A Case-Specific Inquiry

Whose Agent Are You Anyway?

By Ron Clark
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While some general rules have developed and provide a useful starting point, it is important to remember that they are subject to many exceptions and statutory modifications.

In the world of commercial insurance, most insureds obtain insurance through an intermediary rather than directly from an insurance company. Depending upon the terminology of the jurisdiction and the line of business involved, an intermediary may be a broker, an agent, or a "producer." In such cases, when a dispute over coverage arises, a key issue may be determining whom the intermediary represented at a particular point in the process. Similarly, it is common to find both an insurer and an intermediary as defendants in coverage litigation. When that occurs, a court must determine whether an intermediary acted on behalf of an insurer, its insured, or both to decide (1) which, if either, defendant may be liable to the insured; and (2) whether either defendant may be required to indemnify the other.

When an intermediary is a "captive" agent, representing only one insurer, this inquiry is relatively straightforward. A captive agent generally will be deemed to be an agent of an insurer, and a captive agent's acts or knowledge will be attributed to the insurer, not to its insured.

The situation is more complicated when, as is usually the case with commercial insurance, an intermediary represents multiple insurers. Such intermediaries, who are often referred to as "independent insurance agents" or "brokers," have relationships with several insurers and can choose among them to find a policy that best fits a client's needs.

Imprecise terminology can cause even more complications. That is, while an "agent" generally refers to an intermediary who represents the insurer, and a "broker" generally refers to an intermediary who represents the insured, courts have sometimes used these terms interchangeably. In light of this imprecision, a recent trend has been to refer to insurance intermediaries more generically as "producers"—a term that does not carry with it any preconceived notions about whom an intermediary might represent.

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Independent agents may be deemed to represent an insurer, its insured, or both parties, depending on the circumstances. Unfortunately, there is no bright-line rule to determine for which party an independent agent acts with respect to particular acts or omissions. This inquiry is case specific. However, some general rules have developed, and these rules provide a useful starting point for the inquiry. It is important to remember, though, that these rules are subject to many exceptions, and in some cases, they have been modified by statute. Ultimately, resolving this issue depends upon the facts of each case and the state of the law in the specific jurisdiction.

When Is an Independent Agent an Insured's Agent?

The general rule is that an independent agent approached by a prospective client for purposes of obtaining insurance will initially be considered to be the agent of this insured rather the insurer. In practice, this rule often is limited to the period of time before the issuance of the policy—meaning during the process of applying for and procuring a policy.

Application Process

Generally, an independent agent will be deemed to represent an insured during the application process. 2 Allan D. Windt, *Insurance Claims and Disputes* §6:44A (6th ed. 2013). This rule is aptly illustrated in the Georgia Court of Appeals' decision in *Pope v. Mercury Indemnity Co. of Georgia*, 677 S.E.2d 693 (Ga. Ct. App. 2009). In that case, the insurer cancelled the insureds' policy after discovering that their swimming pool had a diving board. The insurer advised the insureds' independent agent that the policy would be reinstated if the insureds forwarded a picture showing that the diving board had been removed. The insureds did so. They then spoke with the agent about how coverage would be affected if they had the diving board reinstalled. According to the insureds, the agent informed them that a loss arising from the use of the diving board would not be covered, but the rest of the policy would not be affected. *Id.* at 696.

The insureds subsequently submitted a claim for damage caused by a tornado. Pictures taken by the claims adjuster revealed that the insureds had reinstalled the diving board. The insurer denied coverage for the loss, citing misrepresentations during the application process. In upholding the denial, the court rejected the insureds' argument that the independent agent was acting on behalf of the insurer at the time of his alleged statements regarding the effect of reinstalling the diving board. *Id.* at 698. The court acknowledged the general rule that an independent agent is generally considered to an agent of the insured rather than the insurer, adding that the insureds failed to present any evidence to rebut the agent's denial that he was acting as the insurer's agent or to show apparent agency. Accordingly, the agent's assertions regarding the diving board did not bind the insurer, and the court upheld the denial of coverage for the insureds' loss. *Id.* at 698–99.

But even this general rule is subject to exceptions. For instance, while an independent agent generally will be deemed to be acting on behalf of a potential insured during the application process, this rule may not apply if the agent makes an error on the application. *See* B. H. Glenn, *Annotation, Insured's Responsibility for False Answers Inserted by Insurer's Agent in Application Following Correct Answers by Insured, or Incorrect Answers Suggested by Agent*, 26 A.L.R. 3d 6 (1969); *State Farm Mut. Auto. Ins. Co. v. Bridges*, 36 So. 3d 1142, 1147 (La. Ct. App. 2010) (if agent enters incorrect answers to questions in application either by mistake or as a result of fraud or negligence, misrepresentations will not be attributed to the insured).

Procurement of Insurance

Most courts have recognized that an independent agent acts on behalf of an insured when procuring insurance. 3 Steven Plitt, Daniel Maldonado, Joshua D. Rogers, & Jordan R. Plitt, *Couch on Insurance* §45:5 (3d ed. 2013). This rule has been applied even when an agent has authority to bind coverage on behalf of an insurer. *See Secura Ins. Co. v. Saunders*, 227 F.3d 1077, 1081 (8th Cir. 2000) (applying Missouri law).

In many states, however, this general rule has been modified by statute. For example, in Oregon "any person who solicits or procures an application for insurance as an agent of the insurer shall in all matters relating to the application for insurance and the policy issued in consequence of the application be regarded as the agent of the insurer issuing the policy and not the agent of the insured." Or. Rev. Stat. §744.078. Statutes in other states are similar. *See, e.g.,* N.C. Gen. Stat. §58-197, Ohio Rev. Code Ann. §3929.27, W. Va. Code §33-12-22. *But see* 44 C.F.R. §61.5(e) (when making representations regarding scope of coverage under a standard flood insurance policy, agent will be deemed to be acting on behalf of the insured). At least one court has ruled that such statutes do not necessarily apply to allocate liability among insureds, independent agents, and insurers. *See Pete's Satire, Inc. v. Comm'l Union Ins. Co.*, 698 P.2d 1388, 1391 (Colo. Ct. App. 1985).

There are two exceptions to the rule that an independent agent represents a potential insured during the procurement process.

There are two exceptions to the rule that an independent agent represents a potential insured during the procurement process. First, when an applicant directs an agent to obtain insurance from a specific insurance company a court will hold that the independent agent represented the insurer. *See, e.g., Mark Andy, Inc. v. Hartford Fire Ins. Co.*, 229 F.3d 710, 717 (8th Cir. 2000) (applying Missouri law). Another exception may arise when an independent agent uses an online underwriting system to obtain coverage. While insurers traditionally perform underwriting tasks, many insurers now make automated underwriting programs available to independent agents. An agent enters an applicant's information into the program, and the program then determines whether an insurer will issue a policy. In this situation, one question that may then arise is whether an independent agent acts for the insured

in submitting an application, or does the agent act for the insurer in determining whether to issue a policy.

When Is an Independent Agent the Agent of the Insurer?

Once a policy is issued, the independent agent that obtained insurance for a client generally will be deemed to be the agent of the insurer. Thus, at this point, the agent acts on behalf of the insurer when delivering the policy, collecting premiums, and processing claims.

Authority comes in many forms. An independent agent ordinarily has an "agency agreement" with each insurer that the independent agent represents. That agreement may spell out the specific activities that an independent agent is authorized to perform on an insurer's behalf.

In determining whether an independent agent has acted as an insurer's agent, courts have looked to fundamental principles of agency law, considering whether the agent has the authority to act on behalf of the insurer in a way that would make the insurer responsible for the agent's acts or omissions. *See, e.g., North Star Mutual Insurance Co. v. Zurich Insurance Co.*, 269 F. Supp. 2d 1140 (D. Minn. 2003).

Authority comes in many forms. An independent agent ordinarily has an "agency agreement" with each insurer that the independent agent represents. That agreement may spell out the specific activities that an independent agent is authorized to perform on an insurer's behalf. In addition, an insurer can expressly authorize an agent to perform specific acts in connection with the issuance of an individual policy, such as when an underwriter advises an agent that a particular risk will be covered or that an insurer will provide a specific amount of coverage.

While the agency agreement is one way by which an insurer may authorize an independent agent to act on its behalf, it is not the only way, and the existence of an agency agreement does not necessarily determine the existence or the scope of an agency relationship between an insurer and an independent agent. *See Leblanc v. 1555 Poydras Corp.*, 104 So. 3d 688, 693 (La. Ct. App. 2012). An independent agent also may have implied authority to act on behalf of an insurer. Such authority may be predicated upon industry custom and practice, a course of dealing between an insurer and an agent, or the fact that an agent necessarily must have the authority to exercise the powers expressly granted to it by an insurer. *Lozada v. Farrall & Blackwell Agency, Inc.*, 323 S.W.3d 278, 292 (Tex. Ct. App. 2010); *Markel Am. Ins. Co. v. Madonna*, 448 F. Supp. 2d 234, 240 (D. Mass. 2006).

Express and implied authority are two types of actual authority conferred upon an independent agent by an insurer. An agent also may have apparent authority to act on an insurer's behalf, which "arises through acts of participation, knowledge, or acquiescence by the principal that clothe the agent with the indicia of apparent authority." *Lozada*, 323 S.W.3d at 292. As between an insurer and its agent, the limit of the agent's authority to bind the insurer depends upon the agent's *actual* authority. Conversely, as between an insurer and its insured, the limit of an independent agent's authority to bind the insurer depends upon the agent's *apparent* authority. *Ohio Cas. Ins. Co. v. W. N. McMurry Constr. Co.*, 230 P.3d 312, 326 (Wyo. 2010). Although some courts have readily found that an independent agent has apparent authority to act on behalf of an insurer, most courts have ruled otherwise. Windt, *supra,* at §6:44B.

These principles are illustrated in *North Star Mutual Insurance Co. v. Zurich Insurance Co.*, 269 F. Supp. 2d 1140 (D. Minn. 2003). The issue before the *North Star* court was whether an independent wholesale broker had actual or apparent authority to bind coverage on behalf of the insurer. Because the broker agreement between the broker and insurer expressly stated that the broker did not have authority to bind coverage, the court concluded that the broker did not have actual authority to do so. 269 F. Supp. 2d at 1151.

The *North Star* court then turned to the *Restatement (Second) of Agency* to determine whether the broker had apparent authority to bind coverage for the insurer. Section 27 of the *Restatement* sets forth the requirements for apparent agency: (1) the principal must hold out the agent as having authority or knowingly permit the agent to act on its behalf; (2) third parties must have actual knowledge that the principal has done so; and (3) the agent's authority must be established by looking at the conduct of the principal, not the agent. The court rejected the assertion that the broker's actual authority to obtain applications and solicit business on behalf of the insurer vested it with apparent authority to bind coverage. *Id.* at 1152. In reaching this conclusion, the court pointed out that an independent agent may be an insurer's agent for some purposes but not others. *Id.*

In certain circumstances, an insurer may be bound by an independent agent's acts even when the agent lacks actual or apparent authority. If an insurer fails to repudiate an unauthorized act promptly, it may be deemed to have ratified that act. *Nat'l Insp. & Repair, Inc. v. Valley Forge Life Ins. Co.*, 274 Kan. 825, 56 P.3d 807, 823 (Kan. 2002). For example, an insurer cannot issue a policy knowing that the agent did not have authority to bind coverage and then accept premiums while waiting to see if the insured makes a claim under that policy.

Can an Independent Agent Be a Dual Agent?

Some courts have determined whether an independent agent can be a dual agent. The short answer to this question is yes—an independent agent can represent both the insured and the insurer. *See Archer Daniels Midland Co. v. Hartford Fire Ins. Co.*, 243 F.3d 369, 372 (7th Cir. 2001) (applying Illinois law). For example, as discussed above,

an agent may represent an applicant during the procurement process and then, once a policy is selected and issued, switch hats and represent the insurer when delivering the policy, issuing certificates of insurance, and collecting premiums. *See, e.g., Gen. Acc. Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc.*, 716 A.2d 751, 756–57 (R.I. 1998) (independent agent was acting as the insured's agent with respect to procurement of policy and as insurer's agent when it issued a certificate of insurance); *Transamerica Interway, Inc. v. Comm'l Union Assur. Co. of S. Africa, Ltd.*, 97 F.R.D. 419, 421 (S.D.N.Y. 1983) (broker may act for insured while applying for and processing policy and then for insurer when delivering policy and collecting and remitting premiums).

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At least one court has ruled that a mistake made by a dual agent can be attributed to both parties. *Am. Mfrs. Mut. Ins. Co. v. E A Tech. Servs., Inc.*, 608 S.E.2d 275, 277 (Ga. 2004). However, there is also authority for the proposition that "[t]he misconduct of a party acting as a dual agent by consent cannot be imputed to either of its principals who is not actually at fault." 4 *Couch on Insurance*, *supra*, at §56:5.

How Do You Determine Whom an Independent Agent Represents?

Determining which party an independent insurance agent represents depends upon the facts of the case. In addition to the general rules cited above, the Illinois courts have developed a useful four-part inquiry to help resolve this issue. In *Farmers Automobile Insurance Association v. Gitelson*, 801 N.E.2d 1064 (Ill. Ct. App. 2003), the court of appeals applied this test to determine whether alleged misrepresentations by an independent agent regarding the residency requirements for UIM coverage would be imputed to the insurer. After their daughter's death in an automobile accident, the insureds submitted a claim for UIM benefits. The insurer denied the claim on the ground that the daughter was not a "resident" of her parents' household at the time of the accident. The insureds had been told by the independent agent who obtained the policy that the whole family would be covered, and they argued that the insurer was bound by this representation regardless of whether the terms of the policy actually provided coverage.

Although the *Gitelson* court's decision was based upon the particular facts before it, the court's analysis provides an excellent illustration of the issues to be resolved in determining whether an independent agent will be deemed to be acting on behalf of the insured or the insurer. The court began its analysis by explaining that "[c]onduct, not title, determines the relationship between the independent insurance agent, the insured and the insurer." *Id.* at 1068. The court then considered the following four factors: (1) who first set the agent in motion, (2) who controlled the agent's action, (3) who paid the agent, and (4) whose interest the agent was protecting. *Id.*

Applying these factors to the case before it, the *Gitelson* court concluded that the independent agent was not acting as the insurer's agent at the time that it bound coverage. *Id.* First, the insureds were the ones who "set the agent in motion." They had a long-standing relationship with the agent and used the agent to fulfill all of their insurance needs. *Id.* at 1068.

Second, although the insurer had granted the agent the authority to bind coverage, that authority was limited to binding coverage provided by the policy and did not extend to providing coverage greater than that afforded under the policy. *Id.* at 1068. The court also characterized the agent's right to bind coverage as "minimal" in light of the fact that the agent had the authority to bind coverage for as many as 20 different insurers. *Id.* at 1068–69.

Third, although the court assumed that the insurer paid commissions to the agent, it did not deem this fact sufficient to warrant a finding that the agent was acting on the insurer's behalf. *Id.* at 1069. The court again noted that the agent represented several different insurers and presumably received commissions from them. *Id.*

Fourth, the court concluded that the agent was acting on behalf of the insureds at the time of the representations regarding the scope of coverage provided by the policy. The court cited the long-standing relationship between the insureds and the agent, adding that the agent's payment of premiums and signing of applications on the insureds' behalf demonstrated the agent's desire to foster a business relationship with the insureds. *Id.*

Without a controlling statute that dictates the resolution of this issue, the four-factor test applied in *Gitelson* provides a useful framework for analyzing the issues relevant to determining whom an independent agent represents.

When Does the Right to Indemnity Arise?

The rules and the exceptions discussed above address the types of situations in which an insurer and an independent agent may be liable to an insured. Determining whom an independent agent represents also is relevant to indemnity.

If an agent acts on behalf of an insured, the insurer is not liable for the agent's actions. Indemnity should not come into play because, presumably, the insurer has not paid any obligation owed to the insured as a result of the agent's conduct. If, however, the agent acts on behalf of an insurer, the insurer may be liable to its insured and may, in turn, seek indemnity from the agent. An insurer's right to indemnity may be expressly set forth in an agency agreement or may be based upon the common law. To recover, an insurer typically must show not only that an agent breached a duty owed to an insured but also that the breach caused damage to the insurer. Thus, for example, if an insurer claims an agent improperly bound coverage, it cannot recover without showing that it would not otherwise have insured the risk. *Continental Cas. Co. v. River Ridge Ins., Inc.*, 973 F.2d 437, 439 (5th Cir. 1992) (applying Louisiana law).

In one notable case, the court imposed liability on an independent agent who had assisted the insured with preparing an application containing numerous material misrepresentations. Even though the insurer settled its claim against the insured

based on the misrepresentations, it sought additional damages from the agent. Not only did the court allow the insurer's claim against the agent to proceed, it ruled that the insurer could recover punitive damages from the agent. *See St. Paul Surplus Lines Ins. Co. v. Feingold & Feingold Ins. Agency, Inc.*, 693 N.E.2d 669 (Mass. 1998). The court rejected the agent's assertion that liability should not be predicated on misrepresentations in an application signed only by the insured, stating:

> We see nothing inappropriate in holding a broker liable to an insurer which issued a policy based on material misinformation that the broker, negligently or with reckless disregard for the truth, placed on an insurance application, where the broker knew, or reasonably should have known, that disclosure of the truth would have led the insurer to reject the application.

Id. at 672.

Often, an insurer will seek indemnity by either filing a cross-claim against an independent agent who is also named as a defendant in a lawsuit filed by an insured or by filing a third-party claim against the agent if the insured has not named the agent as a defendant. However, an insurer need not wait for litigation to ensue. In many cases, an insurer may elect to pay disputed claims to maintain a positive relationship with its insured and then seek indemnity from the agent. It is also commonly the case that an agency agreement will dictate that any indemnity between the parties to the agency agreement be resolved by binding arbitration, rather than litigation.

An independent agent also may be entitled to indemnity from an insurer. For example, if an insurer has wrongly denied coverage, through no fault of the agent, the agent may recover its litigation expenses from the insurer. *See Gen. Amer. Life Ins. Co. v. McCraw*, 963 So. 2d 1111, 1114 (Miss. 2007) (citing *Restatement (Third) of Agency* §8.14 (2006)). As with the case of an insurer's right to indemnity, an independent agent's right to be indemnified may arise from his or her agency agreement with the insurer or from common law principles.

The Bottom Line

Because an independent agent can represent an insured, an insurer, or both, it is important for the agent to be aware, at each step during the process of obtaining, issuing, and maintaining a policy, which party the agent represents. One way to do this is to develop a checklist for each task to be performed and evaluate whether, when performing that task, the agent acts on behalf of an insurer, the insured, or both parties.

If an agent's acts or omissions give rise to litigation against an insurer and an independent agent, defense counsel should perform a similar evaluation and determine on whose behalf the agent worked during each step. In making this determination, counsel should first consider whether any statutes or regulations apply to dictate the result. And, of course, counsel should examine the agency agreement closely.

Counsel should determine whether an agent's conduct falls within the scope of the general rules cited above or whether one or more of the many exceptions to those rules might apply. More often than not, a jury ultimately will decide, based upon the particular facts before it. In such a case, the jury instructions regarding determination of agency take on heightened importance.

Unfortunately, there are very few bright-line rules in this area of insurance law, and the answer to questions in any particular case heavily depend upon the facts of that case. The starting point, however, is to be alert to the issues and aware of some of the general rules. FD