GOLDBERG SEGALLA

Professional Liability Monthly

A national professional liability newsletter | January 2013 Vol.5, No.1

IN THIS MONTH'S EDITION

FEATURED ARTICLE

Avoiding E&O Claims

A recent New York ruling makes it easier for insureds to sue agents. Here's what to do about it. On Nov. 19, 2012, the New York Court of Appeals in *American Building Supply Corp. v. Petrocelli Group, Inc. et al.* ruled for the first time on the issue of whether an insured's receipt of the insurance policy without complaint barred an E&O claim against an insurance agent or broker. The Court of Appeals concluded that "The [insured's] failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker."

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MEDICAL MALPRACTICE

Court Grants Motion to Disqualify Expert – Resulting in Non-Suit of Malpractice Action on Eve of Trial

ANDERSON V. MCAFOOS, M.D.
(Sup. Ct. Pa., December 18, 2012)

The defendant physician was granted non-suit after the trial judge determined the plaintiff's expert was not qualified to testify under the Medical Care Availability and Reduction of Error (MCARE) Act, 40 Pa. Stat. Ann. Sec. 1303.512(c). That statute requires that an expert testifying as to a physician's standard of care: (1) be substantially familiar with the applicable standard of care for the specific care at issue at of the time of the alleged breach of the standard of care; (2) practice in the same subspecialty as the defendant physician, or in a subspecialty which has a substantially similar standard of care for the specific care at issue, except as provided in subsection (d) or (e); and (3) in the event the defendant physician is certified by an approved board, be board certified by the same or a similar approved board, except as provided in subsection (e). Subsection (e) provides exceptions to the requirements of subsection (c).

Defense counsel in this case made the strategic decision to withhold his challenge to the plaintiff's expert pathologist's qualifications until after voir dire at trial. The defense argued that the pathologist was not competent to express expert opinion concerning the standard of care for a general surgeon. The trial court agreed and awarded a non-suit, as there was no expert testimony as to a breach in the standard of care since the pathologist was not qualified to render those opinions. Additionally, the plaintiff did not preserve a claim that the exception to the requirements of the MCARE Act did not apply. The Supreme Court agreed with the trial court's decision, stating that the strategy to refrain from seeking to disqualify the expert until the time of trial was legitimate. The plaintiff had argued that the defense was required to raise objection to the expert's qualifications prior to voir dire. However, three Justices in a concurring opinion asserted that the rules should be changed to require notice of objections to expert qualifications prior to voir dire and went as far as suggesting the Civil Procedural Rules Committee consider revising the rules to require pretrial notice, thus affording an opportunity to substitute a new expert before trial commences.

Impact: Strategic decisions about whether and when to raise objections to expert qualifications and/or opinions require consideration of ultimate trial strategy. This case is an example of when motion practice is better left for trial than pre-trial. Attorneys and their clients need to keep abreast of potential changes to the rules of civil procedure and case law in Pennsylvania so that objections to expert qualifications are not waived.

Medical Malpractice Claim Must be Brought Within Seven-Year Statute of Repose Under the MCARE Act

OSBORNE v. LEWIS
(Sup. Ct. Pa., December 21, 2012)

On June 1, 2000, the defendant, James S. Lewis, M.D. performed LASIK surgery on the plaintiff. The plaintiff returned to Dr. Lewis' office on August 10, 2004 and complained he was losing his vision. Dr. Lewis confirmed the plaintiff had vision issues. The plaintiff was subsequently evaluated by numerous doctors and specialists and was informed his vision issues were caused by the LASIK surgery.

The plaintiff commenced his medical malpractice claim against Dr. Lewis and other defendants involved in the LASIK surgery on July 24, 2007. After the discovery deadline expired, the defendants filed a motion for summary judgment and argued the plaintiff's claim was barred by the seven-year statute of repose set forth in the MCARE Act, 40 P.S. § 1303.513(a), which was granted.

On appeal, the trial court's order was upheld because the pertinent section of the MCARE Act specifically states, "[N]o cause of action asserting a medical professional liability claim may be commenced after seven years from the date of the alleged tort … ." The surgery occurred before the MCARE Act was enacted. However, the statute applied because the cause of action ultimately accrued subsequent to this Act going into effect.

Impact: A plaintiff in a medical malpractice action must commence his claim within seven years after the alleged negligent act and/or omission.

LEGAL MALPRACTICE

An Excess Insurer Cannot Sue Defense Counsel for Legal Malpractice

GREAT AMERICAN E&S INS. CO. v. QUINTAIROS, PRIETO, WOOD & BOYER, P.A.
(Sup. Ct. Miss., October 18, 2012)

The estate of a nursing home resident sued the nursing home for negligent care. The nursing home's primary insurer, Royal Indemnity Insurance, assigned defense counsel to the case. During the course of the litigation, defense counsel provided status updates to the primary insurer with copies to the excess insurer, Great American E&S Insurance Services, Inc., which provided coverage for claims exceeding the one million dollar primary limit. While Great American was not contractually obligated to defend until the primary limits had been exhausted, it requested evaluations and assessments of the claim from defense counsel. In these reports, defense counsel discussed its evaluation of the settlement value of the case, indicating that believed that the case had a settlement value between $150,000 and $400,000. The reports also would indicate the need to retain and designate a physician expert.

Sometime after suit was brought, Royal reassigned the case to the defendant, Quintairos, Prieto, Wood & Boyer, P.A. At the time of the reassignment, the deadline for designating experts was less than one month away. Two weeks after the disclosure deadline had passed, the defendant sent a status report indicating that experts had not yet been disclosed and assessing the case to be worth $250,000 for settlement purposes and to have a trial value of $500,000. One month later the defendant attempted to designate experts but was precluded and as a result the nursing home was left with no expert witness to appear at trial. This caused the defendant to prepare an updated lawsuit evaluation and therein increased the settlement value of the case to between $3 and $4 million dollars.

Upon learning of the increased settlement value and that defendant Quintairos had no attorneys licensed in Mississippi, Great American retained its own defense counsel to protect its interests and the interests of its insured. Royal tendered its policy limits and Great American settled the case for an undisclosed sum of money and then filed this suit against Quintairos claiming legal malpractice, negligence, gross negligence, negligent misrepresentation, negligent supervision, and recovery under the theory of equitable subrogation.

The defendant law firm moved to dismiss, contending that it had no attorney-client relationship with the excess carrier. The trial court granted the motion, dismissing all claims.

The Appellate Court reversed, holding that the excess carrier had sufficiently alleged an attorney-client relationship based on the courtesy copies of suit reports it received from the law firm providing an evaluation of the case. The appellate court viewed the suit reports as confidential communications made in furtherance of the rendition of professional services, which could establish an attorney-client relationship.

The Mississippi Supreme Court granted certiorari to review an issue of first impression — whether the excess carrier could bring a claim against a primary insurer's attorney under a theory of equitable subrogation and whether an attorney-client relationship was necessary for a claim of legal malpractice by the excess carrier. The court held that when lawyers breach the duty they owe to their clients, excess insurance carriers who must pay the damages on behalf of the clients may pursue, to the extent of their losses, the same claim the client could have pursued.

The Mississippi Supreme Court disagreed with the appellate court's holding that an excess carrier can pursue direct claims of legal malpractice against defendant lawyers. Instead, the Supreme Court specifically agreed with the appellate dissent that defendant lawyers do not provide legal advice or legal services to the excess carrier by simply communicating their opinion of the outcome and value of the case in case status reports, without more. *Great American E&S Insurance Company v. Quintairos, Prieto, Wood & Boyer, P.A.,* 100 So. 3d 453, 468 (Miss. Ct. App. 2012) (Carlton, J., dissenting).

The court also rejected Great American's argument that its decision in Century 21 *Deep South Properties, Ltd. v. Corson*, 612 So. 2d 359 (Miss. 1992), abolished the attorney-client relationship requirement in legal malpractice suits in favor of a finding that the attorney is liable to all reasonably foreseeable third parties who rely on the attorney's work. The court distinguished *Corson* because it dealt with attorneys performing title-work, and held Corson was inapplicable in the liability-insurance carrier context where attorneys often provide information and strategies to others with common interests without creating an attorney-client relationship.

Impact: This case is important as it reinforces what might appear as obvious — that a direct attorney-client relationship must exist to sustain a cause of action for legal malpractice. It is also important as a case of first impression in Mississippi that an excess carrier may pursue equitable subrogation against the attorneys retained by the primary carrier, to the extent of its losses.

Law Firm Not Liable to Non-Client for Abuse of Process and Unfair Trade Practices Claims, Despite Allegations that Suit Was Meritless and Firm's Business Benefitted From Suit

ABB, INC. v. TATE & RENNER
(Conn. Super. Ct., December 4, 2012)

The defendant law firm advertised on its website that it was an expert in claims brought under the Sarbanes-Oxley Act and, in an effort to drum up business, also included on its website numerous claims it successfully filed against major corporations.

As a result of its advertisements, the defendant law firm was retained by a client to bring an employment suit against his employer, ABB Dubai, a company located in the United Arab Emirates. The defendant's client was employed pursuant to a contract with ABB Dubai. Under that contract, the client was required to bring any claims against ABB Dubai in the United Arab Emirates. Notwithstanding the contractual provision, the defendant firm brought an OSHA suit against ABB Dubai in the United States. The basis for the suit was violation of the Sarbanes-Oxley Act by ABB Dubai.

Shortly after filing suit, the client's complaint was dismissed for jurisdictional issues with the court finding that because the cause of action pertained to employment outside of the United States, it did not fall under the ambit of the Sarbanes-Oxley Act and consequently, the court lacked jurisdiction. Rather than appealing, the defendant law firm then filed a second suit which was substantially similar in substance to the first suit, but for the first time added ABB Inc. as a party defendant. This second suit

was again dismissed on the same ground as the first, that the claims pertained to employment outside the United States and, therefore, there was no jurisdiction under the Sarbanes-Oxley Act.

Following the dismissal of the second suit the plaintiff, ABB Inc., commenced a lawsuit against the defendant law firm for its prosecution of its client's employment claims against it. In its suit, the plaintiff alleged claims of abuse of process and violations of the Connecticut Unfair Trade Practices Act. Specifically, the plaintiff claimed that it was not an appropriate party to the defendant's client's suit, as had it been, it would have been named in the original complaint and the defendant's attempt to add it to the suit in its second complaint was pretextual and was done to obtain information via discovery about its corporate structure.

The defendant moved to strike the plaintiff's claims for failure to state a cause of action. The defendant first argued that the plaintiff's abuse of process claim was insufficient because it did not allege facts in its complaint demonstrating an injury outside the normal course of litigation and/or an ulterior purpose on the part of the defendant firm in bringing suit — a prerequisite to an abuse of process claim. The defendant also moved to strike the plaintiff's claims of unfair trade practices on the ground that claims under the unfair trade practices act cannot be maintained against an adversary's attorney. The defendant also argued that the entrepreneurial exception, an exception allowing an unfair trade practices act against an attorney where the claim relates not to the attorney's representation of a client but to the entrepreneurial aspects of practicing law, did not apply as all the plaintiff's allegations of unfair trade pertained to the defendant's representation of its client and not to entrepreneurial activities.

In response, the plaintiff argued that it did sufficiently state a cause of action for abuse of process because (1) it was not required to prove an ulterior motive on the part of the defendant for bringing the first suit, and (2) even if it was, it did plead an ulterior motive by alleging that the defendant chose to add the plaintiff after the first suit under a pretext to attempt to gain specific information through discovery relating to its corporate structure. The plaintiff then argued that even though it was not the defendant firm's client, it did plead enough facts to invoke the entrepreneurial exception and assert unfair trade practice claims against the defendant because it had alleged, inter alia, that the defendant brought suit in attempt to gain certain information about the plaintiff that would serve as a benefit to the defendant firm in its practice as an Sarbanes-Oxley expert as the information obtained could be used by the defendant on its website to bolster its claims of Sarbanes-Oxley expertise.

The court rejected the plaintiff's arguments and granted the motion to strike. In rejecting the plaintiff's argument with respect to abuse of process, the court first concluded that the plaintiff must plead an ulterior purpose on the part of the defendant firm in bringing suit. The court then found that despite the plaintiff's assertions, the facts pleaded by the plaintiff, even viewed in their best light, alleged nothing more than that the defendant brought the claims against the plaintiff with knowledge that the claims had no merit. The court found that the plaintiff had only pled conclusory allegations that it suffered damages, conclusory allegations that the defendant's claims were brought under a "pretext", and did not allege sufficient facts to support those allegations. The court found that under Supreme Court precedent allegations that a meritless suit was brought without any specific allegation that the plaintiff suffered any injury outside the normal course of litigation were insufficient to establish a claim of abuse of process.

The court similarly rejected the plaintiff's arguments that it had sufficiently pled a cause of action for unfair trade practices. In rejecting plaintiff's arguments, the court noted that under Supreme Court precedent, a claim for unfair trade practices does not lie against an adversary's attorney. The court then found that the core allegations of the plaintiff's complaint were that the defendant firm improperly brought a claim against the plaintiff and that this was improper as it was well established that an adversary cannot sue an attorney for unfair trade practices.

The court also rejected the plaintiff's claim that the complaint alleged facts sufficient to trigger the entrepreneurial exception. The court reasoned that the complaint only pointed to the defendant's advertisements as support for its abuse of process claim and its argument that the defendant should have known its claims under Sarbanes-Oxley were meritless based on its advertised expertise. The court rejected the argument that the plaintiff's allegation that the defendant sought to use the suit to gain information and that the information sought would benefit and assist the defendant in the prosecution of its trade in the sense that the information it obtained would enable the defendant to continue to advertise on its website its success and Sarbanes-Oxley expertise was sufficient to invoke the entrepreneurial exception. The court reasoned that the mere fact that an attorney might profit from the prosecution of the case is insufficient to make an act entrepreneurial.

Impact: This case solidifies well established precedent that a plaintiff must plead something more than merely that the defendant firm or attorney brought a suit that had no merit and the suit was brought to obtain information to allege an abuse of process claim. The case also solidifies that an adversary cannot bring a claim for unfair trade practices against an attorney and that merely pleading that the defendant firm or attorney might have obtained a financial or business benefit from the suit does not invoke the entrepreneurial exception to unfair trade practices.

Damages In Contract Based Legal Malpractice Action Are Not Limited to the Fees Paid to the Attorney

COLEMAN v. DUANE MORRIS, LLP
(Pa. Super. Ct., Dec. 20, 2012)

The issue before the court in *Coleman* was whether the trial court properly granted a motion for judgment on the pleadings in a legal malpractice claim brought under a breach of contract theory. The plaintiffs allegedly retained an attorney to represent them in connection with the potential and ultimately completed sale of a business. Prior to the sale of the business, the plaintiffs were personally liable to pay the IRS and other state taxing authorities $2.16 million "in unpaid employee withholding, wage and sales taxes… ." The plaintiffs were allegedly of the belief that the sale of the business, in part, "would terminate their personal liability for the unpaid taxes … ." The acquiring company would allegedly be responsible to pay the unpaid taxes. After the business transaction was completed, plaintiffs learned the unpaid taxes were never paid by the acquiring entity.

Based upon the above, the plaintiffs commenced a legal malpractice claim sounding in breach of contract against the attorney who purportedly represented them in the business deal. The attorney defendant filed a motion for judgment on the pleadings after it was established the plaintiffs had not paid any of the invoices for the legal services she performed on their behalf. The motion was granted by the trial court. In rendering this ruling, the trial court relied upon a doctrine which limited the recoverable damages in a legal malpractice claim based upon breach of contract, where the underlying representation arose in the criminal context, "to the amount actually paid for the services plus statutory interest." The trial court reasoned that in the absence fees being paid for the legal representation, the plaintiffs' legal malpractice could not proceed.

On appeal, however, the superior court reversed by finding this "limitation [on damages] does not extend to an action for legal malpractice" sounding in breach of contract "where the underlying action was … a civil action." To the contrary, the plaintiffs, assuming there was a breach of the contract, are entitled to recover the damages that "would naturally and ordinarily result from the breach … ." According to the complaint, this would encompass the much larger figure of the value of the stock plaintiffs sold as part of the business transaction in reliance on the attorney's alleged legal advice. The case was remanded to the trial court for further proceedings including, presumably, the commencement of time consuming and costly discovery.

Impact: The decision in *Coleman* is noteworthy for two important reasons. First, it expressly refused to extend the limitation on damages to the amount of the fees paid where the plaintiff is pursuing a breach of contract legal malpractice claim if the underlying representation involved a civil matter. According to the superior court, this doctrine applies in the limited circumstance of a contract-based legal malpractice claim where the attorney-client relationship arose in the context of a criminal case. Second, the decision appears to blur the line between legal malpractice claims sounding in tort versus one based upon a breach of contract theory. A tort based legal malpractice claim is subject to a two year statute of limitations in Pennsylvania, while a breach of contract cause of action is subject to a four year statute of limitations. A plaintiff may be able to pursue a time-barred negligence claim against an attorney under a breach of contract theory and recover damages well in excess of the fees paid to the attorney.

ARCHITECTURE MALPRACTICE

Design Professional Owes Duty to Homeowners' Association and Third Parties not in Privity under Common Law and California Senate Bill No. 800

BEACON RESID. COMM. ASSOC. v. SKIDMORE OWINGS & MERRILL, LLP
(1st App. Div., December 13, 2012)

The plaintiff, Beacon Residential Condominium Association (BRCA), a homeowners' association, sued the defendant condominium project's architects for alleged construction defects. The architect's involvement in the project included architecture, landscape architecture, and engineering in addition to construction administration and construction contract management. Among the allegations were claims that the defendant caused defects by their negligence in their design, observation, and construction resulting in water infiltration and other structural deficiencies. The plaintiff's sued under the theory that the architect violated the residential construction standards established by Senate Bill No. 800

The trial court granted summary judgment in favor of the architect, thereby dismissing the claims against them, on the ground that the architects owed no duty to the association or its members under either common law or California Senate Bill No. 800. The bill was drafted to specify the rights and requirements of a homeowner to bring an action for construction defects, including applicable standards for home construction, statuye of limitations, and damages recoverable. The plaintiff appealed the trial court's decision to the California Court of Appeal, First Appellate District.

The Appellate Court held that the trial court erred in granting the defendant architects' summary judgment and reversed the trial court's order. The common law analysis regarding when liability can be imposed on a defendant by a third party not in privity is a

matter of policy and involves the balancing of a various factors.

However, the Appeals Court further held that California Senate Bill No. 800 was drafted to give a third party that is not in privity the ability to recover damages from a design professional. It provides that a design professional who as the result of a negligent act or omission causes, in whole or in part, a violation of the standards set forth in California Civil Code for Residential Housing may be liable to the ultimate purchasers for damages regardless of privity. The Appellate Court found that the Legislature had abrogated the economic loss rule in enacting the Senate Bill, and permits recovery of economic loss for a violation of the statutory standards without having to show property damage or personal injury.

Impact: California Senate Bill No 800 abrogates the economic loss rule and permits recovery of economic loss for a violation of the statutory standards without the plaintiff having to show that the violation caused property damage or personal injury.

INTERNATIONAL

Over-Cautious Advice Given by a Solicitor Concerning The Quantum in a Settlement of a Claim Does Not Amount to Negligence

ALEXANDER LANGSAM v. BEACHCROFT LLP
[2012] EWCA Civ 1230

This case is an appeal against a decision dismissing the claim of a Mr. Langsam against his solicitors (Beachcroft) for professional negligence. In its decision, the Court of Appeal in England explains the law concerning (a) solicitor's negligence and (b) appeals of decisions of facts. This case also takes a look at costs issues, and, particularly, the effects of without prejudice letters.

The Appeal

Beachcroft had acted for Mr. Langsam in a prior lawsuit against Mr. Langsam's accountants. The dispute between Mr. Langsam and his accountants eventually settled by consent. However, once settlement was agreed, Mr. Langsam came to the conclusion that the Beachcroft's advice was excessively cautious and unduly pessimistic and, as a result, he could have settled for a larger sum. Mr. Langsam also alleged, among other things, that Beachcroft did not advise him appropriately with respect to the importance of certain witnesses, such as Mr. Langsam's business partner (Mr Morton). Mr. Langsam, therefore, sued Beachcroft.

In the first instance the judge found against Mr. Langsam. The judge's decision was based on his review and assessment of the facts surrounding the various advices given by Beachcroft and the barrister instructed by Beachcroft. Mr Langsam's arguments that Beachcroft acted "jointly" with the barrister or that Beachcroft had an obligation to form a view independently form the barrister on all aspect of the case were rejected by the judge. It was the judge's view that Beachcroft's duty was to consider whether the advice of the barrister was obviously wrong, which, although it might have been over cautious, it was not. Therefore, Beachcroft were not negligent on this point.

With respect to the advice concerning the importance of witnesses, the judge held that an ordinary solicitor would be negligent for failing to advise that he should take a statement from someone who was likely to be called as a witness. However, the situation with Mr. Morton was not ordinary. For instance, Mr Morton disliked lawyers and had a poor relationship with Mr. Langsam. As such, it was very difficult to predict how Mr. Morton would react during trial. Further, it was clear from the facts that Mr Langsam understood that Beachcroft needed to understand Mr. Morton was going to say.

Mr Langsam appealed the decision.

In its decision the Court of Appeal set out the standard of care to be expected from a solicitor. Namely, that a solicitor was not liable for a mere error of judgment on a matter which opinions of reasonably well-informed and competent members of the profession might differ. As to reliance on advices from barristers, the Court of Appeal relied on case law, and reminded that, in general, solicitors were entitled to rely upon the advice of a barrister properly instructed. However, a solicitor must exercise his or her own independent judgment and, as such, if he or she thought the barrister's advice obviously or glaringly wrong, he or she had to reject it. The Court of Appeal also stated that if a solicitor gave advice consistent to an advice previously given by a barrister when said barrister was not present, this did not mean that the solicitor had accepted an independent duty.

Additionally, the Court of Appeal stated that Mr. Langsam, in his appeal, was seeking to overturn the judge's conclusions on matters of evaluation of fact and, as such, he needed to demonstrate that the judge was plainly wrong. It was the view of the Court of Appeal that the judge was in a better position than the Court of Appeal itself to assess the evidence and the witnesses. Taking this into account, the Court of Appeal held that Mr Langsam failed to establish that the judge was wrong.

In light of the above, and the fact that the judge held that the advice of the barrister was the key advice, the Court of Appeal could not interfere with the judge's findings. In those circumstances the duty of the solicitor was to consider whether the advice was glaringly wrong. There was nothing in the judge's decision which pointed to anything wrong with the barrister's advice.

The Court of Appeal, therefore, dismissed the appeal.

The Costs Issue

In England, the winning party in a litigation is entitled to get its costs back from the losing party, subject to an assessment of the same by the courts. In light of this concept, parties use various means to add pressure on the other side to encourage early resolution of the dispute. Such means could be the "without prejudice save as to costs" letter (Calderbank offer) or what is know as Part 36 offer. The effect of these, in short, is that the party who makes an offer and beats it when judgment is delivered, will get all his costs from the date of the offer, such costs to be assessed in a way which is adverse to the losing party who failed accept the offer.

Beachcroft had a counterclaim against Mr. Langsam in respect of their outstanding fees incurred when they represented Mr. Langsam against his accountants. Beachcroft's counterclaim was unsuccessful. Before filing their counterclaim Beachcroft wrote to Mr. Langsam, on a without prejudice basis, offering to withdraw their counterclaim if Mr. Langsam dismissed his action. The offer included an offer to pay up to £100,000 to his costs.

The judge refused to order that Mr. Langsam pay Beachcrofts costs of their unsuccessful counterclaim. The letter was not a Part 36 offer and was not a ground for an award of costs. Beachcroft knew that their claim would be resisted and the costs incurred were not due to Mr. Langsam's refusal to negotiate but by Beachcroft filing their counterclaim. Beachcroft appealed the judge's decision.

The Court of Appeal dismissed Beachcroft's appeal stating that the offer was not a Part 36 offer and that, had Beachcroft wished there to be automatic costs consequences, they could have made a Part 36 offer by offering money as a part of the compromise or paid money into court. Beachcroft's offer had little purpose since, if they were successful in the action, they would obtain their costs of the action in any event.

Impact: This case must come as a relief to lawyers, who, by nature, are of a cautious kind. It is also important, when making an offer with costs consequences, to prepare it carefully so that it amounts to such an offer.

FEATURED ARTICLE

Avoiding E&O Claims

A recent New York ruling makes it easier for insureds to sue agents. Here's what to do about it. On Nov. 19, 2012, the New York Court of Appeals in *American Building Supply Corp. v. Petrocelli Group, Inc. et al.* ruled for the first time on the issue of whether an insured's receipt of the insurance policy without complaint barred an E&O claim against an insurance agent or broker. The Court of Appeals concluded that "The [insured's] failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker."

The ruling is a significant decision that is likely to influence other jurisdictions. It is a call to insurance agents and brokers to revisit and fortify their loss control procedures. Consideration should be given to working with their E&O insurers and/or E&O attorneys to tailor procedures to the particular business of the insurance agency or brokerage.

In so ruling on American Building Supply, the Court of Appeals considered whether the 100-year-old legal presumption set forth in its decision of *Metzger v. Aetna Ins. Co.,* 227 NY 411, 416 (1920), that an insured who is in receipt of the insurance policy has a duty to read it and is presumed to know the contents thereof, applies to bar an E&O action against an agent or broker who has allegedly failed to obtained the insurance coverage specifically requested by the insured. The court concluded that the presumption did not apply:

> The facts as alleged here, that plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint, should not bar plaintiff from pursuing this action.

Although the Court of Appeals noted that it is a good idea for the insured to read its insurance policy, it opined that the insured could rely in this regard upon the expertise of the insurance agent or broker:

> While it is certainly the better practice for an insured to read its policy, an insured should have a right to "look to the expertise of its broker with respect to insurance matters" (Baseball Off. of *Commr. v. Marsh & McLennan,* 295 A.D.2d 73, 82 [1st Dept 2002]; see also *Bell v. O'Leary,* 744 F2d 1370, 1373 [8th Cir 1984]). The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker (see Baseball Off. of Commr. 295 A.D.2d at 82).

The Court of Appeals found that there were issues of fact as to whether plaintiff requested specific coverage for its employees and whether defendant failed to secure a policy as requested, and thus concluded that it was inappropriate to award summary judgment to the insurance broker because "plaintiff's failure to read and understand the policy should not be an absolute bar to recovery under the circumstances of this case."

The Court of Appeals reiterated that ordinarily, absent a special relationship, an insurance agent or broker has the duty to obtain only the insurance that was specifically requested by the insured:

> [I]nsurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage" (*Murphy*

v. Kuhn, 90 N.Y.2d 266, 270 [1997]). To set forth a case for negligence or breach of contract against an insurance broker, a plaintiff must establish that a specific request was made to the broker for the coverage that was not provided in the policy (see *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*, 7 N.Y.3d 152, 155 [2006]). "A general request for coverage will not satisfy the requirement of a specific request for a certain type of coverage" (Id. at 158).

The facts of the case were as follows:

American Building Supply (ABS) provided building materials to general contractors. DRK, LLC (DRK) sublet a building to ABS. Under the primary lease, DRK was responsible for procuring a general liability insurance policy with a minimum of $5 million in coverage covering bodily injury and property damage from a New York licensed carrier.

As part of its sublease agreement, ABS was required to comply with all the terms of the of the original lease agreement, including the provision to procure insurance. ABS hired the insurance broker, Pollack Associates, which procured a policy from Burlington Insurance Company (Burlington). The Burlington policy included a cross-liability exclusion that excluded claims between the policyholders (ABS and DRK) as well as all claims asserted by an "employee of any insured." ABS and DRK then transferred coverage to a new insurance broker, Petrocelli Group, Inc. (Petrocelli), which renewed the Burlington policy for a second policy year.

ABS asserted that it specifically requested "general liability for the employees ... if anyone was to trip and fall and get injured in any way." ABS also alleged that Petrocelli was aware that ABS was a wholesale operation and that only employees were on the premises. Neither ABS nor Petrocelli read the policy and, therefore, were unaware that the policy contained the exclusion. The exclusion came to light in October 2005, when an ABS employee was injured after a forklift fell on his leg and Burlington denied the claim pursuant to the cross-liability exclusion. Although the Supreme Court ordered Burlington to provide coverage to ABS, the Appellate Division, First Department (First Department) reversed, citing the above-mentioned exclusion.

ABS then sued Petrocelli for breach of contract and negligence for failing to procure the correct policy. Petrocelli moved for summary judgment, but the Supreme Court denied the motion, claiming there were issues of fact for a jury to decide regarding the plaintiff's request for specific insurance coverage. The First Department reversed, stating that any recovery was precluded because ABS had failed to read and understand the policy. As such, there were no material issues of fact and summary judgment should have been granted.

In the wake of this decision, given that the receipt of the policy defense will no longer act to bar E&O lawsuits, it is important for insurance agents and brokers to review the procedures in place at their agencies for offering coverages, documenting the insured's specific request for insurance coverage and delivering the insured's insurance policy.

1. Offer a Full Range of Coverage

Although under the Court of Appeals decision of *Murphy v. Kuhn,* supra., ordinarily a New York insurance agent or broker has no duty to advise, guide or direct an insured to obtain a particular type or amount of coverage absent a specific request, the prudent insurance agent or broker will offer a wide range of coverage and document the insured's file with respect to the coverage the insured selected, as well as the coverage that the insured declined. Use checklists to prompt the agent to offer a wide range of coverage. Proposals can reflect the coverage that was offered. Emails and correspondence to the insured can document the coverage that was offered to the insured and detail the coverages that the insured accepted or declined. If warranted, the insured can sign off on major declinations or reductions of coverage.

2. Document the Insured's Specific Request for Insurance

Currently, with the loss of the receipt of the policy defense, there is little to prevent an insured, after a denial of a claim or a partial claim denial, from alleging that he or she requested whatever coverage is lacking, essentially making agent's E&O policy substitute coverage. Such an allegation will often be enough to survive the agent's motion for summary judgment, allowing the insured to get to the jury in an E&O trial.

E&O trials can be expensive and time-consuming and something that most agents or brokers would like to avoid. To strengthen and bolster the agent's recollection as to what insurance the insured specifically requested, the agent should establish a regularly followed procedure for documenting the insured's specific insurance request in the insured's file. This documentation could also include notes as to the insured's description of the risk. An email or correspondence to the insured documenting the insurance that was specifically requested could prove very useful in defending an ensuing E&O lawsuit. Equally important is careful preparation of the insurance application, which the insured should sign only after the agent instructs him to review for accuracy. A copy of the signed application should be kept in the insured's file.

3. Deliver the Insurance Policy With an Offer to Review

Even though the receipt of the insurance policy defense as a complete bar has been eliminated, agents should implement regularly followed procedures surrounding

the delivery of the policy to the insured. When the policy comes in to the agency, a knowledgeable and fully trained policy checker should promptly check it against the application for accuracy. The agent should also be familiar with the forms and endorsements of the various polices offered, which can differ from insurer to insurer.

The policy should then be delivered to the insured with a cover letter advising the insured to review the insurance policy and contact the agent with any questions. The cover letter should also offer the insured the opportunity to review the insurance policy with the agent. A copy of the correspondence should be kept in the insured's file.

The featured article was written by Goldberg Segalla Partners Colleen M. Murphy and Matthew S. Marrone.

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