A GENERAL SURVEY OF CAUSES OF ACTION AVAILABLE TO AN INSURED OR APPLICANT AGAINST AN INSURANCE AGENT, BROKER, OR INSURANCE COMPANY FOR FAILURE TO PROCURE THE PROPER COVERAGE REQUESTED

I. INTRODUCTION

This Note deals with the problems that arise when the insured finds himself in the unenviable position of not being covered by insurance, despite his belief that the policy he possesses covers the contingency that has given rise to his claim. This situation can best be illustrated by an example. Suppose a person desires insurance coverage for his house. He wishes the house to be protected against damage from wind, rain, and snow. In addition, he desires to be covered against lightning damage. The applicant relays this information to an insurance agent or broker who then assures the applicant he will be insured against all of these risks. A policy is then issued to the insured. Six months later, lightning strikes the insured's television antenna, causing it to fall on the house and damage the roof. The insured files a claim, but the insurance company or agent notifies the insured that the policy he received does not cover damage from lightning storms. The question then becomes, what recourse is available to the insured. After all, he was under the impression he was covered for the risks he desired to be protected against. Fortunately, there is help available to the insured in that he has causes of action against the agent or broker and the insurance company itself.

There are two principal remedies the insured can pursue against the insurance agent or broker. The first of these actions, grounded in contract law, provides that the insured or applicant can sue for breach of contract by the agent or broker for failing to procure the agreed-upon coverage.[1] The other possible cause of action is in tort, providing relief for the negligent procurement of the desired coverage.[2]

The insured also has recourse against the insurance company itself. First, the insured can bring an equitable action for reformation of the insurance contract, so as to conform the contract to the original intent of the

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1. Wolfswinkel v. Gesink, 180 N.W.2d 452, 456 (Iowa 1970); Kap-Pel Fabrics, Inc. v. R.R. Jones & Sons, Inc., 402 S.W.2d 49, 53 (Mo. 1966). *See also infra* notes 72-90 and accompanying text.

2. Collegate Mfg. Co. v. McDowell's Agency, Inc., 200 N.W.2d 854, 859 (Iowa 1972); Wolfswinkel v. Gesink, 180 N.W.2d 452, 456 (Iowa 1970); Chrischilles v. Griswold, 260 Iowa 453, 459, 150 N.W.2d 94, 98-99 (1967). *See also infra* notes 92-109 and accompanying text.

parties.[3] In addition, the law in a growing number of jurisdictions permits an action for equitable estoppel, whereby the insurer is estopped from denying liability for risks that the insured relied on as being within the terms of that policy, but were in fact not included in the policy.[4]

It is important to understand that all of the various causes of action available to an applicant or insured in some way rest on the principles of agency law.[5] For instance, to succeed on any claim against the insurance agency or broker personally, the insured must show that some agency relationship existed between the agent and himself.[6] Similarly, to bring a cause of action against the insurance company for the failure to receive the desired coverage, some sort of agency relationship between the agent and the company must be shown.[7] This principal/agent relationship between the insurance company and its agent or broker provides the necessary link in any claim against the insurance company itself. As will be seen, however, these agency relationships are not clearly defined. Under certain circumstances, the law allows an agent to represent both the insured and the insurer.[8] When this occurs, it may be possible for the insured/applicant to bring a claim against *both* the agent and the insurance company.

The following analysis will examine the aforementioned causes of action available to the insured and the requirements necessary to bring these claims. This Note will also focus on the effect that the theory of "dual agency" has on an agent's or insurance company's liability to the insured for failure to provide the coverage requested by a client.

II. The Law Of Agency

A. *Agency Defined*

As alluded to in the introduction, the principles of the law of agency have been held to apply to the relationships of the agent or broker with both the insurance company he represents and his client.[9] The term agent is de-

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3. Johnson v. United Investors Life Ins. Co., 263 N.W.2d 770, 773 (Iowa 1978); Quinn v. Mutual Benefit Health & Accident Ass'n, 244 Iowa 6, 55 N.W.2d 546 (1952). *See also infra* notes 142-73 and accompanying text.

4. Harr v. Allstate Ins. Co., 54 N.J. 287, _, 255 A.2d 208, 219 (1969). *See also infra* notes 176-201 and accompanying text.

5. *See infra* notes 9-16 and accompanying text.

6. *See infra* notes 17-32 and accompanying text.

7. *See infra* notes 124-41 and accompanying text.

8. *See infra* notes 33-57 and accompanying text.

9. New York Life Ins. Co. v. McCreary, 60 F.2d 355, 358 (8th Cir. 1932) (general law of agency applies to insurers and their agents). *See* Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270, _, 164 N.W. 522, 523 (1917). In *Fisk*, the court held:

> It is elementary that the powers possessed by agents of insurance companies, like those of any other corporations, are not governed by any individual principle, but are to be interpreted in accordance with the general law of agency. A different view may not be applied to a contract of insurance than is applied to other contracts.

fined as "a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it."[10] This fiduciary relationship may be created by operation of law[11] or through the means of an express or implied contract.[12] Thus, the term "agency" in its legal sense imports commercial or contractual dealings between two parties through the medium of another.

In an agency relationship, the party for whom another acts and from whom he derives his authority is known as a "principal."[13] The one who acts for, represents, and acquires his authority from the principal is known as an "agent."[14] Therefore, the law of agency is applicable in defining the relationship between the insurer/principal and the insurance agent or broker in delineating the basis upon which agency or contract liability between the agent and insurance company exists.[15] In addition, the law of agency governs the many insurance transactions where a contractual relationship exists between the agent and the applicant/insured[16] and by which agent liability is predicted. Once it has been established that in contracts to procure insurance, an agency relationship upon which liability is predicated exists, the next step is to determine whether an insurance agent is acting on behalf of the insurance company or whether he is acting as an agent for the insured.

B. *Agents and Brokers*

In insurance usage, there exists a variety of apparently different titles or classes of agency, which increases the complexity in defining the relationship between the agent, his principal, and the insured public.[17] Normally, an insurance agent is one who has express or implied authority to represent an insurance company in its dealings with third persons in matters involving insurance.[18] There are, however, different kinds of agents, including what is

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Id.

10. 3 Am. Jur. 2d *Agency* § 1, (1962); *See* Brown v. Schmitz, 237 Iowa 418, 424, 22 N.W.2d 340, 343-44 (1946). This is comparable to the definition of agency as adopted by the Restatement which states that "agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other so to act." Restatement (Second) of Agency § 1 (1957).

11. *E.g.*, Allen v. Minnesota Loan & Trust Co., 68 Minn. 8, _, 70 N.W. 800, 802 (1897)(wife statutory agent for husband).

12. Baumgartner v. Burt, 148 Colo. 64, _, 365 P.2d 681, 683 (1961).

13. Restatement (Second) of Agency § 1 (1957).

14. *Id.*

15. *See infra* notes 17-32 and accompanying text.

16. *See infra* notes 17-32 and accompanying text.

17. Continental Casualty Co. v. Holmes, 266 F.2d 269, 276-77 n.8 (4th Cir. 1959)(citing 16 J. Appleman, Insurance Law and Practices § 8691). "A great deal of confusion has arisen in the law of principal and agent in so far as insurance contracts are concerned, by the loose terminology employed by many courts." *Id.*

18. Travelers Indem. Co. v. National Indem. Co., 292 F.2d 214, 219 (8th Cir. 1961); Lewis

defined as a "general agent"[19] and a "soliciting agent."[20] The nearly unanimous weight of authority provides that a soliciting agent is the agent of the insurer and not of the insured for the purpose of soliciting and preparing the application.[21]

A broker, on the other hand, is ordinarily defined as a person who acts as a middleman between the insured and insurer and who solicits insurance from the public, but is under no employment contract from any one insurance company.[22] As a general rule, an insurance broker is the agent of the insured, and not of the insurer,[23] although this must be determined from the facts and circumstances of each case.[24] In other words, the mere title of agent or broker is not by itself enough to prove an agency relationship with either the insurer or the insured.[25]

The legal significance of the fundamental distinction between agents and brokers is that the acts of one procuring insurance as the agent of the insurer are imputable to the insurer, while those of a person acting as the agent or broker of the insured, are not.[26] Therefore, at least on the surface, it appears that whether or not the insured can sue the agent personally or

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v. Michigan Millers Mut. Ins. Co., 154 Conn. 660, _, 228 A.2d 803, 806 (1967).

19. A "general" agent is ordinarily one who is authorized to accept risks, to agree upon and settle terms of insurance contracts, renew policies, and modify existing contracts. Caldwell v. American Nat'l Ins. Co., 456 F.2d 1268, 1269 (8th Cir. 1972); American Family Mut. Ins. Co. v. Bach, 471 S.W.2d 474, 478 (Mo. 1971). In other words, a general agent of an insurance company stands in its stead in conducting its business, and has authority coextensive with that of the principal. McQuater v. Aetna Ins. Co., 287 A.2d 821, 822 (D.C. 1972).

20. Basically, a "soliciting agent" merely procures applications, forwards them to other officers of the insurer, collects premiums, and delivers policies. Caldwell v. American Nat'l Ins. Co., 456 F.2d 1268, 1269 (8th Cir. 1972). "All courts recognize a clear distinction between the authority of a soliciting agent and a general agent, holding that while the latter's authority is coextensive with that of its principal, the former's is limited, and he cannot bind his principal by any act subsequent to the delivery of the policy. . . ." Gibson v. Texas Prudential Ins. Co., 229 Mo. App. 867, _, 86 S.W.2d 400, 406 (1935).

21. For a complete listing of jurisdictions subscribing to this rule, see 16 J. APPLEMAN, INSURANCE LAW AND PRACTICE § 8697 at 276-78 (1981).

22. Travelers Indem. Co. v. National Indem. Co., 292 F.2d at 220; Segalla v. United States Fire Ins. Co., 135 Vt. 185, _, 373 A.2d 535, 537 (1977).

23. Segalla v. United States Fire Ins. Co., 135 Vt. at _, 313 A.2d at 537. *See also* Hesselberg v. Aetna Life Ins. Co., 75 F.2d 490, 492 (8th Cir. 1935), *cert. denied*, 296 U.S. 623, 623 (1935); Stamps v. Consolidated Underwriters, 205 Kan. 187, _, 468 P.2d 84, 92 (1970).

24. Stoner v. First Am. Fire Ins. Co., 215 Iowa 665, 669, 246 N.W. 615, 617 (1933); Johnson v. Farmers Ins. Co., 184 Iowa 630, 637, 168 N.W. 264, 266 (1918).

25. Stoner v. First Am. Fire Ins. Co., 215 Iowa at 669, 246 N.W. at 617. "The scope and extent of the agent's authority is shown not merely by reference to his title . . . but by the business he is permitted to do and perform in the company's name or by its apparent acquiescence and consent." *Id.*

26. *See infra* note 126 and accompanying text. It is well settled 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 assured or in the capacity of a broker are not. Overland Sales Co. v. American Indem. Co., 256 S.W. 980, 982 (Tex. Civ. App. 1923).

the insurance company itself, depends on whether the insured was dealing with a person acting as an "agent" or a "broker."

The view in Iowa as to whether or not one is considered an agent, can be found in Iowa Code sections 515.123, 515.124, and 515.125. Section 515.123 defines a "soliciting" agent as:

> Any person who shall hereinafter solicit insurance or procure application therefor shall be held to be the soliciting agent of the insurance company or association issuing a policy on such application or on a renewal thereof, anything in the application, policy, or contract to the contrary notwithstanding.[27]

Section 515.124 generally defines "agent" as follows:

> The term "agent" used in the foregoing sections of this Chapter shall include any other person who shall in any manner directly or indirectly transact the insurance business for any insurance company complying with the laws of this state.[28]

Section 515.125 is more specific, stating:

> Any officer, agent, or representative of an insurance company doing business in this state who may solicit insurance, procure applications, issue policies, adjust losses, or transact the business generally of such companies, shall be held to be the agent of such insurance company with authority to transact all business within the scope of his employment, anything in the application, policy, contract, bylaws, or articles of incorporation of such company to the contrary notwithstanding.[29]

The Iowa Supreme Court has held that pursuant to these sections, every person who, in any manner, directly or indirectly, transacts business for an insurance company is an agent of such company.[30] Furthermore, under section 515.123, a person who solicits insurance or procures an application for insurance is held to be the soliciting agent of the insurer.[31] In Iowa, absent evidence to the contrary, it is not assumed that an insurance agent is anything more than a "soliciting" agent, acting as the agent of the insurer.[32] The inquiry, however, into the determination of an agent's liability, does not end on the mere finding that he is an agent of the insured or the insurer. Further complicating this agency relation is the fact that an agent or broker can, in a single transaction, represent both parties in an agency relationship.

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27. Iowa Code § 515.123 (1983).
28. Iowa Code § 515.124 (1983).
29. Iowa Code § 515.125 (1983).
30. Johnson v. Farmers Ins. Co., 184 Iowa at 637, 168 N.W. at 266.
31. Imperial Casualty & Indem. Co. v. California Casualty Co., 402 F.2d 41, 46 (8th Cir. 1968).
32. Stoner v. First Am. Fire Ins. Co., 215 Iowa at 667, 246 N.W. at 617 (citing Murphy v. Continental Ins. Co., 178 Iowa 375, 157 N.W. 855 (1916)).

C. *Dual Agency*

Many courts today do not draw any fine distinctions between agents and brokers in imposing liability. It is generally accepted that many act as both agents and brokers. In other words, a broker may often act as an agent for the insurer, while an agent may have direct obligations to the insured, whether he is licensed as a broker or not.[33] For example, in *Howarth v. Pfeifer*,[34] an agent advised the insured that he had coverage when, in fact, he did not.[35] Based on this representation, the insured canceled his existing coverage.[36] The insured was allowed to recover against the agent although there was no prior relationship between the insured and the agent.[37] Similarly, in *Winans-Cater Corp. v. Jay & Benisch*,[38] a broker was held liable for negligence and breach of contract to the insurance company in failing to obtain a binder or endorsement concerning the changed location of the insured.[39]

This dual role occupied by agents and brokers can also be illustrated by the following example. In preparing the application and procuring the insurance, a person acts as an agent of the insured, even though his commission is paid by the company.[40] When this same person collects the premium or delivers the policy, he acts as an agent for the company.[41] As a consequence of this dual role, courts disregard the title held by the person whose activities are being examined and decide the question of whom that person represents based upon the particular activities which are the subject of dispute.[42]

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33. Levit, *The Liability of an Insurance Broker or Agent Updated*, 615 INS. L. J. 209 (1974).

34. 443 P.2d 39 (Alaska 1968).

35. *Id.* at 40.

36. *Id.*

37. *Id.* at 43.

38. 103 N.J. Super. 394, 247 A.2d 361 (1969).

39. *Id.* at _, 247 A.2d at 364 (emphasis added).

40. Ivey v. United Nat'l Indem. Co., 259 F.2d 205, 209 (9th Cir. 1958). An individual could be a broker for the insured in procuring the required coverage and also an agent for the insurer in delivering the policy to the insured after its execution. *Id.* at 209-10. *See also* American Fire & Indem. Co. v. Lancaster, 286 F. Supp. 1011, 1014 (E.D. Mo. 1968), *aff'd*, 415 F.2d 1145, 1145 (8th Cir. 1969); Global Am. Ins. Managers v. Perra Co., 137 N.J. Super. 377, _, 349 A.2d 108, 112 (1975).

41. *See supra* note 20.

42. Tri-City Transp. Co. v. Bituminous Casualty Corp., 311 Ill. App. 610, _, 37 N.E.2d 441, 443 (1941). The court in *Bituminous Casualty Corp.*, in response to a contention by the plaintiff that a broker had acted as agent for the insurer, stated:

> It is established whether a party acts as a broker or agent is not determined by what such party is called, but is to be determined from what he does—that is, that his acts determined whether he is an agent or a broker. The broker stated that he was not an agent of the insurer and never had been, and the evidence discloses that he did nothing more than solicit the Plaintiffs for their insurance business . . . [which] . . . he could have placed with some other company if he had desired.

Id. at _, 37 N.E.2d at 443. *See also* American Eagle Fire Ins. Co. v. Burdine, 200 F.2d 26, 30

A case which illustrates this point is *Mitton v. Granite State Fire Insurance Co.*[43] In *Mitton,* an insurance company had been found liable on a policy issued to tunnel constructors for damage to the insured's machinery caused by a flood or landslide.[44] The insurance company was held liable even though it had instructed the defendant "brokers" to secure an endorsement which excluded such coverage.[45] The "brokers" failed to act as instructed.[46] In the subsequent action by the company against the "brokers," the brokers were held to be agents of the company for purposes of securing the endorsement, and therefore, liable to the company for failure to carry out the insurance company's instructions.[47]

The above examples appear to violate one of the fundamental laws of agency, namely, that no man can serve two masters.[48] In other words, this time honored principle states that the agent's loyalty must be undivided and his actions devoted exclusively to representing and promoting the interests of the principal.[49] The general limitation placed upon the prohibition of dual agency is that an agent may be the agent of both parties to the policy in matters in which the interests of the two principals are not incompatible or conflicting and where they consent to the agency with full knowledge of the material facts surrounding the transaction.[50] Therefore, the contract for

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(10th Cir. 1953) ("There is no legal barrier to this dual role on the part of the agent. He may serve both the insured and insurer so long as their interests do not conflict, and his duties are not inconsistent."); Diplomat Homes, Inc. v. Commercial Standard Ins. Co., 394 F. Supp. 558, 560 (W.D. Mo. 1975); Browder v. Hanley Dawson Cadillac Co., 62 Ill. App. 3d 623, _, 379 N.E.2d 1206, 1210-11 (1978)("Whether a person is an insurance agent or insurance broker is determined by his acts and is dependent on who called him into action, who controls his movements, who pays him, and whose interests he represents."); Meyers v. State Farm Life Ins. Co., 416 S.W.2d 10, 16 (Mo. Ct. App. 1967) ("The same person may act for the different principals in separate matters in which their interests are not conflicting and his duties are not inconsistent.").

43. 196 F.2d 988 (10th Cir. 1952).

44. *Id.* at 989.

45. *Id.*

46. *Id.*

47. *Id.* at 991.

48. Rokes, *Dual Agency of Insurance Agents and Brokers,* INS. COUNS. J., Oct. 1977, at 680.

49. L. Smith and G. Roberson, *Business Law—U.C.C.,* 4th ed., Chapter 13, p. 315 (1977).

50. In Todd v. German-American Ins. Co., 2 Ga. App. 789, _, 59 S.E. 94, 98-99 (1907), the court held:

> All duality of agency is not forbidden. If the principal who seeks to repudiate knows that his agent is also acting for the other party, or if he authorizes a course of dealings wherein, from the very nature of the agency, the agent is expected to act also for the other party, the principal cannot complain. Another exception to the doctrine generally forbidding dual agencies is that the agent may represent both parties, provided that the acts in which he is to represent the one in no ways conflicts with the full exercise of his duty to the other. . . . He is forbidden to act for both only when there is an opportunity that the skill and judgment which he should exercise for the one may conflict with the skill and judgment he should exercise for the other.

insurance entered into by one acting as an agent for both the insurer and insured may be rescinded by either party if it is found that either consent by both parties or full knowledge of the facts was lacking.[51] The state of Iowa also seems to be in agreement with the above dual agency principles as is exemplified by the case of *Cole v. Hartford Accident & Indemnity Co.*[52] which held that a person cannot act as an agent for both the insurance company and the insured unless he does so with the consent of both parties, and if he acts without consent, the contract of insurance may be avoided by the insurer.[53]

The significance of the foregoing is that it is extremely important to examine statutes and any applicable case law before the principal/agent relation can be clarified in any specific case.[54] It must be remembered that the mere title of agent or broker is not controlling, rather, this determination is based on the facts of each situation.[55] Even then, there still may exist the problem of determining whether an agent or broker in a given case owes a contract duty to only one party or whether a dual agency relationship exists giving rise to contract responsibility to both parties. The issue then becomes whether the acts of the insurance agent in procuring the insurance are in conflict with the acts of the agent in filling out the policy as the agent for the insurance company and whether there has been consent to this agency.[56]

Similarly, one should be aware that there appears to be a growing ten-

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Id.

51. Felds v. Goldstein, 97 Ga. App. 286, _, 102 S.E.2d 921, 922 (1958); Nertney v. National Fire Ins. Co., 199 Iowa 358, _, 203 N.W. 826, 830 (1925).

52. 242 Iowa 416, 46 N.W.2d 811 (1951).

53. *Id.* at 427, 46 N.W.2d at 817-18 (citing Nertney v. National Fire Ins. Co., 199 Iowa at 1366, 203 N.W. at 830). *See* IOWA CODE § 515.125 (1983); Warren v. Franklin Fire Ins. Co., 161 Iowa 440, 445, 143 N.W. 554, 556 (1913).

54. As illustrative of this point, a Nebraska statute defines a broker as:

> [A]ny person, copartnership or corporation, who for compensation, not being an appointed agent for the company in which insurance or reinsurance is effected, acts or aids in any manner in negotiating contracts for insurance or reinsurance . . . for a party other than himself or itself.

NEB. REV. STAT. § 44-103(a) (1943).

Note, however, that in Nebraska both the agent and broker are regarded as representing the company and not the insured in the event of controversies:

> Every agent or broker who shall solicit an application for insurance of any kind shall, in any controversy between the insured or his beneficiary and the company issuing any policy upon such application be regarded as representing the company and not the insured.

NEB. REV. STAT. § 44-329 (1943).

Other states have similar statutes. *See* OHIO REV. CODE ANN. § 3911.22 (Page 1953). *Cf.* IOWA CODE § 515.123-.125 (1983). The Missouri statute represents a more unqualified definition of the legal status of a broker stating, in effect, brokers are agents for the insured and not the insuring company. MO. ANN. STAT. § 375.012 (Vernon Supp. 1983).

55. *See supra* notes 24-25 and accompanying text.

56. *See supra* note 48 and accompanying text.

dency for courts today to treat the insurance agent, as well as the broker, as a representative of both the insurer and the insured, and notwithstanding the general prohibition against dual agency, permitting one or both to be liable in contract for damages sustained by the insured public which has failed to receive the requested coverage.[57] Once this dual role has been established, it may be possible for the insured to bring suit against either the agent or the insurance company.

III. Liability Of The Insurance Agent/Broker

A. *Generally*

There are numerous situations in which an agent may be held liable to the insured. Two common situations are where there is an agreement to obtain insurance and the agent fails to do so,[58] or where an agent advises the insured he will be covered for the risk desired but in reality he is not.[59]

Generally, in order for the insured/applicant to recover for a loss arising out of the insurance agent's failure to obtain the desired coverage, he must show, at least in some fashion: (1) an undertaking or agreement by the insurance agent to procure the desired coverage; (2) failure of the agent to use reasonable diligence in attempting to obtain the insurance as well as failure to notify the client promptly if he failed to obtain the desired coverage; and (3) the actions of the agent warranted an assumption by the client that he was properly insured.[60] Furthermore, the prevailing view today is that when an agent fails to procure the desired insurance, he may be sued for breach of contract to procure insurance or in tort for failure to use reasonable care in

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57. Rokes, *Dual Agency of Insurance Agents and Brokers*, Ins. Couns. J., Oct. 1977 at 680.

58. Hellbaum v. Burwell & Morford, 1 Wash. App. 694, _, 463 P.2d 225, 226 (1969). In this case, the court found that the insurance agent entered into an oral agreement to obtain fire insurance in an amount equal to the replacement cost of the home. *Id.* at _, 463 P.2d at 229. As a result, the agent was held liable for negligent failure to provide insurance after undertaking to do so. *Id. See also* Estes v. Lloyd Hammerstad, Inc., 8 Wash. App. 22, _, 503 P.2d 1149, 1151 (1972) (agent liable for failure to keep promise of transferring insurance to the plaintiff/insured).

59. Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. 411, _, 171 S.E.2d 486, 488-89 (1969). In *Riddle*, the insurance broker told the policyholder he was "fully covered" even though the insured noticed there was no premium charge next to the risk he desired to be covered for. *Id.* at _, 171 S.E.2d at 491. The court allowed the insured to recover from the broker based on his representations. *Id.* Other cases allowing the insured to recover include Howarth v. Pfeifer, 443 P.2d 39 (Alaska 1968) (agent advised the insured he had coverage when in fact, no coverage existed), and McDonald v. Carpenter & Pelton, Inc., 31 A.D. 2d 952, 298 N.Y.S.2d 780, 784 (1969) (where agent was held liable for telling insured he was covered by existing fire insurance when in fact he was not).

60. Porter v. Utica Mut. Ins. Co., 357 So. 2d 1234, 1238 (La. Ct. App. 1978) (suit to recover loss because of agent's failure to obtain the requested fire insurance on plaintiff's residence). *See also* Redmond v. National Union Fire Ins. Co., 403 So. 2d 810, 812 (La. Ct. App. 1981); Cambre v. Travelers Indem. Co., 404 So. 2d 511, 516 (La. Ct. App. 1981).

obtaining the requested coverage.[61]

The Iowa Supreme Court's view concerning the liability of an insurance agent for failing to obtain the desired coverage is found in the seminal case of *Wolfswinkel v. Gesink*.[62] In *Wolfswinkel*, the plaintiff brought an action against an insurance agent for failing to secure coverage on a swine finishing house.[63] The plaintiff alleged that he asked the agent to obtain insurance to cover his swine finishing house.[64] The defendant agent advised the assured plaintiffs that the swine finishing house, the mechanical fixtures and livestock therein were fully insured.[65] Subsequently, the plaintiff's swine finishing house was destroyed by fire.[66] When they made a claim to the insurance company, the company refused to pay the claim stating that the plaintiffs did not have the coverage represented to them by the defendant agent.[67]

In reversing the district court's ruling dismissing the case, the Iowa Supreme Court stated:

> As a general rule, a broker or agent who, with a view to compensation for his services, undertakes to procure insurance for another and unjustifiably and through his fault or neglect fails to do so, will be held liable for any damage resulting therefrom. The agent or broker is liable on the theory that he is the agent of the insured in negotiating for a policy and that he owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance. He may be sued for breach of contract or negligent default in the performance of a duty imposed by contract, at the election of his client.[68]

The *Wolfswinkel* court also held that it is not necessary that the insured first sue the insurance company in order to recover from an agent or broker.[69] It is enough to show that the policy is defective or invalid, and that the company has refused to pay for the claim.[70] It appears that the reasoning of *Wolfswinkel* is still valid today.[71]

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61. *See* Keller Lorenz Co. v. Insurance Assocs. Corp., 98 Idaho 678, _, 570 P.2d 1366, 1369 (1970). The failure of an agent to obtain insurance can be both breach of contract to provide and negligent breach of duty to provide. *Id.* at _, 570 P.2d at 1369. Wolfswinkel v. Gesink, 180 N.W.2d at 456 (Iowa 1970). *See also infra* notes 116-23 and accompanying text.

62. 180 N.W.2d 452 (Iowa 1970).

63. *Id.* at 454.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 456 (quoting 43 AM. JUR. 2D *Insurance* § 174 (1964)). *See also* Chrischilles v. Griswold, 260 Iowa 453, 459, 150 N.W.2d 94, 98-99 (1967).

69. Wolfswinkel v. Gesink, 180 N.W.2d at 456 (citing 44 C.J.S. *Insurance* § 172b (1945)). The property owners in *Wolfswinkel* were not required to show that there had been a final determination of no liability on the part of the insurer. *Id.*

70. *Id.; see* Johnson v. Illini Mut. Ins. Co., 18 Ill. App. 2d 211, _, 151 N.E.2d 634, 637 (1958); Harris v. A. P. Nichols Inv. Co., 25 S.W.2d 484, 488 (Mo. Ct. App. 1930).

71. For a case adopting the holding of *Wolfswinkel*, see Collegiate Mfg. Co. v. McDowell's

B. *Agent Liability Based on Contract Theory*

Although an agent's or broker's liability is often said to be based on the law of agency,[72] it is probably more precise to state that agent liability is based on a combination of both agency and contract law.[73] The courts have not entirely separated contracts of agency from contracts to procure insurance.[74] This may be due to the fact that the agency relationship is, in one sense, contractual; that is, it normally arises out of a contractual or gratuitous agreement between the parties.[75] The existence of the relationship and the consent thereto by the parties may be either express or implied.[76] It is not, however, essential to the existence of the relationship that an actual contract exist or that compensation be expected by the agent or agreed to by the parties.[77]

The basis for an insured/applicant bringing a contract action is that the contract or agreement to procure insurance creates a duty in the agent to use reasonable care and due diligence to obtain this insurance;[78] failing in this duty causes a breach of contract upon which an action may be brought.[79] In other words, the chose in action, in a situation where the desired coverage has not been attained, arises out of a breach of contract to insure, not out of a contract of insurance.[80]

The general rule is that an insurance agent is personally liable to an applicant in damages for a breach of his contract or agreement to procure insurance.[81] Iowa, under the holding in *Wolfswinkel*, is in accord with this

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Agency, Inc., 200 N.W.2d 854, 857 (Iowa 1972).

72. *See supra* notes 9-16 and accompanying text.

73. "The relationship between an insurance agent and his client is both contractual and fiduciary; it is unaffected by the fact that the insurance agent represents both insurer and insured; and failure to provide the requested coverage may support an action either for breach of contract or for negligence." Fli-Back Co. v. Philadelphia Mfrs. Mut. Ins. Co., 502 F.2d 214, 217 (4th Cir. 1974).

74. *Id.*

75. *See supra* note 12.

76. *See supra* note 12.

77. RESTATEMENT (SECOND) OF AGENCY § 16 (1958); Kurtz v. Farrington, 104 Conn. 257, _, 132 A. 540, 544 (1926) (holding that compensation is not a necessary element in the establishment of the relation of the principal and agent). It has been held that the elements of a contract to procure insurance and the terms of the insurance "contract can be found by implication from the previous dealings of the parties." Duncanson v. Service First, Inc., 157 So. 2d 696, 699 (Fla. Dist. Ct. App. 1963).

78. *See generally infra*, notes 91-107 and accompanying text.

79. *Id.*

80. Everett v. O'Leary, 90 Minn. 154, _, 95 N.W. 901, 902 (1903).

81. In Gibson v. R.O. "Bill" Williams Ins. Co., 398 S.W.2d 408, 410 (Tex. Civ. App. 1965), the court held that "there is no doubt that an insurance agent may contract with an insured to maintain certain insurance coverage, and that an action would lie in the event of breach of such contract." Similarly, an insurance agent can bind himself by parole to procure insurance, and if there is a breach of the contract, he is liable in damages. Cass v. Lord, 236 Mass. 430, _, 128 N.E. 716, 717 (1920). *See also* First Nat'l Ins. Agency v. Lessburg Transfer & Storage, Inc., 139

view.[82]

Normally, in order for an insured to sue an insurance agent for failing to obtain the insurance contracted for, it is only required that the policy be in evidence and be found by the court not to provide the coverage.[83] The question then becomes what constitutes an insurance contract. Generally, a valid contract to procure insurance exists where there is established a promise by the insured to take a policy of insurance and an undertaking on the part of the agent or broker to procure it.[84] It has been held that the elements of a contract to procure insurance can be determined by parties' previous dealings.[85] In addition, an essential element of any contract is consideration. In some jurisdictions, for an insurance contract to be binding it must be supported by consideration, and in the absence of consideration, a verdict for the agent would be in order.[86] As strict as this rule may sound, little is actually required to constitute consideration.[87] It has been generally acknowledged that the undertaking in itself imposes a duty to procure such insurance, and the trust and confidence imposed in a broker employed to secure insurance affords sufficient consideration for his undertaking to carry out the instructions given.[88]

It should be briefly noted at this point that a general rule of agency specifies that an agent, who acts within the scope of his authority for and in the name of a disclosed principal, is not a party to the contract he negotiates

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So. 2d 476, 480 (Fla. Dist. Ct. App. 1962); Bulla v. Donahue, 174 Ind. App. 123, _, 366 N.E.2d 233, 236 (1977); Kap-Pel Fabrics, Inc. v. R.B. Jones & Sons, Inc., 402 S.W.2d 49, 53 (Mo. Ct. App. 1966).

82. Wolfswinkel v. Gesink, 180 N.W.2d at 456. *See also* Smith v. State Farm Mut. Auto Ins. Co., 248 N.W.2d 903, 906 (Iowa 1976).

83. Estate of Ensz v. Brown Ins. Agency, Inc., 66 Wis. 2d 193, 199, 223 N.W.2d 903, 909 (1974).

84. Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. at _, 171 S.E.2d at 491. See note 59 for a discussion of the facts in *Riddle*.

85. Duncanson v. Service First, Inc., 157 So. 2d 696, 699 (Fla. Dist. Ct. App. 1963).

86. Many of these cases have held there was no contract in existence because of the failure of the applicant to pay the premium to the agent. *See* Waters v. Employer's Life Ins. Co., 284 Ala. 107, _, 222 So. 2d 367, 369 (1969). The court in Rogers Ins. Agency v. Anderson Mach., 211 Or. 454, _, 316 P.2d 497, 501-02 (1957), held that where an insurance agent agrees to procure insurance but was paid no premium, the agent could not be deemed to have entered into a valid contract to procure and thus owed no duty to do so. *Contra* Lawrence v. Francis, 223 Ark. 584, _, 267 S.W.2d 306, 309 (1954) (there was a duty to procure the coverage even though the agent received no premium); Duncanson v. Service First, Inc., 157 So. 2d at 699 (the payment of a premium was not necessary to validate a contract to procure insurance).

87. *See* Eastman v. Stumbo, 212 Ky. 685, ___, 279 S.W. 1109, 1110 (1926) (mere promise to take out policy constituted consideration).

88. *See* Hause v. Schesel, 42 Wis. 2d 628, _, 167 N.W.2d 421, 424 (1969). In *Hause*, the court found that it would be unrealistic to characterize, as gratuitous, a promise to procure insurance made by someone who submits applications for insurance to an insurance company with the expectation of receiving a profit if the application is accepted. *Id.* at _, 167 N.W.2d at 423. Accordingly, a binding contract to procure insurance was entered into between the agent and the prospective insured. *Id.* at _, 167 N.W.2d at 424.

unless he expressly or impliedly makes himself a party thereto.[89] Where the contract is negotiated, however, with the name of the insurer unknown to the applicant/insured, then the agent is a party to the contract and, as a general rule, is liable on the contract.[90]

C. *Tort Liability of an Agent or Broker*

As previously stated, along with a cause of action based on the breach of contract to procure the desired insurance,[91] the insured/applicant may have a claim in tort on the basis of the agent's negligence in failing to provide the requested coverage.[92] Actionable negligence involves a legal duty on the part of someone to use reasonable care, a breach of that duty, and the breach as the proximate or legal cause of the resulting injury.[93] The next logical step is to determine what the agent's or broker's duty is to the insured.

The duty of an insurance agent to the principal insured has been described as one in which the agent, in negotiating for a policy, owes a duty to his principal to exercise reasonable skill, care, and diligence in effecting the insurance.[94] It follows that the negligent failure to use reasonable skill on the part of the insurance agent will render the agent liable for damages.[95] In

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89. RESTATEMENT (SECOND) OF AGENCY § 4 (1958).

90. Lippert v. Bailey, 241 Cal. App. 2d 376, _, 50 Cal. Rptr. 478, 481-82 (1966). The court ruled that an agent may be personally liable for negligence in failing to insure property as contracted, but any liability on the contract will depend upon the extent of disclosure of his agency for the insurer. *Id.* at _, 50 Cal. Rptr. at 481. Thus, in *Lippert*, the court held that an action against the agents for breach of contract was not maintainable since the insureds knew that the agents were the agents of the defendant insurance company. *Id.* at _, 50 Cal. Rptr. at 482. *See also* Dailey v. Elicher, 447 F. Supp. 436, 438 (D. Colo. 1978); Cardente v. Maggiacomo Ins. Agency, 108 R.I. 71, _, 272 A.2d 155, 156 (1971).

91. *See supra* notes 72-90 and accompanying text.

92. *See infra* notes 98-108 and accompanying text.

93. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

94. Hampton Road Carriers, Inc. v. Boston Ins. Co., 150 F. Supp. 338, 343 (D. Md. 1957) (duty to exercise reasonable skill, care, and diligence in procuring insurance); Highland Underwriters Ins. Co. v. Elegante Inns, Inc., 361 So. 2d 1060, 1065 (Ala. 1978) (reasonable skill and diligence); Caplan v. LaChance, 219 So. 2d 89, 90 (Fla. Dist. Ct. App. 1969) (negligent failure to obtain proper coverage); Bulla v. Donahue, 174 Ind. App. 123, ___, 366 N.E.2d 233, 236 (1977) (liability of agent for negligently failing to procure insurance); Riddle-Duckworth, Inc. v. Sullivan, 253 S.C. at _, 171 S.E.2d at 490 (1969) (insurance agents and brokers are required to exercise due care in placing insurance and are personally liable for neglect of that duty).

95. Bulla v. Donahue, 174 Ind. App. at _, 366 N.E.2d at 236. Iowa is in accord with this view. Wolfswinkel v. Gesink, 180 N.W.2d 452, 456 (Iowa 1980) (the court recognized that an insurance agent owes to his principal a duty of reasonable skill, care, and diligence in procuring the coverage requested). *See also* Werthman v. Catholic Order of Foresters, 257 Iowa 483, 487, 133 N.W.2d 104, 107 (1965); Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 26, 139 N.W. 1087, 1089 (1913). *See also supra* note 91.

The court in Smith v. State Farm Mut. Auto. Ins., 248 N.W.2d 903, 905-06 (Iowa 1976), stated that holding an agent to a duty of reasonable care and liability for breach thereof was

addition to this duty to procure insurance, the insurance agent may also have a duty to notify his client if he cannot procure the desired coverage. Failure to notify may subject the agent to liability and presents another ground upon which the insured can bring a claim in tort.[96]

As previously mentioned, in many jurisdictions the duty or standard of care owed by an insurance agent would be that of an ordinary and reasonably prudent person.[97] The practitioner, however, should be aware that there is a growing trend to view insurance agents and brokers as learned professionals, thereby holding them to the higher professional standard of care.[98] The decision in *Hardt v. Brink*[99] is representative of this trend. In *Hardt*, the plaintiff advised the insurance agent with whom he had many previous dealings that he was going to lease a building.[100] The agent did not examine the lease or seek information as to the terms of the policy.[101] The plaintiff's existing policies did not cover the risk of fire loss.[102] The building was subsequently destroyed by fire with the result being that the plaintiff was liable to the lessor for the value of the building.[103] In holding the agent liable, the court found that the plaintiff could have reasonably inferred that the agent was a highly-skilled insurance advisor and the plaintiff had a right to rely upon him for advice.[104] The agent's failure to procure the coverage and his failure to review the lease was a negligent breach of the duty created by the relationship.[105]

Cases such as *Hardt* expand the realm in which the insured/applicant

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consistent with the position adopted by several leading legal authorities. The court further stated that "[t]he agent of the insured owes to him the duty of obeying his instructions in the performance of his agreement or contract of agency; to use skill and care, conformably to custom and usage, in the performance of his duties. . . ." *Id.* (citing COUCH ON INSURANCE 2d § 25.32 at 329 (1960)).

96. Pittman v. Great Am. Life Ins. Co., 512 S.W.2d 857, 861 (Mo. Ct. App. 1974) (agent duty to notify if desired insurance not obtained). In Werthman v. Catholic Order of Forestors, 257 Iowa 483, 489, 133 N.W.2d 104, 107 (1965), it was held that there was sufficient evidence to justify a finding of liability against an insurance agent who undertook to procure life insurance for an applicant, but who failed to procure the insurance or *notify* the applicant that the coverage had not been obtained prior to the applicant's death in an automobile accident. (emphasis added).

97. *See supra* note 94 and accompanying text.

98. *See* McAlvain v. General Ins. Co. of Am., 97 Idaho 777, _, 554 P.2d 955, 958 (1976) (when an insurance agent performs his services negligently, he is "liable for that negligence just as would an attorney, architect, engineer, physician, or any other professional who negligently performed personal services").

99. 192 F. Supp. 879 (W.D. Wash. 1961).

100. *Id.* at 880.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 881-82.

105. *Id.*

can attempt to hold the agent liable for failure to procure insurance.[106] Iowa cases, such as *Smith v. State Farm Mutual Automobile Insurance Co.*,[107] may signal a shift that is consistent with this trend.[108] As the foregoing analysis has demonstrated, it is becoming increasingly difficult to distinguish between the agent's contract responsibility to the applicant/insured and the agent's duty to exercise reasonable care as an expert in his tort law relationship with the insuring public.

D. *Damages, Defenses and Election of Remedies*

As a fairly accurate rule of thumb, the damages that the insured/applicant can recover from an agent or broker for negligence in failing to procure the type of insurance that the client specified, or for not procuring any insurance at all, is limited to the sums that the insurer would have had to pay the client had the desired insurance been obtained.[109] Moreover, this rule applies, regardless of whether the action is in tort or contract.[110] For example, if the agent fails to procure the desired fire insurance on the client's home and his home is destroyed by fire, the client's damages are limited to the amount he would be able to recover on the policy had it contained the correct coverage.[111] Logically, if the client has sustained no property loss as a result of the agent's negligence or breach of contract, the measure of the client's damages will be the amount he has contributed as insurance premi-

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106. *See generally* Butler v. Scott, 417 F.2d 471, 473 (10th Cir. 1969) (agent represented as possessing special skill and knowledge of the insurance client); Howarth v. Pfeifer, 443 P.2d 39, 43 (Alaska 1968); McAlvain v. General Ins. Co. of Am., 97 Idaho at _, 554 P.2d at 958.

107. 248 N.W.2d 903 (Iowa 1976).

108. In *Smith*, the Iowa Supreme Court stated that "[g]enerally speaking, if an agent accepts an order to insure, he must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation, in doing what is necessary to effect a policy. . . ." *Id.* at 906.

In a recent decision, Sandbulte v. Farm Bureau Mut. Ins. Co., 343 N.W.2d 457 (Iowa 1984), the court found that an agent's duty to his principal may exceed that of a mere general duty of reasonable care where there exists an "expanded agency agreement or relationship." *Id.* at 464. The court reasoned that this expanded duty arises where an agent represents himself as an insurance specialist and receives a fee for advice or consultation in addition to any commission earned on the policy itself. *Id.* (citing Hardt v. Brink, 192 F. Supp. 879, 880-81 (W.D. Wash. 1961); Nowell v. Dawn-Leavitt Agency, Inc., 127 Ariz. 48, 51-52, 617 P.2d 1164, 1168 (Ct. App. 1980)). The court in *Sandbulte* found no evidence of an expanded agency relationship holding that the mere request for "sufficient coverage" is not enough to place such a higher duty upon the agent. *Id.* at 465.

109. Butler v. Scott, 417 F.2d 471, 475 (10th Cir. 1975); Bulla v. Donahue, 174 Ind. App. at _, 366 N.E.2d at 237 (1977); Jernigan v. New Amsterdam Casualty Co., 69 N.M. 336, _, 367 P.2d 519, 526 (1961). *Contra* Estate of Ensz v. Brown Ins. Agency, Inc., 66 Wis. 2d 193, _, 223 N.W.2d 903, ___ (1974) (recovery is value of property which agent agreed to insure).

110. *See, e.g.*, Miller v. Liberty Ins. Co., 161 Me. 438, _, 213 A.2d 831, 833 (1965) (failure to provide car insurance).

111. *See* Butler v. Scott, 417 F.2d 471, 475 (10th Cir. 1975) (fire loss on personal property).

ums.[112] Note also, that in some jurisdictions, damages for special losses, attorney fees, etc., may be recoverable as well.[113]

As to defenses, most jurisdictions, including Iowa, hold that the failure by the insured to read the policy cannot be relied upon by the agent as a valid defense, either in tort or contract actions.[114] Similarly, the agent cannot raise the defense of contributory negligence on the part of the insured/applicant.[115]

In deciding what course to follow, most jurisdictions feel the applicant/insured need not elect whether to proceed solely on a contract theory or only on a tort theory.[116] For instance, the court in *Anderson Feed & Produce Co. v. Moore*,[117] held that the plaintiff who sued the insurance agent for failure to provide the desired coverage was not required to elect whether he was suing in contract or in tort since the remedy is the same under both theories.[118] Similarly, in *Keller Lorenz Co. v. Insurance Associates Corp.*,[119] the court stated that the failure of an agent to obtain insurance on property can be both a breach of contract to provide insurance and negligent breach of professional duty to provide insurance, and recovery for the loss of the

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112. Hartford Life Ins. Co. v. Hope, 40 Ind. App. 354, _, 81 N.E. 595, 598 (1907); Everett v. O'Leary, 90 Minn. 154, _, 95 N.W. 901, 902 (1903).

113. *See* Joseph Forest Prods. v. Pratt, 278 Or. 477, _, 564 P.2d 1027, 1029 (1977) (agent may be liable for consequential damages as well).

114. Winans-Cater Corp. v. Jay & Benisch, 103 N.J. Super. 389, _, 247 A.2d 361, 364 (1969) (insured's failure to read the policy was not a defense). Iowa takes a similar position. Hully v. Aluminum Co. of Am., 143 F. Supp. 508, 513 (S.D. Iowa 1956) (if the insured "is ignorant of the defect and has no special competence or experience in insurance matters, [he] is privileged in Iowa to rely upon that representation without reading or being charged with knowledge of the contents of the policy"). *See also* Baker v. Bockelman, 208 Iowa 254, 258, 225 N.W. 411, 412 (1929).

115. Many times the courts discuss the issue of an applicant/insured's contributory negligence in terms of what is not contributory negligence. For example, in Scott v. Conner, 403 S.W.2d 453, 458 (Tex. Civ. App. 1966), the court held that the insured was not contributorily negligent for failing to inquire as to whether the policy had been procured. *See* Coffey v. Polimeni, 188 F.2d 539, 542 (9th Cir. 1951) (restaurant owner not contributorily negligent for failing to reply to broker's second request for an application which was sent six weeks before a fire destroyed his uninsured restaurant). *See also* Winans-Cater Corp. v. Jay & Benisch, 103 N.J. Super. 389, _, 247 A.2d 361, 364 (1968), *aff'd*, 107 N.J. Super. 268 (1971) (contributory negligence not a defense to suit for breach of contract). *But see* Keown v. Holman, 268 S.C. 546, _, 234 S.E.2d 868, 869 (1977) (contractor contributorily negligent for not ascertaining expiration date of policy).

116. *See* Highlands Underwriters Ins. Co. v. Elegante' Inns, Inc., 361 So. 2d 1060, 1065 (Ala. 1978); McAlvain v. General Ins. Co. of Am., 97 Idaho 777, _, 554 P.2d 955, 958 (1976).

117. 66 Wash. 237, 401 P.2d 964 (1965).

118. *Id.* at _, 401 P.2d at 967. *See also* Action Ads, Inc. v. Judes, 671 P.2d 309, 313 (Wyo. 1983) (agent liability in contract or tort at election of the client); Winans-Cater Corp. v. Jay & Benisch, 103 N.J. Super. 389, _, 247 A.2d 361, 364 (1968) (agent held liable for negligence and breach of contract for failing to secure a binder); Arceanoux v. Bellow, 395 So. 2d 414, 418 (La. Ct. App. 1981), *cert. denied*, 400 So. 2d 669, 669 (La. 1982).

119. 98 Idaho 678, 570 P.2d 1366 (1977).

uninsured property may be grounded in either theory or both, although double recovery is not allowed.[120] The election of remedies doctrine requires the existence of "inconsistent" remedies.[121] The reasoning in *Keller*, that tort and contract remedies against an insurance agent are the same under both theories, was not inconsistent with the doctrine.[122] Iowa law also allows a plaintiff to sue both for breach of contract and negligent procurement.[123]

IV. Liability Of The Insurance Company

A. *Introduction*

An insured/applicant is not strictly limited to bringing suit against his agent or broker to recover for his loss. The insurance company which issues the policy may be liable as well.[124] Since the insurer, being inanimate, can only act through agents, it is liable in either contract or tort for the acts of its agent done or committed in the course of his employment in carrying out the business of the insurance company.[125]

The impetus behind this is the general rule, adopted by the vast majority of jurisdictions, that any knowledge or information coming to an authorized representative or agent of the insurer, while acting within the proper scope of his authority, is the knowledge of the company and is imputed to it.[126] In other words, the insurance company cannot consider its agents to be agents only to the extent to which the benefits of a policy flow from the insured to the company and then deny the agents the authority to represent the company when claims by the insured are involved.[127]

The Iowa Supreme Court has taken the position that an insurance company is estopped from taking advantage of a condition which its agent, by mistake or negligence, failed to handle properly in the policy.[128] In *Basta v. Farm Property Mutual Insurance Association*,[129] the court stated that the mistake or negligence of the agent, acting within the scope of the agent's

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120. *Id.* at _, 570 P.2d at 1369.

121. *See* Bolinger v. Kiburz, 270 N.W.2d 603, 605-06 (Iowa 1978).

122. *Id.* (jury findings of breach of contract and negligence not inconsistent).

123. *See* Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750, 753 (Iowa 1976).

124. *See infra* notes 125-41 and accompanying text.

125. *See* A.I.D. Ins. Servs. v. Riley, 25 Ariz. App. 132, _, 541 P.2d 595, 598 (1975).

126. Johnson v. United Investors Life Ins. Co., 263 N.W.2d 770, 773 (Iowa 1978); Salzman v. Machinery Mut. Ins. Ass'n, 142 Iowa 99, 105-06, 120 N.W. 697, 699 (1909); Robbins v. National Life & Accident Ins. Co., 182 Neb. 749, _, 157 N.W.2d 188, 190 (1968); Macalco, Inc. v. Gulf Ins. Co., 550 S.W.2d 883, 895-96 (Mo. Ct. App. 1977); Jesske v. General Accident Fire & Casualty Life Assurance Co., 1 Wis. 2d 70, _, 83 N.W.2d 167, 177 (1957).

127. Redenbough, *Liability Considerations Concerning Insurance Agents and Brokers*, 22 Drake L. Rev. 738, 746 (1973).

128. Johnson v. United Investors Life Ins. Co., 263 N.W.2d 770, 773 (Iowa 1978); Wensel v. Property Mut. Ins. Ass'n, 129 Iowa 295, 299, 105 N.W. 522, 523 (1906). *See* Mutual Benefit Life Ins. Co. v. Robinson, 58 F. 723, 725 (8th Cir. 1893) (interpreting Iowa law).

129. 217 Iowa 240, 252 N.W. 125 (1933).

apparent authority, is the responsibility of the insurance company.[130] It follows that an agent cannot bind the insurance company when he engages in conduct which is beyond the scope of the agent's authority.[131] For example, if an agent tells the insured he will waive the clause in the policy prohibiting the insured to recover in the event of arson, this representation is not binding upon the insurance company because the agent had no authority to take such a measure.

Notwithstanding the possible existence of a dual agency relationship permitting an agent to act for both the insured and insurer,[132] the Iowa Supreme Court has historically distinguished between soliciting agents and brokers as to whether their knowledge and actions are imputable to the insurance company, thereby binding the company.[133] The general rule is that a soliciting agent of an insurance company is the agent of the insurer and not of the insured for the purpose of soliciting and procuring the application and insurance.[134] Conversely, Iowa courts have stated that the knowledge and promises of an agent who is working for a general insurance agency, with no authority except to solicit insurance for his principal, are not to be imputed to the insurance company.[135] Thus, the courts in Iowa still differentiate as to the status of the insurance agent and the particular role that he plays for the insurance company.[136] Depending upon the jurisdiction, in order to bind the insurance company, the insured may have to first determine whether he is dealing with a soliciting agent[137] or broker.[138]

Finally, notwithstanding the general prohibition against an agent repre-

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130. *Id.* at 244, 252 N.W. at 127. The Iowa Supreme Court discussed the right of a policyholder to rely upon the acts and representations of the insurance agent:

> It is often said that an insurance company must act through agents who deal directly with those whose property it insures. They look to and rely upon the agent as the full and complete representative of the company in all that is said and done in making the contract, and have a right to regard him. "The powers of the agent are, prima facie, coextensive with the business entrusted to his care, and will not be narrowed by limitations not communicated to the persons with whom he deals. . . ."

Id. (quoting Nertney v. National Fire Ins. Co., 199 Iowa 1358, 1363, 203 N.W. 826, 828 (1925)).

131. Southern Farm Bureau Casualty Ins. Co. v. Allen, 388 F.2d 126, 130 (5th Cir. 1967) (must be acting within scope of his authority); Mannschreck v. Connecticut General Life Ins. Co., 200 Neb. 434, _, 263 N.W.2d 849, 854-55 (1978) (insurer not chargeable with information acquired outside scope of agency); Umstattd v. Metropolitan Life Ins. Co., 21 Tenn. App. 312, _, 110 S.W.2d 342, 349 (1937).

132. *See supra* notes 31-55 and accompanying text.

133. Green v. Phoenix Ins. Co., 215 Iowa 1220, 1224, 247 N.W. 660, 662 (1933); Neiman v. Hawkeye Sec. Fire Ins. Co., 205 Iowa 119, 125, 217 N.W. 258, 261 (1928).

134. IOWA CODE § 515.123 (1983); Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 772-73; Quinn v. Mutual Benefit Health & Accident Assoc., 244 Iowa 6, 14-15, 55 N.W.2d 546, 551 (1952) (soliciting agent knowledge and declarations binding on the company).

135. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 772-73.

136. *See supra* notes 27-32 and accompanying text.

137. *See supra* notes 19-21 and accompanying text.

138. *See supra* notes 22-26 and accompanying text.

senting both the insured and insurance company, cases such as *Cole v. Hartford Accident & Indemnity Co.*[139] and *Mitton v. Granite State Fire Insurance Co.*[140] may permit such dual representation under certain circumstances.[141] The significance of these cases is that, as the distinction between brokers and agents becomes increasingly clouded, the insured's chances of suing the insurance company itself for failing to receive the necessary or desired coverage increases.

B. *Reformation*

Once it has been established that an insurance company may be liable for an agent's failure to provide the desired coverage, the next question concerns what remedies are available to the insured/applicant. The first alternative is the equitable remedy of reformation.[142] Another remedy that may be available is equitable estoppel.[143]

Reformation of contract is a cause of action based on the agency of the insurance agent/broker to the insurance company. The rules of law governing the reformation of written agreements are generally applicable to the reformation of an insurance policy.[144] The purpose of reformation is to make the policy express the true contract which the parties desired and intended to put into writing.[145] The insured's right to reform an insurance contract is embodied in cases such as *Parry v. State Farm Mutual Automobile Insurance Co.*[146] In *Parry,* the court held that when the insurer issues a policy which—because of an omission by the company's agent—does not include one of the essential elements of the contract, and where it is not discovered by the insured until after a loss occurs, the insured may have the policy reformed so as to express the real intent of the parties.[147]

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139. 242 Iowa 416, 46 N.W.2d 811 (1951).

140. 196 F.2d 988 (10th Cir. 1952).

141. As previously mentioned, dual agency may be permitted where there is no conflicting interests on the part of the agent and where there is consent by all parties. *See* Todd v. German-American Ins. Co., 2 Ga. App. 789, _, 59 S.E. 94, 99 (1907).

142. *See infra* notes 144-71 and accompanying text.

143. *See infra* notes 176-201 and accompanying text.

144. Highlands Underwriters Ins. Co. v. Elegantè Inns, Inc., 361 So. 2d 1060, 1063 (Ala. 1978); Williams v. United Ins. Co., 618 S.W.2d 229, 231 (Mo. Ct. App. 1981).

145. St. Louis County Nat'l Bank v. Maryland Casualty Co., 564 S.W.2d 920, 924 (Mo. Ct. App. 1978) (contract reformed to reflect the contract agreed to); Shearer v. Dunn County Farmers Mut. Ins. Co., 39 Wis. 2d 240, _, 159 N.W.2d 89, 91-92 (1968).

146. 191 Neb. 628, 216 NW.2d 875 (1974).

147. *Id.* at _, 216 N.W.2d at 878-79. *See also* Frohna v. Continental Ins. Co., 62 Wis. 2d 650, _, 215 N.W.2d 1, 2 (1974). In *Frohna,* the plaintiff-beneficiary of an airline flight insurance policy brought suit against the insurer alleging that the insurer's agent agreed to provide a policy which would cover the insured on all air flights while in Peru. *Id.* at _, 215 N.W.2d at 2. Because of the agent's negligence or mistake, the policy as written did not cover these air trips while she was in Peru. *Id.* She was, in fact, killed in an airplane crash in Peru. *Id.* The plaintiff brought suit for reformation so as to require the insurer to pay the benefits due upon the death

The grounds necessary to invoke reformation include: (1) the existence of a valid contract; and (2) either by accident, inadvertance, fraud or mutual mistake of the parties, the insurance contract fails to conform to the intention of the parties.[148] Although some jurisdictions have taken the position that an error by the insurance company or its agent is a unilateral mistake, thus eliminating reformation as a remedy;[149] the Iowa Supreme Court has held that a policy may be reformed even though the mistake of the insurance company is by an agent or employee of the company.[150]

The principal case in Iowa relating to the reformation of insurance contracts is *Johnson v. United Investors Life Insurance Co.*[151] In *Johnson,* the plaintiff's husband applied, through the defendant insurance company's soliciting agent, for a $100,000 annual renewable term life insurance policy which was to include double indemnity protection for accidental death.[152] After receiving the application, the defendant insurance company issued a policy providing primary coverage of $100,000 and included a double indemnity supplement.[153] Subsequently, the plaintiff's husband was killed while piloting a private aircraft.[154] The insurance agent notified the plaintiff she would receive $200,000 on the basis of the policy's double indemnity clause.[155] However, the insurance company issued a benefit check for only $100,000 because of a provision in the double indemnity rider excluding

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of the insured. *Id.* at _, 215 N.W.2d at 1. The court ruled that a cause of action for reformation of an insurance policy is allowed when the party seeking reformation of the policy shows that because of fraud or mutual mistake, the insurance policy does not contain certain provisions desired and intended to be included. *Id.* at _, 215 N.W.2d at 2.

148. Quinn v. Mutual Benefit Health & Accident Ass'n, 244 Iowa 6, 15, 55 N.W.2d 546, 551 (1952); Rider v. State Farm Mut. Auto. Ins. Co., 514 F.2d 780, 783 (10th Cir. 1975) (reformation granted to correct defects which inhibit expression of parties' intent); A.I.D. Ins. Servs. v. Riley, 25 Ariz. App. 132, _, 541 P.2d 595, 598 (1975) (fault or negligence of agent); Artmar, Inc. v. United Fire & Casualty Co., 34 Wis. 2d 181, _, 148 N.W.2d 641, 644 (1967) (fraud, negligence or mutual mistake).

Mutual mistake can be defined as:

> a mistake shared by, or participated in by, both parties, or a mistake common to both parties, or reciprocal to both parties; both must have labored under the same misconception in respect of the terms and conditions of a written instrument, intending at the time of the execution of the instrument to say one thing and by mistake expressing another, so that the instrument as written does not express the contract or intent of either of the parties.

76 C.J.S. *Reformation of Instruments* § 28 (1952).

149. *See* Rider v. Lynch, 42 N.J. 465, _, 201 A.2d 561, 567 (1964) (reformation denied despite agent's mistake).

150. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 773. *See also* Quinn v. Mutual Benefit Health & Accident Ass'n, 244 Iowa 6, 14, 55 N.W.2d 546, 551 (1952); Sargent v. American Ins. Co., 218 Iowa 430, 435, 253 N.W. 613, 616 (1934).

151. 263 N.W.2d 770 (Iowa 1978) (Rees, LeGrand, J.J., dissenting).

152. *Id.* at 772.

153. *Id.*

154. *Id.*

155. *Id.*

double indemnity coverage for death resulting from piloting a private aircraft.[156]

The plaintiff brought suit against the insurance company seeking reformation of the policy to eliminate the exclusion on the ground of mutual mistake, thus entitling her to $200,000.[157] The lower court granted the relief requested, and the insurance company appealed.[158]

The Iowa Supreme Court held that a soliciting agent's knowledge and material declarations at the time an application for insurance is obtained are binding on the company and may serve as a basis for reformation.[159] This is true even when the agent is mistaken.[160] This rule is not based on the agent's actual authority to bind the company to particular coverage, but rather, on the fact that by acting upon the application for insurance, the company is *charged* with the agent's knowledge and representations while exercising his actual authority to obtain the application.[161]

The *Johnson* court also rejected the insurer's argument that it did not issue policies such as the one desired by the plaintiff and therefore could not be held liable.[162] The court, in dismissing this argument, found that reformation is possible to afford coverage of any lawful risk, and the party seeking reformation does not have any burden of proving that the insurer would actually have insured the particular risk had its agent not made a

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156. *Id.*

157. *Id.* (see note 148 for the definition of mutual mistake).

158. *Id.*

159. *Id. See* Quinn v. Mutual Benefit Health & Accident Ass'n, 244 Iowa 6, 14-15, 55 N.W.2d 546, 550 (1952). The facts in *Quinn* are analogous to those found in *Johnson*. In *Quinn*, the plaintiff offered evidence she told a soliciting agent of the defendant insurer she desired a policy which would cover any illness or accident and contained no restrictions based on the fact she was a woman. *Id.* at 8, 55 N.W.2d at 547. The agent assured the plaintiff through her attorney he would obtain such a policy for her. *Id.* The agent delivered a policy to her, and the plaintiff, without reading it, signed the policy. *Id.* Later, she had surgery performed and made a claim based on her policy. *Id.* The insurer denied coverage because the policy contained an exclusion applicable to such surgery. *Id.* at 8, 55 N.W.2d at 547-48. The court, in affirming the trial court, held that the insurer was charged with knowing what its soliciting agent knew and found a basis for reformation. *Id.* at 15, 55 N.W.2d at 551. The court stated:

> The company, acting through its authorized agent Sullivan knew what insurance plaintiff desired and ordered. To her Sullivan was the company and according to every day business practice and custom she dealt with him and rightly so. While she admits that she did not read either the application or the policy, we hold that under our holdings, she was not negligent in that respect. She thought she was getting the protection she desired; Sullivan thought so. Under the record she was entitled to receive it.

Id.

160. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 773 ("The mistakes of the soliciting agent are the mistakes of the insurer.").

161. *Id.* at 772. (emphasis added). *See* IOWA CODE ANN. § 515.123 (West 1946); Imperial Casualty & Indem. Co. v. Carolina Casualty Ins. Co., 402 F.2d 41, 44 (8th Cir. 1968).

162. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 773.

mistake.[163]

In sum, the court in *Johnson* accepted the plaintiff's theory that her husband and the insurance agent mutually intended the policy to provide double indemnity coverage for accidential death including death while piloting a private aircraft.[164] Since both the plaintiff's husband and the agent mistakenly believed the insurer would issue such a policy, and since the mistakes of the agent are deemed to be the mistakes of the insurer, reformation of the insurance policy was allowed.[165]

Whereas *Johnson* is representative of the line of cases allowing reformation, there are also cases in which reformation has not been granted.[166] When the courts disallow reformation as a remedy, it is usually because the elements necessary for reformation are not established.[167] For example, in *Bales v. State Automobile Insurance Association*,[168] reformation was not allowed because the agent's misrepresentations of the policy occurred *after* the insured received the policy, and therefore, there could be no reliance by the insured on this representation.[169] Similarly, reformation is denied where it would be unreasonable to expect that the insured misunderstood the true terms of the policy or could rely on the agent's representations.[170] Also, reformation will not serve as a remedy in those instances where the insurance agent correctly explained the policy to the insured.[171]

Finally, it is common in these types of insurance cases for the insurance company to raise the defense that the insured failed to read the insurance policy provisions which thereby exonerates the insurer from liability.[172] The

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163. *Id. See* Baldwin v. Equitable Life Assurance Soc'y of the United States, 252 Iowa 639, 650-51, 108 N.W.2d 66, 73 (1961) (a court of equity may grant reformation even when the provision at issue is inhibited by statute, provided the statute does not make it void and the parties are not in pari delicto.); Heikes v. Farm Bureau Ins. Co., 181 Neb. 827, _, 151 N.W.2d 336, 339 (1967); Kaiser v. Carolina Life Ins. Co., 219 S.C. 456, _, 65 S.E. 2d 865, 870 (1951).

164. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 776.

165. *Id.* For additional cases in accord with the decision in *Johnson*, see Quinn v. Mutual Benefit Health & Accident Assoc., 244 Iowa 6, 55 N.W.2d 770 (1952), Lankhorst v. Union Fire Ins. Co., 236 Iowa 838, 20 N.W.2d 14 (1945), Mortenson v. Hawkeye Casualty Co., 234 Iowa 430, 12 N.W.2d 823 (1944), and Green v. Phoenix Ins. Co., 218 Iowa 1131, 253 N.W. 36 (1934).

166. In a few cases, for example, reformation was not allowed even though the insurance policy did not cover the risks intended. Instead the insurer was estopped to deny such coverage. For example, in Owen v. American Home Assurance Co., 153 F. Supp. 928 (N.D. Cal. 1957), the insurer's agent led the insured to believe he was insured for the use of a boat. *Id.* at 929. The agent made no reference to the horsepower limits on the motor. *Id.* The court held that the insurer was estopped from relying on a horsepower limitation. *Id.* at 931. *See also* Makler v. Milwaukee Mechanics Ins. Co., 205 N.C. 692, _, 172 S.E. 204, 208 (1933).

167. *See supra* note 148 and accompanying text.

168. 248 Iowa 487, 81 N.W.2d 474 (1957).

169. *Id.* at 490, 81 N.W.2d at 476 (emphasis added).

170. *Id.*

171. Detrick v. Aetna Casualty & Sur. Co., 261 Iowa 1246, 1255, 158 N.W.2d 99, 103 (1968).

172. Sinclair v. Home Indem. Co., 159 Me. 367, _, 193 A.2d 177, 178 (1963); Buck v.

majority position is that failure to read the policy by the insured is not a bar to reformation if sufficient grounds for reformation are present.[173] One view is that most people who purchase insurance do not understand the complex terminology of insurance contracts so it would make little difference, if any, if they would read the policy.[174] Another theory, which is applied by the Iowa Supreme Court, is that the insured has a right to rely on the insurance agent to procure the necessary coverage.[175] As a rule, courts are very reluctant to deny the equitable remedy of reformation where there is sufficient evidence that the policy was not what the insured had intended.

C. *Equitable Estoppel*

Estoppel, like reformation, represents another equitable alternative available to an insured seeking redress. "Estoppel" refers to an abatement of rights and privileges of the insurer where it would be inequitable to permit their assertion.[176] Estoppel necessarily implies prejudicial reliance by the insured upon some act, conduct or nonaction of the insurer or its agents.[177] Equitable estoppel is premised upon the fundamental principle that the conduct of one party has induced another party to take such a position that he will be injured if the first party is permitted to repudiate his acts.[178]

For example, as a general rule, the insurance company will be estopped to deny liability on any matter arising out of the fraud, misconduct, or negligence of an agent of the company on the grounds that if either party must suffer from an agent's mistake, it must be the insurance company, the agent's principal.[179] Another example occurs where an insurer, or its agent,

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Mountain States Inv. Corp., 76 N.M. 261, _, 414 P.2d 491, 494 (1966).

173. Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 776; Coal Operators Casualty Co. v. F.S. Neely, 219 Ark. 579, _, 243 S.W.2d 744, 746-47 (1951); American Sur. Co. v. Heise, 136 Cal. App. 2d 689, _, 289 P.2d 103, 107-08 (1955); Hyman-Michaels Co. v. Massachusetts Bonding & Ins. Co., 9 Ill. App. 2d 13, _, 132 N.E.2d 347, 355 (1955); *see* RESTATEMENT (SECOND) OF CONTRACTS § 299 (Tent. Draft No. 10)("A mistaken party's fault in failing to know or discover the facts before making the contract does not bar him from avoidance or reformation . . . unless his fault amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.").

174. *See* Portella v. Sonnenberg, 74 N.J. Super. 354, _, 181 A.2d 385, 389 (1962).

175. *See* Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 775-76; Quinn v. Mutual Benefit Health & Accident Assoc., 244 Iowa 6, 14, 55 N.W.2d 546, 551 (1952).

176. Buchanan v. Switzerland Gen. Ins. Co., 76 Wash. 2d 100, _, 455 P.2d 344, 349 (1969).

177. *Id. See also* Phoenix Ins. Co. v. McQueen, 286 So. 2d 570 (Fla. Dist. Ct. App. 1973); Conklin v. North Am. Life & Cas. Co., 88 N.W.2d 825, 829 (N.D. 1958); Ryder v. State Farm Mut. Auto. Ins. Co., 51 Wis. 2d 318, _, 187 N.W.2d 176, 179 (1971).

178. Hartford Accident & Indem. Co. v. D.F. Bast, Inc., 56 Ill. App. 3d 960, _, 372 N.E.2d 829, 832 (1977); American Bank & Trust Co. v. Trinity Universal Ins. Co., 251 La. 445, _, 205 So. 2d 35, 40 (1967).

179. Sumrall v. City of Cypress, 258 Cal. App. 2d 565, ___, 65 Cal. Rptr. 755, 757 (1968). *See also* Pitts v. New York Life Ins. Co., 247 S.C. 545, _, 148 S.E.2d 369, 371 (1966) (essential elements of estoppel); Vulcan Life & Accident Ins. Co. v. Segars, 216 Tenn. 154, _, 391 S.W.2d

has actual or imputed knowledge of facts under which the express terms of the policy render it void, or unenforceable from its inception, but nonetheless issues the policy.[180] The issuance is equivalent to an assertion by the insurer that such facts do not invalidate the policy, and hence, the insurer is estopped from asserting such.[181] In this regard, at least in Iowa, estoppel parallels the remedy of reformation in that the agent's knowledge may be "charged" to the insurer, thereby preventing the insurer from denying liability.[182]

Estoppel, however, does not operate to bring a new insurance contract into existence.[183] Rather, estoppel operates simply to deny legal effect to a provision inserted in the policy for the insurer's benefit.[184] The majority position is that estoppel cannot create a contract of insurance or bring within the coverage of a policy, property or risks not covered by its terms.[185] The theory underlying this rule seems to be that the insurance company should not be required to pay for a loss for which it charged no premium, and estoppel cannot be used to create a contract for the parties.[186] This rule is far from perfect and its theoretical foundation may be suspect. In other words, an insurer would not be able to lower the cost of doing business by taking advantage of its agents' mistakes, misrepresentations or negligence.

In response to the above rule, the New Jersey Supreme Court in *Harr v. Allstate Insurance Co.*,[187] held that equitable estoppel is available to *broaden* the coverage of an insurance policy so as to protect the insured against risks not included therein or expressly excluded therefrom.[188] This

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393, 397 (1965) (failure to inquire as to the health or to point out sound health provision estops insurer from relying on them); Ryder v. State Farm Mut. Auto. Ins. Co., 51 Wis. 2d 318, _, 187 N.W.2d 176, 179 (1971).

180. New York Life Ins. Co. v. Strudel, 243 F.2d 90, 93 (5th Cir. 1957).

181. *Id.*

182. *See* Johnson v. United Investors Life Ins. Co., 263 N.W.2d at 772. *See also* Hully v. Aluminum Co. of Am., 143 F. Supp. at 513.

183. Randolph v. Fireman's Fund Ins. Co., 255 Iowa 943, 950, 124 N.W.2d 528, 531-32 (1963); Sellers v. Allstate Ins. Co., 25 Ariz. App. 482, _, 544 P.2d 699, 703 (1976); Wyoming Sawmills, Inc. v. Transportation Ins. Co., 282 Or. 401, _, 578 P.2d 1253, 1258 (1978) (estoppel cannot be the basis for creating coverage where no such contract previously existed); Peterson v. Truck Ins. Exch., 65 Wis. 2d 542, _, 223 N.W.2d 579, 584 (1974).

184. Manufacturers & Merchants Indem. Co. v. Claman, 96 F. Supp. 385, 386 (S.D. Iowa 1951); Austin v. Fulton Ins. Co., 444 P.2d 536, 538 (Alaska 1968).

185. *See supra* note 14.

186. Sullivan v. Great Am. Ins. Co., 23 Wash. App. 242, _, 594 P.2d 454, 457 (1979).

187. 54 N.J. 287, 255 A.2d 208 (1969).

188. *Id.* at _, 255 A.2d at 218. In *Harr* the insured brought an action against the defendant insurance company to recover for water damage to certain business merchandise which was allegedly covered by a fire insurance policy issued by the defendant. *Id.* at _, 255 A.2d at 210. The agent had advised the plaintiff that he was "fully covered" as to the business merchandise stored in its basement. *Id.* at _, 255 A.2d at 212. The plaintiff's theory of recovery was that certain representations made by the defendant's insurance agent as to the scope of the policy's coverage estopped the insurer from now denying that coverage even though it was ex-

minority view assures that the client receives the desired insurance coverage.[189] Similarly, the view in *Harr*, of allowing the risk of agent misrepresentations and mistakes to fall on the insurer, appears to be equitable as well.[190]

The decision reached in *Hully v. Aluminum Co. of America*[191] appears to align Iowa with this minority position to the extent that estoppel is an available remedy when the insurer's agent is negligent in not procuring the type of policy requested by the insured.[192] In *Hully*, an action was brought by an independent contractor to recover the balance due for labor and materials which were withheld as a set-off for an indemnifiable tort obligation.[193] The contractor had applied for comprehensive liability insurance to cover all risks under its contract with the employer.[194] The contractor had relied on the agent to supply a contract for the employer which would include full coverage.[195] The court held that the insurer was estopped from taking advantage of a policy exclusion as to a contractual indemnity risk which the agent negligently failed to provide for in the policy and which he mistakenly represented was covered by another policy clause.[196]

In reaching this decision, the court in *Hully* relied on principles similar to those upon which reformation has been granted.[197] For example, the

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pressly excluded by the terms of the policy. *Id.* at _, 255 A.2d at 214. The New Jersey Supreme Court in reversing the lower court held that equitable estoppel is available to bar a defense in actions on insurance policies even where the estopping conduct arose before or at the inception of the contract. *Id.* at _, 255 A.2d at 218.

189. The minority position holding that equitable estoppel is available to broaden the coverage of an insurance policy so as to protect the insured from risks not included therein or excluded therefrom is illustrated by Preferred Risk Mut. Ins. Co. v. Thomas, 372 F.2d 227 (4th Cir. 1967) (applying South Carolina law); United Pacific Ins. Co. v. Meyer, 305 F.2d 107 (9th Cir. 1962) (applying Idaho law); Ivey v. United Nat'l Indem. Co., 259 F.2d 205 (9th Cir. 1958) (applying California law); Hully v. Aluminum Co. of Am., 143 F. Supp. 508 (S.D. Iowa 1956), *aff'd sub nom.* Columbia Casualty Co. v. Eichleay Corp., 245 F.2d 1 (8th Cir. 1957); Mutual Benefit Life Ins. Co. v. Bailey, 55 Del. 215, 190 A.2d 757 (1963); Farmers Mut. Auto. Ins. Co. v. Bechard, 80 S.D. 237, 122 N.W.2d 86 (1963), and Dodge v. Aetna Casualty & Sur. Co., 250 A.2d 742 (Vt. 1969). These decisions proceed on the thesis that where an insurer or its agent misrepresents the coverage of an insurance contract, or the exclusions therefrom, to the insured before or at the inception of the insurance contract, and the insured relies upon the agent, the insurer is estopped from denying coverage for a loss not covered by the policy.

190. Harr v. Allstate Ins. Co. 54 N.J. at _, 255 A.2d at 219-20.

191. 143 F. Supp. 508 (S.D. Iowa 1956) *aff'd sub. nom.*, Columbia Casualty Co. v. Eichleay Corp., 245 F.2d 1 (8th Cir. 1957).

192. Hully v. Aluminum Co. of Am., 143 F. Supp. at 513. *But see* Randolph v. Fireman's Fund Ins. Co., 255 Iowa at 951, 124 N.W.2d at 531-32 (the court cited the majority rule prohibiting the creation of new insurance contracts under estoppel).

193. Hully v. Aluminum Co. of Am., 143 F. Supp. at 510.

194. *Id.* at 511.

195. *Id.* at 512.

196. *Id.* The court in *Hully* stated that reformation of the contractor's policy was not a proper remedy since there was no mutual intent or actual agreement of the parties to secure coverage for the indemnity risk. *Id.* at 512-13.

197. *Id.* at 513.

Hully court held that the mistake or negligence of the agent is considered to be the responsibility of the insurance company.[198] Therefore, under estoppel, knowledge is charged or imputed to the insurance company just as it is under reformation, thus establishing a basis for which the insured can hold the insurer liable.[199] The only difference is that under estoppel, where the company or its agent delivers to the insured a policy which is known or should be known to be defective, such conduct is a representation that the policy is valid and effective.[200] Reformation accomplishes this same result by "reforming" the contract so as to express the true intentions of the parties. The significance of cases such as *Harr* and *Hully* is that estoppel may serve as another valuable alternative for the insured/applicant in those cases where the requested or intended coverage is not received.[201]

D. *Election of Remedies*

As previously noted, the majority of jurisdictions do not require the insured to elect between a contract or tort action in proceeding against the insurance agent or broker.[202] With the addition of possible causes of action against the insurance company itself, the issue then becomes whether the insured can sue both the agent and the insurer in one suit. In other words, is it possible to successfully sue the agent for negligent procurement and the insurance company for reformation in the same action.

In order for an insurance company or its agent to assert the equitable defense of election of remedies, three elements must be established.[203] They are: (1) the existence of two or more remedies; (2) inconsistency between these remedies; and (3) a choice of one of them.[204] Obviously, in the case of a suit brought against both the insurer and its agent, the first element is satisfied. The difficulty arises with the second element.

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198. *Id.* at 514. *See* Basta v. Farm Property Mut. Ins. Ass'n, 217 Iowa 240, 249, 252 N.W. 125, 128 (1933).

199. Hully v. Aluminum Co. of Am., 143 F. Supp. at 513. *See also* Imperial Casualty & Indem. Co. v. Carolina Casualty Ins. Co., 402 F.2d 41, 44 (8th Cir. 1968) (the knowledge of an insurance agent of the assured's requirements is imputed to the insurance company).

200. Hully v. Aluminum Co. of Am., 143 F. Supp. at 513. *See* Dryer v. Security Fire Ins. Co., 94 Iowa 471, 474-75, 82 N.W. 494, 495 (1900).

201. As mentioned, the common reason given is that equitable estoppel results in the creation of a new contract which actually contradicts the written contract of the parties. *See supra* note 183. This may not necessarily be the case if one proceeds under the theory that the insured is under the impression that he is covered for all the risks desired. This is what he believes the contract to be. Therefore, by holding the contract to be what the insured intended, a new contract is not created, rather the insured is only receiving the benefit of his bargain by justifiably relying on the insurer's representation and superior knowledge. Harr v. Allstate Ins. Co., 54 N.J. at _, 255 A.2d at 218. To reject this approach because a new contract is thereby made is an unfortunate triumph of form over substance. *Id.*

202. *See supra* notes 116-123 and accompanying text.

203. Bolinger v. Kiburz, 270 N.W.2d 603, 605 (Iowa 1978).

204. *Id. See also* Stroh Corp. v. K & S Dev. Corp., 247 N.W.2d 750, 753 (Iowa 1976).

It has been held that remedies are inconsistent within the meaning of the election of remedies doctrine if the party against whom the doctrine is asserted has pursued one remedy to the point he adopts a contradictory position in attempting to pursue another.[205] In other words, one claim must negate the other.[206] For example, at first glance, it would appear that an action against the agent for negligent procurement would be inconsistent with a claim for reformation of the contract against the insurer since one is in tort and the other is an equitable remedy. However, determining whether the claims are inconsistent depends upon whether the facts relied on as the basis of one recovery are repugnant and contradictory to the facts relied on as the basis of another remedy.[207] Since both claims are based upon the assertion that the insured did not receive the desired insurance, these remedies are not inconsistent.[208]

To avoid the election of remedies defense, the cause of action for reformation and for negligent procurement should be set out in separate counts.[209] Furthermore, as long as the remedies are consistent, they may be pursued even to final adjudication, although the satisfaction of one claim will bar the assertion of the other.[210]

As illustrative of the above, in *Smith v. State Farm Mutual Automobile Insurance Co.*,[211] the administrator of his son's estate filed an action in two divisions against the automobile insurer and its agent for recovery of accidental death benefits.[212] In the first division, the administrator asked for reformation of the policy based on mutual mistake.[213] Alternatively, the second division was an action at law against the agent for his negligence in executing the policy.[214] The Iowa Supreme Court held that the plaintiff's petition sufficiently alleged a cause of action triable in equity for reformation in the first division as well as a separate and distinct cause of action for

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205. Bolinger v. Kiburz, 270 N.W.2d at 606. *See also* Linburg v. Engster, 220 Iowa 1073, 1084-85, 264 N.W. 31, 36-37 (1935).

206. It is well settled that the adoption of election of remedies does not apply to coexistent and consistent remedies. Culligan Soft Water Serv. v. Berglund, 259 Iowa 660, 666, 145 N.W.2d 604, 608 (1966).

207. Bolinger v. Kiburz, 270 N.W.2d at 606.

208. *See* Smith v. State Farm Mut. Auto. Ins. Co., 248 N.W.2d 903, 906 (Iowa 1976).

209. IOWA R. CIV. P. 22, provides for the joinder of all causes which one plaintiff may have against one defendant. *See* Davis v. Mater, 248 Iowa 1, 5, 79 N.W.2d 400, 402 (1956). IOWA R. CIV. P. 79 states that the only express limitations on this practice are that each distinct cause of action should be pled in separate divisions and where there is "misjoinder" of legal and equitable actions the defendant may move to have the two transferred to the appropriate docket. *See* Claeys v. Moldenschardt, 169 N.W.2d 885, 889 (Iowa 1969); IOWA R. CIV. P. 186.

210. Bolinger v. Kiburz, 270 N.W.2d at 606.

211. 248 N.W.2d 903 (Iowa 1976).

212. *Id.* at 904.

213. *Id.*

214. *Id.*

negligent procurement in division two.[215] Based on *Smith*, it would be consistent to plead reformation against the insurer and negligent procurement against the agent.[216] The facts involved in bringing an action against the insurer would entail the same facts as an action against the agent if, as in *Wolfswinkel*, the mistakes of the agent are considered the mistakes of the insurance company.[217]

V. Conclusion

A person seeking insurance, or one who has already received some type of coverage, should be aware that he has a number of recourses available in the event he discovers that he is not covered for those risks for which he sought insurance. First, he may allege that the agent breached his contract with the insured to provide the necessary coverage.[218] The law in some jurisdictions is expanding the scope of the duty an agent or broker owes to the insured or applicant, holding the agent to a "professional" standard of care.[219] As a result, the potential liability of agents may increase when the insured brings an action against him for negligent procurement of an insurance contract. In addition, more and more jurisdictions are allowing the breach of contract action and the negligence action to be brought together in a single proceeding.[220]

Also, the trend toward classifying the relationship between an agent/broker and both the insurer and insured as a "dual agency" relationship is of growing importance. This dual role permits the insured to sue not only the agent, but the insurer as well, for the conduct of the agent or broker.[221]

In a typical case, the insured may allege negligence by the agent, and through his agent under the doctrine of respondent superior, negligence on the part of the insurer as principal. In proceedings against the insurer, the insured can either bring an action for reformation so as to conform the policy to the parties intention,[222] or an action under the equitable remedy of estoppel.[223] Similarly, it appears that the insured can combine causes of action against the insurer with claims against the insurance agent.[224]

The significance of the foregoing is that insurance law is expanding to meet the needs of the insured. In this way, the insured will be protected from losses which are not attributable to any mistake on his part while en-

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215. *Id.* at 906.
216. *See id.*
217. *See supra* notes 125-31 and accompanying text.
218. *See supra* notes 72-98 and accompanying text.
219. *See supra* notes 98-107 and accompanying text.
220. *See supra* notes 116-23 and accompanying text.
221. *See supra* notes 33-57 and accompanying text.
222. *See supra* notes 144-71 and accompanying text.
223. *See supra* notes 176-201 and accompanying text.
224. *See supra* notes 202-16 and accompanying text.

suring that the blame for inadequate coverage falls on those responsible, namely the agent and the insurance company. The insured is entitled to rely upon the representations of an insurance agent and when he does, he should be allowed to assume that the policy conforms to the representations made by the agent to him.

This Note was designed to give an overview of the various causes of action available to the insured when he does not receive the desired coverage. Therefore, a caveat is appropriate. Although much of the foregoing insurance law is common to the states in general, the practitioner should examine the appropriate state statutes and case law for any point particular to that state.

Thomas Robert Hennen