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Symposium
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INSURANCE INTERMEDIARIES

Introduction

The Association of American Law Schools Insurance Law Section's 2008 meeting was devoted to an examination of insurance intermediaries. Intermediaries play a critical middleman role in the distribution and operations of insurance. Besides bringing insureds and insurers together, intermediaries also provide advice to insureds, gather underwriting information for insurers, and generally help facilitate the relationship between insured and insurers all the way through the claims process. Despite the critical importance of intermediaries, judicial decisions considering the duties, obligations, and loyalties of intermediaries have left the law muddied and insureds largely unprotected.

In 2004, the New York Attorney General launched an investigation into whether the common compensation schemes offered to insurance intermediaries by insurers had induced intermediaries to improperly steer their clients' insurance business to those insurers paying the most lucrative commissions, without regard to their client's interests. New York's investigation raised the question of whether the longstanding practice of paying brokers contingent commissions undermined broker loyalty and tainted the broker-insured relationship. The investigation and its aftermath revealed the vulnerabilities of insureds to the undisclosed practices of insurers and intermediaries. Impoverished case law on the loyalties and duties owed by intermediaries to insureds, together with ignorance about the conflicts raised by compensation and contingent commissions likely exacerbated the problem. Thus, the time to look more closely at intermediaries was long overdue.

***572** This article explores the role of the intermediary in the context of insurance in order to introduce reflections on intermediaries presented by Professors Jeffrey Stempel, Daniel Schwarcz, and others at the 2008 AALS program. Daniel Schwarcz considers the problems of compensation schemes in the context of both commercial and personal lines of insurance. [1] Jeffrey Stempel examines the relatively unexamined role of intermediaries employed after the formation of the insurance contract, including so-called independent claims adjusters and managing general agents. [2]

Part II discusses the various methodologies employed to understand the legal relationship of intermediaries to insurers and insureds. It concludes that principles of agency law do not provide a particularly helpful framework to understand the legal relationships among insured, insurer, and their intermediary because the intermediary's role, even in a single transaction, is inconstant.

Part III discusses judicial treatment of claims against intermediaries. It finds the outcomes are fact-driven and unpredictable; it is often difficult for courts to determine to whom an intermediary owes its duties. It observes that courts frequently impose a relatively low standard of care toward insureds upon intermediaries. The majority of courts apply a low standard of care even to those intermediaries who are deemed brokers working for the insured, and captive and independent agents have even lesser obligations. The judicial treatment of intermediaries is out of step with the pro-insured treatment courts generally adopt in disputes between insurers and insureds.

Part IV then briefly considers whether contingent commissions paid by insurers to intermediaries add further mischief to already confused legal relationships. It introduces two views to be considered.

Professor Daniel Schwarcz contends that dangers indeed exist, particularly the temptations of improper steering, and that disclosure of intermediary compensation schemes to insureds is not sufficiently ***573** protective.[3] Schwarcz posits that even if "consumers understand their intermediaries face a potential conflict" they cannot on their own "police the quality of the advice they receive from their intermediaries or calculate the expected costs of this limitation."[4] Schwarz believes that disclosure is insufficient even in the commercial insurance market with sophisticated insureds, because even equipped with that disclosure, insureds will lack a means to protect themselves.[5] Schwarcz proposes methods to reduce or eliminate the conflicts raised by compensation, including perhaps by moving away from differential compensation in the consumer insurance markets altogether.[6]

On the other hand, insurance insider Sean Fitzpatrick contends that we should not abandon the contingent commission scheme, rather that adding the safeguards of mandatory disclosure of compensation practices should suffice.[7] Fitzpatrick argues that the incidents of improper steering and the conflicts raised by contingent commissions are exaggerated.[8] Moreover, he views contingent commission schemes as beneficial to consumers, because they encourage intermediaries to consider "long-term" performance of insurers.[9]

***574** Part V briefly comments on Jeffrey Stempel's viewpoint on outsourced independent adjusters and managing general agents--those intermediaries employed by insurers to facilitate insurance functions after the policy has been issued. He notes that bottom line interests have made outsourcing these insurance tasks more common. Stempel cautions that although these intermediaries carry out important functions associated with insurance, the lack of regulation and a lack of viable legal theories (particularly bad faith) against downstream intermediaries leaves them largely immunized for their own errors. Stempel argues that expanding tort liability to outsourced adjusters and administrators will improve accountability, advance public policy, and enhance the effective operation of the insurance market.[10]

Discussions about the legal status of intermediaries, the conflicts of interest they encounter, and their potential liability to insureds has been little explored or understood. Their role in the marketing, processing, and management of insurance is vital and increasing.

I. Classification of Intermediaries

Insurers have access to a wide "variety of marketing channels."[11] These channels include direct marketing to buyers, through means such as soliciting by Internet, mail, and company employees.[12] To a large extent, however, insurers rely on insurance intermediaries of various kinds to sell their products.[13]

In direct writing, the insurer does not utilize an intermediary, but engages in mass merchandising of its own insurance products.[14] Direct ***575** writers are employees of the insurer, working as the insurer's sales force and representing only the insurance company. With a direct writer, there is often no face-to-face contact with a prospective insured, and no local agent. Instead, communications are through employees, and via phone, mail, fax, and Internet. Direct writers are simply the insurer's own sales force.

Often, however, insurers use intermediaries to sell insurance, and to bring insurers and prospects together. These intermediaries perform an essential service in the insurance market that enables both the insured and the insurer to transact business. Intermediaries may be labeled as "captive agents," agents that principally sell the products of a single company; "independent agents" that typically sell for several insurers;[15] and brokers, that are engaged by insureds to procure insurance on their behalf. Brokers "tend to service larger and more complicated business insurance needs."[16] Large brokers, with a global reach, are "highly concentrated" and "the bulk of commercial [property and casualty] lines for the large and international buyer segment of the market is placed by a small number of brokers for each of whom it is their biggest source of revenue."[17]

While there are numerous ways to classify intermediaries, each merely describes aspects of their role. Commentator Sean Fitzpatrick observes, "[i]ndeed, one can hardly locate an in-depth legal analysis of the broker-agent distinction that does not feature words such as 'blurry' or 'cloudy.'"[18] Determining what intermediaries do and for whom they work has not leant itself to easy answers; definitive characterizations have been illusive. The intermediary's relationship with the insurer and the insured must often be determined on a case-by-case basis.

Among the ways to characterize intermediaries are a) by the exclusivity-independence they have established in their contractual relations with insureds and insurers; b) by the extent to which the insurer's mode of market distribution utilizes intermediaries; and c) by principles of ***576** agency law, including the nature of the agent's authority vis-a-vis the insured or insurer. However, as described below, while these classification exercises may help us understand the role of the intermediary, each does little to help us understand the legal relationship between the intermediary, the insurer, and the insured.

Characterization of intermediaries by the independence or exclusivity they maintain is often unsatisfactory because the actual relationship an intermediary has with insurers and insureds may be less categorical.[19] Many are neither strictly exclusive agents working for an insurer nor strictly independent agents working for an insured. For example, a "captive" agent is one who purportedly sells for a single insurer and ought to be the most clearly an agent of the insurer. Yet a captive agent may sell insurance products of other companies in some circumstances.[20] Moreover, by conduct directed toward the insured, a captive agent may transform from an agent of the insurer to one for the insured in a particular case.[21]

Just as captives may not be strictly captive, "independent" agents are in fact be less independent than that label implies. Although agents are called "independent," implying that they are free from ties to any particular insurance company, independent agents usually sell only for a handful of insurers with whom they have agency appointment contracts.[22] Importantly, although they have the independence to place insurance with ***577** multiple insurers, they are not necessarily agents for the insured.[23] Independent agents are vested with authority to perform certain acts for the insurer and are paid commissions by the insurer based upon agreements with particular insurers.[24]

Brokers, whose name implies that they work for the insured and negotiate contracts on the insured's behalf,[25] are also not as independent as their name implies. Brokers who purport to work for the insured also may "place a significant portion of their business" under agency appointment contracts.[26] These contracts vest authority in brokers to perform certain services for the insurer. This may be so even where the broker also charges the insured a separate fee for their services.[27] Thus, brokers in fact may be working on behalf of both the insured and the insurer in a particular transaction.[28]

Modes of market distribution may also help to characterize the role of the intermediary. Modes of distribution tend to sort by the nature of the lines sold.[29] Personal lines, sold to consumers, are more frequently distributed through direct marketing by insurance employees or through ***578** captive and exclusive agencies.[30] Commercial lines are more often distributed through so-called independent agents and brokers.[31] Notably, some insurers now market through several distribution channels, "blurring the boundaries that used to exist among insurers based upon distribution."[32]

Intermediaries may also be characterized by agency principles, particularly by the intermediary's relationship to its principal, and the level of authority vested in them. The problem here is that insurers vest varying degrees of authority in agents, defying classification by their title. A general agent, enjoying the broadest authority on behalf of an insurer, "is authorized by an insurer to accept risks, to agree upon and settle the terms of insurance policies, to issue and renew policies, and to modify or waive the terms of existing policies."[33] "The powers of such an agent are coextensive with the business entrusted to his care, authorizing him to act for the principal in all matters coming within the usual and ordinary scope and character of such business."[34]

Insurers conduct much of their business through the use of intermediaries with more limited authority. These limited authority agents ***579** are "authorized to act for the principal only in a particular transaction or in a particular way."[35] Agents with limited authority to bind insurers are characterized as "special agents," and include "soliciting agents," who are not authorized to bind the insurer, but are authorized only "to solicit insurance, to take applications for insurance and forward them to the company or its general agent, to deliver policies once issued by the insurer, and to collect premiums."[36] Although agents with limited authority cannot bind the principal beyond the scope of that authority, the principal may still be liable for the agent's conduct, for example, when the agent commits fraud under 'respondeat superior' principles.[37]

Characterizing the loyalties and duties of intermediaries by examining the agent-principal relationship is imperfect at best, because whether the insured or the insurer serves as the principal can depend on the actual tasks performed. Intermediaries, both independent and exclusive, perform valuable services that are desired and beneficial to both prospective insureds and insurers. [38] Thus, "[a]lthough an independent agent or broker is normally an agent for the insured, for some purposes he may be an agent for the insurer as well." [39] Determining for whom the ***580** intermediary works in any given transaction at any point in time involves a complicated factual inquiry. [40] Determining for whom an intermediary works may also require a factual analysis of how the intermediary was engaged in this particular transaction. [41]

Insurers utilize intermediaries not only to sell their products, but also to gather information utilized during the underwriting process, and to provide services on behalf of the insurer to insureds during the coverage period. [42] As Regan and Tennyson observe, to ensure profitability, "insurer[s] must devise an effective method of classifying applicants." [43] Generally, when underwriting requires gathering more sophisticated or complex risk information, insurers utilize the services of independent agents rather than captive agents. [44]

***581** Prospective insureds also benefit from the expertise and labors of intermediaries. A buyer, whether sophisticated or not, would be hard pressed to intelligently compare characteristics of insurance products beyond the premium charged without the expertise of an intermediary. For example, nuances in policy language, insurer solvency, claims practices, and reputation of the insurer are matters for which even sophisticated insureds need the counsel of intermediaries. "[T]he buyer of insurance faces the daunting task of first deciding what sort of insurance protection is needed given the risks faced, and then comparing policies offering alternative coverage at different prices from several insurers with different levels of credit risk and reputations for claims settlement and policyholder services." [45] Buyers, thus, turn to intermediaries to "match buyers with insurers who have the skill, capacity, risk appetite, and financial strength to underwrite the risk, and then help the client select from competing offers." [46]

Despite their vital functions in the insurance market, the inconstancy and vagueness of their legally prescribed allegiances is problematic. In any given intermediary relationship, the intermediary, the insured, and the insurer cannot be certain for whom the intermediary is working. Each time, ad hoc, and without definitiveness, courts must ask if the intermediary was working in their own self-interest, the interest of the insured, or the interest of the insurer.

II. Treatment of Insurance Intermediaries in the Courts

A. The Intermediary's Standard of Care

Although the relationships between insurer, intermediary, and insured are complex and not easily categorized, cases have frequently ***582** adopted a relatively simplistic approach in disputes between insureds and intermediaries. In litigation between intermediaries and their insureds, little judicial attention is paid to the peculiar vulnerabilities of insureds, even though these same courts have developed special protective rules to protect insureds in the context of suits between insureds and insurers.

Professor James Fischer, explaining why insurance contracts traditionally have been judged contractually by special rules, explains that insurers enjoy such a uniquely superior position in the relationship that it is proper to treat the insurer-insured contract differently than any other. [47] There are a variety of justifications for special rules. To name a few, insurers are repeat players with greater knowledge and sophistication about insurance than consumers. Insurers understand more about risk and about the nuances and complexities of coverage and non-coverage in the context of endless factual uncertainties that may arise. Insurance contracts are super-adhesionary; insurers have unilaterally and carefully drafted the insurance policy, and are unwilling to negotiate the language of the document. Most importantly, Fischer explains, insurers hold substantially more information than insureds about nearly every aspect of insurance, and can use this asymmetric possession of information to their advantage. [48] Reasonable expectations, contra proferentum, estoppel, and most notably the tort of bad faith are all judicial inventions aimed at leveling the playing field for insureds. [49] Likewise, for the other important intermediary in the third-party insurance context, the defense attorney, courts have created extraordinary safeguards to protect insureds. [50]

***583** The imbalance of knowledge, power, and sophistication that exists between insureds and insurers is apparent between intermediaries and insureds as well. Intermediaries are more like insurers than insureds: they are repeat players in the insurance industry; they are equipped with expertise, experience and a sophisticated knowledge of insurance; they market products that insureds do not understand; they can exploit this asymmetric possession of information to their advantage. Simply put, insureds have no more savvy, knowledge, or power in the relationship with their intermediary than they do with their insurer.

Despite the imbalances in the relationship between insureds and intermediaries, case law often does not impose a particularly high standard of care upon insurance intermediaries. Usually, courts do not regard these intermediaries as fiduciaries and they are merely held liable under a negligence theory. For some courts, it is the insured who bears most of the risks associated with imperfect communications or failure to purchase appropriate coverage. "[T]he majority of courts have placed the burden on the client to know potential coverages and ask for a particular coverage" rather than "requiring the agent to clarify the request and educate the client." [51]

A few courts have flirted with the notion that intermediaries, particularly independent brokers, may be fiduciaries, on compelling facts [52] ***584** or for particular tasks. [53] Only a handful of jurisdictions have characterized the broker relationship generally as fiduciary. [54] Arizona has adopted a professional standard of care, that requires brokers to "exercise reasonable care, skill and diligence in carrying out the agent's duties . . . ." [55]

In spite of a handful of notable attempts to classify insurance intermediaries as either professionals or fiduciaries, in most cases absent a so-called "special relationship," the only duty the intermediary actually ***585** owes the insured is to act reasonably to procure the specific policy the insured requests. [56] It has proven difficult for insureds to establish that a special relationship in fact existed. "A special relationship in the context of insurance requires more than the ordinary insurer-insured relationship." [57] The agent must take some affirmative step to elevate the relationship, such as "hold[ing] himself or herself out as a highly skilled insurance expert, and the insured relies to his detriment on that expertise." [58] It may "also be demonstrated by a long term relationship of confidence, in which the agent or broker assumes the duty to render advice, or has been asked to provide advice, and the advisor is compensated accordingly, above and beyond the premiums customarily earned." [59]

Lewis-Williamson v. Grange Mutual Insurance Co. [60] illustrates judicial reticence to find a special relationship. There, the plaintiff, a 78-year-old homeowner, had insured her home through Grange Mutual since 1981. [61] Beginning in 1991, plaintiff purchased her insurance through Clute, an agent who wrote "property insurance exclusively for Grange Insurance unless Grange Insurance d[id] not offer the requested insurance, in which case Clute [wa]s authorized to seek coverage from another insurance company." [62] In 1996, when plaintiff's policy limits were $200,000, she attended a Grange Hall meeting [63] and discussed her ***586** insurance with Clute after the meeting. According to the court, Grange Insurance was only available to Grange members and Clute discussed insurance needs with members after the Grange meetings.

Plaintiff asked Clute to increase her insurance "to at least double" and that she wanted "replacement cost." [64] Focusing on the "casual nature of the relationship," the court observed that Clute told plaintiff he would "stop by," but did not make a formal appointment with her. [65] Thereafter, Clute did stop by when she was not there, and examined only the exterior of her home. Intimidated by a large dog, Clute did not fully inspect the home. [66] Nevertheless, Clute did provide the plaintiff with advice. "Based on his exterior inspection and a telephone conversation with plaintiff, Clute recommended to plaintiff that she increase her coverage on the residence to $510,000." [67] Plaintiff followed his recommendation.

In 1998, plaintiff's residence was completely destroyed and replacement costs were estimated at $700,000, well in excess of the insured value. [68] Plaintiff filed a negligence action against Clute, and against Grange on vicarious liability. The court granted summary judgment in favor of both defendants, and the Oregon Court of Appeals affirmed. [69]

The court explained that, absent a special relationship, "an insurance agent acting as an agent for the insured owes a general duty to exercise reasonable skill and care in providing the requested insurance." [70] ***587** The court acknowledged that plaintiff placed trust in Clute to advise her, but distinguished between the factual trust plaintiff placed in Clute and trust establishing a legal obligation to act in her interest. "The fact that she trusted him and deferred to his judgment does not make him her agent or show that he was acting on her behalf." [71] The court continued, "[a]lthough plaintiff trusted Clute to take care of her insurance needs, there is no evidence that she had reason to expect, other than through her trusting nature, that he would work on her economic behalf." [72] The court noted that as a captive agent, Clute was Grange's agent, not hers, and had "been available to her for her convenience by virtue of his presence at Grange Hall meetings, but that was for the economic benefit of Grange and himself and not plaintiff." [73]

The result is troubling. A 78-year-old homeowner purchased an inadequate amount of insurance through a mutual insurer who particularly catered to rural clients, whose captive agent had purposely cultivated a lengthy and trusted relationship, and who affirmatively offered faulty advice. Yet in the court's view the insured was not reasonable to trust Clute's advice. [74]

*588 B. The Disconnect Between the Complexity of the Product and Current Standards for Intermediary Liability

Lewis-Williamson illustrates the majority rule that, absent "special circumstances," little is owed by an insurance intermediary to the insured. It further illustrates judicial reluctance to find that special relationship, even on quite compelling facts. This approach does not appropriately account for the level of trust commonly placed in intermediaries or the lack of sophistication and expertise common to insureds. [75] Insurance intermediaries are generally viewed as a sales force for insurers and "something less than professionals" [76] by the courts, [77] despite the importance and complexity of the product they sell. [78] While courts may ***589** not regard intermediaries as professionals, intermediaries commonly market themselves as professionals with expert knowledge that consumers can trust. [79]

Paradoxically, courts frequently have imposed unrealistically high expectations on insureds in these transactions: to read and understand an insurance policy, and to understand and communicate precisely their own insurance needs. [80] Insureds, both commercial and individual, are expected to carefully research the purchase of insurance as they would the purchase of any commodity, including checking with multiple sources and comparing prices and benefits. [81] Caveat emptor applies to the procurement ***590** of insurance. [82] Notably, the brokerage houses involved in the Spitzer investigation dealt with large commercial insureds. Yet even these highly sophisticated insureds were unable to discern whether they were obtaining the services they needed at a fair price. It begs the question, if even business savvy commercial insureds are unable to protect their interests, how can we expect personal insurance consumers to guard against their agents' undisclosed financial motives without safeguards?

Judicial reluctance to impose a professional standard of care on intermediaries ignores the realities that insurance products are so complex, the customers so unsophisticated, and the bargaining aspects so one-sided that insureds deserve special advantages to level the field. The market for intermediaries exists because of the complexity and incomprehensibility of insurance policies. Even sophisticated insureds must seek the counsel and advice of an intermediary to understand what they are purchasing. [83] Nevertheless, despite the fact that courts understand the vulnerabilities of the insured and protect them in other aspects of the insurance transaction, they neglect a principled approach of imposing a professional standard of care on intermediaries. A heightened standard of care better protects insureds and acknowledges the trust intermediaries nurture, expertise they possess, and the advice they provide.

III. Insurance Intermediary Compensation

On October 14, 2004, then New York Attorney General Eliot Spitzer filed a complaint against one of the world's largest insurance brokers, Marsh and McLennan, alleging that the compensation scheme between it and certain insurance companies constituted fraudulent business practices. [84] The suit alleged that Marsh improperly steered its customer ***591** business to insurers in order to take advantage of Marsh's commission structure with these insurers. The suit alleged that the compensation agreements Marsh had developed with key insurers created an incentive for Marsh to steer business to insurers that paid maximum contingent commissions, regardless of whether those insurers offered the most competitive rates to Marsh's clients. The suit raised the question of whether the compensation scheme between insurers and intermediaries created insurmountable conflicts of interest between insureds, insurers, and their intermediaries. [85]

A. Contingent Commissions

Independent agents and exclusive agents both typically earn compensation through commissions paid by insurers. [86] Brokers, who are selected by insureds to provide broader risk management assessment than simply placing insurance, earn commissions for the insurance they place, even while charging fees to insureds for other services. [87]

It has been "a familiar and public feature of the insurance market" [88] to also pay "contingent commissions" [89] to intermediaries, and it is these ***592** types of commissions, more so than commissions based solely on premiums, that have drawn criticism. Contingent commissions are typically earned based on the intermediary's profitability to the insurer. [90] "Typically, contingent commissions are based on the profitability of the intermediary's business placed with the insurer, the persistency rate, and/or on the volume of business." [91]

Contingent commission compensation structures vary from insurer to insurer, even between intermediaries for the same insurer, and from line to line. [92] They may be contingent on volume sold, i.e., the intermediary receives a commission based on reaching certain volumes; or they may be profit based, i.e., the intermediary receives a commission based on factors such as claims filed on a policy. [93]

Contingent commissions reward intermediaries for meeting profit aims of the insurer. Until recently, there was no obligation or practice that encouraged intermediaries to disclose the manner or amount of compensation they earned from the insurer to the insured. [94]

***593** The perceived problem with contingent commissions is that intermediaries earned additional and different commissions based upon where they placed an insured's business. [95] Some assert that these commissions create an irreconcilable conflict between the intermediary and the insured because the intermediary's self interest in compensation may not be aligned with the insured's interest in obtaining the best insurance for their needs at the best price. [96] The variability in compensation between insurers and the availability of contingent commissions tend to pit the insured's interests against the intermediary's own financial interests, while the lack of disclosure makes it unlikely that insureds would be able to protect themselves.

Contingent commissions may force the intermediary to choose between their own desire to enhance their income and their responsibility to place the insured with the insurer and policy most ideally suited to meet the insured's needs. This type of commission creates the risk of "steering," where the insured is placed with the insurer that provides the best commission rather than the best policy for the insured. [97] Contingent ***594** commissions may also serve to limit the intermediary's drive to search for low prices and bargains. [98] If the intermediary chooses to prioritize "their receipt of contingent commissions over their market-matching role," their customers may receive suboptimal insurance, or a much more expensive policy than their needs dictate. [99]

B. Reponses to Contingent Commissions

Different schools of thought exist regarding the best way to counteract the harmful effects of contingent commissions. Some are convinced that contingent commissions are efficient and do not harm insureds. [100] For those who view contingent commissions as benign, a solution to calm fears is to permit contingent commissions but require ***595** disclosure of the compensation scheme by which they are earned. Proponents of contingent commissions view disclosure as a compromise that would enable insurance customers to make informed decisions. [101]

Opponents of contingent commission argue that disclosure alone cannot correct the fundamental unfairness in the marketplace that contingent commissions exacerbate. For them, nothing short of banning contingent commissions altogether will suffice. [102] Notably, New York's investigation involved extremely sophisticated insureds, employing and paying for the services of one of the largest brokerage firms in the world. Yet they were unaware of potential conflict posed by contingent commissions or the steering that might or did occur at their expense. [103] Full disclosure might have helped them to negotiate a clearer deal with their brokers, but only if they had true choices. Arguably, in a concentrated broker market they may not have had choices. Disclosure cannot protect insureds in the consumer or smaller markets, where there is little ability to negotiate a different arrangement. Thus, Schwarcz's position is particularly compelling in the personal lines market.

IV. Other Insurance Intermediaries

Insureds at least know that an intermediary is brokering the procurement of insurance; however Professor Stempel writes about intermediaries of whom insureds know far less. [104] These intermediaries are employed by insurers after the contract has been formed and do work on behalf of the insurer. Many of the functions undertaken by these ***596** intermediaries are those that have traditionally been in-house operational functions, such as underwriting, adjusting, and claim-handling. [105]

The issue concerning these intermediaries is not for whom they work or where their loyalties lie. We know that downstream intermediaries work for the insurer. The issue here is whether it better protects insureds and serves the public good to subject these intermediaries to tort liability when their actions harm insureds. If they act as agents for the insurer, is it sufficient that the insured can pursue a claim against that insurer, or would it be advantageous to allow an independent claim against the intermediary as well?

Lack of privity between the insured and these intermediaries generally has made them untouchable, under either tort or third party beneficiary theories. Stempel notes that the prevailing view is that there is not a pressing need to create a cause of action because the insured can adequately vindicate claims by suing the insurer, who should be liable as the principal. [106] He complains that it is unfair to use the barrier of privity to preclude tort liability. [107] After all, in these instances the intermediary usually deals directly with the insured, and even if they are not in privity, the insured is obviously a foreseeable plaintiff. Insulating a tortfeasor for its own conduct toward a foreseeable plaintiff, simply on the grounds of privity, undermines basic tort principles.

Stempel argues that these intermediaries should be subject to potential liability. [108] Among other reasons, he observes that potential ***597** liability to insureds will make intermediaries more directly accountable for their wrongdoing, and that in and of itself advances societal interests. He also notes we cannot count on insurers to always have the ability or incentive to police the conduct of intermediaries who are authorized to act on their behalf, because these intermediaries often function in capacities beyond the tight control of the insurer, operating with some independence and autonomy. [109] The public policy interests that legitimate claims be promptly investigated and paid, and that unfounded claims be denied are better served by holding those who impede those interests to account. Each cog that carries out the functions that facilitate the proper administration of insurance should bear the attendant liability. Finally, insureds here are just as peculiarly vulnerable as they are in all other aspects of insurance transactions. Downstream intermediaries stand between insureds and the insurer who owes a duty to investigate, process, and pay claims honestly and expeditiously. The insured has little power to leverage here, except what power judicially constructed protections can provide.

Conclusion

Several dominant themes emerge in the examination of insurance intermediaries that lead to a single conclusion. First, the public knows little about the intermediary who sells them a product or processes or investigates their claims on behalf of insurers. In the case of intermediaries brokering insurance, fundamental questions include: Who does he work for? To whom does he owe his allegiance? Who is paying him? Is he a professional or a salesperson? What recourse is there if he fails to carry out his duties? In the case of downstream intermediaries, similar questions arise, such as: What independent responsibilities and liabilities to the insured does he shoulder for his negligence? That these basic questions are so difficult to answer should compel us to re-think how we regard the intermediary.

The second theme is how relatively low the standard of care is for intermediaries considering the important work they do to facilitate the insured-insurer relationship. The law has established special contract and tort principles to judge the conduct of insurers. It has done so because it recognizes the peculiar vulnerabilities of insureds and strengths of insurers. The insured is just as vulnerable in dealings with intermediaries, and intermediaries share similar strengths with insurers. Intermediaries also ***598** operate in a complex world where insurers and insureds do not share a common language. Intermediaries know a lot about insurance and have an important role in the interface between insureds and insurers but they also have competing interests that are unknown to insureds.

Courts have been champions of insureds when it comes to policing the relationship between insurers and insureds. Courts often favor insureds in the interpretation of insurance contracts; courts construct contractual and tort claims to restrain overbearing conduct, and courts place heightened duties on attorneys who represent insureds at the behest of insurers. Curiously, courts have paid scant attention to the important role of intermediaries in the insurance transaction, and have barely considered whether this to is an area that needs judicial vigilance. It is therefore an opportune time for all of us to examine more closely these important and mysterious middlemen and develop a more principled approach.

Footnotes

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1 Daniel Schwarcz, Differential Compensation and the "Race to the Bottom" in Consumer Insurance Markets, 15 Conn. Ins. L.J. 878 (forthcoming).

2 Jeffrey W. Stempel, The Other Intermediaries: The Increasingly Anachronistic Immunity of Managing General Agents and Independent Claims Adjusters, 15 Conn. Ins. L.J. 741 (forthcoming).

3 Daniel Schwarcz, Beyond Disclosure: The Case for Banning Contingent Commissions, 25 Yale L. & Pol'y Rev. 289, 324 (2007) (concluding that contingent commissions should be banned in the consumer market and possibly banned in the commercial market as well).

4 Id. at 323.

5 Id. at 325-26.

6 Schwarcz, Differential Compensation, supra note 1.

7 Sean M. Fitzpatrick, The Small Laws: Eliot Spitzer and the Way to Market Reform, 74 Fordham L. Rev. 3041, 3067-71 (2006) (calling for voluntary disclosure of compensation mechanisms). Sean M. Fitzpatrick is employed within the insurance industry. He currently holds a Senior Vice President position with The Chubb Corporation.

8 Id. at 3061-62.

9 Id. at 3061.

10 Stempel, supra note 2, at 741.

11 See J. David Cummins & Neil A. Doherty, The Economics of Insurance Intermediaries, 73 J. Risk & Ins. 359, 360 (2006). See also Background on Insurance Intermediaries, 2004 Ins. Info. Inst. 4, available at http:// server.iii.org/yy_obj_data/binary/774206_1_0/InsuranceIntermediaries.doc.

12 See Cummins & Doherty, supra note 11, at 360; Background on Insurance Intermediaries, supra note 11, at 4.

13 See Cummins & Doherty, supra note 11, at 360 (stating "the vast majority of commercial [property and casualty] insurance sales involves an intermediary").

14 Laureen Regan & Sharon Tennyson, Agent Discretion and the Choice of Insurance Marketing System, 39 J. L. & Econ. 637, 638, 640 (1996).

15 Robert H. Jerry, Understanding Insurance Law 64 (3d ed. 2002).

16 Cummins & Doherty, supra note 11, at 361.

17 Id. at 363, 367.

18 Fitzpatrick, supra note 7, at 3054.

19 See, e.g., Quirk v. Anthony, 563 So.2d 710, 712 (Fla. App. 1990) (whether an agent works for insured or insurer presented a triable issue of fact).

20 Cummins & Doherty, supra note 11, at 361. Captive agents may be employees or independent contractors. Regan & Tennyson, supra note 14, at 637-38 (1996).

21 See Campbell v. Valley State Agency, 407 N.W.2d 109, 112 (Minn. App. 1987) ("agent may undertake an affirmative duty by entering into a special relationship with an insured").

22 In 2000, "the average independent insurance agency represented 7.3 personal lines insurers, 6.7 commercial lines insurers, and 4.8 life and health carriers." Jerry, supra note 15, at 64.

23 See Watkins v. HRRW, LLC, No. 3:05-00279, 2006 WL 3327659, at *7 (M.D. Tenn. Nov. 14, 2006) (observing that independent agents may be agent of the insured, but also for the insurer for some functions).

24 Cummins & Doherty, supra note 11, at 374-78.

25 The dictionary defines a broker as "an agent middleman who for a fee or commission negotiates contracts of purchase and sale between buyers and sellers" Webster's Third New International Dictionary 281 (3d ed. 1981).

26 Cummins & Doherty, supra note 11, at 361. See generally Md. Cas. Co. v. J.M. Foster, 414 P.2d 672 (N.M. 1966) (agency agreements authorized independent agent to bind and place insurance with four companies).

27 Cummins & Doherty, supra note 11, at 376-79 (observing that fees charged to insured clients are "offset by commissions").

28 See Almerico v. RLI Ins. Co., 716 So.2d 774, 776-77 (Fla. 1998) ("it is equally well settled that an insurance broker may act in the dual capacity of broker for insured and agent of the insurer").

29 See Jerry, supra note 15, at 64.

30 Id. (characterizing captive agents and insurance marketing through insurer employees directly to buyers as examples of direct marketing).

31 See Cummins & Doherty, supra note 11, at 362 (noting that independent agencies and brokers “control 32 percent of personal lines business” and 68 percent of commercial lines of property and casualty.); Regan & Tennyson, supra note 14, at 653 (observing the dominance of exclusive agencies in personal lines and dominance of independent agents in commercial lines). More specifically,

Firms which use tied sales [exclusive agents] agents sell nearly 80 percent of life-health insurance but hold only a 45 percent market share in property-liability insurance; the remainder of each of these markets is sold by firms using independent sales agents. The distribution of market shares by organizational form is also systematic within more narrow classes of insurance: for example, independent agency firms sell only 35 percent of private passenger auto insurance but control 65 percent of the commercial auto insurance market. Id. at 638.

32 Jerry, supra note 15, at 65.

33 Douglas Richmond, Insurance Agent and Broker Liability, 40 Tort Trial & Ins. Prac. L.J. 1, 3 (2004).

34 Wash. Nat'l Ins. Co. v. Strickland, 491 So. 2d 872, 874 (Ala. 1985).

35 Id.

36 Richmond, supra note 33, at 4.

37 Washington, 491 So. 2d at 874-75.

38 Intermediaries can be characterized as “two-sided firms.” Cummins & Doherty, supra note 11, at 361 n.3.

Three conditions must be present in a two-sided market: (1) two distinct groups of customers; (2) the value obtained by one group increases with the size of the other; and (3) an intermediary connects the two. Coordination of two-sided markets requires that this intermediary or “middleman” create a platform for the groups to interact. The intermediary must ensure the existence of a critical mass on both sides.

Timothy J. Muris, Payment Card Regulation and the (Mis)application of the Economics of Two-sided Markets, 2005 Colum. Bus. L. Rev. 515, at 517. As a result, each side of the market intermediaries bring together may to some extent subsidize the other. Id.

39 Washington, 491 So. 2d at 875. See also Young v. Allstate, 812 N.E.2d 741, 752 (Ill. App. 2004) (“An independent broker may act as agent of the insurer and insured in certain circumstances.”).

40 See Richmond, supra note 33, at 7-9. Richmond comments that brokers “may be an agent of the insured for purposes of obtaining coverage” but an agent of the insurer for purposes such as “issuing policies, issuing certificates of insurance, collecting premiums, and the like.” Id. at 7-8.

41 See Young, 812 N.E.2d at 752 (quoting Farmers Auto. Ins. Ass'n v. Gitelson, 801 N.E.2d 1064, 1068 (Ill. App. Ct. 2003) (identifying four factors to determine to whom a broker owes a duty as "1) who first set the agent in motion; 2) who controlled the agent's action; 3) who paid the agent; and 4) whose interests the agent was protecting").)

42 Regan & Tennyson, supra note 14, at 638-39. As Regan & Tennyson explain the agent's value in underwriting:

Although insurance sales agents do not typically participate in the formal underwriting process, they frequently play an important role in applicant risk assessment. The agent is the first contact the insurer has with a potential policyholder and may be able to obtain information about the consumer which would be difficult or costly for the firm to verify. It is widely acknowledged that agents often employ subjective criteria in evaluating insurance applicants. The agent's information may then be used by the insurer in the decision regarding whether to insure, or under what conditions to insure, an applicant.

Id. at 639.

43 Id. at 638.

44 Id. at 663. The authors explain that the advantage of utilizing independent agents "arises because the independent agent's multiple placement opportunities and ownership of policy expirations reinforce his incentives to participate in risk assessment, thereby lowering the insurer's marginal cost of obtaining agent information." Id.

45 Cummins & Doherty, supra note 11, at 359-60.

46 Id. at 360.

47 See James M. Fischer, Why Are Insurance Contracts Subject to Special Rules of Interpretation?: Text Versus Context, 24 Ariz. St. L.J. 995, 1049-50 (1992).

48 Id. at 1050-51.

49 See Hazel Glenn Beh, Reassessing the Sophisticated Insured Exception, 39 Tort Trial & Ins. Pract. L.J. 85, 85-86 (2004) (discussing justifications for pro-insured canons of contract interpretation, "including the adhesive quality of the insurance product, the parties' relative bargaining power, the relation of trust, the parties' asymmetric access to information, the unique nature of insurance, and the quasi-public nature of the insurance industry").

50 See, e.g., San Diego Navy Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 208 Cal. Rptr. 494, 496 (Cal. Ct. App. 1984) (allowing insured separate and independent counsel at insurer's expense in instances of conflict). Even jurisdictions that do not require so-called "Cumis counsel" establish enhanced obligations to govern both the attorney hired by the insurer and the insurer itself. See Finley v. Home Ins. Co., 975 P.2d 1145, 1156-57 (Haw. 1998); see also Tank v. State Farm Fire & Cas. Co., 715 P.2d 1133, 1137 (Wash. 1986).

51 Daniel Gregory Sakall, Note, Can the Public Really Count on Insurance Agents to Advise Them? A Critique of the "Special Circumstances" Test, 42 Ariz. L. Rev. 991, 1002 (2000).

52 See, e.g., Watkins v. HRRW, LLC, No. 3:05-00279, 2006 WL 3327659 at *8 (M.D. Tenn. Nov. 14, 2006) (a broker may be a fiduciary "if Plaintiff establishes that: 1) that the transaction was not an ordinary arm's length, business transaction; and 2) that the particular facts establish a confidential relationship had been established" and that to establish a confidential

relationship the plaintiff must have "reposed confidence in the agent who exercised dominion and influence to act for the plaintiff's benefit").

53 See, e.g., Highlands Ins. Co. v. PRG Brokerage, Inc., No. 01 Civ. 2272 (GHB), 2004 WL 35439 at *6 (S.D.N.Y. Jan. 6, 2004) (noting that in New York, a broker is a fiduciary in narrow circumstances, specifically collecting and receiving premiums); see also Philips v. State Farm Mut. Auto. Ins. Co., 497 S.E.2d 325, 327 (N.C. Ct. App. 1998) (insurance agent is a fiduciary for the insured "with respect to procuring insurance, correctly naming the insured in the policy, and correctly advising the insured about the nature and extent of his coverage" but has no fiduciary duty to advise insured in the absence of a request).

54 Illinois courts view the insured-broker relationship as fiduciary. However, legislation limits broker liability. See DOD Tech. v. Mesirow Ins. Serv., 887 N.E.2d 1, 6 (Ill. Ct. App. 2008) (insured stated a cause of action for breach of fiduciary duty for alleged misappropriation of premiums, an exception to statutory immunity). In New Jersey, a broker's duties have been characterized as fiduciary:

Further, as a result of the special nature of their relationship, an insurance broker owes a fiduciary duty towards its principal:

Any individual seeking insurance should be able to rely on the expertise of the agent, regardless of the prior contract between the parties. The fiduciary nature of such a relationship should not depend solely upon the length of the relationship. Because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of intricacies, the relationship between an insurance agent and a client is often a fiduciary one.

In re Payroll Exp. Corp., Bankruptcy No. 92-B-43150 (CB), 2005 WL 2438444 at *17 (Bankr. S.D.N.Y. Mar. 30, 2005) (summarizing New Jersey law and quoting Sobotor v. Prudential Property & Cas. Ins. Co.).

55 Sw. Auto. Painting and Body Repair, Inc. v. Binsfeld, 904 P.2d 1268, 1271 (Ariz. Ct. App. 1995). See Shane Ham, Arizona Case Note, Webb v. Gittlen: Assignability of Professional Negligence Claims Against Insurance Agents, 50 Ariz. L. Rev. 647, 650-51 (2008) (observing that Arizona is in a minority of jurisdictions elevating agents to a professional standard of care).

56 Michael Childress et al., A Matter of Trust, 2005 Chi. B. Ass'n Rec. 30, 32; Colin Sammon, Comment, Insurance Agent and Broker Liability: Crossing the Two Way Street, 29 Ohio N.U. L. Rev. 237, 242 (2002); Richmond, supra note 33, at 16.

57 Sadler v. Loomis Co., 776 A.2d 25, 35 (Md. Ct. Spec. App. 2001).

58 Id.

59 Id.

60 39 P.3d 947 (Or. App. 2000).

61 Id. at 948.

62 Id.

63 Grange Hall is a national social and community centered association for farmers with local affiliates in rural communities. Importantly, Grange Mutual is an insurer that focuses on the insurance needs of rural and farm

communities. Hoover's Basic Co. Rec., Grange Mutual Casualty Company (2009); see also Malcolm Trupp, Locally, Granges Thriving, The Register Guard, May 20, 2008, at A7.

64 Lewis-Williamson, 39 P.3d at 950.

65 Id.

66 Id. at 948.

67 Id.

68 Id. at 949.

69 Id. at 948-49.

70 Lewis-Williamson, 39 P.3d at 949.

71 Id. at 950.

72 Id.

73 Id.

74 The plaintiff would have been better off if Clute had advised her to obtain an appraisal of the cost of replacement, rather than to suggest an amount. Had he not wanted her to follow his advice, he could have easily warned her that it was merely his own personal opinion or better yet, not rendered any advice at all.

Canales v. Wilson Southland Ins. Agency, 583 S.E.2d 203 (Ga. Ct. App. 2003), is equally disturbing. Canales, a customer of independent agent Wilson for several years, sought automobile insurance to cover his vehicle in both the United States and Mexico. Canales did not speak English, and brought an interpreter with him to the insurance agency. After the insured vehicle was destroyed in Mexico, the insurer denied the claim because driving in Mexico was excluded from coverage. Canales filed suit against Wilson claiming Wilson did not procure the proper insurance for Canales. At summary judgment, the fact of whether Wilson expressly said the automobile policy would cover trips to Mexico was hotly contested. Both the interpreter and Canales claimed Canales requested Mexico coverage and that Wilson said the policy would cover driving in Mexico, while Wilson denied the alleged statements. Id. at 204. On the other hand, it was undisputed that Canales, who did not read English, did not read the policy issued nor have his interpreter read it to him. Canales also claimed that he relied on Wilson to obtain appropriate insurance, that he trusted Wilson to advise him, particularly because of their prior dealings and because Canales was unsophisticated in matters of insurance. Id. at 204-205. Despite the contested facts regarding what was said, Wilson obtained summary judgment, because the language of the policy issued was clear and Canales had a duty to read the policy or have someone read it to him. Id. The court observed, just because "two peoplehave come to repose trust and confidence in each other as a result of such dealings is not sufficient, in and of itself, to warrant a finding that a confidential relationship exists between them." Id. at 205 (quotation marks omitted).

75 The special circumstances exception that many jurisdictions adhere to requires the plaintiff insured to establish something more than an ordinary broker-insured relationship, i.e., a factual basis for a heightened standard of care imposed on the intermediary. See Richmond, supra note 33, at 27-28 (describing instances where courts have found a

special relationship). Yet, even when confronted with special circumstances, courts seem reluctant to find the exception applies. As Richmond observes, "special relationships are not lightly created." Id. at 27.

76 Sakall, supra note 51, at 1004.

77 Id. at 993.

78 Sakall, surveying approaches adopted by courts observed that the standard of care set by courts is inappropriately low, and the special circumstances test unwieldy. He argued that an Arizona approach is preferable. Under Arizona caselaw, Sakall explains that the duty of agents may include a duty to advise. He writes:

The Arizona approach is preferable to the majority's "special circumstances" test for a number of reasons. First, agents' duties do not turn on whether they are company agents or brokers. All insurance agents are held to a general professional duty. Second, an agent's liability turns not upon some dictate by the court but, rather, upon the conduct of the agent's colleagues and a jury's determination. If both their colleagues and a jury believe it reasonable for an agent not to have advised a client, the agent will not be found liable. Third, agents gain some certainty in knowing that they must keep up with industry customs rather than hoping that a judge does not create some new type of "special circumstance." Fourth, courts are open to clients who truly entrust their insurance concerns to their agents and seek their agents' advice. Fifth, the Arizona approach does not decrease judicial efficiency, as the "special circumstances" rule still requires a jury trial before the judge can determine whether a duty exists. Finally, if a client's damages are limited to the policy limits of a policy that should have been recommended, there is no danger of subverting the fundamental purpose of insurance in allocating risk.

Sakall, supra note 51, at 1013.

79 Id. at 1011.

80 In this regard, both sophisticated commercial insureds and unsophisticated consumer insureds fare similarly. See, e.g., Wilmering v. Lexington Ins. Co., 678 S.W.2d 865, 872 (Mo. Ct. App. 1984) (finding no duty of insured's broker to advise or explain "watchman" warranty to an insured corporate owners of a river vessel purchasing marine insurance). In my view, Richmond also has unrealistically heightened expectations of insureds. See Richmond, supra note 33, at 33 ("[c]ommerical insureds are keenly attuned to deductible amounts and issues").

81 Richmond, supra note 33, at 12, (citing Weisblatt v. Minn. Mut. Life Ins. Co., 4 F. Supp. 2d 371, 382 (E.D. Pa. 1998)).

82 Id.

83 Beh, supra note 49, at 94, 97-98.

84 See generally Fitzpatrick, supra note 7, at 3041 (recounting events and repercussions of the New York lawsuits and investigations). See also In re Marsh ERISA Litigation, No. 04 Civ. 8157(SWK), 2006 WL 370169 (S.D.N.Y. Dec. 14, 2006). Insurers were also targeted in the Spitzer investigation. For example, Aon Corporation eventually settled with the State of New York, apologized for participating in contingent commission steering schemes, and established a fund for insured claimants. See Piven v. Ryan, No. 05 CV 4619, 2006 WL 756043, at *1 (N.D. Ill. Mar. 23, 2006).

85 While attention was largely directed at large commercial brokers, such as Marsh and Willis, in fact contingent commissions were common compensation schemes with brokers of all sizes. Fitzpatrick, supra note 7, at 3045, 3056-57.

86 See Cummins & Doherty, supra note 11, at 379. Cummins and Doherty also observe that "[s]ome intermediaries also receive noncash compensation from insurers" to reward "superior performance." Id. at 379, n.17.

87 Cummins & Doherty, supra note 11, at 379.

88 Fitzpatrick, supra note 7, at 3049.

89 Id. The practice of paying commissions based upon profitability is not new. See, e.g., Harris & Spear, Inc. v. Concordia Fire Ins. Co. of Milwaukee, 68 F.2d 63 (9th Cir. 1933) (describing terms of a 1922 broker contract with an insured: "By the terms of the contract the said general agents or managers were allowed 'a flat commission of thirty-five per cent of the net premiums written,' and, in addition thereto, 'a contingent commission of fifteen (15) per cent of the net profits of the business under their charge, said profits to be computed as of the 31st day of December, 1923, and annually thereafter on the business of each 'single' year so long as this agreement shall continue."). An agreement between a broker and an insurer from the 1980's described the contingent commission as based on 25% of the "[n]et underwriting profit" described as "the excess of income to plaintiff [insurance company] over outgo from plaintiff." Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Risk Exchange, Inc., No. 86 Civ. 7461 (MJL), 1990 WL 210258 at *1 (S.D.N.Y. Dec. 13, 1990).

90 Regan & Tennyson, supra note 14, at 648-50.

91 Cummins & Doherty, supra note 11, at 379. See Roth v. AON Corp., 2008 WL 65069 at *1 (N.D. Ill. Mar. 7, 2008) ("'contingent commissions' refers to a practice in which brokers such as Aon received payments from insurers based on the overall volume or profitability of business that brokers placed with those insurers.").

92 Cummins & Doherty, supra note 11, at 379.

93 Id.

94 Douglas Richmond argues that intermediaries do not have any duty to disclose their compensation to insureds. Richmond, supra note 33, at 35-36. He argues that the competitive marketplace and other market forces, state regulation, impracticalities, and its attenuated effect on premiums favor a no duty to disclose compensation rule. Id.

95 The intermediary's value to the insurer is the fact that they own their client lists. "Agent ownership of policy expirations means that the insurance provider has no legal right to solicit an independent agent's clients directly or to replace the agent and assign his customers to another agent." Regan & Tennyson, supra note 14, at 640. When a policy is first placed or later renewed, an agent earns a "premium based commission." Cummins & Doherty, supra note 11, at 375. This is "a commission which is a proportion of premium volume." Regan & Tennyson, supra note 14, at 648. Some insurers only pay premium-based commissions. Cummins & Doherty, supra note 11, at 375.

96 Schwarcz, supra note 3.

97 Id. at 297. See Jeffrey Wilder, Competing for the Effort of a Common Agent: Contingency Fees in Commercial Lines Insurance (U.S. Dep't of Just., Antitrust Div., Econ. Analysis Group, Working Paper No. EAG03-4, 2004), available at http://irm.wharton.upenn.edu/S02-Wilder.pdf. The study found that contingency fees affect where brokers place their customers in several ways. Brokers receiving contingency fees are more likely to place new customers with insurers offering contingency fees, they are less likely to move renewing insureds to non-contingency fee paying insurers, and they are less likely to place customers with insurers "for which contingency fee contracts have been 'swamped' by past losses and are unlikely to pay contingency fees in the current year." Id.

98 Victor P. Goldberg & Richard A. Epstein, Introductory Remarks: Some Reflections on Two-Sided Markets and Pricing, 2005 Colum. Bus. L. Rev. 509, 512 (2005).

99 Schwarcz, supra note 3, at 878. Recently, an Illinois Appellate Court recognized that an allegation that the broker's undisclosed contingent commissions "led [the broker] to place certain policies for the customer's needs" could state a claim for misappropriation of premiums. DOD Tech. v. Mesirow Ins. Servs., Inc., 887 N.E.2d 1, 8 (Ill. App. 3d 2008). On the other hand, Richmond takes the view that intermediaries have no duty to disclose and that no cause of action for failure to disclose contingent commissions is viable. Richmond, supra note 33, at 33. Richmond contends that claims based on a failure to disclose commissions are ill-conceived. Id. He writes, "[b]oth agents and brokers are entitled to what the insurance industry considers to be reasonable compensation for their services, even if cost-conscious insureds think otherwise." Id. at 36. However, in our view, Richmond does not adequately consider the allegation of self-motivated steering.

100 See Cummins & Doherty, supra note 11, at 360 ("Although contingent commissions, like most business practices, can be misused by the unscrupulous, in general such compensation plans play an important role in aligning incentives between buyers and insurers and thus facilitate the efficient operation of insurance markets.")

101 Fitzpatrick, supra note 7, at 3067-71 (citing "transparency" as the key to the problem posed by contingent commissions).

102 Schwarcz, supra note 3, at 878.

103 Joseph B. Treaster, Connecticut Suit Says Marsh and Insurer Misled State, N.Y. Times, Jan. 22, 2005, available at http:// www.nytimes.com/2005/01/22/business/22insure.html ("Clients paid Marsh a fee or commission for unbiased recommendations and, according to the lawsuit, were often unaware of the incentive payments").

104 Stempel, supra note 2, at 741.

105 Independent adjusters are independent contractors who work for insurers and self-insurers to investigate and adjust claims. Public adjusters, on the other hand, work for insureds to help them present their claim. See, e.g., Hammill v. Pawtucket Mut. Ins. Co., 892 A.2d 226, 232 (Vt. 2005) (explaining that independent adjusters works "in behalf of the insurer" and public adjuster works "in behalf of insured"); Benjamin v. Thomas Howell Group, No. Civ.1996-071, 2002 WL 31573004, at *2 (D.Virgin Islands Apr. 22, 2002) (explaining that a public adjuster works on behalf of the insured, while an independent adjuster "represent[s] the interests of the insurer"). See also NYA djusters: Who We Are, http:// www.nyadjusters.org/Who_we_are/who_we_ are.html.

106 Stempel, supra note 2, at 547.

107 Id.

108 See id.

109 Stempel, supra note 2, at 547.

15 CTILJ 571