NEWSLETTERS

THE PASCHOS LAW UPDATE NEWSLETTER

April, 2013

I. BEST STRATEGIES IN DEFENDING PROFESSIONAL NEGLIGENCE ACTIONS AGAINST INSURANCE AGENTS AND BROKERS IN NEW JERSEY

New Jersey insurance policies are sold either directly by insurance companies or through insurance "producers."[1] Both insurance agents and brokers fall within the definition of an insurance producer. At common law both agents and brokers, when acting on behalf of an insured, owe the insured a duty of due care.[2] In New Jersey, claims against insurance producers are based in tort.[3] Therefore, claimants must establish breach of a duty, proximate causation and damages.

New Jersey is one of several jurisdictions explicitly recognizing agents and brokers as professionals. Insurance producers have a duty to (i) have the degree of skill and knowledge requisite to its employment responsibilities; (ii) exercise good faith and reasonable skill, care and diligence in the execution of his or her employment responsibilities; (iii) possess reasonable knowledge of available policies and terms of coverage in the area in which the insured seeks protection; and (iv) either procure the coverage necessary for the client's exposure or advise the client of his or her inability to do so.[5]

Both insurance brokers and agents owe a fiduciary duty of care to their clients. Liability for breach of that duty can occur (1) if the broker "neglects to procure the insurance," (2) "if the policy is void," (3) if the policy is "materially deficient," or (4) the policy "does not provide the coverage he undertook to supply."[6] However, a separate common law cause of action against an insurance broker for breach of fiduciary duty does not exist in New Jersey.[7] Courts have held that this duty is essentially covered by professional malpractice actions.[8] New Jersey courts recognize an enhanced duty of care between the agent or broker and the insured when a "special relationship" exists.[9] In determining whether a "special relationship" exists requires a very fact specific analysis.

Proving Causation

In the area of agent and broker malpractice, the method by which a plaintiff must establish a claim against an insurance producer turns on the element of causation. To succeed in an action against an insurance agent or broker, the plaintiff must prove that in addition to being negligent, the producer's negligence was a proximate cause of the loss.[10] Unless the facts speak for themselves or the broker has essentially admitted liability, an expert will be necessary to establish an applicable duty of care and perhaps address other issues such as causation.[11]

Producers have argued that the plaintiff must come forward with evidence that the coverage was available. In other jurisdictions, there is support for the view that to successfully maintain a negligence action against an insurance broker, the policyholder must prove by a preponderance of the evidence that the requested coverage was then generally available in the insurance marketplace.[12]

Damages Recoverable

An insurance producer who agrees to procure a specific insurance policy for another but fails to do so may be liable for damages resulting from such negligence.[13] Damages recoverable for failure to procure an insurance policy is the loss sustained by reason of the breach or, in other words, the amount that would have been due under the policy provided it had been obtained.[14]

Insurance agents and brokers are not subject to the treble damages and attorney fee exposure of the New Jersey Consumer Fraud Act.[15] Also, New Jersey does not permit the recovery of the attorney's fees incurred in litigating a professional liability claim against and insurance broker.[16]

The distinction between agents and brokers may impact the remedy available to the insured. If an agent is negligent while acting within the scope of his agency relationship with the insurance carrier, his negligence may bind coverage on behalf of the insurance carrier.[17] However, if a broker is negligent, the insured will only be entitled to monetary damages. The broker's actions do not bind the insurer.

Defenses

There are several defenses available to agents and brokers who are subject to a professional malpractice action in New Jersey. Failure to file the action within the applicable statute of limitations will result in dismissal of the action. Under New Jersey law, negligence actions against agents and brokers are subject to a six year statute of limitations.[18] That period begins to run when a claim accrues, which is governed by the "discovery rule," which operates "to postpone the accrual of a cause of action when a plaintiff does not and cannot know the facts that constitute an actionable claim."[19] Often, policyholders will not be certain they have a claim against their agents or brokers until they have concluded lawsuits against their carriers. In these circumstances, the discovery rule could protect a plaintiff from losing his or her right to sue a broker if the underlying litigation lasts a long time.

Plaintiffs are also required to file an Affidavit of Merit. The New Jersey Affidavit of Merit statute[20] specifically prescribes that:

> In any action for damages for personal injuries, wrongful death or property damage *resulting from an alleged act of malpractice or negligence by a licensed person in his profession or occupation,* the plaintiff shall, within 60 days following the date of filing of the answer to the complaint by the defendant, provide each defendant with an affidavit of an appropriate licensed person that there exists a reasonable probability that the care, skill or knowledge exercised or exhibited in the treatment, practice or work that is the subject of the complaint, fell outside acceptable professional or occupational standards or treatment practices. The court may grant no more than one additional period, not to exceed 60 days, to file the affidavit pursuant to this section, upon a finding of good cause.

A "licensed person" is particularly defined in the statute as a defendant on an enumerated list of professionals, including "any person who is licensed as ... *an insurance producer.*"[21] The statute defines producers as those "required to be licensed under the laws of [New Jersey] to sell, solicit or negotiate insurance."[22] If a plaintiff does not file and serve a timely affidavit of merit as required under the statute, "it shall be deemed a failure to state a cause of action," thereby subjecting the malpractice complaint to dismissal. [23]

The comparative fault defense is unavailable to an insurance producer who asserts that the client failed to read his or her insurance policy.[24] The Supreme Court has held that "[i]t is the broker, not the insured, who is the expert and the client is entitled to rely on that professional's expertise in faithfully performing the very job he or she was hired to do."[25] However, comparative negligence principles could be applied in a professional malpractice case in which "the client's alleged negligence, although not necessarily the sole proximate cause of the harm, nevertheless contributed to or affected the professional's failure to perform according to the standard of care of the profession."[26] For example, if a client interfered with a professional in his or her performance by withholding or failing to provide pertinent information to that professional concerning the matter for which the professional was hired, then an argument can made that the client's action should be barred based on comparative negligence principles.[27]

New Jersey courts will reject any attempt by an insured to assert a malpractice action against a producer for failure to provide notice of a pending cancellation, non-renewal or outstanding premium absent evidence of a "special relationship."

II. BEST STRATEGIES IN DEFENDING PROFESSIONAL NEGLIGENCE ACTIONS

AGAINST INSURANCE AGENTS AND BROKERS IN PENNSYLVANIA

In Pennsylvania, the basic elements of a cause of action founded upon negligence are (i) a duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks; (ii) a failure on his part to conform to the standard required; (iii) a reasonably close causal connection between the conduct and the resulting injury and (iv) actual loss or damage resulting to the interests of another.[28]

Pennsylvania uses the familiar professional malpractice standard of "reasonable skill by a similar practitioner under similar circumstances." Specifically, in Pennsylvania, the duty owed by an insurance agent or broker to an insured is to obtain the coverage that a reasonable and prudent professional insurance agent or broker would have obtained under the circumstances. If the agent or broker fails to exercise such care and if such care is the direct cause of loss to his customer, then he is liable for such loss unless the customer is also guilty of failure to exercise care of a reasonably prudent businessman for the protection of his own property and business which contributes to the happening of such loss.'[30]

An insurance agent's/broker's recognized duty to act with reasonable care, skill, and judgment extends to selection of the insurer and ascertaining whether it is reputable and financially sound and informing the insured of findings if investigation reveals evidence of financial infirmity, but the agent/broker nonetheless intends to place a policy with that insurer.[31] Where an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under such circumstances as to lull the 'insured' into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed.'[32]

Proving Causation

The plaintiff must show that the defendant's breach of duty caused the plaintiff's underlying injuries. Pennsylvania courts have expressed support for the view that to successfully maintain a negligence action against an insurance broker, the policyholder must prove by a preponderance of the evidence that the requested coverage was then generally available in the insurance marketplace.[33] According to this view, a plaintiff is not required to show that a particular insurance company would have written such coverage but only that it was available from some insurer.[34]

Damages Recoverable

In an action against a broker or agent where the broker neglects to procure insurance, or does not follow instructions, or if the policy is void or materially defective through the agent's fault, the broker, in cases of default, is liable '[t]o the same extent as the insurer would have been liable had the insurance been properly effected.'[35] Pennsylvania courts have held that negligence actions against insurance agents and brokers do not allow for recovery of damages for emotional distress.[36]

An insured may bring a private cause of action against an insurer or an insurance producer under Pennsylvania's Consumer Protection Law (CPL).[37] An insured asserting a private right of action under the CPL must prove that he or she suffered an ascertainable loss as a result of the producer's prohibited action.[38]

Defenses

Defenses to claims against an insurance agent or broker in Pennsylvania include many of the standard professional malpractice defenses including: failure to proffer expert testimony establishing the standard of care and failure bring a claim within the statute of limitations. In Pennsylvania, the applicable statute of limitation for a claim of negligence against an insurance agent or broker is two years.[39]

The Pennsylvania Supreme Court has stated that "the policyholder has no duty to read the policy unless under the circumstances it is unreasonable not to read it."[40] The reasoning is that when the insured informs the agent of his insurance needs and the agent's conduct permits a reasonable inference that he was highly skilled in this area, the insured's reliance on the agent to obtain the coverage that he has represented that he will obtain is justifiable.[41] The insured does not have an absolute duty to read the policy, but rather only the duty to act reasonably under the circumstances.[42] As such, the comparative negligence statute

does not apply to negligence actions where the defendant failed to procure an insurance policy for the plaintiff and failed to notify the plaintiff that the insurance had not been obtained. Rather, the doctrine of contributory negligence, which operates to completely bar the plaintiff from recovery if his negligence contributed to the result, applies in these cases. [43] Under this principle, the plaintiff's action will be barred, no matter how slight his or her contributory negligence.[44]

Pennsylvania's Certificate of Merit statute does not apply to insurance professionals.

This newsletter should not be construed as legal advice or legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult a lawyer concerning your own situation with any specific legal question you may have

[1]N.J.S.A. 17:22A-27

[2]Carter Lincoln-Mercury, Inc. v. EMAR Group, Inc, 135 N.J. 182 (1994)

[3]Id.

[4]Aden v. Fortsh, 169 N.J. 64, 776 A.2d 792 (2001)

[5]President v. Jenkins, 180 N.J. 550 (2004); Rider v. Lynch, 42 N.J. 465 (1964).

[6]Rider v. Lynch, supra, 42 N.J. at 476, 201 A.2d 561.

[7]Triarsi v. BSC Group Services, LLC, 422 N.J. Super. 104 (App. Div. 2011)("the fiduciary relationship gives rise to a duty owed by the broker to the client 'to exercise good faith and reasonable skill in advising insureds.'") (quoting Weinisch v. Sawyer, 123 N.J. 333, 340 (1991)); Aden v. Fortsch, 169 N.J. 64, 79, 776 A.2d 792 (2001) (holding that the duty of care owed by an insurance broker "is essentially one of professional malpractice"); Credit Suisse First Boston Mortg. Capital, LLC v. Philip Lehman Co., Ltd., 2010 WL 816540 (N.J.Super.A.D. March 10, 2010).

[8]Id.

[9] Sobotor v. Prudential Prop. & Cas. Ins. Co., 200 N.J.Super. 333, 338 (App. Div.) 1984) superseded by statute on other grounds as stated in Strube v. Travelers Indem. Co. of Ill. (T.I.L.), 649 A.2d 624 (N.J.Super.Ct.App.Div.1994)

[10]Regino v. Aetna Cas. & Sur. Co., 200 N.J.Super. 94, 99, 490 A.2d 362 (App.Div.1985) superseded by statute on other grounds as stated in Strube v. Travelers Indem. Co. of Ill. (T.I.L.), 649 A.2d 624 (N.J.Super.Ct.App.Div.1994).

[11]N.J.S.A. 2A:53A-27 (2003); see also Harbor Commuter Service, Inc. v. Frankel & Co., Inc., 401 N.J. Super. 354 (App. Div. 2008).

[12]Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239 (Colo. 1987).

[13]Aden. at 79, 776 A.2d 792.

[14]Cromartie v. Carteret Sav. & Loan, 277 N.J.Super 88 (App. Div. 1994); Robinson v. Janey, 105 N.J. Super. 585 (App. Div. 1969)

[15]N.J.S.A. 56:8-1. See, Plemmons v. Blue Chip Ins. Services, 387 N.J. Super 551 (App. Div. 2006).

[16]Tweer v. John Hill Agency, 2005 WL 2446289 *1, (N.J.Super.A.D.October 04, 2005)

[17]Regino., 200 N.J.Super. 94, 490 A.2d 362.

[18]See N.J. Stat. Ann. § 2A:14-1; Kominsky v. C.B. Planning Services Corp., 2010 WL 3516808 (N.J.Super.A.D. 2010)

[19]Grunwald v. v. Bronkesh, 131 N.J. 483, 621 A.2d 459, 463 (N.J. 1993)

[20]N.J.S.A. 2A:53A-27 (emphasis added).

[21]N.J.S.A. 2A:53A-26(o) (emphasis added).

[22]Boerger v. Commerce Ins. Svcs., No. Civ. A. 04-1337 2005 WL 2901903, *2, n.2 (D.N.J. 2005) (quoting N.J.S.A. 17:22A-26 (Nov. 1, 2005))

[23]N.J.S.A. 2A:53A-29.

[24]Aden, 169 N.J. 64, 776 A.2d 792 (2001)

[25]Id. at 69-70, 776 A.2d 792

[26]Id. at 77, 776 A.2d 792.

[27]Id.

[28]Fennell v. Nationwide Mut. Fire Ins. Co., 412 Pa.Super. 534, 603 A.2d 1064 (Pa.Super. 1992)

[29]Fed. Kemper Ins. Co. v. Yacomes, 641 F. Supp. 276 (E.D. Pa. 1986); Indust. Valley Bank & Trust Co. v. Dilks Agency, 751 F.2d 637 (3d Cir. 1985); Fiorentino v. Travelers Ins. Co., 448 F. Supp. 1364 (E.D. Pa. 1978); Rempel v. Nationwide Life Ins. Co., 227 Pa. Super. 87, 323 A.2d 193 (1974), aff'd, 471 Pa. 404, 370 A.2d 366 (1977), not followed by Sturm v. Humber, 15 Pa. D. & C. 4th 33 (Pa. Com. Pl. 1992).

[30]Consolidated Sun Ray, Inc. v. Lea, 276 F.Supp. 132, 134 D.C.Pa. 1967 (quoting Talley v. Hoffman, 18 Pa.Dist. & Co.R.2d 725, 729 (1959)).

[31] Al's Cafe, Inc. v. Sanders Ins. Agency, 820 A.2d 745 (Pa.Super. 2003)

[32]Avondale Cut Rate, Inc. v. Associated Excess Underwriters, Inc., 406 Pa. 493, 178 A.2d 758 (Pa. 1962)

[33]See Philadelphia Suburban Development Corporation v. The Stoll Agency, Inc., 1990 WL 902405 Pa.Com.Pl. 1990 (citing Bayly, Martin & Fay, Inc. v. Pete's Satire, Inc., 739 P.2d 239 (Colo. 1987)).

[34]Id.

[35]Laventhol & Horwath v. Dependable Ins. Assoc., Inc., 396 Pa.Super. 553, 579 A.2d 388, 391 (1990), appeal denied, 527 Pa. 648, 593 A.2d 420 (1991); Consolidated Sun Ray, 401 F.2d at 657.

[36]Fennell, 412 Pa.Super. 534, 603 A.2d 1064.

[37]Pekular v. Elich, 355 Pa. Super. 276, 513 A.2d 427 (1986)

[38]Toy v. Metropolitan Life Ins., 593 Pa. 20, 928 A.2d 186 (2007))

[39]42 Pa.C.S.A. § 5524(7)

[40]Rempel v. Nationwide Life Ins. Co., 471 Pa. 404, 370 A.2d 366, 369 (1977) (Cf. McKenna v. Metropolitan Life Ins. Co., 126 Fed.Appx. 571 (3d Cir. (Pa.) 2005) (court held under Pennsylvania law, it was unreasonable for insured not to read life insurance policy, such that insured's affirmative duty to read policy precluded his claim that he purchased policy based on insurer's misrepresentation.)

[41]Fiorentino v. Travelers Ins. Co., 448 F.Supp. 1364 (D.C.Pa.,1978)

[42]Id. (noting that "[t]he circumstances vary with the facts of each case, and depend on the relationship between the agent and the insured.)

[43]Rizzo v. Michener, 401 Pa.Super. 47, 584 A.2d 973, 976 (1990); Wescoat v. Northwest Savings Assoc., 378 Pa. Super. 295, 548 A.2d 619, 621 (1988).

[44]Wescoat, 378 Pa. Super. 295, 548 A.2d 619.

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