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Insurance Agent and Broker E&O 2018: The Year in Review, Part One

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I. INTRODUCTION

The evolution of insurance agent and broker errors and omissions ("E&O") law has been highlighted in recent years by: continued erosion of the "duty to read" defense; increasing perceptions of agents and brokers as possessive of specialized experience and expertise necessary to advise and guide their customers with respect to their insurance coverages and overall risk management; and ever expanding E&O risk concerns. In 2018, while these trends did not abate, there were a number of positive developments for insurance agents and brokers as well. These include: decisions touching on choice of law analysis in resolving conflict of law issues; accrual of failure to procure claims for statute of limitations purposes; the continued vitality of the "duty to read" defense in a number of states; and even the continued viability, in certain jurisdictions, of the absolute defense of contributory negligence on the part of the insureds.

Additionally, there were some helpful decisions in regards to defining the parameters of what constitutes an "interaction with regard to a question of coverage" sufficient to give rise to a duty to advise, and what is necessary to establish "special circumstances" or a "special relationship" based on an "extended course of dealing". Another decision addressed the limited exceptions to the requirement in states requiring the filing of an affidavit of merit as a prerequisite to commencement of a professional liability claim in the context of alleged agent/broker negligent failure to procure. There was also a decision that should be of particular note to agents/brokers forced to defend frivolous E&O claims based on alleged breach of contractual agreement to procure coverage, where the court relied on a state law providing for discretionary award of attorney's fees to victorious defendants in an agent/broker failure to procure lawsuit.

The following is a summary of some of the more interesting and significant developments in insurance agent/broker E&O in 2018.

II. SUMMARY OF THE YEAR'S HIGHLIGHTS

Choice of Law

In an important decision addressing the question of which state laws apply to claims against a broker where the alleged broker misconduct is claimed to have occurred in one state and the alleged injury occasioned thereby in another, the U.S. District Court for the Southern District of New York held that, under New York choice of law rules the court must look to the law of the state where the alleged misconduct occurred. This appears to have resolved some significant confusion on the issue, and is expected to clarify that no longer should federal district courts venued in New York look to the place of injury in determining choice of law for conduct-regulating based issues.

In *Holborn Corp. v. Sawgrass Mut. Ins. Co*., 304 F.Supp.3d 392 (S.D.N.Y. 2018) Sawgrass Mutual was an insurer which wrote homeowners insurance coverage in Florida. It retained Holborn to procure reinsurance for same, but terminated the agreement a

couple of years later, after which Holborn brought suit for breach of contract, alleging Sawgrass had failed to pay its full share of brokerage on all reinsurance procured or placed. In response, Sawgrass asserted counterclaims alleging negligence, breach of fiduciary duty and breach of contract based on Holborn's alleged failure to recommend "Top and Drop" reinsurance coverage, a multi-layer insurance product which allows the insured to re-use the top excess-of-loss layer of reinsurance if it is not breached by the first loss event. Sawgrass alleged that had Holborn recommended this coverage, it would have saved hundreds of thousands of dollars.

Holborn moved to dismiss the first and second counterclaims on the grounds that they were barred by the economic loss doctrine under New York law. In opposition, Sawgrass argued that Florida law should apply, and thus that the economic loss rule should not apply in this instance (as under Florida law the economic loss doctrine only applies to product liability claims). Because the law at issue was "conduct regulating" as opposed to "loss-allocating," the court concluded that New York law should apply based on the alleged negligence and breach of fiduciary duty taking place in New York, where Holborn's brokers were located. In so doing, the court noted some confusion in past precedent on the issue, as a number of courts had previously concluded that conduct-regulating laws should be applied utilizing the law of the state where the last event necessary for liability took place: *i.e.*, the situs of the injury. But applying the Second Circuit Court of Appeals' decision in *Licci ex rel. Licci v. Leb. Can. Bank, SAL,* 739 F.3d 45 (2d Cir. 2013) the court concluded that, in fact, where the alleged wrongful conduct and the alleged injury do not take place in the same jurisdiction, "[I]t is the place of the allegedly wrongful conduct that generally has superior 'interests in protecting the reasonable expectations of the parties who relied on [the laws of that place] to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.'" *Holborn*, 304 F.Supp.3d at 399 (quoting Licci, 739 F.3d at 50–51) Accordingly, because New York law applied, Sawgrass' counterclaims for negligence and breach of fiduciary duty were barred by the economic loss doctrine, and the claims dismissed. Interestingly, a different analysis applies with respect to loss-allocating rules. Under New York law, there is a three step analysis to consider. *See Newmeier v. Kuehner*, 31 N.Y.2d 121, 612 N.E.2d 177 (NY 1972). There is still another analysis to consider with regard to applicable statutes of limitations. *See* N.Y. Civ. Prac. Law § 202 (2018)

Statute of Limitations

In *American Fam. Mut. Ins. Co. v. Krop*, Docket No. 122556, 2018 WL 5077145 (Ill. Oct. 18, 2018) the Illinois Supreme Court dismissed a negligence claim against an agent for allegedly failing to procure homeowner's insurance providing coverage "equal" to the plaintiffs' prior coverage. Because the replacement policy only provided coverage for liability arising from bodily injury or property damage, the insurer (American Family) had denied coverage for claims alleging defamation, invasion of privacy and intentional infliction of emotional distress not involving any alleged bodily injury.

As the policy in issue had been received by the plaintiffs more than 2 years prior to the plaintiffs' lawsuit, the agent moved to dismiss the claim as barred by Illinois' two year statute of limitations provided for under 735 ILCS 5/13-214.4 (West 2014). After the motion was initially granted, then reversed on appeal, the Illinois Supreme Court reversed the appellate court ruling, and dismissed the claim.

In issuing its decision in this regard, the Illinois Supreme Court rejected the plaintiffs' argument that the claim against the agent shouldn't accrue until the discovery of the failure to procure the requested coverage occasioned by the denial of the insureds' claim. In so doing, the court noted that, under Illinois law, an alleged negligent failure to procure doesn't involve the breach of fiduciary duty. *Id*. at *5 And "[b]ecause a claim for negligent failure to procure insurance does not involve a fiduciary duty, insurance customers' obligation to read their policies controls." *Id*. at *6

Detailing its rationale for why this constituted good public policy, the Court explained:

> Customers generally know their own goals better than an insurance agent does, but determining if a policy achieves those goals will be difficult when customers do not read their policies. Expecting customers to read their policies and understand

> the terms incentivizes them to act in good faith to purchase the policy they actually want, rather than to delay raising an issue until after the insurer has already denied coverage. Moreover, insurance customers frequently maintain the same insurance policy for years, perhaps decades, at a time. If the cause of action did not accrue until the insurance producer notified the customer of an uninsured liability, insurance customers would benefit from the policy throughout the intervening period, while evidence potentially relevant to the insurer's defense would be at risk of deterioration. *Id*

In issuing this ruling, the Illinois Supreme Court noted that other courts in other states (including Alaska, Massachusetts, Maryland and Pennsylvania) had applied the "discovery rule," and still others had found that the cause of action only accrues when the insured incurs losses because of an uninsured liability. *Id*. However, the *American Family* Court stated that these courts had relied on two key premises which the Court rejected: "that the injury for which the plaintiffs sought a remedy was a liability that their policy did not cover and that the plaintiffs could not assert their claim until they encountered such a liability." *Id*. Instead, the Court held that the failure to procure insurance is a tort arising out of breach of contract, and thus should be treated as a tort which accrues when the breach occurs. *Id*. at *7.

Recognizing that there will be "a narrow set of cases in which the policyholder reasonably could not be expected to learn the extent of coverage simply by reading the policy," such as where the insurance policies contain contradictory provisions, fail to define key terms, or the circumstances of the loss in issue are so unusual that they could not likely have been imagined by the insureds when they purchased their policy, the Court indicated there could be exceptions to the rule. *Id*. But where, as here, the policy specifically contained a definitions section detailing the fact that "bodily injury" didn't cover emotional or mental distress, mental anguish or mental injury "unless it arises out of actual bodily harm to the person," the Court concluded no such exception should be applied. *Id*.

Applying a different approach, in *Lederer v. Gursey Schneider LLP*, a California appellate court considered the question of when a negligent failure to procure claim accrued in connection with alleged failure to procure requested uninsured/underinsured automobile insurance. In *Lederer*, the evidence was undisputed that the insured had requested $5 million in limits, but a policy with a limit of only $1.5 million was purchased. This was discovered shortly after the policyholder's adult son was severely injured in a motorcycle accident. More than 2 years after this—but less than 2 years after the insurer for the other driver had tendered the $15,000 limits on the other driver's policy and the plaintiff's insurer had tendered the $1.5 million limit of the underinsured motorist policy—the plaintiff policyholder and her son brought suit against the agent. Because the statute of limitations was 2 years, the agent moved for summary judgment, arguing that the plaintiffs' cause of action had accrued when plaintiffs had been alerted to the fact that the insurance coverage that had been purchased was less than what had been requested. The trial court granted the motion. On appeal, however, the ruling was reversed.

In reversing the trial court on this issue, the appellate court concluded that the trial court had conflated the question of when the discovery of the alleged negligence had occurred with the question of when the plaintiffs had incurred actual injury. Because actual harm is required before a cause of action for negligence accrues, the appellate court concluded it was only when the plaintiffs suffered harm as a result of the failure to procure the requested coverage limits that the cause of action accrued. In this case, although the plaintiff son clearly suffered damages from the motorcycle accident in February 2010, and plaintiffs discovered the negligent failure to procure shortly thereafter, the plaintiffs did not suffer damages *caused by the agent's negligence* until the son received the diminished benefit payment in June of 2012 — less than a year prior to the institution of the lawsuit. Significantly, in reaching this ruling the appellate court pointed to the fact that, under the governing statute, a right to underinsured motorist coverage does not accrue until the insured has reached a settlement or judgment exhausting the underinsured policy. In this case, the right to underinsured motorist coverage was not a given, because the cause of the accident was heavily disputed, and the police report of the accident wasn't favorable. It wasn't until the claim was settled with the underinsured motorist and the underinsured motorists coverage was tendered, in January 2012, that the injury caused by the failure to procure the requested underinsured motorist coverage limits was incurred.

In arguing in favor of affirmance of the trial court ruling, defendant argued that, in fact, the son had "suffered actual injury when he sustained severe bodily injuries exceeding his available insurance coverage, without any right to obtain any greater liability protection to fully compensate him for his injuries," and this "diminution of right" was sufficient to trigger the claim. *Id*. at 522. The appellate court rejected this argument, concluding that unless and until the son's right to receive any coverage under the underinsured motorist protections of the policy was extant, the mere "threat of future harm — not yet realized — does not suffice." *Id*. at 522–523 (quoting *Adams v. Paul*, 904 P.2d 1205, 1208 (Cal. 1995).

In *Jackson v. QBE Specialty Ins. Co.*, No. 17-11730, 2018 WL 3408182 (E.D. La., July 13, 2018). a Louisiana federal district court considered whether a case involving a dispute with respect to insurance coverage under a homeowners' policy for mold remediation was properly removed to federal court on the basis of fraudulent joinder of the homeowners' insurance agent. The plaintiffs had asserted claims against QBE for breach of contract in refusing to pay for the mold remediation, and against their insurance agent for failing to procure coverage for mold. The insurer (QBE) argued that the claim against the agent—whose presence destroyed diversity — was barred by the 1 year statute of limitations, given that the coverage was bound on July 12, 2016, the policy language clearly provided no coverage for mold, and the lawsuit wasn't filed until September 15, 2017. In opposing remand, plaintiffs argued that the defendant broker had voluntarily adopted a policy wherein an agent or other employee would review the entire insurance application with the prospective buyer and explain the available options for additional coverage; yet no such review had occurred in this instance. Plaintiff asserted that, had the agent followed this policy, they would have been told that a mold coverage rider was available and that most insureds purchase/obtain the rider given that homes in the area are at high risk for mold. Accepting this argument for purposes of the remand motion, the court concluded that, if an assumed duty was found to exist, the peremptive statutory period would not likely have begun to run until October 11, 2016, when plaintiffs only first became aware of the agent's policy in this regard. *Id*. at *9.

Lastly, in *Penn v. 1st S. Ins. Servs., Inc.*, 324 F.Supp.3d 703 (E.D. Va., 2018). a Virginia federal district court, applying Virginia law, dismissed a claim for breach of contract in failing to procure the requisite minimum liability coverage for a truck engaged in interstate commerce. Although the federal minimum is $750,000, and it was alleged the owners relied on the broker's promised experience and expertise in insuring truckers to purchase the requisite coverage, the defendant broker purchased liability limits of only $100,000 for the truck. After two individuals were severely injured in an accident caused by the driver of the company's truck, they were awarded, collectively, $2.725 million in damages. The company assigned its claims against the broker to the injured parties, and the injured individuals brought suit against the broker for, among other things, breach of contract in failing to procure the required coverage. Because the claim was brought more than 5 years after the alleged breach of contract — *i.e.*, the failure to purchase the correct coverage — on motion to dismiss the claim as time-barred, the court granted the motion. In reaching this holding, the court noted that, under Virginia law, a cause of action accrues when injury is sustained. In this case, the court concluded the owners of the truck sustained injury when they received the wrong coverage. *Id*. at 713.

As the lawsuit had been commenced within a year after the plaintiffs obtained their verdicts against the company, the plaintiffs argued that, because the company was being defended in the personal injury action, it didn't suffer an actual injury resulting from the alleged failure to procure the proper coverage until after judgments against it were obtained. However, in reasoning similar to that adopted by the Illinois Supreme Court in the *American* Family case discussed above, the *Penn* court pointed to the fact that, under Virginia law, in the case of a failure to procure a policy, the right to recover is fully matured when the agreement is violated and the insured has been harmed in paying premiums for coverage that wasn't obtained. *Id*. at 710–711 (citing *Autumn Ridge, L.P. v. Acordia of Virginia Ins. Agency*, 613 S.E.2d 435, 440 (Va. 2005). Accordingly, while further injury was suffered when the judgments were obtained for which there was only $100,000 in coverage, the claim against the broker had accrued years earlier, "When the legally insufficient policy was placed by Defendants." *Id*. at 712.

This ruling, and the *American Family* ruling, are significant in the ongoing debate about accrual of negligent failure to procure claims in that, as courts that have struggled with the issue have noted, the fact that the requested coverage was not obtained may not make

itself readily known until a loss occurs. Not surprisingly, the rule in a number of states is that the statute of limitations does not begin to accrue on such claims until a loss occurs evidencing the lack of coverage, because only then has the insured suffered injury. But the policy argument relied upon by the Illinois Supreme Court holds significant appeal, and the analysis in the *Penn* case supports the argument that, in fact, harm has been suffered immediately upon receipt of the wrong coverage. In light of the continuing evolution of the case law on this issue, it would not be surprising if, even in jurisdictions with apparently "settled" law on the issue, there may be further changes coming.

Defense of Unavailability of Coverage

In *Madison Cnty. v. Evanston Ins. Co.*, No. 5:15-cv-01997, 2018 WL 4680213 (N.D. Ala., Nov. 2, 2018). the court considered the viability of a defense of unavailability of coverage to a failure to procure claim insofar as it is based on an alleged breach of a contractual promise to procure specific coverage under Alabama law. Finding this defense to be lacking, the court noted that in connection with breach of contract claims, Alabama "'has not recognized the defense of impossibility or impracticability. Where one by his contract undertakes an obligation which is absolute, he is required to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract.'" *Id*. at *31 (quoting *Silverman v. Charmac, Inc.*, 414 So. 2d 892, 894 (Ala. 1982) (internal quotations omitted). Accordingly, under Alabama law, absent a contractual provision addressing the contingency of the requested coverage being unavailable, the defense that the coverage wouldn't have been available—which is regularly raised as a defense to negligent failure to procure claims—is apparently *not* a viable defense to a breach of contract based failure to procure claim. *Id*.

Duty to Read

The defense of "duty to read" has been under assault, and there are fewer and fewer jurisdictions which continue to view the "duty to read" as an absolute defense to negligent failure to procure and fraud or negligent misrepresentation claims. But there are still some jurisdictions in which the defense remains alive and well. A couple of decisions in Mississippi and Georgia reflect this, while at the same time highlighting the availability of exceptions to the rule even where it remains in place.

In *Am. Zurich Ins. Co. v. Guilbeaux*, No. 2018 WL 1661629, 2018 WL 1661629, at *5 (S.D. Miss., Apr. 5, 2018). the court reaffirmed that, under Mississippi law, claims of negligent procurement, or fraudulent or negligent misrepresentation against a broker or agent must fail, as a matter of law, if the insured received and had an opportunity to review its insurance policy and a review of same would have clarified the actual coverage procured, based on Mississippi's "duty-to-read" and "imputed-knowledge" doctrines. However, the court noted that, "[f]or an insurer to get the benefit of a presumption of receipt of an insurance policy, the insurer must tender evidence of mailing—such as an affidavit of an employee demonstrating the insurer's records acknowledging mailing." *Id*. As the insured claimed to have been misled that the builder's risk policy he purchased would provide coverage for more than 30% of the completed work on the home he was constructing and there was no documentary evidence he had been provided with a copy of the policy, the court denied the broker's motion to dismiss on summary judgment.

The duty to read as an absolute defense to an insurance agent/broker negligent failure to procure claims remains viable in Georgia as well. But there are exceptions. *Bush v. AgSouth Farm Credit, ACA* 816 S.E.2d 728 (Ga. 2018). provides an illustrative example.

As a general rule, Georgia law provides that:

> An insurance agent who undertakes to procure a policy of insurance for his principal but negligently fails to do so may be held liable to the principal for any resulting loss. However, where the agent does procure the requested policy and the insured fails to read it to determine which particular risks are covered and which are excluded, the agent is thereby insulated from

> liability, even though he may have undertaken to obtain full coverage. *Atlanta Women's Club v. Washburne*, 207 Ga. App. 3, 4, 427 S.E.2d 18 (1992) (citations omitted).

However:

> an exception to this rule applies where the agent, acting in a fiduciary relationship with the insured, holds himself out as an expert in the field of insurance and performs expert services on behalf of the insured under circumstances in which the insured must rely upon the expertise of the agent to identify and procure the correct amount or type of insurance. *Id.*

In *AgSouth Farm Credit*, a farmer ("Bush") who had purchased crop insurance for his wheat and soybean crops, suffered a loss in 2013 to his wheat crop as a result of excessive moisture. He was paid $102,986 for his loss, which he assigned to AgSouth to put towards several loans he had received towards the purchase of farm machinery and equipment. Afterwards, the insurer conducted an audit of his claim, and determined that he had misrepresented his actual production history ("APH"), and he was not entitled to the claim payment he received. The insurer demanded repayment of same, in order for him to remain eligible to participate in the crop insurance program. Because he had used the funds to make payment towards his loan, he couldn't repay the insurer. Without the ability to purchase crop insurance, he contended he lost the ability to operate his farm in 2015 and 2016, had to sell off his cattle, and was forced to lease land and equipment to another farmer — causing him alleged damages of at least $145,000.

In pursuing claims for both negligence, negligent misrepresentation and fraud, Bush argued that the AgSouth agent he utilize to purchase crop insurance had agreed to calculate his APH each year beginning in 2011, and he presumed she had done so based on the "weight tickets" he had provided to her. The agent acknowledged she had prepared the APH calculations based on the information she was provided, and told him he was not required to submit supporting documentation with his policy application. But she claimed she had warned him that he would be subject to audit and if he was ever audited he would "have to document" what was reported in the insurance application. Further, Bush had signed the insurance application certifying that to the best of his knowledge and belief the information contained therein was correct; he signed the production and yield report submitted therewith certifying its correctness; the application stated "I also understand that failure to report completely and accurately may result in sanctions under my policy, including but not limited to voidance of the policy"; and, in signing the production report, he acknowledged "this form may be reviewed or audited and that information inaccurately reported or failure to retain records to support information on this form may result in recomputation of the APH yield." *AgSouth Farm Credit*, 816 S.E.2d at 733. Based thereon, AgSouth and the agent moved for summary judgment dismissing the claims, and the motion was granted.

On appeal, the decision was reversed. Although Bush admittedly had not read the policy and other related documents, the court noted that Bush had alleged that the agent had held herself out as a crop insurance expert. Further, viewing the evidence in the light most favorable to Bush, the court concluded there was evidence the agent had undertaken to calculate the APH for him, and Bush had relied on her expertise in this regard because he knew nothing about crop insurance, having never previously farmed his land for the purpose of selling the produce, and thus never having previously purchased such insurance. As such, Bush depended on the agent to ensure that his crop was adequately insured against loss, which necessarily required the agent to properly calculate the APH based on proper documentation as governed by federal rules set out in a voluminous Crop Insurance Handbook with which the agent was quite familiar. *Id*. at 736. As such, the court determined "[i]t is for a jury to decide whether [the agent's] alleged failure to ask Bush for records to support the APH and her alleged failure to use written verifiable records to calculate the APH constituted negligence and/or negligent misrepresentation." *Id*.

Significantly, while the defendants argued that the documentation requirement was readily apparent on the face of the application documents and policy, and Bush's admitted failure to read these documents preclude recovery, the court concluded that the fact that the expert exception to the general "duty to read rule" applied took the legs out from under that argument. In fact, the court noted, the

policy referred to "written verifiable records," and relied upon reference to a federal regulation to define the term. As such, the court determined, "[i]t would not have been readily apparent to Bush, on the face of the policy, that the weight tickets or other information he provided to Meeks were not adequate to meet the definition of 'written verifiable record.' *Id*. Moreover, "[e]ven if Bush had read the policy from beginning to end, he would not have known that the calculation was not properly done in accordance with federal regulations. Calculating the APH was up to the expert agent and governed by the rules set out in the Crop Insurance Handbook." *Id.*

Affidavit of Merit

In *Ehrhardt v. Amguard Ins. Co.*, No. A–2128–16T2, 2017 WL 6048119 (N.J. Super. Ct., App. Div., Dec. 7, 2017). the court upheld the dismissal of broker negligence and breach of contract claims for failure to serve an Affidavit of Merit pursuant to N.J.S.A. 2A: 53A-26 to 29 attesting that defendants' conduct did not comport with applicable professional standards of care. What is significant about this is the court's rejection of the argument, under the particular facts of this case, that this was such a "common knowledge" negligent act that expert testimony, and thus an Affidavit of Merit, was unnecessary.

In *Ehrhardt*, plaintiffs were the owner/operators of a medical practice and nutritional business in New Jersey ("Body Mind Nutrition") who learned, after Superstorm Sandy struck in October 2012, that much of their losses caused by the storm—including for inventory and business personal property—would not be covered under the commercial general liability policy their broker had procured for them. In addition to suing their insurer (against whom the claims were at some point voluntarily dismissed), they sued their broker, alleging negligence and breach of contract based on failure to procure the coverage requested, and to inform and advise them about the coverage obtained. Among other things, plaintiffs alleged the broker had been requested and failed to obtain coverage comparable to the coverage they had to replace because their prior insurer had advised it would no longer be offering the coverage they previously had in place.

In New Jersey, before a lawsuit alleging professional negligence can be brought against a licensed professional, plaintiffs must obtain and serve an Affidavit of Merit ("AOM") on the defendant from an expert attesting that defendants' conduct did not comport with applicable professional standards of care, pursuant to N.J.S.A. 2A:53A-26 to 29. Because the plaintiffs had admittedly failed to serve an AOM on defendants, at the conclusion of discovery the defendants moved to dismiss the claims against them on summary judgment, and the motion was granted.

Citing to *Hubbard ex rel. Hubbard v. Reed*, 168 N.J. 387, 390 (N.J. 2001). Plaintiffs appealed from the trial court decision on the grounds that, while suits against licensed professionals generally require service of an AOM in New Jersey, there is a "common knowledge" exception that applies where expert testimony is not needed to establish whether the defendants' "care, skill or knowledge . . . fell outside acceptable professional or occupational standards or treatment practices.'" *Ehrhardt*, 2017 WL 6048119 at *3 (quoting *Hubbard*, 168 N.J. at 390). For example, in the *Hubbard* case, a jury didn't need an expert to explain that a dentist had been negligent in extracting the wrong tooth. Here, plaintiffs argued that, because the broker defendants had been asked to replace the coverage they previously had with coverage "as comprehensive as those [in the policies] previously issued" to them and had failed to do so, no expert testimony was necessary. *Id.* at *4. The appellate court rejected this argument, noting that "the assessment of what coverage in a certain insurance policy is equally 'comprehensive' as the coverage provided in another insurer's policy can readily entail a sophisticated assessment of policy-specific language, definitions, exclusions, exemptions, and the like. Lay jurors are simply not equipped to make those assessments." *Id*. at *4. Further, the court rejected the argument that the breach of contract claim should be treated differently because plaintiffs had failed to offer evidence that they had requested identical coverage to what they previously had, nor a reciprocal promise by defendants to fulfill such requests. In fact, at least one of the emails exchanged between the parties "suggest[ed] a desire to explore a 'cheaper' premium, indicating a possible willingness by the insured to accept non-identical coverage for a lower cost." *Id*. As such, the court concluded, "[P]laintiffs have failed to demonstrate that these issues of replacement coverage can be litigated fairly and sensibly in the absence of supporting expert opinion." *Id*.

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Recovery of Attorneys' Fees

In *11333, Inc. v. Certain Underwriters at Lloyd's, London*, No. CV-14-02001, 2018 WL 1576863 (D. Ariz., Mar. 30, 2018). the court considered an application by a victorious insurance broker (HUB) for reimbursement by plaintiff of its reasonable legal fees incurred in defending against allegations of professional negligence, breach of contract and breach of the duty of good faith and fair dealing pursuant to an Arizona statute providing that, "In any contested action arising out of a contract, the court may award the successful party reasonable attorney's fees." A.R.S. § 12-341.01(A). Under this statute, the award of attorney's fees is discretionary, and the courts may consider a variety of factors in determining whether to award same, including: "the merits of the unsuccessful party's case, whether the litigation could have been avoided or settled, whether assessing fees against the unsuccessful party would cause an extreme hardship, the degree of success by the winning party, any chilling effect the award might have on other parties with tenable claims or defenses, [and] the novelty of the legal questions presented." *11333, Inc.*, 2018 WL 1576863 at *2.

In granting HUB fees totaling nearly $90,000, the court took note of the fact that plaintiff had alleged an oral agreement that HUB would procure insurance for the plaintiff's errors and omissions in overseeing an LLC which had taken ownership of an oceanfront subdivision in Galveston, Texas, and had failed to do so. Yet in the course of litigation, the plaintiff had failed to offer evidence that HUB had represented to Plaintiff that the policy it had procured for Plaintiff would provide such coverage, or that it would even have been possible for HUB to have obtained a mortgage bankers/brokers insurance policy that would have provided coverage for the loss (uncovered flood loss). *Id*. at *4. The court also noted that it need not try to allocate defense costs incurred as among the tort-based and contract based claims, because they were so inextricably intertwined. *Id*. at *3.

This decision is significant because it offers hope to brokers in states with similar such statutes that, where a wholly unmeritorious broker breach of contract claim based on alleged failure to procure has been brought, some measure of justice can be meted out to the broker for having to defend same.

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