The Exclusive or Captive Agent of an Insurance Company is a "Producer" and by Statute and Case Law Owes Duties to the Insured.

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> [The following article is adapted from a response filed by the author on behalf of a potential insured to a motion to dismiss filed by the insurance company and its captive agent. No reply was filed. The case settled.]

No-Name Agent was an exclusive or captive agent of No-Pay Insurance Company ("No-Pay"), rather than an independent agent or broker. No-Pay argues that No-Name Agent, owed no duty to Kay K., who was seeking insurance coverage from the agent for her boat. Consequently, No-Pay argues, neither compensatory nor punitive damages can be awarded for No-Name Agent's failure to advise Kay that No-Pay's underwriter declined to issue a policy on the boat (which was later stolen and not covered by insurance). Kay responds to the no-duty argument as follows.

For decades, the Illinois Insurance Code spoke in terms of insurance "agents" and "brokers," defined as follows:

> "Insurance agent" means an individual, firm, partnership, association or corporation *appointed by an insurer* to solicit, negotiate or bind coverages for or on applications or policies of insurance on its behalf, covering property or risks located in this State. [emphasis added]
>
> "Insurance broker" means an individual, firm, partnership, association or corporation, while not acting as a duly licensed insurance agent, who solicits, negotiates, procures, renews or continues a policy of insurance *on behalf of insureds or prospective insureds* other than himself. [emphasis added]

Ill. Rev. Stat. 1983 ch. 73, ¶1065.37. Under this traditional framework, brokers represented insureds, and agents represented insurers, although one could concurrently hold licenses as both a broker and an agent. See Ill. Rev. Stat. 1983 ch. 73, ¶1065.37.

Effective January 1, 1985, the framework was changed. Public Act 83-801 repealed the categories of "agent" and "broker" and, among other things, introduced three new terms, "insurance producer," "limited insurance representative," and "registered firm," only the first of which is relevant here. "Insurance producer" was defined as follows:

> An insurance producer is an individual who solicits, negotiates, effects, procures, renews, continues or binds policies of insurance covering property or risks located in Illinois.

Ill. Rev. Stat. 1985 ch. 73, ¶1065.38–1. Notably absent from the definition of "insurance producer" is any reference to who has retained or appointed the producer, either insurer or insured.

On January 1, 1997, a new statute for "insurance placement liability" took effect. Public Act 89-638 created Section 2-2201 of the Illinois Code of Civil Procedure, which provides in pertinent part:

> (a) An insurance producer, registered firm, and limited insurance representative shall exercise ordinary care and skill in renewing, procuring, binding, or placing the coverage requested by the insured or proposed insured.

735 ILCS 5/2-2201(a) (2011).

To complete the relevant legislative history, the definition of "insurance producer" was changed, insignificantly, by Public Act 92-386 effective January 1, 2002. The definition became, and remains, the following:

> "Insurance producer" means a person required to be licensed under the laws of this State to sell, solicit, or negotiate insurance.

215 ILCS 5/500-10. There are exceptions to who must have a producer license (see 215 ILCS 5/500-10), but the traditional captive insurance agent does not fall within any of the exceptions.

The upshot is that, at all relevant times, No-Name Agent was licensed as an Illinois insurance producer – not as an agent or broker, as those categories were abolished on January 1, 1985.[1] As an insurance producer, No-Name Agent owed a duty of ordinary care to Kay, the proposed Named Insured on the applied-for policy, pursuant to Section 2-2201(a) of the Illinois Code of Civil Procedure, effective January 1, 1997.

No-Pay's argument against a duty owed by No-Name Agent to Kay relies on the antiquated and abolished distinction between agents and brokers. No-Pay cites *Young v. Allstate Ins. Co.*, 351 Ill. App. 3d 151 (2006), for the proposition that an insurance agent acts on behalf of the insurance company and owes no duty to the insured. However, *Young* fails to even mention Section 2-2201(a) of the Illinois Code of Civil Procedure (735 ILCS 5/2-2201) and the duty of care owed by all producers. That silence may owe to the possibility that the policy at issue in *Young* was procured before January 1, 1997, the effective date of Section 2-2201, making it inapplicable. The opinion in *Young* states:

> In 1996, plaintiffs purchased a 1976 Cadillac Eldorado convertible and fully restored the vehicle. Plaintiffs negotiated and procured a physical-damage insurance policy for the vehicle through Allstate's agent, Jacqueline Walton.

[1] There still are references to "agents" and "brokers" scattered throughout the Insurance Code. The Illinois legislature is far from perfect. But even the remaining use of "agents" and "brokers" belies any strict dichotomy. Some Insurance Code provisions speak in terms of brokers being *representatives of insurance companies*. For example, see 215 ILCS 5/143.12 and 5/143.26.

351 Ill. App. 3d at 154. If the policy was procured in 1996, as is most likely, there was no cause to discuss Section 2-2201 in *Young*. If the policy was procured in 1997, however, then *Young*'s silence on Section 2-2201 is the product of some very bad lawyering.

In any event, *Young* does acknowledge that the captive insurance agent under the traditional framework did have some duties to the prospective insured:

> An agent's duties to a prospective insured are to promptly evaluate the insurance application by providing coverage for the applicant or notifying the applicant of rejection of coverage to prevent the insured from being harmed by a delay in seeking coverage elsewhere or from feeling a false sense of security.

Id. at 161. Put more simply, "The extent of an agent's responsibility to a prospective insured is to promptly provide insurance coverage or to inform the party of the rejection of coverage." *Id.* at 163. Significantly, the duty to advise of the rejection of coverage is the gist of the claims by Kay against No-Name Agent and No-Pay; so even under *Young*, Kay's claims should not be dismissed. See *Talbot v. Country Life Ins. Co.*, 8 Ill. App. 3d 1062 (1973) (reversing dismissal of plaintiff's tort claims against insurance company and its agent for failing to timely act on insurance application).

But the proper analysis under current law is to look to Section 2-2201(a) for the duty. The statute places a duty of ordinary care on a producer in procuring the coverage requested by a proposed insured. "Producer" is a defined term under the Insurance Code and includes persons traditionally categorized as either an agent or a broker. See 215 ILCS 5/500-10. That "producer" under Section 2-2201(a) of the Code of Civil Procedure likewise includes a traditional agent is supported by *Country Mut. Ins. Co. v. Carr*, 366 Ill. App. 3d 758 (2006), which, curiously, was cited by No-Pay. The *Carr* decision was vacated, however, due to the parties' settlement (which No-Pay did point out).

In the absence of *Carr*, case law support can be drawn from *Indiana Ins. Co. v. Machon*, 324 Ill. App. 3d 300 (2001), and *North American Specialty Ins. Co. v. Valenti*, 2004 U.S. Dist. LEXIS 1628 (N.D. Ill. 2004). Both cases concerned the statute of limitations for claims against producers, Section 13-214.4 of the Illinois Code of Civil Procedure, which provides:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within 2 years of the date the cause of action accrues.

735 ILCS 5/13-214.4 (2011). Both cases held that Section 13-214.4 applies to actions by an insurance company against the insurance company's agent. Given that the statute of limitations (Section 13-214.4) is a companion to the "insurance placement liability" provision (Section 2-2201) within the Code of Civil Procedure, the term "producer," appearing in each, should be construed consistently to include agents as well as brokers.

Consequently, pursuant to Section 2-2201(a), No-Name Agent owed a duty to Kay, the proposed Named Insured, in the procurement of insurance. No-Pay's argument based on the supposed lack of duty must fail.