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Insurance Bad Faith

Extracontractual Recovery Without Bad Faith: What Every Insurer Needs To Know About Insurance Intermediaries' Liability To Insureds

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Commentary

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I. Introduction

An insured calls to report a claim to Ybor City Indemnity Co. She hit a pedestrian and believes he was seriously injured. She carries $10,000 in automobile-liability coverage. The adjuster promptly obtains the police report and sends an initial-contact letter to the injured pedestrian. A week later, he receives a letter of representation from the pedestrian's attorney, enclosing medical records indicating that the claimant has been rendered paraplegic. The adjuster checks the public records. There is no hospital lien. The pedestrian is not married and has no children. He immediately tenders a draft for the policy limits to the pedestrian's attorney and encloses a sworn disclosure statement, a certified copy of the policy, and a financial affidavit from the insured showing that she carries no other insurance and has no assets. He receives back a letter thanking him for his prompt efforts to settle the case but explaining that $10,000 simply isn't enough money to compensate his client. Suit is filed. The adjuster advises the insured of this and retains defense counsel for her. The litigation lasts three years, but Ybor City Indemnity defends her all the way to a judgment and through appeal, sparing no expense.

Concerned that the judgment is for three million dollars on a ten-thousand-dollar policy, the adjuster retains counsel to give an opinion as to Ybor's exposure for bad faith. After reviewing the file, counsel assures him that his handling of the claim has been nothing short of perfect and that the facts absolutely will not support a bad-faith claim. The adjuster reports to his supervisor that they can both rest soundly with the knowledge that Ybor will not have to pay any extra-contractual money on this claim. Right?

Not so fast. The following day, the adjuster receives a call from Bill Loman. Bill Loman is the insurance agent who sold her the Ybor City Indemnity policy. Mr. Loman explains that he has just been served with a summons and complaint. Count One alleges that the insured had asked him to secure "full coverage" for her but that he, instead, only obtained a $10,000 policy. Count Two alleges that he negligently failed to advise her to purchase enough liability coverage to protect her from this kind of a judgment. Count Three is against Ybor itself. It alleges that Mr. Loman was acting as an agent for Ybor City Indemnity and that Ybor is vicariously liable for Mr. Loman's errors and omissions. The adjuster thanks him for letting Ybor know about the claim advises him to report the suit to his errors-and-omissions carrier. "I just did," Mr. Loman replies. "It's Ybor." The adjuster hangs up and calls his supervisor. This claim is a long way from over.

Few in the industry would deny that attorneys for insureds and third-party claimants often employ strategies — frequently referred to as "set ups" — designed to enable extracontractual recovery by making even insurers with the best intentions appear to have acted in bad faith. But over the years, insurers have become increasingly adept at recognizing and responding to such "set ups," thereby making it more difficult to prevail in bad-faith claims arising from them. Nevertheless, it is a mistake to assume that a weak bad-faith claim means that extracontractual liability is impossible. In the scenario above, the fact of the matter is that recovery from Ybor City Indemnity for an amount exceeding the policy limits may be the pedestrian's only means by which to pay for the care that he will need for the rest of his life. If a bad-faith claim is unavailable or unwinnable, insurers should expect plaintiffs to seek alternate means of obtaining extracontractual recovery. Error-and-omission claims offer plaintiffs many of the advantages that bad-faith claims offer: the prospect of unlimited recovery, an amorphous body of law that is complex enough to leave room for jury questions in most instances, and jury sympathies strongly identified with the insured. As bad-faith claims arising from "set ups" become less frequently brought and less frequently won, insurers should expect this to coincide with an increase in claims arising from alleged errors and omissions by insurance intermediaries.

This being so, it behooves insurers to be familiar with the law regarding the liability of insurance intermediaries. This article is intended to provide an overview of the law of insurance-intermediary liability for insurers and a discussion of some common issues that arise in defending an insurance-intermediary claim.

II. Types Of Insurance Intermediaries

This article uses the term "insurance intermediary" to refer, generally, to any of the various middlemen between insurers and insureds involved in the sale of insurance.

The case law generally classifies insurance intermediaries as "agents" or "brokers," though these terms are themselves without precise meanings.[1] Traditionally, an "agent" is a representative of an insurer who deals at arm's length with insureds,[2] and a "broker" is a representative of an insured who deals at arm's length with insurers[3] and sometimes also offer insurance-counseling services.[4]

In practice, the line between the two is often blurry,[5] and there are a number of subcategories for each.[6] Further frustrating attempts to define them, either one can act as the other for some limited purpose, even in the same transaction.[7] For instance, a broker may be a representative of an insured for the purpose of applying for insurance but an agent of the insurer for the purpose of obtaining a waiver of uninsured-motorist coverage.[8] Conversely, an agent may be a representative of the insurer for the purpose of receiving an application and collecting premiums but an agent of the insured when counseling the insured as to his insurance needs.[9] The important thing to remember is that an insurance intermediary is always acting as an agent for *someone.*[10] Whether an intermediary is acting on behalf of the insured or the insurer at any given moment depends on the facts of the case.[11]

The answer to this question is important for two reasons. First, it determines to whom the intermediary owes a duty.[12] Generally speaking, a true "agent" acting solely as an agent of the insurer owes no special legal duties to the insured.[13] Inversely, a true "broker" acts as an agent for the insured and owes no special duties to the insurer.[14] Second, the acts of an "agent" within the scope of his authority are generally imputable to the insurer while the acts of a "broker" are generally imputable to the insured.[15] Though this article primarily focuses on whether certain conduct does or does not create liability, it should be noted at the outset that, in actions where an error or omission clearly has been made, the issue of whether the insurance intermediary was an "agent" or a "broker" can quickly become the central focus of the litigation.

III. Common Types Of Claims Against Insurance Intermediaries

Claims against insurance intermediaries[16] have been recognized under both tort and contract theories.[17] Such claims can arise from a number of different fact patterns, but the most typical claims involve the intermediary's failing to procure any insurance coverage at all,[18] procuring inadequate coverage,[19] providing bad advice about insurance coverage[20] (or, more controversially, failing to volunteer unsolicited advice),[21] and placing coverage with an insolvent carrier.[22]

A. Failing To Procure Insurance

The most straightforward type of insurance-intermediary claim arises when an insurance intermediary agrees, then fails, to obtain an insurance policy for a customer.

Such claims can generally be brought as actions for breach of a contract to procure insurance,[23] the damages being the amount of the loss that would have been covered if the insurance had been procured.[24] In such breach-of-contract claims, most courts hold that it is not necessary for there to have been any separate consideration for the contract to procure insurance; the insured's agreement to accept and pay for the policy, if placed, is consideration enough.[25]

Many courts also permit an insured, at her option, to sue an insurance intermediary for negligence,[26] although there is some indication of a trend toward applying the economic-loss doctrine to bar tort claims against insurance intermediaries.[27] Courts permitting recovery for negligence in the procurement of insurance generally hold that an insurance intermediary who, "with a view to compensation for his services, undertakes to procure insurance for another, and unjustifiably and through his fault or neglect, fails to do so, will be held liable for any damage resulting therefrom."[28] Generally speaking, even in jurisdictions that permit recovery under a negligence theory, the insured cannot prevail on a negligence claim without a valid contract for the procurement of insurance coverage.[29] Nonetheless, some courts have held that an insurance intermediary who undertakes to procure coverage for another, gratuitously and without compensation, still owes a tort duty to exercise reasonable care in securing the policy.[30]

Notwithstanding any of the above, an insurance intermediary can never have, either in contract or in tort, an absolute duty to procure coverage that he is not, after diligent effort, able to procure. In a negligence action, the insurance intermediary effectively discharges his tort duty by giving timely notice to the insured that he was not able to procure the requested coverage.[31] In a breach-of-contract action, though the insurance intermediary has entered into a contract to procure the requested coverage, the act of notifying the insured that the requested coverage was not obtained functions as a waiver of the insured's right to performance under the contract and an estoppel against her right to assert a claim for breach of contract.[32]

In addition to a claim by the insured, some states also permit third-party claimants to bring direct actions against an insurance intermediary. In Florida, for example, an injured third party is permitted to bring a direct claim against a tortfeasor's insurance intermediary for negligently failing to procure liability insurance that would have covered the third party's claim against the tortfeasor.[33] Before bringing such a claim, however, the injured third party must first be successful in his claim against the tortfeasor.[34]

B. Procuring Inadequate Coverage

The most common types of claims alleging failure to provide "adequate" coverage arise when: (1) a policy excludes, or simply does not cover, an insured's loss; and (2) a policy provides coverage for an insured's loss but has policy limits that are too low to make the insured whole. As with failure-to-procure claims, inadequate-coverage claims may be brought as claims for breach of contract or, in many states, as negligence claims.[35] Some states also allow the claim to be brought as a claim for breach of a fiduciary duty[36] or for misrepresentation of the policy's coverage.[37]

To give an example, *Fillinger v. Northwestern Agency, Inc. of Great Falls*[38] involved an outfitting business whose owners asked an insurance intermediary to procure a liability policy that would cover injuries caused by horses.[39] Both before and after a horse-related injury, the insurance intermediary assured them that the policy covered injuries caused by horses, but it didn't.[40] Under these circumstances, the Supreme Court of Montana affirmed a jury verdict for the insured on a negligent-misrepresentation theory.[41]

Where an insurance intermediary secures coverage that is less extensive than requested, the claim is legally similar to a failure-to-procure claim. For instance, where an insured requests a $100,000 liability policy and the intermediary, through mistake, obtains a $10,000 liability policy instead, the insured can recover the amount of a loss that would have been covered if the requested policy limits had been obtained.[42] Likewise, if an insured expresses to the intermediary that she seeks a policy covering an expressed risk and the intermediary obtains a policy that excludes that particular risk, the intermediary can become liable to the insured for the amount of a loss that would have been covered.[43]

Such claims are not always as straightforward. For instance, in *Cusimano v. St. Paul Fire & Marine Insurance Co.*,[44] a trucking company carried motor-vehicle liability coverage in the amount of $100,000/$300,000 and advised its broker that it needed to carry liability limits of $250,000/$500,000 to comply with a client's requirements.[45] Unable to convince the carrier to raise the policy limits, the broker obtained an excess policy in the amount of $150,000/$200,000 and sent a certificate of insurance to the insured's client showing that the insured now carried liability limits of $250,000/$500,000.[46] When an accident resulted in the death of two persons, the $100,000/$300,000 policy paid $100,000 for each person, and the excess policy paid its $200,000 per-accident limit, totaling $400,000 instead of $500,000.[47] Under these circumstances, the insurance intermediary was held liable for the $100,000 difference.[48]

Inadequate-coverage claims are sometimes premised upon an insured's alleged request for "full coverage" (or "complete protection" or some similar expression) coupled with the assertion that any policy failing to cover one hundred percent of a loss did not comply with the insured's request. There is no such thing as "full coverage"; every policy has exclusions, policy limits, effective dates, deductibles, and so forth.[49] Generally speaking, the courts are unreceptive to claims arising out of an allegation that "full coverage" was promised or requested.[50] For instance, in *DeWyngaerdt v. Bean Insurance Agency, Inc.*,[51] a tree trimmer alleged that his insurance intermediary knew that he was engaged in the business of tree trimming, that he had requested "full coverage" from the insurance intermediary, and that he had subsequently suffered an uncovered loss because the insurance intermediary had obtained a policy that excluded coverage for "wrongful cutting."[52] In affirming the dismissal of his complaint, the Supreme Court of New Hampshire held that the request for "full coverage" "was too broad and too vague to constitute a *specific request* for the particular coverage of 'wrongful cutting.'"[53] Though this is the general rule, insureds and/or third-party claimants are occasionally successful in bringing claims against insurance intermediaries arising from an allegation that "full coverage" was requested by the insured or promised by the insurance intermediary.[54]

C. 'Bad Advice' Relating To Insurance Coverage

Where an insurance intermediary endeavors to provide advice to his customer, he is generally required to exercise due care in giving advice.[55] For instance, in *Seascape of Hickory Point Condominium Ass'n v. Associated Insurance Services, Inc.*,[56] a condominium association alleged that it relied on an insurance intermediary "to provide insurance planning advice," that it requested coverage for its seawall in the case of storm damage, and that it was told that no such insurance product was available.[57] Its complaint further alleged that, after a storm damaged its seawall, it turned out that such coverage was both available and widely known among insurance professionals.[58] This sufficiently alleged a claim for negligence in the rendering of advice on insurance matters.[59]

In situations where an insurance intermediary has a duty to give advice, the courts have unfortunately been unclear as to how far the insurance intermediary must go in rendering advice.[60] For example, in *Adams v. Aetna Casualty & Surety Co.*,[61] the son of an insured who carried low uninsured-motorist ("UM") policy limits sustained serious injuries in a car-pedestrian accident.[62] In that case, over the years, the insured had signed four forms rejecting UM coverage equal to his liability limits.[63] In rejecting an insurance intermediary's argument that this conclusively demonstrated the insured's knowing rejection of UM limits equal to his liability limits, the Florida appellate court explained that the insurance intermediary had undertaken a duty to advise the insured and that the duty included a duty to advise the insured of the "availability and *desirability*" of purchasing higher limits.[64] In other words, offering the coverage and obtaining a written rejection of it wasn't enough; the insurance intermediary had a duty to advise the insured of the "desirability" of having higher coverage.

The rationale behind *Adams* seems strained. Most people know that it is "desirable" to have higher insurance limits than lower ones. Taken too far, a duty to advise could quickly convert an insurance intermediary from advisor to guarantor, making him liable to his customers even where he has advised them to purchase coverage but has not been as persuasive as he might have been.[65] In cases where an insurance intermediary has a *bona fide* duty to advise and has, in fact, given the advice, the insurance intermediary should not incur liability if the insured nevertheless chooses to disregard the advice.[66]

D. Failure To Volunteer Unsolicited Advice As To Coverage Needs ('No Advice')

Insureds who find themselves underinsured after a loss will frequently allege that an insurance intermediary should have realized that they were underinsured and spontaneously recommended that the insured purchase additional coverage. Such claims are inherently speculative, for much as insureds honestly believe in hindsight that they would have happily doubled their monthly insurance premiums if only they had been told that they were underinsured, it is impossible to know whether or not they actually would have.[67] Indeed, recognizing a generalized duty to volunteer advice would create the opportunity to insure a risk *after* a loss simply by asserting that the insured would have purchased additional coverage if it had been offered.[68] The general rule, then, is that "[t]he failure to volunteer information, without evidence that the insurance agent agreed to provide advice or that the insured reasonably expected such advice, does not constitute negligence or breach of contract."[69]

The Maryland case of *Sadler v. Loomis Co.*[70] involves both a typical failure-to-advise claim and an excellent analysis of the reasons behind this general rule. In *Sadler*, a 77-year-old woman had been obtaining automobile insurance, both for herself and her family-owned hardware store, from the same insurance agency for 50 years.[71] At the time of an accident, she carried $100,000 in automobile-liability coverage, testifying that she "never dreamed" that she would ever be in an accident and incur liability beyond that amount.[72] After being involved in an accident that caused her to incur liability exceeding her policy limits by $900,000,[73] she sued the insurance agency for negligence, alleging that it should have recognized her financial exposure and counseled her to purchase sufficient coverage to protect her personal assets.[74]

In affirming the trial court's entry of summary judgment for the insurance agency on the ground that the insurance agency had "no affirmative, legally cognizable tort duty to provide unsolicited advice to an insured regarding the adequacy of liability coverage,"[75] the Maryland appellate court surveyed the various reasons that other courts have refused to recognize such a tort duty. For one, as between the insured and the insurance intermediary, the insured is usually in the best position to assess the value of her assets and the extent of a potential loss.[76] Further, an insurance intermediary can neither compel an insured to provide personal financial information nor verify the accuracy of any information voluntarily provided, so responsibility for the amount of coverage ought to fall on the insured.[77] Most importantly, requiring insurance intermediaries to volunteer unsolicited advice transforms them into "risk managers" or "personal financial counselors or guardians of the insured," imposing a species of guarantor status on them and taking them well beyond anything required by law or by common sense.[78] Indeed, recognizing such a duty would simply encourage insurance intermediaries to sell "defensively," consistently advising their customers to purchase the maximum amount of available coverage at all times without regard to whether it would result in a "mis-allocation of personal resources of individual insureds."[79]

Under certain circumstances, however, the courts have recognized a limited duty to provide unsolicited advice where the insured and insurance intermediary share a "special relationship."[80] Courts from various states have attempted to articulate the factors to be considered in determining whether or not a "special relationship" exists, though the list of factors tends to vary from state to state. Some of these factors include whether the intermediary has received compensation beyond the premium payment, whether the insured made a clear request for the intermediary's advice, whether there was an express or implied agreement that the insurance intermediary would render advice, whether there was a course of dealing reasonably putting the insurance intermediary on notice that his specific advice was being sought and relied upon, whether the insurance intermediary had broad discretion in servicing the insured's needs, and whether the insured relied upon the insurance intermediary's declaration of skill and expertise.[81] Even so, "special relationships" should not be created lightly.[82] For instance, the length of the relationship, by itself, is insufficient to create a duty to volunteer unsolicited advice.[83] Likewise, the simple fact that the insurance intermediary is aware that his customer is less knowledgeable than him is not enough to create such a duty.[84] Other courts look exclusively to the question of whether the insurance intermediary has agreed, either expressly or impliedly, to render advice as to the customer's insurance needs.[85] Some courts treat the question of whether a "special relationship" exists as a question of law.[86] Others treat it as a question of fact.[87]

Apart from the existence of a "special relationship," some courts have held that an insurance intermediary can have a duty to volunteer advice if the intermediary holds himself out as an expert in a given field of insurance.[88] The "holding out" is not, however, sufficient in and of itself; the insured must actually be aware of the "holding out" and actually rely upon the insurance intermediary's "holding out."[89] Though recognized as a valid legal theory in many jurisdictions, recovery under this rationale is very rare.[90]

E. Placement Of Coverage With An Insolvent Carrier

Even where an insurance intermediary places coverage with a carrier that later becomes insolvent, insureds' resulting losses are frequently absorbed by state insurance-guaranty funds.[91] Still, state guaranty funds can be subject to statutory caps or limitations, and guaranty funds are typically unavailable to an insured whose coverage is through a surplus-lines carrier.[92] In instances where an insurer's insolvency leaves an insured with an unpaid loss, they routinely sue their insurance intermediaries in attempt to receive the coverage that was bargained for.[93]

The courts recognize a general duty on the part of insurance intermediaries to exercise reasonable skill and diligence in selecting a financially stable insurance carrier.[94] Accordingly, the general rule is that, if an insurance intermediary procures a policy from a carrier that he knows to be insolvent, he is liable for a loss caused by the insurer's insolvency,[95] but where the insurer was solvent at the time that the policy was procured, the insurance intermediary does not become liable for the insurer's subsequent insolvency.[96]

Where an insurance intermediary does not *know* a carrier to be insolvent, but also does not know whether the carrier is solvent, there is a split in authority as to the insurance intermediary's duty to investigate the financial stability of a carrier before placing coverage. To be sure, insurance intermediaries do not have the ability to audit carriers' finances[97] or compel them to disclose financial information.[98] Even if they could, financial analyses by individual insurance intermediaries would be duplicative of the work done by the insurance commissioner in the insurance intermediary's home state.[99] Because of this, courts generally hold that, so long as an insurance intermediary places coverage with an insurer authorized to transact business in the state, he has no tort duty to duplicate the insurance commissioner's efforts by investigating the insurer's financial condition.[100] The same reasoning holds true with a surplus-lines carrier authorized to do business in a state.[101]

Other courts, however, have held that, while the insurance intermediary may raise the insurer's compliance with the regulatory process in defense, the insurance intermediary can still be liable where the regulatory process has failed but a reasonable inquiry would have revealed the carrier's instability.[102] Nevertheless, even in these jurisdictions, simply checking an insurer's status with regulatory bodies and checking its ratings with a ratings service such as A.M. Best or Standard & Poor's will usually discharge the duty to make a reasonable inquiry.[103] Further, if an insurer is solvent at the time insurance was placed, an insurance intermediary does not have a duty to continue to monitor the insurer's financial condition and inform his former clients if the carrier's financial position changes.[104]

F. Other claims

Like bad-faith claims, the factual and legal bases for claims against insurance intermediaries are potentially limitless. Insurance intermediaries, and the insurers whose products they sell, have been sued for defamation,[105] fraud,[106] breach of fiduciary duty,[107] fraudulent concealment,[108] violation of state unfair-or-deceptive-trade-practices statutes,[109] and a number of other legal theories. This makes such claims difficult to anticipate and avoid without the assistance of counsel.

IV. Common Issues Involved In Defending An Insurance-Intermediary Claim

A. Direct Claims Against Carriers

Carriers themselves are sometimes named as defendants in claims arising from alleged errors and omissions by insurance intermediaries.[110] Particularly with failure-to-procure claims, managing the risk of such claims is difficult for insurers as the plaintiff is generally not a policyholder and frequently is not even an applicant. In such instances, the claim can appear to the insurer to have come out of nowhere; the plaintiff will be a stranger to the insurer notwithstanding that the insurance intermediary has had some interaction of which the insurer is unaware.

These claims are sometimes premised on the dubious notion that the insurer is vicariously liable for the intermediary's negligence in procuring coverage for the insured because the intermediary was acting as an agent for the insurer. This notion should be a legal impossibility as, even if the intermediary is an agent of the insurer for all other purposes, he is the agent of the insured for the purpose of procuring the coverage.[111] Accordingly, it should not be possible for an insurance intermediary to be, simultaneously, the insured's agent for the purpose of owing a duty to the insured and the insurer's agent for the purpose of imposing vicarious liability on the insurer. Indeed, some courts have disposed of such claims on this basis.[112] Others, however, have held that the agency issue — and hence the issue of an insurer's vicarious liability for the intermediary's negligence — should be decided by a jury, implying that it is possible for the intermediary to have been the agent of both insured and insurer at the same time.[113]

Further, under certain circumstances, insurance intermediaries can be entitled to indemnification from insurers,[114] and insurers can be entitled to indemnification from insurance intermediaries.[115] Between the prospect of vicarious liability and the prospect of an indemnity claim, a carrier should not presume that it will be a mere bystander to an insured's error-and-omission claim against an insurance intermediary.

B. Statute-Of-Limitations Issues

There is a lack of uniformity as to when a cause of action arises, for limitations purposes, against an insurance intermediary.[116] Florida's courts, for instance, hold that an insured's action against an insurance intermediary does not accrue until the conclusion of any underlying litigation against the insurer.[117] Other courts have held that the cause of action accrues at the time of the insurance intermediary's negligent act,[118] when coverage is denied,[119] when the insureds under a liability policy learn that their insurer will not provide them with a defense,[120] or when the insurer obtains a declaratory judgment that it is not required to provide coverage.[121] Still others have applied different rules to contract-based claims and tort-based claims.[122]

Apart from determining when the claim *accrues*, the plaintiff's choice of legal theory can also determine the *length* of the limitations period.[123] In Florida, for example, the limitations periods are five years for a contract action,[124] four years for a negligence action,[125] and two years for a professional-malpractice action.[126] In states that provide for different limitations periods for professional-negligence actions as opposed to general negligence actions, the issue of whether insurance intermediaries are "professionals" becomes more than an issue of semantics.[127] Some states consider them to be professionals;[128] others do not.[129]

Pinpointing the end of the limitations period, then, can be very complicated. It can also result in an impressive length of time between the alleged negligent act and the end of the limitations period. For instance, in a jurisdiction where the cause of action against an insurance intermediary does not accrue until the final resolution of underling litigation against an insurer, there could be a year between the sale of a policy and an underlying loss, two or three years before the insured commences underlying litigation against the insurer, five or six years before the underlying litigation is resolved in favor of the insurer through appeal, and an additional five years before the limitations period runs for the claim against the insurance intermediary. It is possible, then, for an insurance intermediary to procure a policy for an insured and hear nothing further about it until he is served with a summons and complaint fifteen years later!

Naturally, after fifteen years, one would expect that the insurance intermediary no longer remembers the insured, no longer has any records of any written or verbal correspondence with the insured, and has no information about the whereabouts of any employees who might have interacted with the insured so long ago. If faced with an insured who claims to remember vividly that the insurance intermediary made certain promises and representations upon which her case is built, disproving those allegations is difficult to do without records or recollections of the conversations. In such cases, the strength of the defense can easily turn on how well the insurance intermediary's records have been preserved. Because of this, where an insurance intermediary (or his errors-and-omissions carrier or an insurer from whom he procures coverage involved in a loss) suspects that a claim against an insurance intermediary is likely to arise from an underlying claim, it is prudent to take immediate efforts to ensure that relevant records are retained and employee and witness statements are taken and preserved.

C. Simultaneous Actions For Coverage

A claim against an insurance intermediary for failure to procure coverage is inherently inconsistent with a claim against an insurer for the coverage that was allegedly not procured.[130] If an insured is successful in a suit against an insurer for coverage, the insurance intermediary cannot be liable for failing to secure coverage. In situations where an insured attempts to cover all angles by suing the insurer for coverage (either by estoppel or otherwise) while simultaneously asserting claims for failure to procure coverage against an intermediary or against the insurer itself, the defense should move for abatement of the failure-to-procure claim until the coverage claim has been resolved.[131]

D. Causation

It is a mistake to assume that an insured has a valid claim against an insurance intermediary simply because the insured has suffered an unprotected (or underprotected) loss and the insurance intermediary has made an error. The error has to be the factual and legal reason that the insured's loss was uninsured (or underinsured).[132] For instance, in a situation where an insolvent carrier was the only carrier willing to place a risk, there is no proximate causation between the insurance intermediary's placement of coverage with the insolvent carrier and the insured's loss.[133] Likewise, in a failure-to-procure action sounding in negligence, there is no proximate causation between the negligent act and the insured's unprotected loss if the policy, had it been procured, would not have covered the loss.[134]

Similarly, in misrepresentation claims, an insured must show detrimental reliance on the insurance intermediary's representation in order to prevail.[135] In cases where an insured claims to have been told by an insurance intermediary that some contingency would be covered, the insured bears the burden of demonstrating that, had the insurance intermediary not made the misrepresentation, the insured would have been able to insure against that contingency.[136] At a minimum, this requires a showing that: (1) some insurance company was writing that risk at that time; and (2) the insured would have qualified for and secured that coverage.[137]

In cases where insureds claim that an insurance intermediary should have recommend the purchase of higher policy limits, knowing the extent to which higher coverage was available at the relevant time can assist insurers in capping damages or, in cases where the insured already carried the highest amount of coverage available, defeating the insured's claim altogether. In such cases, discovery of the insured's finances and monthly expenses is relevant. For instance, where an insured incurs a one-million-dollar judgment arising from an automobile accident and sues an insurance intermediary for failing to recommend that she carry one million dollars in liability coverage, the fact that such a policy was available on the market does not establish proximate causation if the insured could not have afforded it. For this reason, archiving underwriting and actuarial information can be of great assistance to an insurer or insurance intermediary in defending claims against insurance intermediaries. In this hypothetical, for instance, the defendant who is able to show exactly how much coverage the insured could have afforded is in a much better defensive position than the defendant who cannot.

E. Insured's Failure To Read Her Policy

In many cases, an insured would have been able to discover a deficiency in coverage simply by examining her policy. The courts have adopted a spectrum of approaches to address this situation. At one end of the spectrum, some courts consider the insured's failure to read her policy as an absolute defense for the insurance intermediary. At the other end, some courts hold that the insured's failure to read her policy is no defense at all. Most courts are somewhere between the two.

The classical common-law rule is that a party to a contract has a duty to read and understand it and will not be heard to argue that she did not know what it contained.[138] Additionally, where an insured actually reads her policy and realizes that it does not provide the desired coverage, the law will not permit her to sit back and do nothing and then recover a subsequent unprotected loss from the insurance intermediary that procured the policy.[139]

Putting these two rules together, one might expect that, where an insured neglects to read her policy and discover that it does not provide the coverage desired, the courts would not permit her to recover from her insurance intermediary. Certainly, that *is* the law in several states. In Vermont, for instance, the law is that:

> The agent's task is to be generally fair and truthful in explaining the nature of a policy, not to warn the insured about the impact of necessarily complex contract language on every eventuality. As long as the agent does the job without negligence, as between the agent and the purchaser, the task of reading and understanding the policy text is that of the purchasers.[140]

Some courts that apply this strict rule, however, have developed exceptions. In Georgia, for instance, the rule does not apply when: (1) the intermediary holds himself out as an expert and the insured reasonably relies upon the intermediary's expertise to identify and procure the correct type and amount of insurance; or (2) the intermediary and insured share a "special relationship of trust or other unusual circumstances which would have prevented or excused [the insured] of his duty of ordinary diligence."[141] Complicating things further, there is an exception to the exception where the deficiency in the policy would have been "readily apparent" upon examination of the policy.[142] In contrast to negligence claims, however, the insured's failure to read her policy generally does not bar liability where the action is for breach of contract.[143] Where this is the case, defense counsel should raise the defense of failure to mitigate damages by reading the policy and requesting that any errors be corrected.[144]

At the other polar extreme, some courts have held that an insured's failure to read her policy is no defense at all for her insurance intermediary.[145] These courts reason that the insured is entitled to assume that an insurance intermediary has performed his duty to the insured, and the duty is not diminished simply because a policyholder has failed to detect an error.[146] An additional rationale for this rule is that, where a professional's duty involves protecting his client from self-inflicted harm, the client's self-inflicted harm is not to be regarded as contributory negligence.[147] Nevertheless, even in jurisdictions that favor this approach, it is still possible for the insurance intermediary to raise the defense that the insured's failure to read her policy severs any causal link between the agent's alleged fault and the insured's damages.[148]

A more middle-ground approach is that the insured does not necessarily have an absolute obligation to read the policy but, instead, has an obligation to act reasonably under the circumstances.[149] This duty may sometimes require an insured, at the very least, to check parts of the policy; other times it may not.[150] In Oregon, for instance, the jury is asked to consider: (1) whether it was unreasonable, under the relevant circumstances, for the insured not to read the policy; and (2) if so, whether the insured's unreasonable failure to read the policy contributed to the insured's damages.[151] The reasonableness of the insured's failure to read her policy is informed by the extent to which the insured/intermediary relationship justifies the insured's reliance on the intermediary to obtain the requested coverage.[152] Other considerations may include whether the policy was a new policy or a renewal, the nature of any past dealings between the insured and the insurance intermediary, the information that the insured was given regarding the policy, the extent to which it would have been difficult for the insured to detect and appreciate any discrepancy between the policy and the request for coverage, and whether any conduct of the insurance intermediary may have hindered investigation by the insured.[153]

When the middle-ground approach is used, the reasonableness of the insured's failure to read the policy becomes a fact question for the jury.[154] Accordingly, the problem with the middle-ground approach is that it exponentially increases the number of factual issues involved in a case. For instance, *International Brotherhood of Teamsters v. Willis Corroon Corp. of Maryland*[155] involved a relatively straightforward question wherein a labor union requested a statutorily required fidelity bond; an insurance intermediary procured a bond in the wrong amount; and the labor union neglected to read the policy, detect the mistake, and ask that it be corrected.[156] The trial court entered summary judgment for the insurance intermediary on contributory-negligence grounds.[157] On certiorari, the Court of Appeals of Maryland remanded the case for factual findings relating to matters set forth above (whether it was a new policy or a renewal, and so forth).[158] On remand, then, a formerly straightforward case involving essentially undisputed facts became one in which the entirety of the parties' past dealings with one another became open to examination and evaluation by the jury in determining the reasonableness of the labor union's failure to read the policy.

The effect of introducing a new universe of factual considerations into litigation is to increase the cost of litigation. It also creates a substantial risk that the fact finder's tendency to sympathize with the insured may affect the fact finder's resolution of these essentially subjective matters.[159] While the middle-ground approach might be more theoretically fair, in practice it is unfair to both insureds and insurance intermediaries by making resolution on the merits more cost-prohibitive for both of them.

F. What Is 'Adequate' Coverage?

Particularly with liability coverage, claims against insurance intermediaries are frequently premised on the notion that the insurance intermediary secured "inadequate" coverage because a portion of an insured's loss was unprotected. For instance, an insured with a one-million-dollar automobile-liability policy and a two-million-dollar umbrella policy may be held liable to an injured plaintiff for four million dollars and then bring a claim against her insurance intermediary for failing to procure or recommend additional liability coverage. This claim seems logical at first blush, but only at first blush. If, for instance, the insured did not carry additional liability coverage because she already carried the maximum amount for which she could qualify, the failure to recommend the additional coverage is not a proximate cause of her loss.[160] Even in situations where the insured *could* have obtained enough coverage to protect the insured against 100% of a loss, a no-advice, bad-advice, or failure-to-procure claim does not necessarily follow.

First, with certain forms of coverage, it would be impossible for an insurance intermediary to predict the amount of a loss that an insured might potentially incur. For instance, in *Jones v. Grewe*,[161] a couple owned an apartment complex and carried $300,000 in liability coverage.[162] After incurring $1.5 million in liability when a child was seriously injured in the apartment's swimming pool, they brought a claim against their insurance intermediary for failing to recommend that they purchase enough liability coverage to protect their assets.[163] In rejecting their claim, the *Jones* court explained that "[n]either an insurance agent nor anyone else has the ability to accurately forecast the upper limit of any damage award in a negligence action against the insured by a third party."[164] The court continued: "To impose such a duty based on the pleadings in this case would in effect make the agent a blanket insurer for his principal."[165]

Further, in a bad-advice or no-advice claim, it would be wrong to assume, after a loss, that a competent financial advisor would always necessarily advise an insured to purchase enough liability coverage to protect her from 100% of any potential loss. Indeed, there are times when it would *not* be financially wise to purchase enough liability coverage to cover 100% of a loss. To illustrate, imagine an insured with fixed monthly expenses of $650 and a monthly, after-tax income of $850. Assume that she could have purchased a one-million-dollar automobile-liability policy for $200 per month and that her insurance intermediary has voluntarily undertaken the duty to give her advice as to her insurance needs. If a one-million-dollar judgment were ultimately entered against her, hindsight makes it obvious that her $200 in disposable income would have been best spent on liability insurance. Nevertheless, when she applied for her policy, suppose her options were to purchase insurance coverage for an accident that might never happen, save for community college to obtain an associate's degree that would ultimately boost her income, contribute toward the cost of care for her elderly mother, purchase life insurance to ensure that her children will be cared for if anything ever happens to her, pay down credit-card debt that carries a high interest rate, or any other number of intelligent ways to spend her money. Under those circumstances, advising her to spend large amounts of her disposable income on automobile insurance seems like bad advice.

This is bad financial advice because this insured is no worse off for having a million-dollar judgment against her than a hundred-thousand-dollar judgment. Either way, her assets and income are insufficient to pay the judgment, and she will most likely be forced into bankruptcy. While the amount of liability coverage she carries will make a difference to the person that she injures, it makes no financial difference to *her*. Accordingly, a competent financial adviser would likely advise her to spend her disposable income in a manner that increases her assets or protects her loved ones. It makes little financial sense for her to be depleting her meager assets to protect what remains of them. It also makes little sense to spend her disposable income on protecting strangers from losses arising from her negligent torts when she could be spending the same amount of money protecting herself and her family.

In a failure-to-procure or inadequate-coverage claim, then, the defense should obtain discovery into such specifics of the insured's personal life and personal finances. If necessary, the defense should also retain an expert witness in financial planning to give an opinion as to what advice a competent financial planner would have given the insured at the time she applied for her policy. Further, where such discovery reveals cogent information that the insured failed to provide to the insurance intermediary and which the insurance intermediary would have needed to render competent advice, the insured's failure to provide the information can absolve the insurance intermediary from liability.[166]

G. Uninsured-Motorist Claims

A number of states require insurers to make UM coverage available or to provide it unless the insured explicitly rejects it.[167] It is somewhat common for insureds, after electing to carry low (or no) UM limits, to sue an insurer or insurance intermediary for failing to convince the insured to choose differently.[168] The proliferation of such lawsuits has begun to produce a backlash. For instance, in response to a flood of such lawsuits, New Jersey has gone so far as to enact a statute making insurers and insurance intermediaries immune from liability for failing to recommend higher coverage so long as an explanation of UM coverage is given and the insured acknowledges her selection of coverage in writing.[169]

Though an insured's other insurance holdings are almost always relevant to the question of how much insurance coverage an insured could or would have purchased, the insured's other insurance holdings become especially important in the context of UM coverage. As the Alaska Supreme Court explained:

> [T]he question of adequacy of coverage is necessarily a matter of opinion. "Neither an insurance agent nor anyone else has the ability to accurately forecast the upper limit of any damage award in a negligence action against the insured by a third party". The absence of any "correct" answer as to what insurance limits are appropriate is especially true with respect to UM/UIM coverage. As with all insurance, the amount of UM/UIM coverage is a trade off between cost and risk, but risk is in part subjective and dependent on other available resources that may mitigate the consequences of personal injury, such as medical and disability insurance.[170]

Consider, for instance, a hypothetical insured whose employer provides her with health insurance, life insurance, and disability insurance. If she were to be involved in an accident, the at-fault driver would generally be liable for her medical expenses, her lost wages, her property damage, and her pain and suffering,[171] and her spouse would generally be able to recover from the at-fault driver for loss of consortium.[172] If she were to die in the accident, her survivors and/or estate would generally be able to recover the value of her lost support and services, lost companionship and protection, mental pain and suffering, medical and/or funeral expenses, loss of earnings, and loss of prospective net accumulations.[173] UM coverage would ensure that she, her spouse, and/or her survivors would be able to recover these losses from her UM carrier in the event that the at-fault driver lacks the coverage or assets to pay for them.

But there are other insurance products, besides UM coverage, that insure against some of these risks. This hypothetical insured carries enough life insurance to pay for her funeral and to compensate her survivors for her lost financial and emotional support if she were to die. She carries health insurance that will cover her medical expenses if she requires medical treatment. She carries disability insurance that will cover her lost wages if she misses work and collision coverage that will cover any damage to her vehicle. The only risk covered by UM but *not* by these other products are money damages for pain and suffering and her spouse's loss of consortium. Carrying UM coverage, then, is less important to her than to someone without life, health, or disability coverage. Indeed, health insurance policies can, and frequently do, provide for a right of reimbursement where an insured recovers medical expenses from another source, and courts have permitted health insurers to enforce this right of reimbursement against proceeds paid under UM coverage.[174] Accordingly, for this hypothetical insured, her decision to purchase UM coverage is more likely to benefit her health insurer than the insured herself.

In the case of this hypothetical insured, and the myriad people like her, it is difficult to criticize her decision not to purchase insurance that benefits her health insurer when she could be spending her money, instead, on something else that provides a direct benefit to herself or to her family. In her case, the principal benefit of carrying UM coverage would be its coverage for pain and suffering or her spouse's derivative claim. If these were available as stand-alone insurance products, it would be difficult to fault her for choosing not to pay premiums on a pain-and-suffering policy that pays benefits if she were ever to endure any pain or suffering caused by a motor-vehicle accident. Likewise, it would be difficult to fault her spouse for not wanting to spend his wages on premiums for a "spouse insurance" policy that pays benefits if a motor-vehicle accident ever causes his wife to become less enjoyable to him. These products may be nice to have, but few would look down on their decision to put their money toward something else instead.

By extension, it is also very difficult to say that this hypothetical couple's insurance intermediary has been negligent in failing to advise them to purchase UM coverage rather than spend the amount of the UM premium on, say, a retirement fund or a payment on a larger home. Accordingly, when an insured is involved in an accident with an uninsured (or underinsured) motorist, it cannot be inferred that her insurance intermediary has been negligent simply because she lacks the UM coverage to pay 100% of the damages that she might have collected from the at-fault driver. In defending a claim against such an insurance intermediary, defense counsel should determine, in discovery, the extent to which the insured has mitigated against the risks that UM coverage is intended to cover. If the insured carries life, health, and/or disability coverage, the defense should retain an expert witness in financial planning to testify as to whether a competent financial advisor would have recommended that the insured purchase UM coverage in light of the insured's financial position and other insurance holdings.

V. Conclusion

This article has but scratched the surface of the infinite complexities of insurance-intermediary law. The case law on insurance-intermediary liability is every bit as nuanced and intricate as bad-faith case law and every bit as riddled with traps for the unwary and uninitiated. As long as there are people who suffer losses exceeding available coverage, insurers should anticipate, and expect, that they will seek means of obtaining extracontractual recovery. In the increasing number of situations where bad-faith claims are too weak to pose a realistic possibility of extracontractual recovery, prudent insurers should expect to see an increase in the number of claims arising from alleged errors and omissions of insurance intermediaries. And, as with bad-faith claims, the carriers most familiar with this intricate body of law will be best prepared to meet the challenge by recognizing and responding to circumstances that may give rise to liability.

Endnotes

1. Robert E. Keeton & Alan I. Widiss, Insurance Law: A Guide to Fundamental Principles, Legal Doctrines, and Commercial Practices § 2.5(c)(2) n.2 (student ed. 1988) [hereinafter Keeton & Widiss].

2. For simplicity's sake, this article uses the term "insured" to refer both to policyholders and would-be insureds who never actually became policyholders. Also, for the sake of avoiding clumsy "he or she" and "his or her" constructions, this article will generally refer to the insurance intermediary as male and the insured as female unless discussing a specific case or situation.

3. *See generally* Bertram Harnett, Responsibilities of Insurance Agents and Brokers § 2.02 (1975); Douglas R. Richmond, *Insurance Agent and Broker Liability*, 40 Tort Trial & Ins. Prac. L.J. 1, 3-5 (2004).

4. Harnett, *supra* note 3, § 2.02[1][a].

5. *Id.* § 2.02.

6. Richmond, *supra* note 3, at 3-5 (discussing common industry labels such as retail brokers, wholesale brokers, general agents, managing general agents, special agents, soliciting agents, and others).

7. *See, e.g.*, Gen. Accident Ins. Co. of Am. v. Am. Nat'l Fireproofing, Inc., 716 A.2d 751, 756-57 (R.I. 1998).

8. Quirk v. Anthony, 563 So. 2d 710, 715-16 (Fla. 2d DCA 1990).

9. Richmond, *supra* note 3, at 2.

10. *Id.*

11. *See id.*

12. *Id.*

13. *See* Hicks v. N. Am. Co. for Life & Health Ins., __ So. 3d __, 2010 WL 11185, at *10, ¶ 38 (Miss. Ct. App. Jan. 5, 2010); 3 Lee R. Russ & Thomas F. Segalla, Couch on Insurance § 55:4 (3d ed. 2005) [hereinafter Couch on Insurance].

14. *See* Kramer v. Lockwood Pension Servs., Inc. 653 F. Supp. 2d 354, 381 (S.D.N.Y. 2009).

15. *See* Essex Ins. Co. v. Zota, 985 So. 2d 1036, 1046 (Fla. 2008) (quoting Couch on Insurance, *supra* note 13, § 45:1).

16. As discussed in Part IV.A., *infra*, insureds are sometimes able to bring their claims against an insurer from whom they insured desired coverage, either in addition to or in place of the insurance intermediary himself. This article confines specific discussion of this issue to Part IV.A. Nonetheless, for bevity's sake, references to "claims against insurance intermediaries" — or similar expressions — refer both to claims against insurers and claims against the insurance intermediaries themselves.

17. Keeton & Widiss, *supra* note 1, § 2.5(c)(4)(ii).

18. *See generally* Thomas R. Trenkner, Annotation, *Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance*, 64 A.L.R.3d 398 (1975).

19. *See generally* Robin Cheryl Miller, Annotation, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability-insurance Coverage Procured*, 60 A.L.R.5th 165 (1998); Thomas J. Goger, Annotation, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Life, Health, and Accident Insurance Coverage Procured*, 72 A.L.R.3d 735 (1976); Thomas J. Goger, Annotation, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Property Insurance Coverage Procured*, 72 A.L.R.3d 747 (1976).

20. *See generally* Harnett, *supra* note 3, § 3.05[1][d].

21. *See generally* Harnett, *supra* note 3, § 3.05[1][a]; Gary Knapp, Annotation, *Liability of Insurer or Agent of Insurer for Failure to Advise Insured as to Coverage Needs*, 88 A.L.R.4th 249 (1991).

22. *See generally* Michael F. Skinner, Annotation, *Liability of Insurance Agent or Broker for Placing Insurance with Insolvent Carrier*, 42 A.L.R.3d 199 (1996).

23. *See, e.g.*, Duncanson v. Service First, Inc., 157 So. 2d 696, 698 (Fla. 3d DCA 1963).

24. Mondesir v. Delva, 851 So. 2d 187, 189 (Fla. 3d DCA 2003). In a negligence claim, however, it is possible for the insured to recover damages exceeding the policy limits where there is evidence that the intermediary's negligence caused the loss. *See* Republic Textile Equip. Co. v. Aetna Ins. Co., 360 S.E.2d 540 (S.C. Ct. App. 1987).

25. *See, e.g.*, Southtrust Bank & Right Equipment Co. of Pinellas County, Inc. v. Export Ins. Servs., Inc., 190 F. Supp. 2d 1304, 1308 (M.D. Fla. 2002) (quoting Robinson v. John E. Hunt & Assocs., Inc., 490 So. 2d 1291, 1293 (Fla. 2d DCA 1980)); Hause v. Schesel, 167 N.W.2d 421, 424 (Wis. 1969).

26. Thomas R. Trenkner, Annotation, *Liability of Insurance Broker or Agent to Insured for Failure to Procure Insurance*, 64 A.L.R.3d 398, § 2(a) (1975); *see also* Bitz v. Ed Know Clu & Assocs., 721 So. 2d 823, 824 (Fla. 3d DCA 1998).

27. *See* All Erection & Crane Rental Corp. v. Acordia Northwest, Inc., 162 Fed. Appx. 554, 559 (6th Cir. 2006); Mafcote, Inc. v. Genatt Assocs., Inc., No. 104-853, 2007 WL 527870, at *6-7 (S.D. Ohio Feb. 14, 2007); J.F. Meskill Enterprises, LLC v. Acuity, No. 05-2955, 2006 WL 903207, at *1 (N.D. Ohio Apr. 7, 2006); Harnett, *supra* note 3, § 3.11[2][c] (discussing various cases applying the economic-loss rule to claims against insurance intermediaries).

28. Couch on Insurance, *supra* note 13, § 46:46; *see also* Trenkner, *supra* note 26, § 3 (listing cases stating this general rule).

29. *See* Avery v. Diedrich, 2007 WI 80, ¶ 36, 734 N.W.2d 159, 67 ("[A]n insurance agent does not have a duty to procure requested insurance coverage until there is an agreement that the agent will do so."); Willis Ins. Agency, Inc. v. Luckey, 466 So. 2d 1197, 1197-98 (Fla. 3d DCA 1985) (holding that an agent could not be liable to an insured for failing to procure coverage for the contents of the insured's apartment if the insured had never requested such coverage); Phillips v. State Farm Mut. Auto. Ins. Co., 497 S.E.2d 325, 327 (N.C. Ct. App. 1998); *see also* Richmond, *supra* note 3, at 16 ("An intermediary is not obligated to assume a duty to procure insurance for another. Rather, the intermediary's duty depends on a specific, unequivocal request by the insured to procure coverage.").

30. *See* Sheridan v. Greenberg, 391 So. 2d 234 (Fla. 3d DCA 1981).

31. Burns v. Consolidated Am. Ins. Co., 359 So. 2d 1203 (Fla. 3d DCA 1978); Cole v. Wellmark of South Dakota, Inc., 2009 SD 108, ¶ 34, 776 N.W.2d 240, 251; *see also In re* Katrina Canal Breaches Consolidated Litigation, 572 F. Supp. 2d 664, 671 (E.D. La. 2008).

32. Keller Industries, Inc. v. Bellefonte Ins. Co., 412 So. 2d 899, 899 (Fla. 3d DCA 1982) (*quoting Burns*, 359 So. 2d at 1206).

33. Robinson v. John E. Hunt & Assocs., Inc., 490 So. 2d 1291, 1293 (Fla. 2d DCA 1980).

34. *Id.*

35. *See generally* Robin Cheryl Miller, Annotation, *Liability of Insurance Agent or Broker on Ground of Inadequacy of Liability-Insurance Coverage Procured*, 60 A.L.R.5th 165, § 4 (1998).

36. *See, e.g.*, Cameron Parish Sch. Bd. v. State Farm Fire & Cas. Co., 560 F. Supp. 2d 485, 488 (W.D. La. 2008).

37. *See, e.g.*, Fillinger v. Northwestern Agency, Inc., of Great Falls, 938 P.2d 1347 (Mont. 1997).

38. 938 P.2d 1347 (Mont. 1997).

39. *Id.* at 1350.

40. *Id.* at 1349-50.

41. *Id.* at 1352-53.

42. *See* Karam v. St. Paul Fire & Marine Ins. Co., 281 So. 2d 728, 730-31 (La. 1973).

43. *See* Mondesir v. Delva, 851 So. 2d 187, 189 (Fla. 3d DCA 2003). Notwithstanding, the insured still bears the burden of proving, though expert testimony or otherwise, that the loss would have been covered by the policy if it had been obtained. *See* Capell v. Gamble, 733 So. 2d 534, 535 (Fla. 1st DCA 1998) (reversing a final judgment entered for an insured where the insured failed to present any evidence as to what would have been covered by a flood policy if the insurance intermediary would have procured one). Some courts, however, do not require proof of the terms of a specific policy, instead allowing the insured to recover the amount that the insured would have received under the policy that she reasonably contemplated that the insurance intermediary would obtain. *See, e.g.*, Scarsdale Villas Assocs., Ltd. v. Korman Assocs. Ins. Agency, Inc., 533 N.E.2d 81, 83-84 (Ill. App. Ct. 1988).

44. 405 So. 2d 1382 (La. Ct. App. 1981).

45. *Id.* at 1382.

46. *Id.*

47. *Id.* at 1383 n.2.

48. *Id.* at 1384-85.

49. *See* Prof'l Underwriters Ins. Co. v. Freytes & Sons, 565 So. 2d 900, 903 (Fla. 1990). In *Freytes*, a minor's estate sued a convenience store for selling alcohol to a minor, resulting in the minor's death from a self-inflicted gunshot wound. *Id.* at 901. The store's insurance policy excluded coverage for injuries arising from the sale of alcohol. *Id.* at 901-02. In attempting to create coverage by estoppel, Mr. Freytes alleged that he had discussed the policy with an insurance intermediary who told him that the policy provided "full coverage" and was "what he needed" and that the insurer should therefore be estopped from denying that the policy provided "full coverage" or "what he needed." *Id.* at 901-02. Mr. Freytes conceded that the agent did not actually tell him that the policy provided liquor-liability coverage. *Id.* In reversing the trial court's ruling in favor of the convenience store, the *Freytes* court explained:

> [T]he threshold element of a promise or representation concerning liquor liability coverage is missing. The only "representation" the insured testified to was that the insured had "what it needed" but such a statement does not rise to the level of specificity required to be a "representation" of liquor liability coverage. There is also no evidence that Freytes understood the statement that he "had what he needed" to mean he had liquor liability coverage. At most, this statement is an expression of opinion that the insured's expressed or understood needs had been met. Such a statement cannot reasonably be interpreted by an insured to mean that he has just purchased insurance that covers any conceivable claim or contingency he may encounter. Freytes' own testimony reveals he knew that much. Every policy has limitations and exclusions; this one had a total of eighteen under the general liability portion of the policy.

Id. at 903 (citation omitted).

50. *See* Richmond, *supra* note 3, at 30; *see also* Peter v. Schumacher Enters., Inc., 22 P.3d 481, 487 (Alaska 2001) ("Standing alone, a request for 'full coverage' is not a request for a specific type of coverage.").

51. 855 A.2d 1267 (N.H. 2004).

52. *Id.* at 1269.

53. *Id.* at 1270 (emphasis in original). *See also* Boston Camping Distrib. Co. v. Lumbermans Mut. Cas. Co., 282 N.E.2d 374, 376 (Mass. 1972) (holding that a request for "insurance coverage from A to Z, second to none," coupled with a broker's statement that he would definitely comply, did not amount to a contract for the procurement of liability coverage that covered sprinkler leakage).

54. *See, e.g.*, Alfa Mut. Fire Ins. Co. v. Thomas, 738 So. 2d 815 (Ala. 1999) (affirming liability under a fraud or fraudulent-suppression theory); Runia v. Marguth Agency, Inc., 437 N.W.2d 45 (Minn. 1989) (finding liability under a negligent-misrepresentation theory); Lexington Ins. Co. v. Buckingham Gate, Ltd., 993 S.W.2d 185 (Tex. App. 1999) (finding liability under a Unfair or Deceptive Trade Practices statute).

55. Trotter v. State Farm Mut. Auto. Ins. Co., 377 S.E.2d 343, 347 (N.C. 1988) (citing Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486 (N.C. 1969)).

56. 443 So. 2d 488 (Fla. 2d DCA 1984).

57. *Id.* at 491.

58. *Id.*

59. *Id.*

60. It would seem that any duty to give advice could not extend as far as a duty to give interpretations of policy provisions. Indeed, several courts have held that giving interpretations of insurance-policy provisions without a law license constitutes the unlicensed practice of law. *See, e.g.*, Willhite v. Marlow Adjustment, Inc., 623 S.W.2d 254, 261 (Mo. Ct. App. 1981); Linder v. Ins. Claims Consultants, Inc., 560 S.E.2d 612, 621 (S.C. 2002). Giving specific legal advice is "practicing law," even if the advice is merely incidental to some other legitimate business

activity. Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 79.2.B (1999) [hereinafter Appleman on Insurance]. The unlicensed practice of law is a misdemeanor in some states and a felony in others. *See, e.g.*, Alaska Stat. § 08.08.230 (2009) (misdemeanor); Fla. Stat. § 454.23 (2009) (felony). Because a contract in violation of a statute (and, *a fortiori*, a contract to commit a crime) is void and unenforceable by the courts, *see In re* Benninger, 357 B.R. 337 (W.D. Pa. 2006) (holding that an agreement to provide financial "consulting services" was void where such "consulting services" amounted to the practice of law); R.E. Harrington, Inc. v. Windmiller, 86 Ohio Law Abs. 562, 177 N.E.2d 816 (Mun. Ct. 1961) (holding that a nonlawyer's contract to practice law is void as against public policy), and because it is nonsensical for anyone, including an insurance intermediary, to owe a tort duty to commit a crime, *cf.* Jackson v. United States, 258 F. Supp. 175, 184 (N.D. Tex. 1966) (holding that a criminal-defense attorney is never under a duty to commit a crime or dishonest act to free his client), it follows that an insurance intermediary cannot have either a tort or contract duty to give interpretations of specific policy provisions.

61. 574 So. 2d 1142 (Fla. 1st DCA 1991).

62. *Id.* at 1144-45.

63. *Id.* at 1154-55.

64. *Id.* at 1155 (emphasis added).

65. Confusing a duty to "advise" with a duty to "persuade" is fundamentally unfair to insurance intermediaries and provides insureds with the opportunity to make poor decisions, against an insurance intermediary's good advice, and still place blame upon the insurance intermediary. Indeed, one of the New Jersey Legislautre's reasons for deciding to afford limited immunity to insurers and insurance intermediaries was in response to "a flood of claims by insureds who had chosen the minimum available UIM coverage, in spite of having been advised of their options and the consequences of their choice, and who thereafter sought to shift the blame for what they later decided was inadequate coverage by claiming that the insurer, or its representatives, should have caused the insured to make a different choice." Pizzullo v. N.J. Mfrs. Ins. Co., 952 A.2d 1077, 1087 (N.J. 2008). For those who prefer cinematic allusions:

> Idi Amin: You should have ***told*** me not to throw the Asians out in the first place.
> Nicholas Garrigan: I did.
> Idi Amin: But you did not ***persuade*** me, Nicholas. You did not ***persuade*** me.

Last King of Scotland (Fox Searchlight Pictures 2006).

66. *Cf.* Four Seasons Healthcare, Inc. v. Willis Ins. Servs. of Ga., 682 S.E.2d 316, 318 (Ga. Ct. App. 2009) (affirming summary judgment for an insurance broker in a negligence claim where the insureds declined to purchase "prior acts" coverage against the broker's advice).

67. Richmond, *supra* note 3, at 25-26; *cf.* Peter v. Schumacker Enters., Inc., 22 P.3d 481, 486 (Alaska 2001) (explaining that imposing a duty to advise "could afford insureds the opportunity to insure after the loss by merely asserting they would have bought the additional coverage had it been offered") (quoting Nelson v. Davidson, 456 N.W.2d 343, 346 (Wis. 1990)); Phillips v. State Farm Mut. Auto. Ins. Co., 497 S.E.2d 325 (N.C. Ct. App. 1998) (holding that an insurance intermediary had no tort duty to advise his customer that an increase in his automobile-liability coverage made him eligible to purchase additional uninsured-motorist coverage and that it was entirely speculative that he would have purchased it even if advised to buy it).

68. *See* Nelson v. Davidson, 456 N.W.2d 343, 346 (Wis. 1990).

69. Harnett, *supra* note 3, § 3.05[1][a]; *accord* Curry v. State Farm Mut. Auto. Ins. Co., 599 F. Supp. 2d 734 (S.D. Miss. 2009) (holding that an insurance intermediary does not have "some amorphous duty to advise a prospective insured as to all the procedures a [health-insurance] policy will or may cover"); Cameron Parrish Sch. Bd. v. State Farm Fire & Cas. Co., 560 F. Supp. 2d 485, 488-89 (W.D. La. 2008) (holding that an insurance intermediary does not have a duty "to spontaneously identify a client's needs and advise him as to whether he is under-

insured" and that the "client is himself considered responsible for adequately advising the agent of the coverage needed and for reading the clear provisions of the insurance policy").

70. 776 A.2d 25 (Md. Ct. App. 2001).

71. *Id.* at 28.

72. *Id.* at 28-29.

73. *Id.* at 27.

74. *Id.* at 31.

75. *Id.* at 36.

76. *Id.* at 40 (citing Murphy v. Kuhn, 682 N.E.2d 972, 976 (N.Y. 1997)).

77. *Id.* (citing Gabrielson v. Warnemunde, 443 N.W.2d 540, 543 (Minn. 1989)).

78. *Id.* (citing *Murphy*, 682 N.E.2d at 976 *and* Duxreuil v. Allstate Ins. Co., 511 A.2d 300, 302 (R.I. 1986)).

79. *Id.* (quoting Peter v. Schumaker Enter., Inc., 22 P.2d 481, 486 (Alaska 2001)).

80. *See* Richmond, *supra* note 3, at n.197.

81. *See* Wyrick v. Hartfield, 654 N.E.2d 913, 914 (Ind. Ct. App. 1995); Houck v. State Farm Fire & Cas. Ins. Co., 620 S.E.2d 326, 329 (S.C. 2005); Avery v. Diedrich, 2007 WI 80, ¶ 27, 734 N.W.2d 159, 165.

82. Richmond, *supra* note 3, at 27.

83. *See* Bigger v. Vista Sales & Mktg., Inc., 505 S.E.2d 891 (N.C. Ct. App. 1998) (holding that insurance agent who procured requested liability insurance was not liable for failing to recommend workers' compensation coverage despite a 28-year business relationship between insurance agent and insured); Szelenyi v. Morse Payson & Noyes Ins., 594 A.2d 1092, 1094-95 (Me. 1991).

84. Mach. Sales v. Illinois Cent. R.R. Co., 26 F. Supp. 2d 900, 903 (S.D. Miss 1998).

85. *See* Gust K. Newberg Constr. Co. v. E.J. Crump & Co., No. 84-3257, 1986 WL 4152, at *16 (N.D. Ill. Mar. 31, 1986) (applying Florida law).

86. *See, e.g.*, Tackes v. Milwaukee Carpenters Dist. Council Health Fund, 476 N.W.2d 311, 313 (Wis. Ct. App. 1991).

87. *See, e.g.*, Sintros v. Hamon, 810 A.2d 553, 557 (N.H. 2002).

88. *See* Fitzpatrick v. Hayes, 67 Cal. Rptr. 2d 445, 452 (Ct. App. 1997); *see also* Ken Swift, *How Special is Special? An Insurance Agent's Duty to Advise*, 21 Hamline L. Rev. 323, 329 (1998).

89. *Fitzpatrick*, 67 Ca. Rptr. 2d at 453-54 (holding that a brochure, even if it amounting to a "holding out," did not create an issue of fact as to whether an insurance intermediary assumed a duty to volunteer advice where there was no evidence that the insured had ever seen or relied upon the brochure).

90. Swift, *supra* note 88, at 329.

91. *See* Richmond, *supra* note 3, at 36.

92. *See id.*

93. *Id.*

94. *See generally* Michael F. Skinner, Annotation, *Liability of Insurance Agent or Broker for Placing Insurance with Insolvent Carrier*, 42 A.L.R.3d 199, § 3 (1996).

95. Carter Lincoln-Mercury, Inc. v. EMAR Group, 638 A.2d 1288, 1293 (N.J. 1994) (*quoting* 43 *Am. Jur. 2d*, *Insurance* § 143, at 228 (1982)).

96. *See* Richmond, *supra* note 3, at 41.

97. *See* Richmond, *supra* note 3, at 37.

98. Wilson v. All Service Ins. Corp., 153 Cal. Rptr. 121, 124 (Ct. App. 1979).

99. *Wilson*, 153 Cal. Rptr. at 124 ("It would be superfluous, and would create a conflict with the regulatory scheme outlined in the Insurance Code, to

impose upon an insurance broker a similar duty to ascertain the financial soundness of an insurer.").

100. *See, e.g.*, *id.*

101. Richmond, *supra* note 3, at 37 (*citing* Popich Bros. Water Transp., Inc. v. Gulf Coast Marine Ins., 705 So. 2d 1267, 1270 (La. Ct. App. 1998)).

102. *See, e.g.,* Carter Lincoln-Mercury, Inc. v. EMAR Group, 638 A.2d 1288, 1297 (N.J. 1994).

103. *See* Richmond, *supra* note 3, at 41-42.

104. *Id.* at 41 (citing Sternoff Metals Corp. v. Vertecs Corp., 693 P.2d 175 (Wash. Ct. App. 1984); Gordon v. Spectrum, Inc., 981 P.2d 488, 492 (Wyo. 1999)).

105. *See generally* Eric Mills Holmes, Holmes' Appleman on Insurance 2d § 92.2 (1999) [hereinafter Appleman on Insurance].

106. *See generally* Couch on Insurance, *supra* note 13, § 55:11.

107. Richmond, *supra* note 3, at 11.

108. *Id.* at 13-14.

109. *See* Lexington Ins. Co. v. Buckingham Gate, Ltd., 993 S.W.2d 185 (Tex. App. 1999).

110. Keeton & Widiss, *supra* note 1, § 2.5(c)(1).

111. Mercury Ins. Co. v. Pearson, 87 Cal. Rptr. 3d 310, 318 (Ct. App. 2008) (finding that a plaintiff was not entitled to amend his complaint to allege that an insurer was vicariously liable for his brokers' failure to procure requested uninsured-motorist coverage because, even if it were accepted that his brokers were dual agents, any alleged negligence on their part in procuring coverage would have been committed, as a matter of law, in their capacities as agents for the plaintiff); *accord* Good v. Prudential Ins. Co. of Am., 5 F. Supp. 2d 804, 808 (N.D. Cal. 1998).

112. *See, e.g.*, *Pearson*, 87 Cal. Rptr. 3d at 318. There are instances, however, of insurers' disposing of the issue by simply admitting vicarious liability for the acts or omissions of agents. *See, e.g.*, Richey v. Phillip, 259 S.W.3d 1, 14 n.5 (Mo. Ct. App. 2008).

113. *See, e.g.*, Bedessee Imports, Inc. v. Cook, Hall & Hyde, Inc., 847 N.Y.S.2d 151, 154-55 (App. Div. 2007).

114. Gen. Am. Life Ins. Co. v. McCraw, 963 So. 2d 1111, 1114-15 (Miss. 2007); Harnett, *supra* note 3, § 2.08.

115. *See* Occidental Fire & Cas. Co. of N.C. v. Stevenson, 370 So. 2d 1211, 1213 (Fla. 2d DCA 1979).

116. Commonwealth Ins. Co. v. Stone Container Corp., 323 F.3d 507, 511-12 (7th Cir. 2003).

117. Blumberg v. USAA Casualty Insurance Co., 790 So. 2d 1061, 1065 (Fla. 2001).

118. *See, e.g.*, Flemens v. Harris, 915 S.W.2d 685, 689 (Ark. 1996).

119. *See, e.g.*, Johnson & Higgins of Tex., Inc. v. Kenneco Energy, Inc., 962 S.W.2d 507, 514 (Tex. 1998).

120. *See, e.g.*, Am. Home Assurance Co. v. Osbourn, 422 A.2d 8, 15 (Md. Ct. Spec. App. 1980).

121. *See, e.g.*, Wallace v. Helbig, 963 S.W.2d 360 (Mo. Ct. App.1998); Kosa v. Frederick, 737 N.E.2d 1071 (Ohio Ct. App. 2000).

122. *See* Int'l Mobiles Corp. v. Corroon & Black/Fairfield & Ellis, Inc., 560 N.E.2d 122 (Mass. Ct. App. 1990).

123. Appleman on Insurance, *supra* note 60, § 82.2 (1999).

124. Fla. Stat. § 95.11(2)(b)(2009).

125. Fla. Stat. § 95.11(3)(a)(2009).

126. Fla. Stat. § 95.11(4)(a)(2009). Nonetheless, it should be noted that Florida does not recognize professional-malpractice actions against insurance intermediaries. In Florida, to be a "professional," one must be required to hold a four-year degree for licensure. Vesta Constr. & Design, L.L.C. v. Lotspeich & Assocs., 974 So. 2d 1176, 1181 (Fla.

5th DCA 2008). Insurance intermediaries are not required to hold four-year degrees for licensure in Florida. *See* Fla. Stat. § 626.732(2009) (setting forth the educational requirements for the licensure of general-lines agents in Florida). Accordingly, insurance intermediaries are not "professionals" under Florida law. Pierce v. AALL Ins. Inc., 531 So. 2d 84, 87 (Fla. 1988), *receded from on other grounds in* Garden v. Frier, 602 So. 2d 1273 (Fla. 1992).

127. The question of whether an insurance intermediary has held himself out to the insured as an "expert" or "professional" can, in some instances, be relevant to the question of whether or not an insurance intermediary has a duty to give advice. *See* Part III.D., *supra*. Where the insurance intermediary has never advertised himself as a "professional" or communicated to the insured that he is a "professional," it does not heighten his legal duties to the insured if he nonetheless thinks of himself as a "professional" when he goes to bed at night. Notwithstanding, plaintiffs' attorneys sometimes devote significant deposition time to questioning insurance intermediaries as to whether they consider themselves to be "professionals," presumably in hopes that a positive answer will subject the insurance intermediary to a heightened legal duty. Unless the word "professional" has been used in some communication to the insured or advertisement seen by the insured, this is an exercise in meaningless semantics. "Professional" has different meanings in the legal sense than in the colloquial sense. For instance, professional golfers and professional jazz musicians consider themselves to be "professionals" and will say so in deposition, but this does not mean that they are "professionals" for limitations purposes or for the purpose of imposing a higher legal duty.

128. Flemens v. Harris, 915 S.W.2d 685 (Ark. 1996); Burns v. Conn. Mut. Life Ins. Co., 743 A.2d 566 (R.I. 2000).

129. *See* Pierce v. AALL Ins. Inc., 531 So.2d 84 (Fla. 1988), *receded from on other grounds in* Garden v. Frier, 602 So. 2d 1273 (Fla. 1992); Plaza Bottle Shop, Inc. v. Torstrick Ins. Agency, Inc., 712 S.W.2d 349 (Ky. Ct. App.1986); Am. Home Assurance Co. v. Osbourn, 422 A.2d 8, 16 (Md. Ct. Spec. App. 1980); Chase Scientific Research, Inc. v. NIA Group, 725 N.Y.S.2d 592 (N.Y. 2001).

130. Hause v. Schesel, 167 N.W.2d 421, 425 (Wis. 1969).

131. *See* Blumberg v. USAA Casualty Ins. Co., 790 So. 2d 1061, 1065 (Fla. 2001).

132. *See* Appleman on Insurance, *supra* note 60, § 82.1; Couch on Insurance, *supra* note 13, § 55:6.

133. Richmond, *supra* note 3, at 39.

134. *See* Laminated Wood Products, Co. v. Pedersen, 711 P.2d 165, 170-71 (1985).

135. *See* State Farm Fire & Cas. Co. v. Ortiz, 560 So. 2d 1350, 1351 (Fla. 3d DCA 1990).

136. *Id.*

137. *Id.*; *see also* Four Seasons Healthcare, Inc. v. Willis Ins. Servs. of Ga., Inc., 682 S.E.2d 316, 318 (Ga. Ct. App. 2009) (affirming summary judgment for an insurance broker for failing to procure a directors-and-officers liability policy without an exclusion for suits brought by less than five percent of shareholders where there was an absence of evidence to prove that the broker could have procured a policy without the exclusion).

138. Appleman on Insurance, *supra* note 60, § 87.3.

139. *See* Richmond, *supra* note 3, at 43 (citing Small v. King, 915 P.2d 1192, 1194 (Wyo. 1996)); Harnett, *supra* note 3, § 3.06 ("An insured may not reasonably sit back without taking steps for his own benefit, knowing that there is no protection, and expect to recover for any unprotected loss by suing the agent or broker.").

140. Booska v. Hubbard Ins. Agency, Inc., 627 A.2d 333, 335-36 (Vt. 1993); *accord* Barnes v. Mangham, 265 S.E.2d 867, 868 (Ga. Ct. App. 1980); Connely v. Robert J. Riordan & Co., 617 N.E.2d 76, 79 (Ill. App. Ct. 1993); Stephens v. Equitable Life Assurance Soc'y of the United States, 850 So. 2d 78, 82 (Miss. 2003) ("[I]nsureds are bound as a matter of law by the knowledge of the contents of a contract in which they entered notwithstanding whether they actually read the policy.").

141. Canales v. Wilson Southland Ins. Agency, 583 S.E.2d 203, 204 (Ga. Ct. App. 2003) (quoting Heard v. Sexton, 532 S.E.2d 156, 158 (Ga. Ct. App. 2000)) (bracketing in original).

142. Richmond, *supra* note 3, at 44.

143. Keeton & Widiss, *supra* note 1, § 2.5; Richmond, *supra* note 3, at 44.

144. *See* Richmond, *supra* note 3, at 44.

145. *Id.*

146. Aden v. Fortsh, 776 A.2d 792, 802 (N.J. 2001); *see also* Couch on Insurance, *supra* note 13, § 46:69.

147. *Aden*, 776 A.2d at 798-99.

148. Richmond, *supra* note 3, at 45 (citing *Aden*, 76 A.2d at 801-03).

149. Int'l Bhd. of Teamsters v. Willis Corroon Corp. of Md., 802 A.2d 1050, 1059 (Md. 2002).

150. *Id.*

151. Martini v. Beaverton Ins. Agency, Inc., 838 P.2d 1061, 1067 (Or. 1992).

152. Fiorentino v. Travelers Inc. Co., 448 F. Supp. 1364, 1369 (E.D. Pa. 1978).

153. Couch on Insurance, *supra* note 13, § 46:48 n.29 (*citing* Int'l Bhd. of Teamsters v. Willis Corroon Corp. of Md., 802 A.2d 1050 (Md. 2002)).

154. *Int'l Bhd. of Teamsters*, 802 A.2d at 1059.

155. 802 A.2d 1050 (Md. 2002).

156. *Id.* at 1051-52.

157. *Id.* at 1052. Contributory negligence, in Maryland, still functions as an absolute bar to recovery under a negligence theory. *Id.*

158. *Id.* at 1059-60.

159. *See* Harnett, *supra* note 3, § 3.06[6] (discussing the tendency toward sympathy for the insured and its effect on defending insurance-intermediary claims).

160. *See* Part IV.D., *supra*.

161. 234 Cal. Rptr. 717 (Ct. App. 1987).

162. *Id.* at 718.

163. *Id.* at 718-19.

164. *Id.* at 721.

165. *Id.*

166. *See* Nat'l Farmers Union Standard Ins. Co. v. Souris River Tel. Mut. Aid Coop., 75 F.3d 1268, 1273-75 (8th Cir. 1996).

167. *See* Appleman on Insurance, *supra* note 60, § 82.6.

168. *See* Pizzullo v. N.J. Mfrs. Ins. Co., 952 A.2d 1077, 1086-87 (N.J. 2008); *see also* Harnett, *supra* note 3, § 3.12.

169. *See, e.g.*, *Pizzullo*, 952 A.2d at 1086. *See also* N.J. Stat. Ann. § 17:28-1.9 (2010).

170. Peter v. Schumacher Enters., Inc., 22 P.3d 481, 486 (Alaska 2001) (footnote omitted) (quoting Jones v. Grewe, 234 Cal. Rptr. 717, 721 (Ct. App. 1987)).

171. *See, e.g.*, Fla. Std. Jury Instr. (Civ.) 6.2 (2009).

172. *See, e.g.*, *id.* at 6.2(e).

173. *See, e.g.*, Fla. Stat. § 768.21 (2009).

174. *See* Travelers v. Boyles, 679 So. 2d 1188, 1189-90 (Fla. 4th DCA 1996) (holding that, where a health-insurance policy provides that it is entitled to reimbursement for payments made for medical expenses when its insured recovers those losses from another source, the health insurer is entitled to the benefits payable under its insured's UM coverage). ■

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