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Developments in Insurance Agent/Broker Professional Liability 2015: The Year in Review, Part II

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Part I of this article, which appeared in last month's PLUS Journal, focused on discussion of some of the more significant decisions in 2015 touching upon agent/broker liability to third-parties with whom they are not in privity, and the continuing refinement of the Courts' analytical framework for determining when a "duty to advise" may exist in regard to the purchase of insurance coverage on the part of agents/brokers to their clients. This month's follow-up article, Part 2 of our Year in Review wrap-up, will discuss a number of interesting case decisions in 2015 concerning: the determination of when a fiduciary relationship may be deemed to have arisen as between the agent/broker and its customer; the scope of the "duty" to procure"; the valid assignment of agent/broker malpractice claims to others; the continuing applicability of the "duty to read" as a defense to misrepresentation claims; and the continuing viability of the economic loss doctrine, at least in certain jurisdictions, as a defense to agent/broker professional negligence claims.

"Special Circumstances" and Creation of Fiduciary Relationship

Illustrating the continuing evolution of the courts' consideration of what may constitute "special circumstances" sufficient to create a fiduciary obligation on the part of agents and brokers with respect to their clients' coverage choices, a number of decisions that were rendered this past year seemed to ping-pong back and forth regarding just what allegations would be sufficient, and what were not enough to get past an early dispositive motion.

In *Montgomery v. William Moore Agency*,[1] the Court denied summary judgment to an agent alleged to have negligently failed to advise the insured to purchase Hired and Non-Owned Automobile Liability coverage (resulting in a substantial uninsured exposure for their business) based on the conclusion that there was an issue of fact as to whether there was a special relationship because the plaintiff had testified that, based on the agent's advice, "we bought what we were told we needed."[2] Similarly, in *My Space Pre School and Nursery, Inc. v. Capitol Indemnity Corp.*,[3] the Court sustained a claim for breach of fiduciary duty against a broker at the pleading stage, based on the broker's alleged breach of fiduciary duty in failing to obtain the requested coverage for a day care center, and providing a certificate of insurance mis-stating same. In doing so, the Court noted that under Pennsylvania law the insured-broker relationship is not considered a fiduciary relationship *per se*. However, where the broker had allegedly held himself out as an expert in obtaining insurance for day care centers, and plaintiff had alleged she had never owned or operated one, had no idea of the type or amounts of insurance she would need, and relied on the broker's knowledge and expertise as a trusted advisor in attempting to secure the appropriate coverage, the Court concluded these allegations were sufficient to provide the basis for a breach of fiduciary duty claim.[4]

In contrast, in *St. Consulting Group, Inc. v. Eastern Insurance Group, LLC*,[5] the Court dismissed a negligence claim based on alleged "special circumstances," holding that the broker's promises to provide a "superior" insurance program and do "an outstanding job" for all of the plaintiff's needs "are common 'puffery' and are not grounds for imposing a greater duty of care."[6] Similarly, in *Country Gold, Inc. v. State Auto Property and Casualty Ins. Co.*,[7] in the context of a dispute between an insurer and its insured over coverage for a business property loss that failed to provide coverage necessary to fully replace the damaged property, the Court rejected the contention that simply based on the insurer's unequal bargaining power, specialized knowledge, and potential for exploitation, there was consequently a fiduciary relationship between the agent and the insured.[8]

In another interesting case considering whether a fiduciary relationship could be found, *Herzog v. Cottingham & Butler Ins. Servs.,*[9] the plaintiff customer requested advice as to how to reduce its workers compensation insurance premiums. In response the broker suggested contracting with a professional employer's organization ("PEO"), and utilizing the PEO's workers compensation coverage. After the insured did so, the broker was requested to issue a certificate of insurance including the PEO's workers compensation coverage, which it did, relying upon information provided by the PEO, and doing nothing to confirm. It subsequently turned out that the insured wasn't actually covered by the PEO's worker's compensation policy, and when two workers were injured it ended up liable for the claims, plus a 65% penalty for failing to have workers compensation coverage in place.

In an effort to recoup its losses, the insured sued the broker for, among other things, breach of fiduciary duty in not confirming the Workers Compensation coverage. On motion by the broker, the court dismissed the claims, concluding that there was no special relationship creating a fiduciary duty because: (1) the insured had many years experience managing its workers compensation insurance prior to using the broker; (2) it only used the broker for 1 year to handle its workers compensation insurance before switching to the PEO; and (3) it never sought advice from the broker regarding the adequacy of its Workers Compensation coverage.[10]

The lessons to be drawn from these cases appears to be that whether or not "special circumstances" will be found to exist will depend upon the extent to which it can be alleged and supported factually that the insured was truly relying on the agent/broker for advice and guidance in making the specific insurance purchase decisions in issue, and the agent/broker knew or should have known that the client was relying on him for same.

Failure to Procure

In addition to addressing the question of when a fiduciary relationship between the agent/broker and his customer may arise, two decisions of note were issued in 2015 with regard to the scope of the "duty to procure."

In *Dabbs v. Shelter Mut. Ins. Co.,*[11] after plaintiff was held liable for $707,133.10 in a claim arising from an auto accident, she sued her insurance company for bad faith in not settling the claims before verdict. She also sued the insurance agent who sold her auto insurance policy, alleging he had failed to purchase "adequate" insurance. The insurer removed the case to federal court, arguing that there was diversity because the plaintiff had fraudulently joined the agent in an effort to defeat diversity jurisdiction. The court concluded that, in fact, the joinder was fraudulent because the plaintiff had no viable claim against the agent for failing to purchase "adequate" insurance.[12] In doing so, the Court noted that while there is a duty in Oklahoma to purchase the coverage requested, the courts in Oklahoma do not recognize a duty to purchase "adequate" coverage.[13]

In *Sarikov v. State Farm Fire and Casualty Co.,*[14] water damage was suffered by a homeowner who did not reside in the home. Because the policy only provided insurance for a dwelling in which the insured resides, coverage was denied, and the homeowner, inter alia, sued the broker who sold the policy for negligent procurement. In support of his claim, Plaintiff argued that the broker had inspected the home, seen that it was empty, and should have known it was going to undergo renovation and not be immediately occupied, and thus procured coverage that did not require that the home be a dwelling in which the homeowner resided. In granting the broker summary judgment, the Court held that notice of an empty dwelling does not determine an insurance broker's duties, which are ordinarily defined by the nature of the request, and there was no evidence the homeowner requested different coverage, or additional coverage for a house that is not being used as a residence.[15]

Assignment of Claims

A developing trend in insurance agent and broker E&O involves assignment of claims against the agent/broker as part of a settlement of the underlying lawsuit, when the defendant has both insufficient assets and insufficient insurance to cover the liability exposure. A not uncommon response to the effort by the injured party to thereafter pursue the assigned E&O claim involves arguments being made that the assignment is unlawful. However, these arguments have generally met with only very limited success. An example of a case where this issue arose can be found in *Nautilus Ins. Co. v. Crime Prevention Sec. Patrol, LLC.*[16] In Nautilus, the court held that claims against an insurance agent for failure to procure adequate coverage can be assigned to the party injured by the alleged negligence of the insured even before judgment, notwithstanding the risk of collusion created thereby.[17]

Misrepresentation

Misrepresentation claims against agents/brokers can present interesting issues, because they implicate the insured's recognized duty to read its policy, and questions of both what can be considered the proximate cause of the loss (i.e., the misrepresentation or the failure to read the policy), and whether the alleged reliance on the misrepresentation was justified. They also raise the question as to what is simply business advertising and "puffery", and what is actionable misrepresentation.

In *Nassar v. Liberty Mut. Fire Ins. Co.,*[18] the court held that there was no viable action for misrepresentation against an insurance agent based on the representation that the insureds would be "fully covered" and "our trained professionals are committed to providing you with a complete protection plan that is tailored to your lifestyle as well as your budget", coupled with the promise to "review

your policies to make sure you are adequately covered", where there was no allegation of specific discussions regarding coverage. In reaching this decision, the Court held that general references to "a complete protection plan" and "[making] . . . sure you are adequately covered" are insufficient to provide the basis of a misrepresentation claim.[19]

In *Land Escape Outdoor Maint. v. Ins. Advisors,*[20] the court noted that in Michigan failure to read policy endorsements is not necessarily fatal to a claim against a broker for allegedly negligently misrepresenting the scope of coverage; it only provides a defense of comparative negligence.[21] However, in *Hohensee v. River City Lanes*,[22] the court granted summary judgment dismissing customer's negligence claim, because the customer had failed to read the policy, and the court concluded that he could not, consequently, establish "justifiable" reliance on the agent's alleged misrepresentation regarding the policy's coverage.[23]

In *Pittman v. Farmers Fire Ins. Exch.,*[24] after plaintiffs were assured by their insurance agent that flood insurance they had purchased would provide coverage for their personal property in the basement of their house, they suffered a flood and found out that, in fact, coverage for property kept in the basement was limited solely to air conditioning units, clothes washers and dryers, and food freezers. After they sued the broker for, inter alia, negligent misrepresentation, the broker argued that the Plaintiffs could not establish they justifiably relied on his misrepresentations because there was no other flood coverage available. Further, Plaintiffs had the policy and could have read it any time prior to the flood and realized the broker's representations about the coverage had been incorrect. Nonetheless, because the Plaintiffs relied upon the representation in not moving uncovered items out of the basement, the Court found that they had a viable negligent misrepresentation claim.[25] And the Court noted that no Missouri law had been cited by the broker to support the proposition that the Plaintiffs could not establish reasonable reliance as a matter of law by virtue of their failure to read the policy.[26]

In *Long Beach Road Holdings, LLC v. Foremost Ins. Co.,*[27] the insured had purchased flood insurance effective October 25, 2012, just before Super Storm Sandy hit 4 days later and caused it to incur over $262,000 in property damage. After initially paying the claim, the insurer subsequently denied coverage because: (1) policies issued under the National Flood Insurance Program are not effective for 30 days (a policy put in place so insureds can't just wait until news of an approaching hurricane to purchase flood insurance); and (2) the closing on the Plaintiff's mortgage did not take place until November 2, 2012, and pursuant to the NFIP Flood Insurance Manual, the policy could not become effective until the loan transaction closed. The insured thereupon sued the broker for breach of contract, negligence and violation of New York's consumer protection statute, GBL § 341 in purchasing coverage that was presented as being effective on October 25, 2012, but then wasn't.

On motion to dismiss, the Court dismissed each claim. As to the breach of contract claim, the Court noted that the broker was retained to procure flood insurance, and it did so.[28] As to the negligence claim, the Court noted that even assuming the broker had a duty to inform the plaintiff of the provision in the NFIP Manual impacting the effective date of the flood coverage as being 30 days after issuance, the policy could not be deemed effective in any event until after closing of the loan, and the broker had no control over when the loan would close. "Thus, the delay in coverage which resulted in [the insurer] denying the Plaintiff's claim cannot plausibly be attributed to any act of [the broker]."[29] Lastly, as to the GBL § 349 claim, the court noted that this statute was specifically enacted to protect against deceptive conduct aimed at consumers at large, and, putting aside the fact that Plaintiff had not alleged any facts that support finding that the Plaintiff had been harmed by the broker's conduct, there was no allegation that the broker had misled the public at large.[30]

Professional Judgment Standard

In setting the ground rules for the agent/broker E&O claim, the issue often comes down to the applicable standard of care. An interesting question is whether the standard should be set at a high level, regardless of the individualized circumstances of the case, because of the nature of the specialized work done by agents/brokers generally, and the complexity of insurance issues.

In *Rath v. State Farm Mut. Auto. Ins. Co.,*[31] after the plaintiff was involved in a car accident resulting in the death of the other driver, the plaintiff's insurer paid the policy limits to settle the estate's claim, but the plaintiff was compelled to pay an additional $25,000 out of his own pocket because he only had $50,000 in coverage. While he had requested that the insurance agent procure the same coverage he had in place previously, at lower premium, and the insurance agent had done so, he argued that the agent should have advised him to purchase coverage with higher limits. Although he was just a walk-in customer and there were no special circumstances alleged, he argued that the Court should "expand Nebraska case law to recognize the 'professional judgment' rule for insurance agents, which would require them to address coverage issues with the 'highest professional standard because the knowledge of the agent and insured are disparate'."[32] The Court declined to do so.[33]

Economic Loss Rule

The economic loss rule generally provides that a party who alleges only economic harm, and no personal injury or property damage, can recover damages for that harm based only on a contractual claim, and not a tort theory, such as professional negligence. While the economic loss rule appears to

be in retreat insofar as it may be applied in defense of agent broker/professional negligence claims, it still provides a viable defense in certain states.

An example of the continuing vitality of the rule, at least in certain states, can be found in *State Farm Mut. Auto Ins. Co. v. Boggs,*[34] where the court dismissed a negligence claim against a captive insurance agent pursuant to the economic loss doctrine, pointedly noting that under Oregon law "a plaintiff cannot prevail on a negligence claim against a captive insurance agent if the only damages requested are economic losses."[35] So while recent case law has evidenced a noticeable scaling back of the applicability of this defense doctrine in agent/broker professional liability cases, the availability of the defense must continue to be considered when new agent/broker professional liability cases come your way.

Conclusion

Although 2015 was not nearly as dramatic a year as 2014 in terms of the magnitude of the impact felt by the agent/broker professional liability decisions rendered, the year still saw some significant rulings, particularly with regard to liability to third-parties to the agent/broker-customer relationship. It can be seen that cracks in the door may be opening a bit, but it also appears that the analytical framework being applied to determine when such claims may be viable remains somewhat in flux. Additionally, it can be seen that the trend towards courts being ever less inclined to dismiss "duty to advise" cases at the pleading stage continued in 2015. However, lines are still being drawn against finding fiduciary duties/relationships giving rise to a duty to advise absent a strong factual basis asserted for same. And the Courts have clearly not abandoned entirely the notion of personal responsibility on the part of the insureds to read their policies, and for the coverage decisions made with respect to their insurance purchases to the extent truly "special circumstances" are not established.

Endnotes

1 2015 Del. Super. LEXIS 116 (Del. Super. Ct., Feb. 27, 2015)
2 *Id.* at *5-7
3 2015 U.S. Dist. LEXIS 31667 (E.D. Pa. March 13, 2015)
4 *Id.*
5 2015 Mass. Super. LEXIS 43 (Mass. Super. Ct., Feb. 25, 2015)
6 *Id.* at *27-28
7 2015 U.S. Dist. LEXIS 11761 (W.D. OK Feb. 2, 2015)
8 *Id.* at *4-6
9 2015 Minn. App. Unpub. LEXIS 32 (Ct. App. MN Jan. 12, 2015)
10 *Id.*
11 2015 U.S. Dist. LEXIS 132483 (W.D. OK Sept. 30, 2015)
12 *Id.* at 9-11
13 *Id.* at *9-10
14 2015 N.Y. Misc. LEXIS 3424 (N.Y. Sup. Ct., Kings Cty. Sept. 18, 2015)
15 *Id.* at 11-12
16 2015 U.S. Dist. LEXIS 132493 (D.SC Sept. 30, 2015)
17 *Id.* at *8
18 2015 Tex. App. LEXIS 10099 (Tex. App. Houston, 14th Dist. Sept. 29, 2015)
19 *Id.* at *16
20 2015 Mich. App. LEXIS 1581 (Mich. Ct. App. Aug. 12, 2015)
21 *Id.* at *17
22 2015 Mich. App. Lexis 2043 (Ct. App. MI, Nov. 3, 2015)
23 *Id.* at *6
24 2015 U.S. Dist. LEXIS 96707 (W.D. Mo. July 24, 2015)
25 *Id.* at *17-19
26 at *18
27 75 F. Supp. 3d 575, 579 (E.D.N.Y. 2015)
28 *Id.* at 588
29 *Id.* at 591
30 *Id.* at 592
31 2015 Neb. App. LEXIS 84 (Neb. Ct. App., May 19, 2015)
32 *Id.* at *15
33 *Id.*
34 2015 U.S. Dist. LEXIS 21830 (D. Or. Feb. 24, 2015)
35 *Id.* at *13