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subject to suit for negligent conduct at almost every turn. However, at the present time they appear to be in the advantageous position in most states of not being liable for negligence resulting only in mental anguish. Only a few states have departed from the rule; and the departure is apparently only in breach of contract actions. Most of the contract cases imposing liability on morticians involve wilful and wanton conduct, and in this regard only a few states still deny recovery. Presently recovery in tort requires some accompanying physical injury.

It is felt that the courts will eventually come to the position of allowing recovery for mental anquish alone which results from negligence in the care of dead bodies. Perhaps fabrication of mental anguish in the ordinary case is a sufficient danger upon which to base denial of recovery when that is the only damage alleged. However, cases concerning dead bodies are out of the ordinary and involve the great probability of emotional distress and suffering by the family when they learn of some misconduct towards their deceased.

It appears that the present general rule is based not on compensation for mental injury, but on punishment for malicious conduct. While this may result in justice to the injured party when wanton conduct is involved, it does not do so when one who suffers the same injury cannot recover because the responsible party was merely negligent and not malicious. Surely, the courts will eventually realize that mental disturbance should be compensable even though there is no additional physical harm or there is no wanton conduct involved in producing the disturbance.

EDGAR E. SMITH

LIABILITY OF AN INSURANCE AGENT OR BROKER IN PROCURING OR MAINTAINING INSURANCE FOR AN OWNER

The insurance agent or broker is vulnerable to legal attack on several grounds and may incur liability on a variety of theories ranging from breach of implied warranty[1] to fraudulent misrepresentation.[2] The basic fact situation here discussed arises when one desires insurance and the agent sought for the purpose of procuring that insurance

1. Erie Motor Freight, Inc. v. Terminal Ins. Agency Co., 48 Ohio App. 1, 192 N.E. 362, 364 (1934).
2. Colpe Inv. Co. v. Seeley & Co., 132 Cal. App. 2d 16, 22 P.2d 35 (1933); Williams v. Neal, 52 Ga. App. 553, 183 S.E. 650 (1936).

fails to do so through a lack of reasonable care. The nature and origin of the duty owed by such an agent or broker, the various instances in which liability arises, the measure and amount of damages collectible, and the defenses available to the agent are discussed.

An agent may have as his principal a property owner. Or an agent may be acting primarily for an insurance company by soliciting prospective customers and attempting to place business with the company he represents.[3] In contrast, a broker is an agent who acts as middleman[4] between one seeking a policy and an insurance company. The broker is not employed by any particular company; and once an order for insurance is procured from one seeking a policy, the insurance is placed with an insurance company of the prospective policyholder's choice or the broker is free to select any company that may give the protection desired.[5] Whether one is an agent or a broker is a question of fact.[6] Since a broker is an agent of the policy owner in procuring the desired contract, in addition to being an agent of the insurance company for purposes of collecting payments for the company,[7] a separate analysis seems unnecessary in most instances.

The correlation of the agent to the respective poles of owner or insurer becomes important when suit is contemplated by the property owner or a proposed donee beneficiary. If an agent of a prospective policyholder fails to effect a policy and the owner is harmed due to the lack of insurance, recourse is limited to the agent. But if the person at fault is the agent of an insurance company, recovery may be had against either the agent,[8] the company[9] or both.[10] The insurance company is liable if the tortious acts of the agent arose from activities within the scope of the agent's employment;[11] but if the agent acted outside of the scope of employment, the suit can only be successful against the agent. The distinction is important since the insurance company will ordinarily be more able to give relief to the plaintiff.

3. *E.g.*, see the distinction drawn by Mr. Justice Frankfurter in Osborn v. Ozlin, 310 U.S. 53, 60 (1940). One can be agent for the assured and also agent for the insurer in the same transaction as long as the knowledge of the dual capacity is possessed by the assured and the insurer. North British and M. Ins. Co. v. Lambert, 26 Ore. 199, 37 Pac. 909 (1894).

4. Gay v. Lavina State Bank, 61 Mont. 449, 202 Pac. 753 (1921). And see Travelers Fire Ins. Co. v. Bank of Louisville, 243 S.W.2d 996, 998 (Ky. Ct. App. 1951); Pacific Fire Ins. Co. v. Bowers, 163 Va. 349, 175 S.E. 763 (1934).

5. See Arff v. Star Fire Ins. Co., 125 N.Y. 57, 25 N.E. 1073 (1890).

6. Pacific Fire Ins. Co. v. Bowers, 163 Va. 349, 175 S.E. 763 (1934).

7. Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009, (1918) (by implication); Gay v. Lavina State Bank, 61 Mont. 449, 202 Pac. 753 (1921).

8. Briggs v. Life Ins. Co. of Virginia, 155 N.C. 73, 70 S.E. 1068 (1911).

9. See cases cited in note 21 *infra*.

10. Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918).

11. *Ibid.*

DUTY—NATURE AND ORIGIN

Some of the earlier American cases have allowed recovery to an owner without stating whether the theory of the suit was contract or tort.[12] The more recent decisions have used one of the two theories, while a few jurisdictions have found the agent liable on a statutory ground.[13]

It would seem that ordinarily the person who promises to procure insurance is under contract duty that must be performed with reasonable care.[14] For the formation of the contract there must be an offer and acceptance.[15] The contract may be express[16] or implied[17] and payment of premium by the owner before suit is unnecessary.[18] A failure to procure which is attributable to a lack of due care constitues a breach of contract[19] for which the agent or broker is liable in contract.[20]

Some cases[21] and secondary authorities have taken the position that failure to procure is a tort and have attached the consequences of tort liability in the cases arising in this field. The two theories are so interrelated that a court deciding a case on a contract theory has held that a charge to the jury was correct which described the contractual duty

12. Rezac v. Zima, 96 Kan. 752, 153 Pac. 500 (1915); Lindsay v. Pettigrew, 5 S.D. 500, 59 N.W. 726 (1894).

13. Latham Mercantile & Commercial Co. v. Harrod, 71 Kan. 565, 81 Pac. 214 (1905); Morton v. Hart, 88 Tenn. 427, 12 S.W. 1026 (1890). And see text accompanying note 44 *infra*.

14. Derby v. Blankenship, 217 Ark. 272, 230 S.W.2d 481 (1950) (agent liable for negligent failure to procure workmen's compensation insurance); Mayhew v. Glazier, 68 Colo. 350, 189 Pac. 843 (1920) (agent liable for breach of contract to insure crops); Case v. Ewbanks, Ewbanks & Co., 194 N.C. 775, 140 S.E. 709 (1927); Stevens v. Wafer, 14 S.W.2d 295 (Tex. Civ. App. 1929); Rainer v. Schulte, 133 Wis. 130, 113 N.W. 396 (1907) (agent liable for breach of contract to insure building). "This conversation and course of conduct do not support the conclusion that the defendant entered into a contract with the plaintiff to procure for the plaintiff the desired insurance. The strongest inference of which it is susceptible is that *the defendant would use reasonable effort to procure such insurance.*" Heaphy v. Kimball, 293 Mass. 414, 200 N.E. 551, 553 (1936). (Emphasis added.)

15. Prescott v. Jones, 69 N.H. 305, 41 Atl. 352 (1898).

16. 2 COUCH, INSURANCE LAW § 441 (1929).

17. *Ibid.*

18. Marano v. Sabbio, 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953).

19. Mayhew v. Glazier, 68 Colo. 350, 189 Pac. 843 (1920); Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789 (1934).

20. Derby v. Blankenship, 217 Ark. 272, 230 S.W.2d 481 (1950); Mayhew v. Glazier, 68 Colo. 350, 189 Pac. 843 (1920); Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789 (1934); Gay v. Lavina, 61 Mont. 449, 202 Pac. 753 (1921). Ela v. French, 11 N.H. 356 (1840). Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921). See Dargan v. Robinson, 140 S.W.2d 561, 563 (Tex. Civ. App. 1940) (dictum). And see Sheller v. Seattle Title Trust Co., 120 Wash. 140, 206 Pac. 847 (1922), where a statute was basis for the court to hold the face value of the policy was recoverable and the value of the property destroyed was not the limit.

21. Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918); Boyer v. State Farmers' Mut. Hail Ins. Co., 86 Kan. 442, 121 Pac. 329 (1912); Kaw Brick Co. v. Hogsett & Woodward, 73 Mo. App. 432 (1898).

in terms that properly could be used to describe the facets of due care under tort laws.[22]

Cases conflict on the degree of definiteness of coverage that must be present before the agent is accountable. An early case held an agent free of liability for failure to procure where a former policy was indicated as the measure of coverage but present instructions were vague as to the amount of coverage, premium, duration, and risk insured.[23] More recent decisions seem prone to place the agent under a duty to insure by standards of the previous policy and customs pertaining to the subject matter and area for terms not in the policy.[24]

A leading case following the contract theory of liability is *Marano v. Sabbio*[25] where the defendant broker promised to procure burglary insurance and failed. Property of the plaintiff was stolen under conditions that would have allowed the plaintiff to recover his losses if the desired insurance had been obtained. The broker was held liable for the value of the property stolen on the theory that the defendant had a contract duty and failed to perform due to a lack of reasonable care.[26] Other courts have found liability under the contract theory under similar circumstances.[27]

Under the contract theory, consideration moving from the agent or broker can readily be found by the express or implied promise to procure or maintain the insurance in question. But finding consideration moving from the property owner is sometimes more difficult. If the owner pays or promises to pay a sum of money to the agent in return for the agent's promise to procure, clearly there is consideration moving from the owner. Where an owner consigned books to a consignee who promised, as part of his contract, to procure and maintain insurance and the consignee failed to obtain insurance before the books were destroyed, the consideration moving to the promisor was the retention of part of the sale price of the books.[28]

22. Defendant agent promised to procure workmen's compensation insurance for plaintiff employer. The defendant failed and one of plaintiff's employees was injured during employment and recovered from plaintiff. The lower court held that the defendant agent had breached his contractual duty to procure because he had failed to use "ordinary care or diligence in his effort to provide said insurance." The defendant contended that the instruction was error because "it spoke to the jury in the languages of both contract and tort." Held, no error. "A contract requiring, either expressly or by inference, that a party use in a given transaction the same standard of care as is fixed by the law of Torts is altogether valid and permissible." Derby v. Blankenship, 217 Ark. 272, 230 S.W.2d 481, 483 (1950).

23. Mooney v. Merriam, 77 Kan. 305, 94 Pac. 263 (1908).

24. Stevens v. Wafer, 14 S.W.2d 295 (Tex. Civ. App. 1929).

25. 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953).

26. Marano v. Sabbio, 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953).

27. Derby v. Blankenship, 217 Ark. 272, 230 S.W.2d 481 (1950); Gay v. Lavina, 61 Mont. 449, 202 Pac. 753 (1921); Ela v. French, 11 N.H. 356 (1840); Milliken v. Woodward, 64 N.J.L. 444, 45 Atl. 796 (Sup. Ct. 1900).

28. Ela v. French, 11 N.H. 356 (1840).

In the precedent-making *Elam v. Smithdeal Realty & Ins. Co.*[29] the owner's promise to take the policy, if procured by the agent, was held to be consideration that bound the agent to a contract duty to procure and held him liable for the failure to do so due to a lack of reasonable care. In such cases the fact that the agent has not signed a writing containing the agreement does not defeat the owner's recovery.[30]

Suppose there is no justifiable basis for a court to hold that the agent or broker has received consideration? Authorities have tended to turn to tort principles and rely on the common law distinction between nonfeasance and misfeasance.[31] If the agent or broker has not received consideration and has not taken any steps to obtain the insurance as promised, this is held to be nonfeasance. The agent is not liable for a breach of contract because he has not received consideration.[32] And there is no liability in tort because of the common law rule that there is no liability in the absence of misfeasance.[33]

The most famous American case to expound this proposition is *Thorne v. Deas.*[34] There, the plaintiffs together owned one-half of a ship, the *Sea Nymph.* Defendant owned the remaining one-half interest. One of the plaintiffs expressed the opinion that insurance should be secured on the ship, and the defendant made statements from which one could find that the defendant expressed an intention to procure the insurance. The defendant took no steps to get the insurance—although there was sufficient time to act—and the ship was destroyed at sea. The plaintiffs brought an action on the case, a tort theory of recovery. The court held for the defendant on the ground that the defendant had been guilty of a nonfeasance in failing to procure the insurance and therefore was not liable in tort because there was no duty owed to obtain the coverage desired.[35]

As has been indicated, some authorities make the broad general statement that the owner has the choice of suing the agent under either the tort or contract theories.[36] And some jurisdictions following

29. 182 N.C. 599, 109 S.E. 632 (1921).
30. Marano v. Sabbio, 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953). And see note 70 *infra.*
31. MECHEM, OUTLINES OF AGENCY § 516 (4th ed. 1952).
32. See Thorne v. Deas, 4 Johns. 77, 97 (N.Y. 1809) (dictum).
33. Thorne v. Deas, 4 Johns. 77 (N.Y. 1809). An agent who receives no compensation can be held liable for misfeasance in attempting to procure insurance. Wilkinson v. Coverdale, 1 Esp. 75, 170 Eng. Rep. 284 (K.B. 1793).
34. 4 Johns. 77 (N.Y. 1809).
35. Thorne v. Deas, 4 Johns. 77 (N.Y. 1809).
36. "Where he [the agent] undertakes to procure a policy affording protection against a designated risk, the law imposes upon him an obligation to perform with reasonable care the duty he has assumed, and he may be held liable for loss properly attributable to his default. The principal may sue either for breach of the contract or in tort for breach of duty imposed by it." Ursini v. Goldman, 118 Conn. 554, 173 Atl. 789, 791 (1934). Elam v.

the tort theory have held that the duty to use reasonable care arises from the fact that when a state allows an insurance company to incorporate, the company assumes a duty to act so that the citizens of the state will not be harmed.[37] Regardless of whether there is a choice of theories in a given jurisdiction, it would seem clear that some courts have allowed a recovery in tort on facts that would call for recovery under the contract theory in other jurisdictions.[38] For example, in *Wallace v. Hartford Fire Ins. Co.*[39] an agent of Hartford promised to procure insurance on plaintiff's stock of drugs and the furniture and fixtures of the drugstore. At the time of the solicitation the plaintiff had the property insured with another company, and the expiration date was only a few days off. The agent procrastinated an unreasonable length of time, the old policy expired, and the property was destroyed by fire before the agent procured the insurance from Hartford. The agent and Hartford were held liable as joint tortfeasors.[40] The court's rationale seems to have been that the contract to procure created a duty, and the negligent failure to perform the duty was a tort.[41] Hartford was held liable on the theory of respondeat superior.[42] The attempt to argue defenses based on the law of contracts was cut short by the holding that "the nature of the action is to be determined from the pleadings"[43] and that the pleadings sounded in tort rather than in contract.

Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921) (dictum); 1 CHITTY, PLEADINGS 151 (16th ed. 1879).

37. "[I]t is said that a certificate or policy of insurance is simply a contract like any other, as between individuals, and that there is no such thing as negligence of a party in the matter of delay in entering into a contract. This view overlooks the fact that the defendant holds and is acting under a franchise from the state. The legislative policy, in granting this, proceeds on the theory that chartering such association is in the interest of the public to the end that indemnity on specific contingencies shall be provided those who are eligible and desire it, and for their protection the state regulates, inspects, and supervises their business. Having solicited applications for insurance, and having so obtained them and received payment of the fees or premiums exacted, they are bound either to furnish the indemnity the state has authorized them to furnish or decline so to do within such reasonable time as will enable them to act intelligently and advisedly thereon or suffer the consequences flowing from their neglect so to do." Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087, 1089-90 (1913).

38. *Cf.* Marano v. Sabbio, 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953), discussed in text accompanying note 25 *supra.*

39. 31 Idaho 481, 174 Pac. 1009 (1918).

40. 174 Pac. at 1010.

41. The court seems intentionally to complicate its language and obfuscate its meaning, but logical interpolation produces the rule: "[The agent's] conduct in procuring respondent [owner] to not renew his expiring policy, coupled with his failure, because of his negligence, to keep that promise [to procure insurance from Hartford], whereby respondent lost his property without the protection a policy of insurance would have afforded him, was a tort." 174 Pac. at 1010.

42. 174 Pac. at 1010. Note that the agent is thus held to be the agent of the defendant Hartford in soliciting the insurance and as plaintiff's agent in procuring.

43. *Ibid.*

A limited number of courts have based recovery on a statute without specific reference to either tort or contract theories. In *Latham Mercantile & Commercial Co. v. Harrod*[44] a statute provided that an insurance company which failed to meet statutory requirements would be liable for a five hundred dollar penalty and that any agent aiding in such violation would likewise be liable for the same amount. The defendant agent promised to procure insurance for an owner and selected a company which had not complied with statutory requirements. The owner's property was destroyed, but recovery on the policy was impossible because the insurance company was insolvent. The owner recovered from the person who had promised to procure on the theory that the purpose of the statute was to protect owners from such contingencies and the defendant agent had helped the insurance company breach the statute and was liable for the damage.[45] On retrial it was held that recovery was not limited to the five hundred dollar penalty; the owner was compensated for his actual damages.[46]

Is there any sound reason for the existence of two theories of recovery on the same fact situation? The answer in its simplest form seems to be that contract and tort theories coexist in America because England allowed such coexistence and exported its concommitant products.[47] The contract theory was procreated by the law surrounding the development of assumpsit,[48] and the tort cause of action from the action on the case.[49] The law of insurance seemed to have adopted rather than sired these twin theories of recovery, and since it is probable that the developments did not originate with insurance, determining their date of origin and soundness seems out of place for this article. But one may well ask whether one theory was propounded and the second followed with the awareness that the first existed, or whether misuse and misinterpretation of one led to an abortive creation of the second.[50]

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44. 71 Kan. 565, 81 Pac. 214 (1905).
45. 81 Pac. at 214.
46. Harrod v. Latham Mercantile & Commercial Co., 77 Kan. 466, 95 Pac. 11 (1908).
47. See Moore v. Mourgue, 2 Cowp. 479, 98 Eng. Rep. 1197 (K.B. 1776) (dictum), which clearly indicates existence of the tort theory at the time of the creation of the United States. And for contract considerations see Wilkinson v. Coverdale, 1 Esp. 75, 170 Eng. Rep. 284 (K.B. 1793).
48. PROSSER, TORTS § 81 (2d ed. 1955).
49. *Ibid.*
50. The contract theory of recovery holds that when an agent promises to procure, the promise must be performed with reasonable care or the agent is liable in damages for a breach of contract. The tort theory states that when the duty emanating from the contract is not performed with reasonable care, resulting damage creates a tort. One can readily see that somewhere in legal history there may have been only a contract or tort theory and the language used to describe the standard of performance was mistakenly interpreted and a second theory of recovery was allowed.

GOOD FAITH REQUIREMENT

At least two jurisdictions and several textwriters phrase the standard of care in terms of due care and good faith.[51] Thus a Washington court stated that the question was whether the defendant agent had used "good faith, reasonable skill, and ordinary diligence"[52] in his attempts to procure insurance for the principal. While one must note that an agent must be *loyal* to his principal and refrain from conflicting interests,[53] discussing the standard of *care* in terms of good faith seemingly adds nothing of value.

To illustrate, suppose that an agent is employed to procure insurance and investigates a prospective insurer with as much care as any other reasonably diligent agent would use. The insurer is financially shaky, it collapses after the insurance is given, and the insured has a property loss but is unable to collect from the insurer. Through means unrelated to the investigation the agent knew of the debilitation of the company before the policy was written. Most jurisdictions would probably hold the agent liable to the owner because the agent had failed to use the care a reasonable insurance agent would have used under the same or similar circumstances—and one circumstance is that the agent knew of the unsound financial position of the company. The Washington and California jurisdictions would probably hold the agent liable on the theory that the agent had used bad faith.[54]

REASONABLE CARE AND SKILL

The duty to use due care carries with it the implied warranty that the agent possesses the skill that is ordinarily possessed by agents in the field.[55] A failure to procure insurance caused by a lack of such skill makes the defendant liable in contract or tort depending on the jurisdiction in which the failure occurs and whether concurrent remedies exist.

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51. Roberts v. Sunnen, 38 Wash. 2d 370, 229 P.2d 542, 545 (1951); Colpe Inv. Co. v. Seeley & Co., 132 Cal. App. 2d 16, 22 P.2d 35 (1933); 2 COUCH, INSURANCE LAW § 469 (1929); STORY, LAW OF AGENCY § 191 (1839).

52. Roberts v. Sunnen, 38 Wash. 2d 370, 229 P.2d 542, 545 (1951).

53. See generally MECHEM, OUTLINES OF AGENCY § 500 (4th ed. 1952).

54. The Washington court, in Roberts v. Sunnen, 38 Wash. 2d 370, 229 P.2d 542 (1951), cites Couch, Couch in turn cites Story, and Story cites alleged English cases using the "good faith" standard. The cases used by Couch do not seem to use the good faith test, and the American cases cited by Story refrain from use of the phrase. Couch uses the language: "[I]f an agent accepts an order to insure, he . . . must exercise such reasonable skill and ordinary diligence as may fairly be expected from a person in his profession or situation . . . and in all this he is obligated to exercise the strictest . . . good faith toward both his employer and the insured." 2 COUCH, INSURANCE LAW § 463 (1929).

55. Milliken v. Woodward, 64 N.J.L. 444, 45 Atl. 796 (Sup. Ct. 1900); Burges v. Jackson, 18 App. Div. 296, 46 N.Y. Supp. 326 (2d Dep't 1897); MECHEM, OUTLINES OF AGENCY §§ 524-25 (4th ed. 1952).

DAMAGES

In the jurisdictions that allow the contract theory of recovery the general rule is that "the liability of the defendant [agent] . . . with respect to loss or damage . . . is the same as that which would have fallen upon the insurance company had the insurance been effectuated as contemplated."[56] In the case of tangible goods an owner's damages would be the market value of the damaged goods at the time of physical injury.[57] Where the premium has not been paid before the suit, the damages recoverable are reduced by the amount of the unpaid premium.[58] When an owner fails to discover a lack of coverage due to negligence in failing to read a policy and sues on the contract theory, the recovery is reduced by the damage that could have been prevented had the omission been found and corrected.[59] In the absence of proof that the general practice is to insure for only partial value, the agent is liable for the full value of the property.[60]

Generally, the tort theory of recovery is like the contract theory in that the owner recovers damages equal to the amount that could have been recovered if the policy had been procured.[61] A difference in treatment arises when the owner has failed to use the care that an ordinary prudent owner would have used under like circumstances. Where contributory negligence is a complete bar to a plaintiff's action, the owner's suit is defeated. However, in a suit based on the contract theory the plaintiff will recover despite contributory negligence[62] but in a reduced amount.

CAUSATION

Definitive opinions on causation in this field are practically nonexistent and this leads one to the conclusion that the ordinary causation tests prevail in the field of the agent's liability. The "but for" test is the only observed standard. In *Stevens v. Wafer*[63] an owner desired fire insurance on his building and an agent promised to procure but failed to obtain the policy before the building was consumed in flames. The owner sued for breach of a contract and recovered. The court held that the owner would have been insured and compensated

56. Mayhew v. Glazier, 68 Colo. 350, 189 Pac. 843, 846 (1920). See also Gay v. Lavina, 61 Mont. 449, 202 Pac. 753 (1921).

57. See Dargan v. Robinson, 140 S.W.2d 561, 563 (Tex. Civ. App. 1940) (dictum). And see Sheller v. Seattle Title Trust Co., 120 Wash. 140, 206 Pac. 847 (1922), where a statute is basis for the court's holding that the amount of the policy is recoverable and the value of the property destroyed was not the limit.

58. Derby v. Blankenship, 217 Ark. 272, 230 S.W.2d 481 (1950); Sheller v. Seattle Title Trust Co., 120 Wash. 140, 206 Pac. 847 (1922). The *Sheller* case does not clearly indicate whether contract or tort is the theory of the suit.

59. Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921).

60. Ela v. French, 11 N.H. 356 (1840).

61. Burges v. Jackson, 18 App. Div. 296, 46 N.Y. Supp. 326 (2d Dep't 1897).

62. Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921).

63. 14 S.W.2d 295 (Tex. Civ. App. 1929).

for his loss "but for" the agent's failure to procure.[64] The owner's case was made when he alleged that he contracted for insurance and that the property was destroyed before the insurance was obtained—there was no necessity of alleging the specific terms proposed.[65]

The "but for" test has also been used under the tort theory of recovery.[66] Whether the cause of the loss lies at the doorstep of the agent is a jury question.[67] A failure to procure is not actionable when the policy would have been void due to a misrepresentation.[68]

DEFENSES

Generally, contributory negligence on the part of the owner prevents recovery on a tort pleading. It would seem possible for an agent to intentionally refuse to procure and thus the defense of contributory negligence would be vitiated. But if an owner sues for a breach of contract to procure insurance, a failure by the owner to use due care would reduce but not defeat recovery.[69] Arguably, comparative negligence jurisdictions would reach a result similar to the contract treatment but no cases so holding have been found.

The defense of the statute of limitations accentuates the need to distinquish between the contract and tort theories of recovery. Where the allowable time for suit differs, one theory might be barred while the other is extant. Generally the tort statute will be more abbreviated and each jurisdiction would present its singular distinctive comparison. Where the suit cannot be brought on the contract because the agent has not received consideration, the only possible theory of recovery will be tort and as a result only the tort limitation will apply.

The lack of a writing does not defeat the owner's recovery because the agent's oral promise to procure binds him to the contract.[70] Since the duty to procure exists without a writing signed by the agent, a tort suit raises only the question of whether the duty was breached by a failure of the agent to use due care. Thus there is similarity of treatment under the two theories.

At times an agent is sued as an insurer. It has been held by special application of statute that such an agent is not liable as an insurer

64. Stevens v. Wafer, 14 S.W.2d 295 (Tex. Civ. App. 1929).
65. *Ibid.* But the amount of insurance must be established or the action will fail. Wagner v. Falbe & Co., 272 Wis. 25, 74 N.W.2d 742 (1956).
66. Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913).
67. *Ibid.*
68. Alsop v. Coit, 12 Mass. (11 Tyng) 40 (1815).
69. Elam v. Smithdeal Realty & Ins. Co., 182 N.C. 599, 109 S.E. 632 (1921).
70. Wallace v. Hartford Fire Ins. Co., 31 Idaho 481, 174 Pac. 1009 (1918); Marano v. Sabbio, 26 N.J. Super. 201, 97 A.2d 732 (App. Div. 1953). But a contract of insurance must be written and where an oral contract was held invalid by statute, the agent of the owner was liable for failure to obtain a written policy for the principal-owner. Thomas v. Funkhouser, 91 Ga. 478, 18 S.E. 312 (1893).

because of noncompliance with statutory requirements for qualifying as a business entity to insure.[71] But where this assumption of liability is not barred by statute an agent may represent so broadly that he is held contractually bound.[72]

Liability to Others

Aside from liability to an owner, apparently the agent may be sued successfully by an insurer after company liability under the principle of respondeat superior.[73] In *Duffy v. Bankers' Life Ass'n*,[74] decedent sought life insurance and the prospective insurer's agent negligently carried out the task of securing the desired insurance. Death came before the policy was contracted. The estate of the decedent recovered on the ground that the defendant insurer was liable for the torts of its agent.[75] It would seem to follow that the insurance company could recover its loss from the negligent agent.

An interesting problem is posed by asking the question of whether a proposed beneficiary of a life insurance policy can recover against an agent who negligently fails to secure the desired contract. It has been held that no duty is owed by the agent to such a prospective beneficiary.[76]

Conclusion

An agent or broker who promises to procure insurance for another must perform that promise with reasonable care. A failure to procure due to a lack of reasonable care will be deemed negligence and the agent may be liable in contract or tort. The basis for the contract action is that the contract to procure insurance created a duty to use reasonable care to obtain the insurance, and the failure to obtain due to a lack of reasonable care is a breach of contract. Where tort recovery is allowed, the contract is viewed as creating a duty to procure insurance and the negligent performance of the duty is a tort.

Recovery has generally been limited to the person who sought the

71. Milwaukee Bedding Co. v. Graebner, 182 Wis. 171, 196 N.W. 533 (1923). The statute used read: "No unauthorized insurance company or other unauthorized insurer shall hereafter make or issue, directly or indirectly, any policy of insurance on property in this state, except as specifically authorized by law. All such contracts are declared to be unlawful, void, and unenforceable, and no action in law or equity shall be maintained on any such contract in any court." 196 N.W. at 535.

72. Ell Dee Clothing Co. v. Marsh, 247 N.Y. 392, 160 N.E. 651 (1928).

73. See Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913), where an agent failed to insure decedent's life and the company insurer was held liable for the "tort" of its agent. As to an agent's liability to an insurer when the insurer tells the agent to cancel a policy and the agent negligently fails to cancel before the insured contingency occurs, see Mechem, Outlines of Agency § 515 (4th ed. 1952).

74. 160 Iowa 19, 139 N.W. 1087 (1913).

75. Duffy v. Bankers' Life Ass'n, 160 Iowa 19, 139 N.W. 1087 (1913).

76. *Ibid.*