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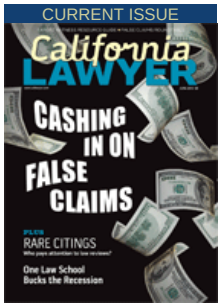

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TRENDING AGAINST THE BROKER

November 2009

By Rex Heeseman

Some legal areas are consistently predictable. Other areas "ebb and flow" - for instance, the rules with respect to the recovery of punitive damages. Those rules long favored the plaintiff, but recently have somewhat tilted towards the defendant. Another example is policyholder versus broker. For a while, the latter generally prevailed over the former. Yet, as explained below, the tide has turned. The latest such example is *Williams v. Hilb, Royal & Hobbs Ins. Svcs.*, 2009 DJDAR 13445 ("*Williams*") (agency, whose broker employee touted expertise in niche market, cannot later deny responsibility for failing to obtain appropriate coverage).

By way of background, many insurers market their products through agents, some of whom are exclusive or captive to one company. Other insurers use independent agents or brokers. Although all "sell" insurance products and predictably earn a commission from the insurer, there are major differences in function and authority.

An "insurance agent" is "a person authorized, by and on behalf of an insurer, to transact all classes of insurance other than life insurance." Insurance Code Section 31. An agent therefore invariably represents the insurer. *Marsh & McLennan of Calif., Inc. v. City of Los Angeles* (1976) 62 Cal. App.3d 108.

In contrast, an "insurance broker" is "a person who, for compensation and on behalf of another person, transacts insurance other than life with, but not on behalf of, an insurer." Insurance Code Section 33. Consequently, a broker usually acts on behalf of the policyholder. *Rios v. Scottsdale Ins. Co.* (2004) 119 Cal.App.4th 1020.

As noted above, decisions of a while ago usually favored the broker. For instance in 1987, *Jones v. Grewe*, 189 Cal.App.3d 950 (2-1 vote), affirmed the sustaining of a demurrer. The issue: even though plaintiffs alleged the defendants had taken care of their "insurance needs" for 10 years, did defendants breach their duty to provide plaintiffs "with liability insurance sufficient to protect their personal assets?" As a matter of law, the court found no duty to locate in effect "complete liability protection."

Free v. Republic Ins. Co. (1995) 8 Cal.App.4th 1726, also evaluated the sustaining of a demurrer, based in part upon the holding in *Jones*. However, the *Free* court reversed, mainly due to factual determinations regarding the broker's purported representations; specifically, the broker may have negligently failed to disclose that the policy limit may not be currently sufficient.

Courts started to comment that more scrutiny would arise if the broker expressed a particular level of knowledge. See, e.g., *Kurtz, Richards, Wilson & Co. v. Insurance Communicators Marketing Corp.* (1992) 12 Cal.App.4th 1249 (although claiming expertise in health insurance, broker erroneously advised plan not subject to Medicare).

Furthermore, *Valentine v. Membrila Ins. Services, Inc.* (2004) 118 Cal.App.4th 462 suggested a broker could be negligent for not disclosing that the bartender insurance had a "broad assault and battery exclusion." But the presence of such a duty could turn upon the policyholder's level of sophistication, especially as in "the specialized area of commercial insurance, the client may be more knowledgeable than the broker."

What is the policyholder's duty to read the policy? *Clement v. Smith* (1995) 16 Cal.App.4th 39 opined: "Absent some notice or warning, an insured should be able to rely on a broker's representations of coverage without independently verifying the accuracy of those representations by examining the relevant policy provisions." That rule applied even if the representations were made in connection with an earlier-in-time policy. 16 Cal.App.4th at 46 ("In the absence of later disclaimers an insured can reasonably rely on prior coverage representations by his agent when he or she decides to renew an insurance policy").

So, what remedies are available? On unusual facts, *Valentine* hinted that, if a broker improperly failed to obtain coverage for defense expenditures, the policyholder might be able to recover the expenditures it actually incurred. 118 Cal.App.4th at 476. See also *Third Eye Blind, Inc. v. Near North Entertainment Ins. Services, LLC* (2005) 127 Cal.App.4th 1311 (possible recovery of attorney's fees in pursuing coverage).

Williams recently evaluated "the liability of an insurance agency for negligence in advising on, procuring and maintaining an insurance package for a new business venture that did not include workers compensation insurance." That dispute arose because an employee of the business (a Rhino Linings dealership) procured a sizeable judgment against the defendants, including the owners of that business.

Years before, Robyn Thaw had told John Williams, one of the owners, that due to her familiarity with Rhino Linings dealerships she could satisfy his "insurance needs." In turn, Williams requested Thaw to put together "whatever insurance was needed to operate the business."

Thaw testified she told Williams on the telephone that workers compensation insurance was mandatory in California, and would cost him an additional $6,204. Yet, he could buy it from someone other than her agency, Robert Driver. According to Thaw, Williams declined. So, the written proposal she sent to him did not include that insurance. Thaw assumed Williams would buy it elsewhere. Thaw, though, admitted that, throughout all of her contacts with Williams regarding workers compensation, she wrote no memorandum to file or a letter to Williams, nor did she make a record of any of her telephone calls with Williams or his wife.

Thaw faxed Williams a blank application form, indicating her package was "designed specifically for Rhino Linings dealers." He partially filled out that form, leaving blank the portion relating to workers compensation. Thaw thereafter selected a policy from Travelers. Williams briefly reviewed that policy, failing to notice the absence of workers compensation coverage.

At the time of the Travelers policy's expiration, Thaw had already gone to another agency, HRH. Still, she obtained a new policy for Williams with Hartford, which paid a commission to HRH. Not until Williams called Thaw to report the accident in question did he learn about the lack of workers compensation coverage.

After that accident, the injured plaintiff sued the business's owners and others. Hartford appointed defense counsel for those owners, paying all defense expenditures. After an adverse jury verdict, Hartford paid its $1 million limits; however, almost $6 million remained unpaid with respect to the judgment against the owners.

The owners' lawsuit asserted a negligence claim against Thaw's new agency, HRH, and her former employer, the Driver agency; the complaint sought damages in the amount of the outstanding judgment. After the Driver agency won a summary judgment, the claim against HRH proceeded to a bench trial.

In awarding all of the damages sought, the trial judge remarked that it "taxes credibility and plain common-sense expectation of business practice...that no written record of even minimum formality exists by agent Thaw documenting considerations, discussions, advisement or plaintiffs' alleged declarations relating to workers compensation insurance."

Noting that "questions of fault and comparative fault, including breach of duty, causation and allocation of fault, are ... quintessentially matters of fact," *Williams* affirmed the trial judge's findings. The rationale: because the preponderance of the evidence established that Thaw, while employed by HRH, was negligent "as she failed to use the skill and care that a reasonably careful insurance professional would have used in similar circumstances."

HRH stressed Williams' failure to read the policies. Such a failure, though, does not mean Williams' reliance on Thaw's "advice unjustifiable as a matter of law." And, there is no case law authority for the "proposition that an insured's failure to read his policy is negligence as a matter of law."

The *Williams* court commented upon several decisions in this area. Specifically, the court quoted from *Fitzpatrick v. Hayes* (1997) 57 Cal.App.4th 916, 927: "The rule [favoring the defendant] changes, however, when - but only when - one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided..., (b) there is a request or inquiry by the insured for a particular type or extent of coverage..., or (c) the agent assumes an additional duty by either express agreement or by 'holding himself out' as having expertise in a given field of insurance being sought by the insured...." (Note this quote, like some decisions in this area, use "agent" when "broker" would seem more accurate; of course, in *Williams*, the key defendant was HRH, the insurance agency and Thaw's employer; still, with respect to Williams and his business, Thaw acted a broker.)

As observed by the *Williams* court, the findings of the trial judge - most meaningfully his rejection of Thaw's testimony - basically dictated the appellate result. Furthermore, a few of HRH's contentions (e.g., Williams was negligent as a matter of law) flew in the face of existing case law (see, e.g., *Clement*, discussed above). In short, the ultimate resolution in *Williams* was predictable.

In any event, *Williams*, as well as other case law mentioned in the preceding paragraphs, demonstrate the "challenge" that brokers and their counsel now face. In particular, such a challenge is exacerbated when the policyholder asserts the broker in effect "touted" special expertise.

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