Recent Developments of Note in Insurance Agent and Broker E&O

Peter J. Biging, Goldberg Segalla, LLP

I. INTRODUCTION

This Fall has seen some interesting and, in some ways, truly significant developments in insurance agent/broker E&O. The following is a brief summary of three such decisions with impacts on: determination of accrual of broker negligence claims for purposes of determining whether applicable statutes of limitations have passed; the effectiveness of affidavits inconsistent with prior admissions of failure to request coverage in a last ditch effort to avoid summary judgment dismissal of broker negligent failure to procure claims; and the applicability of standard contractual choice of law provisions in broker services agreements in determining choice of law with regard to alleged broker malfeasance.

II. RECENT CASE DECISIONS OF NOTE

In *Pape v. Braaten*, 2019 WL 4750036 (N.D. Ill. Sept. 30, 2019), after Plaintiff was induced to cease making payments on his life insurance policy and replace it with two new large insurance policies, and borrow more than two million dollars to do so, he claimed he learned that the broker who had sold him the policies had induced him to do so by making a number of misrepresentations. Among other things, he alleged that he had been led to believe he would have to make one large premium payment up front, which would generate interest that would cover the cost of all premiums on both policies going forward. However, he subsequently learned he had to make significant additional payments. After thereupon cancelling the policies, recouping the present value of the policies, paying off the loans he had taken out in order to finance the premiums, and paying costs incurred to reinstate his lapsed prior policy, he alleged he was caused to incur in excess of $1 million in damages.

In furtherance of his claims that he had been misled, among other things, he alleged he was provided with illustrations indicating earnings on his premium payments sufficient to repay the loans taken out to finance them, and all interest thereon. Based on this, plaintiff brought claims against the broker for common law negligence, breach of fiduciary duty and fraud.

In response, the broker moved to dismiss the claims as barred by the two-year statute of limitations governing all causes of action under any legal or equitable theory against an insurance producer under Illinois law concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance. The broker argued that the claims were time barred because the life insurance policies at issue were procured on January 28, 2015, but the complaint had not been filed until February 28, 2018, more than three-years later. In responding to the motion, the plaintiff argued that the claims didn’t accrue until he learned of the misrepresentations made about the policies in 2017.

Relying on the Illinois Supreme Court Decision in *American Family Ins. Co. v. Krop*, 2018 IL 122556, ¶ 18, 120 N.E. 3d 982 (Ill. 2018) *rehearing denied* (Nov. 26, 2018), the broker argued that because insurance agents and brokers are subject only to a general duty of care, the insured’s obligation to read his policy controls, and thus, except in limited...
circumstances not applicable in this case, the plaintiff must be deemed to have known or should have known of the alleged misrepresentations concerning the policies by simply reading them. In response, plaintiff argued that the alleged misrepresentations,—like “the annual net outlay, the accrual of interest into the loan and the relation of the performance of the index over time compared to the costs on each of the policies”—would not be reflected in the policies themselves. In light of this, because neither the policies nor the illustrations at issue were made part of the Complaint, the Court concluded this created a fact issue making dismissal on the pleadings inappropriate.

Seeking nonetheless to obtain dismissal of the breach of fiduciary duty claim, the broker argued that it was also barred by § 2-2201 of Illinois’ Insurance Placement Liability Act, which provides that:

No cause of action against any insurance producer concerning the sale, placement, procurement, renewal, binding, cancellation of or failure to procure any policy of insurance shall subject the insurance producer to civil liability under standards governing the conduct of a fiduciary or a fiduciary relationship except when the conduct upon which the cause of action is based involves the wrongful retention or misappropriation by the insurance producer of any money that was received as premiums, as a premium deposit, or as a payment of a claim.

In response, Plaintiff argued that by causing him to remit premium payments to Pacific Life for an insurance policy that was not in his best interest, the broker had effectively “misappropriated” the premiums. But the Court rejected this broad reading of the exception to the rule, and thus dismissed the breach of fiduciary duty claim.

In *Khalaf v. Mass Resources, Inc.*, 22019 WL 4852684 (L.A. App. 3rd Cir. Oct. 2, 2019), after an individual working on a pumping unit at an oil well operated by Mass Resources was killed and his estate brought suit for alleged negligence in failing to have a brake on the unit and negligence in maintaining it, Mass Resources brought a third-party action against Four Rivers Insurance Agency (“Four Rivers”) alleging negligent failure to procure general liability coverage that would have insured Mass Resources for the claims against it. During discovery, however Mass Resources admitted that the individual who had been killed on the job had been its employee, and had been acting in the course of his employment when the incident occurred. Mass Resources also admitted that it had never requested that Four Rivers obtain workers compensation insurance for the company.

Under Louisiana law, the fact that the individual had been working in the course of his employment with Mass Resources when the incident occurred meant that his estate’s only recourse would have been through workers compensation insurance. The result was that, because Mass Resources had admitted it had never requested Four Rivers obtain such coverage, the trial court had dismissed the third-party complaint on summary judgment.

On appeal, the Louisiana Appellate Court affirmed. While Mass Resources had tried to amend its answers regarding the question of whether the individual killed in the accident had been an employee, it had failed to first seek permission to do so. As such, this attempted reversal of its answer on this issue was deemed ineffective. Additionally, relying upon settled Louisiana case law allowing for Courts to disregard affidavits submitted at the last minute which are inconsistent with prior admissions for the purpose of defeating summary judgment, the Appellate Court concluded that an affidavit—submitted without any substantiating documentation, and only after summary judgment had been made by the agent—purporting to aver that the individual was actually an independent contractor was found to have been properly disregarded by the trial court.
Lastly, in C-Bons International Golf Group, Inc. v. Lexington Ins. Co., 2019 WL 5427574 (N.D.Tx, Oct. 22, 2019), in a case involving alleged breach of fiduciary duty by a broker in connection with the placement of property insurance for golf courses located in and around Houston, Texas, the United States District Court for the Northern District of Texas confronted hotly contested choice of law issues. The decision reached no immediate conclusion with regard to the choice of law to be applied. However, the Court’s analysis is significant in regard to its review of the applicability of the broker’s choice of law provision contained in its insurance services proposal, and the consideration given to the various factors to be analyzed under Texas law in determining choice of law issues.

The case involved property losses at the C-Bons’ golf courses alleged to total in excess of $31 million as a result of Hurricane Harvey in 2016. C-Bons had policy limits of $75,000,000. However, when it submitted its claim, C-Bons’ insurer, Lexington Insurance Company, agreed to pay only about $2.75 million, which it determined were the extent of damages not caused by flooding—for which no coverage was available under the policy. C-Bons brought suit against Lexington for breach of its policy, claiming it was entitled to full coverage for all loss sustained as a result of this “Named Storm”. In the alternative, C-Bons brought suit against its insurance broker, Willis of Illinois, Inc., alleging breach of its special and/or fiduciary relationship in failing to obtain appropriate coverage.*

Willis argued that Illinois law should apply, and thus that C-Bon’s claims should be dismissed because: (1) under Illinois law no breach of fiduciary claims can be brought against insurance producers except where the conduct complained of is alleged to have arisen out of wrongful retention or misappropriation of monies received as premiums or claim payments; and (2) the Texas Insurance Code claim would be unavailable, as a result. In response, C-Bons argued that Texas law should apply.

As its first argument in support of the application of Illinois law to its claims, Willis pointed to the choice of law provisions in its services agreement with C-Bons, which stated:

Our agreement for services shall be governed by and construed in accordance with the laws of the state in which our office is located.

Willis argued that its principal place of business was in Chicago, and thus application of this choice of law provision mandated application of Illinois law to C-Bon’s claims. However, the Court determined that under Texas law, contractual choice of law provisions are to be read narrowly. Because the provision deals only with construction and interpretation of the contract, the Court found that it could not be found to apply to the claims at issue.

As its second argument, Willis contended that Illinois law should apply in any event, as the Texas Courts apply the “most significant relationship test to determine choice of law in tort cases,” and under that test Illinois must be found to have the most significant relationship to the claims in issue. Under this test, the Courts are required to consider: (a) the place where the injury occurred; (b) the place where the conduct causing the injury occurred; (c) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (d) the place where the relationship, if any, between the parties is centered. See C-Bons International Golf Group, 2019 WL 5427574 at *5 (quoting the Restatement (Second) of Conflict of Laws § 145(2) (1971)). Citing to Coachmen Indus. v. Willis of Illinois, Inc. 2008 WL 1912861, at *6 (S.D. Tex. Apr. 28, 2008) for the conclusion that the law of the state where the insurance agent/broker is located when the alleged conduct to the detriment to the insured has occurred should typically control, Willis argued that because its brokers were acting from Chicago when the coverage was placed, Illinois law should apply. However,
the Court found that even in the case cited for the proposition, the Texas Courts had considered the other factors, and thus declined to rule on that factor alone. Applying the other factors, the Court took note of C-Bons’ argument that: C-Bons’ golf course and business opportunities were damaged in Texas; the insurance coverage Willis had brokered was supposed to cover damage in Texas; the alleged misrepresentations at issue were received and relied upon in Texas; Willis had spent its time trying to find insurance in Texas; Willis was in constant contact with C-Bons while in Texas; and Willis had at least 8 offices in Texas. Further, the place where the relationship of the parties was centered was Texas.

Looking at these arguments, the Court concluded it had insufficient information to determine which state has the most significant relationship to the breach of fiduciary and/or special relationship claim. Accordingly, without ruling on how discovery should be handled, i.e., whether discovery should first be focused on choice of law issues, before any other discovery … the Court determined it was going to deny Willis’ motion to dismiss without prejudice.

The significance of this ruling is that, first, it does not appear that other brokers are likely to have success arguing that contractual choice of law provisions stating that the parties’ services agreement shall be governed and construed by a particular state law should govern choice of law with respect to alleged tortious conduct by the broker. Second, while substantial weight will likely be placed on the state in which the broker is alleged to have engaged in the complained of conduct, the analysis may not necessarily stop there, nor should it.

III. CONCLUSION

This small snapshot of recent relevant insurance agent/broker E&O decisions highlights how vitally important the battles waged with regard to framing the questions critical to determination of these claims will be to their ultimate resolution. It is thus imperative for both the insurance claims handler and insurance agent/broker E&O defense practitioner that eyes be kept on the evolving arguments and analyses applied thereto now and going forward.

About the Author

Peter J. Biging is a partner in the law firm Goldberg Segalla, LLP, where he heads up the firm’s New York metro area Management and Professional Liability practice. He is also Vice Chair of the firm’s nationwide M & PL practice group. Mr. Biging was assisted in the preparation of this article by Ryan McNagny, a commercial litigation and professional liability associate in the firm’s Manhattan office. Portions of the content of this article will also appear in the American Bar Association TIPS Journal Year in Review Winter issue, covering a broad range of professional liability and D&O developments in 2018. Mr. Biging can be reached at pbiging@goldbergsegalla.com.

About the PLDF

The Professional Liability Defense Federation™ is a not-for-profit organization designed to bring together attorneys, claims professionals and risk management specialists to share expertise and information helpful to the successful defense of professional liability claims.

Membership in the PLDF includes delivery of the Professional Liability Defense Quarterly, which is devoted to current legal defense and claims handling issues. Articles of topical interest spanning a wide range of malpractice defense subjects are presented to add value to effective defense preparations for the claims handler and defense counsel. We
encourage member submission of articles proposed for publication to: Editor-in-Chief, Professional Liability Defense Quarterly, PO Box 588, Rochester IL 62563-0588, sandra@PLDF.org.

To learn more about the PLDF and all that we have to offer, please visit www.PLDF.org or contact our management team: Managing Director Sandra J. Wulf, CAE, IOM, sandra@pldf.org; Deputy Director Sara Decatoire, CAE, IOM, sarad@pldf.org.