

(Aug 7, 2008)

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## Agents & Brokers

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### Nebraska Does Not Recognize Cause of Action for Breach of a Contract to Procure Against an Insurance Intermediary Who Is an Insurance Agent Acting Solely on Behalf of a Disclosed Insurer

*Court Recognizes Contract Cause of Action for Failure to Procure Insurance as Requested against an Insurance Broker, Defined As, a Middleman between the Insured and the Insurer, the Legal Agent of Neither and Able to “Shop” for Policies from Different Companies*

*Broad ex rel. Estate of Schekall v. Randy Bauer Insurance Agency, Inc.*, 749 N.W.2d 478 (Neb. 2008)

#### Case at a Glance

While there can be no contract cause of action—an action for failure to procure insurance—against an “insurance agent,” since the agent is the legal agent for the insurer it represents and not the purchaser, there can be such a cause of action against an “insurance broker,” who is not the agent of the insurer. Since the agent-versus-broker status of the intermediary-defendant had not been established in

this case, and since it involved a fact issue, the case was reversed and remanded.

#### Summary of Decision

*Facts.* David Schekall (“David”) was killed in an automobile accident he caused, as was his passenger. The passenger’s estate sued David’s estate. David’s estate did not have enough automobile liability insurance to compensate the passenger’s estate, so David’s estate had to pay \$165,000 to settle with the passenger’s estate.

David had purchased insurance, but not automobile insurance, from Randy S. Bauer and the Randy Bauer Insurance Agency (“Randy”) a year before the accident. He obtained land and cattle, so needed insurance. David and his parents met with Randy on December 31, 2002. The original purpose of the meeting was for David’s parents to “review their insurance coverage” with Randy. David’s father claimed that Randy agreed to obtain the same insurance for David that he got for the parents, except that David’s personal liability umbrella would have a limit of \$1 million, while that of his parents would have a limit of \$3m. This insurance was to be a “farm and ranch premises/personal liability policy.” Randy stated that David had said to him that he did not want homeowner’s or auto coverage, since he already had it. Randy therefore did not obtain homeowners or automobile insurance for David.

David’s estate sued Randy. The trial court granted Randy’s motion for summary judgment. It held the two policies were clear and unambiguous, so if David had read them he would have understand what he did not have. Purchasers of insurance, said the trial judge, have an obligation to read the policies they purchase. David either read the policy or he did not. If he didn’t, his omission was the cause of the problem. If he did, then he failed to grasp what he read, and so he was a fault again. The estate appealed.

The Nebraska Supreme Court reversed and remanded, reasoning that the district court failed to focus on the right issue, namely whether David’s estate had a cause of action against Randy. The allegation against the defendants is breach of contract, but what contract—and hence what type of contract—did Randy allegedly breach? Obviously, it was not a breach of the insurance contract itself. Hence, the complaint must be that Randy breached a

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“contract to procure” the allegedly sought contract of insurance.

Of course, traditionally in Nebraska—as in lots of states—if an insurance agent agrees to obtain a specific kind of policy but negligently does not obtain it, then the customer has a tort cause of action. Apparently, the plaintiff had not plead that; apparently the personal representative of the estate had pleaded only contract. The Court indicated that there was no Nebraska precedent for the existence of a tort cause of action, but implied that there should be something of that sort.

Formulating the elements of this cause of action will be difficult, however, unless two matters of context are explored. First, there is the nature of agency. Second, there is the meaning of the phrase “insurance agent.” That term has been used loosely, even by the courts. But the term “agent” involves the idea of a *principal*, so attention must be paid to this linkage. Many commentators have observed that anyone who negotiates a contract of insurance to deal with someone else’s risks must be the agent for one of the parties. “Depending on whose interests the ‘insurance agent’ is representing, he or she may be a ‘broker’ or an ‘agent.’” Thus, there is a critical distinction.

The court spells out the distinction very clearly. A representative of the insured is a broker. An insurance broker is acting as a middleman between the insurer and the insured. S/he is not employed by any insurer. Ultimately, the insured selects the insurer, unless the insured has no preference, in which case, the broker picks. “In contract, an ‘insurance agent’ represents an insurer under an exclusive employment agreement by the insurance company.” Which one of these an insurance intermediary is usually is a question of fact.

If a person contracts with an agent of a principal for a product of the principal, s/he is contracting with the principal, not the agent, unless the agent purports to bind itself, or something of the sort. This general principle is recognized to apply to insurance. Hence, “an action for breach of contract to procure insurance is inappropriate when brought against an insurer’s agent who, within the scope of his or her authority, contracted on behalf of the disclosed principal and did not bind himself or herself personally. Specifically, an insurance agent’s mere promise to procure requested coverage though his sole principal is insufficient to create the agent’s personal liability

because that promise is clearly within the scope of the agent’s authority. However, we will recognize a cause of action against a broker for breach of contract to procure insurance because the broker is the insured’s agent.”

*Ruling.* Which of the two were the defendants? One of the plaintiff’s pleadings suggests that the defendants were agents. But the pleading was not crystal clear, and there is a question of fact. That question must be answered first, before the question answered by the court below should be dealt with.

## Comment

This is a puzzling opinion. First, it indicates that an intermediary cannot be an insurance agent for any insurer if it can bind more than one insurer. There is no reason why this should be true. Second, it indicates that a broker, who is defined as a person in the middle represents the insured and is—indeed—the insured’s (legal?) agent. This last point cannot possibly be true. The insured is at least frequently not the principal of the middle person in the insurance deal.

The sociology and the linguistics of the insurance market place are both more complex than the distinctions the Nebraska Supreme Court has adopted. It would be far better to start with general phrase “insurance intermediary”—or just plain intermediary— and then to carve it up as needed.

Second, the supreme court unnecessarily remanded the case back to the trial court. If Randy was an insurer’s agent, then there was no contract action against him. If he was a broker, and so suable, if the uncontradicted evidence was that David did not read his policy, and if reading and maybe trying to understand a policy is a condition precedent upon bringing a failure-to-procure cause of action (or an element thereof), then David’s estate has no case, and the court could have created the linguistic scheme it wanted without sending the case back to the trial court for what is almost certainly another summary judgment.

Third, this case may have been fouled up from the beginning. It was probably never a contract case, or at least it was not a failure to procure case. Randy was probably intending to counsel the parents on New Year’s Eve 2002. David also showed up, so Randy tried to do for him, what he was doing for the parents. He