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THIS ARTICLE, WHICH OFFERS A LESSON TO ALL WHO PRACTICE IN THE PROPERTY CASUALTY INDUSTRY, WAS PENNED BY ED GARSON. MR. GARSON IS A PARTNER AT WILSON ELSER, A SAN FRANCISCO LAW FIRM. ED SPECIALIZES IN COMPLEX LITIGATION INVOLVING PROFESSIONAL LIABILITY.

If It's Not In Writing, It Doesn't Exist

Williams v. HRH, Cal. Court of Appeal, September 9, 2009

This recent California case affirmed a $5.8 million judgment against a broker, but the real lesson of the case is buried deep in its text, and is, simply, "If it's not in writing, it doesn't exist."

In general, a broker is only required to use reasonable care in obtaining the insurance that the client requests, but a broker who holds herself out as "having expertise in a given field of insurance," will assume additional duties. No surprise there.

In 1999, the commercial customers started a dealership for a Rhino spray-on lining for pickup trucks. Rhino referred them to its "go-to" insurance broker, who had designed a special coverage package. The coverage was renewed in 2000, and again in 2001 with a different carrier.

In July, 2001, a fire broke out at the customers' Santa Fe Springs operation, severely burning an employee. The customers then discovered they had no workers compensation coverage. The injured employee sued and obtained a verdict of $11.3 million. Although their liability insurer provided a defense and paid its policy limits, the customers were left with an uncovered loss of $5.8 million, and sued the broker.

The broker admitted that she was aware that workers compensation insurance is mandated in California. There was no dispute that she selected the coverages requested in the application form, which she submitted to the carriers. From her point of view there was no mistake. She testified that she had priced the workers compensation coverage and spoken with the customers, who thought the price was too expensive, and would look elsewhere to buy comp coverage. The broker processed the remaining coverages, the premiums were paid, and she forwarded them the policies.

Unfortunately, the story does not end here. The customers' recollection was, well, different. They testified that they never rejected the workers compensation coverage, and never said they would obtain it from another broker. It was up to the judge to decide who was telling the truth. The judge looked for corroborating written evidence, but there was none on either side.

The broker could produce no confirming letter, no email or database entry, not even handwritten notes of a telephone conversation corroborating the customers' instructions to place all the coverages except the workers comp. Finding that the onus should fall on the professional to confirm her instructions, the judge found in the customer's favor, and was upheld on appeal. The moral of the story: document your file.