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“AGENTS” AND “BROKERS”: TEXAS STATUTORY DEFINITIONS AND RULE-ENTAILING CHARACTERIZATIONS

THIS ESSAY CALLS FOR A REACTIONARY REVOLUTION IN TEXAS INSURANCE LEGAL THINKING. ITS PROPOSAL IS “REACTIONARY” IN FOUR SENSES. EACH OF THEM IS IMPORTANT.

First, it requires that we focus literalistically upon the established and clear language of the relatively old text of statutory law. Second, it requires that we comprehend and react to it—and it alone—as is appropriate in interpreting clear statutes. In interpreting statutes, everyone agrees that text is of central importance, even if context is also important and that even legislative purpose, if it is reliable and knowable, is sometimes also important.¹ Then again, one wonders how to embrace legislative intent when there are no legislative records at the time of passage, when actual testimony from legislators present is impossible—since they are all dead—or not terribly believable, since each of them had political, not to mention immediate financial motivation. Texas legislative intent is almost impossible to find and determine.

Third, the deepest and most mysterious theme and focus of this entire enterprise is the word “solicit,” and the concept it expresses. We shall see why this is so important as the essay progresses. How we react to the word “solicit” under various circumstances in thinking about insurance intermediaries is crucial and—believe it or not—complex. Right here, in this area, facts and meaning are and crucially connected.

Fourth and finally, it is called “reactionary” because it demands that we react to some established desires, wishes, attitudes and perceptions in negative ways. (The proposal is not reactionary, however, in the sense that it wants to re-establish a once established rule which is now

ancient and completely unused, or which was explicit, unquestionably unambiguous, well-understood, and widespread, but which is now an ignored, ill-understood, opposed, or abandoned rule, principle, norm, view or theory).

In contrast to what has been said so far, some of the proposals herein are “revolutionary”—in an orthodox sense of that word—because they require that we radically change how many think about and conceptualize one of the important low hanging and supporting branches—or perhaps even roots—of the tree of insurance law. So, let us begin. Remember! Keep the ideas of *solicit*, *solicited*, *soliciting*, *solicitation*, and *solicitor(s)* in mind as we go.

I. STARTING POINT

The discussion here concerns how to think about the law of “insurance agents” and “insurance brokers.”² These two phrases can be explicated and better understood together with—or, as it were, inside—the phrase “insurance intermediaries.” Insurance intermediaries are middle-persons between insurers and policyholders, policy buyers, and/or insurance policy “wannabes,” (i.e., want-to-“bes”). There are many uses of the terms “agent” and “broker” in the insurance sector of life. Brokers are sometimes thought of as middlepersons at “big agencies.” Big-time sellers at Marsh-Mac or Aon are often referred to as “brokers,” and hardly ever as agents. Often they are thought of as middlepersons involving business insurance and specialized insurance. Some people know that there are whole chains of brokers between an insurer and those buying insurance. Agents are often thought of as selling to individuals and families. People ordinarily speak of the “State Farm agent” but

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never of the "State Farm broker." Allstate is the same. Given these usages, neither agents nor brokers are necessarily the legal agents of anyone—and certainly not either an insurer or a policyholder or policy-customer.

Occasionally, in some courts and some states, brokers are thought of as the legal agents of insurers, while agents are thought of as legal agents of customers and policyholders.³ This usage is elegant, since it divides up the world in a sharply distinguishable way, but the usage does not fit with ordinary usage, so it must have either a statutory basis, or a basis in common law. Sometimes it does in some states; sometimes it does not. Thus, to some degree, the terms "agent[s]" and "broker[s]" are used differently in different contexts, and they are—in some ways—ambiguous, although not through and through, or in all contexts.

In discussing these matters it is important to keep in mind that there is a difference between the idea of *being an agent* (like a guy selling bus tickets), *being an agent of someone*, and *being someone's* [or *something's*] *legal agent*. (And, of course, there are many more combinations of relevant phraseology.) What we need to keep in mind more than anything else is the idea of *legal agency*. This idea always involves two or more persons or entities. At least one is the *agent*, and at least one is the *principal*. Agents act *for* principals; principals instruct and/or authorize agents. The agency relationship has a scope, since an agent may be authorized to do this, but not that. The relationship can have a time frame, as well as a topical frame and/or a geographic frame. If an agent is acting within the scope of his agency relationship with his principal, he can bind the principal, for example, by contract or by deed. If an agent, while acting within the scope of the agency relationship, harms some third person or entity, the principal may be responsible to the injured third party. This is called "vicarious liability"; in theory, at least, the principal could then recover from the agent. After all, it was the agent who fouled up. Interestingly, agents are frequently classified as the fiduciaries of their principals.⁴

Here are some important legal questions about insurance intermediaries. These questions are coming up more and more often in suits against intermediaries, and these appear to be becoming more common. In this essay, all of these questions are asked with respect to Texas only:

- Is an insurance intermediary always the legal agent of somebody—insurer, policyholder, policy customer, and/or another intermediary? Why? When?

- Is an insurance intermediary ever the legal agent of an insurer? When? Why?
- Is an insurance intermediary ever the legal agent of a policyholder? When? Why?
- Is an insurance intermediary ever the legal agent of a policy customer? When? Why?
- Is an insurance intermediary ever the legal agent of both the insurer and the policyholder (or customer)? When? Why?

Of course, in theory, these questions could differ as between insurance agents and insurance brokers, but that is not true in Texas, as we shall see, and so that potential difference will be ignored for here and now.

Before going further, it might be helpful to observe that insurers want middlepersons to be classified as their legal agents as infrequently as possible. Agency cannot be avoided anywhere where the middleperson is a managing general agent. These people and/or entities have the authority to issue policies for insurers, so they cannot not be agents of them. It is impossible. However, such insurers try to keep the scope of the agency as narrow as possible. Indeed, with respect to most middlepersons who—in some sense—represent, service, and/or produce for insurers, there are signed contracts containing clauses stating that the middle person is not the legal agent of the insurer. Ask yourself about the extent to which such clauses of such contracts are enforceable in Texas given the law which is about to be outlined and then discussed.

II. TEXAS STATUTE(S)

A long-lasting Texas statute—or group of statutory provisions—in the Insurance Code establish(es) at least some of the circumstances under which an insurance intermediary is the legal agent of the insurer. This statute, now §§4001.003 and 4001.051-053, will be discussed presently. It does not, by its own terms, exhaust the *ways* in which an intermediary can become a legal agent of an insurer, and it does not restrict the *scope* of this agency relationship.

The statute is not well-known in the insurance industry, and this is true not only nationally, but in Texas as well. Of course, this lack of knowledge is a great surprise. However, the statute is not well-understood by those who know of it either, and this is not so surprising. (Wishful thinking often determines interpretative belief and therefore undermines legal knowledge.). Probably most in the

insurance industry—even those who are genuinely knowledgeable—do not realize how powerful its language really is, when interpreted simply, straightforwardly, and clearly. Many judges do not like the statute and prefer avoiding, ignoring, or even misreading it. Many who do know of its existence and invoke it, usually on behalf of policyholders, misinterpret it and do not appreciate its complexity. In any case, the present version (or printing) of this statute will be discussed presently. It is of importance in contemporary Texas legal thought, but it is of even more importance—indeed, it is of enormous importance—when it is understood correctly. Toward this end, we must begin with its language in isolation.

All states have statutes regulating some insurance intermediaries, and virtually all do so extensively.³ Many have statutes classifying and characterizing them as well. Significantly, these statutes change over time,⁴ and this occasionally produces confusion among participants in the insurance industry, as well as the courts. This has not happened in Texas, to any great extent, even though there has been a substantial revision in the way in which Texas statutory law regarding insurance is designed, devised, worded, and presented.

With respect to agents, for example, before 2005, the most significant part of the Insurance Code was Chapter Twenty-One, Subchapter A, which was entitled, “Agents and Agent’s Licenses.” Art. 21.02, entitled “Who Are Agents?” and Art. 21.04, entitled “Solicitor Deemed Company’s Agent” were among the most important provisions regarding the characterization of insurance intermediaries. These sections have been physically revised, reorganized a little, and very slightly altered in the new Texas Insurance Code. The relevant parts to our discussion are to be found in Chapter 4001, which is entitled “Agent Licensing in General.” The two most significant of the old provisions are to be found first in §4001.051, which is entitled “Acts Constituting Acting as Agent,” and which is nearly the same, except in physical configuration, as Art. 21.02.; and second in §4001.052, which is entitled, “Solicitor of Application for Insurance Considered Agent of Insured,” and which is substantially the same as Art. 21.04. In addition, the new Code contains §4001.003, which is entitled, “Definitions,” §4001.053, which is entitled, “Personal Liability for Acting as Agent,” and §4001.001, which is entitled, “Purpose,” and which is potentially extremely important to judicial reasoning.

The next sections of the paper focus on these portions of the new Insurance Code. Necessarily, much of what is said here is quotation, and only some of it is commentary.

Some terms in the statutory quotes are emphasized. This is the author’s addition to the statutes. There are not italics, underlinings, or emboldened letters in the statutes themselves. For reader guidance, some asterisks have been added here and there to coordinate multiple texts, i.e., statutes stating rules and statutes stating definitions. They too are not to be found in the original, official, and authoritative text.

DEFINITIONS

Section 4001.003 contains a number of significant definitions. The crucial definition is that of the word “agent,” and it is to be found in §4001.003. Much of it is about to be quoted. I have added asterisks immediately following those words which are defined elsewhere in §4001.003. Neither the asterisks, nor the underlining are in the original. Here is the quotation of §4001.003(1):

“Agent” means a person* who is an authorized agent of an insurer. . . . , 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 ... contract. [Emphasis—italics and boldness added, along with the asterisks.]

“After all, the word ‘Agent’
in ordinary usage is
ambiguous . . . ”

The definition also concerns representing health maintenance organizations, and it contains a list of those who or which work in the insurance industry who or which are not “agents.”

The key defined term is “person.” It is defined in §4001.003(8), as follows:

“Person” means an individual,* partnership,* corporation,* or depository institution. [Asterisks added.]

The terms “individual,” “partnership,” and “corporation” are all themselves defined in §4001.003. The terms “insurer” and “subagent” were also used in the definition of “agent,” and they are defined. The definition of corporation is a lengthy list, and – no doubt – there are hidden features in this definition.

The definition of the term “subagent” is in §4001.003(9), and it is relatively straightforward:

"Subagent" means a person engaged in activities described under Subdivision (1)[, the definition of "Agent,]" 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 ... contract ..., or collecting premiums or charges on an insurance ... contract ..., 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 ..., or a provision listed in Section 4001.009 includes a subagent without regard to whether a subagent is specifically mentioned. [Asterisks added.]

But Section 4001.009 is a reference to other laws, while Chapter 21, which is entitled "General Provisions," is really the numbering system taken over from the previous Insurance Code, most of which has been repealed. (One exception is Art. 21.11-2, which is entitled, "Agency Contracts with Insolvent Insurers," and there are some others, but they will not be discussed here).

WHAT MAKES AN INTERMEDIARY AN AGENT BY STATUTE?

Obviously, if someone meets the definition of "agent" found in §4001.003, then that person is an agent. It is still not clear, however, precisely what an agent is. This is especially true, given the diversity of usages that exist for the term "agent" in the insurance industry, as well as in language more broadly considered. After all, the word "agent" in ordinary usage is ambiguous, so disambiguation in the law will require, as it were, "going beyond." Above all, the definition found in §4001.003 does not identify the principal of the agent as defined in that section.

Then again, some *acts* by themselves—through their very nature—constitute the acts of a legal agent, whether the *definition* in the statute is met or not—whether the statutory definition is unambiguous or not. Miracle or miracles, at least some of these acts are to be found listed in §4001.051(b) of the statute, along with some explanations. Sound statutory interpretation virtually requires that if there are obvious examples in a statute, then this fact helps interpret, understand, and apply the general language of a related definition. In particular, §4001.051(b) states that one who performs the

listed acts is an agent *of* the insurer. Here are the key portions of this statute:

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 an 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 statute ... ,[?] if the person*:

- (1) *solicits insurance* on behalf of the insurer;
- (2) receives or transmits other than one 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. [Asterisks, italics, and bold added.]

To repeat, the aforementioned quotation is most of what is to be found in §4001.051. Remember what has been emphasized, to wit: the concepts built into the term "solicit" and its semantic relatives. Is there any signifi-

cance that it is first on the list? One cannot help but think so. Surely one would not look stupid if one mentioned this fact in argument.

Of course, this statute is not an absolutely complete account of all one would like to know about the intermediary-to-insurer agency relationship. This is true for several reasons.

First, it does not explicitly specify any duties, and it does not provide a list thereof. Of course, it is natural to look for them in the common law of legal agency. This might well be expected by the legislature under the circumstances. It would be natural especially to infer this vis-à-vis the recent legislative reorganization of this statute, since the Texas Supreme Court has done exactly this with the earlier version of the statute, at least twice.⁴

Second, it does not specify the scope of the agency relationship arising from the various functions. Clearly, someone who made a diagram of a building for an insurer would not be an agent of anyone in the same way as the someone who offered policies, solicited customers, constructed the policies, and transmitted premiums would be. Thus, the question is, *given that someone is statutorily the agent of an insurer, what is the scope of his agency?*

Third, to what extent can a contract between an insurer and a statutory agent control the scope of the agency? Presumably, if a contract says that the non-insurer party to the contract is not the agent of the insurer party to that contract, and the statute says he is, the statute controls. But by how much? To what extent? And why has this not been hitherto litigated? So much for summarizing and wondering about 4001.051(b). What about the other subsections?

Section 4001.051(a) states that the section applies regardless of whether the insurer is incorporated in Texas or elsewhere. Section 4001.051(e) states that if an unlicensed person refers another person to someone who conforms to §4001.051(b), this referral does not make the referring person an agent, "unless the unlicensed person discusses specific insurance policy terms or conditions with the potential customer." These two subsections are probably not terribly important for most purposes.

Section 4001.051(c) is another story. This section, which is taken over from the preceding Code, but presented more prominently, and which appears in many state statutes, is extremely important. That section states as follows:

This section, [§4001.051,] does not authorize an agent to orally, in writing, or otherwise alter or waive a term or condition of an insurance policy or an application for an insurance policy.

In other words, insurers determine what are in the policies, either by themselves or in negotiation with an insured-to-be. Section 4001.051 never expands the scope of an insurance agent's agency so that the insurance agent can alter either the content of an insurance policy or the content and requirements of an application for insurance.

Another set of acts which constitute acting as an agent is to be found in §4001.052, entitled, "Solicitor of Application for Insurance Considered Agent of Insurer." Section 4001.052 contains, roughly speaking, the same limitations that are found in §4001.051(c). Thus, the crucial language of this section is to be found in §4001.052(a), which states as follows:

A person who *solicits* an application for life, accident, or health insurance or property or casualty insurance *is considered the agent of the insurer issuing a policy on the application and not the agent of the insured in any controversy between the insurer and the insured, the insured's beneficiary, or the insured's dependents.* [Italics added.]

This section, §4001.052, is pretty much identical to Art. 21.04 found in the old Code.

COMMENTARY

Of course, there has already been some commentary built into the preceding paragraphs. Now we turn to big-time stuff. The number of cases explicating the meaning of the earlier versions of these statutes is not large, and thus are not much help in understanding the new version. Consequently, some of the commentary set forth here is based upon language, argument, prediction, and guesswork. It is not based on established case law, and, it does not say, "Here is what this statute means, since the Texas Supreme Court has said so, and that's the end of that." There is not a broad and fixed judicial or legal consensus as to the meanings of these statutes. In fact, people in the insurance industry do not understand them very well, as has already been stated, and many lawyers try to ignore them, for reasons which will become clear presently.

A. §4001.052(a): Meaning.

Start with Section 4001.052(a), just quoted above. Basically, it says that if a person "solicits" an application for various kinds of insurance, that person will be, by the courts, "considered an agent of the insurer issuing [the] policy" which is based upon the application and that soliciting person shall not be "considered an agent of the insured in any lawsuit between the insurer and the insured." It seems to the author that the term "agent" in this definition means, or expresses the idea of, *legal agent*. Thus, if someone solicits an application for insurance, that person is the legal agent of the insurer and not thereby the legal agent of the insured. This rule applies only if the insurer issues the policy.

Turn now to the other words in the statute. The term "person" is defined in Section §4001.003(8) to mean virtually any kind of human being or entity involved in the solicitation. All of the ideas of the types of insurance involved are clear enough, except for the term "casualty insurance." It is not defined in the statutes, and there is slight disagreement as to what it means. Virtually everyone agrees that it means liability insurance. One leading insurance dictionary, however, defines it as liability insurance involving bodily injury or injury to property,⁹ whereas another dictionary defines "casualty insurance" as involving all insured liability whatsoever.¹⁰ Texas insurance cases regarding liability insurance do not seem to turn on this definition.¹¹

This leaves us with the word "solicit." There are no civil cases in Texas defining this term in the insurance context. The term "solicit" appears in §7.02(a)(2) in the Texas Penal Code, which is the law against conspiracy, but it is not itself defined there.¹² Thus, the definition of "solicit" should probably be understood as it is usually used, since it does not have any kind of specialized use in the insurance industry.

Broadly understood, the verb "to solicit" means a whole range of things. At the one hand, it means *inviting somebody to do something*, while at the other end of the range it means *trying to get somebody to do something*. The word "solicit" does require that the person soliciting do something. Sitting—or standing—more or less silently and waiting for someone else to suggest something, and then handing over whatever is requested does not

constitute "solicitation," in common usage. For example, tending bar does not make a person a solicitor of anything. Although this might change if the customer begins by saying, "What's a good gin drink?"

What is to be said about the following situation? An insurance intermediary has an office. A person walks into the office and says that he'd like to buy auto insurance. The intermediary says, "You've come to the right place. Here is an application." Did the intermediary solicit the sale to the person who walked in off the street? Did the intermediary solicit the application? After all, he handed it to the customer.

What about this situation? Suppose an insurance intermediary selling life insurance calls on the Smith family and suggests that they ought to buy some life insurance. Unquestionably, this is a solicitation in the context of sales. Now suppose the family agrees that they should buy life insurance, and asks "from whom should we buy it?" Now, if the agent responds and says, "I represent Jones Insurance, and I recommend them; here is an application." Unquestionably, the intermediary has solicited both business and an application. Now supposed the intermediary says, "I represent five different companies. They're all good. The prices are all about the same. Here they are. Pick the one you want. I'm pretty sure all of them will issue coverage to people as splendid as you are." Thereafter, Smith's family picks Jones Insurance Company, and they go forward.

"The word 'solicit' does require that the person soliciting do something. Sitting or standing . . . and then handing over whatever is requested does not constitute 'solicitation,' in common usage."

B. §4001.053(a): Dual Agency.

Now we come to the key portion of §4001.053. Does this section contain a statutorily based legal rule that legal agents of insurers are not also—ever—the legal agents of policyholders or those seeking to buy policies? The fact is the section does not really say that.

First, the passage is restricted to certain types of insurance: life, accident, health, property, and casualty insurance. Of course, these are most all types of insurance, but they are not necessarily the only ones. What is credit risk insurance, for example?

Second, and more significantly, the statute does not say what is or is not true under Texas law. What it says is

what may be *considered* to be the case in legal controversies between insurers and insureds, insurers and the beneficiaries of insureds, insurers and the dependants of insureds. This is a legal rule about what may be done and what may not be done in the contexts of some types of litigation.

In effect, what this provision does is to forbid an insurance intermediary from being counted as a dual legal agent—once for the carrier and once for the policyholder—in controversies between the insurer and the insured. Does the statute establish that an insurance intermediary is the legal agent of the insurer, or does it establish that the intermediary is to be treated as some other type of agent of the insurer's some-other-type-of-agent, albeit an unknown and undescribed one, for some purposes at some times?

The net effect of this statute, at least in Texas, is: (1) Insurers may not argue in lawsuits, arbitrations, or what have you, that the insurance intermediary who or which solicited for it was also automatically and always the agent of the insured, when it submitted an application for the policyholder-to-be, (2) Nor, obviously, can it deny that such a person was never, in any sense, its agent. This might depend on the meaning of "solicit" and the facts surrounding the transaction, —facts which may be old, undocumented (or only partially so), or difficult to remember. (3) Of course, Texas insureds may not argue successfully in any context that all insurance intermediaries assisting them are automatically to be considered their legal agent. (Note that in three party lawsuits, where policyholders have sued both their insurers and the intermediaries it is difficult to see why this might happen, but it might).

Curiously, given the first of these Texas propositions, a leading, well known systematic, national, ABA published "textbook" account of insurance agent malpractice creates the following paradox when it begins its discussion of Texas law with the following sentence: "an insurance agent is an agent of both the insurer and the insured."¹³ The article does not say "sometimes"; it does not say "occasionally"; it does not say "often, as a matter of fact." Its language implies "always."

Clearly, "duality" as to agency is possible under the statute, under some circumstances. Equally clearly, it is not universal. Over the years, precisely this "doubling" or "dualization" of legal agency for insurance intermediaries has been done repeatedly around the country, and courts of review here and there have both recognized it as reasonable and have accepted it.¹⁴ The doubling of agency

relationships for insurance intermediaries through successful legal argument in Texas, however, is extremely rare, as well as rather odd-sounding, and so many jurists and lawyers are uncomfortable about it, because precisely this idea is so clearly contrary sounding when it comes to the literal and obvious meaning of a long-established statute. If the common law of agency is supposed to be used in deciding whether a soliciting intermediary is the agent of the person purchasing insurance, as well as the insurer itself, many guess, and hence believe, that the statute would say this. Statutory silence under this condition, therefore, is often taken not to be consent, but to be prohibition. Fallacious reasoning this may be, but a socio-cultural fact, it is.

The statute does not prevent related classifications under all circumstances. Obviously, whether there is *soliciting* is or should be extremely important. Here is a situation in which meaning and facts are intrinsically connected. But there is more.

Consider the situation in which there is a controversy between an insurance intermediary and an insured, near-insured, or non-insured who was a customer/client of the intermediary. In this schema, no insurer is a party. The statute under discussion does not forbid one or both of those parties from classifying the intermediary as the legal agent of the insured in this type of controversy. Thus, an insured might have, for example, a breach of fiduciary duty action against the intermediary, if it can classify the intermediary as its legal agent, and nothing in §4001.052(a) prevents this.¹⁵ It will do the intermediary no good to claim that he was the legal agent of the insurer, and, therefore, that under §4001.052(a) he could not be the legal agent of the insured. This statute simply does not say that. No Texas cases that say that, either and the lawyer instructional textbooks and the legal treatises regarding Texas law do not discuss it.¹⁶

As a matter of logic and conceptual analysis, with respect to a middleperson, if a statute says that the middleperson is the legal agent of sellers of some knowledge based product, but says nothing at all about buyers, does it follow that statutory silence entails that the middleperson is never the legal agent of the buyer? Surely not! The nature of this relationship could be determined by facts and the common law, without reference to the statute. Probably, the existence of the relation of legal agency running from the middleperson to the buyer would be much less likely and much harder to establish than the relationship running from the middleperson to the seller. Has traditional doubt and confusion permanently trumped literal meaning? If this false impression has existed in the

legal community, perhaps the passage of a slightly revised Insurance Code makes it more possible to get the statutory interpretation right.

What should be done now in lawsuits where the insured has sued both the insurer and the intermediary? What is to be done and what can be said about the intermediary's relationship with the insured under these circumstances? Can the intermediary be counted as the legal agent of the insured, as well as the insurer for any purpose whatsoever? What if the insured takes the position that the intermediary did not solicit for the insurer? What if the insurer-intermediary contract stipulates that the intermediary is not the insurer's agent and/or that the intermediary does not in any sense *solicit* for the insurer. The answers to these questions are uncertain, and as usual in the law, whatever the answers are, there are pluses and minuses therein.

Of course, this second option, which is more logical given the wording of the statute after all, the word "controversy" does not mean the same thing as the word "suit" there would be practical problems galore. It would be extremely difficult to have a jury think of the intermediary in one way when it was hearing evidence about and pondering the case the insured has brought against the insurer, and then to do the opposite in the case the insured has brought against the intermediary. Therefore, for practical reasons, we suspect that the first meaning is the one that would be used in interpreting the statute. Of course, it is becoming more common to sue both insurers and intermediaries in the same lawsuit. Sometimes this is done in order to make sure that recovery is ultimately possible from the insurer. After all, principals are vicariously responsible for the actions of their legal agents, so long as their actions are within the scope of their agency. This is as true for insurance companies and intermediaries as it is for any principal, together with its legal agent.¹⁷

C. §4001.051(b): "The List."

Turn now to §4001.051(b). This statute provides a variety of conditions under which an intermediary is considered the agent of the insurer. In its previous version, this statute contained no reference to brokers. The fact that the word "broker" did not occur in §21.02 of the previous statute is part of the reason why people used to say that there were no brokers in Texas. Significantly, the nine (9) antecedent conditions under which a person is the agent of an insurer are *disjunctively joined*. The word "or" is the last word in Item (8) in the list of

§4001.051(b). In other words, any one of the specifications which occurs anywhere on the list of (1)-(9), by itself and alone, is sufficient to make a person an agent of an insurer. Presumably, the word "agent" here means "legal agent." The list of activity which makes a person the legal agent of an insurer is immense. Consider the following characteristics of intermediaries for Zebra Insurance Company ("ZIC"):

- solicits insurance on behalf of ZIC;
- receives from a customer an application for insurance from ZIC;
- transmits to ZIC an application received from a customer;¹⁸
- receives an insurance policy from ZIC insuring an applicant;
- advertises that he will do any of the first four bullet points above;
- transmits to the applicant an insurance policy from ZIC insuring the applicant;
- advertises that he will do any of the first four of the above bullet points;
- gives notice that he will do what was described in the fifth bullet point;
- receives an insurance policy issued by ZIC for some insured, but physically receives it from someone other than ZIC (e.g., a wholesale broker);
- transmits a ZIC insurance policy for some applicant, but sends it to someone other than the applicant (e.g., a retail broker);
- examines a risk;
- inspects a risk;¹⁹
- receives insurance premium for ZIC;
- collects an insurance premium ultimately going to ZIC;
- transmits an insurance premium ultimately going to ZIC;
- diagrams a building;
- forwards to ZIC a diagram of a building made by someone else;
- does anything in the context of "making or consummating an insurance contract" involving ZIC;²⁰
- adjusts a loss for ZIC;
- is an intermediary adjusting a loss for ZIC;²¹
- "examine into" a loss for ZIC.²²

Obviously, not all of these activities are characteristic of intermediaries. The final three bullet points, for example which constitute a list of §4001.051(b)(9) are characteristic of claims adjusters, not intermediaries.

This is true even though intermediaries are often involved in claims to some extent. Local intermediaries

are often the first to know about a building catastrophe, and they sometimes phone it in. Intermediaries often try to straighten out adjustment controversies. This is particularly true as intermediary firms get larger. Some larger intermediaries have whole adjustment departments.²³

Intermediaries seldom truly examine or inspect risks, an activity which is covered by §4001.051(b)(5). Usually, this is done by engineers or other specialists. At the same time, intermediaries will drive by buildings to see if they are really made out of brick and to express an opinion as to what kind of shape the roof is in. Intermediaries do not usually make serious diagrams of buildings, as is described in §4001.051(b)(7). This is usually reserved for specialists. Of course, the word "diagram" might include a *rough sketch*. Intermediaries might do this with respect to a smaller, simpler building, during the sales process. And so on. Obviously, to some extent, §4001.051(b) pertains to the scope of legal agency, although it is not dispositive. (The agreement between the insurer and the intermediary—or whoever—would be relevant, as would habit and established custom).

Nevertheless, if one focuses on §4001.051(b)(1)-(4), (6), and (8), it is perfectly clear that virtually all of the activities of any intermediary make it a legal agent of the insurer, for at least some purposes. There are significant questions, some of which concern clarity. The most significant question is whether the performance of a specified activity for example, receiving from an applicant and sending off to an insurer an application for insurance restricts the scope of the intermediary's being an agent to that activity alone, or whether the intermediary's engaging in that activity constitutes evidence of a more general scope of agency. (The author would bet the latter.) Then again, how general would the scope of that agency be? Probably this truth depends upon what the intermediary has done, and how it is usually viewed and understood by those involved and the industry in general.

Another question about clarity is to be found in §4001.051(b)(1). According to it, person *A* is an agent of insurer *B* if he "solicits insurance on behalf of" *B*. Suppose *A* sells insurance to customer *C*. Suppose further that *A* does not tell *C* whose insurance he is trying to sell, i.e., whose insurance he is trying to get *C* to buy. Has *A* solicited the purchase of insurance from *C* for *B*? What if *A* represents five insurers, and he tries to sell *C* a type of policy sold by each of them, but *A* makes no reference to which insurers he represents, or how many there are? Or, suppose *C* agrees to buy insurance through *A*, and *A* hands *C* a list of five insurers, and tells *C* to pick

one. With respect to which of the insurers on the list is *A* an agent under §4001.051(b)(1), if any?

The well known case of *Lexington Ins. v. Buckingham Gate*²⁴ is instructive. Buckingham recovered from the intermediary after a jury trial for misrepresentation. The question on appeal relevant to the topic of this essay was whether the intermediary was the legal agent of the insurer, and if so, with respect to what? The court found that the intermediary was the legal agent of the insurer with respect to some activities, but not with respect to at least one other activity, namely, representations made regarding the policy. It would, however, automatically have been a legal agent of the insurer in the relevant respects, had it been what used to be called in Texas a "local recording agent," the opinion of the appellate court implied.²⁵

We need to take a little closer look at a few features of the case, namely to wit: how the court described the legal relationship between the insurer and the intermediary. Unquestionably, the facts of the case established that the intermediary *solicited* insurance business from Buckingham for Lexington. This is not what the Court held, however. What it held was that the testimony of the intermediary:

showed that he (1) examined the risks involved with the property, (2) [his agency] received the policy from Lexington and sent it to Buckingham, (3) collected the premium from Buckingham and sent it to Lexington, and (4) aided in adjusting the loss of the dock. Therefore, [the agency] was Lexington's agent for purposes of article 21.02.

Remember, Art. 21.02 contains roughly the same provisions as §4001.003 and §4001.051(b).

If the Court had found that the intermediary was involved in *soliciting* insurance on behalf of Lexington, it is difficult to see how the intermediary would not have had at least implied authority with respect to making statements about the content of the policy. It would not have the authority to change the terms of the policy, but its authority would be such that its principal would be financially responsible for the legal misrepresentations of its legal agent in the context of soliciting insurance. Of course, the intermediary would itself be liable. (It would, after all, have been the one to make the mistake.) If nothing else this liability might have been established by

the doctrines of promissory or equitable estoppel, as the Utah Supreme Court observed recently.²⁶ Probably, the term "solicit" should be broadly understood, from which it would follow that any explanation of what was contained in the policy which might have a role in discouraging the insured from moving on to a different carrier or indicating to the insured that it did not need to buy additional coverage would be within the area of *soliciting coverage* or *soliciting business*.

How could the Court possibly have impliedly held, through its silence, that the intermediary did not have responsibilities or activities with respect to soliciting business? Only two explanations seem plausible. The first one is the more likely. (1) The lawyers presenting the case simply failed to include testimony about this. This explanation is hard to believe, since need for precisely this is so obvious. (2) The appellate court did not "like" the genuine implications of what was then the controlling statute, namely Article 21.02 of the then and older Texas Insurance Code, so it wrote in such a way to avoid its implications.

It would seem harder to do today what the *Buckingham Gate* court did in 1999. The reason is that the statute creating *local recording agencies* and *soliciting agencies* has disappeared. The word "solicit," when found in the Insurance Code, should not be thought of in terms of old, if not ancient, and now extinct, statutory terms and concepts. (By the way it should be emphasized somewhere along the line, that many jurisdictions other than Texas have over time used the categories of *local recording agent* and *soliciting agent*. These categories were not peculiar to Texas law, and some years ago they were standard vocabulary throughout large parts of the industry.²⁷ They are dying everywhere if they are not already dead. Of course, the term "managing general agent" is still alive and well, and it has some similarity to the idea of a *recording agent*. This fact of business language usage is completely irrelevant to the main point here.)

D. §4001.052: Intermediaries and Other Agents.

It has already been pointed out that §4001.052 forbids dual agency classification of intermediaries remember, these are agents and brokers in controversies between insureds and insurers. Significantly, this prohibition is restricted to those who *solicit applications* for various types of insurance. Section 4001.052(a) does *not* prohib-

it dual-agency classification for anyone else governed by §4001.051(b). This list includes inspectors, engineers, technicians of various sorts, accountants perhaps, architects, architectural technicians, and perhaps most importantly claims adjusters. These people can—legally speaking be classified as agents of the insurer, and also be classified as agents of the insured. This is seldom true with respect to adjusters, although sometimes it might be. (Large companies, for example, sometimes have their own staff of adjusters. They may have subsidiaries which perform adjustment services for the other corporate members of the group. Sometimes, insurance companies send adjusters to the facilities of large companies and work out of them, at least somewhat under the supervision of some of the insured's risk managers).

The fact that Texas courts tend to ignore the implications of §4001.051(b), and its predecessor, has already been mentioned. Since adjusters are being discussed

here, this might be a good place to mention one of the most significant cases in which this statute is ignored. The case is *Natividad v. Alexis, Inc.*,²⁸ a case about adjustment problems. This case is mainly about whether the tort of common law bad faith reaches adjusters who are not employed by the insured, but are retained by the insurer, or are retained by someone retained by the insurer, as

were the facts were here. The principal ruling in the case was as follows:

[t]he duty of good faith and fair dealing emanates from the special relationship between the parties and not from the terms of the contract, therefore its breach gives rise to tort damages and not simply and not simply to contract liability. . . . [T]he 'special relationship' exists only because the insured and the *insurer* are parties to a contract that is the result of unequal bargaining power, and by its nature allows unscrupulous insurers to take advantage of their insureds. Without such a contract, there would be no 'special relationship' and hence, no duty of good faith and fair dealing.²⁹

This is not necessarily a genuine deprivation with respect to an injured insured, since, under this case, "[w]hen the insurance carrier has contracted with *agents*

... the statute creating local recording agencies and soliciting agencies has disappeared."

or contractors for the performance of claims handling services, a carrier remains liable for actions by those agents or contractors that breach the duty of good faith and fair dealing owed to the insured by the carrier.³⁰ In other words, an insurer's duty of good faith and fair dealing is "non-delegable."

Thus, notice that adjusters are counted as either agents or contractors. Under §4001.051(b)(9), and its statutory predecessor, adjusters are the agents of the insurer. Clearly, the court has ignored the message of the statute. This is true in several passages of the *Natividad* majority opinion. At the same time, it must be admitted that not every passage is inconsistent in this way. Here is a different one: "By imposing a non-delegable duty of good faith and fair dealing on insurance companies[,] we are sending a clear message—the buck stops with them. The insurance companies must answer for the 'sins' of their agents."³¹ This passage appears to imply that adjusters are agents. This implication is present because the court has already held that insurers are vicariously liable for acts or omissions of outside adjusters working on a claim involving an insurance policy issued by the defendant insurer.

E. §4001.003(1): The Definition of "Agent."

Relevant parts of the definition of "[insurance] agent" are found in §IIA above. There are several things to notice about this definition. The most important of these is that the idea of an *agent* is conceptually tied to the idea of an *insurer*. The "tie" can be immediate, or it can be removed by one, two, or even more steps. Thus, a person is an agent if he is the "authorized agent of an insurer." A person can be an *insurance agent* if he is a subagent of "an authorized agent of an insurer." A person can be an *agent of an insurer* if he performs the act of an agent of an insurer. It does not matter whether he performs these acts orally or in writing. They may be done face to face; they may be done over the phone; or they may be done over the internet. Thus, the people who are portrayed in television insurance ads for Progressive Insurance as those who take incoming calls, sit at computers, and share data, are agents of Progressive. (One could also wonder whether the actors who appear in those commercials are also agents for Progressive, since they are soliciting insurance business on behalf of Progressive, but that inventive question can be left for another day.) The person may also be an agent if he solicits insurance contracts, negotiates insurance contracts, procures insurance contracts, or collects premiums on insurance contracts. The author confesses that he is not entirely clear about each term of this definition. What,

for example, is the difference between *soliciting* and *procuring* insurance contracts? Is one of these to be done for an insurer while the other one is to be done for an insured?

CONCLUSIONS

(1) The word "agent" in the relevant statutes frequently means "legal agent." It would be hard to see how it could mean anything else. Why would it be so elaborately explicated if it meant something else? It is as if the statute is saying, "Get this straight." Then again, the statute could be clearer.

(2) Determining the meaning of the term "agent" in the statute depends not just upon language and statutory terms, but upon facts, actual beliefs at relevant time among the disputing parties, and the true nature of the contexts.

(3) This last point applies with special force to two typical features of insurance markets: (a) the meaning of *solicitation*, and related terms; and (b) the scope of a legal agency relationship if the intermediary is the legal agent of the insurer.

(4) Insurance intermediaries are quite often the legal agents of the insurers which they serve. This sort of thing does not matter when the intermediary is a large company with plenty of money (as it were, a "brokerage house"), but it does or may well matter if the intermediary is a small firm or solo person.

(5) Under some circumstances, the intermediary can be the legal agent of both the insurer and the insured. In any coverage lawsuit where both the insurer and the insured are parties, along with the intermediary, a finding of duality will turn closely on the facts, as well as the meaning of concepts grouped together as *soliciting*. Usually, insureds will want the intermediary to be the legal agent of the insurer because of his soliciting business. If the insured is trying to establish duality, the opposite will be true, but he will still want the intermediary to be the insurer's agent in some relevant way. This is not an easy argument. Only a professor of rhetoric could love this last maneuver.

(6) The judiciary needs to be cured of its aversion to thinking of insurance intermediaries as legal agents, as do others. Alas, it is not easy to see how to achieve this reform in widespread legal impressions, if not actual idea.

¹ *Index of Abbreviations.* To simplify citations and convey judgment if not information, I have grouped most of the works cited together here. The most straightforward is Part IV, entitled "Insurance Agents and Brokers," of the chapter entitled "Insurance" found in 43 AM. JUR.2d §§122-182 2003, hereinafter cited as "AJ2§ ____." Less helpful is the state legal encyclopedia, TEXAS JURISPRUDENCE (THIRD). Two volumes are devoted to insurance, and the whole section is entitled *Insurance Contracts and Coverage*. The appropriate part of the 1343 sections is Chapter IV, entitled "Agents and Brokers," found in 45 TEX. JUR.3d §§ 271-394 (2006), hereinafter cited as "TJ3§ ____." Also very important, as an encyclopedic-in-scope genuinely learned treatise, is Lee R. Russ & Thomas F. Segalla, COUCH ON INSURANCE 3D (2005), hereinafter cited as "C3d§ ____." One of the most important single-volume insurance treatises is Robert E. Keeton and Alan I. Widiss, INSURANCE LAW; A GUIDE TO FUNDAMENTAL PRINCIPLES, LEGAL DOCTRINES, AND COMMERCIAL PRACTICES (1988), hereinafter cited as "K&W§ ____." Interestingly, the authors entitle their central section on this topic, "Intermediaries in Insurance Marketing." *Id.* at § 2.5. Another helpful volume is Mark L. Kincaid and Christopher W. Martin, INSURANCE LITIGATION (2005), hereinafter cited as "K&M § ____." Another significant textbook is a very thick paperback. Robert H. Jerry II, UNDERSTANDING INSURANCE LAW (1986), hereinafter cited as J2. A significant article on Texas law is Nancy Manderson, *Insurance Agent Malpractice: The Texas Experience*, 29 TORT AND INS. L.J. 623 (1994), hereinafter cited as "M at ____." A little bit will be said about English law regarding insurance intermediaries here and there in this paper. We will rely upon Malcolm Clarke, POLICIES AND PERCEPTIONS OF INSURANCE: AN INTRODUCTION TO INSURANCE LAW (Oxford University Press: Clarendon Law Series, 2003), hereinafter cited as "C at ____." This is a high prestige series of legal treatises. Some of them are among the most famous and influential legal treatises of the 20th century. Indeed, this book was first published in 1997. See Martin S. Schexnayder, *Insurance Agent Liability in Texas*, 64 TEX. B.J. 458 (May 2001) hereinafter cited as "S at ____."

² Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUMBIA L. REV. 1, 35, n. 50 &c. (2006) (arguing at length for moderate and modest textualism in opposition of Justice Scalia and Judge Easterbrook, among others).

³ S at 462.

⁴ For a general account of the complexities here see C3d§45 and for an overview of confusions and vagaries see K&W§2.5(a)-(b), esp. §2.5(b)(3)-(4). See also J2§35[e] for a screaming error: "Agents are usually employees of the insurer. . . ." See also S at 458.

⁵ For a statement of the general law of agency, the following is about as good as it gets: RESTATEMENT OF THE LAW GOVERNING AGENCY (THIRD) (2006). This latest relevant restatement is shorter than its immediate predecessor and perhaps more concise. Still, AGENCY (SECOND) is a good research tool, since it has so many cases collected over the years, since its 1958 publication.

⁶ C3d§47:3.

⁷ See *Country Mut. Ins. Co. v. Carr*, 852 N.E.2d 907, (Ill. App. 2006, appeal pending).

⁸ As well as those provided by the unrepealed articles of Chapter 21 of the Code, which is Chapter 21 from the old Code, most of which has been repealed, or which are provided by the other laws set forth and listed in §4001.009 of the new Code.

⁹ See *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96 (Tex. 1994) and the case it relied upon *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688 (Tex. 1979).

¹⁰ Thomas A. Green, GLOSSARY OF INSURANCE TERMS, 40 (5th Ed. 1994).

¹¹ Michael C. Thomsett, "Compiler," INSURANCE DICTIONARY 25 (1989).

¹² In fact, the author has not located a Texas insurance case which defines these terms.

¹³ The earlier concept of *soliciting agent* utilized the definition of the term "solicitor." It was found in Art. 21.14 §2 of the old Texas Insurance Code.

¹⁴ M at 623-24. ("[T]he agent is often in a difficult position and [that is] why an important threshold question in many agent malpractice actions is 'for whom was the insurance agency acting?'" [T]he agent's dual roles and the lack of firm, specific legal guidelines have combined to increase dramatically the agent's exposure to malpractice liability.")

¹⁵ C3d§45:21

¹⁶ One wonders what fiduciary duties an insurance intermediary might owe a policyholder. As far as we are aware, there is no systematic study of what they might be. Here are some possibilities: undivided loyalty, trustworthiness, fairness, good faith, integrity, scrupulousness, full and complete disclosure of material facts, candor, openness, honesty, an absence of concealment, an absence of deception, confidentiality to the extent the customer might desire it, reliability, disclosure of any possible conflicts, and the placing of the client's interests ahead of his own. This list has been deliberately constructed so that it is not quite as high as the fiduciary duties lawyers owe their clients, but it is still recognizably higher than a simple routine commercial relationship. For a summary and bibliography of fiduciary duties attorneys owe their client under Texas law, see www.michaelseanquinn.com, in the "Articles" section.

¹⁷ For example, see K&M§274&307.

¹⁸ *Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 98-99 (Tex. 1994); *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693-94 (Tex. 1979).

¹⁹ The last two items exclude applications the person in question is submitting on his own behalf.

²⁰ The ideas of *examining* and *inspecting* are slightly different. Usually, it is physical, real property which is inspected. Financial documents and internal organizational schemes are not inspected, they are examined. (The usages we are deploying here are not completely universal, and they are certainly not rigid).

²¹ Again, other than a contract of which the person is a party.

²² According to Professor Clarke, in England, intermediaries often get involved in loss adjustments. C at 56-57. It is less common today in the United States that intermediaries would be in charge of or have control over claims adjustment, but years ago, it was quite common. It still happens occasionally as to small claims, e.g., small personal household and auto claims of no particular controversy. (One sees this occasionally when stuff is stolen out of a car, and the history between the company and the claimant is without suspicion).

²³ What do you suppose it is to "examine into" a loss?

²⁴ On its website, for example Marsh advertises that it helps

with claims advocacy and claim documentation preparation, at least for large businesses with specialized problems, e.g., the chemical industry.

²⁵ *Lexington Ins. Co. v. Buckingham Gate, Ltd., Inc.*, 993 S.W.2d 185 (Tex. App.—Corpus Christi 1999, pet. denied).

²⁶ See C §45:22. See also S at 460.

²⁷ *Youngblood v. Auto-Owners Insurance Co.*, ___ P.3d ___, 2007 WL 861157 (Utah March 23, 2007).

²⁸ AJ2 §146-47.

²⁹ *Natividad v. Alexsis, Inc.*, 875 S.W.2d 695 (Tex. 1994).

³⁰ *Id.* at 697-98. [Emphasis added.]

³¹ *Id.* [Emphasis added.]

³² *Id.* at 698. n. 7.

