Reprint
April 2014 ● Vol. XXVII ● Number 4
PLUS
PROFESSIONAL LIABILITY UNDERWRITING SOCIETY
Journal
Your source for professional liability education and networking

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Insurance Agent and Broker E&O 2013: The Year in Review, Part I

by Peter J. Biging

Introduction

A substantial portion of the errors and omissions claims that are brought against insurance agents and brokers involve allegations of failure to procure requested coverage, or failure to advise with regard to coverage issues or concerns. In the past, agents and brokers were the beneficiaries of a bias towards viewing them primarily as "order takers," and holding insureds responsible for reading and understanding their policies. However, the landscape that has been developing in recent years has moved substantially towards courts increasingly viewing agents and brokers as experts. And in increasing situations they can be found liable if available coverage is insufficient for losses sustained, or it doesn't respond to all of the losses incurred.

In looking at this past year's most significant case decisions, it can be seen that, not surprisingly, a number deal with claims of failure to procure the requested coverage, claims that the agent/broker had a duty to advise, and/or claims that the agent/broker stood in a fiduciary relationship with the insured, and in this capacity failed to provide the necessary advice or guidance that would have protected the client from an uninsured or underinsured loss. This article—to be published in two parts—will provide a summary of the past year's more significant E&O decisions. It will focus on these issues, as well as important decisions considering: causation defenses; the insured's duty to read the policy as a defense to a "failure to procure" or "failure to advise" claim; and the applicability of the economic loss rule as a defense to insurance agent/broker negligence claims. This month's article will focus on the cases discussing the "duty to advise," the interplay of the "duty to read," and "failure to procure" claims.

Duty to Advise

Looking first at the duty to advise, one of the areas where claims have been successful is where the agent/broker has gotten involved in efforts to place a value on the property to be insured under a property/casualty policy. The case law suggests that great care has to be taken when such involvement is considered, and to make sure the insured has been clearly advised in writing that it is their responsibility to value their property, that it is recommended that an appraisal be obtained to confirm the appropriateness of the valuation, and that any valuation assistance being provided is given without any representation or assurance that the valuation is to be relied upon in ensuring that coverage limits based thereon will be sufficient to fully insure the property against loss. *Ambroselli v. C.S. Burrall & Son, Inc.*,[1] is a good example of this.

In *Ambroselli*, an agent using a cost estimator, had valued a Victorian era home the plaintiff operated as a bed and breakfast at $433,991, which he rounded up to $435,000. At the insured's instruction, he then purchased property coverage for this amount, which over the next two years was automatically increased to guard against inflation. Although this was for far greater limits than her prior policy purchased through a prior agent (which had limits of only $250,000), and the limits were paid in full after a fire, the insured sued the agent and his agency after it turned out that the policy was insufficient to cover the cost of rebuilding the home.

Following discovery, the defendants moved for summary judgment on the grounds that the agent had procured the requested coverage, and had assumed no duty to advise regarding the coverage to purchase because there was no long term relationship between the agent and the plaintiff, and plaintiff had not requested full replacement coverage. The court denied the motion, however, holding that "the evidentiary proof raises a

material question of fact as to whether [the agent] took on the obligation to estimate the value of the B&B so that it would be properly insured." In so holding, the court took particular note of the fact that the plaintiff did not ask the agent to estimate the value of the building, and he voluntarily assumed this task—which the plaintiff alleged she relied on.

In reaching this decision, it is noteworthy that the court rejected the defendants' argument that the insured had a duty to read her policy, and having accepted it without objection she should not be heard to argue that it wasn't sufficient. Quoting the New York Court of Appeals decision in *American Bldg. Supply Corp. v. Petrocelli Group Inc.*,[2] the court noted that "receipt and presumed reading of the policy does not bar an action for negligence against the broker."[3]

Another course of conduct that can provide grounds for making a successful "special relationship" argument involves engaging in activity that goes beyond merely purchasing the coverage, but suggesting ideas for addressing related issues, such as how to finance the insurance purchased. An example can be found in *Helton v. American General Life Ins. Co.*,[4] where a number of individuals had purchased high value life insurance policies with large premiums, putting in place financing for the premium and interest payments through opening lines of credit with certain banks. The hope and expectation was that at the time of their deaths the death benefits would be sufficient to repay all of the borrowed funds plus interest, and still provide insurance proceeds to the beneficiaries. To protect the banks providing the funds used to finance the premiums, the banks were given a security interest in the cash value of each policy up to the amount of the loan plus accumulated interest. After substantial premiums were paid on lines of credit set up for this purpose, in the midst of the Great Recession the banks decided not to continue financing the premiums on the policies and cashed in the policies for their cash value, leaving the policyholders with no insurance and large unpaid debts to the banks.

The policyholders responded by bringing suit against the insurance agent who had sold them the policies along with the issuer of the life policies. Among the claims asserted was a claim for negligence on the part of the agent, in allegedly selling the insureds policies that were unsuitable for them, and failing to make arrangements for additional or alternative financing, so he could cash in on large up-front commissions. The agent moved for summary judgment, arguing that he owed no duty to advise the insureds, but the court denied the motion, holding that there was evidence presented not merely that the agent purchased insurance for the plaintiffs, but that he came up with the idea for each policyholder to establish a trust to own the policies, and advised them through all aspects of the premium financing. As a result, the Court found that there was "a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his advice is being sought and relied on…"[5]

Although it is generally clear that brokers have no continuing duty to advise after they have been replaced, this hasn't stopped insureds from trying to make claims based thereon. *Garnick v. Mesirow Financial Holdings, Inc.*,[6] provides an example of such a claim. In *Garnick*, a woman lost a valuable earring, received insurance for it under a "private collections" policy, and replaced it. Then, four years later, when she lost the new set, she and her husband put in a new claim for this loss. Unfortunately, when they did so, they learned that the original set of earrings had been taken off the schedule of insured items because of the loss of the original earring, and the new set was therefore not covered—resulting in an $80,000 uncovered loss.

Although the couple had used a new broker the past 4 years to renew the coverage, they sued the original broker. They alleged that he had neglected to inform them that the loss of one of the earrings would result in removal of the earrings from the schedule, failed to inform them that if they obtained a replacement earring they would need to inform the broker of the acquisition so that the new set of earrings would be included on the schedule of covered items, and failed to verify with the couple that they received an endorsement to the policy advising them that the earrings, as originally listed on the schedule, had been removed. They claimed that but for his breach of this duty of care, the earrings would have remained on the policy, and they would have been insured for the loss.

The broker, claiming he owed no such duty as a matter of law, moved to dismiss, and the court granted the motion. On appeal, the decision was affirmed. In affirming, the appellate court concluded that the broker owed a duty of care only for the policy that he had procured for the couple, and it was the couple's responsibility to review the renewal policy and schedule of covered items, and confirm it was complete or advise their new broker of the need to correct it. In reaching this determination, the court stated: "An insurance broker's duty is not so broad as to encompass all insurance matters for the foreseeable future when the insured retains a new broker. Rather, the broker owes a duty only with respect to those matters for which its services were retained."[7]

Another potential source of a duty to advise can arise where the agent/broker has been provided with information that may impact coverage for the insured, and the question arises as to whether, having become aware of this information, he has assumed a fiduciary duty to advise the insured of the coverage issue. An example of this can be found in *Sasser-Ford v. State Farm Fire & Casualty Co.*[8] In *Sasser-Ford*, a husband and wife owned a property with a main house and a guest house on it. The husband's parents lived in

the guest house and paid no rent. The main house and guest house were both covered under a property policy purchased by a State Farm insurance agent, and the same policy was renewed year after year, even after the husband died. After the wife's father-in-law died, she began to rent out the guest house. When Hurricane Rita hit, a tree fell on the guest house and caused both exterior and interior damage to the building. When a claim was submitted, coverage for this loss was denied because the policy contained an exclusion for a dwelling extension that has been rented or held for rental to a person not a tenant of the dwelling.

After the insured sued State Farm and its agent, State Farm received summary judgment on the coverage denial, and the insured continued its claims against the agent. While the agent was not alleged to have failed to procure the requested coverage or misrepresented the coverage obtained, the plaintiff argued that he should nonetheless be liable for failing to advise the insured that she was engaging in conduct that would trigger a coverage exclusion after learning that she was renting the guest house, and offering to procure coverage for dwelling as a rental. Nonetheless, the trial court granted the agent summary judgment, dismissing the claims against him.

On appeal, the appellate court reversed. It did so based on the insured's testimony that she had delivered a flyer advertising the rental of the guest house to an employee of the agent who handled work as a real estate agent. In so holding, the appellate court concluded that "[the agent] owed a duty to disclose any exclusion in [the insured's] homeowners' policy if she notified him that she was using her property in a way that voided coverage under her policy."[9]

While efforts have also been made to impose an implied contractual duty generally to look closely into the insured's business, identify potential coverage gaps, and make recommendations based thereon, the courts have to date been unwilling to go that far. An example of how this argument was presented, and how the courts have responded can be found in *San Diego Assemblers, Inc. v. Work Comp for Less Insurance Services, Inc.*[10] In *San Diego Assemblers*, the broker for a remodeling contractor had purchased general liability insurance for a number of years, with each policy containing a "prior completed work" exclusion. Several years after the contractor had completed work at a restaurant, there was an explosion and resulting fire there. The restaurant's property insurer paid for the loss. It then brought suit against the contractor in subrogation, and obtained a default judgment. After the contractor assigned any claims it might have against the broker, the insurer sued the broker for negligence in failing to procure coverage for the contractor that would protect the contractor against the loss.

Notably, the contractor had acknowledged he had never requested coverage for prior completed work. He also acknowledged that he had read the policies procured upon receipt, never asking questions thereafter, or asking for different coverage. Based on this, the broker moved for summary judgment, which was granted. On appeal, the decision was affirmed.

In attempting to salvage its claim, the insurer had argued that the broker owed an implied contractual duty to investigate the contractor's needs and procure the requisite coverage to meet those needs. In arguing in support of the court finding such an implied duty of care, the insurer asserted that "recognizing the implied contractual duty would ensure fairness and equity by holding insurance brokers to the same standards as other professionals."[11] Rejecting this argument, the court noted that "[w]hatever the merits of these policy arguments, it is not difficult to conceive of countervailing policy considerations, including the likelihood that such an implied contractual duty might cause brokers to oversell insurance to their clients in an effort to avoid the prospect of later professional liability."[12] The court also noted that a decision to imply such a duty would effectively mandate prior completed work coverage in all contractor general liability policies, which could appreciably increase the cost of the policies without directly benefitting the insureds. Because "balancing these types of considerations is properly the function of the Legislature, not the courts," the court concluded that mandating a broad duty on the part of brokers to affirmatively determine and procure insurance to meet an insured's needs was something it was not prepared to do.[13]

Lastly, a growing number of cases involve claims where the insured alleges that while it had indeed received its policies and had an opportunity to review them, it made clear to its broker that it was relying on the broker to review them for it, and thus the broker should be responsible for failing to alert it to any changes in coverage even though it had received the policy and failed to raise objection. An example of this can be seen in *South Bay Cardiovascular Associates, P.C. v. SCS Agency, Inc.*,[14] where the plaintiff was a cardiovascular medical group that had for a number of years purchased commercial property and liability coverage through the SCS Agency, including coverage for employee dishonesty with a $250,000 limit. In the middle of the 2005 policy year, the insurer merged with another insurer and made changes to its commercial liability policies. One of these changes included reducing its coverage for employee dishonesty to $25,000. Notice was sent to the medical group and received by the person responsible for insurance coverage there. However, that person testified that she did not read the document, but instead relied on SCS to inform her about "anything that I needed to know, any change [or] updated information."[15] The policies were then renewed. Thereafter, it was learned that an employee of the

group had misappropriated funds over the course of several years, and a claim for this loss was submitted.

While the medical group accepted $25,000 in settlement of the claim from its insurer, it sought recovery for the uninsured portion of the loss in excess of $25,000 from the broker. The medical group alleged that it would have had more coverage but for the broker's failure to advise of the reduction in the employee dishonesty limit.

The broker moved for summary judgment, on the grounds, *inter alia*, that the medical group had admitted receiving notice of the change in coverage. However, the court denied the motion—and the Appellate Division affirmed on appeal—on the grounds that there was an issue of fact as to whether there was a special relationship sufficient to give rise to a duty of care owed by the broker to advise the insured of the coverage change. In affirming the trial court's decision, the Appellate Division made reference to the aforementioned Court of Appeals decision in *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*,[16] this time for its holding that: "While it is certainly better practice for an insured to read its policy, an insured should have the right to look to the expertise of its broker with respect to insurance matters."[17] And the court noted that not only had the medical group's employee who handled insurance coverage testified that she would not read policy language and notices (instead relying on the broker to tell her anything she needed to know), but she also testified that she had no special training in procuring insurance and did not choose coverage on her own, and the broker had told her he "did not expect her to read the insurance policies" purchased for the group.[18]

Interplay of Duty to Read

In the past the duty to read was often tantamount to a "get out of jail free" card for agents and brokers who allegedly failed to procure the coverage requested, or advise of changes to coverage that the insurer had chosen to impose or that were the result of different policy forms after a change in insurers. However, as noted in the last case example, this defense has become less and less effective over time. Courts have come more and more to give credence to insureds' arguments that they were relying on the broker, with the broker's knowledge and understanding, to review the coverages to make sure the coverage was what they wanted/needed, and to advise of any problems or concerns in this regard. Nonetheless, it isn't a dead issue. And even in cases where one might think it would be least likely to find traction, it has still sometimes proven an effective defense to a failure to procure or failure to advise claim.

A really good example of this can be found in *Mandina, Inc. d/b/a Mandina's Restaurant v. O'Brien*.[19] In *Mandina*, five days before Hurricane Katrina hit, the broker for a popular restaurant on Canal Street in New Orleans had his annual meeting with the owner to go over his insurance coverages. In light of the impending hurricane the broker recommended, and the owner agreed, to increase the business interruption/extra expense ("BI/EE") coverage from $400,000 to $500,000 under the restaurant's existing fire/windstorm policy. Although the restaurant had flood coverage under a policy provided through the National Flood Insurance Program ("NFIP"), this policy didn't include BI/EE coverage, and there was no discussion about adding it. Nonetheless, the owner claimed he left his conversation with the broker believing the broker was putting in all necessary coverage to protect the restaurant from a business interruption loss that might arise from the hurricane.

When Katrina hit, the restaurant suffered severe windstorm and flood damage. This resulted in a substantial business interruption loss. When the owner learned he had no business interruption coverage under the flood policy, he brought suit against the broker, alleging that the broker owed a fiduciary duty to accurately and completely explain and disclose the insurance coverage available when they had met to discuss the restaurant's coverages, and to ensure that the coverage purchased for the restaurant provided the types and amounts of coverage sought, including for flood related business interruption loss.

After discovery was taken, the broker moved for summary judgment, which was granted. However, the trial court subsequently reversed itself. The reversal was based on a question of fact regarding what the restaurant owner believed following his meeting with the broker to review his coverages. The court certified the matter for an interlocutory appeal, which the appellate court heard, but as a "supervisory writ." Upon review, the appellate court reinstated the summary judgment award, and dismissed the case.

In reaching this determination, the court took note of the Louisiana Supreme Court's holding in *Newman School v. J. Everett Eaves, Inc.*,[20] in which the court stated:

> *An agent has a duty of "reasonable diligence" to advise the client, but this duty has not been explained to include the obligation to advise whether the client has procured the correct amount of insurance coverage. It is the insured's responsibility to request the type of insurance coverage, and the amount of coverage needed. It is not the agent's obligation to spontaneously or affirmatively identify the scope or the amount of insurance coverage the client needs. It is also well settled that it is the insured's obligation to read the policy when received, since the insured is deemed to know the policy contents.*[21]

The owner's contention was that during the course of his conversation with the broker, he understood them to be talking about getting him business interruption coverage generally, not only for the windstorm policy. However, he acknowledged that he had the windstorm and flood

policies for years, he never asked the broker if the BI/EE coverage included flood related losses, and the broker never told him it did. In finding for the broker, and concluding that the restaurant owner's subjective belief regarding coverage was irrelevant, the court placed great emphasis on these facts, and the owner's duty to read his policies.

Conversely, in *Bailey v. State Farm Mutual Automobile Ins. Co.*,[22] the court found that a "failure to procure" claim was not preempted by the insureds' duty, and failure, to read their policy. In *Bailey*, a couple living in Oregon had been State Farm insureds for many years. After the couple moved to Montana, they asked a State Farm agent there to transfer their Oregon State Farm auto policy to Montana—and, in fact, alleged that they presented their Oregon State Farm insurance cards to the agent and requested that they be provided with the same coverage. The agent completed a computerized application, then printed it out for the couple. Above the signature line, the following language appeared:

> *I apply for the insurance indicated and state that (1) I have read this application, (2) my statements on this application are correct, (3) statements made on any other applications on this date for automobile insurance with this company are correct and are made part of this application, (4) I am the sole owner of the described vehicle except as otherwise stated, and (5) the limits and coverages were selected by me.*

Although the couples' Oregon auto policy provided underinsured motorist coverage, the agent had checked "no" next to this coverage on the application, and the policy was issued without the coverage. Oregon law mandates that uninsured motorist coverage must include underinsured motorist protection. This is not the case in Montana. The agent claimed that she would have gone through all the possible coverage options with the insureds and never recommends reducing coverage. However, the State Farm coding for uninsured and underinsured motorist coverage was different in Oregon and Montana, and where a "U" in Oregon would denote combined uninsured and underinsured motorist coverage, this would only denote uninsured coverage in Montana. This suggested a possibility that the agent used a code that meant one thing in Oregon and another in Montana when she filled out the application.

Although the couple received insurance cards twice a year for the next 8 years, and the policies as well, the Plaintiffs did not review them. Then they were hit head on by a drunk driver, suffered severe injuries, and incurred over $1 million in medical expenses. The drunk driver carried only the statutory minimum liability insurance limits, and the Plaintiffs' medical expenses and other injuries far exceeded this coverage. In light of this, the Plaintiffs sued State Farm and the agency for negligence in failing to purchase the requested coverage, asserted a claim for breach of fiduciary duty as against the agent, and sought declaratory relief and reformation of the policy as against State Farm.

Following discovery, the trial court granted State Farm and the agent summary judgment, finding that they had provided the specific insurance requested by the Plaintiffs in their application. On appeal, the Montana Supreme Court reversed, and remanded the case for trial. In so doing, the court noted that:

> *While it is generally presumed that a person who executed a written contract knows its contents and assents to them, an insured does not have an absolute duty to read an insurance policy. Instead, 'the extent of an insured's obligation to read the policy depends upon what is reasonable under the facts and circumstances of each case.' The relationship between the insured and the insurance agent is an important factor to consider when examining the insured's duty to read the insurance contract. (emphasis added) Once an insured informs an insurance agent of his insurance needs and the agent's conduct permits a reasonable inference that the agent is highly skilled in this area, an insured is justified in relying on an insurance agent to obtain the coverage that the agent has represented he will. The insured's failure to read an insurance policy does not operate as a bar to relief as a matter of law, but it may constitute comparative negligence.*[23]

Because there were material issues of fact as to how it came about that the policy that was provided didn't include underinsured motorist coverage, the Court concluded that the summary judgment award was improper, and a trial was required.

While this case example suggests that the duty to read may play less of a role in duty to advise cases, there continue nonetheless to be cases where it is determinative—particularly where it can be shown that the insured had the knowledge to understand precisely what he had purchased. An example of this is *MLR Investment Group, PLLC v. Pate Insurance Agency, Inc.*[24] In *MRL Investment*, after the Plaintiff had purchased homeowners coverage for real property he owned through his company, he decided to use it as a rental property. At the time of renewal, he advised his State Farm agent that he was now renting the property out and would require coverage for it as a rental property. In fact, familiar with the specific type of policy required based on his purchase of insurance for rental properties in Florida, he requested a "DP-3" policy.

The State Farm agent told him that State Farm didn't offer DP-3 polices, so he could move his insurance to another company or increase his deductible and his rental property would be covered. He opted to stay with State Farm, but when he subsequently submitted a claim for damages caused by a tenant who had been using the house to purchase marijuana, the claim was denied because neither he nor his wife lived in the house. He then sued the agent for negligence.

Although it appears that the agent clearly gave him bad advice, the court dismissed the case on summary judgment. In doing so, the court noted, first, that as a captive agent of State Farm, the defendant agency owed a duty of care solely to State Farm. Absent fraud or deceit, under Georgia law, there is no liability in tort to an insured for failure by a captive agent to procure coverage for the insured.[25]

Second, under Georgia law an insured has a duty to read and examine the policy to determine whether the coverage desired has been furnished. In this case, had Plaintiff examined the policy he would have seen that there would be no coverage for any loss if neither he nor his wife lived on the premises. While Plaintiff argued that there is an exception to this rule when one is relying on the agent/broker as an expert, the court noted that the Plaintiff knew exactly the type of coverage he wanted. Having been charged as a matter of law with knowledge of the terms of the policy he purchased, Plaintiff could not seek recovery from the agent for negligence in procuring it.[26]

Duty to Procure

In addition to "failure to advise" cases, a claim that often arises involves allegations of failure to procure the requested coverage. 2013 again saw its share of these, distinguished by varying efforts by insureds—with varying degrees of success—to have the court read a duty to procure into the context of the insured's agent's interactions during the coverage procurement process.

An example of a significant case involving this issue can be seen in *O&G Industries, Inc. v. Litchfield Ins. Group, Inc.*[27] In *O&G Industries*, in connection with the development of a power generation facility, the plaintiff ("O&G") was required to maintain $100 million in general liability insurance. O&G retained Aon to purchase coverage under a contractor controlled insurance program ("CCIP") and Litchfield Insurance Group ("LIG"), its regular broker, to procure umbrella and excess coverage. Aon procured a general liability policy, and three excess policies providing one half the required coverage. LIG purchased umbrella and excess coverage above that, but when LIG procured the umbrella coverage, it procured a policy which provided umbrella coverage over O&G's basic general liability coverage, but failed to provide coverage for the power generation project. The excess policies LIG purchased were "follow the form" policies, so they failed to provide coverage for this as well. After an explosion occurred at the power generation project site, there were multiple deaths and injuries, substantial property losses, and O&G had to pay liquidated damages of $44.6 million for extensive project delays caused by the explosion. As a result of the lack of coverage under the umbrella and excess policies purchased by LIG, O&G had a substantial gap in coverage, exposing it to over $10 million in additional costs (to pay for retrospective liability coverage for $3.85 million with a $7 million deductible).

O&G sued both Aon and LIG for, *inter alia*, negligence, breach of contract, and professional malpractice, but Aon moved to dismiss on the grounds that it was solely responsible for purchasing the CCIP coverage, which it had successfully procured. However, the court denied the motion, on the grounds that O&G had alleged that it was Aon's obligation pursuant to the service agreement with regard to the CCIP not only to procure certain coverage, but to ensure that the coverage procured thereunder, along with O&G's own umbrella and excess coverage, satisfied the insurance obligations O&G assumed under its agreement to build the power generation facility. The court found this allegation sufficient to state negligence and breach of contract claims against Aon, and to sustain LIG's cross-claim for apportionment of liability as against Aon.

In sustaining the claims asserted, the court made note of the fact that Aon had argued that it was not retained or paid to supervise LIG's purchase of the umbrella policies, and thus it should not be subject to a claim for failure to advise regarding whether the policies purchased by LIG provided the requisite coverage. However, the court found that O&G had alleged enough to establish a claim against Aon by alleging that Aon knew that the contract required O&G to secure a minimum amount of umbrella coverage in connection with the project, and that Aon had a professional responsibility to request and review documentation to ensure that the CCIP coverage it placed, together with O&B's excess policies, satisfied the contract's insurance requirements.[28] Significantly, in reaching this decision, the court took note of the Connecticut Superior Court decision the year before in *Seven Bridges Foundation v. Wilson Agency, Inc.*,[29] where the court stated that "because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between the insurance agent and his client is often a fiduciary one."[30]

A different result was reached in *Sea Trade Maritime Corp. v. Marsh USA Inc.*[31] In *Sea Trade Maritime*, the owner of a maritime vessel requested in 1992 that its insurance broker purchase "held covered" insurance for the vessel. While maritime policies can require that the vessel's owner notify the insurer before the vessel travels to a designated war zone in order to be covered in the event of a loss incurred as a result of travel into the war zone, "held covered" policies provide coverage in the event that the owner inadvertently fails to give advance notice of the vessel's travel into a war zone. Although the broker provided cover notes indicating that the coverage purchased was "held covered," this was actually not what was obtained, and the insurance required advance notice of the vessel's entry into a war zone.

After the producer moved to a new broker, the insured appointed the new broker as its broker of record. The new broker (which ultimately became part of Marsh) was requested to renew the coverage and did so annually. The new broker's confirmations of insurance correctly described the fact that under the policy advance notice was required before the vessel entered into a war zone. Several years later, while floating in the waters outside Sri Lanka, the boat was damaged by a terrorist bomb attack, causing $6.8 million in damages. Because the vessel was in a war zone and advance notice had not been provided, the insurer initially declined coverage. It eventually paid half. However, in an effort to recover the remainder the vessel's owner sued Marsh for negligent failure to procure and negligent misrepresentation.

Marsh moved to dismiss, and the motion was granted. In granting the motion, the court noted that while the original broker may have violated its duty to procure "held covered" insurance, and Marsh may arguably have known of the mistake made by the original broker through the producer who moved over to Marsh, "that knowledge did not create a duty for Marsh to correct the mistake."[32] "Marsh was not under a duty to investigate whether [the insured] was misled by the incorrect A&A Cover Notes or whether [the insured] was satisfied with the insurance obtained by A& I."[33]

The insured argued that Marsh had a duty to identify the coverage it had wanted and led to believe had been purchased by the prior broker, but the court noted that Marsh had purchased the coverage actually requested, and made no misrepresentations with regard thereto. In refusing to impose the duty requested on Marsh, the court stated:

> *[The insured] points to no New York case, and the Court has found no case, imposing a duty to obtain a policy different from the one requested, absent some special duty. The duty proposed by [the insured] would require insurance brokers to investigate the prior statements made by and to other brokers, and then to divide whether or not the other broker had misled its customer. This would require a degree of telepathy on the part of the insurance brokers not required by New York law under the circumstances as plead in the Complaint.*[34]

In another significant decision, a Missouri intermediate court considered whether the insured's receipt of a specimen copy of a policy before purchase could preclude a claim that the broker nonetheless failed to purchase the correct coverage and, surprisingly, concluded that it didn't. In *Gateway Hotel Holdings, Inc. v. Richfield Hospitality Services*,[35] a boxing event was going to be held at a hotel. In advance of the event, the promoter had agreed to provide the hotel with insurance indemnifying the hotel from any general liability claims that might be made against it arising from the event in the amount of $5 million. The promoter also agreed to have an ambulance on standby at the hotel. However, while the promoter purchased CGL coverage in the required amount, the primary and excess policy both contained "athletic participant exclusions," and no ambulance was actually on call for the event.

A boxer participating in one of the matches collapsed after his fight. He subsequently sued the hotel for his injuries allegedly caused or contributed to by the failure to have an ambulance available and provide medical care at the event. A judgment far in excess of the $5 million coverage was obtained. Subsequently, the hotel and its general liability insurer sued the promoter for contribution, indemnity, and breach of contract. Apparently having limited assets, the promoter settled these claims by entering into a consent judgment against it and assigning its rights against the broker to the hotel and its general liability insurer. The hotel and the general liability insurer then sued the broker (naming both the brokerage firm and the individual broker who handled the placement), alleging that the broker had been requested to procure general liability coverage that would provide insurance against injuries to both participants in the matches and spectators, and had failed to do so. They asserted claims for negligence, breach of fiduciary duty, and breach of contract.

During the course of discovery, it was made clear that prior to purchasing the coverage, the broker sent the promoter a specimen policy containing the "athletic participant exclusion," and it was approved. Accordingly, the broker moved for and obtained summary judgment dismissing all of the claims asserted. On appeal, however, the decision was reversed because the appellate court concluded that the record contained issues of fact regarding the promoter's conversations with the broker with respect to the coverage being purchased, and what the promoter had asked for and believed he had been provided with. Specifically, the record showed that when he was provided with the specimen policy, the promoter called the broker and told him he needed coverage that would protect both spectators and participants, and the broker misconstrued his request when he learned that he had some other very limited coverage for the participants. In reversing the trial court, the appellate court noted that the promoter's "acceptance of the specimen copy does not automatically relieve [the broker and the producer] of their duty to procure the type of insurance coverage [the promoter] requested."[36]

Lastly, in *Guida v. Herbert H. Landy Insurance Agency, Inc.*,[37] a Massachusetts Appellate Court considered whether a broker could be found liable for failing to replace expiring coverage with identical coverage because he had told them the replacement coverage would continue their coverage "in a seamless manner." In *Guida*, after a lawyer learned that the office manager for his prior (since

dissolved) firm had embezzled over $2 million from the firm's client trust account, he and his former partner submitted a claim with their professional liability insurer. However, the claim was denied because the policy had an exclusion for claims arising from the theft of funds held by the law firm for the benefit of others. The lawyers then sued their insurance broker, alleging, *inter alia*, that the broker had misled them into believing coverage that had been purchased to replace a National Casualty policy that was no longer being offered in the state by a Gulf policy provided identical coverage when, in fact, it didn't. The argument was that the broker represented that the Gulf policy would allow them "to avoid a gap in coverage, and continue coverage in a seamless manner...," and this led the lawyers to believe the replacement coverage would be identical to the expiring coverage.[38]

The trial court rejected this argument, and the ruling in this regard was affirmed on appeal. In affirming the ruling in this regard, the court noted that while the broker represented that procurement of the Gulf policy would provide "seamless" coverage, the broker did not make a representation about a specific aspect or exclusion of that coverage. And, indeed, the lawyer responsible for purchasing the policy acknowledged that he was aware that the Gulf policy had additional amendments, "an awareness undercutting his claim that he thought the policy was identical to the previous two policies."[39] Further, because they were a business entity, in the absence of special circumstances, they had a duty to read the policy rather than rely on representations by the agent.

Endnotes

1 932 F. Supp. 2d 431 (W.D.N.Y. 2013).
2 979 N.E.2d 1181 (2012), *reargument den.*, 20 N.Y. 3d 1044 (N.Y.2013).
3 *Id*. at 736. This issue also arose in *Zaremba Equipment, Inc. v. Harco National Ins. Co.*, 837 N.W. 2d 686 (Mich. Ct. App. 2013), where the court found that an agent's representation to the insured that a Marshall & Swift valuation would be sufficient to determine the limits necessary to cover the cost of replacing the property created a "special relationship" upon which the jury could find the agent liable for negligence when a fire occurred and the cost of replacing the building ended up far exceeding the coverage limits.
4 946 F. Supp. 2d 695 (W.D. Ky. 2013).
5 *Id*. at 710.
6 994 N.E.2d 986 (Ill. App. Ct., 1st Dist. 2013).
7 *Id*. at 922.
8 112 So.3d 968 (La. App. 3 Cir. 2013), *writ den.*, 2013 La. LEXIS 1569 (La., June 28, 2013).
9 *Id*. at 971.
10 163 Cal. Rprr. 3d 621 (Cal. App. 4th Dist. 2013), *review den.*, 2014 Cal. LEXIS 640 (Cal., Jan. 29, 2014).
11 *Id*. at *625.
12 *Id*.
13 *Id*. at 625-626.
14 963 N.Y.S. 2d 688 (App. Div. 2d Dep't 2013).
15 *Id*. at 690.
16 19 N.Y.3d 730, 736 (N.Y. 2012).
17 *Id*.
18 963 N.Y.S.2d at 691.
19 2013 La. App. LEXIS 1560 (La. App. 4th Cir. July 31, 2013), *writ den.,* 2013 La. LEXIS 2737 (La., Nov. 22, 2013).
20 42 So.3d 352 (La. Sup. Ct. 2010).
21 242 So.3d at 359.
22 300 P.3d 1149 (Mont. 2013).
23 300 P.3d at 1154.
24 2013 U.S. Dist. LEXIS 146512 (M.D. Ga. Oct. 10, 2013).
25 *Id*. at * 7.
26 *Id*. at *13.
27 2013 Conn. Super. LEXIS 1492 (Conn. Super. Ct. July 1, 2013).
28 *Id*. at 18-19.
29 53 Conn. L. Rptr. 584, 586 (Conn. Super. 2012).
30 *Id*.
31 2013 N.Y. Misc. LEXIS 4688 (Sup. Ct., N.Y. Cty. Oct. 21, 2013).
32 *Id*. at *14.
33 *Id*.
34 *Id*. at *13.
35 2013 Mo. App. LEXIS 112 (Mo. Ct. App. Jan. 29, 2013), *transfer den.,* 2013 Mo. LEXIS 168 (Mo., Apr. 30, 2013).
36 *Id*. at *18-19.
37 84 Mass. App. Ct. 1105, 2013 Mass. App. Unpub. LEXIS 803 (Mass. App. Ct., Aug. 1, 2013)., *app. den.*, 994 N.E.2d 801 (Mass., Sept. 11, 2013).
38 *Id*. at *2-4.

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