

Developments in Insurance Law: Agents' and Brokers' Liability

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During this survey period, Indiana courts again had the opportunity to address a myriad of insurance-related issues.¹ One issue, in particular, received the repeated attention of our courts. That issue concerned the duties and related liabilities of insurance agents and brokers to their principals, including both insureds and insurers.

Traditionally, insurers use the terms "agents" and "brokers" to describe "field" personnel responsible for selling policies. The two terms are distinguished by the activity undertaken. Generally, an "agent" is a representative of the insurer and a "broker" represents the insured for most purposes.² A "broker" is essentially an independent contractor "who acts as a middleman between the insured and the insurer, and who solicits insurance from the public under no employment from any special company, and who, upon securing an order, places it with a company selected by himself."³ Most often, the insured bears the risk of a broker's error while the insurer bears the risk of its agent's negligence.⁴

Until 1977, Indiana distinguished between agents' and brokers' liability by statute. Indiana Code section 27-1-15-1(d) provided:

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¹This article deals only with insurance law cases during the survey period in the area of agents' and brokers' liability. Other cases of note, however, should not go unmentioned. *See, e.g.*, *B & R Farm Servs. v. Farm Bureau Mut. Ins.*, 483 N.E.2d 1076 (Ind. 1985) (products hazard exclusion does not exclude coverage for product accidentally released into property of others); *Eli Lilly & Co. v. Home Ins. Co.*, 482 N.E.2d 467 (Ind. 1985) (Indiana adopts multiple-trigger interpretation of comprehensive general liability injury/occurrence policy language); *Allstate Ins. Co. v. Boles*, 481 N.E.2d 1096 (Ind. 1985) ("household exclusion" clause of automobile liability policy does not contravene public policy); *Loving v. Ponderosa Sys., Inc.*, 479 N.E.2d 531 (Ind. 1985) (distribution of insurance proceeds among lessor, lessee, and mortgagee); *Erie Haven, Inc. v. Lippman Refrigeration Construction*, 486 N.E.2d 646 (Ind. Ct. App. 1985) (scope of insurable interest on unexpired lease and leasehold improvements); *Hartford Ins. Co. v. Vernon Fire & Casualty Co.*, 485 N.E.2d 902 (Ind. Ct. App. 1985) (scope of omnibus clause permitted use provision); *Milwaukee Guardian Ins., Inc. v. Reichhart*, 479 N.E.2d 1340 (Ind. Ct. App. 1985) (duty to defend absent prior notice); *State Farm Mut. Auto. Ins. Co. v. Glasgow*, 478 N.E.2d 918 (Ind. Ct. App. 1985) (insurer not collaterally estopped from litigating the issue of insured's negligence in proceedings supplemental).

²B. HARNETT, *RESPONSIBILITY OF INSURANCE AGENTS AND BROKERS* §§ 2.02-2.07 (Supp. 1984).

³3 M. RHODES, *COUCH ON INSURANCE* 2D § 25:93 (Rev. ed. 1984).

⁴*Id.*

The word "broker" . . . shall mean an individual, co-partnership, or a corporation authorized by its charter or by law to do an insurance agency business, resident in any state, and not an officer or agent of the company interested, who or which for compensation acts or aids in any manner in obtaining insurance for a person other than himself An insurance broker is hereby declared to be the agent of the insured for all purposes in connection with such insurance.⁵

In 1977, Indiana Code sections 27-1-15-1 through 27-1-15-9 were repealed⁶ and replaced by Indiana Code sections 27-1-15.5-1 through 27-1-15.5-18, which address the licensing of "insurance agents, surplus line agents, insurance consultants, and limited insurance representatives."⁷ The term "broker" is not separately defined by the new chapter; rather, the earlier definition of "broker" has been partially incorporated into the definition of "insurance agent." "Insurance agent" is defined by the Code as

[a]ny individual or corporation who, for compensation, acts or aids in any manner in soliciting applications for a policy of insurance or in negotiating policies of insurance on behalf of an insurer. An individual or corporation not licensed as an insurance agent, surplus lines insurance agent, or limited insurance representative who solicits a policy of insurance on behalf of others or transmits for others an application for a policy of insurance to or from an insurance company, or offers or assumes to act in the negotiations of such insurance, shall be an insurance agent within the intent of this chapter, and shall thereby become liable for all the duties, requirements, liabilities, and penalties to which such licensed agents are subject.⁸

Despite this change, post-1977 Indiana case law has continued to distinguish between "brokers" and "agents" and to apportion liability based upon a distinction between the terms.⁹ Such case law has confirmed

⁵IND. CODE § 27-1-15-1(d) (1971).

⁶IND. CODE §§ 27-1-15-1 to 27-1-15-9 were repealed by 1977 Ind. Acts, Pub. L. 280, § 3.

⁷IND. CODE § 27-1-15.5-1 (1982).

⁸*Id.*

⁹*See, e.g.,* Monarch Ins. Co. v. Siegel, 625 F. Supp. 693 (N.D. Ind. 1986); Augustine v. First Fed. Sav. & Loan of Gary, 270 Ind. 238, 384 N.E.2d 1018 (1979); Town & Country Mut. Ins. Co. v. Savage, 421 N.E.2d 704 (Ind. Ct. App. 1981); Stockberger v. Meridian Mut. Ins. Co., 182 Ind. App. 566, 395 N.E.2d 1272 (1979); Bulla v. Donahue, 174 Ind. App. 173, 366 N.E.2d 233 (1977). The *Bulla* and *Stockberger* decisions do not rely upon Indiana statute as authority for their finding that "[a]n insurance agent or broker who undertakes to procure insurance for another is an agent of the proposed insured" *Bulla*, 174 Ind. App. at 126, 366 N.E.2d at 236. The decisions cite instead J. APPLEMAN, INSURANCE LAW & PRACTICE, as well as C.J.S., AM. JUR. 2D and A.L.R.3D.

that although the definitions of the terms agent and broker appear clear, the lines distinguishing the two roles are often hazy and are highly dependent upon the facts of each case. The determination of legal responsibility for agents' and brokers' acts rests more with the extent of and authority behind such acts than with the pure application of either term. This year's survey cases concerning agents' and brokers' liability are instructive in continuing to define the respective duties of agents and brokers and the extent to which insurance companies will be bound by breach of such duties.

A. Breach of Duty to Procure Insurance Coverage

Several cases during this survey period examine the insurance agent's duties in regard to procuring insurance on behalf of a future insured. In *Monarch Insurance Co. v. Siegel*,¹⁰ the United States District Court for the Northern District of Indiana found that the insurance company was not liable for the acts of an independent insurance broker through whom its insured had placed a policy of aircraft insurance.¹¹

Defendant Siegel, the co-owner of a Piper Turbo Seminole aircraft, had originally purchased a Global Insurance policy on his airplane through Dickens & Company, insurance brokers, and Dickens' agent, Terry Campton. In September 1982, Siegel conferred with Campton as to whether his pilot, Ackerman, would meet the Global policy's coverage requirements. Siegel advised Campton that Ackerman had 250 hours of multi-engine flight time, although, in fact, Ackerman had not. Based upon Siegel's representation, Campton informed Siegel that Ackerman would qualify with five additional flight hours.

In 1983, Siegel cancelled the Global policy and arranged with Campton to purchase a Monarch policy providing similar coverage. In his application, Siegel represented that the plane was for "[p]rivate business and pleasure"¹² and not rental use. The Monarch policy required, among other things, that the aircraft pilot have 250 hours of flying time in multi-engine aircraft.

In February 1983, four couples, including pilot Ackerman and his wife, rented the Seminole from Siegel for a flight to Tennessee. Ackerman piloted the aircraft and, upon return, crash-landed at Indianapolis, injuring his passengers.

Stockberger, 182 Ind. App. at 576, 395 N.E.2d at 1279; *Bulla*, 174 Ind. App. at 126, 366 N.E.2d at 236. In each of these cases, except *Monarch*, the facts concerned insurance policies issued prior to the 1977 statutory change. *Monarch*, which concerned a policy issued in 1983, cited *Stockberger* and *Augustine* in continuing to recognize the "broker"/"agent" distinction. 625 F. Supp. at 697.

¹⁰625 F. Supp. 693 (N.D. Ind. 1986).

¹¹*Id.*

¹²*Id.* at 696.

Monarch filed a declaratory judgment action seeking a determination that it had no coverage for the occurrence.¹³ In his defense, Siegel raised the issue of whether Campton and Dickens & Company had adequately discharged their duty to him in procuring the Monarch policy and whether Monarch was responsible for the negligent acts of Dickens & Company and Campton, Monarch's "agent."¹⁴ After a brief analysis, the district court held that Monarch was not liable.¹⁵ It found that because Campton placed insurance with several companies, he was an "insurance broker" and was thus an "independent contractor" working for the insurer.¹⁶ The court also held that any negligence on the part of Campton, as an independent contractor, or any statement made by Campton in regard to the Monarch policy would not bind the insurance company.¹⁷

The court next examined the issue of whether Campton breached a duty to Siegel in failing to warn him that Ackerman was not covered by the Monarch policy. The court noted that in Indiana, an agent who undertakes to procure insurance and "through fault and neglect fails to do so, . . . may be liable for breach of contract or for negligent default in the performance of a duty imposed by contract."¹⁸ The court also noted the corresponding duty "on the part of the insured to provide the agent or broker with the information necessary to implement the policy[.]"¹⁹ The court, therefore, found that the issue of Campton's and Dickens & Company's negligence was a factual issue which would turn upon the jury's finding as "to what Campton knew and what Siegel told him prior to the procurement of the Monarch policy."²⁰ Because of this fact question, a trial was necessary, and summary judgment was denied.

In *Nahmias Realty, Inc. v. Cohen*,²¹ the Indiana Court of Appeals had occasion to address a similar procurement issue. In *Nahmias*, the plaintiff, Nahmias, owner of a commercial building, relied upon defendants, Alvin Cohen and Affiliated Agencies, Inc., to procure adequate fire insurance for his building. Affiliated placed Nahmias' coverage through American Insurance Company, but through error, failed to procure replacement cost coverage. Affiliated also failed to inform Nah-

¹³*Id.*

¹⁴*Id.* at 697, 699, 702.

¹⁵*Id.* at 697.

¹⁶*Id.* The court cited as authority *Stockberger v. Meridian Mut. Ins. Co.*, 182 Ind. App. 566, 395 N.E.2d 1272 (1979) and other cases decided prior to the 1977 changes in the Indiana Code.

¹⁷*Monarch*, 625 F. Supp. at 697.

¹⁸*Id.* at 702 (citing *Stockberger v. Meridian Mut. Ins. Co.*, 182 Ind. App. 566, 576, 395 N.E.2d 1272, 1279 (1979)).

¹⁹*Id.*

²⁰*Id.* at 703.

²¹484 N.E.2d 617 (Ind. Ct. App. 1985).

mias that Nahmias could obtain building and fire code update coverage under its American policy.

Nahmias' building burned in 1977 and Nahmias decided to repair. American denied replacement coverage and eventually Nahmias bought another building, sold his condemned, damaged building to the city of Indianapolis for \$250,000, and sued American and Affiliated.²² The insurer, American, entered into a covenant not to sue, paying Nahmias \$357,000. At trial, Affiliated admitted liability; however, the trial court determined that Nahmias had been fully compensated by American and awarded no damages.²³ Nahmias appealed, seeking the full cost of repair to its building.²⁴

The court of appeals found that an insurance agent's negligent failure to procure insurance renders the agent liable for "any damage resulting from his failure."²⁵ The court held that the measure of damages should, therefore, be "(a) the amount which would have been due under the policy which Affiliated should have obtained . . . , plus (b) any consequential damage resulting from Affiliated's breach of duty, less (c) the cost of unpaid premiums"²⁶ The court noted that it was uncontested that Nahmias had wanted to restore its building and that "[b]ut for Affiliated's neglect, Nahmias would have so recovered."²⁷

Noting that replacement cost coverage was not a pure indemnity contract, the court held that Nahmias was entitled to the full cost of repairs.²⁸ This was true despite the fact that Nahmias had failed to repair his building, a condition precedent to recovering replacement costs under his American policy. The court found that policy defenses were not available to Affiliated, "a non-party to the insurance contract."²⁹

The court further found that Nahmias was also entitled to the cost to bring "both the damaged and undamaged parts of Nahmias' reconstructed building into compliance with all applicable building codes"³⁰

The *Nahmias* decision does not address the nature of the relationship between Affiliated and American and, therefore, leaves unanswered the question of whether Affiliated's negligence would have been imputed to American had American not entered into a covenant with Nahmias. Further, the opinion contains little factual background for its finding

²²*Id.* at 619.

²³*Id.*

²⁴*Id.*

²⁵*Id.* at 620 (citing *Bulla v. Donahue*, 174 Ind. App. 123, 126, 366 N.E.2d 233, 236 (1977)) (emphasis added).

²⁶*Id.* at 620-21 (citations omitted).

²⁷*Id.* at 621.

²⁸*Id.* at 624.

²⁹*Id.* at 623.

³⁰*Id.* at 624.

that Affiliated breached its duty and was negligent in failing to advise Nahmias that Nahmias could obtain code update coverage by purchasing a waiver of American's exclusion concerning such coverage.³¹ Although prior Indiana case law has recognized an affirmative duty on the part of an agent to make inquiries into all necessary information concerning desired coverage, such cases have based this duty upon either a "long-established relationship of entrustment . . . between the insured and the agent"³² or upon facts known to the agent which would put the agent on notice that certain coverages would be necessary.³³ On its face, *Nahmias* holds that an agent has an affirmative duty to advise a proposed insured who relies on its services of all coverages available or to face the risk that the insured will claim the benefit of such coverage after a loss. Under the facts of *Nahmias*, it appears that the insured will not have to claim or establish that it would have agreed to purchase the coverage if offered.

In *State Farm Life Insurance Co. v. Fort Wayne National Bank*,³⁴ the Indiana Court of Appeals found an insurer and its agent liable to a decedent's estate for failure to place ownership of a life insurance policy in the proper party.³⁵ In 1975, James Zimmerman purchased life insurance from Robert Houser, State Farm's local agent, and State Farm's agency manager, Vernon Deutsch. James Zimmerman was ninety-five percent owner of Zimmerman's Excavating Service with his son, Steven. The acknowledged purpose of the life insurance policy was to fund Steven's purchase of outstanding stock in the event of his father's death. The policy named James Zimmerman as owner. When he died, the policy proceeds passed through James' estate with a tax consequence of approximately \$34,000 and resulted in an insufficient balance to cover the stock purchase. This deficit would not have occurred if the policy had been credited to the ownership of Steven, who paid all premiums.

The personal representatives of the estate sued State Farm and its agents, contending that they were negligent in failing to accomplish the undisputed purpose of the policy.³⁶ Neither Houser nor Deutsch was permitted to testify against the estate pursuant to Indiana's dead man

³¹*Id.* at 621, 623.

³²*United Farm Bureau Mut. Ins. Co. v. Cook*, 463 N.E.2d 522, 528 (Ind. Ct. App. 1984) (agent had duty to inquire into information necessary for coverage and to inform the insured that he could not procure the requested coverage).

³³*See, e.g., Automobile Underwriters, Inc. v. Hitch*, 169 Ind. App. 453, 349 N.E.2d 271 (1976) (agent who had knowledge that proposed insured, a service station operator, offered shotgun shells for sale at station, was negligent in failing to procure liability insurance covering incident in which customer was injured by defective shell).

³⁴474 N.E.2d 524 (Ind. Ct. App. 1985).

³⁵*Id.*

³⁶*Id.* at 526.

statutes.³⁷

Plaintiffs offered evidence, "including a retail credit report and the testimony of Steven's wife," which the court found established that State Farm knew the policy was meant to fund the stock purchase.³⁸ Further, the plaintiff provided expert testimony which established that State Farm's act in failing to properly identify the policy owner was "inconsistent with the skill, knowledge, diligence and care ordinarily exercised in the insurance industry."³⁹

State Farm raised the defense of contributory negligence on the part of James Zimmerman.⁴⁰ The appellate court found, however, that Zimmerman "was not familiar with the legal means" to accomplish the intended purpose of his insurance "but relied on State Farm to properly execute his intentions," and therefore was not negligent.⁴¹

In *State Farm*, the court identified Houser and Deutsch as State Farm's local agents and, therefore, incompetent witnesses based upon the fact that they "actively negotiated" a contract with the deceased on their principal's (State Farm's) behalf.⁴² Were Houser and Deutsch held to be independent brokers, thus Zimmerman's agents, the results may have been different in that their testimony would not automatically be incompetent under Indiana Code section 34-1-14-8, nor would it automatically be classified as "adverse" and improper under Indiana Code section 34-1-14-6.⁴³

In *Pekin Insurance Co. v. Wheeler*,⁴⁴ the court of appeals found

³⁷Indiana statutes provide that a witness is incompetent to testify against an estate if

- a. The action is one in which an administrator or executor is a party or one of the parties is acting in the capacity of an administrator or executor;
- b. The action involves matters which occurred within and during the lifetime of the decedent;
- c. The action is a case in which a judgment or allowance may be made or rendered for or against the estate represented by such executor or administrator;
- d. The witness is a necessary party to the issue and not merely a party to the record;
- e. The witness is adverse to the estate and must testify against the estate.

IND. CODE § 34-1-14-6 (1982). The section that involves contracts is as follows:

No person who shall have acted as an agent in the making or continuing of a contract with any person who may have died, shall be a competent witness, in any suit, upon, or involving, such contract, as to matters occurring prior to the death of such decedent, on behalf of the principal to such contract, against the legal representatives, or heirs of the decedent, unless he shall be called by such heirs or legal representatives.

IND. CODE § 34-1-14-8 (1982).

³⁸*State Farm*, 474 N.E.2d at 528.

³⁹*Id.*

⁴⁰*Id.*

⁴¹*Id.*

⁴²*Id.* at 527.

⁴³See *supra* note 37.

⁴⁴493 N.E.2d 172 (Ind. Ct. App. 1986).

that an insurance policy "never came into existence" after an agent signed the insured's name to an application absent the insured's knowledge.⁴⁵ In *Pekin*, the plaintiff, Pekin Insurance Company, brought suit, claiming that its insureds, the Wheelers, were covered under another valid policy issued by Celina Insurance Company.⁴⁶ The Wheelers had originally purchased a Republic Mutual Insurance policy (a Celina Group member), which had an expiration date of March 1, 1978, through McClain, an independent insurance agency. In February 1978, McClain contacted Celina about issuing a second policy to be effective on the expiration of the first. Celina suggested that McClain forward an application, but cautioned that acceptance would be dependent upon a driving record check. Thereafter, someone at McClain signed the Wheelers' name to an application and forwarded it to Celina.

In the interim, the Wheelers contacted another agency and purchased automobile coverage through Pekin Insurance to replace their Republic policy.

Celina issued a policy to the Wheelers on the basis of the application signed by McClain, completed its investigation into Jimmie Wheeler's questionable driving record, and notified McClain that it was cancelling the policy effective April 20, 1978. In 1982, Pekin named Celina as a defendant in a lawsuit concerning an accident on April 11, 1978, involving Jimmie Wheeler. Pekin claimed Celina had coverage. Through discovery, Celina learned that the Wheelers had not signed the Celina application nor were they aware the application had been made. Celina counter-claimed against Pekin and sought a declaratory judgment that Celina's policy was void from its inception.⁴⁷

The sole issue addressed by the court of appeals was whether McClain had the authority to bind Celina and the Wheelers to an insurance contract. The court held it did not.⁴⁸ The court found that Celina had no duty to ascertain the extent of McClain's authority from Wheeler in that Jimmie Wheeler's forged signature was on the application and Celina was entitled to "believe it was dealing with a bona fide applicant."⁴⁹ Further, the court found that because there was no "meeting of the minds" between Celina and the Wheelers, no contract had ever been formed.⁵⁰

The case presents an interesting reversal of a fact situation. Here, the issue was an unauthorized attempt to procure rather than a failure to procure coverage. The case invites speculation as to whether McClain would have been liable for failure to procure automobile insurance

⁴⁵*Id.* at 174.

⁴⁶*Id.* at 173-74.

⁴⁷*Id.* at 173.

⁴⁸*Id.* at 174.

⁴⁹*Id.* at 173.

⁵⁰*Id.* at 174.

coverage had it not contacted Celina and had the Wheelers' Republic policy expired without replacement. Although it has been held that an agent has no obligation to renew term insurance,⁵¹ that finding would be dependent upon facts concerning the Wheelers' reliance on McClain.

B. Insurer's Liability for Punitive Damages Assessed Against Its Agents, Brokers, and Claims Representatives

In *Liberty Mutual Insurance Co. v. Parkinson*,⁵² plaintiff Mary Ann Parkinson sued Liberty Mutual Insurance Company for punitive damages for its failure to settle an uninsured motorist claim.⁵³ Plaintiff Parkinson was involved in a hit-and-run collision and reported the incident to Liberty Mutual, her insurer. She asked Liberty Mutual's claim representative about her coverage for the accident and the effect of her claim upon her insurance rates. Liberty's claim representative informed Parkinson "that her rates would go 'sky high'."⁵⁴ She was also told that her policy coverage did not include the cost of a rental car.

Parkinson relied on this information, hired an attorney, and attempted to sue the hit-and-run driver, who could not be located. Parkinson then saw a second attorney, who told her that she was covered under the uninsured motorist provisions of her Liberty Mutual policy. Parkinson's attorney eventually settled her uninsured motorist and property damage claims with Liberty Mutual for approximately \$6,000. In settling, however, Parkinson reserved her right to sue Liberty Mutual for bad faith and eventually did so.⁵⁵ At trial, the court awarded Parkinson compensatory damages of \$2,000 and punitive damages of \$40,000.⁵⁶ Liberty Mutual appealed, alleging, among other errors, that the award of compensatory damages was contrary to law in that Parkinson had been fully compensated for her loss pursuant to the settlement agreement. Liberty Mutual also claimed that the trial court's award of punitive damages was contrary to law.⁵⁷

⁵¹See 16A J. APPLEMAN, INSURANCE LAW & PRACTICE § 8832 (1981 & Supp. 1986).

⁵²487 N.E.2d 162 (Ind. Ct. App. 1985).

⁵³*Id.* at 163.

⁵⁴*Id.*

⁵⁵*Id.*

⁵⁶*Id.*

⁵⁷*Id.* Liberty Mutual also contended that Indiana did not recognize the independent tort of bad faith, upon which Parkinson's suit was premised. The court found that while the tort had been adopted by many jurisdictions, it had not been specifically adopted in Indiana. *Id.* at 164-65. The court, however, held that Indiana's "special contractual remedy" providing punitive damages when an insurer's breach of contract "is accompanied by an independent tort or where a serious wrong of a tortious nature was committed and the public interest would be served by the deterrent effect of punitive damages" was sufficient to support plaintiff's cause of action. *Id.* (citing *Travelers Indem. Co. v. Armstrong*, 442 N.E.2d 349 (Ind. Ct. App. 1982)).

The court of appeals found that although Parkinson may have settled for "all benefits due under the policy, [she] did not receive all she was due under the contract."⁵⁸ The court noted that the contract "contained a promise, implied in law, that Liberty Mutual would deal fairly with [Parkinson] in settlement of any claim,"⁵⁹ and that Liberty Mutual breached this promise "by discouraging Parkinson from filing a claim that could not in good faith be disputed."⁶⁰ Parkinson was therefore entitled to compensation for the breached implied promise, including damages incurred by the delay in settlement.⁶¹

The appellate court also reaffirmed the trial court's award of punitive damages against Liberty Mutual based upon the claim representative's acts of dissuading Parkinson from filing her claim and misrepresenting the terms of the policy.⁶² As an additional basis for the punitive damage award, the court of appeals cited Liberty Mutual's practices of instructing its representatives "never to admit coverage or volunteer information about a policy to the policyholder," and of providing no training for its representatives in policy interpretation.⁶³

The court found that although it may be sound business practice for representatives not to volunteer coverage information, "*at a minimum, . . . a claims representative should assist a policyholder in filing a claim.*"⁶⁴ The court held that Liberty Mutual's failure to assist Parkinson, coupled with the "use of 'scare tactics'" was "convincing evidence of oppression [which justified] the imposition of punitive damages."⁶⁵

Liberty Mutual petitioned for rehearing, contending that the appellate court failed to address the issue of the company's liability for the acts of its claims representative.⁶⁶ The court denied Liberty's petition for rehearing, noting that Liberty's corporate policy of "intentionally keep[ing] claims representatives ignorant of uninsured motorist coverage," together with other evidence, supported the award.⁶⁷

In *Bymaster v. Bankers National Life Insurance Co.*,⁶⁸ applicants for a life insurance policy sued both the insurance company and the agent for failure to refund their complete advance premium.⁶⁹ On Feb-

⁵⁸*Id.* at 165.

⁵⁹*Id.*

⁶⁰*Id.*

⁶¹*Id.*

⁶²*Id.* at 166.

⁶³*Id.*

⁶⁴*Id.* (emphasis added).

⁶⁵*Id.*

⁶⁶*Liberty Mut. Ins. Co. v. Parkinson*, 491 N.E.2d 229, 230 (Ind. Ct. App. 1986).

⁶⁷*Id.*

⁶⁸480 N.E.2d 273 (Ind. Ct. App. 1985).

⁶⁹*Id.* at 276.

ruary 6, 1979, plaintiffs Glenn and Rosemary Bymaster applied for two \$100,000 Bankers National Life (Bankers) policies and prepaid the first year premiums. They made application for their policies through defendant Pat Mattmann. Mattmann was an officer of Continental National Corporation (CNC).

In 1977, CNC had entered into a general agent's agreement with Bankers to sell its policies as an independent contractor. Later, Bankers entered into a licensing agreement identifying CNC as "general agent." Mattmann was appointed as CNC's agent to solicit sales of Bankers policies and was paid by CNC.

The agreement between Bankers and CNC required that all premiums collected by CNC be kept in a trust account due and payable immediately to Bankers, although only ten percent was required to be forwarded immediately to Bankers. No commission was earned by CNC until it delivered the policy to the insured.

When Mattmann made his sales presentation to the Bymasters, he represented that he was Bankers' agent. He had them fill out an application, which revealed that Mrs. Bymaster had a history of cancer and that Mr. Bymaster had had heart problems. Nonetheless, Mattmann accepted their first year premium payment and gave them a conditional receipt signed by himself and Bankers' secretary. Mattmann also gave the Bymasters CNC's written guarantee that their premiums would be returned if the policies were not issued. CNC then forwarded ten percent of the Bymasters' premium to Bankers.

The Bymasters' application was denied by Bankers in May 1979, and ten percent of their premium was returned from Bankers in June. They were instructed by Bankers to contact CNC regarding the balance.

At the time it returned the Bymasters' ten percent premium, Bankers had already terminated its agency agreement with CNC and had lodged a formal complaint against CNC with the Illinois Insurance Commissioner, alleging that "CNC had repeatedly misrepresented the terms of certain policies and had repeatedly violated regulations concerning the return of monies held in their premium trust accounts."⁷⁰

When the Bymasters demanded their premium from CNC, Mattmann told them he was also an agent for Equitable Life Insurance Company and could transfer their premiums to that account. The Bymasters again signed applications, but demanded that their premium be returned when they learned they would have to have additional medical examinations.

Bankers did not learn that the Bymasters had not received the full return of their premium until eight months after it had sent the Bymasters the ten percent check. Bankers knew of the intervening transaction with Equitable and assumed the refund problem had been resolved.

⁷⁰*Id.* at 275.

CNC subsequently filed bankruptcy and the Bymasters sued CNC, Mattmann, Bankers, and Equitable for actual and punitive damages.⁷¹ At trial, the jury awarded verdicts against CNC and Mattmann for actual and punitive damages, and against Bankers for actual damages in the amount of \$28,353.⁷² Bankers obtained a judgment on the evidence in its favor on the punitive damage issue.⁷³ The Bymasters appealed the grant of judgment on the evidence for Bankers, and Bankers cross-appealed the award of compensatory damages.⁷⁴

The Bymasters claimed that the trial court erred in failing to award punitive damages against Bankers. They argued that "CNC and Mattmann were Bankers' agents and were permitted to solicit the sale of policies, collect premiums, . . . issue conditional receipts, . . . and maintain a premium trust account" on behalf of Bankers.⁷⁵ The court of appeals found that no "fraud or other substandard conduct" occurred by CNC, Mattmann, or Bankers in soliciting the policies or processing applications.⁷⁶ In other words, no substandard conduct occurred while CNC and Mattmann were acting as Bankers' agents. The court noted that the fraud allegation pertained only to the retention of the ninety percent premium balance, an act that occurred after Bankers' agency contract with CNC had terminated.⁷⁷ The court further indicated that even if the agency relationship were not terminated, Bankers would not automatically be subject to a punitive damage award if CNC and Mattmann had engaged in fraud.⁷⁸ Citing *Husted v. McCloud*,⁷⁹ the court reiterated that "where an agent commits independent fraud for his own benefit, he ceases to act as an agent for his principal."⁸⁰ The court held that because Bankers never condoned CNC's failure to return the Bymasters' premium, Bankers was not liable for punitive damages.⁸¹

⁷¹*Id.* at 276.

⁷²*Id.*

⁷³*Id.*

⁷⁴*Id.*

⁷⁵*Id.* The Bymasters also argued that Bankers had been reckless in employing CNC and Mattmann and was, therefore, liable for punitive damages under the authority of *Orkin Exterminating Co. v. Traina*, 461 N.E.2d 693 (Ind. Ct. App. 1984) (later reversed on appeal by the Indiana Supreme Court, 486 N.E.2d 1019 (Ind. 1986)).

⁷⁶*Bymaster*, 480 N.E.2d at 278.

⁷⁷*Id.*

⁷⁸*Id.* at 279.

⁷⁹450 N.E.2d 491 (Ind. 1983). In *Husted*, one law firm partner defrauded a client and the law partnership by converting the client's funds. The Indiana Supreme Court found that the innocent partner, although liable for actual damages, could not be assessed punitive damages. *Id.*

⁸⁰*Bymaster*, 480 N.E.2d at 279.

⁸¹*Id.*