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Liability of Insurance Agents and Brokers In Texas

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TABLE OF CONTENTS

I. INTRODUCTION1

II. The Agency relationship3

 A. General Terminology3

 1. Agents3

 2. Brokers4

 3. Producers.....6

 B. Historical Terminology--Texas.....6

 1. Local Recording Agent6

 2. Soliciting Agents.....7

 3. Managing General Agents8

 C. Modern Terminology--Texas8

 1. Agent.....8

 2. Acts of an Agent12

 3. “Who is Excluded From” Definition13

 4. Broker14

III. Agents of the insured15

 A. *Overland Sales v. American Indemnity Co.*15

 B. *Continental Cas Co. v. Bock*.....16

 C. *Foundation Reserve Ins. Co. v. Wesson*.....17

 D. Dual Agency18

 E. Appointment of Agent19

IV. Duties Owed to the Insured.....19

 A. General 19

 B. Duty to Procure20

 C. Duty to Keep Insured Informed23

 D. Duty in Selection of Company.....24

 E. Duty to Explain Terms and Conditions of Coverage.....25

 F. Duty to Review Policy28

 G. Duty to Extend Insurance.....28

 H. Duty to Investigate Solvency29

 I. Expiration Dates and Nonrenewals.....31

 J. Duty to Acquaint Oneself with Insured’s Business33

 K. Duty to Investigate.....33

I. INTRODUCTION

Insurance professionals play an important role for businesses and consumers today. The purchase of insurance is no longer as simple as it once was. There are many choices available to businesses and consumers. Many of these choices involve complicated issues which are beyond the knowledge of the ordinary lay person or ordinary business person. One court has described the duty owed by the agent to the insured as follows:

A local agent . . . owes his clients the greatest possible duty. He is the one insured looks to and relies upon. Most people do not know what company they are insured with. Insured looks to the agent he deals with to get the coverage he seeks with a sound company who can and will properly and promptly pay claims when they are due. It is his duty to keep his clients fully informed so that they can remain safely insured at all times.¹

Because of this, the state of Texas, like with other professionals, has engaged in greater regulation of insurance agents. This regulation is pervasive. Agents are required to have a license for the particular product they sell. For example, an agent selling property and casualty insurance must have a property and casualty license.² A person selling life, accident and

¹ *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440, 442 (Tex.Civ.App.—Beaumont 1977).

² Section 4051.051 of the Texas Insurance Code provides that:

§ 4051.051. LICENSE REQUIRED. A person is required to hold a general property and casualty license if the person acts as:

- (1) an agent who writes property and casualty insurance for an insurer authorized to engage in the business of property and casualty insurance in this state;

health insurance likewise must have a license specific to that area of practice.³ The regulation

- (2) a subagent of a person who holds a license as an agent under this chapter who solicits and binds insurance risks for that agent; or

- (3) an agent who writes any other kind of insurance as required by the commissioner for the protection of the insurance consumers of this state.

Added by Acts 2003, 78th Leg., ch. 1274, § 7, eff. April 1, 2005.

³ Section 4054.051 of the Texas Insurance Code provides that:

§ 4054.051. LICENSE REQUIRED. A person is required to hold a general life, accident, and health license if the person acts

as:

- (1) an agent who represents a health maintenance organization;

- (2) an industrial life insurance agent for an insurer that writes only weekly premium life insurance on a debit basis under Chapter 1151;

- (3) an agent who writes life, accident, and health insurance for a life insurance company;

- (4) an agent who writes only accident and health insurance;

- (5) an agent who writes fixed or variable annuity contracts or variable life contracts;

- (6) an agent who writes for a stipulated premium company:

- (A) only life insurance in excess of \$15,000 on any one life;

- (B) only accident and health insurance; or

- (C) both kinds of insurance described by Paragraphs (A) and (B);

extends beyond just those actually selling those products to the public. For example, a customer service representative for a property casualty agent is now required to be licensed by the state of Texas.⁴

This pervasive regulation not only extends to licensing, but extends to continuing

education⁵ as well as discipline.⁶ Because of the increase in complexity in an insurance program and because of the stringent regulation, the liability of those selling insurance in Texas has increased. Insurance agents currently rank fourth among professionals in the number of lawsuits being filed against them. They are preceded only by physicians, attorneys, and accountants. Statistically, one out of every seven insurance agents will report an errors and omissions claim in this country during the coming year. Clearly the complexities of the issues involved in the coverage are in part responsible for the increase in the number of claims being filed. However, that alone is not responsible. Over the last 20 years, litigants have increasingly become more sophisticated. In those cases where a judgment is taken against an insured and no coverage is available,

(7) an agent who writes life, accident, and health insurance for any type of authorized life insurance company that is domiciled in this state, including a legal reserve life insurance company, and who represents the company:

(A) in a foreign country or territory; and

(B) on a United States military installation or with United States military personnel;

(8) an agent who writes life, accident, and health insurance for a fraternal benefit society except as provided by Section 885.352; or

(9) an agent who writes any other kind of insurance as required by the commissioner for the protection of the insurance consumers of this state.

Added by Acts 2003, 78th Leg., ch. 1274, § 7, eff. April 1, 2005.

⁴ Section 4051.151 of the Texas Insurance Code provides that:

§ 4051.151. LICENSE REQUIRED. A person is required to hold an insurance service representative license if the person is a salaried employee who performs assigned duties only in an office of a property and casualty agent, including explaining insurance coverage, describing an insurance product, quoting insurance premium rates, and issuing insurance binders only with the express approval of the property and casualty agent who supervises the license holder.

Added by Acts 2003, 78th Leg., ch. 1274, § 7, eff. April 1, 2005.

⁵ Section 4004.051 of the Texas Insurance Code provides that:

§ 4004.051. GENERAL REQUIREMENTS.

(a) Except as provided by Section 4004.052 or other law, each individual who holds a license issued by the department shall complete continuing education as provided by this chapter.

(b) All required continuing education hours must be completed before the expiration date of the individual's license.

(c) At least 50 percent of all required continuing education hours must be completed in a classroom setting or a classroom equivalent setting approved by the department.

(d) The department may accept continuing education hours completed in other professions or in association with professional designations in an insurance-related field.

Added by Acts 2003, 78th Leg., ch. 1274, § 7, eff. April 1, 2005.

⁶ See Section 4.005.001, et seq. of the Texas Insurance Code.

plaintiffs and insureds are no longer simply willing to walk away. Where no coverage exists, further scrutiny is being given, and that scrutiny is being focused on the agent who purchased the coverage. Several questions are being asked:

- Does the coverage match what was requested in the application?
- Did the agent properly advise the insured of all the risks inherent to his or her business or his or her personal situation?
- If there was a transfer in coverage, did the agent advise the insured of all the changes in coverage that would result from the transfer in coverage?

These are only a few of the questions that are being asked in an effort to create coverage in the form of an errors and omissions claim against the agent when none exists under the literal terms of the policy sold by the agent. This is certainly not to say that an affirmative answer to these questions would result in liability to the agent or broker.

The liability of agents and brokers is not limited only to their clients. In addition, agents and brokers may have liability to insurers for malfeasance and their duties owed to the insurers. In addition, they may have liabilities to third persons who have relied upon their actions.

Other factors are responsible for the increase in claims against insurance professionals, particularly in the state of Texas. As stated earlier, insurance professionals rank fourth among professionals in the number of claims being filed behind physicians, attorneys and accountants. Tort reform in Texas has dramatically reduced the claims being filed against physicians.⁷

Attorneys have historically been well represented in the Legislature and in the courts and have attempted to limit the number of claims being filed against them.⁸

It is against this background that the duties owed by insurance agency and brokers to their clients and to insurers will be examined. In addition, the defenses available to insurance agents and brokers will be examined along with the types of damages recoverable.

It is against this background that the duties owed by an insurance agent and broker to their clients, to insurers, and to third parties will be examined.

II. THE AGENCY RELATIONSHIP

A. General Terminology

The terminology used to describe the various insurance professionals in the insurance transaction is vague, confusing and varies from state to state and from jurisdiction to jurisdiction. While it is impossible to address every interpretation or definition that has been given, the following will address the general terminology as used by most commentators followed by the precise definitions provided by Texas courts and the Texas legislature. It is important when reviewing the case law or commentaries on the duties and liabilities of insurance agents and brokers to keep in mind the definition intended by the commentator or court, to the particular insurance professional involved. It is only by this method that a true understanding of the duties and liabilities can be achieved.

1. Agents

The most common and pervasive term used to describe insurance professionals is the term “agent.” However, depending upon the context,

⁷ H.B. 4, 78th Legislature, Regular Session 2003.

⁸ While this has been true historically, it also seems to be changing. The number of errors and omission claims being filed against attorneys in Texas has also seen somewhat of an upturn.

this term has a very broad and varied meaning. Depending on the source, the insurance agent may be the agent of the insured or the agent of the insurer. For example, New York statutes define an “insurance agent” as:

Any authorized or acknowledged agent of an insurer or fraternal benefit society and any subagent or other representative of such an agent, who acts as such in the solicitation, negotiation for, or procurement or making of, an insurance or annuity contract, other than as a licensed insurance broker . . .⁹

Therefore, by definition, under New York law, the insurance agent is acting on behalf of the insurer in the selling of insurance.

By contrast, under Oklahoma law, an “insurance agent” is one who acts under an employment by the insured to obtain insurance on behalf of the insured.¹⁰ Under Oklahoma law, the agent and the insured is the principle under traditional notions of agency law.

Other courts have defined an “insurance agent” to have a “fixed and permanent relationship to [one or more] insurance companies” to which it owes certain duties and responsibilities.¹¹

2. Brokers

Unfortunately, the definition of a “broker” is equally as unsettled as that of an agent. New York law defines a “broker” as:

[A]ny person, firm, association, or corporation who or which for any compensation, commission or other thing of value acts or aids in any manner in soliciting, negotiating or

procuring the making of any insurance or annuity contract, or in placing risks or taking out insurance on behalf of an insured other than himself or itself, or on behalf of any licensed insurance broker.”

However, New York law goes on to provide that an insurance broker may act as an agent and, likewise, an agent may act as a broker.

Any insurer which delivers in this state to any insurance broker or any insured represented by such broker a contract of insurance pursuant to the application or request of such broker, acting for insured other than himself, shall be deemed to have authorized such broker to have received on its behalf payment of any premium which is due on such contract at the time of its issuance or delivery or payment of any installment of such premium or any additional premium which becomes due or payable thereafter on such contract, provided such payment is received by such broker within 90 days after the due date of such premium or installment thereof, or after the date of delivery of a statement by the insurer of such additional premium.¹²

Others define a “broker” as a person who negotiates between the insurer and the insured. He generally does not maintain a permanent arrangement with any company or insured.¹³

In several states, distinction is made between insurance agents and insurance brokers, the former representing a single insurer, and the

⁹ New York Insurance Law, § 21.01.

¹⁰ INSERT CITE

¹¹ *Lazzara v. Howard E. Esser Inc.*, 802 F.2d 260, 264 (7th Cir. 1986).

¹² New York Insurance Law, §21.21.

¹³ *Galihier v. Spates*, 129 Ill.App.2d 204, 206-207, 262 N.E.2d 626, 628 (1970). *See also Campione v. Wilson*, 422 Mass. 185 (1996) (“broker is the agent of the insured in negotiation for a policy . . .”)

later selling policies of different insurers. As one court explained:

A broker procures insurance and acts as a middle man between the insured and the insurer, and solicits insurance business from the public under no employment from any special company, but having secured an order, places the insurance with the company selected by the insured or, in the absence of any selection by him, with the company selected by such broker. . .¹⁴

An insurance agent, on the other hand, has been held by some to have a fixed and permanent relationship to an insurance company that the agent represents and has certain duties and allegiances to that company.¹⁵ Some Texas courts have used the term “insurance broker.”¹⁶ In the past, the supreme court noted that the broker/agent distinction was not found in the Texas Insurance Code in its version at that time or in past versions.¹⁷ This is no longer true. For example, with respect to reinsurance intermediaries, the Insurance Code defines a broker to mean:

A person, other than an officer or employee of an insurer, who solicits, negotiates, or places reinsurance business on behalf of an insurer and who may not exercise the authority to

bind reinsurance on behalf of that insurer.¹⁸

With respect to risks retention groups and purchasing groups, the definition of “agent” includes the terms “agent” and “broker” as those are used in the Liability Risk Retention Act of 1986.¹⁹ Even the subchapter of the Insurance Code dealing with agent licensing now uses the term “broker.”²⁰

Historically, in Texas courts have used the term “broker.” They have used the term to describe an individual who represents the insured and owes his duties and loyalties to the insured. For example, in *Foundation Reserve Ins. Co. v. Wesson*,²¹ the court held that:

The general rule is that while an insurance broker acts for the insured in making the application and procuring the policy, he acts for the insurer in delivering the policy and in collecting and remitting the premium.²²

In *Continental Casualty Co. v. Bock*,²³ the court held that:

We are of the opinion that appellee’s witness, Bullock, was acting as the

¹⁴ *Lazzara v. Howard A. Esser, Inc.*, 802 F.2d 260, 264 (7th Cir. 1986).

¹⁵ *May v. United Servs. Asso. of Am.*, 844 S.W.2d 666 (Tex. 1992).

¹⁶ *Foundation Reserve Ins. Co. v. Wesson*, 447 S.W.2d 436, 438 (Tex.Civ.App.—Dallas 1969, writ ref’d); *Zurich General Acc. & Liab. Ins. Co. v. Fort Worth Laundry Co.*, 58 S.W.2d 1058, 1059 (Tex.Civ.App.—Fort Worth 1933, no writ).

¹⁷ *May v. United Servs. Assoc. of Am.*, 844 S.W.2d 666, 669 (Tex. 1992).

¹⁸ Tex. Ins. Code Ann. § 4152.001(2).

¹⁹ Tex. Ins. Code Ann. § 22.01.002.

²⁰ Section 401.051(b) (regardless of whether the act is done at the request of or by the employment of an insurer, broker or other person . . .). Other uses of the term “broker” are found in Tex. Ins. Code Ann. §1806.104; §1806.156; §2209.151; §33.002(a)(1); §33.003(a); §39.003(b)(1); §4004.002(d)(1); §4005.153(a)(2); §4102.054(a)(10); §4152.001(9); §462.053(1); §544.001(1); §4101.006(c)(1)(C); §541.002(2); §651.001(3); §1501.303(c)(1); §941.702(a); §981.152(b)(1); §463.054(1).

²¹ 447 S.W.2d 436 (Tex.Civ.App.—Dallas 1969).

²² *Id.* at 438.

²³ 340 S.W.2d 527 (Tex.Civ.App.—Houston 1960).

agent for Bock, as an insurance broker and not as appellant’s agent.²⁴

In *Overland Sales Co. v. American Indemnity Co.*,²⁵ the court held that:

It is well settled, and as both sides agree, that the acts of one procuring insurance as the agent of the insurer are imputable to it, while those of one who either acts as the agent of the assurer or in the capacity of a broker are not; the broker being further held to represent the assured for the purpose of procuring the policy and the assurer only in order to receive and transmit the premium.²⁶

Therefore, in the historical context, when the reference is made to the broker, it will refer to the person who is representing the interest of the insured.

In many situations, the distinction between an “agent” and a “broker” is outcome determinative. Depending upon the precise definition applied, the agent or broker may or may not owe a duty to the insured or the insurer. Likewise, additional duties such as the duty of good faith and fair dealing may attach depending upon who the principle is for the agent.²⁷

3. Producers

Another term with somewhat generic meaning is the term “producers.” More often, it is used in connection with policies issued through the Lloyds or the London market. However, the term also has been used in connection with policies issued through U. S. carriers. In general, the term “producer” represents an insurance professional who, on behalf of the insured, approaches one or more

brokers or markets in an attempt to obtain coverage on behalf of the insured. Absent statutory provisions to the contrary, the producer is solely the agent of the insured and typically has absolutely no authority to bind the insurer. As a result, the producer’s duties generally run solely to the insured though he may have limited duties to the insurer, such as forwarding premiums.

B. Historical Terminology--Texas

Historically, Texas classifies its insurance professionals based upon the level of authority they possess from the insurer. In reviewing many of the cases addressing the duties and authorities of insurance professionals, these terms will be used. However, these terms were eliminated from the Insurance Code in 2001. Therefore, they are no longer relevant in ascertaining the insurance professional’s authorities and duties. However, they will be discussed for historical perspective in order to properly understand the treatment by Texas courts in the past.

1. Local Recording Agent

The term “local recording agent” was typically applied to an agent other than those engaged in life, health or accident insurance, who engaged in the soliciting and writing of insurance. Such agent was typically authorized by insurance companies, including fidelity and surety carriers, to perform numerous functions. This includes soliciting business, underwriting and delivery of policies, issuance of binders, as well as collection of premiums.²⁸

²⁸ See Tex. Ins. Code Ann. Art. 21.14, Sec. 2 (a)(1):

“Local Recording Agent” means a person or firm engaged in soliciting and writing insurance, being authorized by an insurance company or insurance carrier, including fidelity and surety companies, to solicit business and to write, sign, execute, and deliver policies of insurance, and to bind companies on insurance risks, and who maintain an office and a record of

²⁴ *Id.* at 531.

²⁵ 256 S.W. 980 (Tex.Civ.App.—Galveston 1923).

²⁶ *Id.* at 982.

²⁷ *Cavillini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 262 (5th Cir. 1995) (applying Texas law).

In addition, authorizing insurance policies on behalf of an insurance company and possessing the authority to bind the insurer on risks, a “local recording agent” had other responsibilities and duties. A local recording agent is not prohibited from charging a reasonable fee for services rendered to a client regarding delivery of documents, emails and phone calls, and printing/copying expenses as well as charge interest on any purchase of insurance by a client through the agent. However, the local recording agent must obtain the client’s written consent before submitting such charges.²⁹ One case held that a local recording agent owed the client the duty to keep the client fully informed “so they can remain safely insured at all times.”³⁰ The insurer was

such business and the transactions which are involved, who collect premiums on such business and otherwise perform the customary duties of a local recording agent representing an insurance carrier in its relation with the public; or a person or firm engaged in soliciting and writing insurance, being authorized by an insurance company or insurance carrier, including fidelity and surety companies, to solicit business, and to forward applications for insurance to the home office of the insurance companies and insurance carriers, where the insurance company’s and insurance carrier’s general plan of operation in this State provides rules for the appointment and compensation of agents for insurance and for the execution of policies of insurance by the home officer of the insurance company or insurance carrier, or by a supervisory office of such insurance company or insurance carrier, and who maintain an office and a record of such business and the transactions which are involved, and who, collect premiums on such business and otherwise qualify and perform the customary duties of a local recording agent representing an insurance carrier in its relation with the public.

²⁹ Tex. Ins. Code Ann. Art. 21.35A(c).

³⁰ *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440, 442 (Tex.Civ.App.—Beaumont 1977, no writ).

generally liable for any misconduct by the local recording agent that was within the actual apparent scope of the local recording agent’s authority.³¹ While a local recording agent might be liable for any affirmative misrepresentations regarding the coverage of the policy, there was no duty on the part of the local recording agent to disclose policy coverage limitations.³² The local recording agent had the authority to speak and act for the company and transact all the insurance business of the company which was authorized to transact under the state’s permit or license.³³

2. Soliciting Agents

Soliciting agents, on the other hand, had a more narrow authority from the insurers. Typically, they would be engaged in the business of soliciting insurance on behalf of a recording agent. Typically, they would be operating under the license of the Local Recording Agent.³⁴

³¹ *Celtic Life Ins. Co. v. Coates*, 885 S.W.2d 96, 98 (Tex. 1994).

³² *Moore v. WhitneyVakyIns. Agency*, 966 S.W.2d 690, 692 (Tex.App.—San Antonio 1998, no pet.).

³³ *Lexington Ins. Co. v. Buckingham Gate Ltd, Inc.*, 993 S.W.2d 185 (Tex.App.—Corpus Christi 1999, pet. denied).

³⁴ See Tex.Ins.Code Ann. Art. 21.14, Sec. 2 (a):

“Solicitor” means a person who is a bona fide solicitor and engaged in the business of soliciting and binding insurance risks on behalf of a local recording agent, and who offices with such local recording agent, and who does not sign and execute policies of insurance, and who does not maintain company records of such transactions. This shall not be construed to make a solicitor of a local recording agent, who places business of a class which the rules of the company or carrier require to be placed on application or to be written in a supervisory office. A solicitor may bind insurance risks only with the express prior approval of the local

The soliciting agent, on the other hand, did not have the binding authority that the local agent possessed. The soliciting agent was defined, in pertinent part, as “a person who is a bona fide solicitor and engaged in the business of soliciting and binding insurance risks on behalf of a local recording agent . . .”³⁵ The soliciting agent had no power or authority to construct the contract on behalf of or bind the insurer or to waive any term of a policy of the insurer.³⁶ A soliciting agent possesses no actual authority to bind the insurer and they only bind insurance risks with the express prior approval of the local recording agent for whom the soliciting agent worked.³⁷ The soliciting agent may office with a local recording agent, but did not sign or execute policies or insurance and did not maintain company records of such transactions.³⁸ A soliciting agent had no duty to explain to the applicant the terms of the application or of insurance, or the coverages included in the application of insurance, or to prevent the applicant from being self-deceived.³⁹

3. Managing General Agents

The third type of agent historically mentioned in the Insurance Code is the “managing general agent.” The managing general agent is defined, in pertinent part, as

recording agent for whom the solicitor works.

³⁵ Tex. Ins. Code Ann. Art. 21.14, §2(a)(2).

³⁶ *Lexington Ins. Co. v. Buckingham Gate Ltd., Inc.*, 993 S.W.2d 185, 198-99 (Tex.App.—Corpus Christi 1999, pet. denied); *International Security Life Ins. Co. v. Finck*, 496 S.W.2d 544 (Tex. 1973).

³⁷ *Farmer Enterprises, Inc. v. Gulf States Ins.*, 940 S.W.2d 103, 111 (Tex.App.—Dallas 1996, no writ); Tex. Ins. Code Ann. Art. 21.14 § 2(2).

³⁸ *Id.*

³⁹ *Riggs v. Sentry Ins. Co.*, 821 S.W.2d 701, 705 (Tex.App.—Houston [14th Dist.] 1991, writ denied); *McNeill v. McDavid Ins. Agency*, 594 S.W.2d 198, 203 (Tex.Civ.App.—Fort Worth 1980, no writ).

“any person, firm or corporation who has supervisory responsibility for the local agency and field operations of an insurance company or carrier within the state or who is authorized by an insurance company or carrier to accept or process on its behalf insurance policies produced and sold by other agents.”⁴⁰ A managing general agent may, for an insurance company or carrier, receive and pass on daily reports or monthly accounts, receive and bear responsibility for agency balances, handle loss adjustment or point or direct local recording agents or other agents in the state.⁴¹ At least one court has held that a managing general agent to have a “special relationship” with the insured, and, therefore, owe the insured the duty of good faith and fair dealing.⁴² However, such holding was later vacated on appeal.

C. Modern Terminology--Texas

1. Agent

Under the current Insurance Code, an agent is defined to mean:

"Agent" means a person who is an authorized agent of an insurer or health maintenance organization, a subagent, and any other person who performs the acts of an agent, whether through an oral, written, electronic, or other form of communication, by soliciting, negotiating, procuring, or collecting a premium on an insurance or annuity contract, or who represents or purports to represent a health maintenance organization, including a health maintenance organization offering only a single health care

⁴⁰ Tex. Ins. Code Ann. Art. 21.07-3 § 2(a); *Dalco General Agency, Inc. v. Cotton*, 457 S.W.2d 348, 349 (Tex.Civ.App.—Waco 1970).

⁴¹ Tex. Ins. Code. Ann. Art. 21.07-3 § 2(a).

⁴² *William H. Magee & Co. v. Schick*, 792 S.W.2d 513, 521 (Tex.App.—Eastland 1990) (judgment vacated and cause dismissed); *Schick v. William H. Magee & Co.*, 843 S.W.2d 473 (Tex. 1992).

service plan, in soliciting, negotiating, procuring, or effectuating membership in the health maintenance organization.⁴³

There are several key elements to this definition. The first key element in a definition of “agent” is the term “person.” The term “person” is defined by this subchapter to mean:

[A]n individual, partnership, corporation, or depository institution.⁴⁴

The term “individual” is defined by the subchapter to mean:

[A] natural person. The term includes a resident or a nonresident of this state.⁴⁵

The term “partnership” is defined by the subchapter to mean:

[A]n association of two or more persons organized under the partnership laws or limited liability partnership laws of this state or another state. The term includes a general partnership, limited partnership, limited liability partnership, and limited liability limited partnership.⁴⁶

The term “corporation” likewise is defined by the subchapter. It is defined to mean:

[A] legal entity that is organized under the business corporation laws or limited liability company laws of this state or another state and that has as one of its purposes the authority to act as an agent.⁴⁷

⁴³ Tex. Ins. Code Ann. Sec. 4001.003(1).

⁴⁴ Tex. Ins. Code Ann. Sec. 4001.003(8).

⁴⁵ Tex. Ins. Code Ann. Sec. 4001.003(5).

⁴⁶ Tex. Ins. Code Ann. Sec. 4001.003(7).

⁴⁷ Tex. Ins. Code Ann. Sec. 4001.003(3).

Finally, the term “depository institution” is defined by this subchapter to mean:

"Depository institution" means:

(A) a bank or savings association as defined by 12 U.S.C. Section 1813, as amended;

(B) a foreign bank that maintains a branch, agency, or commercial lending company in the United States;

(C) a federal or state credit union as defined by 12 U.S.C. Section 1752, as amended;

(D) a bank branch; or

(E) a bank subsidiary, as defined by state or federal law.⁴⁸

The second element of the term “agent” is the types of insurance professional who may constitute “agent.” The current definition of “agent” includes three different types of insurance professionals.

a. Authorized Agent of Insurer or Health Maintenance Organization

The first category of insurance professionals who constitute “an agent” is the authorized agent of an insurer⁴⁹ or health

⁴⁸ Tex. Ins. Code Ann. 4001.003(4).

⁴⁹ Tex. Ins. Code Ann. 4001.003(6) defines an “insurer” as follows:

"Insurer" means an insurance company or insurance carrier regulated by the department. The term includes:

(A) a stock life, health, or accident insurance company;

(B) a mutual life, health, or accident insurance company;

(C) a stock fire or casualty insurance company;

maintenance organization. Implicit in this definition is the formal appointment by an insurer. Specifically, the current code provides that:

A person who obtains a license under this title may not engage in business as an agent unless the person has been appointed to act as an agent by an insurer designated by the provisions of

- (D) a mutual fire or casualty insurance company;
- (E) a Mexican casualty insurance company;
- (F) a Lloyd's plan;
- (G) a reciprocal or interinsurance exchange;
- (H) a fraternal benefit society;
- (I) a stipulated premium company;
- (J) a nonprofit or for-profit legal services corporation;
- (K) a statewide mutual assessment company;
- (L) a local mutual aid association;
- (M) a local mutual burial association;
- (N) an association exempt under Section 887.102;
- (O) a nonprofit hospital, medical, or dental service corporation, including a company subject to Chapter 842;
- (P) a health maintenance organization;
- (Q) a county mutual insurance company; and
- (R) a farm mutual insurance company.

this code and authorized to engage in business in this state.⁵⁰

The appointment contemplated by the Insurance Code involves several aspects. First, the appointment must be by an insurer authorized to engage in business in this state.⁵¹ This does not necessarily mean that the insurer must be domiciled or have a certificate from the commissioner to transact insurance business in the state of Texas. While not licensed or regulated to do business in this state, surplus lines insurers are authorized insurers provided all the necessary formalities for selling surplus lines insurance in Texas have been met.⁵²

Nor is an agent limited to appointment by one insurer. Many agents in Texas have multiple appointments by competing insurers in order to provide their clients with a broader market from which to purchase insurance.⁵³ When an agent is appointed by an insurer, the appointment shall be reflected with the Department by the filing of a form prescribed by

⁵⁰ Tex. Ins. Code Ann. Sec. 4001.201.

⁵¹ Tex. Ins. Code Ann. Sec. 4001.201.

⁵² Tex. Ins. Code Ann. Sec. 101.001.

⁵³ Tex. Ins. Code Ann. Sec. 4001.202:

APPOINTMENT BY MULTIPLE INSURERS.

(a) Except as specifically prohibited by this code, an agent may represent and act as an agent for more than one insurer.

(b) Not later than the 30th day after the effective date of the appointment, the agent and the insurer involved shall notify the department, on a form prescribed by the department, of any additional appointment authorizing the agent to act as agent for one or more additional insurers. The notice must be accompanied by a nonrefundable fee in an amount set by the department for each additional appointment for which the insurer applies.

the Department and the accompaniment of a nonrefundable fee.⁵⁴

b. Subagent

The second group of insurance professionals falling within the definition of “agent” as that term is defined by the Insurance Code are “subagents.” A subagent means:

"Subagent" means a person engaging in activities described under Subdivision (1) who acts for or on behalf of an agent, whether through an oral, written, electronic, or other form of communication, by soliciting, negotiating, or procuring an insurance or annuity contract or health maintenance organization membership, or collecting premiums or charges on an insurance or annuity contract or health maintenance organization membership, without regard to whether the subagent is designated by the agent as a subagent or by any other term. A subagent is an agent for all purposes of this title, and a reference to an agent in this title, Chapter 21, or a provision listed in Section 4001.009 includes a subagent without regard to whether a subagent is specifically mentioned.⁵⁵

Therefore, under the language of the Insurance Code, a “subagent” is essentially one who engages in the activities of an agent, but does it pursuant to the appointment of an insurer of another agent. The appointment of subagents is also regulated by the Insurance Code. If a general life, accident, and health agent or a general property and casualty agent appointed by an insurer authorized to engage in the business of insurance in Texas must notify the department on a form adopted by the department if that agent elects to appoint a subagent, of

course the notice must be accompanied by the prescribed fee.⁵⁶

A subagent is not entitled to escape any regulatory scrutiny or responsibility by the fact that an agent sits between them and the insurer. Section. 4001.009 provides a list of statutes whereby the reference to an agent in those statutes and laws is deemed to include a subagent without regarding to whether a subagent is specifically mentioned.⁵⁷

⁵⁶ Tex. Ins. Code Ann. Sec. 4001.205(a).

⁵⁷ Tex. Ins. Code Ann. Sec. 4001.009(a):

§ 4001.009. REFERENCES TO OTHER LAW. (a) As referenced in Section 4001.003(9), a reference to an agent in the following laws includes a subagent without regard to whether a subagent is specifically mentioned:

- (1) Chapters 281, 523, 541-556, 558, 559, 702, 703, 705, 821, 823-825, 827, 828, 844, 1108, 1205-1209, 1211-1213, 1352, 1353, 1357, 1358, 1360-1363, 1369, 1453-1455, 1503, and 4102;
- (2) Subchapter C, Chapter 521;
- (3) Subchapter F, Chapter 542;
- (4) Subchapters G and I, Chapter 544;
- (5) Subchapter A, Chapter 557;
- (6) Subchapter B, Chapter 805;
- (7) Subchapter D, Chapter 1103;
- (8) Subchapters B, C, D, and E, Chapter 1204, excluding Sections 1204.153 and 1204.154;
- (9) Subchapter B, Chapter 1366;
- (10) Subchapters B, C, and D, Chapter 1367, excluding Section 1367.053(c);
- (11) Subchapters A, C, D, E, F, H, and I, Chapter 1451

⁵⁴ Tex. Ins. Code Ann. Sec. 4001.202.

⁵⁵ Tex. Ins. Code Ann. Sec. 4001.003(9).

c. Any Other Person

The third category of insurance professionals encompassed in the definition of “agent” is “any other person” who performs the acts of an “agent.” This would include any person who has not received a formal appointment as an agent or a subagent if they are performing specific functions. These specific functions will be examined below:

2. Acts of an Agent

The current version of the Insurance Code specifically defines those acts which will constitute the acts of an agent. There are four. They are:

- (1) Soliciting
- (2) Negotiating
- (3) Procuring
- (4) Collecting a premium on an insurance or annuity contract.⁵⁸

a. Soliciting

The term “soliciting” is not defined by the Insurance Code. However, cases have discussed the term in the context of the historical term “soliciting agent.” As defined by the Code and by the case law, a “soliciting agent” was limited to receiving and forwarding applications for

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- (12) Subchapter B, Chapter 1452;
 - (13) Sections 551.004, 982.001, 982.002, 982.004, 982. 052, 982.102, 982.103, 982.104, 982.106, 982.107, 982.108, 982.110, 982.111, and 982.112;
 - (14) Subchapters D, E, and F, Chapter 982;
 - (15) Section 1101.003(a); and
 - (16) Chapter 107, Occupations Code.

⁵⁸ See Tex. Ins. Code Ann. Sec. 4001.003(1).

insurance.⁵⁹ The dictionary definition of “solicit” is to make petition; to approach with a request or plea; to strongly urge or to entice or lure.⁶⁰ Therefore, utilized in historical context, the term “soliciting” is used in the definition of agent should mean to seek application as well as to receive and forward application to insurers.

b. Negotiating

The term “negotiating” is likewise not defined by the Insurance Code. In a non-insurance context, courts have held that a party “negotiates” if the party conducts communications or conferences with a view towards reaching a settlement or agreement.⁶¹ The dictionary defines “negotiate” as “to confer with another so as to arrive at the settlement of some matter.”⁶² Therefore, in this context, the term “negotiating” would mean communication with a view toward reaching an insurance agreement.

c. Procuring

The term “procuring” is not defined by the Insurance Code. The verb “procure” is defined by the dictionary as “to get possession of;. . . to obtain by particular care and effort.”⁶³ Therefore, as used in the context of the definition of an agent, procuring would mean to obtain an insurance policy.

d. Collecting a premium

The Insurance Code likewise does not define what it means to collect a premium on an insurance or annuity contract. For the most part, the term is self-explanatory. The verb “collect”

⁵⁹ *TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754 (5th Cir. 2002); Tex. Ins. Code Ann. Art. 21.04.

⁶⁰ Webster’s Ninth New Collegiate Dictionary.

⁶¹ *Green v. Unauthorized Practice of Law Committee*, 883 S.W.2d 293 (Tex.App.—Dallas 1994).

⁶² Webster’s Ninth New Collegiate Dictionary.

⁶³ Webster’s Ninth New Collegiate Dictionary.

is defined by the dictionary to mean “to claim as due and receive payment for.”⁶⁴ Therefore, the term “collecting a premium” would mean to obviously receive payment of a premium from an insured.

With respect to a health maintenance organization, the four operative terms are slightly modified. An agent with respect to a health maintenance organization is one who represents or purports to represent a health maintenance organization, including a health maintenance organization offering only a single health care service plan, and soliciting, negotiating, procuring, or effectuating membership in the health maintenance organization.⁶⁵

It should be noted that the four acts constituting the acts of an “agent” listed in Section 4001.003(1) are narrower than those contained in Section 4001.051 setting forth the acts of an agent will be attributable to the insurer. In Section 4001.051(b), the insurance professional is deemed to be the agent of the insurer for the following acts.

Regardless of whether the act is done at the request of or by the employment of an insurer, broker, or other person, a person is the agent of the insurer for which the act is done or risk is taken for purposes of the liabilities, duties, requirements, and penalties provided by this title, Chapter 21, or a provision listed in Section 4001.009 if the person:

- (1) solicits insurance on behalf of the insurer;
- (2) receives or transmits other than on the person's own behalf an application for insurance or an insurance policy to or from the insurer;

- (3) advertises or otherwise gives notice that the person will receive or transmit an application for insurance or an insurance policy;
- (4) receives or transmits an insurance policy of the insurer;
- (5) examines or inspects a risk;
- (6) receives, collects, or transmits an insurance premium;
- (7) makes or forwards a diagram of a building;
- (8) takes any other action in the making or consummation of an insurance contract for or with the insurer other than on the person's own behalf; or
- (9) examines into, adjusts, or aids in adjusting a loss for or on behalf of the insurer.⁶⁶

3. **“Who is Excluded From” Definition**

By statute, the four categories of individuals and institutions that are excluded from the definition of “agent” contained in Section 4001.003(1) are as follows:

a. **Insurer’s Employees**

The following employees of insurer are excluded from the definition of “agent.”

- (1) "Agent" means a person who is an authorized agent of an insurer or health maintenance organization, a subagent, and any other person who performs the acts of an agent, whether through an oral, written, electronic, or other form of communication, by soliciting, negotiating, procuring, or collecting a premium on an insurance or annuity contract, or who represents

⁶⁴ Webster’s Ninth New Collegiate Dictionary.

⁶⁵ See Tex. Ins. Code Ann. Sec. 4001.003(1).

⁶⁶ See Tex. Ins. Code. Ann. Sec. 4001.051(b).

or purports to represent a health maintenance organization, including a health maintenance organization offering only a single health care service plan, in soliciting, negotiating, procuring, or effectuating membership in the health maintenance organization. The term does not include:

(A) a regular salaried officer or employee of an insurer, health maintenance organization, or agent who:

(i) devotes substantially all of the officer's or employee's time to activities other than the solicitation of applications for insurance, annuity contracts, or memberships;

(ii) does not receive a commission or other compensation directly dependent on the business obtained; and

(iii) does not solicit or accept from the public applications for insurance, annuity contracts, or memberships.⁶⁷

b. Employee Benefit Plan

Likewise, employees of an employee benefit plan are likewise excluded. Section 4001.003(1)(B) excludes the following from the scope of the statute:

(B) an employer or an employer's officer or employee or a trustee of an employee benefit plan, to the extent that the employer, officer, employee, or trustee is engaged in the administration or operation of an employee benefits program involving the use of insurance or annuities issued by an insurer or memberships issued by a health maintenance organization, if the employer, officer, employee, or trustee is not directly or indirectly

compensated by the insurer or health maintenance organization issuing the insurance or annuity contracts or memberships.⁶⁸

c. Depository Institutions

Similarly, banks or other depository institutions that collect or remits premiums by charging those premiums against the accounts of depositors are exempt from the requirements of an agent.⁶⁹

d. Administrative, Management or Healthcare Services to an HMO

Finally, a person who has contracted to provide administrative, management, or healthcare services to a health maintenance organization and who is compensated for those services by the payment of an amount computed as a percentage of the revenue, net income or profit of the HMO is exempt from the title.⁷⁰

4. Broker

⁶⁸ See Tex. Ins. Code Ann. Sec. 4001.003(B).

⁶⁹ Tex. Ins. Code Ann. Sec. 4001.003(1)(C).

⁷⁰ Tex. Ins. Code Ann. Sec. 4001.003(1)(D). A depository in institution is defined by Section 4001.003(4) as follows:

(4) "Depository institution" means:

(A) a bank or savings association as defined by 12 U.S.C. Section 1813, as amended;

(B) a foreign bank that maintains a branch, agency, or commercial lending company in the United States;

(C) a federal or state credit union as defined by 12 U.S.C. Section 1752, as amended;

(D) a bank branch; or

(E) a bank subsidiary, as defined by state or federal law.

⁶⁷ See Tex. Ins. Code Ann. Sec. 4001.003.

The current Insurance Code uses the term “broker” extensively.⁷¹ However, with respect to the licensing of insurance professionals intermediaries, that term is not used. Insurance professionals are licensed as agents and not brokers. The Insurance Code and other documents from the Department of Insurance tend to use the terms “agent” and “broker” interchangeably. Until further clarification is given, either by the courts or by the Legislature, the term “broker” will remain as amorphous as it has historically.

III. AGENTS OF THE INSURED

The acts of an agent that are contained in Section 4001.003(1) are undifferentiated; however, those acts may be performed on behalf of the insured or the insurer. The general principles of law of agency apply in addressing relationship between the insured and its agent as well as the insurer and its agent.⁷² In that regard, in order to determine who is the agent of the insured, it is important to determine who is actively representing the insured’s interest. In this regard, the agent for the insured generally is charged with the obligation of obtaining the broadest possible coverage at the best possible price. An agent who is representing the insured may solicit quotes from several insurers and are charged with the responsibility of accepting “which is in the best interest of the insured.” On the other hand, agents for the insurer have no such obligations. Rather, their charge and duty are to promote the interest of the insurer by selling as many policies as possible within the applicable underwriting guidelines that have been set out by the insurer.

In many circumstances, the agent hired by the insured may actually have dual roles in performing his functions as an agent. Historically, Texas has developed a body of law regarding the issue for whom an agent was acting, and who was responsible for the agent’s

act. Several courts have held that while an insurance agent acts for the insured in making the application and procuring the policy, he acts for the insurer in delivering the policy and in collecting and remitting the premium.⁷³

A. *Overland Sales v. American Indemnity Co.*

In *Overland Sales v. American Indemnity Co.*,⁷⁴ the insured, Overland Sales Co. was issued a garage liability policy for its automobile and garage business. In November 1919, Mrs. Lula Marquette sustained personal injuries while on a business visit to their salesrooms, and later brought suit to recover for her personal injuries. A demand was made upon American Indemnity to defend the lawsuit, but the company declined to do so. Thereafter, settlement was reached with Mrs. Marquette for \$2,000 and court costs. Later, demand was made upon American Indemnity for the \$2,000 settlement plus \$750 in attorneys’ fees.⁷⁵

One of the primary defenses asserted by American Indemnity was that no notice was given of the accident until January 29, 1921, more than fourteen months after it occurred, and that no copy of the summons or citation was ever delivered to it. The insured, Overland Sales claimed that a copy had been delivered to the agent for the insured, Lea, Radford & Robinson. The trial court entered a judgment that Overland Sales take nothing. In the court of appeals, the

⁷³ *East Texas Fire Ins. Co. v. Blum*, 76 Tex. 653, 13 S.W. 572, 575 (1890); *East Texas Fire Ins. Co. v. Brown*, 82 Tex. 631, 18 S.W. 713, 715 (1891); *Zurich General Accident Indemnity Ins. Co. v. Fort Worth Laundry Co.*, 58 S.W.2d 1058 (Tex.Civ.App.—Fort Worth 1933, on reh’g 63 S.W.2d 236, no writ); *Overland Sales Co. v. American Indemnity Co.*, 256 S.W. 980, 982 (Tex.Civ.App.—Galveston 1923, no writ); *Fort Worth v. Security Union Ins. Co.*, 37 S.W.2d 235 (Tex.Civ.App.—Fort Worth 1931, no writ); *Continental Cas. Co. v. Bock*, 340 S.W.2d 527, 532 (Tex. 1960).

⁷⁴ 256 S.W. 980 (Tex.Civ.App.—Galveston 1923, no writ).

⁷⁵ *Id.* at 981.

⁷¹ See Footnote 20.

⁷² *Stewart v. Davis*, 417 S.W.2d 595 (Tex.Civ.App.—San Antonio 1967, writ ref’d n.r.e.).

key issue was whether the agent was the agent for the insurer such that notice given to them would be imputable and binding upon the insurer, or whether the agent was solely the agent for the insured.

The court of appeals examined the evidence and noted that the statute of Mr. Lea's firm in the procurement of the contract was not that of an agency soliciting insurance generally for various companies, but rather that of one, with exclusive handling of all insurance business of his principals, was by them given specific instructions to procure for them a certain particular policy from a named insurance company. It was undisputed that the firm of Lea, Radford & Robinson never had authority to solicit or write insurance for American Indemnity and did nothing more than apply to A. B. Langham, its general agent in Houston for the policy.

In holding that the agent in this case was the agent of the insured and not the agent of the insurer, the court held that:

There is no difference between the opposing litigants as to the principles of law; the divergence being merely upon their application. It is well settled, as both sides agree, that the acts of one procuring insurance as the agent of the insurer are imputable to it, while those of one who either acts as the agent of the insured or in the capacity of a broker are not; the broker being further held to represent the assured for the purpose of procuring the policy and the insurer only in order to receive and transmit the premium.⁷⁶

B. *Continental Cas Co. v. Bock*

A similar illustration can be found from our supreme court in *Continental Cas Co. v. Bock*.⁷⁷ There, suit was brought against Continental

Casualty under a vacation business travel accident policy. The policy had a requirement that it would only cover air travel if the aircraft being used for transportation had a standard air-worthiness certificate issued by the Civil Aeronautics Administration of the United States of America or a transport type aircraft operated by the Military Air Transport Service (MATS) of the United States. The plaintiff's husband was killed in a military air crash. The aircraft in question was a Lockheed TV-2 jet aircraft. It had no air-worthiness certificate and was not a transport-type of aircraft operated by MATS. Plaintiff sought recovery on the alleged grounds of mistake, fraud and estoppel, alleging that affirmative representations were made by the agent of the insurer. At issue was whom the agent who sold the policy represented. Bullock was the agent. Bullock was an experienced recording or local insurance agent with over twenty years' experience.⁷⁸ Bock contacted Bullock in order to secure the policy. The court noted that "Bullock was an experienced insurance agent holding himself out as offering "personalized insurance, programmed to fit *your* needs."⁷⁹ The court concluded that Bullock was acting as an agent for Bock, as an insurance broker, and not as the agent of the insurer.⁸⁰ The court noted that in obtaining the policy, Bullock had been contacted by Bock to obtain the policy and thereafter contacted Rose, Continental's general agent in the Houston area for a quote. The quote was later accepted. The court concluded that Bock was acting as the broker for Bullock was acting as the broker for Bock while Rose was the agent for Continental. The court held that:

The law is well settled that where the policy is issued at the instance of and is delivered to the insured through an intermediary or broker who collects the premium and shares in the commission paid thereon by the

⁷⁶ *Id.* at 982.

⁷⁷ 340 S.W.2d 527 (Tex. 1960)

⁷⁸ *Id.* at 530.

⁷⁹ *Id.* at 532.

⁸⁰ *Id.* at 531.

insurer, such intermediary is the agent of the insured.⁸¹

C. *Foundation Reserve Ins. Co. v. Wesson*

The third illustration of the distinction between the broker who represents the insured and the agent who represents the insurer is found in *Foundation Reserve Ins. Co. v. Wesson*.⁸² In this case, Wesson, a local recording agent, sued to recover premiums paid by him on behalf of some of his customers for automobile insurance policies issued by Foundation Reserve which were later cancelled. Foundation Reserve denied liability for the return of the premiums alleging it never received them. Wesson had paid the premiums to one V. G. Marshall who was then to have forwarded them on to Foundation Reserve. The issue in the case was whether Marshall was Foundation Reserve’s agent with actual or at least apparent authority to write the insurance for Foundation Reserve and to collect the premiums and remit them to Foundation Reserve.⁸³ Wesson was a licensed local recording agent. He was not licensed to place business in non-admitted carriers and from time to time when his customers required insurance which could not be obtained from companies which he regularly represented, such insurance would be placed with brokers such as Marshall. Marshall represented several non-admitted carriers. Wesson had similar dealings with Marshall over a period of years. Marshall would either send the application to Foundation Reserve and, when the policy was issued and returned to him, he would send it to the local agent, such as Wesson, or he would simply issue the policy out of his own office and deliver it to the local agent while at the same time sending a copy to Foundation Reserve.⁸⁴ Under either method, he would send Wesson the bill for the premium with each policy. He would also send

Wesson a monthly statement of the total premiums thus accrued during the month. Foundation Reserve billed Marshall monthly for the premiums on all business written in the preceding month. Wesson promptly paid all of Marshall’s statements to him, less his commission, and a special discount.

It was only when Marshall became insolvent and did not pay Foundation Reserve the premiums that the policies were cancelled.⁸⁵ The trial court found that, based upon the foregoing evidence, that Marshall had actual authority from Foundation Reserve to accept and transmit premium payments to it and that Foundation Reserve had clothed Marshall with certain indicia of actual or apparent authority to act at its agent in billing for and collecting insurance premiums from Wesson.⁸⁶ In affirming the judgment for Wesson, the Dallas Court of Appeals stated the following rule:

The general rule is that while insurance broker acts for the insured in making the application and procuring the policy, he acts for the insurer in delivering the policy and in collecting and remitting the premium. [Citations omitted.]

“It is held by the authorities without dissent that, where an insurance broker is intrusted by the company with the delivery of a policy and the collection of the premiums thereon without any directions so to do by the insured, he is to be regarded as the agent of the company for such purpose.”⁸⁷

Therefore, based upon the foregoing, when an insured retains the services of an agent to secure a policy for the insured, the agent is the agent of the insured and will owe his duties and responsibilities to the insured. Likewise, for the

⁸¹ *Id.* at 532.

⁸² 447 S.W.2d 436 (Tex.App.—Dallas 1969).

⁸³ *Id.* at 437.

⁸⁴ *Id.* at 438.

⁸⁵ *Id.* at 438.

⁸⁶ *Id.* at 437

⁸⁷ *Id.* at 438-39.

most part, his acts and knowledge will be attributable to the insured.

D. Dual Agency

As noted by the opinion in *Foundation Reserve Ins. Co. v. Wesson*,⁸⁸ the insurance professional is generally the agent of either the insured or the insurer and will owe his sole duties to that principal. However, the issue of dual agency does arise. If the agent is truly the agent for the insured, but is acting as the agent for the insurer in collecting the premium or transmitting the policy, does that present a problem? The law in Texas is that an insurance agent cannot act in a dual relation and bind either party, without its consent, where the duties and interest conflict, or the services are not incompatible, so that each relies upon the agent.⁸⁹ The issue then is presented as to whether an agent has been retained by an insured to represent its interest is violating duties and responsibilities owed to that insured if it acts for the insurer in such things as delivery of the policy or collecting the premium. Can an agent undertake these activities on behalf of the insurer without being in conflict of interest with the insured? If an agent or broker undertakes the activities, does the insured who employed such agent or broker have grounds to bring some action against that agent for the conflict of interest?

This issue was addressed in *Merbitz v. Great Nat. Life Ins. Co.*⁹⁰ In that case, Great National brought suit against Merbitz for a declaratory judgment that it was not liable for benefits under a policy issued insuring the life of Merbitz's wife and bearing the effective date of June 1, 1974. Great National also sought the

same determination with respect to a second policy issued on July 26, 1974, because of the suicide of the named insured on June 24, 1976. Great National also asserted alternative causes of action against its agents for violations of their general agency contract. At issue in the underlying case and the appeal was for whom the agent acted. One issue before the court was whether the agent, Staver, could act as both the agent for the insured and the insurer. The court of appeals held that:

Appellant's contention that Staver could not act as the agent of both the appellee and the appellant is likewise without merit. Staver, as an agent of appellee, had the authority only to accept applications, collect the initial premium, and deliver the policy. He had no authority to waive or change any of the policy terms. The agency relationship between Staver and appellant included the procurement of insurance but extended much further for investment purposes that did not conflict with the insurance agency. The duties of his agency with appellant did not conflict with the duties of his agency with appellee.⁹¹

A similar rule was announced in *Maintain, Inc. v. Maxson-Mahoney-Turner, Inc.*⁹² In that case, the insurance agent brought an action on a sworn account against the insured seeking to recover allegedly unpaid premiums. One issue was whether the agent had the capacity to sue on behalf of the insurer. The court of appeals noted that:

An insurance agent can act as the agent of both the insured and the insurer by collecting the premium and delivering the policy for the carrier,

⁸⁸ 447 S.W.2d 436 (Tex.Civ.App.—Dallas 1969).

⁸⁹ *Lincoln Fire Ins. Co. v. Taylor*, 81 S.W.2d 1059 (Tex.App.—Fort Worth 1935); *Liverpool & London & Globe Ins. Co. v. McCollum*, 149 S.W. 775 (Tex.Civ.App.—Amarillo 1912); *Aetna Ins. Co. v. Richey*, 206 S.W. 383 (Tex.Civ.App.—San Antonio 1918).

⁹⁰ 599 S.W.2d 655 (Tex.Civ.App.—Texarkana 1980).

⁹¹ *Id.* at 658.

⁹² 698 S.W.2d 469 (Tex.Civ.App.—Corpus Christi 1985).

and by procuring insurance for the insured.⁹³

Therefore, on the issue of dual agency, the agent may represent both the insured and the insurer so long as the duties do not conflict with each other.

E. Appointment of Agent

Unlike the appointment of agents by insurers, the appointment of agents by insureds does not require a formal appointment.⁹⁴ Nor is an agent limited to appointment by one insurer. Many agents in Texas have multiple appointments by competing insurers in order to provide their clients with a broader market from which to purchase insurance.⁹⁵ The appointment by the insured is often oral. However, in many large and sophisticated insurance matters, the appointment may be formal. Quite often, a document known as a “broker of record” letter is issued formalizing the appointment of the broker or agent as the agent of the insured. This broker of record letter will authorize various markets to deal with that particular broker. A broker-of-record letter is often used when there has been a change from one broker to the other so as to allow the market to know which broker has the authority to represent the insured. Examples of brokers of record letters may be found in Texas case law. For example, in *Dion Durrell & Associates, Inc. v. S.J. Kemp & Co.*,⁹⁶ the fact

that the agent for the insured as well as the agent for the insurer or public commissions from the insurer does not alter who they represent or to whom they owe their duty.

With regard to consideration, where a policy is issued at the request of an insured, the broker receives consideration and is the agent for the insured, even though the agent is paid with commissions from the insurer.⁹⁷

The issue of the broker or agent being paid by commissions by the insurer is somewhat illusory. In reality, the money used to pay the commission for the broker/agent for the insured as well as the agent for the insurer comes from the insured. So, therefore, the money that is actually being used to compensate the agent/broker of the insured is actually coming from the insured.

IV. DUTIES OWED TO THE INSURED

A. General

According to one court:

A local agent . . . owes his clients the greatest possible duty. He is the one the insured looks to and relies upon. Most people do not know what company they are insured with. The insured looks to the agent he deals with to get the coverage he seeks, with a sound company who can and will properly and promptly pay claims when they are due. It is his duty to keep his clients fully informed so that they can remain safely insured at all times.⁹⁸

⁹³ *Id.* at 472 (citing *Guthrie v. Republic National Life Insurance CO.* 682 S.W.2d 634 (Tex.App.—Houston [1st Dist.] 1984, writ ref’d n.r.e.); *Merbitz v. Great National Life Insurance Co.*, 599 S.W.2d 655 (Tex.Civ.App.—Texarkana 1980, writ ref’d n.r.e.).

⁹⁴ Tex.Ins.Code Ann. § 4001.201 provides as follows:

A person who obtains a license under this title may not engage in business as an agent unless the person has been appointed to act as an agent by an insurer designated by the provisions of this code and authorized to engage in business in this state.

⁹⁵ See Tex. Ins. Code Ann. § 4001.202.

⁹⁶ 138 S.W.3d 460 (Tex.App.—Tyler 2004).

⁹⁷ *Critchfield v. Smith*, 151 S.W.3d 225 (Tex.App.—Tyler 2004); see also *Turner-Bass Associates of Tyler v. Williamson*, 932 S.W.2d 219, 223 (Tex.App.—Tyler 1996, no writ).

⁹⁸ *Cateora v. British Atlantic Assurance Ltd.*, 282 F.Supp. 167 (S.D. Tex. 1968).

That general duty was followed in 1977 by the Beaumont Court of Appeals in *Trinity Universal Ins. Co. v. Burnett*.⁹⁹ The supreme court, however, has never approved of this broad statement of the duty owed to an agent. In *May v. United Services Association of America*,¹⁰⁰ the Supreme Court stated that:

Justice Doggett in his dissent relies upon the duty of an agent acknowledged in *Trinity Universal Insurance Co. v. Burnette*, 650 S.W.2d 440 (Tex.Civ.App.—Beaumont 1977, no writ): to keep his or her clients fully informed so that they can remain safely insured. Although we express no view on the correctness of this holding or the court’s formulation of the agent’s duty, we note that Wiley did not breach the duty articulated in *Burnette*.¹⁰¹

Texas, like many states, has refused to adopt the “professional judgment” rule and, instead, has adopted the “limited duty” rule. The underlying assumption to this rule is that insurance agents are merely salespersons and that clients can understand their insurance options and policies without the assistance of an insurance professional.¹⁰² At least one commentator has criticized this view, arguing that it assumes an insurance agent is somewhat like a gas station attendant given his role.¹⁰³ Under the limited duties, the agent’s duties to the insured are generally limited to the procurement of the requested policy. Some courts have expanded this duty with respect to rules in cancellations, but generally a specific request from the insured is required before a

duty is imposed upon the agent.¹⁰⁴ There is a minority view that had adopted the “professional judgment” rule. The underlying assumption behind the “professional judgment” rule is that it is unreasonable to assume that insureds “have sophisticated knowledge of insurance to understand the myriad of policy options and exclusions and to recognize when a life change alters their insurance needs.”¹⁰⁵ The advocates of “professional judgment” rule ruled that insurance agents are professionals and not salespersons. Under this rule, insurance agents are treated as professionals¹⁰⁶ and are there to provide counsel or advice to their clients.¹⁰⁷

Under the “professional judgment” rule, an insurance agent or broker would owe the same duty as any other professional; that is, to act as a reasonably prudent insurance agent would under the same or similar circumstances. If this required the added explanation of the terms of the policy, such an explanation would be required. If it required recommendations as to greater limits or broader coverage, this would be required as well.

The following will be a discussion of the specific duties the Texas courts have articulated are owed by agents to insureds who have sought and employed their services.

B. Duty to Procure

Perhaps the oldest and most discussed duty on the part of an agent is the duty to procure. In *Burroughs v. Bunch*,¹⁰⁸ suit was brought by

⁹⁹ 560 S.W.2d 440 (Tex.Civ.App.—Beaumont 1977).

¹⁰⁰ 844 S.W.2d 666 (Tex. 1992).

¹⁰¹ *Id.* at 670.

¹⁰² *Trammel v. Prairie States Ins. Co.*, 473 N.W.2d 460, 462 (S.D. 1991).

¹⁰³ R. D. Blanchard, *An Insurance Agent’s Legal Duties to Customers*, 21 *Hamline L. Rev.* 9, 10 (1997).

¹⁰⁴ *Trammel*, 473 N.W.2d at 462.

¹⁰⁵ Ken Swift, *How Special is Special? An Insurance Agent’s Duty to Advise*, 21 *Hamline L. Rev.* 323, at 334 (Winter, 1998).

¹⁰⁶ *Bell v. O’Leary*, 744 F.2d 1370, 1372 (8th Cir. 1984).

¹⁰⁷ *See Bell*, 744 F.2d at 1372; Gary Knapp, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 *A.L.R.4th* 249 (1991).

¹⁰⁸ 210 S.W.2d 211 (Tex.Civ.App.—El Paso 1948, writ ref’d).

Bunch Construction against Burroughs for failing to obtain an insurance policy on a certain house which was under construction by Bunch Construction Co. The plaintiffs in that case pled that Burroughs was a general insurance agent representing numerous fire insurance companies and had been contacted by Bunch Construction to obtain a builder's risk policy in the sum of \$16,000 on a building that was under construction. The policy was to be in force and effect from the start of construction until the date of completion. The evidence showed that there had been a course of dealing between Bunch Construction and Burroughs whereby Burroughs would issue various policies covering builder's construction risk and the settlement for the premiums would be made at the time the building was completed. A fire destroyed the building, and it was learned that no insurance was in place to cover the loss.¹⁰⁹ The agent denied any conversation with Bunch Construction with reference to the house and denied that he knew the house was under construction. However, the insured testified that he discussed with the agent the construction of the property. The jury found that there was such a discussion and found in favor of the insured. The instructions given to the jury in the case were as follows:

The court instructs the jury, that where an owned of a property request an agent to procure insurance company and the agent agrees to do so, and is free to do so, the effect of such contract is to obligate the agent to use reasonable diligence to procure the insurance and seasonably to notify the owner of the property in the event of failure of such attempt to procure insurance.¹¹⁰

The court of appeals then stated the controlling law as follows:

An insurance broker agreeing to obtain insurance has a legal duty to obtain same and if he cannot do so to notify his principal of failure.¹¹¹

The rule was later emphasized by the Beaumont Court of Appeals in *Scott v. Conner*.¹¹² This case involved a suit by Conner against Scott Insurance Agency for failing to provide fire coverage on a house owned by Conner which Scott agreed to provide. Conner owned a house in Lufkin, Texas, and alleged that Scott agreed to secure a policy of insurance covering the property. Scott did secure the policy with Great American County Mutual Fire Insurance Company for a period of three years. However, prior to the expiration of the policy, Great American cancelled the policy. Upon receipt of notice, Conner asked Scott to furnish him with similar insurance on the house and Conner was assured by Scott that a replacement policy would be obtained in the same amount.¹¹³ After the fire occurred, Scott had asked Conner if he failed to secure a policy of insurance covering the property that was destroyed by the fire.

The affirmative defenses of Scott at trial were:

- A. That no request was made by Conner to Scott or his secretary to secure any additional insurance on the property.
- B. That at no time did Scott or his secretary promise or assure in any manner Conner that he would secure additional insurance.
- C. That Conner was not entitled to rely upon any assurances either actual or implied because Scott did not agree to secure other insurance for Conner.

¹⁰⁹ *Id.* at 212.

¹¹⁰ *Id.* at 214.

¹¹¹ *Id.* at 214.

¹¹² 403 S.W.2d 453 (Tex.Civ.App.—Beaumont 1966).

¹¹³ *Id.* at 455.

D. That Conner was negligent in failing to attempt to secure other insurance if he desired to do so on such property, which negligence on the part of Conner was the proximate cause of any damages sustained when the building was destroyed by fire.¹¹⁴

The jury found that Scott was negligent in failing to obtain the insurance. The court stated the law as follows:

It may be laid down as a general rule that a broker or agent who, with a view to compensation for his services, undertakes to procure insurance on the property of another, and who fails to do so, will be held liable for his failure to do so.¹¹⁵

The third case which must be discussed in addressing the duty to procure is *Rainey-Mapes v. Queen Charters, Inc.*¹¹⁶ In *Rainey-Mapes*, William Gordon, president of Queen Charters, Inc., contacted Sanger & Altgelt Insurance Agency to procure the required insurance for a sailboat that was being purchased. Sanger thereafter contacted Rainey-Mapes, an insurance broker, to obtain the insurance as Sanger did not normally handle maritime insurance. Rainey-Mapes thereafter contact Southern Maritime Underwriters who in turn contacted the Colony Insurance Company who ultimately issued the policy.¹¹⁷ Prior to the closing of the sale, Gordon contacted Sanger inquiring whether there were any territorial restrictions. Gordon received the insurance binder prepared by Sanger which stated coverage would incept on February 25, 1983. The binder did not contain any territorial exclusions. Gordon departed St. Thomas on March 2, 1983, and while in route, the sailboat struck a reef off the coast of the Dominican Republic and sank. Colony

ultimately denied based upon a territorial exclusion. The jury found that the agents, including Rainey-Mapes, had agreed to procure a policy free of territorial exclusions and were negligent in failing to do so.¹¹⁸ Therefore, negligence in failing to procure insurance applies not only in failing to procure a policy, but in failing to procure a policy of the type promised to procure.¹¹⁹

The fact that the agent or broker may exercise reasonable diligence in attempting to procure the insurance will not relieve the agent or broker of liability where he has failed to notify the insured of his inability to obtain insurance. In *Powell v. Narried*,¹²⁰ the insured was a Brady Narried who was in the automobile salvage business. He secured a contract for the dismantling of a large feed mixing mill with the right to sell the dismantled equipment and machinery as salvage. Narried had a relationship of some 15 years with Hendricks & Powell Insurance, a local insurance agency. Though Narried had never carried workmen's compensation insurance before, due to the high risk in his type of business, he did want coverage for his employees in the dismantling of the feed mill, since he felt the job was out of his regular line of work. Narried testified that he called Powell on the telephone and requested the worker's compensation coverage and Powell told him to go ahead with the work as he was covered. Testimony indicated that in prior dealings with Powell, Narried had secured insurance coverage over the telephone and would not pay for the coverage until he was billed by his agents. In this case, the agency billed Narried for the worker's compensation premiums and the invoice was paid. Later, an

¹¹⁴ *Id.* at 456.

¹¹⁵ *Id.* at 457.

¹¹⁶ 729 S.W.2d 907 (Tex.App.—San Antonio 1987).

¹¹⁷ *Id.* at 909.

¹¹⁸ *Id.* at 913.

¹¹⁹ Further cases addressing the duty on the part of insured's agent to procure insurance, see *May v. United Services Association of America*, 844 S.W.2d 666 (Tex. 1992); *Critchfield v. Smith*, 151 S.W.3d 225 (Tex.App.—Tyler 2004, pet. denied); *Talamantez v. State*, 790 S.W.2d 33 (Tex.App.—San Antonio 1990, pet ref'd).

¹²⁰ 463 S.W.2d 43 (Tex.Civ.App.—El Paso 1971).

employee was working on the dismantling of the job and was severely injured. Narried later learned that he had no worker’s compensation coverage. The jury found that Powell had failed to advise Narried that he had been unable to obtain the insurance and that such failure was negligence and the proximate cause of damages to Narried.¹²¹ In addressing the applicable law, the court of appeals held that:

The rule seems to be settled that if an insurance agent or broker, with a view toward being compensated, undertakes to procure insurance for another and, through fault and neglect, fails to do so, he will be held liable for any damage that results thereby. The failure of an agent or broker, even after the exercise of reasonable diligence to procure insurance, to notify the insured of the agent’s inability to obtain insurance, will likewise impose liability upon him. [Citations omitted.] Obviously, then, an insurance agent has a duty to his client, not to advise the client that he is covered by insurance if he is, in fact, not so covered. The suit is not upon any oral contract of insurance. It is a negligence action. The mere fact that workmen’s compensation coverage on only part of Narried’s business could not be obtained was no defense to the theory of this action. If it could not be obtained after the agent had undertaken to procure the insurance, the failure of the agent to notify the insured of his inability was actionable.¹²²

The basis for imposing liability in this situation is because the agent induced the plaintiff to rely on his performance of the undertaking to procure insurance and the plaintiff reasonably, but to his detriment,

¹²¹ *Id.* at 45.

¹²² *Id.* at 45.

assumed that he was insured against the risk that caused his loss.¹²³

Where the insureds are not misled into believing a policy exists in the name, no liability will attach to the agent.¹²⁴

Moreover, the duty to procure is not without its limits. In *First National Bank of Jefferson v. Tri-State General Agency, Inc.*,¹²⁵ the First National Bank financed a mobile home owned by Donald Van Huss. The mobile home was destroyed by fire on March 4, 1975 and Van Huss was not carrying fire insurance. Tri-State in the past had provided single interest insurance for property insured by the bank. The agency testified that it did not receive an application from the bank until after the fire had occurred. The bank argued that because Tri-State had left applications at the bank, that such constituted an offer to provide insurance coverage and that the mailing of the application constituted acceptance of the offer to provide coverage.¹²⁶ The jury and the court of appeals both agreed that there was no proof that Tri-State had in any way made an offer to the bank to provide single interest insurance coverage on property financed by the bank. The court of appeals held that there was no obligation on the part of Tri-State to furnish the bank insurance prior to the receipt of an application for the coverage and that such failure did not constitute negligence.¹²⁷

C. Duty to Keep Insured Informed

At least one court has held that the agent owes insured “the greatest possible duty.”¹²⁸ Consistent with this duty, the court has held that

¹²³ *May v. United Services Association of America*, 844 S.W.2d 666, 669 (Tex. 1993).

¹²⁴ *Id.* at 670.

¹²⁵ 578 S.W.2d 456 (Tex.Civ.App.—Texarkana 1979).

¹²⁶ *Id.* at 459.

¹²⁷ *Id.* at 459.

¹²⁸ *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440 (Tex.App.—Beaumont 1977, no writ).

an agent has a duty to keep his or her clients fully informed so that they can remain safely insured.¹²⁹ In *Frank B. Hall & Company v. Beach, Inc.*,¹³⁰ the court upheld the jury finding that an insurance agent was negligent in failing to “thoroughly acquaint himself” with his clients needs and in failing to procure the coverage most appropriate to fulfill them.

The Supreme Court has expressly reserved judgment on whether such a duty will or will not be recognized in Texas. The majority in *May v. United Services Association of America*,¹³¹ recognize that the *Burnette* court recognized the duty on the part of an agent “to keep his or her clients fully informed so that they can remain safely insured.”¹³² The court expressed no view on the correctness of the holding or the court’s formulation of the agent’s duty, but merely noted that in the *May* case, there was no such breach.¹³³

D. Duty in Selection of Company

A separate line of cases holds that where an agent has requested to place the policy without the designation of a company, if that agent must exercise good faith and diligence in the selection of the company that would pay the risk and will be a suitable insurer. In *Shippers’ Compress Co. v. Northern Assurance Co.*,¹³⁴ Shippers’ Compress asked their agent, Rice & Belk to insure the property against tornado. A binder was issued on Northern Assurance by Rice & Belk. That same day, Northern Assurance telephone Belk and told him to cancel

the binder or transfer it to another company represented by him because Northern Assurance had not received the authority from the state of Texas to write tornado insurance.¹³⁵ Upon receipt of the message, Belk transferred the risk to Commercial Union. The next day, about 3:00 p.m., a tornado hit and severely injured part of the property insured by Shippers’ Compress. Commercial Union made an agreement with Shippers’ Compress for Shippers’ Compress to sue Northern since a binder had been issued on Northern Assurance, and that if they were unsuccessful, Commercial Union would pay for the loss.¹³⁶

On review of the facts, the court found that the agent did not have the authority to issue the binder, that at the time of the loss, the plaintiff had no insurance with Northern Assurance Co.¹³⁷ In addressing the discretion and duties in the binder of the agent, the court held that:

It appears, therefore, to our minds clear that, under a proper construction of the employment of Belk by the plaintiff to place insurance, he was authorized, as such agent, to exercise his discretion in placing insurance in some company authorized to write the same, and that, as a plaintiff, had not been advised of any company selected, he was authorized to substitute a binder in the Commercial Union Assurance Company in lieu of his attempted binder in the Northern Assurance Company, so that there would be no question as to the validity of the insurance. To our minds, he had this authority, and further we may say that it was his duty, as the representative of the plaintiff, for the purpose of placing insurance, to use his discretion in securing a company that would carry the risk and furnish his employer, the plaintiff, insurance

¹²⁹ *Trinity Universal Ins. Co. v. Burnette*, 560 S.W.2d 440 (Tex.App.—Beaumont 1977, no writ) (quoting *Cateora v. Britist Atlantic Assurance Ltd.*, 282 F.Supp. 167, 174 (S.D. Tex. 1968).

¹³⁰ 733 S.W.2d 251, 261 (Tex.App.—Corpus Christi 1987, writ ref’d n.r.e.).

¹³¹ 844 S.W.2d 666, 670 (Tex. 1993)..

¹³² *Id.*

¹³³ *Id.*

¹³⁴ 208 S.W. 939 (Tex.Civ.App.—Beaumont 1919, writ denied).

¹³⁵ *Id.* at 943.

¹³⁶ *Id.* at 943.

¹³⁷ *Id.* at 944.

about which there would be no question.¹³⁸

The duty to exercise care in the selection of company has been recognized by the supreme court, particularly in the context of the solvency of the insurers. This issue will be addressed intra.

E. Duty to Explain Terms and Conditions of Coverage

One issue that frequently arises is whether the agent for the insured owes a duty to the insured to explain the terms and conditions of the coverage which was purchased for the insured. The law in Texas appears to be that when the agent of the applicant agrees to apply for insurance on behalf of the principle, the agent has the duty to explain the terms of the application form, or otherwise inform the insured of what coverages are included in the application. This proposition was illustrated in *McNeill v. McDavid Ins. Agency*.¹³⁹ In that case, McNeill purchased an automobile from Dale McDavid Pontiac. Associated with Dale McDavid Pontiac is McDavid Insurance Agency. The McDavid Insurance Agency solicits applications for policies for automobile insurance and submits these applications to various insurance companies for acceptance. Cameron was an agent employed by McDavid Agency. The soliciting agents at the McDavid Agency reported to Cameron. Clark & Company was an insurance company that received the applications from McDavid Agency and wrote policies of insurance. When McNeill purchased the automobile, he decided to finance part of the purchase price and was required to secure collision and comprehensive insurance coverage. The application did not include a request for liability coverage and no premium charge was entered in the space providing for such coverage. The court concluded that Moore had no duty to explain the terms of the

application to McNeill. The court of Appeals held that:

In our opinion, the duty of a soliciting agent in this regard depends on whether the solicitor is the agent of the applicant or of the insurer. It is well settled that if the agent of an applicant agrees to secure insurance for the applicant, but fails to do so, the agent has the duty to inform the applicant that no such insurance has been secured. [Citations omitted.] Likewise, we decide that when the agent of an applicant agrees to apply for insurance on behalf of the principal, that agent has the duty to either explain the terms of the application form or otherwise inform the principal what coverages are included in the application.¹⁴⁰

A similar result was reached in *Riggs v. Sentry Ins. Co.*¹⁴¹ This case involved the two claims that arose after a policy lapsed for nonpayment of the renewal premium. After a judgment against the insured, the insured brought upon appeal the trial court erred in failing to give the jury the following instruction:

You are further instructed that a salesman for an insurance company who is selling an insurance policy to a client has a duty to explain the terms of the application to the client.¹⁴²

The court of appeals held there was no error on the part of the trial court in refusing to give the instruction because it did not completely instruct the jury on the applicable law. The court of appeals held that:

Riggs contends that this instruction was necessary because the salesman

¹³⁸ *Id.* at 946.

¹³⁹ 594 S.W.2d 198 (Tex.App.—Fort Worth 1980).

¹⁴⁰ *Id.* at 203.

¹⁴¹ 821 S.W.2d 701 (Tex.App.—Houston [14th Dist.] 1991).

¹⁴² *Id.* at 705.

did not explain to Ramirez that the policy coverage extended for six months rather than one year. Further, Riggs claims that this requested instruction is a correct statement of the law, taken from *McNeill v. McDavid*, 594 S.W.2d 198, 203 (Tex.Civ.App.—Fort Worth 1980, no writ) Although the requested instruction contains a direct quote from the *McNeill* case, the instruction omits other language explaining when this duty on the part of an insurance agent is applicable. The *McNeill* court stated that the duty of a soliciting agent depends on whether the solicitor is the agent of the applicant or of the insurer. *Id.* If the soliciting agent is the agent of the applicant, then he has the duty to explain the terms of and coverages included in the application. *Id.* If, on the other hand, the solicitor is the agent for the insurer, no such duty necessarily arises. *See id.* Although the *McNeill* court maintained it did not condone unfair or deceptive practices, it refused to make an agent an insurer that there is no misunderstanding or mistake concerning the application for insurance. *Id.*¹⁴³

The issue, however, of whether the insured's agent has a duty to explain the terms of the policy has received radically different treatment. In *May v. United Services Association of America*,¹⁴⁴ with respect to the duty of the insured's agent to disclose limitations in coverage, the court ruled that:

Some courts have extended this theory of agent liability beyond affirmative misrepresentations to failures to disclose some limitation in the policy's coverage. Usually, though, courts have done so only if there is an explicit agreement, a course of

dealing, or other evidence establishing an undertaking by the agent to determine the customer's insurance needs and to counsel the customer as to how they can best be met. *Compare Stein, Hinkle, Dawe & Associates, Inc. v. Continental Casualty Co.*, 110 Mich. App. 410, 313 N.W.2d 299, 302-03 (1981) (agent liable for failing to warn customers that their malpractice insurance policy required a "prior acts" endorsement to provide continuous coverage for past acts of negligence, where a "special relationship" had been created by ten years of transactions between customers and agency) *with Nowell v. Dawn-Leavitt Agency, Inc.*, 127 Ariz. 48, 52, 617 P.2d 1164, 1168 (1980) (affirming summary judgment in favor of agent who failed to advise customer that the homeowner's policy she requested did not include flood coverage, where the parties' prior dealings "negate[d] the kind of relationship of entrustment and initiative which is the basis for liability"). We need not decide whether we would follow a similar approach, or whether such a relationship of entrustment existed in this case, because the Mays do not content that Wiley failed to disclose any limitation in the Double Eagle policy's coverage.¹⁴⁵

This issue was addressed four years later in *Moore v. Whitney-Vaky Ins. Agency*.¹⁴⁶ In this case, Moore repossessed an apartment complex known as the Oak Hills Village. After he reacquired the complex, McLain, an agent for Whitney-Vaky asked whether he could handle the insurance for the complex. Moore did not recall specifically discussing any types of coverage with McLain; however, Moore had been responsible for obtaining insurance for his

¹⁴³ *Id.* at 705.

¹⁴⁴ 844 S.W.2d 666 (Tex. 1992).

¹⁴⁵ *Id.* at 670.

¹⁴⁶ 966 S.W.2d 690 (Tex.App.—San Antonio 1998).

businesses in the past. Later, an employee who was terminated brought a wrongful-termination claim. Moore sued his insurer and Whitney-Vaky, asserting he was lead to believe that all liabilities would be covered under the policy.¹⁴⁷ In rejecting the claim, the court noted that:

Although the court in *May* did not decide whether agent liability might extend beyond affirmative misrepresentations to failures to disclose some limitation in the policy's coverage, it noted that other jurisdictions were only willing to make such an extension of liability where there is "an explicit agreement, a course of dealing, or other evidence establishing an undertaking by the agent to determine the customer's insurance needs and to counsel the customer as to how they can best be met" [Citations omitted.] Moore asserts in his brief that this special relationship requirement is met in this case by his ongoing business relationship with McLain. However, Moore's deposition testimony refutes such a relationship. In his deposition, Moore admitted that McLain initially inquired as to whether he could place Moore's insurance coverage during a buffet at a country club. Moore could not recall ever discussing the desired coverage of the policy or its contents with McLain during the initial inquiry by McLain or at any time thereafter. Although Moore continued to use McLain to renew his policy every year, the renewal at most involved McLain's determination of whether the existing coverage could be obtained for a lower premium. Therefore, even if we were willing to recognize a duty to disclose coverage limitations based on a special relationship, the uncontroverted

evidence in this case established that no such relationship existed¹⁴⁸

The basis for such rule is that the insured is under a duty himself to read the terms of the policy. The duty on the part of the insured to read the policy was addressed extensively by the court in *Continental Cas. Co. v. Bock*.¹⁴⁹ There the court held:

There is no evidence that at the time of or subsequent to the delivery of the policy anything was said or done, fraudulently or innocently, that was calculated to prevent either Bullock or Colonel Bock from reading the policy and learning its terms. We think, therefore, that the insured and those in privity with him are bound by the plain unambiguous provisions of the policy as written regardless of the negotiations and conversations prior to the actual delivery thereof which fell short of any definite oral agreement as to insurance coverage. [Citations omitted.] "The insured is under a positive duty to read the contract delivered to him, and he will be presumed to have done so. By acceptance and retention, therefore, without objection to the terms thereof, the insured is precluded from stating that he did not know the terms thereof or did not intend to accept the contract in that form."¹⁵⁰

Similarly, in *American National Ins. Co. v. Huey*,¹⁵¹ the court held there that:

It is the settled law of this state that ordinarily the provisions of an insurance contract are binding on the

¹⁴⁷ *Id.* at 691.

¹⁴⁸ *Id.* at 692.

¹⁴⁹ 340 S.W.2d 527 (Tex.Civ.App.—Houston 1960).

¹⁵⁰ *Id.* at 533.

¹⁵¹ 66 S.W.2d 690 (Tex.Comm.App.—Section A, 1933).

insured whether he has read the policy or not. [Citations omitted.] Of course, this rule is subject to the further rule that, where a mere soliciting agent fraudulently represents to an applicant for insurance that the application calls for a different policy than it actually does call for, the applicant may rescind the contract.¹⁵²

F. Duty to Review Policy

Ample case law exists in Texas where an agent places an order for a policy and that policy is received by the agent, the agent is under an obligation to review the policy to make sure that the coverage afforded comports to the coverage ordered. This duty was first announced by the court in *Continental Casualty Co. v. Bock*.¹⁵³ There the court held that:

It is our view that under the facts of this case it was Bullock’s duty to Bock to examine the policy and make sure proper coverage was provided. [Citations omitted.]

This duty is part and parcel to the duty to procure. An agent is charged with the responsibility of insuring that he has obtained the policy which he was requested to obtain. The only way he can insure that this duty is fulfilled is by a careful review of the policy. Some courts treat this as a separate duty. Others treat it as part of the duty to procure.

G. Duty to Extend Insurance

Perhaps one of the most controversial areas - this issue was squarely addressed by the Supreme Court in *McCall v. Marshall*.¹⁵⁴ In *McCall*, the insurance policy obtained for the insured covered a used car business at the corner of West Fifth and West Avenue in Austin. The policy provided coverage for “Named

Locations.” Coverage for “Unnamed Locations” could be obtained if the insured notified the insurer of these unnamed locations. The jury found that the insured told the agent of the new location, but failed to find the insured requested the agent to include the South Congress “make ready” shop in his insurance policy as an additional location.¹⁵⁵ The agent contended that there was no duty imposed upon it to provide additional coverage of insurance for the insured at the South Congress location. The supreme court agreed holding that:

There are several cases which hold that certain fact situations impose a duty upon the agents to provide coverage for the customer, but we find that these cases can be distinguished on their facts. Here, no specific request by the insured for additional coverage occurred as in *Burroughs v. Bunch*, 210 S.W.2d 211 (Tex.Civ.App. 1948, error ref.). Nor had the insurance company with which the agent had placed the insured’s property become insolvent with the agent failing to replace the coverage with a solvent insurer. *Diamond v. Duncan*, 107 Tex. 256, 172 S.W. 1100 (1915), motion for rehearing overruled, 107 Tex. 256, 177 S.W. 955. Also, this is not a case in which the agent failed to renew the policy or to notify the insured that his policy had lapsed. *Diamond v. Duncan*, supra.¹⁵⁶

This principle was further expanded in *Pickens v. Texas Farm Bureau Insurance Companies*.¹⁵⁷ In this case, the Bennetts purchased a homeowners policy for their Amarillo home with liability limits of \$25,000. They did not seek advice about coverage nor did they confer with the agent. Later, suit was brought against them which resulted in a

¹⁵² *Id.* at 691.

¹⁵³ 340 S.W.2d 527 (Tex.Civ.App.—Houston 1960).

¹⁵⁴ 398 S.W.2d 106 (Tex. 1965).

¹⁵⁵ *Id.* at 107.

¹⁵⁶ *Id.* at 108-09.

¹⁵⁷ 836 S.W.2d 803 (Tex.App.—Amarillo 1992).

judgment in the amount of \$953,000.¹⁵⁸ At issue was whether there was a duty on the part of the agent to advise the benefits about the availability of higher liability limits. The trial court ruled in favor of the agent. The court of appeals affirmed holding that:

The determination of the existence of a legal duty is a question of law for the court. [Citations omitted.] No legal duty arises on the part of an insurance agent to extend the insurance protection of his customer merely because the agent has knowledge of the need for additional insurance of that customer, especially in the absence of evidence of prior dealings where the agent has customarily taken care of his customer's needs without consulting him.¹⁵⁹

More recently, the issue was addressed in *Critchfield v. Smith*.¹⁶⁰ The policy contained a \$100,000 per person UM/UIM bodily injury coverage. At issue was whether the agent had a duty to inform them that there were \$500,000 in uninsured motorist limits available to the insured. Summary judgment was granted to the agent. The court of appeals affirmed holding that:

In Texas, an insurance agent owes the following common-law duties to a client when procuring insurance: 1) to use reasonable diligence in attempting to place the requested insurance, and 2) to inform the client promptly if unable to do so. [Citations omitted.] No legal duty exists on the part of an insurance agent to extend the insurance protection of his customer merely because the agent has knowledge of the need for additional insurance of that customer, especially in the absence of evidence of prior

dealings where the agent customarily has taken care of his customer's needs without consulting him."¹⁶¹

H. Duty to Investigate Solvency

The duties owed by an agent with respect to the investigation of the financial solvency of the insurer depends upon what stage of the transaction such information is or should have been acquired by the agent. In *Hancock v. Wilson*,¹⁶² appellants were agents of *North American Fire Insurance Association of San Antonio*. A loss arose and the claim was submitted, but was returned unpaid. The court found that the agent and others were acting together in operating the North American Fire Insurance Association. It knew it to be an unincorporated concern without any capital. In finding liability and a duty on the part of the agent, the court of appeals held that:

That plaintiff did not know of said concern being insolvent, but relied upon defendants insuring them in a solvent company, as defendants represented they would do. The defendants were experienced insurance men, and the plaintiffs were inexperienced, and knew nothing about insurance contracts, and thought they were getting good insurance in a reliable concern and relied upon defendants' representations that their

¹⁵⁸ *Id.* at 805.

¹⁵⁹ *Id.* at 805.

¹⁶⁰ 151 S.W.3d 225 (Tex.App.—Tyler 2004).

¹⁶¹ *Id.* at 230. See also *Choucroun v. Soll Wisenberg Ins. Agency—Life and Health Division, Inc.*, 2004 WL2823147 (Tex.App.—Houston [1st Dist.] 2004); *The Estate of Hunn v. St. Paul Fire & Marine Ins. Co.*, 2006 WL1004870 (Tex.App.—San Antonio 2006); *Houston General Ins. Co. v. Lane Wood Industries, Inc.*, 571 S.W.2d 384 (Tex.Civ.App.—Fort Worth 1978); *Sexton v. Tom Baker Ins., Inc.*, 1988 WL 30326 (Tex.App.—Houston [14th Dist.] 1988); *Sledge v. Mullen*, 927 S.W.2d 89 (Tex.App.—Fort Worth 1996); *Townsend v. State Farm Lloyds*, 1998 WL 724016 (Tex.App.—Houston [1st Dist.] 1998).

¹⁶² 173 S.W. 1171 (Tex.App.—Dallas 1915).

property would be insured in a reliable company.¹⁶³

The holding in *Hancock* was clarified by other courts which have held that even when the insurer was solvent at the time of placement of the policy, but the agent later learns of the insolvency of the insured, a duty on the party of the agent to act arises. In *Diamond v. Duncan*,¹⁶⁴ the supreme court upheld liability where following procurement of the policy, the agent became aware of the insurance company's insolvency, but did nothing to protect the insured's interest. The court held that:

We restate the proposition which is before us and which contains the only issue that is presented to us in this case, thus: Diamond, an insurance broker, undertook to keep the property of Duncan insured, and having insured it in a company that failed, and of which failure he had knowledge, did not give notice to Duncan of such failure or take steps to procure substitute insurance.¹⁶⁵

Similarly, in *Cateora v. British Atlantic Assurance Ltd. of Nassau, Bahamas*,¹⁶⁶ the court held that an insurance agency that had actual knowledge prior to the insured's loss that the company he selected was not paying claims and had somehow disappeared had a duty to protect the interest of the insured. The court held:

By the middle of February, 1967, the defendant, Verner knew, or should have known, that British Atlantic had disappeared from the scene, was insolvent, and was not taking care of its obligations. From that time on, the Defendant had the obligation to advise

the Plaintiff Cateora of the situation or to replace his insurance with some else. This he failed to do.¹⁶⁷

However, a different situation arises if the agent has no actual constructive knowledge of the financial insolvency of the insurer at the time the policy was issued or at any time thereafter. In *Higgenbotham & Associates, Inc. v. Greer*,¹⁶⁸ Greer purchased a bowling center in Marshall, Texas. Higgenbotham, an independent insurance agent in Fort Worth, placed the insurance through Proprietors Insurance Corporation, an Ohio company. A fire occurred, and after the claim was submitted to PIC, a check was issued for the loss, but was returned unpaid because PIC had become insolvent.¹⁶⁹ Greer sued Higgenbotham alleging negligence in the procurement of the policy. A jury found that Higgenbotham was negligent. On appeal, the court held there was no evidence of Higgenbotham's negligence. The court held that:

The general rule is that an insurance agent or broker is not a guarantor of the financial condition or solvency of the company from which he obtains the insurance. He is required, however, to use reasonable skill and judgment with a view to the security or indemnity for which the insurance is sought, and a failure in that respect may render him liable to the insured for resulting losses. Thus, where a policy is procured in a company known by the agent to be insolvent, the agent is liable for a loss suffered by reason of such insolvency. On the other hand, where the company was solvent when the policy was procured, its subsequent insolvency generally

¹⁶³ *Id.* at 1172.

¹⁶⁴ 107 Tex. 256, 172 S.W. 1100 (1915).

¹⁶⁵ *Id.* at 259.

¹⁶⁶ 282 F.Supp. 167 (S.D. Tex. 1968).

¹⁶⁷ *Id.* at 173-74.

¹⁶⁸ 738 S.W.2d 45 (Tex.App.—Texarkana 1987).

¹⁶⁹ *Id.* at 46.

does not impose liability on the agent or broker. [Citations omitted.]¹⁷⁰

The court then discussed the cases where the agent was aware of the insolvency at the time the policy was issued or at a time prior to the loss occurring. The court then set forth the duty of an agent which would govern situations where the insolvency occurs after the underwriting of the policy. The court held that:

We find these authorities persuasive, and conclude that an agent is not liable for an insured's lost claim due to the insurer's insolvency if the insurer is solvent at the time the policy is procured, unless at that time or at a later time, when the insured could be protected, the agent knows by the exercise of reasonable diligence should know, of facts or circumstances which would put a reasonable agent on notice, and the insurance presents an unreasonable risk.¹⁷¹

I. Expiration Dates and Nonrenewals

When an insurance agent has placed a policy on behalf of his client, his duty to the insured continues and extends to expiration dates in those renewals where an agent has knowledge. In *Kitching v. Zamora*,¹⁷² the issue before the court was whether an insurance agent could be held liable for failing to keep a customer informed about the expiration date of the customer's insurance policy. The trial court rendered judgment in favor of the insurer. The court of appeals reversed and rendered judgment for the agent. As a result of confusion, double payments were made for the premium because they were made by both the Kitchings and their mortgage company.¹⁷³ Steps were taken by the Kitchings to stop the mortgage company from

making claims and for them to be responsible solely for the mortgage payments. Because of the change, the Kitchings did not receive the correspondence regarding their 1979 policy renewal or the premium. The agent was notified about the lack of payment and pending cancellation, but did not notify the insured. The policy expired on June 16, 1979, and on July 16, 1979, the Kitching's house sustained substantial damages from a flood. Since the policy had not been renewed, the flood insurance company refused to cover the Kitchings' loss. With respect to the duty owed by the agent, the supreme court held that:

An insurance agent, who receives commissions from a customer's payment of insurance policy premiums, has a duty of reasonably attempting to keep that customer informed about the customer's insurance policy expiration date when the agent receives information pertaining to the expiration date that is intended for the customer.¹⁷⁴

In *Schindler v. Mid-Continent Life Ins. Co.*,¹⁷⁵ the insured purchased two life insurance policies from Mid-Continent Life. The summary judgment proof showed the Schindler paid the annual premium at the time of issue, but no subsequent annual premium was ever paid and the policies terminated for nonpayment in June 1981. In March 1984, Schindler discovered he had cancer and inquired and learned that the two policies had expired because of nonpayment. In holding that the agent breached no duty because of lack of knowledge that there were any premiums overdue, the court held that:

Appellants also allege Compensation had a duty to inform of premiums due and rely on *Kitching v. Zamora, supra* in support of their argument. In *Kitching*, an agent was held liable for

¹⁷⁰ *Id.* at 46-47.

¹⁷¹ *Id.* at 47.

¹⁷² 695 S.W.2d 553 (Tex. 1985).

¹⁷³ *Id.* at 553.

¹⁷⁴ *Id.* at 554.

¹⁷⁵ 768 S.W.

failing to notify an insured of premiums due. In that case, there was proof that the agent had received numerous statements from the insurer asking it to forward the information to the insured. In the present case, appellants allege that agent Compensation received notice of premiums due from the insurer and therefore had a duty to pass the information on to the insured. . . . Because there is no proof that agent Compensation had notice of premiums due or policy termination, we hold that Compensation had no duty, as a matter of law, to give notice to appellants.¹⁷⁶

Therefore, where the agent has no notice of any termination or any expiration of the policy or notice of premiums due, no duty arises on his part to notify the insured.

In *Corn v. Hedgecote Ins. Agency*,¹⁷⁷ the issue was presented as to whether an insurance agency, through which an insurance policy was issued naming a mortgagee to whom a loss was payable and who paid the premium, has a duty of reasonably informing the mortgagee of the expiration and nonrenewal of a policy by the named insured. The court had no trouble in extending the holding in *Kitching v. Zamora*. The court held that

An insurance agent who receives a commission from the payment of the insurance policy premium by the named mortgagee in the policy, knowing that the mortgagee pays for the coverage and whose servicing of the policy includes notification to the insured of the expiration and nonrenewal of the policy, has a duty of reasonably attempting to keep the

mortgagee informed about the policy expiration date and nonrenewal.¹⁷⁸

In *Trinity Universal Ins. Co. v. Burnette*,¹⁷⁹ the court again addressed the duty on the part of agent/broker with respect to expiration or nonrenewal of a policy. In that case, the insured's home was destroyed by fire at a time when the insured believed that it was insured by a Trinity policy procured by Davis Insurance Agency. Trinity believed the policy had been renewed by Davis placing it in another of the companies that he represented. Davis's records incorrectly indicated that the policy had been renewed.¹⁸⁰ In affirming judgment against the agent, the court of appeals held that:

The evidence is uncontroverted that Davis handled a number of insurance policies for plaintiff's automobile insurance, boat insurance, and fire insurance on several dwellings. Don (Larry) Davis, the president of Davis Insurance Agency, Inc., testified that his agency had always renewed policies for plaintiffs or notified them when policies were not renewed.

Although there was no statutory or contractual duty impressed upon Davis to notify its policyholders of nonrenewal, we hold that Davis was under a duty, as plaintiff's insurance agent, to either renew their policy with Trinity, replace the policy with another company, or notify them of its nonrenewal so that they could obtain insurance elsewhere.¹⁸¹

¹⁷⁶ *Id.* at 333-34.

¹⁷⁷ 836 S.W.2d 296 (Tex.App.—Amarillo 1992).

¹⁷⁸ *Id.* at 299.

¹⁷⁹ 560 S.W.2d 440 (Tex.Civ.App.—Beaumont 1977, no writ).

¹⁸⁰ *Id.* at 441-42.

¹⁸¹ *Id.* at 442-43.

J. Duty to Acquaint Oneself with Insured’s Business

At least one court has held there is a duty on the part of the agent to acquaint him or herself with the insured’s business. In *Frank B. Hall & Co. v. Beach, Inc.*,¹⁸² the insured was a trucking company primarily engaged in the business of hauling and rigging oilfield equipment. Beach was hired by Eljay’s Drilling Corporation to move and rig up draw works. It was late in the afternoon, when Beach arrived at the drilling site with Eljay’s draw works on its trailer. It was decided that the draw works would be left on the trailer until the next day. The next morning, as Beach’s crane was removing the draw works from the trailer and turning it in order to place it upon the “substructure” the spreader beam broke and the draw works fell, striking the corner of the substructure. The draw works suffered extensive damage. Wausau denied the claim based on its interpretation of the policy to Beach that there was no coverage for “lifting and rigging” and that the draw works was not “in transit” within the meaning of the policy.

Suit was filed against Hall and Wausau. Judgment was rendered in favor of the insured. In addressing the duty owed by Hall to the insured, the court of appeals held that:

Mr. Cox admitted that, at the time he prepared the insurance proposal for Beach, he did not know what a lifting and rigging policy was. The evidence stated above is sufficient to support the jury’s answers. . . .

By its twelfth and thirteenth points of error, Hall challenges the legal and factual sufficiency of the evidence to support the jury’s finding that Hall was negligent in failing to provide insurance coverage for Beach’s lifting operations.

Several witnesses testified that an insurance agent should thoroughly acquaint himself with the client’s business before he attempts to write the policy. This should be done so that the client will be covered for all risks associated with the operation of his business. . . .

Mr. Cox admitted that he didn’t know what “lift risk” was when he wrote the insurance proposal. This evidence is sufficient to support the jury’s finding of negligence. Hall’s twelfth and thirteenth points of error are overruled.¹⁸³

Few, if any cases have followed the *Beach* case. However, it does support the proposition that the agent should familiarize himself with the insured’s business prior to attempting to underwrite the policy.

K. Duty to Investigate

One issue of considerable disagreement is the duty of the agent to investigate changes in the business of the insured. In *Houston General Ins. Co. v. Lane Wood Industries, Inc.*,¹⁸⁴ the insured, Ranada Mobile Homes, sold its assets to Lane Wood Industries in an asset sale. Included in the asset sale was Ranada’s prepaid insurance.¹⁸⁵ Following the sale but prior to the expiration of the policy, an explosion injured three persons. Suit was brought and Houston General agreed to defend Ranada Mobile Homes, Inc., but refused to defend Lane Wood Industries. The policy had a provision which stated that an assignment of interest under the policy would not bind the company unless its consent was endorsed.

Testimony at trial indicated that the agent was told by the owner of Ranada that “we’ve sold out.” They did not discuss the specific

¹⁸² 733 S.W.2d 251 (Tex.App.—Corpus Christi 1987, writ ref’d n.r.e.)

¹⁸³ *Id.* at 261.

¹⁸⁴ 571 S.W.2d 384 (Tex.App.—Fort Worth 1978).

¹⁸⁵ *Id.* at 387.

details of the sale, but the agent testified that he believed that it was a stock sale. Houston General testified that they would not have been willing to extend a “split risk” coverage to Lane Wood for only that operation and, in fact, Houston General had refused to renew policy once it came up for renewal.¹⁸⁶

The trial court found that the agent was negligent. On appeal, the court found that the agent had a duty to investigate and held that:

We hold that Smyres had a duty to investigate the sale and is therefore charged with notice that the sale was an asset sale. It is undisputed that Smyres was informed by Crowder that Ranada had “sold out.” And Smyres admitted that he wondered whether the coverage was still in force. “[W]hatever is sufficient to put a person on inquiry is sufficient to affect him with notice of such facts as he might be presumed to learn upon reasonable inquiry.” [Citations omitted.]¹⁸⁷

Therefore, under certain circumstances, the agent will have a duty to investigate the business of the insured in order to insure that the appropriate coverage has been procured.

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¹⁸⁶ *Id.* at 388.

¹⁸⁷ *Id.* at 393.