, 892 (La. App. 4th Cir. 1973); B. Ostrager & T. Newman Handbook on Insurance Coverage Disputes, §18.02 [d] (9th ed. 1998). This theory of dual agency is based on the laws of agency and on statutory authority.²

Consequently, the nature of the relationships between the parties involved is critical because an insurer’s liability regarding a particular insurance transaction often depends on whether the intermediary is designated as an agent of the insurer or a broker to the insured.

B. Broker

As a rule, insurance brokers are generally considered the agents of the insured and not of the insurer. Handbook on Insurance Coverage Disputes, §18.02 [b]; Motor Ins. Co. v. Bud’s Boat Rental, Inc., 917 F.2d 199, 204 (5th Cir. 1990); Trahan v. Bailey’s Equipment Rentals, Inc., 383 So. 2d 1072, 1077 (La. App. 3d Cir.), writ denied, 390 So. 2d 1342, and 391 So. 2d 455 (La. 1980) and 391 So. 2d 455. This is especially so if the broker represents several companies or is working through other agents. United Credit Plan of Jena, Inc. v. Hailey, 341 So. 2d 58, 61 (La. App. 3d Cir. 1976). Where that is the case, the negligence of the broker is not imputable to the insurer. Hartford Life and Accident Ins. Co. v. Nittolo, 955 F. Supp. 331, 336 (D.N.J. 1997). Insurance brokers, however, may be agents in fact of the insurer when the facts of the case exhibit an agency relationship between them. Tiner, 291 So. 2d at 778.

Ultimately, whether a person is considered an agent or a broker and whether he or she is an agent of the insured or the insurer is determined by the totality of the facts regarding the transaction at issue. Independent Fire Ins. Co. v. Lea, 775 F. Supp. 921, 925 (E.D. La. 1991). If the facts of the transaction are consistent with an agency relationship with the insurer, the intermediary is an agent of the insurer. Handbook on Insurance Coverage Disputes, § 18.02 [a]. Labels will be disregarded when they fail to reflect the realities of the situation. Id. The acts of a person and not what he is called will determine the relationship, and this determination often depends on who controls the intermediary. Boyster v. Blazer Constr. Co., Inc., 505 So. 2d 854, 861 (La. App. 2d Cir. 1987).

Some courts have held that an insurance broker or agent is the agent of the party who

² Louisiana’s Civil Code defines a broker as a person employed to negotiate a matter between two parties and states that a broker is considered a mandatory of both. La. Civ. Code art. 3000.

first employs him. Travelers Indem. Co. v. Booker, 657 F. Supp. 280, 286 (D.D.C. 1987). Another court has developed four questions to determine whether an insurance agent is an agent of the insured or the insurer. "The four inquiries are (1) who put the agent in motion; (2) who controls the agent's actions; (3) who pays the agent, and (4) whose interest does the agent represent." American Ins. Co. v. Sederes, 807 F.2d 1402, 1405 7th Cir. 1986) (citing Lazzara v. Howard A. Esser, Inc., 802 F.2d 260, 264 (7th Cir. 1986)). Additional factors which impact an intermediary's status include the actual contractual relationship he has with the insurer, the number of licenses he holds, whether he has authority to quote premiums or bind coverage for the insurer, or whether he solicits business from the general public and advertises in a mass publication, such as the yellow pages or outdoor advertisement. Other relevant factors include whether the insured approached the intermediary about coverage and whether the intermediary was free to obtain quotes for coverage from any one of several companies.

C. Agent of the Insurer

1. Actual and Apparent Authority

Agency arises from actual authority, whether express or implied, and from apparent authority. Williams v. Lafayette Ins., Co., 640 F. Supp. 686, 688 (N.D. Miss. 1986). Thus, an insurance company can be held vicariously liable for the acts of an agent if the agent had actual, implied or apparent authority. Burton v. State Farm Mutual Auto. Ins. Co., 869 F. Supp. 480, 485 (S.D. Tex. 1994), affirmed without opinion, 66 F.3d 319 (5th Cir. 1995). Conversely, the insurer is not bound by the unauthorized acts of its agent. Thus, the question to be answered is whether the agent was acting within the scope of his or her authority when he engaged in the contested acts. Williams, 640 F. Supp. at 688.

Implied authority arises as a necessary or reasonable requisite for the insurance agent to effectuate authority expressly conferred. Insurance companies generally impliedly authorize their agents to do what is usual or necessary in the transaction of their business.

The apparent authority of an insurance agent is the authority the insurance company knowingly allows the agent to assume, or which it holds the agent out as possessing. In other words, it is the authority that a reasonably prudent person would suppose the agent has in light of the company's conduct. Couch on Insurance 3d § 48:12.

The Louisiana Supreme Court in Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987), explained that as between the principal and the agent, the agent's authority is limited to the agent's actual authority. However, as between the principal and third persons, the agent's authority is expanded to include the agent's apparent authority. Apparent authority is a judicially created concept of estoppel which operates in favor of a third person seeking to bind a principal for the unauthorized acts of an apparent agent. Id. The basis for imposing liability on the insurer for the unauthorized acts of its agent is that the insurer, having permitted his or her agent to appear to have a given authority, is estopped to deny that authority. Couch on Insurance 3d § 48:13.

The burden of proving apparent authority is on the party relying on the mandate. The

elements which must be established are that the principal acted to manifest the alleged agent's authority to an innocent third party and that the third party relied reasonably on the manifested authority of the agent. Boulos, 503 So. 2d at 3.

In addition to the factors listed in the preceding section, relevant to the inquiry of apparent authority is whether the insurer has any control over the intermediary or his business procedures, whether the intermediary considered himself an agent of the insurer or held himself out as such. A copy of the intermediary's errors and omissions insurance application may be helpful to the practitioner to determine whether the intermediary listed the insurer as a company which he represents under an agency agreement. Furthermore, a copy of any contract or agency agreement with the insurer should assist in making such a determination, although some courts have held that the existence or nonexistence of a written agency agreement is not dispositive of whether an agency relationship exists. Independent Fire Ins. Co., 775 F. Supp at 925.

A growing number of courts have held that possession of various indicia of agency may create an appearance of authority that is binding on the insurer. For example, the presence of the insurer's sign in the agent's office indicating general agency, insurer's stationery, documents containing the signature of agent's employee as agent to the insurer, acceptance of premiums by the agent on behalf of the insurer, and printed application forms bearing the insurer's name are all indicia of agency. Couch on Insurance 3d § 48:14.

An interesting case on indicia of agency is Herbert Construction Company v. Continental Ins. Co., 931 F.2d 989 (2nd Cir. 1991) where the court affirmed the lower court's refusal to grant summary judgment in favor of the surety company after a former agent fraudulently issued performance and payment bonds on behalf of the surety. The court, however, also reversed a grant of summary judgment in favor of the contractor on the bond. In that case, a former agent issued the bonds on a form which bore the logo "The Continental Insurance Companies" and designated Continental as the surety on the bonds. The bonds were signed by Lawrence Dixon as attorney for Continental and were accompanied by a Continental financial statement and a general power of attorney naming Dixon as Continental's "true and lawful attorney." A corporate seal was also affixed to the documents, although Continental denied it was its seal. Continental, however, had revoked Dixon's power of attorney to execute surety bonds on its behalf several months before these bonds were issued, although it had left intact Dixon's authority to solicit applications for surety bonds and insurance. Following Continental's decision to revoke Dixon's power of attorney, representatives of Continental went to Dixon's office and removed the power of attorney forms they found, two corporate seals and some Continental financial statements. They did not, however, remove the blank bond forms, presumably because Dixon still had authority to solicit applications. Dixon was able to issue the bonds with an apparently authentic power of attorney by taking a power of attorney form returned by a client whose application had been rejected, deleting the date, and then making several copies.

The issue to be determined was whether Dixon had apparent authority to bind Continental. Continental admitted that it made no effort to advise individual clients or the public in general that Dixon's authority to execute bonds had been revoked. Applying New York law on apparent authority, the court reasoned that

Two scenarios establish the bookends of New York law on apparent authority. At one end sits the agent who possesses actual authority to bind the principal to third parties, a situation not present here given Continental's revocation of Dixon's power of attorney five months before the bond in question was issued. At the other end sits the agent who has no actual authority and perpetrates a fraud on a third party independent of any responsibility of the principal. Such a situation would exist, for instance, if the agent stole a principal's indicia of authority and falsely represented to a third party that he had authority to bind the principal. Under this scenario, the principal would not be liable to the third party, because the apparent authority would not be "traceable" to him.

Apparent authority lies between these two extremes. To recover on this theory the third party must establish two facts: (1) the principal "was responsible for the appearance of authority in the agent to conduct the transaction in question," and (2) the third party reasonably relied on the representations of the agent. (citations omitted). *Id.* at 993-94.

In reversing summary judgment in favor of the contractor, the court refused to find that Continental was responsible as a matter of law for Dixon's possession of a Continental power of attorney. The court, however, did note that the contractor's contention that Continental bore some responsibility for Dixon's acquisition of a power of attorney form had merit. It reasoned that Continental could have used original, not facsimile powers of attorney and also could have numbered and dated each form. *Id.* at 994. Nevertheless, the court found that whether Continental bore responsibility for not tracking down the power of attorney form and preventing Dixon from doctoring it was a matter of fact which should be decided by the jury. The court did note that the fact that Continental allowed Dixon to keep the bond forms facilitated his fraud. "But, absent a power of attorney or a corporate seal, Dixon's possession of a blank bond form could not have amounted--alone and as a matter of law--to a manifestation by Continental to third parties that it consented to have Dixon act on its behalf." *Id.* at 995.

The court also concluded that an issue of fact existed as to whether the contractor reasonably relied on Dixon's representations of authority. It found that the contractor had not directly dealt with Dixon and had never transacted business with him before. Further, a five month delay occurred between the date the bonds were requested and the date they were received. Also, there were questions regarding whether the bond was regular on its face. *Id.* at 996.

In rejecting Continental's motion for summary judgment the court observed that a jury could conclude that Continental should have avoided the uncertainty surrounding the retrieval of the power of attorney forms by using numbered originals which would have made it easier to account for all the forms. Ultimately, the court framed the question as: "Should Continental have done more than it did to deprive Dixon of indicia of authority after it revoked his power of attorney?" *Id.* at 997. It concluded that: "Resolution of this issue requires that evidence be weighed and inferences drawn, tasks that our legal system properly delegates to a jury." *Id.* Thus, summary judgment was not appropriate in this case.

On the other hand, the court in Hall v. Modern Woodmen of America, 68 F.3d 1120 (8th

Cir. 1995), affirmed a motion for summary judgment in favor of the insurer in ruling that under Arkansas law, the acts of a soliciting agent, as opposed to a general agent, who was aware of the insured's ill health could not be imputed to the insurer and that the plaintiff had failed to provide sufficient evidence to prove that the agent had apparent authority to bind the insurer. Id. at 1122.

2. Effect of Agent's Acts

The insurer, in accordance with general principles of agency law, is bound by the actions of his or her agent within the scope of his or her authority. Couch on Insurance 3d § 48:1. Thus, an insurance company is liable for the frauds, deceits, misrepresentations, injurious statements, and wrongful acts of its agents when the acts are committed or the statements are made within the general or apparent scope of the agent's employment, even though the agent exceeded his or her actual authority, or disobeyed the insurer's general or express instructions. Couch on Insurance 3d § 56:6.

As a general rule in Louisiana, an agent cannot change the policy through either oral or written representations and such are not binding on the insurer for two reasons. First, the insurance policy must contain the entire contract between the parties. La. R.S. 22:628 provides that "[n]o agreement in conflict with, modifying, or extending the coverage of any contract of insurance shall be valid unless it is in writing and physically made a part of the policy or other written evidence of insurance." The purpose of the statute is that the insured shall have in his possession at all times the entire evidence of the insurance contract and that each party is aware of the other party's obligations under the terms of the policy. Marsh v. Reserve Life Ins. Co., 516 So. 2d 1311, 1314-15 (La. App. 2d Cir. 1987). This statute protects both the insured and the insurer against allegations that the express terms of the policy were modified by an oral agreement between the insured and the insurer's agent. McKenzie and Johnson, Insurance Law and Practice, Section 4, p. 12 (West 1996).

Obviously, there are exceptions to this general rule. Louisiana allows, as do other jurisdictions, reformation of contracts under certain circumstances. Under the doctrine of equitable reformation, a court may reform the written language of an insurance policy to conform with the original intentions of the parties. Couch on Insurance 3d § 26:12. Thus, insurance policies may be reformed after proof that it does not express the actual contract intended by the parties due to mutual error or mistake. Kolmaister v. Connecticut General Life Ins. Co., 370 So. 2d 630, 632 (La. App. 4th Cir. 1979), writ denied, 373 So. 2d 531 (La. 1979); Farmers-Merchants Bank & Trust Co. v. Employers Nat'l Ins. Corp., 553 So. 2d 1088, 1089 (La. App. 3d Cir. 1989), writ denied, 559 So. 2d 141 (La. 1990); Leitz v. Wentzell, 461 So. 2d 473, 476 (La. App. 5th Cir. 1984), writ denied, 462 So. 2d 1267 ((La. 1985); Billiot v. Sentry Ins., 366 So. 2d 1017 (La. App. 1st Cir. 1978); writ denied, 368 So. 2d 125 (La. 1979); Stacy v. Petty, 362 So. 2d 810 (La. App. 3d Cir. 1978); Green v. SHRM Catering, Inc., 710 F. Supp. 174 (W.D. La. 1987). Reformation, however, is warranted only to embody the parties' mutual intent; otherwise, the courts would, in effect, be rewriting the contract. Couch on Insurance 3d § 26:12. A mistake is not mutual if both parties do not labor under the same erroneous conception regarding the terms and conditions of the policy. Couch on Insurance 3d § 27:4. Therefore, the court must examine the record to ascertain the true intention of the parties, and equitable reformation of any insurance policy by judicial fiat requires caution and restraint. Farmers-Merchants Bank & Trust Co., 553 So. 2d at 1090.

A party seeking reformation in Louisiana bears the burden of proving, by clear and convincing evidence, that a mutual mistake has been made. Motors Ins. Co. v. Bud's Boat Rental, Inc., 917 F. 2d 199, 203 (5th Cir. 1990)(citing Many v. Hartford Accid. & Indem. Co., 505 So. 2d 929 (La. App. 2d Cir. 1987)); Farmers-Merchants Bank & Trust Co. v. St. Katherine Ins. Co., 96-1138 p. 6, (La. App. 3d Cir. 4/30/97), 693 So. 2d 876, cert. denied, 703 So. 2d 25 (La. 1997); Staten v. Security Indus. Ins. Co., 414 So. 2d 1328, 1332 (La. App. 2d Cir. 1982); Rougeau v. State Farm Mutual Auto Ins. Co., 262 So. 2d 803, 806 (La. App. Cir. 1972). To justify reformation of the policy to afford primary coverage, there must be proof that the insurer shared the insured's intent with regard to the coverage or that a mutual mistake occurred. See Motors Ins. Co., 917 F. 2d at 203-204. Determination of intent is a question of fact. Id.

Although unilateral mistake alone is not a sufficient basis for reformation, if the mistake was induced by the conduct of another party, reformation may be justified. Couch on Insurance 3d § 27:10. Thus, reformation is also a remedy when the agent who issues the policy acts in a negligent, mistaken, or fraudulent manner. Kolmaister, 370 So. 2d at 632 (citing Herbert v. Breaux, 285 So. 2d 829 (La. App. 1st Cir. 1973)); Farmers-Merchants Bank & Trust Co. v. St. Katherine Ins. Co., 96-1138 p. 6 (La. App. 3d Cir. 4/30/97), 693 So. 2d 876. If an agent has knowledge of the true intentions of the policy holder as to the coverage sought, the insurer is bound by its agent's knowledge, and the policy thus issued will be reformed to the insured's original intention. Bischoff v. Old Southern Life Ins. Co., 624 So. 2d 979, 980 (La. App. 3d Cir. 1993), writ denied 631 So. 2d 1162 (La. 1994); Dowden v. Commonwealth Life Ins. Co., 407 So. 2d 1355, 1357 (La. App. 3d Cir. 1981). See also Motors Ins. Co., 917 F. 2d at 203 (insurance policies can be reformed if they fail to reflect the mutual intentions of the parties due to a unilateral mistake made by the insurer or his agent in drafting the agreement, citing Staten, 414 So. 2d at 1333).

In Maggio v. State Farm Mutual Automobile Insurance Co., 123 So. 2d 901, 904, 905 (La. App. 1st Cir. 1960), the First Circuit reformed an insurance policy to comply with the intentions of the insured where those intentions were known by the insurer's agent. The court found that the insurer was bound by the knowledge of the true intention of the parties that the insurance policy was issued for the protection of an additional insured. See also Hebert v. Breaux, 285 So. 2d at 831-832 (court found insurer was bound by the knowledge of its agent as to the true intention of the parties to the policy and that the policy should be reformed to conform therewith); Urania Lumber Co. v. Ins. Co. Of North America, 177 So. 2d 640, 643 (La. App. 3d Cir. 1965) (court rejected insurer's argument that mistake was unilateral because insurer's local agent made an erroneous assumption that the coverage issued was the same as that requested by the insurer; therefore, considering the agent's erroneous assumption, the mistake was mutual).

In Kolmaister, 370 So. 2d at 632, plaintiff sued for a declaratory judgment, seeking a ruling that he be allowed to recover from defendant-insurer all sums to which he was entitled under the major medical feature of the group insurance policy. Defendant also sued the alleged agent of the insurer. The jury awarded a verdict in favor of the insurer, and the trial court dismissed plaintiff's case against the agent on a motion for a directed verdict. Plaintiff appealed both judgments.

Plaintiff argued that the trier of fact erred in not allowing reformation of the contract. The appeal court affirmed the trial court's ruling because it found that reformation was not

warranted. An insurance policy may be reformed after proof that it does not express the actual contract intended by the parties due to mutual error or mistake. The court reasoned that the mistake in the case was only on the side of the appellant-plaintiff and that likewise any negligence was only on the part of the plaintiff and his employer or its employees. The court reasoned that the jury must have found that appellant had not shown that appellee failed to point out the changes at the regularly scheduled meeting held about the time of each policy renewal. The insurer's office manager testified that the medicare changes were incorporated into the standard oral presentation and written summary given to company policy holders. The court explained that the evidence showed that the insurer provided booklets to plaintiff's employer to reveal the reduction in benefits and that each booklet contained provisions dealing with Medicare and that the booklet was clear and complied with the law. Therefore, the court concluded that the actions of the insurer and the agent were not negligent, and the facts of the case did not require the reformation of the policy. Id. at 633.

On the other hand, reformation was allowed in Bischoff, 624 So. 2d at 980-81. In that case, plaintiffs sought to recover for medical expenses incurred for a period of time by certain family members. The trial court rendered judgment in favor of plaintiffs and ordered that the policies issued by defendant-insurer be reformed to provide 100% of coverage. Defendant appealed, arguing that the trial court erred in reforming the policies at issue in previous litigation and in reforming the policies to provide 100% of coverage. In an earlier suit, the plaintiffs had sued under the same policy, regarding the same issues, for medical expenses that occurred during a different time period. The appeal court affirmed the trial court's ruling, finding that it would not disturb the trial court's award because of the actions and misrepresentations of defendant's agent when he sold the policies to the plaintiffs. The court reiterated its opinion on the appeal of the first case and noted that plaintiffs testified that the agent told them that the two policies would cover 100% of all bills with any claim. The court noted that defendant did not submit any testimony in the second case to contradict plaintiffs' testimony as to the intended amount of coverage, and that defendant's agent was not present to rebut plaintiffs' allegations. Id. at 981.

Likewise, in Dowden v. Commonwealth Life Insurance Co., 407 So. 2d 1355, plaintiff brought an action against its insurer for benefits allegedly due under policies of cancer insurance issued by defendant. The trial judge awarded benefits, among other things, under the first policy but denied benefits under the second policy due to the "other policy" provision in the second policy. Plaintiffs appealed the judgment denying benefits, penalties, and attorney fees under the second policy. The court of appeals reversed the trial court's ruling with regard to the second policy. Id. at 1356-57. The court explained that the record overwhelmingly supported plaintiff's contention that coverage should be allowed under the second cancer insurance policy considering the actions and misrepresentations by defendant's agent to the insured assuring her that she was covered under both policies. Id. at 1358. The court noted that an insurer is bound by its agent's knowledge of the original intention of the insured when that intention differs from the actual coverage provided by the policy. It found that defendant's agent not only knew that plaintiff intended to fully insure plaintiff's family against medical costs arising out of cancer treatment, but he initially made the suggestion and continued to mislead the plaintiff into believing that the sum total of both policies provided complete coverage for plaintiff's family. Therefore, the court ruled that benefits under the second policy were due. Id.

D. Dual Representation

The fact that an intermediary is likely to be held to be the agent of the insured does not automatically preclude a finding that he also is the agent of the insurer. Under certain circumstances, such as collecting insurance premiums or delivering the policy, a broker may be the agent of the insurer. See Tiner, 291 So. 2d at 777 (La. 1974) (“A broker who procures insurance which is accepted and issued by an insurance company pursuant to application forms furnished to the broker by the company is considered the agent of such company in the issuance of the policy.”) See also Handbook on Insurance Coverage Disputes § 18.02 [c] and [d]. Further, a broker may be the agent of the insurer if he is affiliated with an insurer or has underwriting authority. Id. at § 18.02 [d]. Clearly if the intermediary’s actions are determined to be the cause in fact of why the correct insurance was not obtained, a critical issue in the case will be whether the intermediary was the agent of the insurer or a broker. This is because a broker’s mistake in procuring coverage for the insured is not chargeable to the insurer since a broker is ordinarily an independent contractor rather than an agent of the insurer. Couch on Insurance 3d § 27:21.

II. Intermediary's Liability for Improper Placement

An insurance agent or broker who undertakes to procure insurance for another owes an obligation to his client to use reasonable diligence in attempting to place the insurance requested and to notify the client promptly if he has failed to obtain the insurance as requested. Karam v. St. Paul Fire & Marine Ins. Co., 281 So.2d 728, 730 (La. 1973). The degree of skill, care and diligence owed to the insured is that of a reasonably prudent and competent insurance agent or broker acting under the same circumstances. Marshel Investments, Inc. v. Cohen, 634 P.2d 133, 141 (Kan. App. 1981).

The client may recover the loss he sustains as a result of the agent’s failure to procure the desired coverage if the actions of the agent warrant an assumption by the client that he was properly insured in the amount of the desired coverage. Many, 505 So. 2d at 932 (La. App. 2d Cir. 1987). The broker is answerable to the insured for any fault or negligence regarding the insured’s coverage. Foster v. American Deposit Ins Co., 435 So. 2d 571, 574 (La. App. 3rd Cir. 1983). The measure of damages applied by the court in Nahmias Realty, Inc. v. Cohen, 484 N.E.2d 617 (Ind. App. 4th Dist. 1985) was (a) the amount which would have been due under the policy the broker should have obtained, plus (b) any consequential damages resulting from the broker’s breach of its duty, less (c) the cost of unpaid premiums. Id. at 620-21.

In Louisiana in order to recover for loss arising out of the failure of an intermediary to obtain insurance coverage, the client must provide 1) an undertaking or agreement by the intermediary to procure the insurance; 2) a failure of the intermediary to use reasonable diligence in attempting to place the insurance and failure to notify the client promptly if he has failed to obtain insurance; and 3) the actions of the intermediary warranted an assumption by the insured that requested coverage had been obtained. Motors Ins. Co., 917 F.2d at 205.

_____ The duty of a broker is to obtain, not merely request, the coverage desired, and if it is found to be unavailable, the broker must notify the client. Haeuber v. Can-Do, Inc., II, 666 F.

2d 275, 280 (5th Cir. 1982). A broker is obligated to ascertain that his clients are in fact covered by the policies he has procured for them, and failure to do so may rise to liability Bell v. O'Leary, 577 F. Supp. 1361 (E.D. Mo. 1983), aff'd, 744 F.2d 1370 (8th Cir. 1984). For example, in Cambre v. Travelers Indem. Co., 404 So. 2d 511, 516 (La. App. 1st Cir. 1981), writ denied, 410 So. 2d 761 (La. 1982), the court held that the broker had the duty to explain to the insured the difference between an all risks policy, which is what the insured requested but was unavailable, and a named risk policy, which is what the broker procured.

The burden of proof, however, is on the plaintiff to show that the defendant agreed to procure the insurance coverage. Kieran, 271 So. 2d at 892. The client is considered responsible for adequately advising the agent of the coverage needed. Motors Ins. Co, 917 F.2d at 205.

III. Recourse of the Insurer Against the Intermediary

A. Insurer's Recourse Against its Agents

1. Actions Taken Without Authority

The insurer, although responsible for the actions of its agent, has recourse in certain circumstances against the agent. It is settled law in Louisiana and elsewhere that ““where an insurer is exposed to liability for policy claims because of action by its agent beyond the agent’s authority *or contrary to instructions*, the agent is accountable to the insurer for the latter’s loss.”” Toups v. Equitable Life Assurance, 657 So. 2d 142, 148 (La. App. 3rd Cir. 1995) (citing Richard v. American Federation of Unions Local 102, 378 So. 2d 564, 568 (La. App. 3rd Cir. 1979). The basis for this rule is that an insurance agent owes to his principal an obligation of fidelity that he will not proceed without authority, especially where his instructions have forbidden him to assume certain risks on behalf of the insurer. Consequently, if an agent issues a policy in violation of his actual authority causing loss to the insurer, the agent will be held accountable therefor. Annotation: Liability of Insurance Agent, For Exposure of Insurer to Liability, Because of Issuance of Policy Beyond Authority or Contrary to Instructions 35 A.L.R. 3d 907, 911 § 2.

For example, in Manufacturer’s Casualty Insurance Co. v. Martin-Lebreton Insurance Agency, 242 F.2d 951 (5th Cir.), cert. denied, 355 U.S. 870 (1957), the court concluded that an agent who had issued a performance bond in violation of explicit instructions not to issue the bond, could not escape liability to the surety by arguing the failure of the surety to immediately repudiate the bond. Id. at 954. Consequently, the court reversed the judgment in favor of the agent and remanded the case. In reaching this conclusion, the court noted that

[t]he law is well settled: that an agent owes to [the surety] the obligation of high fidelity; that he may not proceed without or beyond, his authority, particularly where he has been forbidden to act; and that, if so proceeding, his actions cause loss to the [surety], the agent is fully accountable to the [surety] therefor. Id. at 953.

The court in Equitable Surety Company v. Stemmons, 239 S.W. 1037 (Tex. App. 1922), reversed a judgment dismissing an action by a surety against its agent. It was alleged that

the agent signed a reinsurance bond in the name of the principal after altering the bond to substitute in place of the original obligee “subcontractors, workmen, mechanics, and furnishers of material, as their interest may appear.” Id. at 1038. The alteration was made without authority and the court held that the surety had stated a cause of action against the agent for damages. Id. at 1040.

In Michigan Mutual Liability Company v. Shuford & McKinnon, Inc., 292 F. Supp. 290 (S.D. Miss. 1968), a general agent for an insurer was held liable to the insurer for negligently writing a fire insurance policy which covered contents which were not located in the building described in the policy. The agent did not realize, although he inspected the premises, that the bulk of the insured property was located in a shed. The insurer did not insure sheds or property located therein. Thus, the agent was held liable for the \$16,680.90 loss sustained by the insurer as a consequence of his negligence in failing to use reasonable care and diligence in writing the policy. The amount awarded the insurer included attorneys’ fees and costs in defending the action brought by the insured, as well as the amount of the judgment awarded the insured. Id. at 294.

In Millers Casualty Insurance Company of Texas v. Cypress Insurance Agency, Inc., 273 So. 2d 602 (La. App. 1st Cir. 1973), an insurance agent issued a binder for coverage which violated the Experience Rating Plan Manual of the insurer. The insurer settled the claim and then brought this action against the agent. The court found that the agent had exceeded its authority in issuing the binder, and held the agent liable to the insurer for the amount the insurer was required to pay to settle the claim. Id. at 604-05.

In Richard v. American Federation of Unions Local 102, 378 So. 2d 564 (La. App. 3d Cir. 1979), a local union who contracted with Blue Cross of Louisiana to provide medical benefits to union members was held to be an agent of the insurer and liable to it for certifying a disabled member as eligible for coverage where the contract between Blue Cross and the union made it clear that only members who were actually working were eligible. Id. at 568.

On the other hand, the court in Continental Casualty Company v. River Ridge Insurance, Inc., 973 F.2d 437 (5th Cir. 1992), held that although the River Ridge agency had exceeded the monetary limits of its authority to bind CNA, the insurer was not entitled to recover against the agent because it failed to prove that the breach by the agent was the cause of CNA’s loss. The court found that CNA had failed to prove that it was not common practice for agents to exceed the monetary limits of their binding authority, or that CNA would not have continued to provide coverage for the building for the amount bound. Id. at 441.

2. Failure to Disclose or Assess Risk

Additionally, pursuant to well recognized principles of agency, “an insurance agent who fails to make a full disclosure of all matters concerning the risks and hazards of a prospective insurable interest, or to report the issuance of a policy as directed . . . , may incur liability to the insurer for exposing the insurer to liability for claims of loss under [the policy].” Annotation: Liability of Insurance Agent, For Exposure of Insurer to Liability, Because of Failure to Fully Disclose or Assess Risk or to Report Issuance of Policy 35 A.L.R. 3d 821, 823 § 2.

In an interesting opinion, the court in UsLife Credit Life Ins. Co. v. McAfee, 630 P.2d

450 (Wash App. 1981), cert. denied, 97 Wash. 2d 1004 (1982), held that an insurance agent who, upon learning of his wife's diagnosis of cancer, obtained seventeen policies of credit life insurance, did not owe a duty to disclose his wife's cancer where no information regarding her health was sought by the insurers. Nevertheless, as to the two policies obtained from insurers for whom McAfee was an agent, the court held McAfee owed a duty to disclose the information, whether requested or not. This duty the court explained arose out of the agent-principal relationship and not out of the insurer-insured relationship or the contract of insurance. Consequently, "Mr. McAfee as the agent owed the utmost degree of good faith to his principal and was thereby obligated to fully inform Unigard of the illness." Id. at 455. Thus, the court affirmed the trial court's rescission of the two policies issued by Mr. McAfee's principal. Id. at 456.

In Progressive Ins. Company v. Rivero, 509 N.W.2d 378 (Minn. 1993), the court affirmed a judgment in favor of the insurer against its agent in accordance with the indemnification provisions contained in the agency agreement where the agent and the insured submitted an application for automobile insurance which stated that the insured had been involved in no prior accidents when in fact the insured had come to the agent and explained that he had been in an accident earlier that day and needed coverage. In addition to the award for breach of contract, the court held that the insurer also was entitled to fees, costs and expenses as set forth in the indemnification agreement in which the agent agreed to indemnify the insurer for any fees due to the failure of the agent to process an application for insurance properly. Id. at 379-80.

In General Accident Ins. Co. v. David C. Smith & Associates, 584 N.Y.S.2d 900 (App. Div. 1992), an agent issued a binder for insurance coverage but failed to send a copy to the insurer as required by the agency agreement. Upon review of the insurance application, the insurer determined that there were too many risks and advised the agent to immediately replace the coverage. Although the insurer was later advised that the insurance had been replaced, the binder was never reclaimed. Fire damaged the insured property and the insurer became liable solely because of the insurance binder. This suit was brought by the insurer against the agent for indemnification and the court affirmed a lower court ruling that the agent's breach of the agency agreement was the sole and proximate cause of the insurer's loss and awarded judgment in its favor against the agent. Id. at 901.

In United States Liability Insurance Company v. Haidinger-Hayes, Inc., 83 Cal. Rptr. 418, 463 P.2d 770 (1970), a general corporate agent with authority to solicit and underwrite proposals of insurance, to determine the premium rate and to issue contracts of insurance, was held liable to the insurer for negligence in failing to adequately assess the loss ratio, i.e., the ratio of anticipated losses to anticipated premiums, in connection with the underwriting of a liability policy. The court found that the agent failed to consider the information available to it and should have known that the premium rate it developed would probably result in a substantial financial loss to the insurer. Thus, the agent had breached its duty to exercise reasonable care and to make a reasonable effort to produce a profit for the insurer. Id. at 773-

On the other hand, the court in Virginia Surety Company, Inc. v. Lee, 402 S.W. 2d 714 (Tenn. App. 1964), held that the negligence of an agent in issuing an oral binder covering two tractor-trailers to an insured in Arkansas, apparently out of his territory, and failing to comply with the terms of his agency contract by not reporting the oral binder until after the accident, was not the proximate cause of the insurer's damages and affirmed the judgment of the lower court in favor of the agent. Despite the negligence of the agent, the insurer failed to prove that the insured was a bad risk and that it would not have issued the policy. Id. at 718.

Similarly, the court in Granite State Ins. Co. v. E.H. Bacon, 586 S.W.2d 254 (Ark. App. 1979) refused to hold an agent liable to an insurer after a policy was reformed to provide \$55,000 in coverage, not the \$5,500 the agent erroneously typed in a letter to the insurer. The court found that the agent had authority to bind the insurer and that the insurer would have issued a policy for \$55,000 if that amount had been requested. Consequently, the only amount the agent was held liable for was the premium the insured would have paid had the correct amount of coverage been inserted. Id. at 256.

3. Failure to Cancel or Reduce Risk

Agents also have been held liable in situations where they fail promptly to carry out instructions from the insurer to cancel a policy or reduce its risks where the terms of the policy allow the insurer to cancel or reduce the risks. Annotation: Liability of Insurance Agent For Exposure of Insurer to Liability Because of Failure to Cancel or Reduce Risk 35 A.L.R. 3d 792, 797 §3. Although unclear whether the "agent" in question was really an agent of the insurer or a broker, in Anderson v. Fontenot, 163 So.2d 366 (La. App. 3d Cir. 1964), the agent's errors and omissions insurer was held liable along with the issuer of a family combination automobile policy where the agent failed to transmit to the insured an endorsement which restricted coverage to only described vehicles. Since the insurer could not prove that notice of the endorsement was given to the insured, the insurer was liable for the damages incurred by the insured, although the automobile in which the accident occurred was not listed in the policy. Id. at 370. On the other hand, the court in Nautilus Ins. Co. v. First National Ins. Co., Inc., 837 P.2d 409 (Mont. 1992) affirmed a directed verdict in favor of a broker who was sued by an insurer for failing to procure cancellation of a policy after the insured requested the cancellation. The court found that the broker who took some steps to effect the cancellation did not owe a duty to the insurer to follow through with the requested cancellation on behalf of the insurer. Id. at 412.

B. Insurer's Recourse Against Brokers

The broker generally owes a duty of care only to the insured. Nevertheless, insurers have successfully sued brokers for fraud and misrepresentation in the placement of coverage.

³ The court, however, reversed a judgment against the individual defendant who was the president and principal officer of the corporate agent, finding that he could not be held liable to the insurer for his negligent performance of his corporate duties. 463 P.2d at 775.

In a recent case, an excess insurer successfully recovered against an insurance agency which had misrepresented the terms of a primary policy. In Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Casualty Co., 126 F.3d 727 (5th Cir. 1997), the broker represented that the primary policy provided annualized coverage of \$500,000 for three years. In fact, however, the total amount of coverage provided by the primary policy was only \$500,000, rather than the \$1,500,000 the excess insurer was led to believe existed. The underlying suits were settled for approximately \$1,500,000. Consequently, if the primary policy had had annualized limits as the agency represented, the excess carrier would have suffered no losses. In affirming the judgment in favor of the excess insurer, the appellate court, quoting the district court, reasoned that “[c]ommon sense dictates that the excess carrier and its agent must know the material details of the underlying policy.” Id. at 742. The broker breached this duty by misrepresenting that the coverage was annualized and because the excess insurer would not have provided excess coverage if it had known the primary coverage was not annualized, the court affirmed the award in favor of the excess insurer. Id. at 743.

Similarly, the court in Midland Insurance Company v. Markel Service Inc., 548 F.2d 603 (5th Cir. 1977) upheld a judgment finding a broker liable to an excess insurer for misrepresenting the limits of primary coverage. The broker represented that the insured would obtain primary automobile coverage of 250/500/100. The lower limits of 100/300/50, however, were not raised and the broker failed to advise the excess insurer until a fatal accident involving one of the insured’s trucks occurred. The broker was held liable for the difference between the amount it represented would be covered by the primary policy and the amount actually covered. Id. at 607. The court rejected for lack of proof the excess insurer’s claim that it should be entitled to recover the entire amount it paid because it would have canceled the policy if it had learned that the primary limits had not been raised. Id. at 608.

IV. Summary

In summary, characterization of an insurance intermediary is critical to the insurer as it affects the insurer’s liability. Whether an intermediary is ultimately held to be an agent of the insurer whose acts are imputable to the insurer, or a broker for the insured, depends on the facts and circumstances of each case. Nevertheless, even if an agency relationship exists resulting in the liability of the insurer, an insurer has recourse against its agent for actions taken outside the scope of the agent’s authority.