

# **An Insurer is not Vicariously Liable for Actions by an Agent That Are Outside the Scope of the Agency Relationship and Were Performed in the Agent's Dual Role as a Broker**

Article By:

Katherine C. Sample

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In December 2020, Plaintiff Erin Hughes applied for homeowners coverage for her Malibu home with her Farmers' insurance agent. Hughes obtained a fire policy through the California FAIR Plan and a homeowners policy through Farmers that insured the property against perils not covered by the FAIR Plan policy.

After a fire damaged her home, Hughes claimed that benefits paid by the FAIR Plan failed to cover all of her losses. Thus, she filed a complaint against Farmers and its agent, claiming that the agent failed to: (1) inform her about the maximum coverage available from the FAIR Plan; and (2) secure excess coverage. Hughes further claimed that Farmers was vicariously liable for the agent's alleged negligence in the procurement of the FAIR Plan policy.

Farmers moved for summary judgment, arguing that it could not be responsible for any purported negligence by the agent, because the agent was not acting as Farmers' actual or ostensible agent when she obtained the FAIR Plan policy. Instead, the agent was acting in a dual role as Hughes' broker. And, unlike an agent, an insurance broker does not act for the insurer, but instead represents the insured. In that instance, the insurer should not be liable for the broker's acts or omissions.

In support of its motion, Farmers submitted the agent's "Appointment Agreement," which related only to the procurement of insurance with Farmers and its affiliates. The FAIR Plan was not a party to that Agreement. Farmers also submitted evidence demonstrating that the agent purchased the FAIR Plan policy directly from the FAIR Plan, and did so in her capacity as a FAIR Plan broker – not as a Farmers' agent.

In opposition, Hughes argued that the agent encouraged her to purchase the FAIR Plan policy and Farmers policy together "as a package deal," and that she was never informed that the agent was acting as a broker when she obtained the FAIR Plan policy. Hughes also argued that the agent used a Farmers email address to send her emails about the FAIR Plan policy, and that these emails included a Farmers logo. Finally, she argued that the agent's office had a Farmers sign above the door.

The trial court granted summary judgment in favor of Farmers on two grounds. First, there was no

triable issue of fact regarding actual agency, because the undisputed evidence established that the agent was acting as Hughes' insurance broker – and outside of the scope of her Appointment Agreement with Farmers – when she helped Hughes obtain the FAIR Plan policy. Second, Hughes did not meet her burden to raise a triable issue regarding ostensible agency. Specifically, Hughes failed to show that Farmers acted in a manner that could have caused Hughes to reasonably believe that the agent was acting on behalf of Farmers in the procurement of the FAIR Plan policy.

The Second District Court of Appeal affirmed the judgment on both grounds. As a threshold matter, the Appointment Agreement only authorized the agent to sell insurance products on behalf of Farmers and its affiliates, which did not include the FAIR Plan. Thus, the agent did not have the actual authority to bind Farmers when she assisted Hughes in obtaining coverage from the FAIR Plan.

Second, there was no conduct by Farmers, whether negligent or intentional, that could have contributed to a reasonable belief by Hughes that the agent procured the FAIR Plan policy in her role as a Farmers agent, rather than as Hughes' broker. The Court of Appeal reasoned that it is well-established that the use of a principal's trade name or logo is insufficient to establish ostensible agency.

Finally, the Court of Appeal rejected Hughes' argument that the agent's use of Farmer's estimating software during the application process for the FAIR Plan policy established her ostensible agency. That is because ostensible agency can only be established by representations or conduct of the principal, and not of the agent.

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