



9-1-1974

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### Recommended Citation

Timothy Tynan Griesenbeck Jr., *The Assigned Risk in Texas: The Questions of Agency and Absolute Liability*, 6 ST. MARY'S L.J. (1974).

Available at: <https://commons.stmarytx.edu/thestmaryslawjournal/vol6/iss3/10>

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## COMMENTS

### THE "ASSIGNED RISK" IN TEXAS: THE QUESTIONS OF AGENCY AND ABSOLUTE LIABILITY

TIMOTHY TYNAN GRIESENBECK, JR.

This year in Texas, over 180,000 owners and operators of motor vehicles<sup>1</sup> will obtain automobile liability insurance as "assigned risks" through the Texas Automobile Insurance Plan.<sup>2</sup> These drivers will pay higher premiums

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1. Tex. Auto. Ins. Plan, Resume of Activities (October 1973) which is a monthly report by the manager of the Plan prepared for the Governing Committee of the Assigned Risk Plan.

2. TEX. REV. CIV. STAT. ANN. art. 6701h, § 35 (1969). The Texas Automobile Insurance Plan is the office established by this statute to operate the Assigned Risk Plan. The manager accepts all applications sent from local servicing agents and "assigns" the application to an insurance company doing business in the state. This designated insurer then has the duty to issue the policy. The number of policies an insurance company receives during the year is based on the amount of business conducted within the state during the previous year.

Section 35 provides for the assigned risk plan:

Subject to the provisions of Article 5.10, Texas Insurance Code of 1951, as amended, insurance companies authorized to issue motor vehicle liability policies in this state may establish an administrative agency and make necessary reasonable rules in connection therewith, relative to the formation of a plan and procedure to provide a means by which insurance may be assigned to an authorized insurance company for a person required by this Act to show proof of financial responsibility for the future and who is in good faith entitled to motor vehicle liability insurance in this state but is unable to secure it through ordinary methods . . . and may establish a plan and procedure for the equitable apportionment among such authorized companies of applicants for such policies and for motor vehicle liability policies . . . . When any such plan has been approved by the State Board of Insurance, all insurance companies authorized to issue motor vehicle liability policies in the State of Texas shall subscribe thereto and participate therein.

The State Board of insurance . . . may determine, fix, prescribe, promulgate, change, and amend rates or minimum premiums normally applicable to a risk so as to apply to any and every assignment such rates and minimum premiums as are commensurate with the greater hazard of the risk . . . .

There are only three cases which cite this article: *Gibbs v. Allstate Ins. Co.*, 386 S.W.2d 606, 608 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.); *Swinney v. Pioneer Cas. Co.*, 348 S.W.2d 462, 463 (Tex. Civ. App.—Dallas 1961, no writ); *State Farm Mut. Auto. Ins. Co. v. Chatham*, 318 S.W.2d 684, 685 (Tex. Civ. App.—Dallas 1958, no writ). Assigned risk plans requiring all companies which write automobile liability insurance policies in a state to afford good-faith, high risk applicants an opportunity to procure insurance have been held valid. It "must be reasonable and consistent with the statute." 7 D. BLASHFIELD, *BLASHFIELD AUTOMOBILE LAW AND PRACTICE* § 272.3, at 21 (3d ed. 1966). Under some plans an insurance company is allowed to deny a risk assigned to it for "good cause," as where the driver is found to be irresponsible or reckless. *Id.* § 272.3, at 22, citing *Manufacturers Cas. Ins. Co. v. Hughes*, 316 S.W.2d 827 (Ark. 1958).

to an insurance company which they did not choose,<sup>3</sup> and will encounter legal problems never experienced with their previous insurer. There are two important and unresolved questions concerning assigned risk situations: first, whether an insurance broker who procures an insurance policy for an individual through the Assigned Risk Plan is the agent of the insured or the agent of the insurer, and second, whether the Texas Motor Vehicle Safety-Responsibility Act imposes absolute liability on an insurer who issues an assigned risk policy which is not certified.<sup>4</sup>

#### INTRODUCTION

The Assigned Risk Plan<sup>5</sup> in Texas was established by the state legislature as a means of providing motor vehicle liability insurance for those who have been denied automobile insurance for various reasons.<sup>6</sup> Persons who apply for assigned risk insurance fall into two categories. The first group includes drivers who have been either convicted of a penal offense, such as driving while intoxicated,<sup>7</sup> or involved in an accident.<sup>8</sup> Before such risks are allowed to drive again, they are required to show some type of proof of financial responsibility, in order to protect potential future victims.<sup>9</sup> The second group who must apply for Assigned Risk Insurance consists of the drivers "who cannot obtain automobile liability insurance in the regular manner," even if they have never been in an accident and do not have traffic violations on their record.<sup>10</sup> For example, insurance companies are reluctant to insure teen-

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3. A STUDY OF ASSIGNED RISK PLANS, REPORT OF THE DIVISION OF INDUSTRY ANALYSIS, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION TO THE DEPARTMENT OF TRANSPORTATION (August 1970) [hereinafter cited as STUDY]. Texas is one of 11 states which currently require the full annual premium at the time of application. *Id.* at 25.

4. TEX. REV. CIV. STAT. ANN. art. 6701h, § 21(f) (1969) provides:

Every motor vehicle liability policy shall be subject to the following provisions

1. The liability of the insurance company with respect to the insurance required by this Act shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs; said policy may not be cancelled or annulled as to such liability by any agreement between the insurance company and the insured after the occurrence of the injury or damage; no statement made by the insured or on his behalf and no violations of said policy shall defeat or void said policy.

5. TEX. REV. CIV. STAT. ANN. art. 6701h, § 35 (1969).

6. *Id.* §§ 4, 17a.

7. *Id.* § 17(a).

8. *Id.* § 4.

9. They are not allowed to drive because their licenses and registrations have been suspended under the Texas Motor Vehicle Safety-Responsibility Act. *Id.* § 5(b).

Section 7 provides in part:

The license and registration . . . suspended . . . shall remain so suspended and shall not be renewed nor shall any such license or registration be issued to such person until:

1. Such person shall deposit and file . . . the security and proof required under . . . this section . . . .

10. See, e.g., *Manufacturers Cas. Ins. Co. v. Hughes*, 316 S.W.2d 827, 830 (Ark. 1958).

aged drivers; elderly drivers; non-residents; military; drivers with certain types of cars; and drivers with physical impairments.<sup>11</sup> The insurance companies consider these drivers "bad risks" and will generally not issue them an automobile liability policy.<sup>12</sup> The only recourse for these drivers is to apply for Assigned Risk Insurance.

The Plan was originally established as a minor provision of the Texas Motor Vehicle Safety-Responsibility Act,<sup>13</sup> which was enacted to deal with the constantly increasing problem of uninsured motorists involved in accidents and unable to compensate their victims.<sup>14</sup> The Act requires such drivers to show "proof of financial responsibility," and provides four methods in which to comply.<sup>15</sup> The easiest and most practical method of showing this "proof" is by a policy of automobile liability insurance;<sup>16</sup> however, few, if any, insurance companies will issue policies to these motorists.<sup>17</sup> Thus, to effectuate

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11. MOTOR VEHICLE ASSIGNED RISK PLANS, REPORT OF THE DIVISION INDUSTRY ANALYSIS, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, TO THE DEPARTMENT OF TRANSPORTATION, 27, 53, 56 (August 1970) [hereinafter cited as MOTOR VEHICLE ASSIGNED RISK PLANS]. The "non-residents" are usually limited to military personnel stationed in Texas.

12. The latest survey in 1969 showed that 82.63 percent of assigned risk applicants in Texas were not required to file proof of financial responsibility. MOTOR VEHICLE ASSIGNED RISK PLANS 53.

13. Every state has either a Safety Responsibility or Financial Responsibility Law. A list of statutory references is given in Loiseaux, *Innocent Victims* (1969), 38 TEXAS L. REV. 154, 157 n.14 (1959). These laws are

intended to discourage careless driving or to mitigate its consequences by providing for proof of financial responsibility as a condition of the granting of a driver's license or certificate of registration, or by providing for the suspension or revocation of a driver's license or certificate of registration for failure to satisfy a final judgment or furnish proof of responsibility after an accident or a violation of a motor vehicle statute.

7 AM. JUR. 2d *Automobiles & Highway Traffic* § 135, at 694 (1963).

Instead of a Financial Responsibility Law, some states have Compulsory Insurance for a motor vehicle to be operated on the public highways.

14. STUDY 1, 3.

15. TEX. REV. CIV. STAT. ANN. art. 6701h, § 18 (1969). The purpose of the Act is

to encourage safer use of motor vehicles on the streets and highways of Texas and to deny the privilege of driving to reckless and financially irresponsible persons by requiring security of owners and operators of motor vehicles following accidents and by providing for proof of financial responsibility for the future.

*Gillaspie v. Department of Pub. Safety*, 152 Tex. 459, 463, 259 S.W.2d 177, 180 (1953), *cert. denied*, 347 U.S. 933 (1954).

Section 18 of the Act provides four means of establishing proof of financial responsibility: 1) a certificate of insurance; 2) a bond; 3) a certificate of deposit of money or securities; and 4) a certificate of self-insurance.

16. STUDY 1; see INSURANCE ACCESSIBILITY FOR THE HARD-TO-PLACE DRIVER, REPORT OF THE DIVISION OF INDUSTRY ANALYSIS, BUREAU OF ECONOMICS, FEDERAL TRADE COMMISSION, TO THE DEPARTMENT OF TRANSPORTATION 31 (May 1970). This method is the "easiest" since it does not necessitate obtaining large amounts of cash to show financial proof.

17. Once these laws were enacted, unforeseen problems arose, such as the tremendous increase in automobile accidents and the resultant financial losses to the insurance companies. In response to these developments, the insurance companies became more

the purposes of the Act, the Assigned Risk Plan was added in order to provide these drivers with automobile liability insurance. This amendment authorizes the insurance industry to establish an agency and to promulgate the rules necessary to forming a plan.<sup>18</sup> In addition, it provides the procedure by which insurance may be assigned through an authorized insurance company.<sup>19</sup> Applications for such policies are equitably apportioned among the authorized companies.<sup>20</sup>

A driver who is designated a high risk applies for Assigned Risk insurance at a nearby insurance office. The insurance agent mails the application to Austin where the Texas Automobile Insurance Plan, the administrative agency which administers the Plan, is located.<sup>21</sup> This office accepts the application from the local insurance agent, and then "assigns" the policy to an insurance company doing business in Texas. This is the first notice that the insurance company receives of a particular applicant, and pursuant to this notice, the company must issue him a policy.<sup>22</sup>

Insurance companies doing business in Texas are authorized to "make necessary reasonable rules" for the effective operation of the plan.<sup>23</sup> These rules are contained in the *Automobile Insurance Plan for the State of Texas*, a 15-page portion of the Auto-Fire-Theft-Liability Rate Manuals which contains the rules, rates and premiums which govern the insuring of automobiles in Texas.<sup>24</sup> The *Automobile Insurance Plan* states that it grants automobile liability insurance to "risks unable to secure it for themselves," which is clearly not restricted to those required to show "proof" of financial responsi-

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and more selective. The various legislatures did not foresee that the statutes enacted for public protection placed an unbearable burden on the insurance companies which prevented them from insuring these "high risks." R. LONG, *LAW OF LIABILITY INSURANCE* § 3.36, at 3-109 (1974). A "high risk" is one who for "various reasons [cannot] . . . obtain automobile liability insurance in the open market." *Employees Commercial Union Co. v. Waldrop*, 186 S.E.2d 134, 135 (Ga. Ct. App. 1971).

18. *TEX. REV. CIV. STAT. ANN.* art. 6701h, § 35 (1969).

19. *Id.*

20. *Id.* The policies are assigned to the insurance companies in Texas in the same percentage as the amount of voluntary business operated in the state. For example, if a company writes 12% of the total voluntary automobile insurance in the state in each year, then it will be assigned 12% of the total number of assigned risk applicants each year.

21. *Id.*

22. *Automobile Insurance Plan for the State of Texas*, AUTOMOBILE-FIRE-THEFT LIABILITY RATE MANUALS, RULES AND PREMIUMS GOVERNING THE INSURING OF AUTOMOBILES AFTER MAY 1, 1955 § 14A, at 10 [hereinafter cited as *Automobile Insurance Plan for the State of Texas*]. It is distributed by the Texas Automobile Insurance Service Office which is an advisory organization licensed under the insurance laws of Texas. It is prescribed by the State Board of Insurance of the State of Texas and is located in Austin. This is the provision in the Insurance Manual which is set up by the insurance industry to govern the application and operation of the plan. Section 14A discusses the duty of the insurer to issue a policy after it receives notice of designation.

23. *Id.*

24. *Id.* §§ 9-20, at 8-15.

bility.<sup>25</sup> An applicant who certifies that he has attempted unsuccessfully to obtain automobile insurance will be considered for assignment upon making a good faith application.<sup>26</sup> An applicant is considered in "good faith" if he reports all material information and does not willfully make any misleading or incorrect statements,<sup>27</sup> provided that

the applicant . . . [possesses] a valid driver's license, or . . . the application is being made to show proof of financial responsibility as required by the provisions of the Texas Motor Vehicle Safety-Responsibility Act for the purpose of obtaining a driver's license . . . [or] preserving the motor vehicle registration plates.<sup>28</sup>

Thus the rules provide assigned risk insurance for both groups of people—those required to furnish proof, and those who have their license but are unable to obtain automobile insurance.

#### THE QUESTION OF AGENCY

All automobile insurance policies have express provisions requiring the insured to give notice in writing to the insurance company, or its duly authorized agent, of any accident in which the insured is involved, and to forward to the company any suit papers the insured may receive.<sup>29</sup> Generally, the failure of the insured to comply with these provisions entitles the insurer to deny liability on the policy.<sup>30</sup> This is based on the contention that the insurer is not liable for one who breaches the policy provisions. The "assigned risk" insured, however, is usually under the erroneous impression that the salesman from whom he bought the policy works for, and is thus an agent of, the insurance company which issues the assigned risk policy. This almost invariably is not the case.

The local insurance office may be an independent agency which writes insurance policies for a small number of companies, or it might be an agency for a major company, such as State Farm Insurance Agency or Allstate Insurance Company. This distinction does not matter, however, for neither has the ability to send the application to a company of its choosing; the assigned

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25. *Id.* at 1.

26. *Id.* § 9, at 8.

27. *Id.* § 9, at 8. This provision is considered "lenient" because the applicant is in "good faith" just because he has a driver's license and makes no willful misrepresentations. Only nine states are this progressive, the remainder being more restrictive. STUDY 22.

28. *Automobile Insurance Plan for the State of Texas* § 9, at 8-9; STUDY 22.

29. 8 D. BLASHFIELD, *BLASHFIELD AUTOMOBILE LAW AND PRACTICE* §§ 342.1, at 241, 342.10, at 274, 342.11, at 280 (3d ed. 1966).

The requirement that the insured give written notice of the occurrence of an accident as soon as practicable enables an insurance company to make a thorough investigation and decide whether to defend or settle. *Id.* § 342.2, at 243-44.

30. *Id.* § 344.23, at 433.

risk application they transmit to Austin is assigned on an "equitable" basis by the Texas Automobile Assigned Risk Plan.<sup>31</sup> Thus, an insured who applies for an assigned risk policy may be assigned to a company for which the independent agency does not normally write policies.

When an assigned risk insured is involved in an accident, and gives notice of the accident or forwards suit papers to the local insurance agent instead of directly to the insurance company, the company who issues the policy will generally deny coverage. The company will allege that the insured breached the policy by failing either to give notice or to forward suit papers directly to the company. The insured will contend that the local insurance agency is a duly authorized agent of the insurer, and therefore notice to the agent will satisfy the policy provision. This specific question of whether an insurance broker who procures an insurance policy for an individual through the assigned risk plan is to be considered as an agent of the insurer or of the insured has not been decided by the Texas courts.<sup>32</sup>

In the insurance industry a distinction is made between insurance agents, who have broad authority as agent for the insurer, and the insurance broker who is usually regarded as "the agent of the first person who employs him."<sup>33</sup> This means that "he is the agent of the insurance applicant and hence without authority to bind the company."<sup>34</sup> Consequently, the assigned risk broker is generally held to be the agent of the insured;<sup>35</sup> therefore, notice to the broker does not constitute notice to the insurance company which issued the assigned risk policy.

Various theories have been advanced to overcome this rule. The three most important ones are agency by indicia of authority, agency by virtue of the assigned risk plan, and agency by statutory authority.

#### *Agency by Indicia of Authority*

The general rule in assigned risk situations is "that absent any indicia of authority except possibly to forward the policy to the insured and to accept premiums from him, the broker is the agent of the insured . . . ."<sup>36</sup> To

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31. *Automobile Insurance Plan for the State of Texas* § 1b, at 1. It is "equitable" in that the policies are sent to the insurance companies on the basis of the volume of business conducted in the state.

32. Although there are no cases in point, *Gibbs v. Allstate Ins. Co.*, 386 S.W.2d 606 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.) is most applicable.

33. 43 AM. JUR. 2d *Insurance* § 139, at 194-96 (1969); Annot., 12 A.L.R.3d 1304, 1331 (1967).

34. Annot., 12 A.L.R.3d 1304, 1331 (1967), *citing* 43 AM. JUR. 2d *Insurance* § 139, at 194-96 (1969).

35. *Id.*

36. *Bradford, Inc. v. Traveler's Indem. Co.*, 301 A.2d 519, 524 (Del. 1972), *citing* *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210 (7th Cir. 1956); *Gabriel v. Attigliato*, 303 N.Y.S.2d 399 (Sup. Ct. 1968).

overcome this rule, the contention is made that if sufficient "indicia" of authority is present, the broker is the agent of the insurer. Types of "indicia" include whether there were prior dealings between the local office and the insurer; whether he is an independent salesman or works for the insurance company; whether the salesman made any representations; or whether there were a series of different transactions between the parties.<sup>37</sup>

One of the first cases to decide whether the broker is an agent of the insured or of the insurer was *Iowa National Mutual Insurance Co. v. Richards*,<sup>38</sup> where the Court of Appeals for the Seventh Circuit interpreted the Illinois Automobile Assigned Risk Plan. The "indicia" considered by the court was the presence of any formal agreement or previous transaction. Finding none, the court held that an agency relationship existed only between the agent and the insured.<sup>39</sup> The fact that the insured had notified the agent that he had traded automobiles, and that the agent subsequently had failed to submit this information to the insurer did not alter the court's position. The processes of forwarding and assignment were not found to have been indicia that the insurance salesman was an agent for the insurance company.<sup>40</sup> Likewise, in *Gabriel v. Attigliato*,<sup>41</sup> the salesman was held to be the agent of the insured where the insured testified that "she took no other steps to notify" the insurance company other than calling the broker on the evening of the accident.<sup>42</sup> No indicia of authority was found except the placing of the application with the assigned risk plan, forwarding the policy, and accepting the premiums; the broker was considered an "ordinary insurance broker who had no apparent or real agency connection with [the insurer]."<sup>43</sup>

Courts will also consider whether the insurer should be estopped to deny liability on the basis that it held out the broker as its agent. In *Hannah v. State Farm Insurance Co.*<sup>44</sup> the Court of Appeals for the Sixth Circuit determined that State Farm had not held the broker out as its agent where the evidence disclosed no relationship with the insurer other than the preparation and forwarding of the application to the proper official.<sup>45</sup> The court agreed with the other decisions holding that this situation did not establish any

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37. *Hannah v. State Farm Ins. Co.*, 403 F.2d 375, 377 (6th Cir. 1968).

38. 229 F.2d 210 (7th Cir. 1956).

39. *Id.* at 212.

40. *Id.* at 212. If no indicia is found, the broker is considered to be the agent of the insured. *Bradford, Inc. v. Traveler's Indem. Co.*, 301 A.2d 519, 524 (Del. 1972); accord, *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210, 212 (7th Cir. 1956); *Gabriel v. Attigliato*, 303 N.Y.S.2d 399, 401 (Sup. Ct. 1968); see *Nationwide Mut. Ins. Co. v. Mason*, 218 So. 2d 185 (Fla. Ct. App. 1969); *American Cas. Co. v. Castellanos*, 203 So. 2d 26 (Fla. Ct. App. 1967).

41. 303 N.Y.S.2d 399 (Sup. Ct. 1968).

42. *Id.* at 401.

43. *Id.* at 401.

44. 403 F.2d 375 (6th Cir. 1968).

45. *Id.* at 377. The court also considered whether there was a contract between the broker and the insurer. *Id.* at 377.



agency relationship between broker and insurer.<sup>46</sup>

The opinions in these cases are further clarified when compared with two Florida decisions in which the brokers were found to have been agents of the insurers.<sup>47</sup> In *American Casualty Co. v. Castellanos*,<sup>48</sup> the "indicia of authority" was determined from evidence that during the year, two policy amendments and a renewal were made by the local office of the insurer.<sup>49</sup> The second Florida decision was *Nationwide Mutual Insurance Co. v. Mason*,<sup>50</sup> where the insurer sent letters to the local office and the insured which stated that the company would forward the assigned risk policy to the local office and send the premium to the insured before a certain date. The letters, however, did not have a return address, and since there were no direct dealings between the insured and the insurer, the court found the local agency office to have been the agent of the insurer.<sup>51</sup> Payment of the premium to the agency within the specified time was held to have been payment to the insurer, thereby precluding the insurance company's attempted cancellation.<sup>52</sup> These cases emphasize the general rule that something in addition to the forwarding of the application and the acceptance of the premiums must be present in order to create the agency relationship between the assigned risk broker and the insurer.<sup>53</sup>

The presumption that an insurance broker in an assigned risk situation is the agent of the insured should be adopted by the Texas courts. Dicta which supports Texas' adoption of this rule can be found in *Gibbs v. Allstate Insurance Co.*<sup>54</sup> in which the local agent failed to renew the insured's assigned risk application, cashing the premium check instead. The Fort Worth Court of Civil Appeals, relying on the insured's testimony, found that "he understood clearly that [the agent] could not bind Allstate or any other company, but, in this instance, could only apply through the plan."<sup>55</sup>

Although some jurisdictions emphasize the inequity of making the assigned risk broker an agent of the insured, it is even more inequitable to hold him to be the agent of the insurer. The two almost never know each other; they generally have never conducted prior business transactions; and they never

46. *Yoshida v. Liberty Mut. Ins. Co.*, 240 F.2d 824 (9th Cir. 1957); *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210 (7th Cir. 1956).

47. *Nationwide Mut. Ins. Co. v. Mason*, 218 So. 2d 185, 187 (Fla. Ct. App. 1969); *American Cas. Co. v. Castellanos*, 203 So. 2d 26 (Fla. Ct. App. 1967).

48. 203 So. 2d 26 (Fla. Ct. App. 1967).

49. *Id.* at 27. One amendment changed the description of the vehicle, while the other involved a change of address.

50. 210 So. 2d 185 (Fla. Ct. App. 1967).

51. *Id.* at 187.

52. *Id.* at 185.

53. *Bradford v. Traveler's Indem. Co.*, 301 A.2d 519, 524 (Del. 1972).

54. 386 S.W.2d 606 (Tex. Civ. App.—Fort Worth 1965, writ ref'd n.r.e.).

55. *Id.* at 609.

know what the other might say or do. No insurance salesman should be the agent of every insurance company which does business in Texas.

*Agency By Virtue of the Assigned Risk Plan*

One theory which holds that the assigned risk broker is the agent of the insurer is based on the premise that in becoming a member of the assigned risk plan, the insurance company designates the "Producer of Record" who becomes an agent of the insurer as a matter of law.<sup>56</sup> This theory follows from the idea that "public policy" requires that the local insurance salesman be an agent of the insurer as a matter of public protection. Since the plan is designed to protect the public from uninsured motorists, there should be no escape for these motorists by virtue of an agency exception. Therefore, this type of plan makes the local insurance salesman the agent of the insurer as an implication of law.

This theory was rejected by the Arkansas Supreme Court in *Manufacturers Casualty Insurance Co. v. Hughes*.<sup>57</sup> The court stressed that even though the insurance company was *required* to become a member of the plan, its responsibilities and liabilities are limited by the provisions of the plan itself.<sup>58</sup> The applicable provision negated any contention that the agent was a general agent for the insurer, since it provided that the "*applicant may designate any licensed agent of any licensed and authorized casualty insurance carrier to act on his behalf in soliciting coverage from insurers.*"<sup>59</sup> The court then stated that

[i]t will thus be seen that any insurance agent who is approached to make the contract for any applicant desiring to obtain insurance under the Assigned Risk Plan, *acts as the agent of the applicant rather than the agent of the insurer.*<sup>60</sup>

In *Iowa National Mutual Insurance Co. v. Richards*<sup>61</sup> an application for insurance under the Illinois Assigned Risk Plan contained the provision "I (we) hereby designate as producer of record for the insurance" which was followed by a blank space.<sup>62</sup> The defendant's contention that the "producer of record" was the agent of the insurance company by virtue of the Illinois Assigned Risk Plan, was denied.<sup>63</sup> Since the name of the agent was written in the space, the defendant's contention of agency as a matter of law by virtue

56. *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210, 212 (7th Cir. 1956).

57. 316 S.W.2d 827 (Ark. 1958).

58. *Id.* at 833.

59. *Id.* at 833 (emphasis added), *citing* Arkansas Automobile Assigned Risk Plan, Act 347 Motor-Vehicle Safety Responsibility Act § 41 (1953).

60. *Id.* at 833 (emphasis added).

61. 229 F.2d 210, 212 (7th Cir. 1956).

62. *Id.*

63. *Id.* at 212.

of the plan was contradicted by his designation of the local insurance salesman as his producer of record.

Stronger language within an insurance application was held to be controlling in *Watson v. United States Fidelity & Guaranty Co.*<sup>64</sup> in which the application contained the statement,

I hereby designate as producer of record for this insurance . . . I understand the designated producer of record is *not acting as an agent* of any company for the purpose of this insurance and has no authority to bind such insurance.<sup>65</sup>

The court found "nothing in the terms of the Plan, in the statutes of Hawaii, or in general agency law, to support a result contrary to his proviso."<sup>66</sup> These cases relied on the terms of the policy to overcome the contention that the producer of record was an agent of the insurer by virtue of the plan.

The Texas policy is entitled "Application for Automobile Liability Insurance under the Texas Automobile Insurance Plan."<sup>67</sup> Section 17 of the application is similar to that used in *Iowa National* which provided the basis for denying agency as a matter of law. This provision states: "I (we) hereby designate as servicing agent for the insurance\_\_\_\_\_."<sup>68</sup> The term "servicing agent" also appears at the bottom of the signature line.<sup>69</sup> This term is a more explanatory one than "producer of record," and in bold print the form explains that "[t]he local service fee for services rendered . . . shall be retained by the servicing agent designated herein."<sup>70</sup> The form also provides that "coverage becomes effective only in accordance with the [Texas] Plan,"<sup>71</sup> and the plan itself uses the term "servicing agent" throughout. In fact, nowhere in the plan is there any assertion or provision of agency as a matter of law. Since the policy provisions and the terms of the "plan"

64. 427 F.2d 1355 (9th Cir. 1970).

65. *Id.* at 1357 n.1 (emphasis added).

66. *Id.* at 1357. In *Billington v. Interinsurance Exch.*, 79 Cal. Rptr. 326 (1969), the plaintiff claimed that the assigned risk plan precluded the insurer from alleging the insured's violation of the cooperation clause as a defense to coverage. The supreme court held this was erroneous since it equated assigned risk policies with compulsory insurance. The court relied on "authorities on insurance law [which] indicate an injured person is subject to the defense of the insured's failure to cooperate under an assigned risk policy." *Id.* at 333, citing 7 J. APPLEMAN, INSURANCE LAW & PRACTICE § 7297, at 120 (1962).

67. It is distributed by the Texas Automobile Insurance Plan. The application describes the "producer of record" used in *Watson v. United States Fidelity & Guar. Co.*, 427 F.2d 1355, 1357 (9th Cir. 1970) and *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210, 212 (7th Cir. 1956), as a "servicing agent."

68. Application For Automobile Liability Insurance under the Texas Automobile Insurance Plan, Number 17 (Form No. TAIP 1000-Rev. 8-27-73).

69. *Id.* "Servicing Agent" is also under the line for the street address.

70. *Id.* at 3 (located at the beginning of the application form in bold print). This one sentence indicates that the "servicing agent" is so designated because he renders services in processing the application, and consequently is paid a "local service fee."

71. *Id.* (located beneath the line for the applicant's signature).

are against this assertion of agency, Texas courts should have no difficulty in refuting the proposition.

### *Agency by Statutory Authority*

The legislatures of a majority of states have enacted statutes generally entitled "Who are Agents."<sup>72</sup> The applicable Texas statute provides in part:

Whoever solicits insurance on behalf of any insurance company . . . or who takes or transmits other than for himself, any application for insurance or any policy of insurance, to or from such company . . . shall be held to be the agent of the company for which the act is done or the risk is taken . . . .<sup>73</sup>

Although there are no Texas cases construing the applicability of this statute to an agent who procures an assigned risk policy, a few jurisdictions have done so.<sup>74</sup>

The relevant question is whether the statute intends that the broker in an assigned risk situation is always, by virtue of the statute, the agent of the insurer. Since the statute does not apply to an insurance broker in an assigned risk situation, the broker is not the agent of the insurer.<sup>75</sup> An insurance company which receives an application for assigned risk insurance is generally unfamiliar with the local insurance salesman who sent the policy to the Texas Automobile Insurance Plan. The company has no control over the actions of this salesman; neither are there any guidelines or "company policy" which the salesman must follow.

In the seminal case of *Hannah v. State Farm Mutual Insurance Co.*,<sup>76</sup> this question was confronted in light of the Tennessee statute which is similar to the Texas statute.<sup>77</sup> The injured plaintiffs maintained that since the insurance salesman had prepared the application, he came under the statute, and was therefore an agent of the insurer as a matter of law. Thus, any representations by him to the insured were binding on the insurer. The district court upheld this contention but was reversed on appeal.<sup>78</sup> The Court of Appeals for the Sixth Circuit held the statute was inapplicable because it was "in-

72. *E.g.*, TEX. INS. CODE ANN. art. 21.02-1 (Supp. 1974).

73. *Id.*

74. *See Hannah v. State Farm Mut. Ins. Co.*, 403 F.2d 375, 378 (6th Cir. 1968), which found no Tennessee case nor any "direct authority in the decisions of other jurisdictions." The statute had not been applied "to the situation in which an insurance policy has been issued pursuant to an assigned risk plan . . . ." *Id.* at 378. *See also Driver v. Tennessee Farmers Mut. Ins. Co.*, 505 S.W.2d 476, 478 (Tenn. 1974); *Harris v. Knutson*, 151 N.W.2d 654, 657 (Wis. 1967).

75. *Hannah v. State Farm Mut. Ins. Co.*, 403 F.2d 375, 378 (6th Cir. 1968); *Allstate Ins. Co. v. Smoak*, 182 S.E.2d 749, 753 (S.C. 1971); *Harris v. Knutson*, 151 N.W.2d 654, 657 (Wis. 1967).

76. 403 F.2d 375 (6th Cir. 1968).

77. TENN. CODE ANN. § 56-705 (1955).

78. *Hannah v. State Farm Mut. Ins. Co.*, 403 F.2d 375, 378 (6th Cir. 1968).

tended to apply only when an insurance company has *voluntarily* accepted an application . . . and then has *voluntarily* issued a policy thereon.”<sup>79</sup>

An insurance company which is required to participate in the assigned risk plan and required to issue policies upon receipt of the applications can hardly be described as “voluntary.” The presumption that the statute was to be liberally construed in favor of an insured applies only to situations where the policies were “voluntary” and the insurer had the option of rejection. The court was unwilling to

extend vicarious liability by applying the statute to a case where the insurer had no control over the producer of record, had no knowledge of the representations made by him, and had no choice but to issue the policy once an application containing all the necessary information was received.<sup>80</sup>

Relying on the dissenting opinion in *Hannah*, a recent Tennessee case determined that the statute *does apply* to insurers when they write insurance policies under the assigned risk plan.<sup>81</sup> Therefore, the person who handles the application for such policy becomes the agent of the insuring company.<sup>82</sup> The basis for this decision was that the “company, by agreeing to participate in the plan as a condition to doing business in the state, did in legal effect agree voluntarily to write this assigned risk policy.”<sup>83</sup>

In order to clarify this reasoning, the words “agreeing to participate” should be prefaced with the words “faced with the prospect of no business at all.” In other words, an insurance company must “agree” to participate in the Assigned Risk Plan or else be denied the right to conduct business within the state. A statute which effectively requires companies to perform an act should not call that compulsion “voluntary.”

A similar statute has also been interpreted as involving “two classes of persons: employees of insurance companies and those acting ‘at the instance or request of such insurance companies.’”<sup>84</sup> It has been held that if the agent was not a member of either class, the statute did not apply.<sup>85</sup> The effect of the statute was further limited by the Supreme Court of South Carolina in *Allstate Insurance Co. v. Smoak*<sup>86</sup> when it held that even if the statute applies, the extent of the agent’s authority must be determined by the jury, and not as a matter of law.<sup>87</sup> “The statute itself does not impose absolute

79. *Id.* at 378; see 3 G. COUCH, CYCLOPEDIA OF INSURANCE LAW § 26.16, at 467 n.7 (1960).

80. *Hannah v. State Farm Mut. Ins. Co.*, 403 F.2d 375, 380 (6th Cir. 1968).

81. *Driver v. Tennessee Farmers Mut. Ins. Co.*, 505 S.W.2d 476 (Tenn. 1974).

82. *Id.* at 478.

83. *Id.* at 478, quoting *Hannah v. State Farm Ins. Co.*, 403 F.2d 375, 381 (6th Cir. 1968).

84. *Allstate Ins. Co. v. Smoak*, 182 S.E.2d 749, 758 (S.C. 1971).

85. *Id.* at 753.

86. *Id.*

87. *Id.* at 753.

liability on insurers for all acts by 'agents.'"<sup>88</sup> If absolute liability is imposed, then any distinction between an agent and a broker would be obviated.<sup>89</sup>

Although *Smoak* is not an assigned risk case, the scarcity of cases interpreting such "Who are Agents" laws makes it important, especially since South Carolina's statute is almost an exact copy of Texas'.<sup>90</sup> An agent in an assigned risk situation is not an "employee," nor does he act at the request of an insurance company, since the company has no authority to make such a request. It is the insured himself who requests the local agent to transmit the policy to the Texas Automobile Insurance Plan. Since the insurance company has no choice or power to accept or reject an application, it cannot be claimed that it requests the agent's services.

*Hannah* and *Smoak* signal the future path Texas should follow in interpreting the "Who are Agents" statute. It is inequitable to bind a company for the misrepresentations or negligence of an insurance agency which the company knows by name only and over which it has no authority or control.

#### THE QUESTION OF ABSOLUTE LIABILITY

It is a general rule of insurance law that an insurer may plead a breach of policy provisions as a defense to liability.<sup>91</sup> Failure to give notice of an accident or to forward suit papers to the insurer are examples of facts which the insurance company may plead as breach of policy.<sup>92</sup> "The rights of an insurance company to cancel or defend against a [automobile insurance] policy which has been given as proof of financial responsibility, however, are usually narrowly restricted,"<sup>93</sup> and, in most situations, the insurer is denied the right to plead his policy defenses. The purpose of the Texas Motor Vehicle Safety-Responsibility Act is to insure that irresponsible and uninsured drivers are able to compensate any future victims.<sup>94</sup> Therefore, the future victims must be protected from *any* negligence of the insured, even that which would allow an insurer to avoid liability.

The effect of such statutes is to impose absolute liability on an insurer who issues an automobile insurance policy to one who is required to furnish

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88. *Id.* at 753.

89. *Id.* at 753.

90. Compare S.C. CODE ANN. § 37-233 (1962) with TEX. INS. CODE ANN. art. 21.02-1 (Supp. 1974).

91. 8 J. APPLEMAN'S, INSURANCE LAW AND PRACTICE § 4816, at 190 (1972) states "that breach of the insured's obligation to give timely notice of an accident, claim or suit operates to prevent a recovery by the injured person." This discussion of the insured's duties provides: "If the insured fails to co-operate in the defense of the suit by the insurer, usually required by the policy . . . 'it is generally held that the injured person is thereby precluded from recovering . . .'" *Id.* § 4817, at 195-98.

92. *Id.* § 4816, at 190, § 4817, at 195-98.

93. 7 D. BLASHFIELD, BLASHFIELD AUTOMOBILE LAW AND PRACTICE § 272.6, at 32 (3d ed. 1966).

94. See TEX. REV. CIV. STAT. ANN. art. 6701h, § 21(f) (1969).

proof of financial responsibility. In Texas, the applicable statute provides for absolute liability as follows:

Every motor vehicle liability policy shall be subject to the following . . . .

[T]he liability of the insurance company with respect to the insurance required by this Act shall become absolute whenever injury or damage covered by said motor vehicle liability policy occurs . . . no violation of said policy shall defeat or void said policy . . . .<sup>95</sup>

The question for Texas courts is whether this provision imposes absolute liability on an insurer who issues an assigned risk policy to an insured who has *not* been required to furnish proof of financial responsibility.

There are three essential elements which must be present before the Motor Vehicle Safety-Responsibility Act applies: (1) a person must be "required" to furnish proof of financial responsibility; (2) the insurance company must issue a "motor vehicle liability policy;" and (3) the insurance company must file a "written certificate," the SR-22, with the Department of Public Safety.<sup>96</sup>

#### *Insurance Required By This Act*

In Texas, all high risk drivers apply for insurance through the Assigned Risk Plan whether or not they have been required to show proof of financial responsibility. Persons "required" to show proof, however, obtain a "motor vehicle liability policy," while the other high risk drivers receive merely an assigned risk policy.

A person is required to furnish proof of financial responsibility when he comes under the authority of the Act by virtue either of an automobile accident<sup>97</sup> or of a conviction for driving while intoxicated.<sup>98</sup> If the driver is uninsured and cannot pay for the damage resulting from the accident, or is unable to obtain insurance because of his conviction, his license and registration are suspended until he furnishes sufficient proof of financial responsibility by one of four statutory methods.<sup>99</sup> Section 19(a) provides that

[p]roof of financial responsibility may be furnished by filing with the department the *written certificate* of any insurance company duly authorized that there is in effect a *motor vehicle liability policy* for the benefit of the person *required* to furnish proof of financial responsibility.<sup>100</sup>

Accordingly, risk motorists usually choose to apply for an assigned risk policy

95. *Id.*

96. TEX. REV. CIV. STAT. ANN. art. 6701h, §§ 19(a), 21(a), 21(f)(1) (1969).

97. TEX. REV. CIV. STAT. ANN. art. 6701h, § 4 (Supp. 1974-75); *Lumbermens Mut. Ins. Co. v. Grayson*, 422 S.W.2d 755, 757 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

98. TEX. REV. CIV. STAT. ANN. art. 6701h, § 17 (1969); *Lumbermens Mut. Ins. Co. v. Grayson*, 422 S.W.2d 755, 757 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.).

99. *Id.* § 18.

100. *Id.* § 19(a) (emphasis added).

since most insurance companies will not issue an automobile insurance policy to a driver required to furnish proof of financial responsibility.

### *Written Certificate*

The "written certificate" which the insurer files with the Department of Public Safety is form SR-22. It is prescribed by the Department to show evidence of insurance required under the Financial Responsibility Law.<sup>101</sup> An SR-22 certifies that the person has complied with the requirement to furnish proof of financial responsibility by receiving an insurance policy from the insurance company filing the certificate. Once an SR-22 is filed, the automobile liability policy becomes "certified" and is transformed into a "motor vehicle liability policy."<sup>102</sup>

Several Texas cases have discussed the question of absolute liability under the Financial Responsibility Law.<sup>103</sup> These cases have failed to resolve its applicability to an assigned risk policy issued to a person not required to furnish proof of financial responsibility, and where no SR-22 has been filed.

In *McCarthy v. Insurance Co. of Texas*,<sup>104</sup> the San Antonio Court of Civil Appeals stated that

the only provision for absolute insurance occurs in cases where such a certificate has been furnished. . . . Section 21(a) . . . defines a "motor vehicle liability policy" as one which has been certified. Section 21(f) provides that a "motor vehicle liability policy" so defined, becomes absolute.

. . . The sum of the above analysis is that absolute coverage results when a *certificate* has been furnished. In this case *none* was ever *furnished* by the insurer, *nor required* by the act in advance of the first accident. The insurer is entitled to plead its policy defenses.<sup>105</sup>

*McCarthy* was not an assigned risk case, and neither were two subsequent decisions which relied on this interpretation.<sup>106</sup> But in *Lumbermens Mutual*

101. *Anderson v. Aetna Cas. & Sur. Co.*, 432 S.W.2d 151, 153 (Tex. Civ. App.—Fort Worth 1968, writ ref'd); *Pan American Ins. Co. v. Claunch*, 398 S.W.2d 792, 794 (Tex. Civ. App.—Amarillo 1965, no writ).

102. *National Sur. Co. v. Diggs*, 272 S.W.2d 604, 611 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.).

103. *Lumbermens Mut. Ins. Co. v. Grayson*, 422 S.W.2d 755, 757 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.); *Pan American Ins. Co. v. Claunch*, 398 S.W.2d 792, 795 (Tex. Civ. App.—Amarillo 1965, no writ); *Western Alliance Ins. Co. v. Alvarez*, 380 S.W.2d 710, 714 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); *United States Cas. Co. v. Brock*, 345 S.W.2d 461, 463 (Tex. Civ. App.—Amarillo 1961, writ ref'd); *McCarthy v. Insurance Co. of Texas*, 271 S.W.2d 836, 837 (Tex. Civ. App.—San Antonio 1954, no writ).

104. 271 S.W.2d 836, 837 (Tex. Civ. App.—San Antonio 1954, no writ).

105. *Id.* at 837 (emphasis added).

106. *Western Alliance Ins. Co. v. Alvarez*, 380 S.W.2d 710, 714 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.); *United States Cas. Co. v. Brock*, 345 S.W.2d 461, 463 (Tex. Civ. App.—Amarillo 1961, writ ref'd).



*Insurance Co. v. Grayson*,<sup>107</sup> the insured did procure an assigned risk policy. The insured was convicted of driving while intoxicated, his driver's license was suspended, and the insurer filed an SR-22. The Waco Court of Civil Appeals held:

[W]hen a person comes under the Act by virtue of either Section 4 (the having of a first accident) or by virtue of Section 17, suspension of license for driving while intoxicated, and an Insurance Company issues a policy under the Assigned Risk Plan . . . and files . . . an SR 22, liability under the policy becomes absolute.<sup>108</sup>

The Texas case which most nearly answers the question of absolute liability is *Anderson v. Aetna Casualty & Surety Co.*,<sup>109</sup> where the insured was convicted of driving while intoxicated. He subsequently applied through the Assigned Risk Plan and an SR-22 form was issued, but it was never received by the Texas Department of Public Safety. The plaintiff contended that Aetna was absolutely liable on the policy in spite of the fact that the SR-22 was never filed. The Fort Worth Court of Civil Appeals, however, held that an insurer is "absolutely liable only if it has furnished to the department a certificate showing that the insured is covered by a liability policy."<sup>110</sup> Since the insurer in this case had not filed an SR-22 to the department, it was not held absolutely liable, and could plead, "in defense of its alleged liability . . . any defenses based on the insured's failure to give notice to it of a suit . . . [or] failure to forward [suit papers]."<sup>111</sup>

*Vidaurri v. Maryland Casualty Co.*<sup>112</sup> upheld the insurer's defense even though the assigned risk policy had been issued and the SR-22 had been filed.<sup>113</sup> The insurer denied its liability because at the time of the accident the assigned risk driver had been driving without the automobile owner's permission. Although the insured asserted that the certification did not allow the company to avoid coverage, the court found the determining question to be whether there was "coverage as to such accident."<sup>114</sup> The policy covered temporary substitute automobiles only when driven with permission of the owner. Therefore, when the insured drove an automobile owned by his

107. 422 S.W.2d 755 (Tex. Civ. App.—Waco 1967, writ ref'd n.r.e.)

108. *Id.* at 757.

109. 432 S.W.2d 151 (Tex. Civ. App.—Fort Worth 1968, writ ref'd).

110. *Id.* at 155.

111. *Id.* at 155. The plaintiff in *Aetna* relied upon *Lumbermens Mutual, McCarihy* and *National Sur. Corp. v. Diggs*, 272 S.W.2d 604, 611 (Tex. Civ. App.—Fort Worth 1954, writ ref'd n.r.e.). The court analyzed these cases, however, and held that "none of the above cases [are] controlling." *Id.* at 154. The basis for this was the fact that in all three cases, an SR-22 was filed. In *Aetna*, none was ever filed.

112. 444 S.W.2d 767 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

113. *Id.*; accord, *Swinney v. Pioneer Cas. Co.*, 348 S.W.2d 462, 464 (Tex. Civ. App.—Dallas 1961, no writ); *State Farm Mut. Auto. Ins. Co. v. Chatham*, 318 S.W.2d 684, 690 (Tex. Civ. App.—Dallas 1958, no writ).

114. *Vidaurri v. Maryland Cas. Co.*, 444 S.W.2d 767, 769 (Tex. Civ. App.—San Antonio 1969, writ ref'd n.r.e.).

brother without the requisite permission, the policy provisions precluded coverage.<sup>115</sup>

*Vidaurri* relied upon an earlier case, *Swinney v. Pioneer Casualty Co.*,<sup>116</sup> in which the plaintiff had contended that the certified insurance policy imposed absolute liability on the insurer. The insured was previously convicted of driving while intoxicated, and was issued a motor vehicle liability policy under the Assigned Risk Plan. The policy issued by the Plan was an "operator's policy" which was distinguishable from an "owner's policy" which applies to all automobiles owned by the insured.<sup>117</sup> In its analysis of section 21(f), the court emphasized the words, "covered by said motor vehicle liability policy."<sup>118</sup> This section operates to deprive an insurer of certain defenses, but in no way enlarges the scope of the policy to cover accidents by a third party. The court rejected the "public policy" assertion by stating that the legislature did not intend to "redraft or write a new insurance policy."<sup>119</sup>

That a certified policy can be contested was established in *State Farm Mutual Automobile Insurance Co. v. Chatham*.<sup>120</sup> Chatham had been required to furnish proof of financial responsibility and a Motor Vehicle Liability "operators" policy had been issued under the Assigned Risk Plan. The policy endorsement, which incorporated by reference all provisions of the Financial Responsibility Act, did not incorporate the provision relating to "insured's motor vehicle," but only the provision relating to non-owned automobiles.<sup>121</sup> State Farm refused to defend on the grounds that Chatham, driving a car he owned, was specifically excluded from coverage. Since such coverage was specifically excluded, the insurer was under no obligation to defend.<sup>122</sup>

These cases lend greater weight to *Aetna* because they found no absolute liability even when an SR-22 had been filed. Thus, section 21(f) is not an "absolute" at all, but is only applicable in the proper situations. Because there are exceptions even when an SR-22 is filed, the statute should not apply to situations where no SR-22 was even required. The liability of an insurer who issues an assigned risk policy which is not required as proof of financial responsibility should not be absolute at all.<sup>123</sup>

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115. *Id.* at 769.

116. 348 S.W.2d 462 (Tex. Civ. App.—Dallas 1961, no writ).

117. *Id.* at 464.

118. *Id.* at 464.

119. *Id.* at 464.

120. 318 S.W.2d 684 (Tex. Civ. App.—Dallas 1958, no writ).

121. *Id.* at 688.

122. *Id.* at 688; *accord*, *Employers Liab. Assurance Corp. v. Roux*, 100 A.2d 416 (N.H. 1953).

123. A recent assigned risk case with disturbing implications is *Kahla v. Traveler's Ins. Co.*, 482 S.W.2d 928 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) which held the insurer absolutely liable. This case is highly questionable because there was no evidence of a prior accident or a conviction for driving while intoxicated, nor any evidence that the insured was required to furnish proof of financial responsibil-

Although it may seem that *Aetna* resolved the question of whether absolute liability is imposed on an insurer who issues an assigned risk policy which is not certified, this is not actually true. The writ was refused for no reversible error by the Supreme Court, and thus cannot be assumed to be the basis for future Texas law. Considered together with *Vidaurri*, *Swinney*, and *Chatham*, which denied the contention of absolute liability even with a certified policy, *Aetna* forms the groundwork for a future holding that an assigned risk insurer is not absolutely liable on an assigned risk policy which is not certified.

#### CONCLUSION

The question of whether an insurance broker who procures insurance through the Assigned Risk Plan is an agent of the insured or insurer has already been decided in several state and federal jurisdictions.<sup>124</sup> These decisions have invariably held that the broker is an agent of the insured. Where there is additional indicia of authority, courts have made the broker an agent of the insurer only because additional facts exist which are not present in normal situations. But where the broker merely forwards the application and accepts the premiums, Texas should hold the broker to be the agent of the insured. The theory that the broker is the agent of the insurer as a matter of law by virtue of the Plan is opposite to the provisions and terms of the Plan and the application form. The insurance salesman in the assigned risk situation should be considered by the Texas courts as an agent of the insured.

Absolute liability on a non-certified assigned risk policy should be denied. Since an SR-22 form is necessary only when one is required to furnish proof of financial responsibility, the insurer who issues an assigned risk policy to an insured who is not required to furnish proof of financial responsibility will not have to file an SR-22 and should not be held absolutely liable. Therefore, the insurer may plead any and all policy violations as a breach of policy. If these two questions are resolved in this manner, they will balance the equities by providing "high risk" users of our highways the opportunity for automobile liability insurance while affording some protection from absolute liability to the insurance companies required to issue such policies.

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ity, much less any evidence showing whether or not an SR-22 was actually filed. Also, the insurer defended the insured in the trial court, and never pled its policy defenses. Without these essential facts disclosed, this case is not authority for holding an insurer absolutely liable.

124. *Watson v. United States Fidelity & Guar. Co.*, 427 F.2d 1355 (9th Cir. 1970); *Hannah v. State Farm Mut. Ins. Co.*, 403 F.2d 375 (6th Cir. 1968); *Yoshida v. Liberty Mut. Ins. Co.*, 240 F.2d 824 (9th Cir. 1957); *Iowa Nat'l Mut. Ins. Co. v. Richards*, 229 F.2d 210 (7th Cir. 1956); *Bradford, Inc. v. Traveler's Indem. Co.*, 301 A.2d 519 (Del. 1972); *Gabriel v. Attigliato*, 303 N.Y.S.2d 399 (Sup. Ct. 1968); *Warren v. Merchants Mut. Ins. Co.*, 276 N.Y.S.2d 275 (Sup. Ct. 1966).