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THE ANOMALOUS POSITION OF THE INSURANCE  
AGENT — AN INVITATION TO SCHIZOPHRENIA

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THE CONFLICT OF INTERESTS built into the American Agency System<sup>1</sup> is beginning to tear that structure apart. After more than a century of successful refutation of St. Matthew's maxim that "no man can serve two masters,"<sup>2</sup> the dual role of the insurance agent<sup>3</sup> as simultaneous representative of the insurer and the insured<sup>4</sup> is creating an intolerable situation. The unique accommodation to economic factors that has permitted the image of "Independent Agent" to develop<sup>5</sup> (incongruous as that title is in legal concept) is unable to cope with the changes that are developing in the insurance industry

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1. For a description of the American Agency System, which is the arrangement under which the typical insurance agent operates, see *Hedlund v. Farmers Mut. Auto. Ins. Co.*, 139 F. Supp. 535 (D. Minn. 1956); *Ballagh v. Polk-Warren Mut. Ins. Ass'n*, 136 N.W.2d 496 (Iowa 1965); *Woodruff v. Auto Owners Ins. Co.*, 300 Mich. 54, 1 N.W.2d 450 (1942).

2. *Matthew* 6:24.

3. An "insurance agent" is a person expressly or impliedly authorized to represent an insurer in dealing with third persons in matters relating to insurance. The term "agent" as used in this article will refer to: a person engaged in writing property and liability insurance as distinguished from life insurance and allied lines; a person representing more than one insurer with freedom to select the insurer with which he will place the business; a person who represents so-called agency companies and not a direct writer; a person who is paid a commission by the company out of the premium it receives instead of a fixed salary; and a person who operates his own office rather than one who is housed by an insurer. This is the type of person to whom the term "independent agent" is applied in the industry. The National Association of Insurance Agents has widely promoted the symbol of the "Big I" to designate such an agent. See *Travelers Indem. Co. v. National Indem. Co.*, 292 F.2d 214 (8th Cir. 1961); 29 AM. JUR. *Insurance* § 135 (1960); 44 C.J.S. *Insurance* §§ 136, 137 (1945).

4. See *Ivey v. United Nat'l Indem. Co.*, 259 F.2d 205 (9th Cir. 1958); *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210 (7th Cir. 1956); *Indemnity Ins. Co. of No. Am. v. Midwest Transfer Co.*, 184 F.2d 633 (7th Cir. 1950); *France v. Citizens Cas. Co.*, 400 Ill. 55, 79 N.E.2d 28 (1948).

5. Fire insurance agents occupy a very curious and anomalous position. Legally, and in fact, they are agents for the companies and must protect the companies' interests, but at the same time their personal relationship with the insured makes them equally solicitous for his best interests. Add to this the fact that the agent represents not one but several companies and that he is called upon to distribute his favors among them all, and we have a notable example of a man who is serving many masters. That the system works as well as it does is remarkable and particularly when the equally anomalous condition is noticed that, in general, agents are paid a commission upon the premium receipts, so that a large volume of business and particularly hazardous high-rated business is for the benefit of the agent, irrespective of whether the results are favorable or unfavorable to the company.

I REPORT OF THE JOINT COMM. OF THE STATE OF N.Y. (Hughes Report 92 (1910)) [hereinafter cited as HUGHES REPORT].

since *United States v. South-Eastern Underwriters Ass'n*.<sup>6</sup> The agent is under pressure from the insurers he represents to adjust his business methods and attitudes so as to help them in their competitive battle with other insurers and is under simultaneous pressure from his insureds to employ a high standard of professional skill in securing for them a maximum of insurance protection at a minimum cost. The agent is thus caught in a dilemma. He must split his personality if he is to serve conflicting interests; it is an invitation to schizophrenia.

### I. HISTORICAL DEVELOPMENT

The historical development that led to the creation of this hybrid representative will be discussed only briefly. From a beginning in which the agent was paid fifty cents per policy by the insured for writing the contract and, later, another fifty cents from the same source for making a survey of the property to be insured, the agent grew in power until he was able in many cases to fix his own commission. Competition for business between insurers led them to offer an ever-increasing portion of the premium dollar to the agent who could produce the business. The "market"<sup>7</sup> sought the producer.

At the end of the Civil War, the insurance agent, by custom<sup>8</sup> and contract, had assumed a role quite different from that of the soliciting agent in general business. For example, the agent and not the insurer was entitled to the "expirations list," which is the list of customers he had procured for his principal and which, in large measure, constitutes goodwill.<sup>9</sup> Thus, up to the moment when the insurance agent had determined with what insurer to place the business, he was deemed to be acting as agent for the insured to procure insurance.<sup>10</sup> The same economic forces which led to the competitive advantage of the agent vis-a-vis the insurer led to the development of the role of insurance broker.<sup>11</sup> The insurers were willing to pay for business produced by one who did not represent them under contract. Once

6. 322 U.S. 533 (1944), which held that fire insurance companies were engaged in commerce among the several states and that the Sherman Act did apply to them, thus overruling *Paul v. Virginia*, 75 U.S. (8 Wall.) 168 (1869). The *South-Eastern Underwriters Ass'n* case and other decisions stripped away the protection against federal antitrust laws which the insurance industry had enjoyed for a hundred years, and it led to the passage in 1945 of the McCarran Act, 66 Stat. 163 (1952), 8 U.S.C. § 1101 (1964). See VANCE, *LAW OF INSURANCE* 126 (3d ed. 1966).

7. The term "market" is used in the insurance industry to designate an insurer who is willing to assume a particular risk and issue a policy on it.

8. Custom plays an important role in the operation of the agent in the insurance industry. See *Long v. North British & Mercantile Ins. Co.*, 137 Pa. 335, 20 Atl. 1014 (1891).

9. *Woodruff v. Auto Owners Ins. Co.*, *supra* note 1; *Kerr & Elliott v. Green Mountain Mut. Fire Ins. Co.*, 18 A.2d 164 (Vt. 1941).

10. COUCH, *INSURANCE* §§ 14:19, 14:22 (2d ed. ....) [hereinafter cited as COUCH].

11. "An insurance broker is 'One who acts as a middleman between the assured and insurer, and who solicits insurance from the public under no employment from any special company, and who either places an order for insurance with a company selected

again, this payment came out of the premium dollars collected by the insurer for its policy, although the broker's services were actually being rendered to the insured.

The sharp distinction between the role of broker and agent was gradually eroded. By statute, many states declared that the broker shall be deemed to be the agent of the insurer for specific purposes; usually, payment of the premium to the broker constitutes payment to the insurer.<sup>12</sup> Courts, in their desire to protect insureds, sometimes found that the broker had, in fact, acted as agent for the insurer.<sup>13</sup> The high water mark in this particular direction was probably reached in an Illinois decision, which held that the broker had acted as *agent* for Lloyds of London, an institution which for some two hundred years has operated outside of the insurance agency system.<sup>14</sup> This blurring of distinction between agent and broker can be found in the many court decisions where the terms are used interchangeably without any attempt to determine whether there was any limitation on the agent's obligations either to insurer or insured.<sup>15</sup> Conversely, from time to time, an insurance agent would be unable to find a market for the insured's requirements among the insurers that he represented, and was obliged to "broker" the business through the agent of some other insurer. To do so, he would have to hold a broker's license.<sup>16</sup> The ultimate result was that, while not every broker has been appointed an agent by some insurer, most agents hold broker's licenses were they are available.

The resultant situation has created many a judicial headache.<sup>17</sup> To those engaged in the insurance business, however, it has long offered

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by the assured or, in the absence of any selection by him, then with a company selected by such broker. . . ." *Zak v. Fidelity-Phenix Ins. Co.*, 58 Ill. App. 2d 341, \_\_\_\_\_, 208 N.E.2d 29, 34 (1965). See 16 APPLEMAN, *INSURANCE LAW AND PRACTICE* § 8726, at 152-53 (1941) [hereinafter cited as APPLEMAN]; 29 AM. JUR. *Insurance* § 135 (1960). As a practical matter, in some areas (the large metropolitan areas) most business is handled by brokers, while in others, brokers are of minor importance or non-existent. See I HUGHES REPORT 98.

12. *E.g.*, MASS. GEN. LAWS ch. 175, § 169 (1959), "An insurance agent or broker acting for a person other than himself in negotiating, continuing or renewing any policy of insurance or any annuity or pure endowment contract, shall, for the purpose of receiving any premium therefor, be held to be the agent of the company. . . ." See *United States Fire Ins. Co. v. Cannon*, 349 F.2d 941 (1965); *Gechijian v. Richmond Ins. Co.*, 298 Mass. 487, 11 N.E.2d 478 (1937). Similar provisions can be found in Minnesota, Ohio, South Carolina, Texas, Vermont, Virginia and West Virginia.

13. *Dudley v. Inland Mut. Ins. Co.*, 330 F.2d 112 (4th Cir. 1963). See *Travelers Indem. Co. v. National Indem. Co.*, *supra* note 3; *Ivey v. United Nat'l Indem. Co.*, *supra* note 4.

14. *Mooney v. Underwriters at Lloyds, London*, 33 Ill. 2d 566, 213 N.E.2d 283 (1965), *reversing* 54 Ill. App. 2d 237, 204 N.E.2d 51 (1964).

15. See *Lawrence v. Francis*, 223 Ark. 584, 267 S.W.2d 306 (1954).

16. See *Coffey v. Polimeni*, 188 F.2d 539 (9th Cir. 1951).

17. "The relationship of agent and insurance company cannot depend solely upon general agency principles because these relationships have their own peculiar rights and obligations." *Bushnell v. Kraft*, 133 Ind. App. 474, 183 N.E.2d 340 (1962). See *General Acc., Fire & Life Ins. Co. v. Browne*, 217 F.2d 418 (7th Cir. 1954).

a *modus vivendi*, using a blend of business custom, unexpressed understanding, balancing of interests and adjustment to the economic forces involved. Insurers accepted the fact that their agents' prime interest lay with the insured, the source of the premium out of which his commission was taken. An equilibrium was established that with some accommodation withstood the stresses of a century of growth.

The contract which established the principal-agent relationship between insurer and insurance agent was reduced to a simple form.<sup>18</sup> It fixed the agent's authority by territory and type of risk; it gave the agent authority to bind the insurer; it called for a report of business written and the payment of accounts on penalty of forfeiting the ownership of expirations; and it eliminated any responsibility of the insurer for the agent's expenses of operation. A survey of the decided cases in this area of operations indicates that most of them were suits for an accounting for premiums owed,<sup>19</sup> where the agent acted in an unauthorized manner,<sup>20</sup> or where the agent failed to heed the insurer's request to terminate the insurer's liability under a particular policy.<sup>21</sup> In the realm of broker-insured litigation, the majority of cases involved the negligent failure of the broker to procure insurance coverage which he had agreed to procure,<sup>22</sup> or his failure to advise the insured of his inability to do so.<sup>23</sup>

## II. CHANGE IN CONDITIONS

The equilibrium so carefully worked out through the years is now, unfortunately, being destroyed. The business structure which permitted the insurance agent to balance his duties to the insurer and to the insured and thereby to walk a tightrope of responsibility between the two is beginning to disintegrate.

It is being undermined by the insurers who now find themselves holding the upper hand in their power struggle with the agent. The

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18. Certain provisions, such as that controlling the ownership of expirations, were apparently left intentionally vague.

19. *National Union Fire Ins. Co. v. Weatherwax & Gentry*, 247 Ala. 143, 22 So. 2d 733 (1945). See *Thatcher v. H. C. Baldwin Agency, Inc.*, 283 F.2d 857 (5th Cir. 1960); *Robertson v. Malone*, 190 F.2d 756 (7th Cir. 1951).

20. *Manufacturers Cas. Indem. Co. v. Martin Lebreton Ins. Agency*, 242 F.2d 951 (5th Cir. 1957); *Hawkeye Cas. Co. v. Frisbee*, 316 Mich. 540, 25 N.E.2d 521 (1947); *United States Cas. Co. v. Hiers*, 233 S.C. 333, 104 S.E.2d 561 (1958).

21. *Mitton v. Granite State Fire Ins. Co.*, 196 F.2d 988 (1952); *Insurance, Inc. v. Furneaux*, 62 N.M. 249, 308 P.2d 577 (1957); *Douglas v. Koontz*, 137 W.Va. 345, 71 S.E.2d 319 (1952).

22. *Johnson v. Illini Mut. Ins. Co.*, 18 Ill. App. 2d 211, 151 N.E.2d 634 (1958); *Cass v. Lord*, 236 Mass. 430, 128 N.E. 716 (1920); *Aresto v. National Ben Franklin Ins. Co.*, 184 Pa. Super. 114, 133 A.2d 304 (1957).

23. *Rider v. Lynch*, 42 N.J. 465, 201 A.2d 561 (1964); *Marano v. Sabbio*, 26 N.J. Super. 201, 97 A.2d 732 (1953). Cf. *DeWees v. Cedarbaum*, 381 P.2d 830 (Okla. 1963); *Couch* § 25:34.

reasons for this shift in power are beyond the scope of this article.<sup>24</sup> The result, however, is a sharp tightening of the reins. Insurance agents find insurers demanding the first call upon their loyalties. Both in the area of underwriting and of loss adjustment, the agent is face to face with the need to promote the interests of the insurer if he is to maintain his markets.<sup>25</sup> As a result he cannot place less desirable risks in his prime markets, lest an adverse loss ratio lose him those markets. This may oblige him to place the business in a market less advantageous from the insured's point of view. Similarly, the agent may hesitate to suggest certain types of insurance which would be beneficial for the insured, because his markets have advised him to avoid such coverages.

In the event of a loss, the agent, who formerly encouraged and aided an insured in maximizing his claim within the policy coverage, feels himself constrained to soft-pedal his advice for fear of antagonizing the insurer, whose goodwill is necessary for him to continue as an insurance agent.<sup>26</sup> The insurance agent might have been able to adjust to the pressures from the insurer and maintain his Janus-like role of serving dual interests were it not for the fact that the insured has begun to assert pressure on his own behalf, demanding a higher standard of performance from the agent.

### III. AGENT'S LEGAL RESPONSIBILITY

Of the established duties that every agent owes to his principal, two are of particular relevance in the relationship between an insurance agent or broker and the insured — the duty to be loyal and the duty to use due care and avoid negligence.<sup>27</sup> As interpreted by the courts, a basic ingredient of the duty of loyalty is the absence of any conflict of interest.<sup>28</sup> An agent may not make a profit at the principal's

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24. These arise primarily from the fact that markets rather than volume have become of primary importance. They include the reduction in number of insurers due to mergers, continued adverse loss ratios in certain types of insurance, shrinking of reinsurance facilities, the bad loss experience with certain types of structures and operations, the temporary diminution of insurance company surpluses due to stock market conditions and the lack of additional capital investment in the insurance industry to cover the increasing insurable values in our expanding economy. Utilizing their power, insurers have cut commission rates, dropped unprofitable agents, reversed their program of protecting an agent who has made a mistake and now resist marginal claims which earlier they might have paid to maintain the agent's favor.

25. He would then have to "broker" it through other agents with whom he would have to split his commission. See *Stuyvesant Ins. Co. v. Keystone Ins. Agency*, 420 Pa. 578, 218 A.2d 294 (1966).

26. Agents are known to pay small claims under "Homeowners" policies out of their own pocket rather than run the risk of irritating the insurer.

27. *Lowitt v. Pearsall Chem. Corp.*, 242 Md. 245, 219 A.2d 67 (1966); *COUCH* § 25:37; *APPLEMAN* § 8833; *MECHEM, Agency* § 2370 (2d ed. 1914); 29 AM. JUR. *Insurance* § 163 (1960).

28. See *Rozen v. Cohen*, \_\_\_\_\_ Mass. \_\_\_\_\_, 214 N.E.2d 451 (1966).

expense,<sup>29</sup> sell his own goods to his principal without disclosure,<sup>30</sup> or act for both parties without disclosure.<sup>31</sup> Even though the agent is acting primarily for the insurer, he occupies a position of trust toward the insured, who is considered as being his client.<sup>32</sup>

When most insurers offered the same contract and schedules of rates and commissions were similar, the apparent built-in conflict of interest led to little real conflict. But today, insurers vie with each other both in the extent of protection they offer under their contracts and the rates they charge. Usually the more liberal the policy toward the insured, the less commission is paid to the agent or broker. The apparent conflict is now becoming real. The insured's representative must put his principal's welfare above his own or breach his obligation of loyalty. As stated by one Court, "the legal consequences of the acts of an insurance agent who, in attempting to preserve the confidence reposed in him by company or client, must by necessity render a dis-service to one or the other, are oftentimes severe."<sup>33</sup>

It is the duty of the agent to use good faith in procuring insurance on the best possible terms, including the securing of policies which contain cost-reducing provisions where this would work to the insured's benefit.<sup>34</sup> The violation of the duty to be loyal is closely

29. See *Fisk v. Kildare Truck Line, Inc.*, 112 So. 2d 310 (La. 1959); *In re Brownings Estate*, 175 Misc. 107, 22 N.Y.S.2d 652 (Surr. Ct. 1940), *aff'd sub nom. In re Browning's Will*, 260 App. Div. 1013, 24 N.Y.S.2d 1001 (1940).

30. See *Budnick v. The Maccabees*, 230 N.Y.S.2d 271 (N.Y. City Ct. 1962); *Commercial Standard Ins. Co. v. Gordon's Trans., Inc.*, 154 F.2d 390 (6th Cir. 1946).

31. "The possibility of dual agency, and its propriety where there is good faith, no conflict of interest, and due authority from both principals, is well recognized. . . . It is not seen, however, how such a relationship, even if it existed, would relieve [the agent] . . . of the duty of due care, to either, or both, of the principals." *Hampton Roads Carriers v. Boston Ins. Co.*, 150 F. Supp. 338, 343 n.9 (D. Md. 1957). (Footnotes of the court omitted.) See also 44 C.J.S. *Insurance* § 141 (1945).

32. Insurance representatives have a trust relation imposed upon them by the very nature of the service which they render. It is necessary that they cultivate the friendship and trust of their clients, and this requires that they divulge every aspect of their mutual contracts frankly and noticeably. Their clients expect and believe that they will be informative on such matters which are less understood by them. *Hannon Motor Lines, Inc. v. Liberty Mut. Ins. Co.*, 214 F. Supp. 250, 256 (N.D. Ind. 1963).

"Under the course of conduct pursued by the agency in this case, and, indeed, under the well known and accepted relationship of trust generally existing between a client and his insurance agent, the client, of necessity, must and, therefore, has a right to rely upon his agent, at least to a limited degree. . . ." *Smith v. Travellers Fire Ins. Co.*, 90 So. 2d 586, 589 (La. Ct. App. 1956). See also *Lynd v. Heffernan*, 286 App. Div. 597, 146 N.Y.S.2d 113 (1955).

33. *Inland Empire Ins. Co. v. Bair*, 246 F.2d 505, 509 (10th Cir. 1957).

34. An insurance broker, particularly one who acts as general agent for insured and who undertakes to keep the property insured from year to year, is under a duty to exercise good faith and reasonable diligence to procure the insurance on the best terms he can obtain; and in this connection proper diligence requires him to canvass the market and have adequate knowledge as to the different companies and terms available.

*Zeif Distrib. Co. v. Aetna Cas. & Sur. Co.*, 389 S.W.2d 789, 795 (Mo. Sup. Ct. 1965), quoting 44 C.J.S. *Insurance* § 172 (1945). See also *Hampton Roads Carriers v. Boston Ins. Co.*, 150 F. Supp. 338 (D. Md. 1957); *Johnson & Higgins v. Harper Transp. Co.*, 228 Fed. 730 (D. Mass. 1915); *Colpe Inv. Co. v. Seeley & Co.*, 132 Cal.

related to the duty not to be negligent. Failure to procure insurance at the lowest cost may result from the agent's personal interest in placing the business with a stock company which he represents rather than with a mutual company which returns a dividend to the insured. The agent may find it to his personal advantage to place the business with the insurer that pays him the highest percentage of commission. Such violation of duty may also result from the agent's desire to maximize commission by writing the insurance with an insurer which he represents as agent, rather than brokering it. Or, as the cases indicate, the agent's failure may have resulted from an oversight or a lack of knowledge on his part.<sup>35</sup> In the past the results of such failure may have been mitigated by concessions of the insurer or have been overlooked by the insured. The climate of opinion under which such leniency flourished is rapidly disappearing. Parallel with the growth of malpractice suits against doctors, lawyers, engineers, architects and other professional men,<sup>36</sup> there is developing a tendency to sue insurance agents and brokers both for breach of contract and in tort for negligence.<sup>37</sup> The same standard of measurement is applied: "The agent or broker must have the skill ordinarily possessed by the professional he holds himself out as."<sup>38</sup> This is usually a question for the jury to decide.<sup>39</sup>

#### IV. THE FUTURE

The pressure which is breaking the American Agency System apart can be traced directly to the trend of legal decisions. Our courts have refused to accept any longer the concept of the agent-broker which is basic to that system — the concept which allowed a man to serve

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App. 16, 22 P.2d 35 (Dist. Ct. App. 1933); *Roberts v. Sunnen*, 38 Wash. 2d 370, 229 P.2d 542 (1951).

35. See *Bituminous Cas. Corp. v. Lou Bachrodt Chevrolet*, 55 Ill. App. 2d 373, 204 N.E.2d 481 (1965) (memorandum opinion).

36. *Smythe v. Missouri R.R.*, 72 F.2d 216 (2d Cir. 1934); *Mauldin v. Sheffer*, 133 Ga. 883, 150 S.E.2d 150 (1966); *Leonard v. Firemen's Ins. Co.*, 100 Ga. App. 434, 111 S.E.2d 773 (1959). See *Patrick v. Sedwick*, 391 P.2d 453 (Alaska 1964), as an extreme example.

37. This is no doubt fostered by the knowledge that most insurance agents now carry malpractice insurance known as "Errors and Omissions" insurance. *Hardt v. Brink*, 192 F. Supp. 879 (W.D. Wash. 1961). For an interesting life insurance case, see *Knox v. Anderson*, 159 F. Supp. 795 (D. Hawaii 1958). See also *Hamacher v. Tummy*, 222 Ore. 341, 352 P.2d 493 (1960); *Portella v. Sonnenberg*, 74 N.J. Super. 354, 181 A.2d 385 (1962).

38. *Colpe Inv. Co. v. Seeley & Co.*, 132 Cal. App. 16, 22 P.2d 35 (Dist. Ct. App. 1933). See *Lowitt v. Pearsall Chem. Corp.*, 242 Md. 245, 219 A.2d 67 (1966); *Ryder v. Lynch*, 42 N.J. 465, 201 A.2d 561 (1964).

39. *Dudley v. Inland Mut. Ins. Co.*, 299 F.2d 637 (2d Cir. 1962); *Smythe v. Missouri R.R.*, 72 F.2d 216 (2d Cir. 1934); *Derby v. Blankenship*, 217 Ark. 272, 230 S.W.2d 481 (1950). See *Colpe Inv. Co. v. Seeley & Co.*, *supra* note 38; *Mooney v. Underwriters at Lloyds, London*, 33 Ill. 2d 566, 213 N.E.2d 283 (1965) (dissenting opinion).



two masters and at the same time retain sufficient independence to allow him to serve his own interests as well. Disregarding the delicate balancing of the interests which alone enabled the system to function effectively, the courts have progressively insisted on forcing the business of property and liability insurance into the same mold of legal rules and principles which apply to other business activities.

It is possible that this trend will stop short of requiring complete uniformity, that the business of distributing such insurance will be accepted as being *sui generis*, one in which a certain degree of deviation is permissible. This could permit a new balance of the interests to be worked out. Conceivably, the insurer-agent relationship would be divided into two roles: a *producer*, acting independent of any duty to the insurer and paid a commission for directing a piece of business to the insurer, and a *serviceman*, who would be hired by the insurer to perform various service functions for which he would be paid by the insurer and to whom he would owe undivided loyalty. As a practical matter, the agent's commission would be divided into two parts; a basic commission, as producer acting solely on behalf of the insured, and additional units of compensation, also by way of commission, for those service procedures he is called upon to perform for the insurer. Not all agents would perform the same spectrum of functions. This is not completely alien to present operations in part of the property and liability insurance business, where central policy writing and central premium billing have been introduced with a reduction in commissions paid. Such a financial rearrangement may destroy the viability of small or marginal agencies but it would meet the legal requirements.

Some indication that the ultimate readjustment in the system need be only so limited in nature could be read into the decision in *Smith v. Travellers Fire Ins. Co.*<sup>40</sup> where the court states that the client has a right to rely upon his agent "to a limited degree." It would appear that little confidence should be placed in any such possibility. The decisions indicate a willingness to stretch the agent's duty to the insured to a point where he is, in fact, protected. In the *Smith* case, the court did find a breach of even the limited duty.

Another balancing point might be found in the adoption of a relationship similar to that existing between the parties in the life insurance business. Traditionally, the life agent acts only as a solicitor. He can make no commitment for the insurer; he can only submit an application. As a result, there is little basis for creating a professional-client relationship between the agent and the insured. That such rela-

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40. 90 So. 2d 586, 589 (La. Ct. App. 1956).

tionship does exist, however, is shown by the *Knox v. Anderson* decision.<sup>41</sup> If the courts should decide to expand the theory of duty expressed in that decision, an increasing degree of responsibility on the part of the life insurance agent to the insured could develop.

A drastic change would be necessary to accommodate such an adjustment. Life insurance agents do not usually own their expirations, and they can even forfeit their right to limited renewal commissions under various conditions. This is also the case with the representatives of those fire and liability insurance companies which operate outside of the American Agency System (usually referred to as direct writers or direct sellers) and which pay their representatives on a salary or a salary plus commission basis; expirations are the property of the insurer. While it is not impossible to conceive of an amalgamation of the two systems, it could not be accomplished without great trauma. Even then there is no assurance that the professional-client relationship would be avoided. Quite to the contrary. A breakthrough has already occurred in the *Hannon Motor Lines* case.<sup>42</sup> The insurer in that case was the Liberty Mutual Insurance Company, a direct writer. Yet this did not prevent the federal court from imposing upon its representative a duty of trust to the insured who was to be considered as his client.

One other possible point of balance, which would not necessitate an abandonment of the American Agency System, involves a new method of compensating the producer. It has already found some slight acceptance in the placing of large lines of insurance. Such a method involves the elimination of any commission built into the price. The rate is then quoted "net" and the agent is paid for his services by way of a fee from the insured. To the extent that the producer acts in surveying the risk, applying the standards of risk management, seeking a market and bargaining for a price, he is acting solely as the representative of the insured to whom he owes his full and undivided loyalty. No self-interest may intervene. However, it is possible to conceive of this same producer acting as a local serviceman for one or more companies and, in this capacity, performing subsequent service functions in connection with business he may place with such companies. It would be necessary, however, to amend the present insurer-agent agreement so as to identify the limited area in which the agent owed any loyalty to the insurer.

Such an arrangement would comply with the criteria laid down by the courts when they accepted the possibility of a dual agency in the

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41. 159 F. Supp. 795 (D. Hawaii 1958).

42. *Hannon Motor Lines, Inc. v. Liberty Mutual Ins. Co.*, 214 F. Supp. 250, 256 (W.D. Ind. 1963).

operation of the American Agency System. As stated in the *Hampton Roads Carriers* case,<sup>43</sup> such a dual agency is possible and proper "where there is good faith, no conflict of interests and due authority from both principals. . . ." Such a situation can exist, as hereinbefore pointed out, only when the agency for insurer and insured fall in different areas and the duty of the producer to each of his principals is so sharply divided that his own personal interest is not injected into the situation. Anything short of this would negate the possibility which the *Hampton Roads Carriers* case and the entire line of similar cases posit.

## V. CONCLUSION

While it may be possible to find a point of equilibrium at some part-way point and maintain the basic elements of the American Agency System, the trend of the decided cases seems to indicate that this will not be possible. The companies apparently realize this, if a proper interpretation can be placed upon the expansion of branch offices and the purchase by agency-oriented companies of local agencies. This would seem to indicate an acceptance upon their part of the inevitability of a new arrangement. Under this new arrangement, the insurer would have no agents who also represented the insured. Through their local offices, these insurers would deal with representatives of the insured, with professional brokers who would owe their loyalty only to the insured. Such an arrangement prevails today in the market for re-insurance. Servicing of the business written would be performed by the local offices acting solely on behalf of the insurers. Such an arrangement would still not fall into the category of direct selling because the insurer would deal with a middleman, the broker, who would control the business and own the expirations. The transfer of many agency operations to the computers may help accelerate this process of re-orientation.

So much of the present system has been built into our statutes and is supported by contracts and custom that any change cannot come abruptly. Nonetheless, present indications are that, in the not too distant future, the independent agent will come to call himself an independent broker, and the American Agency System will be replaced by the American Brokerage System.

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43. *Hampton Roads Carriers, Inc. v. Boston Ins. Co.*, 150 F. Supp. 338 (D. Md. 1957).