THIRTEETH ANNUAL
SOUTHERN SURETY AND FIDELITY CLAIMS CONFERENCE
APRIL 4-5, 2019

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

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I. INTRODUCTION

In connection with the 1994 Southern Surety & Fidelity Claims Conference held in Atlanta, Georgia, Michael Trocke of Shumaker, Loop & Kendrick, LLP submitted a paper titled, "An Overview: The Insurance Broker. Whose Agent is He?" Mr. Trocke analyzed and discussed how an issue will occasionally arise concerning whether the person who sold an insurance policy is an agent for the insured or an agent for the insurer.[1] Agency is the fiduciary relationship that arises when one person (the "principal") manifests assent to another person (the "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act. RESTATEMENT 3D OF AGENCY §1.01.

The purpose of this paper is to expand and further discuss the circumstances under which an insurance broker may act as an agent for the insurer, as opposed to the insured, in not only the insurance arena, but also the surety arena. The issuance of a bond, whether a payment bond, performance bond, or other type of bond, involves numerous people throughout the process. The actions of these other participants in the bonding process – underwriters, agents and brokers – can impact the liability of the insurer and surety. This paper focuses on the relationship of the broker.

II. CHARACTERISTICS OF AN AGENCY RELATIONSHIP

Whether an agency relationship has been established pursuant to which a broker's actions and possible omissions will bind an insurer or surety depend on whether the broker is classified as an agent for the insured or an agent for the insurer.

A. "Broker" or "Agent"

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 proposed insured's requests or needs.[2] Insurance brokers are generally considered the agents of the insured, and not of the insurer.[3] An insurance broker is one who acts as a middleman between the insured an insurer, who solicits insurance from the public under no employment from any specific company, and who, upon

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[1] For further discussion of the consequences of an agent's actions, *see* Maura Z. Pelleteri & Diane L. Matthews, *Whose Agent Is It Anyway? The Consequences of an Agent's Actions* (unpublished paper submitted at the 10th Annual Southern Surety and Fidelity Claims Conference, April 15-16, 1999).

[2] *See, e.g., Essex Ins. Co. v. Zota*, 985 So. 2d 1036, 1046-47 (Fla. 2008).

[3] *Id*.

obtaining an order, places the order with a company selected by the insured, or in the absence of such selection, with a company selected by the broker.[4]

However, insurance brokers may be deemed agents in fact of the insurer or surety when the facts of a case exhibit an agency relationship between them. Although many states provide statutory definitions for "insurance agent" and "insurance broker," the definitions are frequently not determinative of whether an agency relationship was created. Confusion has resulted due to people in the insurance and surety industries using the terms "agent," "broker," and "independent contractor" interchangeably. However, courts have addressed and discussed how "insurance broker" and "insurance agent" are not synonymous terms.[5]

A principal's right to control another person – broker, agent or independent contractor - has been described by numerous courts as the "touch stone" of an agency relationship.[6] For example, if an independent contractor has been delegated a fiduciary obligation to the contracting party, then the parties have established an agency relationship.

An analysis on the issue of whether an insurance broker was an agent for the insurer or the insured was set forth in *Essex Ins. Co. v. Zota,* where the Florida Supreme Court held:

> [A]n insurance broker acts as an agent of the insured, not the insurer, where the broker is employed by the insured to procure insurance. The presumption can be overcome by the existence of special circumstances [*i.e.*, indicia of agency] indicating that the broker's arrangement with the insurer was not a standard relationship.

985 So. 2d at 1046. (Internal citations and emphasis omitted).

Courts have developed tests to discern whether a particular situation involves a "broker" or an "agent." The presumption that an insurance broker is acting as an agent of the insured, and not the insurer, can be overcome by the existence of special circumstances indicating that the broker's arrangement with the insurer was not a standard relationship.[7]

As an example, Illinois courts apply a four part test: (1) who put the party (broker or agent) in motion; (2) who controls the party's actions; (3) who pays the party; and (4) whose interest does the party represent.[8] Even when courts use the terms "agent" and

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[4] *Boulton Agency, Inc. v. Phoenix Worldwide Industries, Inc.*, 698 So. 2d 1248, 1250 (Fla. 3d DCA 1997).
[5] *See supra* note 2.
[6] *See e.g., Jack Eckerd Corp. v. Dart Group Corp.,* 621 F. Supp. 725, 732 (D.C. Del. 1985).
[7] COUCH ON INSURANCE 3D § 45:5.
[8] *See e.g., American Ins. Corp. 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).

"broker" interchangeably, the distinction between an agent and a broker is important because customarily, the acts of an agent are imputable to the insurer, and the acts of the broker are imputable to the insured.[9]

In addition, The Restatement 3d of Agency provides as follows:

> *c. Elements of Agency.* As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person's consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process.

RESTATEMENT 3D OF AGENCY §1.01, comment c.

B. Actual and Apparent Authority of an Insurance or Surety Broker

Agency arises from actual authority, whether express or implied, and from apparent authority.[10] Numerous courts have held that possession of various indicia of agency may create an appearance of authority that is binding on the insurer or surety.[11]

Indicia of apparent authority to bind an insurer to provide coverage include, but are not limited to, the presence of an insurer's sign in an agent's office indicating the existence of a general agency, the insurer's stationery, documents containing the signature of an agent's employee as an agent for the insurer, the acceptance of premiums by the agent on behalf of the insurer, and printed application forms bearing the insurer's name.[12] Courts may find that a broker is, in various phases of conducting

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[9] COUCH ON INSURANCE 3D § 45:1.

[10] As between an insurance company and an agent, the limit of the agent's authority to bind the insurance company is governed by the agent's actual authority; as between the insurance company and third persons, the limit of an agent's authority to bind the principal is governed by his or her apparent authority. *Ohio Cas. Ins. Co. v. W.N. McMurry Const. Co.*, 230 P. 3d 312 (Wyo. 2010).

[11] *See supra* notes 6-8; *see also*, *e.g., First Nat. Life Ins. Co. v. Sunshine-Jr. Food Stores, Inc.*, 960 F. 2d 1546, 1552 (11th Cir. 1992); *Cohen v. Utica First Ins. Co.*, 436 F. Supp. 2d 517, 531 (E.D. N.Y. 2006).

[12] COUCH ON INSURANCE 3D § 48:14.

business, acting as an agent and serving the insurer's interests instead.[13] Thus, an insurer or surety must be cautious to avoid cloaking agents or brokers with apparent agency.[14]

The insurer, in accordance with the principles of agency law, is bound by the actions of his or her agent or broker within the scope of his or her authority.[15] An insurance company or surety can be found liable for the frauds, deceits, misrepresentations, and wrongful acts of its agents and brokers when the acts are committed within the general or apparent scope of the employment.[16]

III. Examples of Resulting Liability

As discussed above, an insurance agent is employed by a particular insurance company to effect insurance for that company, and a broker solicits insurance from the public generally and places the insurance with companies he or she chooses. Although the question of whether a broker is the agent for the insured or the insurer is normally one of fact for determination by a jury, the determination may include an analysis of numerous questions. A few examples of cases involving liability for actions of agents and brokers are summarized below.

In *State Bank of St. Anthony Village v. Earl Welch Excavating Co.*, 289 Minn. 266, 184 N.W.2d 5 (1971), the bonding company was liable for an insurance agency's breach of contract. State Bank of St. Anthony Village sued United Bonding Insurance Company to recover money loaned by the bank to Earl Welch Excavating Company. John-Dee, Inc. was acting as the bonding company's agent when it purportedly induced the bank to grant a loan to Earl Welch Excavating Company, and then entered into an agreement to give the bank priority in the disbursement of funds due the contractor under the contractor's contract with the prime contractor. John-Dee, Inc. subsequently breached that agreement due to its inability to grant the bank priority in the disbursement of funds. The court held that given the express authority that United Bonding had conferred on John-Dee, Inc. to write bonds, the bank was correct in reasonably assuming John-Dee, Inc. was acting on behalf of the bonding company in inducing the loan to the contractor. The bonding company had argued that John-Dee, Inc. had no express authority to enter into the agreement with the bank or to induce the creation of the loan, and John-Dee, Inc. had never previously engaged in such conduct on behalf of the bonding company. However, the court held there was sufficient evidence to support a finding of agency, and to affirm the judgment against the bonding company. The bank had claimed damages when it was unable to collect on its loan.

If a bond is presented and delivered by a person clothed with authority to issue or deliver such instruments, and to make representations as to authenticity, then the surety will be held liable for its failure to guard its forms and documents against theft or forgery. *See, e.g., In re National Sur. Co.*, 162 Misc. 344, 294 N.Y.S. 433 (Sup 1937) (bond

[13] COUCH ON INSURANCE 3D §§ 45:4, 45:5, 48:14.
[14] *See, e.g., Almerico v. RLI Ins. Co.*, 716 So. 2d 774 (Fla. 1998).
[15] COUCH ON INSURANCE 3D § 48:1.
[16] COUCH ON INSURANCE 3D § 56:6.

forged by agent of surety company). A different result may occur when a claim is based on a forged bond delivered by a stranger to the surety company. *Id.*

Courts have analyzed whether a purported representation by an agent constitutes actionable fraud where no fiduciary relationship exists between the insured and agent. In *Sherwin-Williams Co. v. St. Paul-Mercury Indem. Co.*, 97 Ga. App. 298, 102 S.E. 2d 919 (1958), the surety was not found liability under facts where an agent of the insurer provided advice to subcontractor Sherwin-Williams. The agent allegedly advised Sherwin-Williams, with whom no fiduciary relationship existed, that it was protected from loss under provisions of a surety bond. However, the court found the agent was expressing an opinion of law, and such would not constitute actionable fraud. In addition, in *Fields v. Fire & Cas. Ins. Co. of Conn.*, 101 Ga. App. 561, 114 S.E. 2d 540 (1960), the court found the agent's representation that loss was covered under fire policy when, in fact, no such coverage existed was an opinion of law, and not actionable fraud.

In addition, insurers have successfully sued brokers for fraud and misrepresentation in the placement of coverage, in addition to other claims. For example, in *Midland Ins. Co. v. Markel Service, Inc.*, 548 F. 2d 603 (5th Cir. 1977), the excess liability insurer brought an action against the insurance broker for misrepresentation and concealment of certain information that caused the excess liability insurer to incur a loss from failure to cancel a policy. The excess liability insurer had communicated its intention to cancel the policy if the limits in the insured's primary policy were not increased. The court upheld a judgment finding the broker liable to the excess insurer for misrepresenting the limits of the primary coverage. Damages were calculated as the difference between the amounts the broker represented would be covered by the primary policy and the amount actually covered.

An additional consideration, outside of the traditional insured-insurer scenario, is the availability of relief by others against a broker on a third party beneficiary theory. *See, e.g., Hamer v. Kahn*, 404 So. 2d 847 (Fla 4th DCA 1981) (holding the plaintiff may be able to state a cause of action against an insurance agent who failed to perform his binding agreement with the general contractor to procure a million dollar insurance policy that would have inured to the benefit of the plaintiff).

IV. CONCLUSION

In summary, the determination of what role a broker was acting under at a particular point in time will depend on the facts of each case. Most states follow the general rule that a broker acts as the agent of the insured. Whether a broker is ultimately held to be an agent of the insurer or surety whose acts are imputable to the insurer or surety depends on the facts and circumstances of each case. If a court determines an agency relationship was created between the broker and insurer or surety, then that insurer or surety may have recourse against the broker for any actions taken by the broker outside the scope of the broker's authority.