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Insurance Agent and Broker E&O 2017: The Year in Review

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2017 saw a number of interesting developments in regards to insurance agent and broker E&O, including cases examining: when a "special relationship" or "special circumstances" exist sufficient to give rise to a duty to advise; the applicability of the "duty to read" in the context of statute of limitations accrual analysis; and the impact of the insured's contributory negligence. Interesting decisions were also issued with regard to when a negligent misrepresentation claim can properly be stated in the context of a broker failure to advise claim; and how the courts will analyze proximate causation of defenses. As in past years, there are significant lessons to be learned from reviewing these decisions, the legal arguments presented, and how the courts reached their determinations on the facts before them. The following is a summary of some of the more interesting/significant decisions with regard to insurance agent and broker E&O issues over the past 12 months.

Special Relationship

In the vast majority of jurisdictions, the duty of the insurance agent/broker is limited to the duty to procure the coverage that is requested, make sure it is not void or defective, and, to the extent such coverage cannot be procured, to alert the insured of the inability to procure it within a reasonable period of time. There is typically no duty to advise or offer guidance with regard to coverage the insured has in place or should consider purchasing. In order for a greater duty of care to apply, the courts typically look to determine if there are "special circumstances" or if there are factors giving rise to a "special relationship" as between the broker and the insured sufficient to give rise to a "duty to advise." Because the circumstances can vary, this has been and continues to be a hotly contested issue, and it is important to keep tabs on the developing arguments and trends. As in recent years, 2017 again had some interesting case decisions regarding when a "duty to advise" could be said to have arisen such that a broker could be found responsible for the insured's failure to be aware of or take steps to address coverage deficiencies.

In BioChemics, Inc. v. Axis Reinsurance Co.,[1] after being notified by its broker, Brown & Brown, that its then current D&O carrier (XL) would be restricting D&O coverage in the coming policy year and increasing premiums, BioChemics, Inc. ("BioChemics"), a specialty pharmaceutical company, agreed to purchase D&O coverage from a different insurer (Axis) at the conclusion of the XL policy term. As part of the process of applying for replacement coverage, which was to be offered on a claims made and reported basis, BioChemics was asked to confirm that all known claims had been noticed to XL, and did so. However, in fact, it had been the subject of a Non-Public Formal Investigation by the SEC commencing six months earlier, by Formal Order, which included the SEC serving a series of document subpoenas, and BioChemics had not provided notice to XL.

Those subpoenas indicated the existence of the Formal Order, and BioChemics had retained counsel to represent it in regards to the SEC investigation. Based on the fact that the Formal Order had been issued during the prior D&O policy period, the new insurer, Axis, denied coverage, and was subsequently granted summary judgment dismissing BioChemics' claims for breach of contract and declaratory relief.

Seeking relief alternatively against Brown & Brown based on alleged negligence and breach of fiduciary duty, BioChemics asserted that Brown & Brown had been negligent in failing to advise them on the risks associated with the expiration of the XL policy. Specifically, the present and chief executive officer claimed that he didn't understand that the SEC action amounted to a reportable claim, and had Brown & Brown only properly advised him prior to the expiration of the XL policy he would have preserved

BioChemics' coverage thereunder by reporting the action.

Brown & Brown moved for summary judgment on the grounds that it owed no duty to advise, and the court granted the motion. In reaching this decision, the court noted that under Massachusetts law brokers generally don't owe a fiduciary duty of care to their customers to ensure that the insurance policies procured on their behalf are adequate for their needs, absent "special circumstances of assertion, representation and reliance."[2] BioChemics pointed to a long-term relationship with a business and insurance consultant who had introduced BioChemics to Brown & Brown's corporate predecessor, and argued that Brown & Brown had inherited this relationship. But they were unable to present any evidence of representations made by the consultant on which they had relied. Further, while Brown & Brown worked annually with BioChemics to obtain competitively priced coverage, their president and CEO could not recall ever seeking specific advice from anyone at Brown & Brown with respect to insurance coverage issues, nor could he recall anyone else at BioChemics having done so. Instead, he testified to just having a general expectation that Brown & Brown would provide adequate coverage.

Based on this, the court found that there were no special circumstances giving rise to a fiduciary duty of care. Accordingly, the court found that Brown & Brown was entitled to accept BioChemics' representation that they had reported all known D&O claims to XL, and "were under no duty to ferret out potential claims left unreported."[3]

In Certain Interested Underwriters at Lloyd's London v. Bear, LLC,[4] after a yacht valued at $17 million sustained damage to its hull, it was taken to a shipyard for repairs. During the course of the repair work, it was consumed by fire caused by "hot work repairs" to the hull. The yacht was insured for damages caused during repair work, but the policy had a "Maintenance and Repair Clause." This clause stated that while the policy would remain in full force while the yacht was undergoing maintenance and repair work, there would be no coverage with respect to any "hot work" other than soldering unless, prior thereto, the underwriters had been provided with and agreed (in writing) to the full details and schedule of the work, and a copy of the shipyard's Ship Repairers Liability Insurance. Additionally, the policy provided that the insured could not agree to waive subrogation without the underwriters' written agreement. Because the insured had signed an agreement containing a waiver of subrogation and had allowed the yacht to undergo repairs involving "hot work" without first obtaining the underwriters' written agreement, the participating underwriters commenced an action seeking a declaration that they had no obligation to indemnify the owner for the loss.

In response, the owner of the yacht counterclaimed and also brought a third party action against its broker, Marsh, for breach of contract in failing to procure the requested coverage, breach of fiduciary duty in failing to inform and explain the coverage to the owner, negligence in its procurement of the requested coverage, and negligent failure to advise. Following discovery, Marsh moved for summary judgment dismissing each of the claims, based on the fact that:

- There was no dispute that Marsh had procured a policy for the requested limits that would have provided $17.25 million in coverage but for the owner's failure to comply with the policy's conditions precedent with respect to coverage for the repair work; and
- Both in its initial proposal and during each renewal of the policy, Marsh had repeatedly warned the owner "to keep in mind the warranties and exclusions of the policy, especially those related to liabilities assumed under contract which are excluded unless approved by underwriters beforehand," and specifically warned about the "Maintenance and Repair Clause".

The court accepted Marsh's arguments as to the first three claims and dismissed them on summary judgment. However, the court denied summary judgment on the negligent failure to advise claim. In doing so, the court noted that there is generally no duty to advise absent a "special relationship." But the court found that sufficient facts had been alleged to create an issue of fact as to whether there was a special relationship based on the evidence presented of the owner's long term relationship with Marsh and its reliance on Marsh's expertise in making its purchasing decisions. Further, the court found that if a special relationship could be established, a jury could potentially find that Marsh had been negligent in failing to advise the owner not to agree to a policy with the Maintenance and Repair Clause in question for a vessel with a steel hull.

Interestingly, Marsh argued that this claim should be dismissed in any event because, even though the owner had identified a Chubb policy that would have provided coverage without imposing the same conditions on repair work in advance of same, the owner could not prove that (1) it would have chosen the Chubb policy instead of the Lloyd's Policy had Marsh recommended it, despite the owner's concerns about pricing, (2) Chubb would have renewed on the same terms every year and the owner would have elected it every year, and (3) Chubb would have covered the loss despite the owner's failure to notify of the work in advance. The court acknowledged that these causation issues were very real issues. The court nonetheless concluded that the owner had created an issue of fact as to each by submitting a declaration from the boat's captain stating that his prior experience with a fire during welding performed while the boat was being built would have led them to choose the Chubb coverage had it been offered; and via the testimony of an expert that it was "highly probable"

that Chubb would have continued to offer the same policy, the owner would have continued to renew it, and it would have covered the loss.

In Koeppel v. John D. Bronson Co.,[5] a broker appealed from a verdict against it for negligence in connection with the preparation and submission of an insurance application and in obtaining replacement coverage for the plaintiff art gallery that offered substantially reduced valuation for damaged art work, without disclosing the change to the plaintiff. On appeal, the broker raised a number of issues, including the jury instruction regarding how the jury should determine whether a "special relationship" existed as between the broker and the plaintiff. In rejecting the argument made on appeal on this issue, the court noted that evidence had been presented at trial to support the jury instructions. Notably, the plaintiff had presented evidence of: (1) the defendant broker's website's promises of "personal care and service" and "attention to detail" in order to "recommend the right coverage"; and (2) a letter the broker had written to an insurance adjuster in connection with a prior claim in which the broker noted that the broker had handled the plaintiff's insurance needs for over 20 years, and viewed the plaintiff gallery as "one of [its] most important clients."[6] This decision is somewhat troubling, as these factors alone typically signify nothing more than a promise to do good work and a relationship of some longevity.

While the above-noted decisions are somewhat concerning for agents/brokers worried about the increasing proliferation of "duty to advise" claims, there were a number of more favorable decisions to agents and brokers on this issue. For example, in direct counterpoint to Koeppel, in Rick Friedman Enterprises, Ltd. v. Travelers Indemnity Co.,[7] the court dismissed a claim for alleged negligent failure to advise with regard to flood coverage based on the contention that its broker had been its agent for 10 years and marketed itself as having a commitment to service and its ability to obtain business and flood insurance. The court referenced these facts as "being insufficient to demonstrate anything beyond a longstanding business relationship."[8]

In another example, FDT Group, LLC v. Guaraci,[9] a business location owned by the plaintiff with the lower of two floors partially below grade suffered floor damage due to a water pipe backup. There was no coverage for the claim because the plaintiff's policy did not include water backup coverage. The plaintiff sued the broker who placed the coverage, contending the broker owed a fiduciary duty to recommend water backup coverage. After discovery was taken, the broker moved to have the action dismissed on summary judgment, and the motion was granted. On appeal, the ruling was sustained.

In rendering its ruling, the appellate court took note of the fact that the plaintiff had only used this broker for about a year, regularly used a competitive bidding process to solicit proposals, did not have a personal relationship with and did not communicate with the broker directly, admitted that he was the ultimate decision maker regarding insurance for his business, knew about water backup coverage generally and had it on other properties, and knew it was his responsibility generally to make sure the coverage he wanted was included within the policies purchased. Based thereon, the court concluded that this was an "ordinary" broker-insured relationship, "and that no special relationship of trust and confidence existed between the parties."[10]

In Advanced Radiographics, Inc. v. Colony Ins. Co.,[11] the court affirmed the dismissal of a negligence claim by a company in the business of storing medical records based on the broker's alleged failure to properly advise with regard to property coverage for its warehouses. The broker had, at the insured's direction, purchased a commercial package policy that included both general liability and property coverage. However, while the general liability coverage applied to both its corporate offices and each of its nine warehouse locations, the property coverage only applied to its corporate offices. The insured had alleged that it relied on the broker "to advise . . . regarding its insurance needs and to make recommendations for insurance coverage that was adequate in kind and amount to cover potential losses." Nonetheless, in affirming the dismissal of the claim by the trial court, the Louisiana Court of Appeals held that, even if this allegation was taken as true, at no point did the insured allege that it had requested any specific insurance which the broker had failed to procure, thereby undermining its claim. In reaching this conclusion, the court stated:

> Our Supreme Court has been clear in its direction that relying on an insurance broker/agent for advice and being disappointed by that advice is not a breach of the duty of "reasonable diligence" owed by an insurance agent/broker to a client. The allegations in [plaintiff's] petition attempt to impose a duty upon [the broker] to identify the type and amount of coverage [plaintiff] needed for their property. Louisiana does not impose this duty upon the broker but, instead, upon the insured.[12]

In LaRocca v. Bleeda,[13] Frank LaRocca co-leased a vehicle with his mother, which they used to provide care for his father, who was ill and unable to drive. After Frank was severely injured in a car accident with an uninsured motorist while driving this vehicle, he submitted a claim under the insurance policy his mother had with Pioneer. The claim was denied because he was not listed on the policy and was not a resident relative. In response, the LaRoccas brought suit against the agency that purchased the coverage for the vehicle ("Morris"), asserting claims, inter alia, for negligence. The trial court granted Morris summary judgment. On appeal, the decision was affirmed.

In affirming, the Michigan Court of Appeals noted that, under Michigan law, an insurance agent owed a duty

of loyalty to act in the best interests of the insured, both in terms of finding an insurer that can provide the insured with the most comprehensive coverage and in ensuring the insurance coverage purchased properly addresses his/her needs.[14] However, the court noted that, "generally an insurance agent does not have an affirmative duty to advise a client regarding the adequacy of a policy's coverage."[15]

The court noted there are exceptions when: the agent misrepresents the nature or extent of the coverage offered or provided; an ambiguous request is made that requires clarification; an inquiry is made that may require advice and the agent gives advice that is inaccurate; or the agent assumes an additional duty by either express agreement or promise to the insured.[16] However, in this case: "the LaRoccas did not provide any facts to indicate that Grace requested or even mentioned that she wanted coverage for Frank or that Frank would also be driving the vehicle, and Grace did not subsequently ask any questions about the adequacy of her coverage" after it was placed.[17] The LaRoccas contended that because Grace and Frank were co-lessees of the car, this should have triggered a duty to advise, but the court concluded that this, alone, was insufficient to do so.

Lastly, in BNCCORP, Inc. v. HUB Int'l Ltd.,[18]BNC had suffered $26 million in losses arising from a fraudulent loan scheme, but was able to recover only $7.5 million under its insurance because it didn't secure coverage specific to its mortgage loans in transit ("MLT") activities. HUB had been retained as its broker only after BNC had already entered into two MLT agreements, was not asked to provide any risk management services, and was, upon renewal, asked to help BNC procure financial institution bond and excess follow-form policies from new insurance carriers that matched BNC's expiring coverages. While BNC also requested servicing contractor coverage, it did not request any special endorsement, rider or other coverage specific to the MLT programs. Nevertheless, BNC argued that because it had asked HUB both to replace its expiring coverages and for "any recommendations for other limit increases you feel appropriate," Hub should be held liable for its failure to identify insufficiently insured coverage risks related to this activity, and for its failure to recommend and procure coverage specific to the exposures presented by the MLT program. After a bench trial, the court found in favor of HUBb, and dismissed BNC's claims. On appeal, the decision was affirmed, with the court holding that "where a bank fails to identify or foresee its own risks, but makes a general request for additional coverage recommendations, a broker need not assess for risks absent a specific request to identify, and an agreement to do so, accompanied by adequate information to undertake such an assessment."[19]

Accrual of Claims for Statute of Limitations Purposes

One of the arguments that brokers defending against negligence and failure to procure claims have tried to make with only limited success in recent years has been that the claim should accrue for statute of limitations purposes on the date the policy was received, as opposed to the date when it was discovered that the policy did not provide the requested coverage (i.e., the date coverage for a claim was challenged, questioned or denied). The argument made has been that because an insured has a duty to read his/her policy, if the lack of coverage was clear on the face of the policy, then the claim should accrue upon receipt of same.

Since 2012, in Illinois there had been authority to support this argument in the form of a case entitled Hoover v. Country Mutual Ins. Co.,[20] in which the court held that a broker's negligent failure to procure claim accrued on the date the insureds received their policy, and not the date they first learned the policy would not cover their claims. However, in May of 2017 the Illinois Appellate Court, First District declined to follow Hoover's precedent (See American Family Mut. Ins. Co. v. Krop.[21]) In so doing, the court reversed dismissal of a claim brought more than two years after a homeowner's policy had been issued, but within two years of the homeowners learning that it would not provide the requested coverage for a claim being made against their son. As the rationale for its decision overruling this precedent, the court held that an insurance agent/broker owes a fiduciary duty to his insured under Illinois law. Because a fiduciary duty is owed, this implicates the tolling of the statute of limitations until the breach of the agent/broker's duty of care has been discovered.[22]

In RVP, LLC v. Advantage Ins. Services, LLC,[23] after insurance coverage for a recycling business' equipment, stock and inventory was canceled, and separate insurance for its' sister company's buildings was non-renewed, their insurance broker was instructed to find the same or similar coverage elsewhere. Nonetheless, the broker obtained insurance for the equipment, stock and inventory for $925,000 less than had been in place. The broker also procured property coverage with limits on the buildings which insured one building for $1 million less than had been in place, while also failing to provide blanket limits for loss on any one building up to the total limits for both. As a result, when a fire occurred causing substantial damage to the buildings and their contents, the businesses received a recovery for almost $1,500,000 less than would have been available on one of the buildings, and less coverage than they believed would have been recoverable for the lost business equipment and contents. The plaintiffs thereupon brought suit against the broker within two years of the fire loss, but more than 2 years after the replacement coverages were bound.

The broker moved for summary judgment on the grounds that the claims were barred by the two year statute of limitations in effect under Illinois law for all causes of action by an insured against his insurance producer concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure insurance under § 13-214.4 of the Illinois Code of Civil

Procedure. In response, the plaintiffs argued that the statute of limitations should not be deemed to have accrued until after the loss, when it was first learned that the replacement policies would not provide the same coverage as the prior policies. While the plaintiffs' CFO admitted signing applications for the policies, plaintiffs argued that he had not seen the completed applications, and simply signed the last page of each.

The court granted the motion for summary judgment, rejecting plaintiffs' argument that the claims didn't accrue until after the plaintiffs were made aware of the limited coverage available. In doing so, the court noted that the policies, which clearly indicated the reduced limits, had been received more than two years prior to the commencement of the lawsuit. While the court expressly did not address whether failure to read the policy would present an absolute bar to plaintiffs' claims generally, in this case because the policy limits were each clearly stated in the policy declarations pages, the court concluded that upon receipt plaintiffs should have known the policy limits failed to match what had been requested.[24]

In one other decision of note on this issue, in Catlin Specialty Ins. Co. v. Tegol, Inc.,[25] anticipating how North Carolina's Supreme Court would rule on an issue of first impression, the court concluded that the statute of limitations for a claim of breach of fiduciary duty by a broker would accrue when the insured discovered or ought to have discovered, through reasonable diligence, that its insurance policies didn't include the trademark infringement coverage plaintiff allegedly had been relying on the agent to procure.

Contributory Negligence

In most jurisdictions, it is recognized that an insured has a duty to read his policy. To the extent the broker fails to do so, and thus is unaware that the coverage purchased does not match what the broker was asked to procure, the broker can argue that the insured should be found responsible, at least in part, for the insured's comparative negligence. While there was a time when this could provide a complete defense in a significant number of jurisdictions, the prevailing rule is now that the insured's failure to read his policy can only provide the basis for a comparative fault finding. However, there are still a small number of states that apply the old contributory negligence rules and, thus, hold that an insured's failure to read the policy remains a complete defense to a broker negligent failure to procure claim.

One of those states is Alabama, which again came to light in a federal court decision early in the year. In Brown v. State Farm Fire & Casualty Co.,[26] the court denied a motion for remand from federal court back to state court based on alleged fraudulent joinder of an insurance broker as a defendant to defeat diversity jurisdiction. The plaintiff was a homeowner who had suffered property damage resulting from a lightning strike to his home, and his insurer had denied coverage for same. He sued both the insurer ("State Farm") and his broker in state court, and State Farm removed the case to federal court. In seeking remand, the plaintiff pointed to the joint residency of the plaintiff and the broker in Alabama. However, the federal district court denied remand, holding that there was no valid claim available against the broker.

Applying Alabama law, the district court noted that the insured conceded the policy was in full force and effect at all times relevant to the claims, and concluded therefore that because he had duty to read the policy, he had been contributorily negligent in not doing so. Because contributory negligence remains a complete defense to a negligent failure to procure claim in Alabama, the district court determined he could not recover under a negligent failure to procure claim.[27] Additionally, under Alabama law, his acceptance of the policy without objection vitiated any claim he might otherwise have had for breach of contract.[28]

While the contributory negligence of the insured in failing to read his policy can also result in dismissal of a broker negligence claim in its entirety in North Carolina, a North Carolina appellate court decision issued in the latter part of the year pointed out some limitations in the use of the failure to read as a complete defense. In Holmes v. Sheppard,[29] the plaintiff owned a number of residential and office buildings. A water damage claim to one of the plaintiff's buildings was denied because it had been vacant for more than 60 consecutive days immediately prior to the loss. The plaintiff sued his broker, asserting claims for negligent failure to procure coverage that would insure the building even if vacant, and negligent misrepresentation. The plaintiff claimed he specifically requested coverage that would apply even if the building was vacant. The broker claimed this was not the case and, in fact, he had been advised at the time by plaintiff that it would be leased or rented within 30 days. The plaintiff denied this.

The broker moved for and was granted summary judgment based on the fact that the plaintiff had received the policy without objection and admitted he had not read it. On appeal, the appellate court reversed the dismissal of the negligent failure to procure claim. In so doing, the court noted that the plaintiff had testified to having specifically requested a policy without a vacancy exclusion. Assuming the trier of the fact were to accept the plaintiff's version of events, the court noted that this would create a duty on the part of the broker to purchase such coverage. Further, while North Carolina law provides that contributory negligence in failing to read a contract can result in knowledge of the contents being imputed to him, and dismissal of the negligence claim, the court pointed out that this rule only applied to the extent "nothing has been said or done to mislead [the plaintiff] or to put a man of reasonable business prudence off his guard."[30] Because there were facts in evidence to suggest the plaintiff may have been misled or put off his guard by the broker advising the coverage had to be placed with a different insurer to address the

vacancy issue, the court concluded that the plaintiff's admitted "failure to read the policy did not necessitate as a matter of law that summary judgment be granted on his claim that Defendants were negligent."[31] The court also rejected the argument that the plaintiff's receipt of the policy without objection essentially effected a novation, and thus agreement to accept the policy actually procured in place of the policy requested. However, of note the court affirmed the dismissal of plaintiff's negligent misrepresentation claim. In so doing, the appellate court noted that there was no evidence that the alleged false information provided by the broker could not have been discovered to have been untrue by the exercise of reasonable diligence – i.e., reading the policy.[32]

Negligent Misrepresentation

In Loomcraft Textile & Supply co. v. Schwartz Bros. Ins. Agency, Inc.,[33] a company engaged in the business of supplying commercial fabric and finished goods ("Loomcraft") retained a broker ("Schwartz") to purchase commercial general liability coverage to replace its coverage with Liberty Mutual. Pursuant to a "selling price endorsement," the Liberty Mutual coverage insured against any loss or damage to Loomcraft's finished goods or merchandise held for resale valued at the regular cash selling price, minus certain discounts and charges. The broker allegedly received representations from a Fireman's Fund underwriter that the coverage it procured from Fireman's Fund provided this same coverage, and no separate endorsement as in the Liberty Mutual policy would be required. In fact, however, this coverage only applied to products manufactured by Loomcraft, and not to products which Loomcraft finished and held for sale to others. As a result, when Loomcraft suffered a loss it valued at $608,611.85, it was only reimbursed for replacement cost, and thus sustained $529,980.58 in uninsured loss.

After Schwartz conceded that it had confirmed to Loomcraft that the Fireman's Fund coverage contained the same selling price endorsement as the Liberty Mutual policy, Loomcraft moved for and was granted summary judgment against Schwartz. Schwartz then settled with Loomcraft, but continued to pursue third-party claims against Fireman's Fund for indemnification pursuant to the terms of its agency agreement with Fireman's Fund, which stated:

> [Fireman's Fund] will indemnify you and hold you harmless, including paying your reasonable defense costs, against liability for damages, fines and penalties, arising out of acts we took or failed to take, and for our errors and omissions, and for your acts taken at our direction.[34]

The trial court dismissed Schwartz's indemnification claim on summary judgment, and Schwartz appealed. In so doing, the appellate court concluded that Schwartz had failed to establish a right to indemnification based on either negligent misrepresentation or professional negligence. First, with regard to the negligent misrepresentation claim, the court held that "[f]or a claim of negligent misrepresentation, the defendant has to be in the business of supplying information to guide others, in contrast to information that is supplied as ancillary to or in connection with the sale of merchandise or other matter."[35] Accordingly, because Fireman's Fund is in the business of selling insurance rather than supplying information, and the information it supplied is ancillary to the sale of insurance, a claim for indemnification based on negligent misrepresentation could not be made.

As to the issue of whether the claim could properly be based on professional negligence, the court found that in order to make out this claim Schwartz was required to establish the standard of care through expert testimony, and had failed to do so. Because "there is no defined 'duty of care' or 'standard of care' regarding an insurer's representations about coverage to the broker/producer, and whether the insurer can expect that a broker/producer would rely solely on such representations without examining the policy itself," a standard of care expert was necessary and, thus, Schwartz's failure to offer such expert testimony properly subjected the claim to dismissal on summary judgment.[36]

Proximate Causation

On the issue of proximate causation, a California Appellate Court decision in August provided an excellent example of how proximate causation can be utilized as a key broker defense issue, and how good lawyering on the plaintiff's part can fend off the issues raised in this regard.

In Performance Team Freight System, Inc. v. Arthur J. Gallagher & Co.,[37] Arthur J. Gallagher ("Gallagher") was sued for professional negligence and breach of contract by its customer, a company engaged in the business of providing trucking and warehousing services ("Performance Team"), after a claim for over $1.4 million under crime insurance coverage was challenged by its insurers, and the claim was ultimately settled for just $500,000. The claim was made after it was determined that drivers hauling customer merchandise were systematically opening packages, stealing portions of the merchandise, and then re-sealing the packages before delivery. After commencing a lawsuit against the insurers asserting, inter alia, claims for declaratory relief and breach of contract, Performance Team ultimately settled for the deeply discounted $500,000 figure. In its suit against Gallagher, Performance Team alleged that they were compelled to settle for far less than the actual value of the stolen merchandise because of Gallagher's negligence in procuring coverage, which covered thefts by employees, but which, per endorsement requested by Gallagher, defined "employees" in such a manner as to give rise to questions as to whether the thefts would be entirely covered. Specifically, while the endorsement defined "employees" to include independent contractors in the regular service of Performance Team's ordinary course of business, it limited such coverage to those contractors performing services for Performance Team pursuant to a

written contract between a "natural person independent contractor" and Performance Team for such services.

The problem that developed was that in the course of investigating and considering the claims, the insurers raised questions about whether coverage would apply only with respect to thefts by drivers who each had individual written contracts with Performance Team. Not all did. Additionally, the insurer questioned whether some portion of the thefts might have occurred after delivery, as there was no definitive evidence that the thefts occurred prior thereto. They had also raised questions about whether there was sufficient evidence to determine the drivers involved in the thefts had all conspired and colluded with others, thus making it a single claim with a single deductible, or multiple claims.

As noted above, after settling with its insurers, Performance Team sued Gallagher, claiming it was compelled to settle for such a discounted amount because of Gallagher's negligence in regards to the inclusion of the endorsement on the policy concerning covered "employees." After taking discovery, Gallagher moved for summary judgment. The theory presented was that Gallagher could not prove "causation" because Performance Team had not identified which drivers involved in the thefts fell outside the policy's definition of employees. Thus, it was argued, they could not prove what portion, if any, of the reduced payment was caused by this. Additionally, Gallagher argued that Performance Team could not establish that, but for Gallagher's alleged negligence, Performance Team's claim would have been fully covered. The argument in this regard was based on the fact that there were other issues that had not been resolved, including whether there definitively was collusion among the drivers, or not, and thus whether one or more deductibles would have applied. Lastly, and relatedly, Gallagher argued that Performance Team had failed to prove actual damages flowing from Gallagher's alleged negligence. Gallagher's argument in this regard prevailed at the trial court, and Performance Team's claims were dismissed on summary judgment.

On appeal, however, the judgment was reversed. As grounds for reversal, the appellate court pointed out that:

> Performance Team's complaint was not limited to the theory that Gallagher was negligent in negotiating and agreeing to Endorsement No. 6 because it was too narrow. The complaint *also* alleged Gallagher's breach was in **failing to procure** "full and complete crime coverage" for the risk of driver theft and by **failing to advise** Performance Team there was a gap in the company's crime coverage. This theory is that Gallagher breached its duty by failing to ensure that Performance Team's crime coverage would encompass theft by *any* of the independent contractors driving for Performance Team, irrespective of whether the driver was a "natural person" or whether there was a written independent contractor agreement. Under this theory, had Gallagher procured such coverage, it would have been unnecessary for Performance Team to show the insurer anything other than that truck drivers performing services for Performance Team committed the thefts. Endorsement No. 6 gave Federal an opportunity to challenge coverage based on the status of the drivers. Performance Team argues that had Gallagher procured the "full and complete" coverage for driver theft the company wanted, Federal simply could not have argued there was no coverage for the theft losses because of the nature of the drivers' employment, or because of a lack of proof of driver status.[38]

As to the argument raised with respect to the fact that there were other reasons having nothing to do with the "employee" endorsement that were raised concerning the claim, the appellate court noted that Performance Team had offered evidence that it had identified the drivers, by name, that it believed had committed the thefts and provided this evidence to the lead insurer. Performance Team also attested, by counsel, that they had provided Federal with detailed supporting documentation which identified each specific item of merchandise that the client claimed was missing from their shipments. While Performance Team never specifically accused any drivers of stealing, the appellate court found this to provide sufficient evidence to establish the existence of a material issue of fact precluding summary judgment.

With regard to the collusion issue, the court noted that while Performance Team had no evidence of communications between the drivers about planning and executing the thefts, it had presented strong circumstantial evidence that there was a common conspiracy. This evidence included the fact that all of the drivers implicated were making pick-ups at specific client warehouse locations, that they all were tied to the same merchandise shortages involving opened and re-sealed cartons, and that they all moved the merchandise through the same fencing operation.

Lastly, the court noted that the fact that Federal had challenged coverage on multiple bases did not, ipso facto, negate Performance Team's assertion that but for Gallagher's negligence, it would have been able to secure a better settlement or recovery against Federal at trial. The uncertainty created by the application of the definition of who were "employees" within the meaning of the endorsement, and thus what portion of the claims might be covered, was, by itself, a significant reason why Federal did not accept coverage.

On the damages argument, because the court concluded that Performance Team's claims could not be dismissed on summary judgment on the evidence

before it, the court found that the arguments Gallagher had raised were not sufficient to dismiss the claim based on an alleged inability to prove Performance Team's actual damages. In so doing, the court noted that it was insufficient for Gallagher to simply point to the fact that Federal had multiple reasons for challenging coverage. On summary judgment, it was Gallagher's burden to show that no damages could be proven because of this.

The significance of this decision is how it highlights some of the challenges facing brokers today, insofar as they provide more sophisticated services. In this case, Gallagher stepped in to try to help its client resolve an issue that had arisen about when thefts by independent contractors might be covered. In so doing, it went beyond purchasing an "off the shelf" product. And in so doing, it opened itself up to risk in failing to consider all of the potential theft scenarios that could arise, and how the language defining who were to be deemed "employees" or not could potentially lead to coverage disputes.

The case is also significant in how it highlights a variety of useful defense arguments available to brokers facing E&O claims, and what can be done by Plaintiffs' counsel to try to fend off these arguments. In this instance, Gallagher ultimately failed to obtain summary judgment, but the issues its counsel identified, and the manner in which they were presented evidenced some very intelligent lawyering. The fact is that, notwithstanding the very real and legitimate concerns raised by the issue regarding which implicated drivers were and weren't properly deemed covered "employees", there were a number of other coverage issues raised by Federal in the course of investigating the claim. At the end of the day, it is the plaintiff's burden to prove the damages proximately caused by the broker's alleged negligence. This case strongly suggests that a court, viewing a set of complicated facts such as these, will not be satisfied to come to the conclusion that the broker may have acted negligently in procuring coverage, but because it's complicated to follow the threads leading from this negligent conduct to the injuries incurred as a result, the only rational solution is to let the broker off the hook. Proximate cause is a critical issue. But complexity, alone, in determining how the broker's negligence impacted the customer's lack of coverage or other harm will not be sufficient to avoid liability. On summary judgment, it will be the broker's responsibility to show how the harm cannot be attributed to the broker's negligence, in whole or in part.

Miscellaneous

Quickly surveying some additional relevant miscellaneous holdings, it is noted that, in O.P.H. of Las Vegas, Inc. v. Oregon Mut. Ins. Co.,[39] the court held that, absent special circumstances, a broker does not owe a duty to monitor the insured's payment of insurance premiums. In J & A Freight Systems, Inc. v. Travelers Property & Casualty Co. of America,[40] while acknowledging a duty on the part of an insured to know the import and meaning of its insurance policy, the court denied a motion to dismiss the insured's negligent misrepresentation claim based on same. The court held that an insured's duty to know the contents of his policy does not present an absolute bar to causes of action brought by an insured against an insurance agent or broker, as opposed to causes of action by an insured against an insurer. And in Moje v. Federal Hockey League LLC,[41] the court held that a minor league hockey player who was blinded during a game might have standing to pursue a claim against the broker who procured liability coverage for the league in his capacity as a "proposed insured" to whom the broker owed a duty of reasonable care. This continues the trend towards courts being ever more open to the concept of a broker owing a duty of care flowing out beyond the customer it is dealing with directly.

Conclusion

As in recent years, the decisions in 2017 continue to evidence a trend of courts being more receptive generally to finding bases for identifying a duty to advise. There is simply no denying it. Nevertheless, at the same time, the cases demonstrate that courts will not blindly accept conclusory allegations of a "special relationship." The actual facts or lack thereof providing a basis for the existence of such a duty are going to be carefully examined. And whether within the realm of the "duty to advise" claim or otherwise, there are numerous viable arguments in the thoughtful lawyer's arsenal upon which to build strong defenses to the various claims that can typically be brought against a broker when insufficient coverage is available to respond to an insured's loss. As we move deeper into the digital age, with all the risks that are presented by the reduced interaction between human beings on both the broker side and the underwriting side, and we continue to see courts become ever more accepting of the premise that insurance is a complicated field through which the broker is seen as and expected to provide specialized expertise and guidance, it is important to continue to keep a close eye on the trends, and take careful note of the issues and arguments that are driving the case law.

Endnotes

1 No. 13-10691, 2017 WL 4317384 (D. Mass. Sept. 28, 2017). An appeal to the United States Court of Appeals for the 1st Circuit, No. 17-2059, was filed October 31, 2017 and is currently pending.

2 Id. at *3.

3 Id. at *4.

4 No. 15-630, 2017 WL 2180401 (S.D. Cal. May 17, 2017).

5 No. HO41697, 2017 WL 3446424 (Cal. Ct. App. 6th Dist. Aug. 11, 2017).

6 Id. at *5. Of note is the fact that the court also sustained the verdict for plaintiff's attorney's fees incurred in having to sue its insurer regarding coverage as a result of the broker's negligence, finding it validly recoverable compensatory damages. Id. at *7-8. In doing so, the court relied on the "tort of another" doctrine, which permits recovery of attorney's fees necessitated in order to act to protect the party's rights as a result of the defendant's tortious conduct. Id.

7 No. 652949/13, 2017 WL 119766 (N.Y. Sup. Ct., NY Cnty. Jan. 9, 2017).

8 Id. at *3.

9 No. 16AP-679, 2017 WL 712793 (Ohio Ct. App. 10th Dist., Franklin Cnty., Feb. 23, 2017).

10 Id. at *5.

11 No. 17-144, 2017 WL 4398726 (La. App. 3 Cir. Oct. 4, 2017).

12 Id. at *2.

13 No. 329504, 2017 WL 1367168 (Mich. Ct. App. Apr. 13, 2017).

14 Id. at *2.

15 Id. (quoting Mate v. Wolverine Mut. Ins. Co., 233 Mich. App. 14, 22-23, 592 N.W.2d 379, 383 (1998)).

16 Id. (citing Harts v. Farmers Ins. Exch., 461 Mich. 1, 10-11, 597 N.W.2d 47, 52 (2016)).

17 Id. at *2.

18 243 Ariz. 1, 400 P.3d 157 (2017).

19 Id. at 170. It should be noted, however, that the outcome in a case like this might have been different if standard protocol had been to ask more questions. In Harrision v. Allstate Indemnity Co., 54 Misc.3d 1224(A), 55 N.Y.S.3d 692 (Table) (N.Y. Sup. Ct., Steuben Cnty., Mar. 3, 2017), after a fire damaged the Harrison's home, Allstate denied coverage on the grounds that the Harrisons hadn't resided at the premises for more than 2 years prior to the loss. The Harrisons, who had primarily been residing with Mrs. Harrison's gravely ill mother in order to care for her, but continued to maintain, pay the taxes on, periodically visit, and keep the bulk of their possessions at their home, brought suit against Allstate, as well as the Allstate agency that handled their account. As regards the agency, the Harrisons argued they had advised an employee of the agency that they had been absent from the insured premises for a prolonged period and they wanted to make sure their home would be covered, and that going forward mail was sent to their mother in law's house. The employee allegedly told them she would make whatever changes were necessary

While noting that agents don't generally have a continuing duty to advise, guide or direct an insured to obtain additional coverage, and a claim for negligent failure to procure requires evidence of a specific request, the court denied the agency's motion to dismiss in this instance. In doing so, the court noted that the agency had a protocol in place requiring questioning the insured about use of the property and asking if they were aware of either the insured not living at the home or letting others live there would impact their coverage. It was uncertain whether this protocol was followed in this instance.

20 975 N.E.2d 638, 2012 IL App. (1st) 110939 (2012).

21 82 N.E.3d 533, 2017 IL App. (1st) 161071 (2017).

22 Id. at 541-42.

23 82 N.E.3d 619, 2017 IL App. (3d) 160276 (2017).

24 Id. at 625-26.

25 No. 14-00607, 2017 WL 252290 (W.D.N.C. Jan. 19, 2017).

26 No. 16-1390, 2017 WL 492992 (N.D. Ala. Feb. 7, 2017).

27 Id. at *6-7.

28 Id. at *7.

29 805 S.E.2d 371 (N.C. Ct. App. 2017).

30 Id. at 375.

31 Id. at 376.

32 Id.

33 No. 2-16-0557, 2017 IL App (2d) 160557(U), 2017 WL 1242780 (Ill. Ct. App., 2d Dist., Apr. 3, 2017).

34 Id. at *2.

35 Id. at *4.

36 Id. at *6.

37 No. B277505, 2017 WL 3668442 (Cal. Ct. App., 2d Dist., Div. 8, Aug. 25, 2017).

38 Id. at *7.

39 401 P.3d 218 (Nev. 2017).

40 No. 14-1581, 2017 WL 4274170 (N.D. Ill. Sept. 26, 2017).

41 No. 15-8929, 2017 WL 4005920, at *2 (N.D. Ill., Sept. 12, 1017).