Broker Liability in the Forefront

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When an insurer refuses to pay, the next place an insured frequently looks to cover a loss is to its broker.

The Massachusetts courts have recently opined on when this will and will not work.

In Perrault v. AIS Affinity Insurance Agency of New England, Inc., Mass. App. Ct. No. 17-P-1139 (2018), the Appeals Court refused to impose liability on a broker when coverage for settlement of legal malpractice claim against the insured attorney was denied by the insurer.

At the time of the legal representation of the client (in 2007) who eventually sued, the insured was a principal in the law firm of AG&M. That firm instructed Aon to provide malpractice coverage, which it did. The insured started his own law firm in 2009, and instructed Aon to obtain insurance for his new firm. At that time, the insured instructed Aon to cancel the AG&M coverage, and although offered, he did not purchase coverage for his prior acts. Instead he purchased new coverage, for malpractice beginning in 2010. When the client sued later in 2010, the claim was denied, because the prior policy for AG&M was cancelled and the new policy did not cover malpractice that occurred before 2010, so the insured turned to the broker, and claimed the broker should have advised him to purchase coverage for his prior acts. The Appeals Court recited established law that there is no duty on an agent to ensure that policies provide coverage adequate for the insured's needs, unless the insured could demonstrate circumstances "special circumstances." If not, the insured is out of luck.

The court pointed to criteria for determining when "special circumstances" could be found, including (i) the length of the relationship, (ii) the complexity and comprehensiveness of the coverages, (iii) the frequency of the contact, and (iv) the extent of the reliance on the agent's advice.

Applying these tests to a lawyer seeking coverage for malpractice that occurred before the policy became effective and who did not otherwise appear to have contact with the agent about other coverages, was sufficient to convince the Appeals Court that the lawyer had to sleep in the bed he made for himself and could not look to the broker to bail him out of his bad decisions.

Perrault is consistent with the notion that hard facts make for bad law. An even more recent decision and more sympathetic case reaches a different result. Although not a classic case of broker liability, because only the insurer was sued, the recent Appeals Court decision in Brown v. SBLI, Mass. App. Ct. No. 16-P-1106 (2018) is instructive on when agents or brokers can be held liable without a demonstration of "special circumstance" creating a duty. There, the insured had a term life insurance policy with SBLI. As the term was expiring and a renewal would be dramatically more expensive, the sales agent called the insured's spouse and recommended purchasing a new policy rather than triggering an option in the expiring policy to continue coverage. The insured let his old coverage lapse, and his application for a new policy was denied. The insured died uninsured soon thereafter, and the spouse brought suit under contract tort and c. 93A theories. The trial court found the two year limitation on suits valid and dismissed the contract claims as time-barred. The trial court also dismissed the tort-based claims on the basis that the insured should have known to maintain the old policy in force until a new policy issued. The Appeals Court reversed this aspect of the case, finding that the failure to disclose to the insured the importance of the option of reinstatement of the old policy could lead a jury to find negligence or unfair or deceptive acts.