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North America

Insurance Broker Liability for Failure to Procure Adequate Insurance and the Duty of the Insured to Read the Policy

Policyholders hire brokers to reduce the risk that inadequate insurance will be procured. When an insurance claim is denied or a policy's limit of liability is insufficient, the policyholder will look to the broker's actions to determine liability. When an insurance broker promises, or gives some affirmative assurance, that he will procure a policy of insurance under such circumstances as to lull the insured into the belief that such insurance has been affected, the law will impose upon the broker the obligation to perform the duty which he has assumed.[1] Failure to perform this duty may result in liability under a number of theories including breach of contract and professional negligence.[2]

In response to an insured's claim that is premised on a broker's failure to procure adequate insurance, the broker may raise the defense of the insured's negligence in failing to read the policy. However, this defense is not always successful.

Insurance Broker Can be Liable to Insured Who Failed to Read Policy

The majority of courts have held that insurance brokers cannot avoid liability for failure to procure the correct insurance by claiming that the insureds have a duty to read their insurance policies.[3] In other words, the comparative fault defense is unavailable to an insurance broker who asserts that the client failed to read his or her insurance policy.

In *Morrison v. Allen*,[4] the defendant issued a life insurance policy which was signed but not read by the plaintiffs. Two months after the policy was issued Mr. Morrison died as a result of injuries from a car accident. After making a claim for life insurance, Mrs. Morrison received notice that the claim was denied because the application was improperly completed with respect to information regarding a driver license suspension. Mrs. Morrison filed a claim alleging that the agents negligently failed to properly procure the insurance. The agent countered with the fact that the Morrisons did not read the application.

The Tennessee Supreme Court addressed this defense stating that "[a]gents employed…for their expertise…may not claim any greater duty on their clients' part to anticipate and rectify their errors." The Court would not allow the agents to shield their own negligence with the fact that their clients didn't catch their mistakes.

Similarly, in *Aden v. Fortsh*,[5] the New Jersey Supreme Court 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."[6] However, the court acknowledged that the 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

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to perform according to the standard of care of the profession."[7] 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.[8]

Insured's Failure to Read May Amount to Comparative Negligence

Some jurisdictions have recognized that while an insured's failure to read a policy does not operate as a bar to relief, in certain situations, it may amount to contributory or comparative negligence.[9] The issue becomes whether there is evidence from which a jury could find that, under the relevant circumstances, it was unreasonable for the insureds not to have read the policy.

In *Fillinger v. Northwestern Agency, Inc. of Great Falls*,[10] the defendant denied coverage for an accident that occurred during a hunting trip guided by the insured. The insured sued the broker for failure to procure adequate insurance. The court viewed the issue raised as "not being whether the insureds had an absolute duty to read the policy, but rather was there evidence from which the jury could have found that, in the circumstances of this case, it was not unreasonable for the insureds not to read the policy and whether the insureds acted reasonably in relying upon any representations made by their agent."[11] The court quoted *Fiorentino v. Travelers Ins. Co.*[12]:

> 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. The insured does not have an absolute duty to read the policy, but rather only the duty to act reasonably under the circumstances. The circumstances vary with the facts of each case, and depend on the relationship between the agent and the insured.

The Montana Supreme Court held that while insureds do not have an "absolute" duty to read their policy, their failure to do so may amount to contributory negligence.

Insurance Broker Is Not Liable to Insured Who Failed to Read Policy

In a minority of jurisdictions, an insured's duty to read an insurance policy is absolute and may protect an insurance broker from a claim for failure to procure adequate insurance.[13] For example, in *MacIntyre & Edwards v. Rich*,[14] the insured, Scott and Margaret Rich, requested that insurance agency MacIntyre & Edwards, Inc., place their homeowner's coverage with Glen Falls Insurance Company. Per Scott Rich's request, the policy provided for an unlimited guaranteed replacement cost. In 2000, Glen Falls notified MacIntyre & Edwards that renewal policies for 2001 would have limits or caps on coverage. For the Riches, this meant that they would be insured for 125 percent of the total amount of insurance available for the dwelling, contents and other structures at the location. The agent received the notice but did not review it and did not relay the information to the Riches. The Riches admittedly did not read the renewal documents.

In 2001, the property was destroyed by fire and the Riches filed a lawsuit against MacIntyre & Edwards arguing that the agency failed to inform them of the change in coverage and that as a result of the agency's failure to inform the Riches of the changes in the renewal policy, the Riches suffered damages in excess of $250,000. The court held that the Riches had a duty to read their insurance policy and barred recovery against the agent noting that the change to the policy was readily apparent and if the Riches had reviewed the documents they would have been aware that they did not have the coverage they had requested.

However, it should be noted that some of the minority jurisdictions recognize an exception to this defense. The court in *Canales v. Wilson Southland Ins. Agency*[15] held that while generally, an insured is obligated to examine an insurance policy, the rule does not apply when (1) the broker has held himself out as an expert and the insured has reasonably relied on the broker's expertise to procure the requisite insurance or (2) there is a "special relationship" of trust which would prevent or excuse the insured of his duty to exercise ordinary diligence.[16] P

1 *web2.westlaw.com/find/default.wl?mt=Pennsylvania&db=BC-COMPANYSRBD&rs=WLW13.04&docname=CIK(LE10237295)&rp=%2ffind%2fdefault.wl&findtype=l&lvbp=T&vr=2.0&fn=_top&sv=Split&returnto=BusinessNameReturnTo&pbc=A03DD158&utid=1" \t "_top" Avondale Cut Rate, Inc. v. Associated Excess Underwriters, Inc.*, 406 Pa. 493, 178 A.2d 758 (Pa. 1962)

2 *Saunders v. Cariss*, 224 Cal.App.3d 905, 908-09, 274 Cal.Rptr. 186 (1990)

3 *Aden v.Fortsh*, 169 N.J. 64, 776 A.2d 792 (2001); *Williams v. Hilb, Rogal & Hobbs, Ins. Servs. Of Calif.*, 177 Cal.App.4th 624, 98 Cal.Rptr.3d 910 (2009)

4 338 S.W.3d 417 (Tenn. 2011)

5 169 N.J. 64, 776 A.2d 792

6 *Id.* at 69-70, 776 A.2d 792

7 *Id.* at 77, 776 A.2d 792.

8 *Id.*

9 *American Bldg. Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 979 N.E.2d 1181 (N.Y. 2012.); *Fiorentino v. Travelers Ins. Co.*, 448 F.Supp. 1364 (E.D.Pa.1978); *Floral Consultants, Ltd. v. Hanover Ins. Co*, (Ill.1984), 128 Ill.App.3d 173, 83 Ill.Dec. 401, 470 N.E.2d 527; *Kirk v. R. Stanford Web Agency, Inc.* (N.C.App.1985), 75 N.C.App. 148, 330 S.E.2d 262; *Martini v. Beaverton Ins. Agency, Inc.*, 314 Or. 200, 838 P.2d 1061, 1067 (1992).

10 *Fillinger v. Northwestern Agency, Inc. of Great Falls*, 283 Mont. 71, 938 P.2d 1347 (1999).

11 Id. at 79, 938 P.2d at 1352.

12 448 F.Supp. 1364 (E.D.Pa.1978)

13 *Westchester Specialty Ins. Serv., Inc. v. U.S. Fire Ins. Co.*, 119 F.3d 1505(11th Cir. 1997); *Dahlke v. John F. Zimmer Ins. Agency*, 252 Neb. 596, 567 N.W. 2d 548 (1997).

14 599 S.E.2d 15 (Ga.App. 2004)

15 583 S.E.2d 203 (Ga. App. 2003)

16 Id. at 204