IADC Committee Newsletter

PROFESSIONAL LIABILITY

June 2014

IN THIS ISSUE

This month's Professional Liability Committee Newsletter reviews the liability of insurance agents and brokers to third-party non-clients and recent developments in the area of professional liability. It is a reprint of an article from the 2014 Midyear Meeting in Carlsbad, California.

Liability of Insurance Agents and Brokers to Third-Party Non-Clients and Recent Developments

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ABOUT THE COMMITTEE

The Professional Liability Committee consists of lawyers who represent professionals in matters arising from their provision of professional services to their clients. Such professionals include, but are not limited to, lawyers, accountants, corporate directors and officers, insurance brokers and agents, real estate brokers and agents and appraisers. The Committee serves to: (1) update its members on the latest developments in the law and in the insurance industry; (2) publish newsletters and Journal articles regarding professional liability matters; and (3) present educational seminars to the IADC membership at large, the Committee membership, and the insurance industry.
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Introduction

As the variety of professional services performed by insurance agents and brokers has expanded over time, so too has their liability exposure.[1] Agents and brokers are subject to a broad assortment of liability claims asserted by their own clients who claim that they were supposed to be insured and by insurers.[2] For instance, it is well settled that an agent or broker who agrees to procure insurance coverage for a client is obligated to exercise reasonable diligence and care in procuring such coverage.[3] But courts have increasingly held agents and brokers liable for claims of third-party non-clients or at least recognized the possibility for such liability in certain circumstances.[4] This article will refer to insurance agents and brokers as insurance intermediaries or simply as intermediaries, unless otherwise specified.

For each claim brought by a third-party non-client seeking to impose liability against an insurance intermediary, the defense lawyer must identify several key facts in order to properly analyze the exposure. These facts include:

1. Who is bringing the claim and in what capacity?
    A. What is the claim?
    B. What relationship, if any, did the intermediary have with the third party?
    C. What was the foreseeability of the third party's injury?
2. What law applies to the claim?

The law evolves with the passage of time. This article provides lawyers with an overview of insurance intermediary liability to third-party non-clients and considerations in light of recent case law throughout the United States.

I. Who is bringing the claim and in what capacity?

Client claims against insurance intermediaries for failing to procure insurance or placing deficient insurance are nothing new. Courts generally recognize such claims to state causes of action.[5] But it is clear that the intermediary's potential exposure does not end with the client's malpractice claim. There seems to be an increase in third-party non-clients claims against insurance intermediaries based on a variety of arguments to impute liability to intermediaries. Some third parties assert breach of contract claims against intermediaries by arguing that they are third-party beneficiaries of both the insurance policy and the intermediary's agreement with the policyholder to procure coverage. These purported third-party beneficiaries include (1) those allegedly injured by a wrongful act of the intermediary's client, such as a car-accident victim; (2) those who are or claim to be additional insureds under a liability policy

[1] *See* John H. Swanston & Jeffrey M. Smith, *Judgmental and Third-Party Liability of Insurance Agents and Brokers*, 16 FORUM 998, 998 (1981).
[2] Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability*, 25 BRIEF 34, 34 (1996).
[3] *E.g.*, *Graff v. Robert M. Swendra Agency, Inc.*, 800 N.W.2d 112, 116-17 (Minn. 2011); *Bichlemeyer Meats v. Atl. Ins. Co.*, 42 P.3d 1191, 1196 (Kan. Ct. App. 2001).
[4] *See, e.g.*, *Cleveland Indians Baseball Co., L.P. v. N.H. Ins. Co.*, 727 F.3d 633, 638 (6th Cir. 2013) (predicting Michigan law); O'Donnell, *supra* note 2 at 39; Richard E. Fagerberg & Jay B. Brown, *Liability of Professionals to Non-Clients: An Expanding and Tangling Web*, 64 DEF. COUNS. J. 597, 598 (1997).
[5] *E.g.*, *Desai v. Farmers Ins. Exch.*, 55 Cal. Rptr. 2d 276, 280-82 (Cal. Ct. App. 1996).

issued to the intermediary's client or those holding certificates of insurance describing policies issued to the intermediary's client; (3) those seeking benefits under life, worker's compensation, or group policies; and (4) those seeking benefits under property policies.

In addition to asserting status as a third-party beneficiary, non-clients often assert claims sounding in negligence by arguing that the intermediary directly owed them duties, but breached them. Such claims hinge on whether the court concludes that an intermediary owed a direct duty to the third party. Courts have analyzed whether an intermediary owes a duty to a third party by focusing on the foreseeability of the injury or whether there is privity between the third party and intermediary.

The most successful strategy for third parties to follow in asserting claims against insurance intermediaries is to obtain an assignment of the insured-client's claim against the intermediary. The overwhelming majority of courts allow third-party non-clients to assert such claims.

To defend against third-party non-client claims, defense lawyers must understand who is asserting a claim (*e.g.*, a tort-victim, an additional insured); in what capacity the party is asserting the claim (*e.g.*, as a third-party beneficiary, an assignee); the nature of the claim (*e.g.*, breach of contract, negligence, negligent misrepresentation); the relationship between the intermediary and the third party, if any; and the type and foreseeability of the injury.

A. Third-party beneficiaries.

Most jurisdictions have not permitted third-party non-clients to assert claims against insurance intermediaries.[6] But some jurisdictions that permit third parties to assert claims against insurance intermediaries for breach of contract or negligence do so for the reason that the third party is an intended third-party beneficiary of the agreement or implied agreement between the insurance intermediary and insured to procure insurance of a particular type or amount for the benefit of the third party.

1. Those harmed by a wrongful act of the insured.

Perhaps the most frequent claims asserted by third-party non-clients against insurance intermediaries are those brought by parties who have been harmed by some wrongful act of an insured. These claims arise in situations involving the alleged failure to procure liability insurance, often automobile insurance. Some jurisdictions have adopted an extremely liberal resolution to the issue by reasoning that because a liability insurance policy is for the benefit of the public as a source of money to pay for a third party's injuries, the intermediary has direct exposure to the injured claimant. For example, the Massachusetts Supreme Judicial Court in *Flattery v. Gregory* held that an injured third party driver was an intended beneficiary of an insurance intermediary contract to obtain optional auto insurance coverage that the client and the intermediary intended would pay any judgments against the insured.[7] Because the injured third-party driver was an intended beneficiary of the contract, the court concluded that the injured third party could

[6] *E.g.*, *Pressman v. Warwick Ins. Co.*, 623 N.Y.S.2d 306, 308 (N.Y. App. Div. 1995); Fagerberg & Brown, *supra* note 4, at 598.

[7] 489 N.E.2d 1257, 1262 (Mass. 1986).

proceed against the intermediary for breach of contract for failing to fulfill the promise of obtaining the coverage the insured sought.[8] The Michigan Court of Appeals has adopted similar reasoning, and concluded that unspecified claimants are intended beneficiaries of an agreement between an insured or applicant and an insurance intermediary to procure auto insurance in order to benefit those who might be injured through the insured's negligence.[9]

This expansive view of third-party beneficiary status is not limited to auto insurance. In *Werrmann v. Aratusa*, the New Jersey Supreme Court held that an injured restaurant patron could bring a direct claim against the restaurant's insurance intermediary that failed to renew a general liability policy.[10] The court concluded that "[b]ecause of the importance of liability insurance, whether it be mandatory or optional, members of the general public are third-party beneficiaries of an agreement between a business proprietor and its insurance broker to procure insurance…. [I]t is intended to provide a source of recovery for an innocent injured party."[11]

The New Jersey appellate court's decision is twenty years old. There has not been a movement in other jurisdictions to adopt this expansive reasoning. The reason may be that insureds and insurers, and even claimants, agree that liability insurance is not for the benefit of claimants but the protection of insureds. But there could be exceptions where the intermediary failed to follow instructions and procure liability insurance for activities where liability insurance is mandatory. Perhaps courts in various jurisdictions would be inclined to conclude that the intermediary's failure to procure insurance where insurance is mandatory and causes injury will result in the intermediary's liability to the injured person. A limited set of activities for which liability insurance is mandatory would include: operating an automobile (in almost every state), operating a commercial vehicle, practicing dentistry (in Minnesota and some other states), practicing medicine (in at least seven states — Colorado, Connecticut, Kansas, Massachusetts, New Jersey, Rhode Island, and Wisconsin), practicing law (in Oregon and perhaps other states), selling alcoholic drinks, producing special events (*e.g.*, parades, fireworks), conducting ultra-hazardous activities (*e.g.*, demolishing buildings, removing waste, detonating explosives, hauling hazardous materials), crop dusting, employing workers, and entering into construction contracts.

2. Additional insureds.

Third-party non-clients argue that the insurance intermediary is liable to them because they are or were supposed to be additional insureds. Some courts consider evidence of additional insured status or intent to make a party an additional insured sufficient to give that party third-party beneficiary status to assert a claim against an insurance intermediary.[12] But most courts hold that an additional insured does not qualify as a third-party beneficiary. To be considered a third-party beneficiary, a party

[8] *Id.*
[9] *Auto-Owners Ins. Co. v. Mich. Mut. Ins. Co.*, 565 N.W.2d 907, 911 (Mich. Ct. App. 1997).
[10] 630 A.2d 302, 303, 305 (N.J. Super. Ct. App. Div. 1993).
[11] *Id.* at 305-06.
[12] *E.g.*, *Rollins Burdick Hunter of Utah, Inc. v. Bd. of Trs. of Ball State Univ.*, 665 N.E.2d 914, 923 (Ind. Ct. App. 1996); *see also Cordero Mining Co. v. U.S. Fid. & Guar. Ins. Co.*, 67 P.3d 616, 623-27 (Wyo. 2003) (concluding that additional insureds are third-party beneficiaries, but concluding that failure to read policy barred recovery).

must be more than an additional insured; there must be some evidence that the insured-client and the insurance intermediary intended to confer a benefit on the additional insured.[13]

3. Life insurance, worker's compensation, and group policies.

Third-party non-client claimants include beneficiaries of life insurance, worker's compensation, and group policies. Some jurisdictions have permitted such claims while others have not. For instance, in *State ex rel. William Ranni Associates, Inc. v. Hartenbach*, an employer purchased a group life insurance policy, which insured an employee and officer of the company.[14] The employee died, but the general agent for the insurer delayed in transmitting the policy proceeds for over a year. The agent's duties included transmitting policy proceeds to the beneficiaries.[15] The beneficiaries under the life insurance policy sued the insurance agent based on various grounds, including that the agent failed to timely notify them of the existence of the policy; they argued, in part, that they were owed duties because they were third-party beneficiaries under the insurance policy.[16] The court rejected the argument that they were third-party beneficiaries and therefore owed duties by the agent, because the duties the plaintiffs sought to impose stemmed from the agent's contract with the insurer, not the life insurance policy.[17] Therefore, although the plaintiffs were third-party beneficiaries of the life insurance policy, they were only incidental beneficiaries of the agent's agreement with the insurer.[18]

In *Rae v. Air-Speed, Inc.*, an insurance intermediary was hired by an employer to procure worker's compensation insurance.[19] The intermediary failed to place the insurance, and the employee died in a work-related accident.[20] The employee's estate and dependents sued the insurance intermediary, arguing that they and the employee were third-party beneficiaries of the contract between the intermediary and the employer to obtain worker's compensation insurance.[21] The court agreed, but provided little analysis.[22]

4. Property interests.

Courts have also found third-party beneficiary status in situations pertaining to insurance policies protecting certain property interests. For example, a mortgage loss payee may qualify as a third-party beneficiary under a mortgagee's lender-placed insurance policy.[23]

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[13] *E.g.*, *O&G Indus., Inc. v. Aon Risk Servs. Northeast, Inc.*, 922 F. Supp. 2d 257, 265-66 (D. Conn. 2013) (concluding there was sufficient evidence that additional insureds to a contractor controlled insurance program were meant to be third-party beneficiaries, and thus had standing to bring breach of contract claims); *Aero Techs., LLC v. Lockton Cos. Int'l, Ltd.*, No. 09-20610-CIV, 2010 WL 7657475, at *4 (S.D. Fla. Apr. 25, 2011) (stating that issuance of certificate of insurance to a party did not confer third-party beneficiary status; a party must allege it is a third-party beneficiary not only of the insurance policy but of the agreement between the insured and the insurance intermediary), *aff'd without opinion*, 467 Fed. App'x 824 (11th Cir. 2012); *Fed. Ins. Co. v. Spectrum Ins. Brokerage Servs., Inc.*, 758 N.Y.S.2d 21, 22 (N.Y. App. Div. 2003) (stating that a broker owed no duty to additional insureds).

[14] 742 S.W.2d 134, 135-36 (Mo. 1987).

[15] *Id.* at 136.

[16] *Id.* at 139-40.

[17] *Id.* at 140-41.

[18] *Id.*

[19] 435 N.E.2d 628, 629 (Mass. 1982).

[20] *Id.*

[21] *Id.* at 633.

[22] *Id.*

[23] *E.g.*, *McKinney v. Balboa Ins. Co.*, No. 8:13-cv-1118-T-24, 2013 WL 4495185, at *1-4 (M.D. Fla. Aug. 19, 2013).

5. Recent cases.

Recent cases have confirmed pre-existing precedent, sometimes limiting and sometimes expanding application, depending on the facts of the claims.

a. Those harmed by a wrongful act of the insured.

In *Hanover Insurance Company v. Yu Guan*, a New Jersey court placed an unexpected limitation on New Jersey's expansive approach to third-party beneficiary status.[24] In *Hanover*, an employee driving an employer's car injured another driver in an auto accident.[25] Before the accident, the employer had obtained auto insurance through an insurance intermediary, but the coverage had been cancelled.[26] The injured driver's insurance company paid the injured driver personal injury protection benefits (PIP) and uninsured motorist benefits (UIM).[27] The injured driver's insurance company sued the employer's insurance intermediary for professional negligence in allowing the employer's policy to be canceled; the driver's insurer argued that it was permitted as a subrogee and third-party beneficiary to sue the employer's intermediary.[28] The New Jersey court noted that the New Jersey Supreme Court generally permits an injured tort claimant to bring a claim against an insurance intermediary, based on status as a third-party beneficiary of the agreement between the insured and intermediary because an insurance policy is intended to be a source of recovery for an innocent injured party, regardless of whether the insurance is mandatory or optional.[29] But the court noted that the same rationale did not apply to a subrogating PIP and UIM insurer.[30] The court reasoned that the insurer-subrogee was simply an incidental beneficiary, limiting the otherwise broad approach New Jersey courts have taken with third-party beneficiary status and recovery claims.[31]

b. Additional insureds.

In *Kemp v. CTL Distribution, Inc.*, the Federal District Court for the Middle District of Louisiana concluded that a third party could assert a direct claim against an insurance intermediary where the intermediary failed to include it as an additional insured.[32] The court concluded that the party was a third-party beneficiary because there was evidence that the insured had specifically asked the insurance intermediary to amend the policy to include the third party as an additional insured, and the service agreement between the insured and the third party established a legal relationship between them requiring that the insured protect the additional insured from liability by providing insurance under its policy.[33] The court distinguished the long line of Louisiana cases holding that an insurance intermediary has no duty to non-client tort claimants by noting that here, it was the insurance intermediary, not the insured, who had performed the wrongful acts, and it was not a case where a member of the general public happened to be injured by the intermediary and brought a claim against the

[24] 2009 WL 537067, at *1 (N.J. Super. Ct. App. Div. Mar. 5, 2009).
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *Id.* at *5.
[30] *Id.* at *1, 5.
[31] *Id.* at *5.
[32] No. 09-1109, 2011 WL 6004268, at *1, 7(M.D. La. Nov. 30, 2011), *modified on other grounds on reh'g*, 2012 WL 860404 (M.D. La. Mar. 13, 2012).
[33] *Id.* at *6.

intermediary.[34] Rather, the court concluded that the third party was a third-party beneficiary and could assert a claim against the intermediary because the intermediary's client had specifically directed it to perform an act for the benefit of the client and a particular third party.[35] This is a noteworthy development in a jurisdiction that historically does not permit a third-party non-client to assert a claim against an intermediary.

Similarly, a Connecticut court recently found third-party beneficiary status for additional insureds based on specific evidence that the additional insureds were intended to be beneficiaries of the agreement between the intermediary and insured-client. In *O&G Industries, Inc. v. Aon Risk Services*, the Federal District Court for the District of Connecticut affirmed Connecticut precedent that third parties may bring a breach of contract claim against an insurance intermediary.[36] The third parties were subcontractors participating in a contractor controlled insurance program (CCIP).[37] As part of a construction project, the contractor was required to procure and maintain commercial general liability coverage with defense costs coverage outside limits and umbrella/excess coverage that followed form to the primary coverage.[38] The contractor entered into a service agreement with Aon, the insurance intermediary, to procure the insurance coverage and review all policies.[39] The intermediary failed to obtain excess coverage that provided defense costs, however, and an explosion at the construction site resulted in multiple deaths and injuries.[40] The court noted that the subcontractors were not parties to the service agreement with the insurance intermediary, and only had standing to assert a breach of contract claim against the intermediary if they were third-party beneficiaries.[41] The court concluded that they were intended beneficiaries to the service agreement because the agreement referred to the intermediary providing "CCIP orientation" for the contractor's project team and for the subcontractors, and stated that the contractor would provide the intermediary with a list of subcontractors.[42]

Although the court concluded that the additional insureds had standing as third-party beneficiaries to assert a claim, the court went on to conclude that they had failed to state a breach of contract claim because the service agreement between the contractor and intermediary did not specify the required coverage.[43] Moreover, the service agreement with the intermediary contained a merger clause superseding any prior requests or agreements the contractor might have made or had with the insurance intermediary.[44] And the court concluded that the breach of contract claim amounted to a professional malpractice claim for failing to exercise reasonable care, and thus had to be dismissed.[45] *O&G* provides helpful guidance on defeating a third-party beneficiary's claim in a jurisdiction that generally permits such claims. It is particularly helpful in illustrating that although a third-party might be asserting a breach of contract claim, the basis for such claim might not be contract but instead negligence law.

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[34] *Id.* at *7.
[35] *Id.*
[36] 922 F. Supp. 2d 257, 265-67 (D. Conn. 2013).
[37] *Id.* at 263.
[38] *Id.* at 263-64.
[39] *Id.* at 264.
[40] *Id.* at 265.
[41] *Id.*
[42] *Id.* at 265-66.
[43] *Id.* at 269.
[44] *Id.*
[45] *Id.* at 270.

In contrast, the Federal District Court for the Middle District of Florida in *Aero Technologies, LLC v. Lockton Companies International, Ltd.*, reaffirmed longstanding Florida precedent that requires a party to plead that it is an intended third-party beneficiary not only of the insurance contract but also of the agreement between the insured and the insurance intermediary to procure insurance.[46] The court noted that the third party had certificates of insurance and the complaint alleged that it was a beneficiary of the insurance policies, but contrary to Florida precedent, the complaint did not contain any allegations that the third party was an intended beneficiary of the agreement between the insured and intermediary to procure insurance.[47] Therefore, the court dismissed the third party's claims against the insurance intermediary.[48] This case illustrates that courts generally view third-party beneficiary status as flowing not simply from the insurance policy itself, but from the agreement between the intermediary and the insured-client.

c. Life insurance and group policies.

In *Fick v. Unum Life Insurance Co. of America*, the City of Bakersfield contacted insurance intermediaries to procure group long-term disability insurance.[49] A city employee enrolled in the group disability program, and later submitted a claim for benefits based on a variety of health problems.[50] Unum paid disability benefits to the employee for two years, but then terminated benefits, citing a two-year benefit limitation in cases involving mental illness.[51] An earlier market conduct examination by the California Department of Insurance revealed that Unum had been illegally using the mental illness benefits limitation to wrongfully deny or discontinue benefits to claimants and using definitions in its policies that were not permitted under state law.[52] After the employee's benefits were terminated, she sued the insurance intermediaries for breach of contract and negligence, among other things, in placing the group long-term disability policy with Unum when the intermediaries should have known of Unum's wrongful practices.[53] The court rejected the intermediaries' argument that they might have owed duties to the city (the group policyholder) but not to the employee, because the employee was a third-party beneficiary of the group policy as a member of the class that the insurance was intended to benefit.[54]

In the context of life insurance, the Iowa Supreme Court in *Pitts v. Farm Bureau Life Insurance Co.* recently held that an insurance intermediary owes a duty to an intended beneficiary of a life insurance policy where the beneficiary can show that it was the direct, intended, and specifically identifiable beneficiary of the policy.[55] Likewise, the Federal District Court for the District of Maryland recently held that the named beneficiaries on a conditional receipt agreement for a life insurance policy could bring a breach of contract claim against an insurance intermediary for failing to properly procure life insurance coverage, based on

[46] No. 09-20610-CIV, 2011 WL 7657475, at *4 (M.D. Fla. Apr. 25, 2011), *aff'd without opinion*, 467 Fed. App'x 824 (11th Cir. 2012).
[47] *Id.* at *4.
[48] *Id.*
[49] No. 2:12-cv-01851, 2012 WL 5214346, at *1 (E.D. Cal. Oct. 22, 2012).
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.* at *1-2.
[54] *Id.* at *7-8.
[55] 818 N.W.2d 91, 106 (Iowa 2012).

their status as third-party beneficiaries.[56] Nevertheless, the court dismissed the beneficiaries' negligence claim against the insurance intermediary because an intermediary generally owes no duty in tort to a third-party beneficiary of a life insurance policy, and because the economic loss doctrine barred their negligence claim.[57]

The recent cases addressing third-party beneficiary status and claims underscore that lawyers should be diligent in separating breach of contract claims from claims sounding in negligence. And they illustrate that where there is specific evidence within or surrounding an insured-client's agreement with an intermediary that the policy is intended to benefit the third party, a court will likely find third-party beneficiary status, even perhaps in jurisdictions that do not generally recognize third-party beneficiary claims.

B. Negligence claims.

1. In general—foreseeability of harm and relationship to the third party.

In addition to bringing claims against intermediaries based on third-party beneficiary status, third parties will assert negligence claims against intermediaries, arguing that the intermediaries owed them a direct duty based on other grounds but breached that duty. Thus, an intermediary's tort liability generally hinges on whether a court concludes an agent owes a duty to a third party. Some courts analyze these tort claims by looking at foreseeability of the injury or privity between the parties.

There is a bright-line rule in a several jurisdictions, holding that third parties may not assert negligence claims against an insurance intermediary. For example, in *Pressman v. Warwick Insurance Co.*, the New York Appellate Division granted summary judgment in the insurance intermediary's favor where a third party injured at a tavern sued an uninsured tavern's intermediary for negligence.[58] The court simply noted that "where an insurance agent's negligence causes an insured to be without coverage, the agent cannot be held liable for damages sustained by an injured third party as a consequence thereof," because "the third party is not in privity with the agent."[59] Similarly, in *West Houston Airport, Inc. v. Millennium Insurance Agency, Inc.*, the Texas Court of Appeals was asked to determine whether an insurance intermediary owed a duty to a non-client when the intermediary's client asks for procurement of a liability policy with a certificate of insurance designating the third party as an additional insured.[60] The court concluded that even if "injury" to the additional insured was foreseeable, the parties lacked sufficient privity to impose a duty on the intermediary, and the parties had never communicated regarding insurance coverage.[61]

The Arizona Supreme Court in *Napier v. Bertram* took a slightly different analytical approach in refusing to recognize that an insurance intermediary owes a duty in tort to a non-client by focusing on the foreseeability

[56] *Colden v. W. Coast Life Ins. Co.*, No. RDB-12-1691, 2013 WL 1164922, at *4 (D. Md. Mar. 19, 2013).
[57] *Id.* at 6.
[58] 623 N.Y.S.2d 306, 307 (N.Y. App. Div. 1995).
[59] *Id.* at 308; *accord Halali v. Vista Environments, Inc.*, 666 N.Y.S.2d 196, 196 (N.Y. App. Div. 1997).
[60] 349 S.W.3d 748, 751 (Tex. Ct. App. 2011).
[61] *Id.* at 754.

of the injury.[62] The court recognized that certain other professionals, such as architects and psychiatrists, have duties to non-clients based on some distinct factor that enhances the relationship between the professional and the non-client such that the non-client was somehow dependent on the professional, involving more than general foreseeability.[63] But the court concluded that imposing a duty on an insurance intermediary, such as to obtain auto insurance, is untenable because it "would impose on agents a duty to a vast number of non-clients—literally all who reside in or travel" in the state, resulting in duties far broader than imposed on other professionals.[64] The court concluded that for there to be a duty to a third-party non-client, it must be based on a relationship between the non-client and intermediary beyond mere general foreseeability.[65]

And in *Jones v. Hyatt Insurance Agency, Inc.*, the Maryland Court of Appeals concluded that when determining whether an insurance intermediary owes a third-party non-client a tort duty, such as an auto accident victim, it is necessary to focus on the nature of the harm likely to result from a failure to exercise due care, and the relationship between the parties.[66] The court concluded that the nature of the harm caused by an insurance intermediary to a victim of a wrongful act of an insured for failure to procure insurance is economic loss only.[67] Where only economic loss is at issue, there must be some direct relationship, such as an intimate nexus, between the intermediary and third party to impose a tort duty; but where the third parties were not even among the members of a class intended to be beneficiaries of the contract until an accident occurred, there was only general foreseeability and no direct relationship, precluding an intermediary from owing a duty.[68]

Although some courts have taken an extremely broad view of foreseeable injury to a third-party non-client,[69] courts generally require foreseeable harm to the particular third party, and thus impose a duty on an intermediary where the third party was within the zone of harm emanating from the intermediary's actions.[70]

2. Recent cases—Additional insureds.

Many of the recent cases addressing whether a third-party non-client could bring a direct negligence claim against an insurance intermediary analyzed whether the intermediary owed a duty in tort to an additional insured.

In *Cleveland Indians Baseball Co., L.P. v. N.H. Ins. Co.*, the Sixth Circuit was asked to determine whether, under Michigan law, an insurance intermediary owed a duty of reasonable care to the Cleveland Indians, an additional insured on a liability policy, to procure insurance that the named insured requested.[71] The Indians had entered into an agreement with an entertainment company to hold "Kids Fun Day" events before baseball games, which would include an inflatable slide; as part of the agreement, the entertainment company was required to obtain a general liability policy for the events

[62] 954 P.2d 1389, 1394-95 (Ariz. 1998).
[63] *Id.* at 1393-94.
[64] *Id.* at 1394-95.
[65] *Id.* at 1393-94.
[66] 741 A.2d 1099, 1109 (Md. 1999).
[67] *Id.*
[68] *Id.*
[69] *E.g.*, *Werrmann v. Aratusa, Ltd.*, 630 A.2d 302, 305 (N.J. Super. Ct. App. Div. 1993).
[70] *E.g.*, *Bus. to Bus. Markets, Inc. v. Zurich Specialties*, 37 Cal. Rptr. 295, 299 (Cal. Ct. App. 2006); *Carter Lincoln-Mercury, Inc. Leasing Div. v. Emar Grp.*, 638 A.2d 1288, 1297 (N.J. 1994).
[71] 727 F.3d 633, 635-37 (6th Cir. 2013).

and name the Indians as an additional insured.[72] The entertainment company contracted with an insurance intermediary to procure the liability insurance; the intermediary issued a certificate of insurance to the Indians stating that the coverage was in place, but the intermediary had failed to procure insurance that actually covered the inflatable slide.[73] At one of the events, the slide collapsed, causing a fatal injury.[74] The Indians sued the intermediary for negligent failure to procure the insurance requested by the named insured, but the intermediary argued that it owed no duty of care to the Indians.[75] The court disagreed, concluding that it was reasonably foreseeable that the Indians would be harmed if the intermediary failed to procure the intended coverage where the intermediary knew it was procuring insurance for the named insured and the Indians (the additional insured), it knew the precise dates and events the insurance was for, the Indians had paid the premium, and the intermediary issued a certificate of insurance.[76] According to the court, these factors distinguished the situation from mere foreseeability of harm to a limitless class of total strangers.[77] The court also rejected the argument that the economic loss doctrine barred recovery, in part because the underlying injuries of the underlying claimants were physical.[78]

In *O&G Industries, Inc. v. Aon Risk Services Northeast, Inc.*, a court applying Connecticut law concluded that subcontractor-additional insureds could bring negligence claims against an insurance intermediary because subcontractors were referenced in the insurance service agreement the intermediary had with the named insured-client, and as such, were foreseeable beneficiaries of the service agreement.[79]

In contrast, the Texas Court of Appeals in *Brannan Paving GP, LLC v. Pavement Markings, Inc.*, concluded that insurance intermediaries owed no duty to a third party who was supposed to be added as an additional insured to a liability policy.[80] The court noted that the third party who was supposed to be an additional insured was not a client of the insurance intermediaries, had no contractual connection or other relationship with them, and had never directly communicated with them.[81] Accordingly, the court concluded that even if the injury had been foreseeable in general, the parties lacked sufficient privity to impose a duty on the intermediaries.[82]

Two other cases have considered arguments for expanded duties an insurance intermediary might owe to additional insureds, but rejected imposing duties on the intermediary based on a party's status as an additional insured. In *Good Samaritan Hospital v. Lexington Insurance*, a hospital contracted with a company to provide temporary nursing staff.[83] The staffing company contacted an insurance intermediary to obtain professional liability insurance as required by the contract.[84] The insurance intermediary obtained the liability insurance, and issued a certificate of insurance to the hospital, but did not disclose

[72] *Id.* at 635.
[73] *Id.* at 635-36.
[74] *Id.* at 635.
[75] *Id.* at 637.
[76] *Id.* at 639.
[77] *Id.*
[78] *Id.* at 640.
[79] 922 F. Supp. 2d 257, 261-66 (D. Conn. 2013).
[80] Nos. 13-11-00005-CV, 13-11-00013-CV, 2013 WL 3832717, at *1-2, 11 (Tex. Ct. App. July 25, 2013).
[81] *Id.* at 11.
[82] *Id.*
[83] No. C12-5043, 2012 WL 934238, at *1 (W.D. Wash. Mar. 20, 2012).
[84] *Id.*

that the policy had only a $1 million self-insured retention (SIR).[85] A claimant's estate and family later filed a lawsuit against the hospital and nursing company for negligence.[86] The nursing company filed for bankruptcy, and the hospital commenced a separate lawsuit against the nursing company's insurance intermediary and the liability insurer, alleging misrepresentation, bad faith, and breach of duty of care for failing to disclose the $1 million SIR.[87] The hospital's argument for liability was therefore different than the typical claims against an intermediary that the intermediary failed to procure insurance or the proper insurance; here, the question was whether the intermediary had a duty to the hospital-certificate holder to inform it of a specific provision within the policy. The court concluded that the intermediary had no duty to the hospital-certificate holder to disclose the $1 million SIR on a certificate of insurance that was for informational purposes only and that was subject to the specific terms and provisions of each policy.[88] The court concluded that there was nothing about the relationship between the intermediary and certificate holder that imposed a duty to disclose the SIR.[89]

In *Garner and Glover Co. v. Barrett*, the Georgia Court of Appeals concluded that an insurance intermediary had no duty to notify an excess carrier that a claim had been made against an additional insured "based solely upon its status as an additional insured under the policy."[90] Citing Georgia precedent holding that an insurance intermediary was not liable to an additional insured for breach of contract for failing to continue insurance coverage because the intermediary was not the additional insured's agent, the court applied the same reasoning to hold that an intermediary has no duty to notify an excess carrier regarding a claim made against an additional insured.[91] The court recognized, however, that such a duty might exist if the intermediary had voluntarily undertaken to give notice.[92] Therefore, even in jurisdictions such as Georgia, which generally do not permit third-party non-clients to bring claims against insurance intermediaries, defense lawyers must be prepared to confront an argument that the intermediary negligently undertook a duty that might not otherwise exist.

Similar to the recent cases addressing third-party beneficiary status, recent cases addressing negligence claims asserted by third-party non-clients based on their status as additional insureds illustrate that courts generally look for more than mere foreseeability or general foreseeability of harm to the third party.

C. A client's claims against an insurance agent or broker might be assignable.

Even if a third-party claimant is in a jurisdiction that does not recognize liability of an insurance intermediary to a third-party non-client, an intermediary might be liable where the third party asserts the client's claim through an assignment. Lawyers representing or advising insurance intermediaries should be aware that a third party might use a consent agreement with a covenant-not-to-execute on a client's assets in exchange for an assignment of the client's claims against its insurance intermediary.

[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.* at *4.
[89] *Id.*
[90] 738 S.E.2d 721, 723 (Ga. Ct. App. 2013).
[91] *Id.*
[92] *Id.*

Some jurisdictions do not permit a third party to assert a breach of duty claim against an insurance intermediary. For instance, as summarized above, the Arizona Supreme Court in *Napier v. Bertram* refused to recognize that an insurance intermediary owes a duty to a non-client.[93] Although some professionals might be liable to non-clients,[94] imposing a duty on an insurance intermediary, such as to obtain auto insurance, is untenable because it "would impose on agents a duty to a vast number of non-clients – literally all who reside in or travel" in the state, resulting in a far broader rule than duties imposed on other professionals.[95]

The Arizona Supreme Court revisited its *Napier* decision ten years later in *Webb v. Gittlen*, where an insured assigned a professional negligence claim against an insurance intermediary to a third-party non-client.[96] The intermediary argued, in part, that the court should not allow the assignee to assert a negligence claim because allowing an assignment of claims against intermediaries would conflict with the court's earlier *Napier* decision by allowing people who are not parties to an insurance policy to benefit from the insurance intermediary-client relationship.[97] The court rejected the argument, reasoning that a non-client's assertion of a claim against an insurance intermediary based on an assignment from a client-insured does not expand an insurance intermediary's duties or improperly increase the beneficiaries of an intermediary's relationship with a client because the claim asserted is actually the client's.[98] Therefore, in Arizona, a third party may bring a claim against an insurance intermediary so long as the claim asserted is the client's. An assignment can produce the same result as would a successful, but prohibited, direct claim.

Similarly, the Colorado Court of Appeals recently held that a client's assignment to a third party of the proceeds from the insured's negligence and negligent misrepresentation claims against an insurance intermediary was valid and enforceable.[99] The client had settled with the third-party claimant and entered into a covenant-not-to-execute.[100] The court noted that the majority of courts recognizing covenants-not-to-execute or similar agreements have held that a client's assignment of claims against an insurance intermediary are valid.[101] Indeed, courts in California, Connecticut, Florida, Hawai`i, Iowa, Kentucky, Massachusetts, New Hampshire, North Dakota, South Dakota, Tennessee, and Washington have held that a third-party non-client may assert claims

[93] 954 P.2d 1389, 1394-95 (Ariz. 1998).
[94] *Id.* at 1393-94.
[95] *Id.* at 1394-95.
[96] *Webb v. Gittlen*, 174 P.3d 275, 280-81 (Ariz. 2008).
[97] *Id.* at 280.
[98] *Id.* It is interesting to note that one New Jersey court took the opposite view when considering whether to permit a third-party non-client to assert a direct negligence claim against an intermediary. The New Jersey court observed that the third party could have simply received an assigned claim from the insured, and stated that "it is nonsensical, unfair and contrary to public interest to recognize [a third party's] cause of action as an assignee, but not her right to sue as a member of the general public whose right to recover has been compromised or entirely foreclosed by the very conduct that would have formed the basis of [the insured's] assigned claim against the broker." *Werrmann v. Aratusa, Ltd.*, 630 A.2d 302, 305 (N.J. Super. Ct. App. Div. 1993).
[99] *DC-10 Entm't, LLC v. Manor Ins. Agency, Inc.*, 308 P.3d 1223, 1229 (Colo. Ct. App. 2013).
[100] *Id.* at 1224.
[101] *Id.* at 1228.

against an insurance intermediary based on an insured's assignment of claims.[102]

II. What law applies or likely applies to the claim?

Perhaps the single most important factor in determining whether third-party non-clients have a claim against an insurance intermediary is what law applies to the claim. For instance, a court applying New York law would dismiss a third party's negligence claim against an insurance intermediary, while a court applying the law of nearby Connecticut, Massachusetts, or New Jersey would permit such a claim in the right circumstances.[103]

Federal and state courts, of course, make a distinction between procedural law and substantive law. Filing a lawsuit in one jurisdiction does not necessarily mean that the law of that jurisdiction will apply to the substantive legal issues. In contrast to substantive law and issues, a court will generally apply its own procedural law. For example, a New York state court will follow the procedural rules established by that state while potentially applying the substantive law of another state or even another country. But procedural issues should not be overlooked. Procedural law can determine such things as whether attorneys' fees are available and whether the statute of limitations has run on a claim. For instance, in Connecticut, the statute of limitations for a negligence claim is two years from the accrual date, while a breach of contract claim is six years for a written contract and three years for an oral contract.[104]

A defense lawyer should conduct a conflict-of-law and choice-of-law analysis where the substantive law of more than one jurisdiction might apply and a potential conflict in the laws would make a difference in the outcome.[105] Courts determining whether a third-party non-client may bring a claim against an insurance intermediary have generally not engaged in a conflict-of-law and choice-of-law analysis. But that does not mean such analysis is unimportant in determining whether a particular third party may bring a claim. For example, a third-party claimant's negligence claim against an insured driver for a car accident occurring in Louisiana will likely be governed by Louisiana negligence law; but a third party's

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[102] California: *Troost v. Estate of DeBoer*, 202 Cal. Rptr. 47, 52 (Cal Ct. App. 1984); Connecticut: *Esposito v. CPM Ins. Services, Inc.*, 922 A.2d 343, 352 (Conn. Super. Ct. 2006); Florida: *Forgione v. Dennis Pirtle Agency, Inc.*, 701 So. 2d 557, 560 (Fla. 1997); Hawaii: *McLellan v. Atchison Ins. Agency Inc.*, 912 P.2d 559, 565 (Haw. Ct. App. 1996); Iowa: *Red Giant Oil Co. v. Lawlor*, 528 N.W.2d 524, 528-35 (Iowa 1995); Kentucky: *Associated Ins. Serv., Inc. v. Garcia*, 307 S.W.3d 58, 64-65 (Ky. 2010); Massachusetts: *Campione v. Wilson*, 661 N.E.2d 658, 662 (Mass. 1996); New Hampshire: *Stateline Steel Erectors, Inc. v. Shields*, 837 A.2d 285, 288-91 (N.H. 2003); North Dakota: *Wangler v. Lerol*, 670 N.W.2d 830, 837-38 (N.D. 2003); South Dakota: *Kobbeman v. Oleson*, 574 N.W.2d 633, 636 (S.D. 1998); Tennessee: *Tip's Package Store, Inc. v. Commercial Ins. Managers, Inc.*, 86 S.W.3d 543, 553-55 (Tenn. Ct. App. 2001); Washington: *Steinmetz v. Hall-Conway-Jackson, Inc.*, 741 P.2d 1054, 1056-57 (Wash. 1987). *But see Or. Mut. Ins. Co. v. Gibson*, 746 P.2d 245, 247 (Or. Ct. App. 1987).

[103] *Compare Pressman v. Warwick Ins. Co.*, 623 N.Y.S.2d 306, 308 (N.Y. App. Div. 1995), and *Oathout v. Johnson*, 451 N.Y.S.2d 932 (N.Y. App. Div. 1982), *with O&G Indus., Inc. v. Aon Risk Servs. Northeast, Inc.*, 922 F. Supp. 2d 257, 266-69 (D. Conn. 2013); *Flattery v. Gregory*, 489 N.E.2d 1257, 1260-62 (Mass. 1986); *Werrmann v. Aratusa, Ltd.*, 630 A.2d 302, 305-06 (N.J. Super. Ct. App. Div. 1993).

[104] Conn. Gen. Stat. §§ 52-576 (written contract), -581 (oral contracts), -584 (negligence).

[105] *See, e.g., Townsend v. Sears, Roebuck & Co.*, 879 N.E.2d 893, 898 (Ill. 2007); *Jepson v. Gen. Cas. Ins. Co.*, 513 N.W.2d 467, 469 (Minn. 1984).

claim against the insured's insurance intermediary for negligence occurring in Florida for failing to procure or maintain insurance might be governed by Florida law. Louisiana generally does not recognize a third-party claimant's right of action against an insurance intermediary for failure to procure adequate or proper insurance for the tortfeasor, but Florida does.[106]

Different states apply different choice-of-law tests, depending on the type of claims at issue. And courts might divide a case into individual issues, each subject to a separate choice-of-law analysis, potentially resulting in the application of the substantive law of one state to some claims but the substantive law of a different state to other claims.[107] In a breach of contract case, in general, there are two methods to determine which state's law to apply: (1) determining the place of contracting (*lex loci contractus*), and (2) determining the state with the most significant relationship. Under the *lex loci contractus* analysis, a court will apply the law of the jurisdiction where the contract was made.[108] A contract is considered to have been made when the last act necessary for the contract's completion is done, or, stated differently, when the last act necessary under the forum's rules of offer and acceptance has occurred to give the contract binding effect.[109] This might be the state in which the contract was delivered, or where the policy was delivered and premiums are paid, or where a document necessary for the contract was signed.[110]

In contrast to the *lex loci contractus* test, the most significant relationship analysis in matters involving a contract is more flexible and requires consideration of several factors:

1. the place of contracting;
2. the place of contract negotiation;
3. the place of performance;
4. the location of the subject matter of the contract; and
5. the domicile, residence, nationality, place of incorporation and the place of business of the parties.[111]

In situations involving a tort claim, many courts apply a most significant relationship test taking into account the underlying actions. The most significant relationship test in matters involving a tort requires assessment of the following factors:

1. the place where the injury occurred;
2. the place where the conduct causing the injury occurred;
3. the domicile, residence, nationality, place of

[106] *See Hamer v. Kahn*, 404 So. 2d 847, 850 (Fla. Dist. Ct. App. 1981); *Chisley v. Smith*, 986 So.2d 222, 225 (La. Ct. App. 2008).
[107] *Ruiz v. Blentech Corp.*, 89 F.3d 320, 324 (7th Cir. 1996).
[108] *E.g.*, *State Farm Mut. Auto. Ins. Co. v. Roach*, 945 So. 2d 1160, 1163 (Fla. 2006).
[109] *Fioretti v. Mass. Gen. Life Ins. Co.*, 53 F.3d 1228, 1235 (11th Cir. 1995) (applying Florida law); *Comm. Union Ins. Co. v. Porter Hayden Co.*, 698 A.2d 1167, 1200 (Md. Ct. Spec. App. 1997).
[110] *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418-19 (4th Cir. 2004) (applying Virginia law); *Fioretti*, 53 F.3d at 1236 (applying Florida law); *Porter Hayden Co.*, 698 A.2d at 1200.
[111] Restatement (Second) of Conflict of Laws § 188; *Am. States Ins. Co. v. Allstate Ins. Co.*, 922 A.2d 1043, 1047-48 (Conn. 2007).

incorporation and place of business of the parties; and

4. the place where the relationship, if any, between the parties is centered.[112]

These contacts are to be evaluated according to their relative importance with respect to the particular issue.[113]

There are variations on the tests states use to determine which jurisdiction has the most significant relationship. Thus, the particular test of each state must be applied. Although each state has adopted some governing case law for the determination of which law to apply where there is a conflict, applying the governing test might not result in a clear answer. Lawyers advising or representing insurance intermediaries should carefully consider which law applies to a third party's claim because they might be permitted by some jurisdictions and barred by others. Convincing a court that one state's law should or should not apply might be the best defense.

Conclusion

Third-party non-clients often bring claims against insurance intermediaries, trying new arguments or testing the arguments that have worked before in other jurisdictions. When a lawyer is asked to defend or advise an insurance intermediary against a third-party's claim, the lawyer should be sure to identify precisely who is bringing the claim, in what capacity, the nature of the claim, and the nature and foreseeability of the harm. By carefully identifying these factors, a lawyer will be able to assert defenses tailored to the claim. In those states where courts have not yet considered whether liability should be imposed on an insurance intermediary where the client was obligated to have liability insurance, the defense lawyer should anticipate an argument that the third-party may assert a cause of action against the intermediary because the client's mandatory liability insurance was for the benefit of the third-party. Defense counsel should also anticipate an assignment of the client's claim against the intermediary in those states where it is permitted.

[112] Restatement (Second) of Conflict of Laws § 145(2).

[113] *Id.*

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