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Defending Broker-Liability Claims Based on a Lack of Communication: An Overview of a Developing Defense in Louisiana

Claims against wholesale insurance brokers for failure to procure proper coverage are not uncommon in Louisiana. In fact, such allegations are almost a "natural" off-shoot of first-party coverage disputes between insureds, insurance companies and insurance agents in the property insurance context. Over the last few years, though, a new defense to broker liability claims has developed in Louisiana. The purpose of this article is to analyze some of the cases that have addressed this defense.

In general terms, these cases involve a factual scenario where an insured hired an insurance agent to procure insurance coverage, and the agent then consulted a broker to assist in identifying and obtaining an appropriate policy. Under such facts, a traditional broker typically has no direct communication with the insured at all, dealing instead only with the agent. The question then becomes whether the insurance broker can be liable to the insured for failure to procure/produce proper coverage without any direct communication or contractual relationship with the insured. Several cases have responded with a clear "no."

In *T.J.'s Sports Bar, Inc. v. Scottsdale Ins. Co.*,[1] for example, a Louisiana federal district court dismissed an insured's Hurricane Katrina claims against a broker because there was no evidence of direct communication between the insured and the broker. There, Hurricane Katrina damaged the insured's sports bar. Following the insurer's denial of coverage, the insured sued the broker, alleging it was negligent in procuring the insurance, misrepresented the scope of the policy's coverage, and failed to advise the insured that it was under-insured.[2] However, finding that the broker was only a wholesale broker that had no direct communication with the insured, the court dismissed all claims against the broker:

> Given the legal duties of agents outlined in recent Orders of all Sections of this Court, the Court finds that Burns & Wilcox [*i.e.*, the broker] has met its burden in proving that T.J.'s has no possibility of recovery against it under Louisiana state law.[3]

The same result can be seen in *Nguyen v. Scottsdale Ins. Co.*,[4] where the same court dismissed another insured's claims against a broker following Hurricane Katrina. There, the insured obtained insurance through a retail insurance agent who had, in turn, approached the broker-defendant.[5] The plaintiff claimed the broker was liable for its Hurricane Katrina losses because it had made misrepresentations regarding the policy and failed to procure adequate insurance.[6] The court disagreed. In granting the broker's Motion to Dismiss, the court stated:

> Various sections of this Court have addressed these arguments

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in post-Katrina cases and have found that because wholesale brokers do not communicate with insurance customers, plaintiffs have no possibility of recovery against them under Louisiana state law…. Moreover, two sections have reached the same conclusion with respect to Burns & Wilcox [*i.e.*, the broker] in almost identical cases….[7]

Other Louisiana cases which reached the same conclusion under similar circumstances include:

1) *Bowman v. Lexington Ins. Co.*:

> …Hull [the wholesale broker] has shown through sworn testimony that the nature of its business precludes any communication between it and customers. Given the legal duties of agents outlined in recent Orders of all Sections of this Court, the Court finds that Hull has met its burden in proving that the Bowmans [the insureds] have no possibility of recovery against it under Louisiana state law.[8]

2) *Teamer v. Lexington Ins. Co.*:

> …[T]he record establishes that Hull [the wholesale broker] has no communication between it and Lexington [the insurer] customers. Given the legal duties of agents outlined in recent orders of all Sections of this Court, the Court finds that Hull has met its burden in proving that Teamer [the insured] has no possibility of recovery against it under Louisiana state law.[9]

3) *Belmont Commons, LLC v. Axis Surplus Ins. Co.*:

> Many sections in this District have reviewed the liability question presented here: whether the intermediary broker who does not have a direct relationship and contact with the insured can be held liable under Louisiana law for breach of a fiduciary duty. Those courts hold no duty exists.[10]

A similar holding can also be seen in *Cajun Kitchen of Plaquemines, Inc. v. Scottsdale Ins. Co., et. al.*[11]

The evolution of this defense is still in its early stages overall, and close scrutiny of the pro-defense cases reveals some potential limitations on the defense's applicability. Specifically, all of the pro-defense cases were issued by the Louisiana Federal Eastern District Court. All are unpublished decisions. All involve only Hurricane Katrina claims. Further, the underlying concept of these rulings appears to be that, without evidence of direct communication or a contract between the insured and the broker, the only legal relationship that exists with the broker is between the broker and insurance agent. This implies that while the insured has no cause of action against a traditional, intermediary "broker," the agent may.

With these issues in mind, it is worth noting that the pro-defense cases were issued by four different judges (i.e., Barbier, Feldman, Fallon and Lemelle), not just one. This defense, then, appears to be thoroughly engrained in the Louisiana Eastern District. This makes it very likely the defense will at least be addressed, if not wholly adopted, by other Louisiana courts in the future.

Against the backdrop of these decisions are two pre-Katrina cases, *Ronald C. Durham v. McFarland, et. al.*[12] and *Alex M. LeGros v. Great American Ins. Co., et. al.*,[13] which seem to go in the opposite direction. Again, these two cases were decided before any of the pro-defense holdings cited above, which means neither of them directly repudiate those decisions.

While *Durham* does refer to a Louisiana Supreme Court decision in stating that a broker is not a mere "order taker" and can be liable to an insured, the "broker" in that case was communicating directly with the insured. Further, the ruling seems to use the terms "broker" and "agent" interchangeably, casting doubt on the decision's applicability in light of the distinction between wholesale brokers and insurance agents being considered here.

As to *LeGros*, that case involved the denial of a supervisory writ, and it does not appear from the holding that the broker ever asserted lack of communication as a defense. Instead, the broker simply argued it had no duty to the insured as a matter of law. The court responded by finding this argument was an improper topic for summary judgment because the presence or absence of an agency relationship and whether a breach of duty exists are factual questions.

Overall, it is still too soon to anticipate what limitations may ultimately develop with respect to this defense's application. At a minimum, though, there is repeated and consistent Louisiana case law supporting its viability. This means that lack of direct communication is a defense that should now be considered as part of a broker's defensive strategy when facing these types of claims from an insured in Louisiana.

1 2007 WL 196989 (E.D.La.)(unpublished).
2 Id at *1-*2.
3 Id at *2 (citing Frischhertz v. Lexington Ins. Co., 2006 WL 3228385 (E.D.La.)).
4 2007 WL 647307 (E.D.La.)(unpublished).
5 Id at *1 and n.1.
6 Id at *1.
7 Id at *2 (internal citations omitted).
8 2006 WL 3733839, *2 (E.D.La.)(unpublished).
9 2007 WL 609738, *1 (E.D.La.)(unpublished).
10 2008 WL 2945926, *1 (E.D.La.)(unpublished)(citing cases).
11 2007 WL 60999 (E.D.La.)(unpublished).
12 527 So.2d 403 (La.App. 4th Cir. 1988).
13 02-1485 (La.App. 3 Cir. 11/12/03); 865 So.2d 792.