IN THE CROSS-HAIRS: CURRENT STATUS OF AGENT/BROKER LIABILITY

Blake S. Evans
Stephen W. Burnett
Schubert & Evans, P.C.
900 Jackson Street, Suite 630
Dallas, Texas 75202
Telephone: 214.744.4400
Facsimile: 214.744.4403
bevans@schubertevans.com
sburnett@schubertevans.com
www.schubertevans.com

* The analysis, conclusions, and opinions expressed in these materials do not necessarily reflect the position of the law firm of Schubert & Evans, P.C. or its clients and should not be construed as legal advice.

Presented at the State Bar of Texas' Fourth Annual Advanced Insurance Law Course

March 29-30, 2007
Dallas, Texas

I.

INTRODUCTION

> *"[G]iven the relative financial positions of most [insurance] companies versus their . . . [agents], the only time an . . . [agent] is going to be sued is when it serves a tactical legal purpose like defeating diversity.'"*

Sohmer v. American Med. Sec., Inc., 2002 WL 31323763, *2 (N.D.Tex. 2002) (citing *Waters v. State Farm Mut. Auto. Ins. Co.*, 158 F.R.D. 107, 109 (S.D. Tex. 1994) (citing *Ayoub v. Baggett*, 820 F.Supp. 298, 298-300 (S.D.Tex. 1993))).

If one took to heart the observations made by the *Sohmer* court (and several other federal courts), the law of agent liability could be properly relegated to a footnote in federal practice treatises. It is fairly obvious why a federal court facing one remand motion after another may feel this way. Nonetheless, the duties owed by an agent to its insured are quite real and the liability faced by agents represents more than just a procedural mechanism to secure a favorable venue against an insurer.

The first part of this paper addresses the core concepts of (1) who is an agent, and (2) imputation of liability to the insurer. The remainder of the paper is devoted to a discussion of agent liability in the context of direct claims made by the insured.[1]

One word of caution to the practitioner: while certain principles can be distilled from a few seminal opinions, the results reached by the courts in each case are more often than not driven heavily by the facts involved. As such, considerable care should be given to the entire opinion in evaluating its persuasive force.

II.

WHAT IT MEANS TO BE AN AGENT AND WHY IT IS IMPORTANT

The word "agent" can mean different things in different circumstances. Certainly, it has a very general meaning such as in discussions involving agency/principal doctrines. In the insurance context, the term "agent" has very specific meanings with concrete liability implications. To further confuse matters, insurance agents historically came in more than one form such as soliciting agents, local recording agents and brokers, though recent revisions to the Texas Insurance Code have possibly blurred these distinctions. In some circumstances, these distinctions may matter; but, in many other circumstances, the distinctions may not matter, especially with respect to an agent's potential liability to an insured.

[1] Under certain circumstances, actions and statements of an insurance agent can be imputed to the insurer, including wrongful actions such as misrepresentations. While this paper will explore those circumstances, the paper does not address when an insurer may sue its own agent for exposing it to such liability or for any other acts or omissions that may be deemed a breach of duties an agent owes to an insurer.

A. HISTORICAL AND CURRENT DEFINITIONS/TYPES OF AGENTS.

Agents have historically gone by a number of names—"soliciting agent," "local recording agent," "broker" and just plain "agent." Before the recent revisions in April 2005, the Texas Insurance Code made a distinction between "local recording" agents and "soliciting" agents. A "local recording agent" had the most authority to bind the insurer and had the power to write policies, bind risks and collect premiums. *See, e.g., Sedgwick*, 276 F.3d at 760 ("The recording agent is closest to the principal, and his actions will always bind the principal."); *see also Royal Globe*, 577 S.W.2d at 693-4; *see repealed* TEX.INS.CODE § 21.14. A "soliciting agent" was an agent that sold policies, but did not have the authority to waive or alter the policy terms. *See, e.g., Sedgwick*, 276 F.3d at 759; *see also Royal Globe*, 577 S.W.2d at 693 (holding that soliciting agent's authority "is clearly much more limited than" a local recording agent's authority); *see repealed* TEX.INS.CODE § 21.04. In contrast, a broker was not defined in the former Code, but was and is a term often used in connection with someone who represents the insured in an effort to secure coverage. *See, e.g., Sedgwick*, 276 F.3d at 759; *see also Duzich v. Marine Office of America Corp.*, 980 S.W.2d 857, 865 (Tex.App.--Corpus Christi 1998, pet. denied). If an agent fit into none of these categories, then it was simply the insurer's agent as long as he performed some of the acts listed in former Insurance Code section 21.02. *See, e.g., Celtic Life*, 885 S.W.2d at 98; *Sedgwick*, 276 F.3d at 760; *see repealed* TEX.INS.CODE § 21.02.

The April 2005 revisions to the Texas Insurance Code essentially streamlined these definitions. One difference is that the Insurance Code no longer provides a separate definition of local recording agent. Instead, the Insurance Code now simply defines an "agent" as a person "who performs the acts of an agent . . . by soliciting, negotiating, procuring or collecting a premium." TEX.INS.CODE § 4001.003. Then, it gives a list of acts that constitute acting as an agent. TEX.INS.CODE § 4001.051. This provision is very similar to former Article 21.02. Like its predecessor, the current Insurance Code provision still mandates that someone who performs acts constituting acting as an agent "is the agent of the insurer for which the act is done or risk is taken for purposes of the liabilities, duties, requirements, and penalties provided by this title, Chapter 21, or a provision listed in Section 4001.009." TEX.INS.CODE § 4001.051. Specifically, the Insurance Code lists the following acts that constitute acting as an agent:

> (1) solicits insurance on behalf of the insurer;
> (2) receives or transmits other than on the person's own behalf an application for insurance or an insurance policy to or from the insurer;
> (3) advertises or otherwise gives notice that the person will receive or transmit an application for insurance or an insurance policy;
> (4) receives or transmits an insurance policy of the insurer;
> (5) examines or inspects a risk;
> (6) receives, collects, or transmits an insurance premium;
> (7) makes or forwards a diagram of a building;
> (8) takes any other action in the making or consummation of an insurance contract for or with the insurer other than on the person's own behalf; or

(9) examines into, adjusts, or aids in adjusting a loss for or on behalf of the insurer.

TEX.INS.CODE § 4001.051(b).

A similar result is reached in Section 4001.052 for "solicitors." If a person solicits an application for life, accident, or health insurance or property or casualty insurance, that person is an agent of the insurer. In both Section 4001.051(c) and 4001.052(b), the Insurance Code expressly states that an agent cannot waive or alter the policy terms. But, as noted, the fact that an agent has no authority to waive or alter policy terms will not relieve the insurer of liability for the agent's misrepresentations. *See, Celtic Life,* 885 S.W.2d at 98-100.

It is important not to get too caught up in these distinctions when assessing an agent's or carrier's liability. By way of example, the Texas Supreme Court has held that the Insurance Code makes no distinction between an "agent" and a "broker." *May v. United Services Ass'n. of Am.,* 844 S.W.2d 666, 669, n.8 (Tex.1992). Moreover, the Texas Supreme Court pointed out that the Insurance Code does not distinguish between recording and soliciting agents with respect to selling life, health and accident coverage. So, to a large extent, the excising of some of the distinctions among types of agents has limited significance because there were already a lot of areas where there were no distinctions. Ultimately, either the agent has actual or apparent authority or not; ultimately, either the agent owes duties to the insured or not.

B. ACTUAL/APPARENT AUTHORITY AND IMPUTING LIABILITY TO THE CARRIER.

1. Principal-Agent Relationship.

Because general agency principles can apply to all types of insurance agents, it is worthwhile to review a few basics. Three elements create a principal-agent relationship: "(1) the manifestation by the principal that the agent shall act for him, (2) the agent's acceptance of the undertaking, and (3) the understanding of the parties that the principal is to be in control of the undertaking." *Roberts v. Driskill Holdings, Inc.*, 2000 WL 301195, *2 (Tex.App.—Austin 2000, no pet.) (citing RESTATEMENT (SECOND) OF AGENCY § 1 cmt. B (1958)). As recently explained by the Houston Court of Appeals, an agent is a person authorized to transact business or manage an affair for another. *See Coleman v. Klöckner & Co.*, 180 S.W.3d 577, 588 (Tex.App.—Houston [14th Dist.] 2005, no pet.); *see also Burnside Air Conditioning and Heating, Inc. v. T.S. Young Corp.*, 113 S.W.3d 889, 896 (Tex.App.—Dallas 2003, no pet.). The "critical element" of an agency relationship, however, is the principal's right to control the "means and details" of the mission to be performed by the agent. *Id.*

More central for the purposes of this paper are the effects and differences between actual and apparent authority on the principal-agent relationship. Actual authority, as the name would imply, is specific authority given by the principal to the agent to perform some act. Moreover, a principal can also confer implied actual authority on its agent,

which is authority that an agent necessarily possesses in order to fulfill his express authority. *See*, MARK KINCAID & CHRISTOPHER W. MARTIN, TEXAS PRACTICE GUIDE: INSURANCE LITIGATION, §6:6 (2006). Implied actual authority is not the same thing, however, as apparent authority. *Id.*, §6:6, 6:7. Apparent authority is conferred by the principal doing something that would cause a reasonable person to believe that the agent was acting with the authority of the principal. *See, e.g., TIG Ins. Co. v. Sedgwick James of Washington*, 276 F.3d 754, 760-761 (5th Cir. 2002) (holding, "The principal must visibly confer authority for the agent to perform a range of tasks that include the disputed action.").

For purposes of binding the insurer for the agent's actions, the exact scope of an agent's actual authority may not matter as long as the agent has some authority to sell an insurer's policies. The Supreme Court of Texas has made clear that, as long as an insurer has authorized an agent to sell its policies, that insurer cannot escape the misrepresentations of its agent with a defense that the agent did not have actual authority to make such misrepresentations. At the end of the day, under those circumstances, an insurer (principal) is possibly going to be bound by and charged with the misrepresentations of its agents regardless of the scope of that particular agent's actual authority. In such situations, proving apparent authority is typically not a problem.

The Supreme Court of Texas has explained that it is only fair that the principal that appointed the agent accept the risk that the agent may act beyond his authority. *See, Celtic Life Ins. Co. v. Coats*, 885 S.W.2d 96, 99 (Tex. 1994) (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 694 (Tex. 1979) (quoting *Standard Distributors v. FTC*, 211 F.2d 7, 15 (2nd Cir. 1954) (Hand, J.))). In other words, if the carrier appointed an agent to sell, the insurer takes a risk that it may not be able to hide behind lack of authority to avoid being imputed with the agent's acts or statements.

The Supreme Court in *Royal Globe* explained:

> We are not to be understood as holding that the statutory authority granted an agent under Article 21.02 authorizes that agent to misrepresent policy coverage and bind the company to terms contrary to those of the written policy; that question was decided by us in *International Security Life Ins. Co. v. Finck*, *supra*. However, an insurance company that authorizes an agent to sell its policies may not escape liability for the misrepresentations made by that agent which violate Article 21.21 or Section 17.46 merely by establishing that the agent had no actual authority to make any such misrepresentation.
>
> Neither Article 21.21 nor Section 17.46(b)(12) require either expressly or by implication that an agent have actual authority before an insurance company can be found to have vicariously committed a deceptive act or practice. . . .

> To require actual authority would emasculate both Article 21.21 and Section 17.46 and provide a violator with an easily manufactured defense. It would only be necessary for a corporate principle to deny that an agent had actual authority to perform an act, even though a reasonably prudent man, using diligence and discretion in view of the insurance company's conduct, would naturally suppose the agent possessed such authority.

Royal Globe, 577 S.W.2d at 693-694.

2. When Knowledge is Imputed to the Insurer.

As mentioned above, someone who performs at least some of the acts listed in Section 4001.051 will be deemed the insurer's agent. If they are the insurer's agent and acting within the course and scope of their authority, then their actions, words and knowledge are imputed to the insurer. *See, e.g., Celtic Life*, 885 S.W.2d at 98-99; *see also Kirk v. Kemper Investors Life Ins. Co.*, 448 F.Supp.2d 828, 838 (S.D.Tex. 2006) (finding that agent did not have actual knowledge of insured's misrepresentations on policy application so carrier was not imputed with said knowledge); *State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908, 912-913 (Tex.App.—Austin 1991, no pet.) (superseded by statute on other grounds) (demonstrating how uncontroversial the rule is, the carrier stipulated that it was bound by its agent's actions); *Live Oak Agency v. Shoemake*, 115 S.W.3d 215 (Tex.App.—Corpus Christi 2003, no pet.) (imputing agent's knowledge and acts (such as sending renewal notices to homeowner's son at different address after homeowner died and accepting premiums from homeowner's son) to carrier); *cf. Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 92-3 (Tex.App.—Houston [1st Dist.] 2003, pet. denied) (hiring of agent by insured to check on insurer's adjustment calculations did not lead to insurer being imputed with agent's acts or statements).

In *Celtic Life*, Celtic's agent met with the owner of Aloha Pools in connection with selling a health insurance policy for Aloha's employees. Aloha's owner explained that he wanted a policy that provided psychiatric care benefits "equal to or better than the $20,000 coverage" being provided by Aloha's existing policy. 855 S.W.2d at 97. Not only did Aloha's owner explain why he needed such coverage for his sons, but the agent stated that he understood because his own son had similar problems. *Id.* Aloha's business manager reviewed the Celtic brochures and asked why they stated that psychiatric care was limited to $10,000. The agent assured her that the $10,000 limit was only applicable to out-patient care. *Id.* Aloha purchased the policy. *Id.* at 97-98. Later, when Aloha's owner filed a claim for payment of his son's psychiatric care, Celtic Life refused to pay more than $10,000. Aloha's owner eventually obtained a judgment against Celtic Life, which was affirmed by both the appellate court and the Texas Supreme Court. *Id.* at 98, 100.

The jury had determined that Celtic's agent misrepresented the policy's terms, but Celtic argued that it could not be liable for the misrepresentations because (1) the agent was a mere soliciting agent and (2) the jury had found that the agent was acting outside

his authority in making representations about the policy's terms. *Id.* at 98. The Supreme Court rejected both arguments.

First, the court held that the Texas Insurance Code does not make a distinction between soliciting agents and recording agents in the context of life, health and accident insurance. Rather, the Insurance Code provides a general definition of who is an agent.[2] *Id.* Moreover, and regardless of the statutory wording, the court simply concluded that an insurer is liable for an agent's misconduct within the agent's actual or apparent authority. As such, the court held that "under common-law rules of agency," Celtic was liable for its agent's misrepresentations of policy terms. *Id.* at 99.

Second, the court ruled that the carrier was still liable even if the agent overstepped his authority in making the representations. *Id.* A carrier cannot escape liability on the grounds that a particular representation is outside its agent's scope of authority if the representation was made while the agent was performing tasks, such as explaining the policy, that were within the agent's scope of authority. *Id.* As stated,

> In determining a principal's vicarious liability, the proper question is not whether the principal authorized the specific wrongful act; if that were the case, principals would seldom be liable for their agents' misconduct. Rather, the proper inquiry is whether the agent was acting within the scope of the agency relationship at the time of committing the act.

Id. (citing Leonard Lakin and Martin Schiff, THE LAW OF AGENCY 144-45 (1984)); *see also, Performance Autoplex II Ltd. v. Mid-Continent Cas. Co.*, 322 F.3d 847, 859-60 (5th Cir. 2003) (reversing summary judgment for insurer because plaintiff's affidavit stated that agent was authorized to sell insurer's policies thereby creating fact question over whether the agent's representations were imputed to insurer).

Accordingly, it is black letter law that an insurance company is liable for its agent's actions committed in the scope of the agency relationship when cloaked with actual or apparent authority by the insurer. As such, the battle is often over whether the agent was the insurer's agent or merely the insured's agent. If the "agent" was just a "broker," then the broker's knowledge will not typically be imputed to the carrier. *Duzich*, 980 S.W.2d at 865; *see also Executive Risk*, 2006 WL 42359, at *2 (holding that evidence was clear that agent/broker was only agent/broker for insured and therefore notice to agent/broker was not notice to the insurance company).

[2] At the time that the *Celtic Life* opinion was issued, the definition of agent was codified in Section 21.02 of the Texas Insurance Code; now, it is codified in Section 4001.051. Nonetheless, the same actions that the *Celtic Life* court pointed to, such as "soliciting insurance on behalf of an insurance company; transmitting an application or policy to or from the insurance company; receiving, collecting or transmitting an insurance premium; and adjusting a loss on behalf of an insurance company," are also in the current statute. *Celtic Life*, 885 S.W.2d at 98, n.3. The same is true for the other key language relied on by the Supreme Court, which was that any person performing such actions is considered the agent of the insurer. *Id.* at 98.

Although the *Duzich* court found that there was a fact question as to whether the insurance agent was strictly a broker working for the insured, it provides an interesting fact pattern for this discussion. Duzich was the owner of a fishing boat insured under two policies "issued and adjusted" by Marine Office of America Corporation ("MOAC") with Fidelity & Casualty as the insurer. 980 S.W.2d at 861. Duzich purchased the policies from Whitney-Vaky Insurance, whom he believed was Fidelity's local agent. When one of his crew was injured, Duzich reported the claim to Whitney-Vaky, which was what he had done with previous claims, and requested copies of all documents in any future action. *Id.* Duzich never heard anything else about the matter until his boat was arrested in port roughly a year later because of a default judgment that had been entered against him. Eventually, notice was given to MOAC, but the claim was denied because of late notice.

The issue in Duzich's inevitable coverage suit against MOAC was whether notice of the claim to Whitney-Vaky constituted notice to MOAC.[3] *Id.* at 865-866. Duzich brought forward summary judgment evidence that he had always given notice of his claims to Whitney-Vaky and this had never led to any problems nor to anyone instructing him to provide notice in some other manner. The court found that a "broker" is typically held to be an agent for the insured and merely giving notice of a claim to one's own broker does not satisfy a policy's notice requirements. *Id.* at 865 (citing John Alan Appleman and Jean Appleman, INSURANCE LAW AND PRACTICE § 5089.55 (1981)). On the other hand, there is an exception to this rule if the broker had been cloaked with apparent authority by the insurer. *Duzich*, 980 S.W.2d at 865. In *Duzich*, the appellate court held that there was a fact question as to whether Whitney-Vaky had apparent authority to accept claims on behalf of MOAC and Fidelity. *Id.*

3. Dual Agency.

While titles are nice, the ultimate question often is whether responsibility lies with the agent or carrier. Typically, an insured will want to alternately claim that the agent is either *his* agent or the *insurer's* agent. When attempting to establish the agent's direct liability, the insured will seek to establish that the agent was working for the insured and therefore owed duties to the insured. On the other hand, when trying to establish liability against the carrier, the insured will want to establish that the agent was cloaked with authority by the carrier, thereby binding the carrier with all of the agent's acts and statements. By contrast, a carrier will often attempt to distance itself from the agent in situations where acts, statements, or omissions of the agent are at issue. In many situations, especially given the Insurance Code language in Section 4001.051, it will be quite difficult for an insurer to make such an argument. In some contexts, though, especially with more complex commercial lines policies, there are scenarios where there are multiple agents and brokers working to bind or procure a particular policy. In these situations, an insured will contact a broker it typically uses, who may or may not have binding authority with any number of companies. The broker will then contact another insurance agent who does have binding authority for various companies and that second agent will procure the policy from the particular carrier. In such situations, it may be

[3] Duzich also sued Whitney-Vaky, but dropped his claims against it.

possible for an insurer to escape being imputed with the knowledge of the insured's broker.

If a carrier and the insured are simultaneously arguing that an agent was an agent for the other, both could be correct. When playing this game of agent hot potato, it is important to note that it may not always be an "either/or scenario" in that an insurance agent can be the "agent" for **both** the insured and the insurer under some circumstances. *See, e.g., BDB Interests, L.C. v. Arcadia Financial Ltd.* ---S.W.3d ---, 2007 WL 174345, *6 (Tex.App.--Houston [14th Dist.] 2007, no pet.h.); *Executive Risk Indem. v. First State Bank, N.A.*, 2006 WL 42359, *2 (N.D.Tex. 2006) (not designated for publication); *Jefferson Ins. Co. of N.Y. v. Huggins*, 2000 WL 1881201, *2, n.1 (N.D.Tex. 2000) (a "broker" can serve as agent for the carrier and the insured, "but only where the acts for the insurer are ministerial, i.e., collecting premiums, holding the policy, etc."); *Monumental Life Ins. Co. v. Hayes-Jenkins*, 403 F.3d 304, 318 (5th Cir. 2005) (agent can serve as agent for both insured and insurer in "narrow set of circumstances") (citing *Essex Ins. Co. v. Redtail Prods., Inc.*, No. Civ. A. 3:97CV2120D, 1999 WL 627379, at *2 (N.D.Tex. Aug.17 1999); *Maintain, Inc. v. Maxson-Mahoney-Turner, Inc.*, 698 S.W.2d 469, 472 (Tex.App.-Corpus Christi 1985, reh. d.). Importantly, the *Jefferson* court held that a "broker cannot act as *fiduciary* for both." *Jefferson*, 2000 WL 1881201, *2, n.1. (Emphasis added.)

III.

ACTIONS BY INSURED AGAINST AGENT

The discussion above outlines the circumstances under which an insurer may or may not be liable for acts of an agent. The remainder of this paper will explore the individual liability of the agent and the nature and scope of the duties it directly owes to its insured, including what actions were taken or promises made and what duties arose out of those actions or promises.

A. GENERAL DUTIES OF AN AGENT TO INSURED.

The legal duties owed by an insurance agent to its insured were succinctly summarized by the Texas Supreme Court: "It is established in Texas that an insurance agent who undertakes to procure insurance from another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." *May v. United Services Assoc. of America*, 844 S.W.2d 666, 669 (Tex.1992) (citing *Burroughs v. Bunch*, 210 S.W.2d 211 (Tex.Civ.App.--El Paso 1948, writ ref'd) (wherein agent was liable for not notifying client that he had not procured a builder's risk policy on house being constructed by client); *Scott v. Conner*, 403 S.W.2d 453 (Tex.Civ.App.—Beaumont 1966, no writ) (wherein agent was liable for not following customer's request to replace an old policy that had been cancelled and for not returning the unearned premium from the previous policy)); *see also Frazer v. Texas Farm Bureau Mut. Ins. Co.*, 4 S.W.3d 819, 823 (Tex.App.—

Houston [1st Dist.] 1999, no pet.) (finding fact question over whether agent did in fact agreed to procure higher UM/UIM limits).

While the holding in *May* is clear, the Court *suggested* that the duties owed by an agent may not be so narrowly defined. For example, the *May* court distinguished the facts before it from a New Jersey case wherein an agent was liable for not advising of policies with higher limits because the insured had requested the "best available" coverage. *May*, 844 S.W. 2d at 669 (citing *Sobotor v. Prudential Property & Cas. Ins. Co.*, 200 N.J. Super. 333, 491 A.2d 737 (1984) (per curiam)). The *May* court further contrasted the facts before it with a situation wherein the "adequacy" of a policy can be objectively measured. *May*, 844 S.W.2d at 671, n.13. As an example, the court cited to the Idaho case of *McAlvain v. General Ins. Co. of America*, 97 Idaho 777, 554 P.2d 955 (1976) which involved a situation where an insured requested "sufficient coverage" for his business, including inventory, and provided proof of the value of the inventory only for the agent to procure a policy with limits lower than the value of said inventory. *May*, 844 S.W.2d at 671, n.13. Despite the strict holding, one arguably could read *May* to expand the duty where the customer has put the agent on notice of reliance on expertise to compare and contrast policies. The liability of the agent when acting in a "consultant" capacity raises some interesting questions that have yet to be definitively resolved by the courts.[4]

There are a number of cases applying the *May* standard. Two such cases decided thirty years apart--one preceding *May* and one subsequent to *May*--are worthy of discussion. In *Gulf-Tex Brokerage v. McDade & Assoc.*, 433 F.Supp. 1015 (S.D.Tex. 1977), Gulf-Tex owned a shrimp trawler that was insured by a marine hull policy that contained navigational limits precluding coverage for claims occurring south of an imaginary line from Cape Sable, Florida to Cape Catoche, Mexico. After the boat set out on one particular fishing expedition, Gulf-Tex's port captain and president separately contacted Gulf-Tex's insurance agent, Preston Caddell, on a Saturday and informed him that Gulf-Tex's vessel had left on a voyage that was going to take it south of the policy's navigational limits. Caddell contacted another insurance broker, Mike Schmidt at McDade & Associates, on the following Monday to have the navigational limits extended to Nicaragua. After the issue was explained, McDade's representative said "that he would 'take care of it.'"

Neither Caddell nor Gulf-Tex's president heard back from the agent until after there was an event giving rise to a claim. At that time, the insured first learned that McDade had not been able to secure an extension of the coverage limitations. Gulf-Tex's president testified that had he known there was no coverage, he could have contacted the boat to order it to stop before it traveled outside of the navigational limits. The court held that the agent, McDade, was liable for negligence because although he agreed "to take care of it," he both failed to procure the requested coverage and to notify the insured promptly upon his failure to do so. *Id.* at 1018. The court further explained:

[4] In Section III(C), p. 15-17, *infra*, we will focus on the duties the *May* court specifically held are not owed to an insured by an insurance agent.

> The defendant in this cause had a duty to warn of any delay in effecting coverage of the plaintiff's vessel which duty defendant negligently failed to fulfill thus destroying plaintiff's opportunity to have the vessel hold up until coverage was confirmed. Defendant also violated its admitted duty to respond in a timely fashion to plaintiff's request for coverage. The defendant in this instance was acting as the agent of the plaintiff and had a duty to keep the plaintiff informed as to the progress of the request.

Id. at 1018-19.

A similar result was hinted at by the Houston Court of Appeals in January of this year. *See, BDB Interests, L.C. v. Arcadia Financial Ltd.* ---S.W.3d ---, 2007 WL 174345, *6 (Tex.App.--Houston [14th Dist.] 2007, no pet.h.). In that case, Sarah Jackson acted as her husband's attorney-in-fact under a durable power of attorney and purchased a car from BDB Interests d/b/a Gulf Coast Nissan and Steve Blanchard Nissan ("Gulf Coast") for her husband and herself. *Id.* at *1. In the course of drawing up the finance papers, Gulf Coast acted as an agent for Servco Life Insurance Company and offered to include in the financing agreement an insurance policy that would cover any remaining payments if the policyholder died. *Id.* at *1.

Although the policy had an age limit of sixty-five, Mrs. Jackson claimed that Gulf Coast never mentioned any such limit. Moreover, she gave them a copy of her seventy-three year old husband's drivers license at closing. Gulf Coast admitted to receiving the license, but claimed not to have realized Mr. Jackson's age at that time. After closing, Gulf Coast assigned the contract to Arcadia Financial. Three months later, Mr. Jackson died from Alzheimer's disease. When Mrs. Jackson came to collect the insurance proceeds a few days later, Gulf Coast admitted to her for the first time that they never sent the premium to an insurance company because her husband exceeded the age limit. *Id.* In fact, Gulf Coast was in the process of refunding the premium payment to Arcadia, which eventually applied the refund to the balance of the note.

Mrs. Jackson continued making payments for several months after her husband died, but eventually stopped. She told Arcadia that Gulf Coast had never informed her of the lack of coverage. *Id.* at *2. In the end, Arcadia demanded that Gulf Coast repurchase the finance contract because Mrs. Jackson had a valid defense to payment and because Gulf Coast had breached certain warranties and provisions of the "Master Dealer Agreement" ("MDA") between Gulf Coast and Arcadia. *Id.*

Arcadia obtained summary judgment against Gulf Coast, but the Houston Court of Appeals reversed the summary judgment because it found a fact question existed on whether Gulf Coast had breached the MDA based on the summary judgment evidence submitted to the trial court. *Id.* at *7-8. The important MDA provision at issue was one that called for Gulf Coast to repurchase a finance contract if Gulf Coast took some action that "affects the validity or enforceability of the" contract. *Id.* at 6. So, the issue was whether Gulf Coast did something that affected the liability of the finance contract, *ie.*, breached any duties it may have owed as an agent on the insurance policy.

The *BDB* court reiterated that once an agent agrees to procure insurance, the agent must "use reasonable diligence" to do so and the agent must "inform the client promptly" if the insurance cannot be procured. *Id.* (citing *May*, 844 S.W.2d at 669). The court further stressed that an agent can be liable even if it used reasonable diligence to procure coverage if it does not notify the insured of its failure to obtain a policy. *Id*. (citing *Powell v. Narried*, 463 S.W.2d 43, 45 (Tex.Civ.App.--El Paso 1971, writ ref'd n.r.e.)).

Here, though, the court found that a fact question existed because (1) there was no summary judgment evidence of exactly what representations Gulf Coast made to Mrs. Jackson, (2) it was not clear whether Gulf Coast used reasonable diligence in procuring coverage, and (3) it was not clear if Gulf Coast promptly notified Mrs. Jackson of its failure to procure coverage. While Gulf Coast did not inform her of the lack of coverage until after her husband had died, there was no evidence of when Gulf Coast had discovered such information. *Id.* at *7.

B. CAUSES OF ACTION AGAINST AN AGENT.

1. Negligence.

Common law negligence is a viable cause of action to bring against an agent. *Gulf-Tex Brokerage*, 433 F.Supp. at 1018-19. As with any other negligence claim, an insured will be required to establish not only that a duty was owed, but also that the duty was breached and was the cause in fact of the damage. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex. 1995).

2. Misrepresentation.

An insured can also sue an agent for both negligent and intentional misrepresentations. *See, e.g., KIW, Inc. v. Zurich American Ins. Co.*, 2005 WL 3434977, *3, n.12 (S.D. Tex 2005) (not designated for publication) ("*Nast v. State Farm Fire and Cas. Co.*, 82 S.W.3d 114, 124 (Tex.App.—San Antonio 2002, no pet.) (finding insured stated claim for negligent misrepresentation against insurance agent regarding insurance coverage); *Shandee Corp. v. Kemper Group*, 880 S.W.2d 409, 413 (Tex.App.—Houston 1994, writ denied) (determining evidence supported finding that insurance agent committed fraud against insured by intentionally misrepresenting an insurance policy's coverage)."); *Performance Autoplex*, 322 F.3d at 860, n.20 (describing what employee dishonesty policy would cover may be actionable if false); *see also, Kennard v. Indianapolis Life Ins. Co.*, 420 F.Supp.2d 601, 611-12 (N.D. Tex. 2006) (denying motion to dismiss plaintiff's misrepresentation claims against insurance agent because "the court is unable to say that [the plaintiff] can prove no set of facts in support of his claims that would entitle him to relief" where the plaintiff was seeking rescission of a policy because carrier had issued unapproved life insurance policies in Texas and agents had marketed the policies as legal tax shelters).

Further, the absence of coverage under the policy will not serve as a defense for an agent. *Sledge v. Mullin*, 927 S.W.2d 89, 94 (Tex.App.—Fort Worth 1996, no pet.).

To be actionable, though, such misrepresentations must relate to specific policy terms. *See, e.g., Test Masters Educational Services, Inc. v. Scottsdale Ins. Co.*, 2006 WL 2331050 (S.D.Tex. 2006) (slip copy). *Test Masters* involved the frequent scenario where a carrier attempts to remove the case to federal court on grounds that the agent was fraudulently joined to defeat diversity. Plaintiff alleged that it contacted the agent and explained that it needed a policy that would provide a defense in the event that there was a recurrence of litigation for which a defense had been previously provided under the plaintiff's expiring policy. *Id.* at *2. After the agent made assurances that a defense for such recurring litigation would be provided, the plaintiff purchased the policy. When said defense was not provided, the insured sued the carrier as well as the agent.

The carrier argued that any misrepresentations made by the agent merely constituted an opinion and were therefore not actionable.[5] *Id*. at *4. The *Test Masters* court held that the statements specifically related to policy terms governing the duty to defend and that such statements "rise above general statements about policy coverage." *Id.* As such, the court found that the defendant had not met its "heavy burden of showing improper joinder" and remanded the case to state court.

A case often cited as an example of an actionable misrepresentation is *State Farm Fire & Cas. Co. v. Gros*, 818 S.W.2d 908, 912-913 (Tex.App.—Austin 1991, no pet.) (superseded by statute on other grounds). In that case, Lee and Sharon Gros built their house on a hill, literally, but the retaining wall built into the hill was only constructed the length of the house to save money. *Id.* at 910. In 1984, a storm caused some boulders to become loose and roll down the hill. Luckily, they missed the house, but the boulders blocked the Gros' driveway and needed to be moved. *Id.* Lee and Sharon Gros contacted their insurance agent, Linda Goss. Although Mr. Gros and Goss disagree about what was said at that meeting, the jury ultimately believed Mr. Gros. He said that Goss had told him that removal of the boulders was not covered, but that it would have been covered under their homeowners' policy if the boulders had hit and damaged the house. *Id.* at 911. Three years later, this is exactly what happened when the retaining wall collapsed after continuous heavy rains. In spite of Goss' earlier statements, State Farm denied the claim under the policy's landslide exclusion, the inherent vice exclusion and the damage from surface waters exclusion. *Id.*

On appeal from the trial court's judgment for the homeowner, the Austin Court of Appeals confirmed that the facts were legally sufficient to support the jury's finding that agent Goss was individually liable for the misrepresentation. *Id.* at 912-913. State Farm had stipulated it was bound by Goss, who was State Farm's local recording agent. Based on this misrepresentation, the court also affirmed the jury finding that State Farm had acted unconscionably. *Id.*

Interestingly, State Farm argued that there was no producing cause of damages because State Farm had produced evidence that, notwithstanding Goss' misrepresentations, the homeowners would have been unable to obtain insurance in their

[5] The carrier relied on *Sohmer*, 2002 WL 31323763. The holding of *Sohmer* will be explained in Section III (C)(5), p.25, *infra*.

market that would have covered their loss. *Id.* at 913. The court disagreed. First, it held that proof that the promised coverage could have been obtained elsewhere is not required to recover under the Insurance Code or DTPA. *Id.* (citing *Royal Globe*, 577 S.W.2d 688 and *Parkins v. Texas Farmers Ins. Co.*, 645 S.W.2d 775 (Tex. 1983)). Second, the court found that but for the misrepresentation, the homeowners "might have" made improvements to make the retaining wall more structurally sound. *Gros*, 818 S.W.2d at 914. As such, the court upheld the jury's misrepresentation and producing cause finding. *Id.* ; *see, e.g., Nast*, 82 S.W.3d at 121 (relying on agent's statement that homeowner was not eligible for FEMA flood insurance program was causation for homeowner not having flood insurance when house flooded).

In some cases, courts tend to meld negligence and misrepresentation claims. For example, in finding "negligence" the *Gulf-Tex Brokerage* court concluded its opinion by holding that the insured's "reliance in this instance was justified." *Gulf-Tex Brokerage*, 433 F.Supp. at 1019. Similarly, the U.S. District Court for the Southern District of Texas in *Moody Nat'l Bank of Galveston v. St. Paul Mercury Ins. Co.*, 193 F.Supp.2d 995, 1000-1001 (S.D.Tex. 2002) held that it was possible for the plaintiff to recover for negligence based on its pleadings against its Texas agent, thereby destroying diversity. Specifically, the court found under the facts before it that "a Texas state court could reasonably conclude that [the agent] made *affirmative misrepresentations* to [the insured] that wrongly led [the insured] to believe that the Policy covered a particular risk that was in fact excluded from coverage, thereby subjecting [the agent] to *negligence* liability . . ." *Moody*, 193 F.Supp.2d at 1001. (Emphasis added.)

The apparent lack of precision in addressing these two distinct claims may not be too surprising given that the two-pronged duties set forth in *May* are triggered by an agent's *representation* that he will procure coverage.

3. DTPA/Insurance Code.

As explained above, the Texas Insurance Code provisions dealing with agents have been recently revised. Even under the current version, though, an agent is still a "person" who can be found liable for an unfair method of competition or an unfair or deceptive act in the business of insurance or for violating Section 17.46(b) of the DTPA. *See* TEX.INS.CODE §541.002(2); TEX.INS.CODE § 541.151; *see also Liberty Mut. Ins. Co. v. Garrison Contractors, Inc.*, 966 S.W.2d 482 (Tex. 1998) (holding that employees of insurance companies can be found liable under the Insurance Code, but only if the employee is "engage[d] in the business of insurance")[6]; *Clark v. State Farm Lloyds*, 2001 WL 1516762, * 5 (N.D.Tex. 2001) (same); *Jones v. Ace American Ins. Co.*, 2006 WL 3826998, *4-5 (E.D.Tex. 2006) (slip copy) (explaining that an insurance adjuster, "'like an agent,'" can be liable under insurance code) (quoting *Vargas v. State Farm Lloyds*, 216 F.Supp.2d 643, 648 (S.D.Tex. 2002)).

[6] In *Garrison*, the defendants did not argue that the insured's DTPA claims against the individual agent were barred, so the court did not express an opinion as to whether an insurance company employee can be individually liable under the DTPA. 966 S.W.2d at 484, n.1.

So, in addition to common law causes of action, an agent also can be found liable under the DTPA for misrepresenting specific policy terms and under the Texas Insurance Code for an "unfair method of competition." TEX.INS.CODE §541.002(2); TEX.INS.CODE § 541.151; *Garrison*, 966 S.W.2d at 486-87 (overturning trial court's summary judgment and allowing insured to proceed against agent and insurer on alleged representations about the maximum amounts that would be charged as retrospective premiums); *KIW*, 2005 WL 3434977, *3 (finding that a cause of action can be brought against an agent under the DTPA); *Moody*, 193 F.Supp.2d at 1001, n.5.; *Hernden v. State Farm Lloyds, Inc.*, 2006 WL 870663, *1, 3 (W.D.Tex 2006) (misrepresenting that policy provided "100% mold coverage" can constitute a misrepresentation of a specific policy term that serves as the basis for a claim under the Texas Insurance Code and the DTPA); *Team Indus. Serv., Inc. v. American Safety Indem. Co.*, 347 F.Supp.2d 366, 369-70 (S.D.Tex. 2004) (finding fact question as to whether agent "understood" that insured wanted insurance for the obvious risks of its main business purpose); *cf. Scottsdale Ins. Co. v. Shahinpour*, 2006 WL 870642, *5 (S.D.Tex. 2006) (holding that unlike Article 21.21, only an insurer, and not an agent, can be liable under 21.55).

Notably, agents have at times cited to the professional services exemption in the DTPA. Courts, however, typically reject such arguments. *See, e.g., Nast*, 82 S.W.3d at 122 ("This exemption, however, does not apply to an express misrepresentation of material fact that cannot be characterized as advice, judgment, or opinion."); *see also, Omni Metals, Inc. v. Poe & Brown of Tex., Inc.*, 2002 WL 1331720, *9 (Tex.App.--Houston [14th Dist.] 2002, pet. denied) (faxing a certificate of insurance is not a professional service, but rather "a mere act of employment").

4. Breach of Contract.

It is axiomatic that an agent cannot be sued for breaching an insurance policy. Simply put, the agent is not a party to the policy between the insurer and insured. An agent can be held liable, however, for breaching its own contract with the insured. In *Turner-Bass Assoc. of Tyler v. Williamson*, 932 S.W.2d 219 (Tex.App.—Tyler 1996, no pet.), the insured was a paint contractor that had used the same insurance agent for several years. 932 S.W.2d at 220. When the insured performed jobs in other states, he would take some key employees from Texas and then hire local employees. *Id.* On December 1, 1990, the insured obtained general liability and worker's compensation insurance that was limited to Texas residents. He had indicated on the application that his company had "Texas only" employees. *Id.* During the policy period, the insured took a painting job as a subcontractor in New Mexico. The general contractor required the insured to provide both general liability and worker's compensation coverage. *Id.*

The insured requested a certificate of insurance from its long-time agent indicating general liability and worker's compensation coverage for his employees. The agent provided such a certificate and no where did the certificate state that coverage was limited to Texas residents. *Id.* Although their testimony on the details differs, both the insured and the agent agreed that they did not discuss whether the insured was going to employ Texas residents. *Id*. at 221.

The insured testified that he never saw a copy of the worker's compensation policy that had been issued by Liberty Mutual. Moreover, Liberty Mutual had audited the insured's payroll records that included the New Mexico employees, but never told the insured that such employees were not covered. When a New Mexico worker was subsequently injured, Liberty Mutual denied the ensuing worker's compensation claim. The insured then filed suit against the agent for breach of contract and DTPA violations alleging that he had relied on his request to the agent and the subsequent certificate of insurance issued by the agent that did not limit coverage to Texas employees. *Id.*

After a judgment was entered against the agent, the agent's sole point of error on appeal was that a contract was never entered into between the insured and the agent. *Id*. After setting forth all of the elements necessary for the formation of a contract, the appellate court found that there was some evidence under these facts to support a verdict that the agent had agreed to procure worker's compensation coverage for New Mexico employees. *Id.* at 222-223. In explaining why the jury verdict was not "manifestly unjust," the court pointed to the fact that the insured procured similar coverage in the past as evidence of a meeting of the minds between the agent and the insured. The one element that the court focused on the most was the element of "consideration." *Id.* The court held, "The continuation of an ongoing business relationship and the commissions on policies issued can serve as consideration for an agreement to provide insurance." *Id*. (citing *Burroughs v. Bunch*, 210 S.W.2d 211, 213-14 (Tex.Civ.App.--El Paso 1948, writ ref'd)); *see also Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc.*, 962 S.W.2d 507, 527 (upholding jury verdict against broker for breach of contract where there was evidence that broker agreed to secure contingency coverage); *Critchfield v. Smith*, 151 S.W.3d 225, 234 (Tex.App.—Tyler 2004, pet. denied) (finding fact question about whether there was a valid oral contract to procure the adequate coverage and holding that commissions could serve as consideration for contract between insured and agent even if the commissions are actually paid by the insurer); *Frazer*, 4 S.W.3d at 823 (finding fact question about whether agent breached contractual duty by failing to fulfill agreement to obtain higher UM/UIM limits).

C. CONDUCT THAT IS NOT ACTIONABLE.

Ironically, the leading Texas Supreme Court case that sets forth an agent's two general duties as explained above is a case in which the court held that the agent was *not* liable for breaching those duties. *See May v. United Services Assoc. of America*, 844 S.W. 2d 666 (Tex.1992). So, while *May* is perhaps the seminal case for what duties an agent owes to an insured, it also provides significant guidance as to what duties an agent does *not* owe to an insured.

Daryl and Faith May did not have health insurance through an employer, so they had to seek their own plan. *Id*. at 667. They received a brochure from Preston Insurance Agency that described a group policy called "Double Eagle." Although Continental Bankers of the South underwrote the policy, members of United Services Association of America could purchase the policy. The policy had "relatively low premiums and deductibles." The trade-off was that the underwriter could cancel the entire group at any

time and could "defer coverage on group members or covered dependents that were hospitalized or totally disabled at the time coverage began." *Id.*

Faith May met with one of the Preston agents, Rex Wiley, prior to purchasing a policy. May told Wiley that she and her husband wanted "a good policy" that they could afford. *Id.* at 671-2. The Mays were planning on having a child and Faith May had lost an infant child in a previous marriage. So, after Wiley explained the terms of the policy to May, she informed him that she and her husband were interested in maternity and dependent health coverage. Wiley attached "a handwritten maternity rider to the policy." *Id*. at 667. A little over one year later, Continental terminated the entire group and Hermitage Insurance Company became the new underwriter. When this happened, Faith May was pregnant, but Wiley assured May that the new underwriter would insure them on the same terms as the previous underwriter. *Id*. at 667-668.

When the Mays' child was born with congenital heart and lung disorders, Hermitage provided coverage for his medical expenses. But, a few months later, Hermitage canceled the entire group and Keystone Life Insurance became the underwriter. At this time, Keystone classified the May child as being totally disabled and denied him coverage. *Id.* at 668. The Mays sued Preston (along with United, Keystone and Hermitage). At trial, the jury did not find any misrepresentations, but it issued a plaintiff's verdict on the Mays' negligence claims against Preston and United; Preston appealed. *Id.*

The Mays argued that Preston was negligent (1) for placing their coverage in a plan that exposed them to losing coverage because of "shifting" coverage (2) for failing to investigate the financial position of the insurer and (3) for placing coverage with an insurer that was close to insolvency. *Id.* at 668-9. The Supreme Court rejected the latter two arguments because there was no evidence that the Mays' claim was denied due to an insurer's financial woes or insolvency. *Id.* at 673-4.

The Supreme Court devoted a majority of its analysis to the Mays' first argument. The court began by setting out the "established" rule in Texas, which is "an insurance agent who undertakes to procure insurance from another owes a duty to a client to use reasonable diligence in attempting to place the requested insurance and to inform the client promptly if unable to do so." *Id.* at 669 (citing *Burroughs v. Bunch*, 210 S.W.2d 211 (Tex.Civ.App.--El Paso 1948, writ ref'd) (wherein agent was liable for not notifying client that he had not procured a builder's risk policy on house being constructed by client)) and (citing *Scott v. Conner*, 403 S.W.2d 453 (Tex.Civ.App.—Beaumont 1966, no writ) (wherein agent was liable for not following customer's request to replace an old policy that had been cancelled and for not returning the unearned premium from the previous policy)).

The *May* court distinguished *Burroughs* and *Scott* because unlike in those cases, Preston did not mislead the Mays into thinking that there was a policy or that the policy had particular terms. *Id*. at 670. In fact, the jury had rejected the Mays' misrepresentation claim. Here, the Mays' negligence claim was essentially centered on

the agent's professional judgment in placing the Mays with a policy in which there was a risk that disabled persons could lose coverage if a new underwriter took over the policy. *Id.* at 670, 672. The court found no Texas case with similar allegations and the court distinguished the few cases from other jurisdictions in which an agent was held liable under similar claims. *Id.* at 670-673. Regardless, the court refused to find Preston negligent under these facts:

> The Mays claim that Wiley was negligent because he should have known of the risk posed to them by the potential shifting of the underwriters, but they offer no evidence as to why this risk was unjustified for them in particular, or why Wiley should have prevented them from assuming it. Their claim does not rest on the theory that, with greater familiarity with or attention to the details of the Mays' situation, Wiley would have realized the policy was inappropriate. Under their theory, any of the seventy to eighty customers for whom Wiley also procured Double Eagle policies would have equally valid negligence claims against Wiley for any uncovered losses. [The case of *Jones v. Grewe*, 189 Cal.App.3d 950, 234 Cal.Rptr. 717 (1987)] well captures the infeasibility of such a cause of action grounded solely on the failure to obtain complete insurance protection: if a breach of due care can be proved without a more concrete showing than a subsequent failure of coverage, agents would be rendered "blanket insurers." [Citations and footnotes omitted.]
>
> Unquestionably, Wiley could have done a better job by ascertaining whether the Mays would have preferred to pay a higher premium for a nongroup policy without a comparable termination provision. However, under the facts of this case, we do not believe that this failure constitutes any evidence of negligence. There is no testimony that Faith May ever asked to see different policies or even expressed any dissatisfaction with the Double Eagle. Unlike the [customer in *Sobotor v. Prudential Property & Cas. Ins. Co.*, 200 N.J. Super. 333, 491 A.2d 737 (1984) (per curiam)], whose request for the "best available" policy implies a comparison to obtain the most complete coverage and makes the agent's failure to advise of policies with higher limits a material nondisclosure, the Mays conveyed no such wish to Wiley.

Id. at 672-673; *see also Choucroun, v. Sol L. Wisenberg Ins. Agency-Life & Health Div., Inc.*, 2004 WL 2823147, *6 (Tex.App.—Hous.[1st Dist.] 2004, no pet.).

The rest of this section will flesh out what duties an agent *does not* owe to the insured.

1. Breach of the Duty of Good Faith and Fair Dealing/Breach of Fiduciary Duty.

i. *Duty of Good Faith and Fair Dealing*.

An insurance agent cannot be sued for a breach of the good faith and fair dealing. In the insurance context, the duty of good faith and fair dealing arises out of a special relationship created by an insurance contract, which "is the result of unequal bargaining power." *See, e.g. Natividad v. Alexsis, Inc.*, 875 S.W.2d 695, 697-698 (Tex. 1994) (citing *Arnold v. National County Mut. Fire Ins. Co.*, 725 S.W.2d 165, 167 (Tex. 1987); *Viles v. Security Nat'l Ins. Co.*, 788 S.W.2d 566 (Tex. 1990); *Aranda v. Insurance Co. of N. Am.*, 748 S.W.2d 210 (Tex. 1988); *Chitsey v. National Lloyds Ins. Co.*, 738 S.W.2d 641 (Tex. 1987)).

Since an agent is not a party to the insurance contact, it therefore cannot breach the contract or be liable for violating the duty of good faith and fair dealing. The duty of good faith and fair dealing is owed by the insurer and is non-delegable. *Natividad*, 875 S.W.2d at 698. The Supreme Court explained "the 'special relationship' exists only because the insured and the insurer are parties to a contract that is the result of unequal bargaining power, and by its nature allows unscrupulous insurers to take advantage of their insureds. [citation omitted]. Without such a contract there would be no 'special relationship' and hence, no duty of good faith and fair dealing." *Id.*; *see also, Choucroun v. Sol L. Wisenberg Ins. Agency-Life & Health Div., Inc.*, 2004 WL 2823147, *7 (holding that the duty of good faith and fair dealing is owed by insurance company because of unequal bargaining power between insurer and insured, so the duty does not extend to those who are not parties to the contract such as insurance agents and finding "no evidence . . . of a contract giving rise to a special relationship" in the case at hand); *see also Blanchard v. State Farm Lloyds*, 206 F.Supp.2d 840, 845-6 (S.D. Tex. 2001); *see also Griggs v. State Farm Lloyds*, 181 F.3d 694, 701 (5th Cir. 1999) (finding no evidence that relationship was governed by any contract or had any characteristics that would make it a "special relationship").

ii. *Fiduciary Duty*.

While it is clear that an agent cannot be held liable for bad faith, what about a claim based on a fiduciary relationship between the agent and insured? At the outset, it should be noted that several cases confuse the duties of good faith and fair dealing and the fiduciary duties. For instance, in *Flanders v. Fortis Ins. Co.*, 2005 WL 3068779, *4 (W.D.Tex. 2005), the court referred to the duty as the "fiduciary duty of good faith and fair dealing." Likewise, the *Choucroun* court titles one sub-section of its opinion, "**Breach of Fiduciary Duty.**" 2004 WL 2823147, *7. (Emphasis in Original.) But, the *Choucroun* court then cites to *Natividad* and explains why it is the carrier, and not the agent, that owes the duty of good faith and fair dealing to the insured. *Id.* (explaining that a long-standing relationship does not necessarily equate to a "special relationship"). While the courts in these two cases may have commingled these two duties, they were nonetheless certain that the agents did not owe them to the insured. There is a difference

between the two causes. The duty of good faith and fair dealing requires parties to treat each other fairly whereas the fiduciary duty requires the fiduciary to place the other person's interests above his own. *See Mauskar v. Hardgrove,* 2003 WL 21403464, *6, n.10 (Tex.App.—Houston [14th Dist.] 2003, no pet.).

Earlier this year, the Houston Court of Appeals gave a helpful explanation of what creates a fiduciary relationship:

> The term "fiduciary" refers to a person owing a duty of integrity and fidelity, and "it applies to any person who occupies a position of peculiar confidence towards another." [*Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 138 Tex. 565, 571, 160 S.W.2d 509, 512 (Tex. 1942).] In certain formal relationships, such as an attorney-client or trustee relationship, a fiduciary duty arises as a matter of law. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002). Texas courts also have recognized that certain informal relationships may give rise to a fiduciary duty. *See Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp.*, 823 S.W.2d 591, 594 (Tex. 1992). An informal fiduciary relationship exists "where, because of family relationship or otherwise, [one party] is in fact accustomed to be guided by the judgment or advice" of the other. *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1963). "Such informal fiduciary relationships have also been termed 'confidential relationships' and may arise 'where one person trusts in and relies upon another, whether the relation is a moral, social, domestic or merely personal one.'" *Crim Truck & Tractor Co*, 823 S.W.2d at 594 (quoting *Fitz-Gerald v. Hull*, 150 Tex. 39, 237 S.W.2d 256, 261 (1951)). Stated another way, a party fails to comply with his fiduciary duty "where influence has been acquired and abused, and confidence has been reposed and betrayed." *Hoggett v. Brown*, 971 S.W.2d 472, 488 (Tex.App.—Houston [14th Dist.] 1997, pet. denied) (citing *Crim Truck & Tractor Co.*, 823 S.W.2d at 594).
>
> * * * * * *
>
> Mere subjective trust does not transform an arm's-length transaction into a fiduciary relationship. *Ins. Co. of N.Am. v. Morris*,, 981 S.W.2d 667, 674 (Tex. 1998). Rather, in order to establish the existence of an informal fiduciary relationship, the record must show that one of the parties relied on the other "for moral, financial, or personal support or guidance." *Trostle v. Trostle*, 77 S.W.3d 908, 915 (Tex.App.—Amarillo 2002, no pet.). The length of the relationship is another important factor in determining whether a fiduciary relationship should be recognized. [Citation omitted.] But even a longstanding relationship of friendship or cordiality is insufficient, without more, to establish an informal fiduciary relationship. [Citation omitted.] On the other hand, a close personal family relationship can give rise to a fiduciary relationship.

Lee v. Hasson, --- S.W.3d ---, 2007 WL 236899, *8-9 (Tex.App.—Houston [14th Dist.] 2007, no pet.h.); s*ee also, E.R. Dupuis Concrete Co. v. Penn Mut. Life Ins. Co.*, 137 S.W.3d 311, 318 (Tex.App.—Beaumont 2004, no pet.) (reiterating that "'the relationship of trust and confidence must exist prior to, and apart from, the agreement made the basis of the suit.'") (citing *Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 96 (Tex.App.—Houston [1st Dist.] 2003, pet. denied)).

The *E.R. Dupuis* court held that going to church and praying together does not create the confidential relationship between an agent and insured that is needed for an agent to be liable for the breach of a fiduciary duty. *E.R. Dupuis*, 137 S.W.3d at 318-9. Moreover, a long-standing relationship does not necessarily equate to a "special relationship." *See also, Choucroun*, 2004 WL 2823147, *7. Likewise, the Houston Court of Appeals held in *Mauskar* that Texas law does not establish a fiduciary relationship as a matter of law between an insured and agent, so an insured suing an agent must establish an informal fiduciary or confidential relationship. 2003 WL 21403464, *6. The court added, "The fact that a business relationship has been cordial and of extended duration is not by itself evidence of a confidential relationship. [Citations omitted.] Nor is subjective trust sufficient to transform an arms-length transaction into a fiduciary relationship." *Id.*

While a vast majority of Texas cases found that a fiduciary relationship did not exist under the facts at issue, there are cases suggesting that the relationship can exist under the right circumstances. In *Certain Underwriters at Lloyd's London v. A&D Interests, Inc.*, the Southern District has held that all of the plaintiff's claims against an agent, which included a breach of fiduciary duty claim among many others, were actionable under Texas law. 197 F.Supp.2d 741, 752, 753 (S.D.Tex. 2002). The court, however, issued this ruling without any discussion of a fiduciary duty claim. Moreover, it cited to a number of cases in support of its ruling; the referenced cases were for negligence, misrepresentations, DTPA violations and Texas Insurance Code violations, but the court cited no case finding an agent liable for the breach of a fiduciary duty. *Id.*; *see also Triumph Trucking, Inc. v. Southern Corporate Ins. Managers, Inc.*, --- S.W.3d ---, 2006 WL 2290987 (Tex.App.—Houston [1st Dist.] 2006, pet. denied) (finding by jury of breach of fiduciary relationship by agent, but not discussed on appeal); *National Plan Administrators, Inc. v. National Health Ins. Co.*, 150 S.W.3d 718, 730 (Tex.App--Austin 2004, pet. granted) (finding a fiduciary relationship generally exists between third-party administrator and health insurer, but holding that a fiduciary relationship does not exist unless it "involve[s] the element of a solely subordinated interest"); *Herrin v. Medical Protective Co.*, 89 S.W.3d 301, 308-9 (Tex.App.--Texarkana 2002, pet. denied) (finding fact question existed on whether an informal fiduciary relationship existed between insurer and insured in part because of evidence that insured had worked with agent for 15 years and had trusted him and believed their relationship was a "confidential one"); *Rice v. Louis A. Williams & Assoc., Inc.* 86 S.W.3d 329 (Tex.App.--Texarkana 2002, pet. denied) (allowing fiduciary duty claim against an agent to survive a statute of limitations defense).

Albeit not in a case involving an insurance agent, the Waco Court of Appeals found that an advisory fee agreement made a mortgage broker the borrower's agent. *See*, *Kelly v. Gaines*, 181 S.W.3d 394, 414-415 (Tex.App.—Waco 2005, pet. granted August 25, 2006); *cf. Marketic v. U.S. Bank Nat. Ass'n.*, 436 F.Supp.2d 842, 855 (N.D.Tex. 2006) (holding that a fiduciary relationship does not exist between mortgagor and mortgagee under Texas law). The *Kelly* court then found a fiduciary relationship because "[a] principal-agent relationship constitutes a fiduciary relationship as a matter of law." *Id.* (citing *Shands v. Tex. St. Bank*, 121 S.W.3d 75, 77 (Tex.App.--San Antonio 2003, pet. denied); *Exxon Corp. v. Breezevale Ltd.*, 82 S.W.3d 429, 443 (Tex.App.--Dallas 2002, pet. denied); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 200 (Tex. 2002)); *see also Texas Technical Inst., Inc. v. Silicon Valley, Inc.*, 2006 WL 237027, *6 (S.D.Tex. 2006) (finding two types of fiduciary relationships, the second of which is a formal fiduciary that exists "as a matter of law, typified by such relationships as a partnership, attorney-client, and **principal-agent**") (emphasis added); *Beasley v. Avery Dennison Corp.*, 2005 WL 1719222, *5-6 (W.D.Tex. 2005) (pointing out that certain relationships, including principal-agent, "necessarily" create a fiduciary relationship, but rejecting plaintiff's argument that one was created in this case, partly because the defendant was not the plaintiff's "employee, trustee, real estate agent, or **insurance agent**") (emphasis added).

Practitioners should be cautious before concluding that an insured will be able to assert a fiduciary duty claim simply by virtue of a principal-agent relationship. The *Jefferson* court held that someone may be an agent for both the insured and insurer, but they cannot be a fiduciary to both. *See*, Section II(B)(3), p.8, *supra*. Also, to be a principal, one must have the right to "control" the means by which an agent carries out its tasks. *See Coleman*, 180 S.W.3d at 588; *see also Burnside Air Conditioning and Heating*, 113 S.W.3d at 896. Many insureds will not have this right to control an agent procuring coverage. As such, just because an insured works with an "agent" does not mean that a "principal-agent" relationship automatically exists. On the other hand, many insurers will have such control, so they may be a "principal." Additionally, the Texas Insurance Code mandates that a person performing the acts of an agent is the agent of the insurer. *See* TEX.INS.CODE § 4001.051. This is consistent with a number of cases holding that an agent owes a fiduciary duty to the insurance company under an agency agreement between the agent and carrier. *See, e.g., American Indemnity Company v. Baumgart*, 840 S.W.2d 634 (Tex.App.—Corpus Christi 1992, no writ); *Hartford Cas. Ins. Co. v. Walker County Agency, Inc.*, 808 S.W.2d 681, 687-88 (Tex.App.—Corpus Christi 1991, no writ); *Insurance Co. of N. Am. v. Hickman*, 2000 WL 1207138 (Tex.App.—Dallas 2000, no pet.). Specifically, the insurance agent owes the insurer "loyalty and good faith, integrity of the strictest kind, fair, honest dealing, and the duty not to conceal matters which might influence his actions to this principal's prejudice." *Id.*

2. <u>No Duty to Advise or Warn</u>.

Moreover, as outlined above in the discussion of the *May* opinion, an insurance agent generally does not have a duty to explain the policy terms or exclusions to a client

or to warn or advise a client of the client's insurance needs. *See, e.g., Sledge v. Mullin*, 927 S.W.2d 89 (Tex.App.—Fort Worth 1996, no pet.); *Townsend v. State Farm Lloyds*, 1998 WL 724016, *6 (Tex.App.--Houston [1st Dist.] 1998, no pet.) (holding that agent "does not have a duty to the applicant to explain the terms and exclusions of the application"); *Mudd v. Selectquote Ins. Services of Tex., Inc.*, 2005 WL 1475364 (Tex.App.--San Antonio 2005, no pet.) (affirming summary judgment on behalf of agent on fraud and DTPA and Insurance Code claims because client telling agent that she was going to cancel a life insurance policy did not create for the agent a duty to tell client that this would mean that there would no longer be coverage for suicide for an additional two years whereas there was current and immediate coverage under former policy); *Choucroun*, 2004 WL 2823147, at *4-6; *Estate of Hunt, ex. rel. v. St. Paul Fire and Marine Ins. Co.*, 2006 WL 1004870 (Tex.App.—San Antonio 2006, pet denied); *Amoco Prod. Co. v. Hydroblast Corp.*, 90 F.Supp.2d 727, 734 (N.D.Tex. 1999) (contrasting fact that there was no evidence that agent "knew or should have known" that insured desired or was required to have pollution coverage with fact that insured could have refused the policy with the pollution exclusion); *Critchfield v. Smith*, 151 S.W.3d 225 (Tex.App.--Tyler 2004, pet. denied); *Mauskar*, 2003 WL 21403464, *4; *Stroman Realty, Inc. v. State Farm Lloyds*, 2003 WL 22672223, *1-2 (Tex.App.—Beaumont 2003, pet. denied) (finding no duty to procure policy for insured's sister corporation even when agent knew of existence of the other corporation); *Empolyers Mut. Cas. Co. v. Maya*, 2005 WL 1017814, *5 (holding that agent does not owe an insured a duty to investigate absent a contract) (N.D.Tex. 2005) *Avila v. State Farm Fire & Cas. Co.*, 147 F.Supp.2d 570 (W.D.Tex. 1999); *Burton v. State Farm Mut. Auto. Ins. Co.*, 869 F.Supp. 480 (S.D.Tex. 1994); *cf. McCall v. UNUM Life Ins. Co. of Am.*, 2001 WL 1388013, *6 (N.D.Tex. 2001) (finding that failure to make a material disclosure may be actionable if the disclosure was "necessary to make other statements not misleading").

In *Sledge*, the insured sold one of her cars to her son and told her agent "to take the [old car] off the insurance policy" and to "substitute" a new car she had purchased. 927 S.W.2d at 91. A few days later, the son caused an accident while driving his mother's former car and the carrier denied the claim on the grounds that the old car was no longer covered on the policy. *Id.* The mother sued her agent alleging that her agent had a duty to investigate and determine her needs and a duty to warn her that the old car would no longer be covered. She also complained that the agent should have informed her that newly purchased cars were automatically covered for thirty-days. The court pointed out, however, that she had testified that she could not afford to insure both cars (in addition to the two other cars she was insuring) and that there was no evidence that keeping both cars insured for thirty days would have been free. *Id.* at 92.

After providing the definition of the word "substitute," the court rejected all of the insured's arguments. *Id.* at 92-94. It is clear from the opinion that the court felt that the agent did what the insured had asked him to do. There is no duty to go beyond that. The court explained an agent has no duty:

> to expand the insurance protection of his customer, even if the agent has knowledge of the customer's need for additional insurance, when there is no evidence showing that the customer and agent have created a special business relationship between them through a history of dealings in which they share an expectation that the agent habitually will satisfy all of the customer's insurance needs without consultation.

Id. at 93 (citing *McCall v. Marshall*, 398 S.W.2d 106, 109 (Tex. 1965)). In other words, absent a special relationship through a history of dealing, an agent does not have to tell a client what kind of or how much insurance the client should purchase. *See also*, *Critchfield v. Smith*, 151 S.W.3d 225, 230-31 (Tex.App.—Tyler 2004, pet. denied) (finding that agent did not breach any common law tort duties in not procuring higher limits for UM coverage when the evidence was that client knew he had $100,000 in UM coverage, that he never asked for $500,000 in coverage and never asked whether coverage was adequate); *see also Estate of Hunt v. St. Paul Fire and Marine Ins. Co.*, 2006 WL 1004870, *5 (Tex.App.—San Antonio 2006, pet denied) (holding that there was no liability for agent, court pointed to evidence that agent procured the exact amount requested by the insured).

One of the fundamental principles supporting these cases is the concept that an insured has a duty to read its own policy. Even if the insured does not read the policy, the insured is still bound by its terms. *Burton*, 869 F.Supp at 486 (citing *American Guar. & Liab. Ins. Co. v. Shel-Ray Underwriters*, 844 F.Supp. 325, 332 (S.D.Tex. 1993); *Heritage Manor of Blaylock Properties, Inc. v. Petersson*, 677 S.W.2d 689, 691 (Tex.App.—Dallas 1984, writ ref'd n.r.e.)); *Mauskar*, 2003 WL 21403464, *4 (upholding defendant's statute of limitations claims because cause of action accrued when insured received policies because insured had duty to read them and if he had done so he would have learned policies did not have terms that agent said they would); *see also*, *Mudd*, 2005 WL 1475364, *5; *Avila v. State Farm Fire & Cas. Co.*, 147 F.Supp.2d 570 (W.D.Tex. 1999); *cf. Turner-Bass*, 932 S.W.2d at 221 (pointing out that insured claims never to have seen policy).

3. No Duty to Ensure Statutory Compliance

Along those same lines, an agent has no duty to ensure that its client/insured driver complies with the Texas Safety Responsibility Act. *Sledge*, 927 S.W.2d at 93; *see also Burton v. State Farm Mut. Auto. Ins. Co.*, 869 F.Supp. 480, 486 (S.D.Tex. 1994) (holding that no viable misrepresentation claim when statement that policy met the requirements of Texas Safety Responsibility Act was correct when it was made).

4. Breach of the Insurance Contract and Related Claims.

As alluded to in Section III, *supra*, an agent will not be liable for a breach of contract when the only evidence of a contract is the insurance policy. *See, e.g.*, *Blanchard*, 206 F.Supp.2d at 845 (citing *Griggs v. State Farm Lloyds*, 181 F.3d 694, 700 (5th Cir. 1999); *Choucroun*, 2004 WL 2823147, *3; *Townsend*, 1998 WL 724016, *4

(holding that an agent is not liable for his principal's contracts and here there was no evidence that the agent agreed to pay claims if the carrier refused); *Moody*, 193 F.Supp.2d at 1000 (stating that plaintiff "probably failed to state a valid claim" for breach of warranties). Of course, if there is a contract between the insured and agent, either orally or in writing, a viable claim for breach of contract may exist. *See, e.g., Critchfield*, 151 S.W.3d at 230-31; *Frazer*, 4 S.W.3d at 823.

5. General Misrepresentations and Opinions.

In addition to negligence, perhaps the most prevalent common law causes of action brought against agents are misrepresentation claims—either common law claims or statutory claims under the Insurance Code or DTPA.[7] For an agent to be liable for a misrepresentation, however, the representation must relate to a specific policy term. *See, e.g., Druker v. Fortis Health*, 2007 WL 38322, *4-5 (S.D.Tex. 2007) (rejecting Plaintiff's argument that its complaint alleged misrepresentations of specific policy terms where the complaint "prophylactically" used the term "defendants" in every allegation because such allegations did not put at issue any specific policy misrepresentations made by the agent); *see also Frazer*, 4 S.W.3d at 823 (even if agent did promise to raise UM/UIM benefits, such a promise is not a specific misrepresentation about coverage so as to be actionable under the DTPA).

In *Johnson-Ramirez v. Araiza*, the agent gave advice to the insured in completing a health insurance application and actually ended up completing the application on the insured' behalf. 2005 WL 3047950, *1 (W.D.Tex. 2005). Specifically, in response to a question about what constituted a "disorder," the agent stated to the insured that the carrier "'would get her full medical history for full answers to the questions on the application' and 'not to worry about missing something in [the] medical history because [the insurance company] would double check everything.'" *Id.* at *2. When the insured discovered that her policy had been cancelled, she sued her agent and insurer. In denying the plaintiff's motion to remand, the court held that such statements by the agent did not relate to any specific policy term or coverage and were therefore not actionable misrepresentations under the Insurance Code or the DTPA.

Moreover, an insured's mistaken belief about coverage in and of itself does not justify an agent's liability for misrepresentations. *See, e.g., Sledge*, 927 S.W.2d at 94 (holding that client's mistaken belief of coverage is not basis for action under DTPA unless the agent made a specific misrepresentation by the agent); *Choucroun*, 2004 WL 2823147, *6 (mistaken belief of coverage does not render agent liable for misrepresentation under the DTPA or Insurance Code); *Burton*, 869 F.Supp. at 486; *Avila*, 147 F.Supp.2d at 581; *Moore v. Whitney-Vaky Ins. Agency*, 966 S.W.2d 690, 692

[7] This Section of the paper will not discuss claims under the Texas Insurance Code or DTPA specifically, because a court's rejection of an agent's liability for an alleged particular duty or action, *i.e.* misrepresentation, also serves as the basis for the rejection of statutory liability. For instance, when a court finds that an agent did not make an actionable misrepresentation, then it follows that the agent has not violated the Insurance Code or DTPA based on that same alleged misconduct. For instances where those statutes are violated, however, please see Section III(B)(3), pp. 13-14, *supra*.

(Tex.App.--San Antonio 1998, no pet.); *cf. Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514 (Tex.App.--Corpus Christi 2000, no pet.) (distinguishing *Moore* because the policy in *Moore* made clear that there was no coverage whereas the policy in *Valdez* showed the vehicle in question was insured, but coverage was later denied for "an undisclosed technicality," *ie.*, that the insured no longer had an insurable interests after he sold the car).

Furthermore, opinions are not actionable misrepresentations or fraud. *See, e.g.*, *Sohmer v. American Med. Sec., Inc.*, 2002 WL 31323763, *2 (N.D.Tex. 2002) ("An insurance agent's statement that a policy will protect an insured is generally an expression of opinion, and opinion alone is not sufficient to support an action for fraud or misrepresentation.") (citing *Rodgers v. Insurance Co. of State of Pa.*, 513 S.W.2d 113, 119 (Tex.Civ.App.--Fort Worth 1974, writ ref'd n.r.e.)).

Along those same lines, courts hold that "puffery," such as statements that insurance company will handle claims professionally, do not give rise to a misrepresentation claim against an agent. *See Druker*, 2007 WL 38322, at * 4 (finding statements that claims would be handled professionally were not actionable misrepresentations under the DTPA or Insurance Code); *Flanders v. Fortis Ins. Co.*, 2005 WL 3068779, *3-4 (W.D.Tex. 2005) (rejecting phrases such as "good companies," "solid reputation," "quality affordable . . . coverage," and "reputable company" were not representations about specific policy terms that give rise to liability); *Griggs*, 181 F.3d at 701 (holding that statements made before purchasing policy that insurer would handle claims professionally and post-loss statements that agent would monitor the claim's progress are inactionable puffery); *cf. Performance Autoplex*, 322 F.3d at 860, n.20 (distinguishing *Griggs* because alleged statement describing what employee dishonesty policy would cover was more than "mere puffery.").

6. Certificate of Insurance.

One issue that sometimes arises in agent liability cases is whether agents can be found liable for the issuance of a certificate of insurance. A certificate of insurance is often issued by an agent on behalf of an insured to indicate either that the insured does in fact have insurance or that someone with whom the insured is working, such as a general contractor or sub-contractor, has been named an additional insured under the insured's policy.

As seen in Section III(B)(4), the court in *Turner-Bass* used the issuance of a certificate of insurance as evidence that a contract existed between the agent and the insured. Plus, a recent federal district court case found that due to the industry custom, a party in the maritime industry may reasonably be able to rely on such certificates as proof of insurance. *See, U.S. of Am. v. Inter-Bay Towing, Co.*, 2005 WL 3995989, *7 (S.D.Tex. 2005).

A case one year later also out of the Southern District of Texas, *Scottsdale Ins. Co. v. Shahinpour*, 2006 WL 870642 (S.D.Tex. 2006), reached a different result, although not in the context of maritime law.

Parvin Shahinpour d/b/a/ Taste of Katy was a lessee in a building owned by Mason Park. *Id*. at *1. Pursuant to the lease agreement, Taste of Katy was required to designate Mason Park as a loss payee on its property insurance and to have Mason Park added as an additional insured under its commercial general liability policy. Katy Insurance Agency issued a certificate of insurance indicating that Taste of Katy had general liability coverage and property damage coverage with policy limits of $1,000,000 and $100,000, respectively. The certificate also listed Mason Park as a "certificate holder," though the court found that it did no represent Mason Park to be an additional insured. *Id*. at *1,4. In fact, the policy issued by Scottsdale had limits of liability of $400,000 for business personal property and $87,750 for business interruption. *Id.* at *1.

When Taste of Katy was damaged by a fire, Mason Park sued Katy Insurance Agency for breach of contract, breach of the duty of good faith and fair dealing, violations of Article 21.21 and 21.55 of the Texas Insurance Code and violations of the DTPA. *Id.* Since the court found that the only possible contract to which Mason Park could have been a party or third-party beneficiary was the certificate of insurance, as opposed to the insurance policy, the court focused on the provisions of the certificate in connection with its analysis of Mason Park's contract claim. *Id.* In particular, the court pointed to that part of the certificate that stated, "THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER." *Id.* at *3. (Emphasis in Original and in Certificate of Insurance.) Moreover, the certificate stated that it does not alter the terms of the policy and merely states that the *insurer* will "*endeavor*" to provide written notice of any policy changes to the certificate holder. *Id.* Based on this language, the court held that "[a] certificate of insurance does not create a contract for insurance coverage." *Id.* at *4. As such, the court dismissed Mason Park's breach of contract claim against Katy Insurance Agency. *Id.* at *4.

Based on the same language cited by the *Shahinpour* court, the Texas Supreme Court very recently explained, "Given the numerous limitations and exclusions that often encumber such policies, those who take such certificates at face value do so at their own risk." *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006); *see also Sabine Towing & Transp. Co., Inc. v. Holliday Ins. Agency, Inc.*, 54 S.W.3d 57, 62-63 (Tex.App.—Texarkana 2001, pet. denied) (rejecting plaintiff's assertion of discovery rule to limitations defense because plaintiff could have discovered lack of coverage had it used diligence in confirming "bare" certificate of insurance).

7. Post-loss Representations.

Moreover, an agent typically cannot be held liable for post-loss misrepresentations. *See, Breslin v. Texas Farmers Ins. Co.*, 2000 WL 960120, *3 (Tex.App.—Dallas 2000, no pet.). In *Breslin*, the insured was involved in a car accident

on November 22, 1994. Her policy had lapsed 11 days earlier, but her agent told her after the accident that if she paid her premium immediately, her policy would continue in force. The agent even gave her a document showing her policy to be in force from November 11, 1994. When the carrier actually issued the policy, however, the effective date was not until November 28th, meaning there was no coverage for the accident. The *Breslin* court began by citing the "well-settled" principle that an agent's post-loss statements cannot bind an insurer to coverage where coverage does not already exist. *Id*. at *3 (citing *Royal Globe Ins. Co. v. Bar Consultants, Inc.*, 577 S.W.2d 688, 693 (Tex. 1979); *State Farm Mut. Auto. Ins. Co. v. Matlock*, 462 S.W.2d 277, 279 (Tex. 1970); *Mid Century Ins. v. H & H Meat Prods. Co.*,, 822 S.W.2d 747, 750 (Tex.App.—Corpus Christi 1992, no writ); *see also Maccabees Mut. Life Ins. Co. v. McNiel*, 836 S.W.2d 229, 232 (Tex.App.—Dallas 1992, no writ)). Even though the case only involved claims against the carrier, the court then issued a statement that should equally apply to cases against agents. The court held that any damages suffered by the insured in defending the underlying lawsuit arising out of the accident were caused by the accident happening outside of the policy period, not because of the insured's reliance on any statements made by the agent. *Breslin*, 2000 WL 960120, at *3; *see also Royal Globe*, 577 S.W.2d at 694-695 (denying DTPA claim for post-loss representations because the insured would have repaired the damaged property regardless of any post-loss representation).[8]

[8] In addition to the authorities, cases and statutes cited herein, the authors also relied on Mark Kincaid & Christopher W. Martin, TEXAS PRACTICE GUIDE: INSURANCE LITIGATION, (2006) and Bob Roberts, THE INSURANCE AGENT AS A DEFENDANT (2005) (presented at the University of Texas School of Law Tenth Annual Insurance Law Institute, December 8-9, 2005) in connection with drafting this paper, and would commend them for additional reading in this area.