Insurance Agent/Broker Errors and Omissions Claims: 2018 Case Law Update

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Errors and omissions claim trends involving insurance producers appear to reflect increases, due perhaps to recovery expansion by courts through pro-policyholder leanings specifically, or merely as a result of increased litigiousness by insurance customers generally. Surveyed here is a summary of recent case law around the United States relating to the insurance agent's or broker's duties to customers and sometimes others, and defenses to the claims that may be available.

Most states view professional liability claims against insurance producers through the law lens of professional negligence or breach of contract. But customer or policyholder counsel may also assert claims based upon breach of fiduciary duty, negligent or intentional misrepresentation, and breach of state statutory deceptive practices acts (which may also allow for recovery of attorneys' fees). Producers may also face exposures to insurers from indemnity clauses contained in agency agreements, when the insurers are vicariously liable for the agent's conduct. General principles commonly seen recently in this litigation are as follows.

Agent or Broker?

In some jurisdictions, the scope of an agent's or broker's liability depends upon whether he or she is an insurance agent or an insurance broker. The distinction may have legal significance.

A party who negotiates an insurance contract to cover someone else's risk is acting as an agent for either the insured or the insurer. Depending on whose interests the "insurance agent" is representing, he or she may be a "broker" or an "agent." A critical distinction exists. A representative of the insured is known as an "insurance broker." As a general rule, a broker is the agent of the insured and not the insurer. As such, the insurer is not liable for the broker's tortious or negligent conduct. A broker represents the insured by acting as an intermediary between the insured and insurer, soliciting insurance from the public under no employment from any special company and, upon securing an order, places it with a company selected by the insured, or if the insured has no preference, with a company selected by the broker. In contrast, an "insurance agent" represents an insurer under an employment agreement with the insurance company. Unlike the acts of a broker, acts of an insurance agent are imputable to the insurer. A person may be an agent as well as a broker, and may at different times act in different capacities, sometimes representing the insurance applicant and at other times acting on behalf of the insurance company. Whether an insurance intermediary is an agent of the insured or the insurer is fact sensitive and includes consideration of the facts and circumstances of the case, the relation of the

parties, their actions, their usual course of dealing, any instructions given to the person by the company, the conduct of the parties generally, and the nature of the transaction. *Restorative Dentistry v. Laven Ins. Agency,* 999 N.E.2d 922, 935 (Ind. App. 2013), *accord Accident Fund Ins. Co. v. Custom Mech. Const. Inc.*, 2018 WL 419988 *7 (S.D. Ind. Jan. 16, 2018). The Pennsylvania Supreme Court agrees that an insurance broker is generally considered the agent of the insured when the insured employs a broker to choose an insurer. *Dolan v. PHL Variable Ins. Co.,* 2018 WL 1696650 *5 (M.D. Pa. Apr. 6, 2018) (adding a broker will likely be considered an agent of the insurer if there is evidence that the broker had the insurer's "apparent, if not actual authority").

General Duties

Insurance agents and brokers have been held liable to insureds or applicants for insurance on a number of theories including breach of contract and professional negligence. Some of the cases arise in the context of an agent who fails to obtain insurance for a client as promised. In other cases, the agent obtains insurance but fails to obtain certain requested coverage, or obtains the requested coverage in the wrong amount. In any of these situations, contractual liability of the agent can be at least theoretically premised on the agent's breach of an oral agreement to obtain insurance as requested by the client. *Hydro-Mill v. Hayward, Tilton and Rolapp,* 10 Cal. Rptr. 3d 582, 589 (Cal. App. 2004). An insurance agent may also be obligated to procure insurance by common law duty. An insurance agent who fails to procure insurance may be liable for breach of contract or negligence. *Espenscheid Transp. Corp. v. Fleetwood Srvs, Inc.*, 2018 UT 32 (Utah 2018).

Under Pennsylvania law, an insurance agent owes an insured a duty to obtain coverage that a reasonable and prudent professional insurance agent would have obtained under the same circumstances. *Elican v. Allstate Ins. Co.,* 2017 WL 6525781 *5 (E.D. Pa. 2017) (adding also that when an insurer issues a policy that is different from what the insured requested and paid for, the insurer has a duty to advise the insured of the difference between the policy and what was requested). "If, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal." *Crossroads Convenience, LLC v. First Cas. Ins. Grp., Inc.*, 2018 WL 2967265 *7 (D.S.C. June 13, 2018); *accord Bainum v. Lincoln Nat'l Life Ins. Co.,* 2018 WL 1505495 *2 (W.D. Ark. Mar. 27, 2018) (ruling that in Arkansas, "an agent may be negligent for failing to give the insured notice of an impending cancellation of a policy"). Conversations between an insurance agent and an insured may impose upon the agent a duty to exercise reasonable care, skill and diligence in effecting insurance. *Lake Ridge New Tech Schools v. Bank of N.Y. Mellon,* 2018 WL 3633959 *4 (N.D. Ind. July 31, 2018).

An insurance agent has a duty to exercise good faith and reasonable diligence in obtaining insurance requested by a customer. *HP Mfg. Co.. v. Westfield Ins. Co.,* 2018 Ohio 2849 (July 19, 2018) (ruling that when jury found client caused intentional injury for which insurance would not be available, an E&O claim could not proceed as a matter of law). In Minnesota, an insurer has a duty to exercise the skill and care that a "reasonably prudent person engaged in the insurance business [would] use under similar circumstances." Absent an agreement to the contrary, the scope of this duty is limited to acting in good faith and following the insured's instructions. Thus, an insurer "is under no affirmative duty to take other actions on behalf of the client if the typical principal-agency relationship exists." *AgCountry Farm Credit Srvs. v. Elbert,* 2018 WL 2090617

(Minn. App. May 7, 2018) (affirming summary judgment for the agent when the insured failed to review the coverage and discern a tract of land was missing from the policy).

In Illinois an agent has a duty to exercise ordinary care and skill in renewing, procuring, binding, or placing coverage requested by the insured or proposed insured. However, that duty arises only after the insured makes a specific request for coverage. *Beeks v. American Fam. Ins. Co.,* 2018 WL 2298858 *5 (C.D. Ill. May 21, 2018). But if an insurance agent acts so as to induce detrimental reliance by the proposed insured, the agent thereby undertakes an individual duty not to betray that reliance by his or her subsequent acts. *MG Skinner v. Norman-Spencer Agy.,* 845 F. 3d 313, 320 (7th Cir. 2017). The Kentucky Supreme Court has held that an insurance agent ordinarily owes only a duty to his or her principal, the insurer. But an agent may assume a duty to the insured by implication. *Pugh v. AIG Prop. Cas. Co.,* 2018 WL 1533014 *2 (E.D. Ky. Mar. 29, 2018) (finding no agent liability for the insurer's non-renewal when the agent's involvement occurred after the insurer sent the notice of non-renewal).

Some courts look to see if the agent or broker acted for the most part as an order taker, or whether the agent or broker took additional actions thereby increasing the duty owed. Under Kentucky law, if an insurer's agent assumes a duty to advise an insured, he or she does so either expressly or impliedly. An implied assumption of duty may be present when: (1) the insured pays the insurance agent consideration beyond a mere payment of the premium; (2) there is a course of dealing over an extended period of time which would put an objectively reasonable insurance agent on notice that his or her advice is being sought and relied on; or (3) the insured clearly makes a request for advice. *Baker v. Kentucky Farm Bureau,* 2018 WL 3814763 *3 (Ky. App. Aug. 10, 2018). Louisiana law does not recognize a duty owed by an insurance agent to spontaneously advise or procure any specific type or amount of insurance coverage for a client. Rather, the responsibility rests with the insured to read the policy and request the required coverage. However, in some instances an insurance agent can be held liable for failing to advise the client of recommended coverage. *Jackson v. QBE Specialty Ins. Co.,* 2018 WL 3408182 *8 (E.D. La. July 13, 2018) (recognizing law that an agent is not a mere order taker and can voluntarily assume obligations to the insured depending upon the case facts).

Many cases involve claims in which the customer asserts the agent agreed to provide "full coverage" or to provide the same coverage sold by the prior carrier. But courts are willing to scrutinize such claims as they are easy to assert but are filled with vagaries. The applicable standard of care does not require agents to undertake independent risk evaluation. "A request for `full coverage,' `the best policy,' or similar expressions do not [oblige an insurance agent] to determine the insured's full insurance needs, to advise the insured about coverage, or to use his discretion and expertise to determine what coverage the insured should purchase." *BNCCORP, Inc. v. HUB Intern. Ltd.,* 400 P.3d 157, 169 (Ariz. App. 2017). An insurance agent ordinarily assumes only those duties normally found in any agency relationship, duties which do not include the obligation to procure a policy affording the insured complete liability protection. *Koeppel v. John O. Bronson Co.,* 2017 WL 3446424 *4 (Cal. App. Aug. 11, 2017). Georgia law provides that, as a general rule,

> [A]n insurance agent who undertakes to procure a policy of insurance for the principal but negligently fails to do so may be held liable to the principal for any

> resulting loss. However, where the agent does procure the requested policy and the insured fails to read it to determine which particular risks are covered and which are excluded, the agent is thereby insulated from liability, even though he or she may have undertaken to obtain full coverage.

Bush v. AG South Farm Credit, 2018 WL 3134878 *5 (Ga. App. 2018). There are two exceptions to this rule. The first is the expert exception: when an agent holds himself or herself out as an expert in the field of insurance and "has undertaken to perform an additional service, such as determining the amount of insurance required, and the insured relies upon the agent to perform that service, the agent may be held liable for negligence in the selection of coverage even if the insured fails to examine the policy." The second is the special-relationship exception: an insured is excused of the duty to exercise ordinary diligence when there is evidence of a "special relationship of trust or other unusual circumstances." *Stillwell v. Allstate Ins. Co.,* 663 F. 3d 1329, 1333-1334 (11th Cir. 2011) (adding that where the agent does procure the requested policy and the insured fails to read it to determine which particular risks are covered and which are excluded, the agent is thereby insulated from liability, even though he or she may have undertaken to obtain "full coverage").

Some courts take a more conservative approach. While it may be good business for an insurance agent to make such suggestions, absent evidence that an insurance agent has agreed to provide advice or the insured was reasonably led by the agent to believe he would receive advice, the failure to volunteer information does not constitute either negligence or breach of contract for which an insurance agent must answer in damages. *Hansmeier v. Hansmeier,* 25 Neb. App. 742 (2018) (adding it would be an unreasonable burden to impose upon insurance agents a duty to anticipate what coverage an individual should have, absent the insured's requesting coverage in at least a general way). In Mississippi agents are under no affirmative duty to advise buyers regarding their coverage needs, because insureds are in a better position to make that assessment. *Emerald Coast Finest Produce Inc. v. Alterra American Ins. Co.,* 864 F.3d 394, 399 (5th Cir. 2017) (applying Mississippi law); *Fink v. Brown & Brown Program Ins. Srvs., Inc.,* 2018 WL 1744999 *2 (D. Ariz. Apr. 11, 2018) (recognizing "the general rule that `brokers have no [obligation] to advise insureds about the adequacy or appropriateness of the insurance coverage they purchase, or to inform them about optional coverage that might be available" but concluding a jury question was raised as to the duty).

Even California can tend to be more conservative. "[A]n insurance broker does not breach its duty to clients to procure the requested insurance policy unless `(a) the [broker] 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 [broker] 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.'" *Randle v. Farmers New World Life Ins. Co.,* 2018 WL 2276347 *4 (Cal. App. May 18, 2018) (noting also there was no evidence the broker misrepresented the terms of the policy, or expressly agreed to assume an additional duty to plaintiff, or held himself out to plaintiff as an expert in life insurance). Wisconsin has held that absent special circumstances an agent has no duty to advise an insured about potential gaps in coverage. *Olson v. Wisconsin Mut. Ins. Co.,* 2018 WL 4770898 *11 (Wis. App. Oct. 2, 2018).

It must be remembered that whether an agent or broker is liable does not end on the question whether a professional duty or a contract was breached. To establish liability, the customer must also prove that the agent or broker's conduct caused the loss. To establish what is known as proximate cause, plaintiffs must prove that the damage would have been covered by the policy that would have been in effect but for the negligence of the broker. *Richardson v. Wells Fargo Ins. Srvs. USA, Inc.*, 2017 WL 3172812 *3 (W.D. Wash. July 26, 2017).

Expert testimony establishing the agent's standard of care and breach ordinarily is required. But this is not so when the "common knowledge of layperson[s]" exception applies. *See, e.g., Estvold Oilfield Services, Inc. v. Hanover Ins. Co.*, 2018 WL 4101504 *9 (D.N.D. Aug. 28, 2018) (finding that errors in describing property to be insured and failure to secure coverage specifically requested did not require expert testimony on standard of care).

Fiduciary Duty?

Policyholders may attempt to cast the insurance producer as a fiduciary, or one having an enhanced duty of care to the customer, much like a trustee of a trust owes to a beneficiary. A few states will extend the law of fiduciary duty to insurance agents and brokers. Because of the complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies, the relationship between an insurance agent or broker and a client is often a fiduciary one in New Jersey. *See Loyle, LLC v. Greater New York Mut. Ins. Co.*, 2017 WL 3861289 *17 (N.J. App. Sept. 5, 2017). This is so because:

> Insurance intermediaries in this State must act in a fiduciary capacity to the client because of the increasing complexity of the insurance industry and the specialized knowledge required to understand all of its intricacies. The fiduciary relationship gives rise to a duty owed by the broker to the client "to exercise good faith and reasonable skill in advising insureds."

C.S. Osborne & Co. v. Charter Oak Fire Ins. Co., 2017 WL 1548796 *4-5 (N.J. App. May 1, 2017) (but finding there is no common law duty of a carrier or its agents to advise an insured concerning the possible need for higher policy limits upon renewal of the policy); *accord, Northeast Builders Supply & Home Centers LLC v. Member Ins. Agency, Inc.*, 2018 WL 4688292 *6 (D. Conn. Sept. 28, 2018).

But more states hold to the contrary. There is no creation of a fiduciary duty between an insurance agent and an insured, even when the insured relies on the advice of the agent selling the policy. Generally, "[t]he severity of the burdens and penalties integral to a fiduciary relationship should not apply to ordinary insurance policy transactions." *American Zurich Ins. Co. v. Guilbeaux*, 2018 WL 1661629 *4 (S.D. Miss. Apr. 5, 2018) (citing Mississippi law but recognizing Mississippi recognizes claims for negligent procurement of insurance). Pennsylvania declines to modify the law of fiduciary duty to encompass the particular pitfalls involved in the sale of insurance products by commissioned agents or financial advisors to less savvy customers. Absent evidence that a consumer of financial services cedes control over the decision to purchase, either explicitly or implicitly because of over-mastering or undue influence, no fiduciary relationship arises. *Yenchi v. Ameriprise Financial, Inc.*, 161 A. 3d 811, 824 (Pa. 2017). South Carolina has recognized a fiduciary duty only in limited circumstances, none of which include the relationship

between an insurer and an independent insurance agent. *Companion Prop. and Cas. Ins. Co. v. Wood*, 2017 WL 86030 *12 (D.S.C. Jan. 10, 2017).

As a general rule in Ohio, "the relationship between an insurance agent and his [or her] client is not a fiduciary relationship, but rather, an ordinary business relationship." *FDT Grp., LLC v. Guaraci,* 2017 Ohio 663 (App. 2017). A fiduciary relationship between a policyholder and an insurance agent exists under Ohio law only if they both mutually understood "that a special trust or confidence has been reposed." *First Nat'l Bank v. Transamerica Life Ins. Co.,* 2017 WL 2880854 *17 (W.D. Pa. July 6, 2017) (interpreting Ohio law). To demonstrate a fiduciary relationship, a plaintiff must show the existence of "a relationship of special trust over and above the typical insurer-insured relationship." *Owner's Management Co. v. Arthur J. Gallagher & Co.,* 2017 WL 5971697 *3 (N.D. Ohio Dec. 1, 2017).

Special Relationship

Virtually all states will find an enhanced duty, short of a fiduciary one, under what is known as the "special relationship" or "special circumstances" test. "A special relationship exists between the agent and insured if: '(1) the agent holds herself out as an insurance specialist and receives additional compensation for consulting and advice, or (2) there is a long-standing relationship, some type of interaction on the question of coverage, and the insured relied on the agent's expertise to the insured's detriment. "[I]n cases where the insured never consulted with the agent about the adequacy of coverage and the agent never gave any advice, courts have held that no special relationship exits." *He v. Norris,* 415 P.3d 1219, 1221 (Wash. App. 2018) (finding no special relationship could exist when no evidence showed the client asked the agents about the adequacy of their insurance). The *He* court noted the agent never received compensation or consideration from the insured for consultation or advice on issues involving coverage or policy limits, and never discussed liability coverage limits. Further, the insured did not ask the agent either to recommend higher or lower limits, or whether excess or umbrella coverage might be available, until after the accident. In such circumstances, a special relationship will not be shown. *Id.*, at 1224.

Factors creating special circumstances include (1) a prolonged business relationship; (2) the complexity and comprehensiveness of the customer's coverages; (3) the frequency of contact between customer and agent to attend to the customer's insurance needs; and (4) the extent to which a customer relies on the advice of the agent by reason of the complexity of the policies. *Perreault v. AIS Affinity Ins. Agy., Ins.,* 93 Mass. App. 673 (Aug. 2, 2018) (finding no special relationship where the relationship spanned merely three years and the insured's needs were perfunctory not complex).

In New York a special relationship may arise where (1) the agent receives compensation for consultation apart from payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on with the agents to attend to coverage details or to discuss claims. *Nicotera v. Allstate Ins. Co.,* 147 App. Div. 3d 1474, 1476 (N.Y. App. 2017). In Arkansas a special relationship between the agent and the insured may be evidenced by an established and ongoing relationship over a period of time, with the agent being actively involved in the client's business affairs and regularly giving advice and assistance in

maintaining proper coverage for the client. *J.B. Hunt Transp., Inc. v. American Int'l Grp., Inc.*, 2017 WL 1395506 *4 (W.D. Ark. Apr. 17, 2017).

Duty Owed to Third-Parties?

To whom does an agent's or broker's duty extend? Early on South Carolina recognized a duty owed by insurance agents to third parties, if the duty originates in the agent's contractual relationship with the insured-client. *See Barker v. Sauls*, 289 S.C. 121, 122, 345 S.E.2d 244 (1986). But agents have been held to have no duty to potential clients. *See Glazer v. UNUM Life Ins. Co.*, 2018 WL 3421325 *4 (E.D. Mo. July 13, 2018) (commenting that failure to procure claim cannot apply to potential clients). Obviously if an insurance agent is not acting as such in a transaction, he or she cannot owe duties to third parties not in privity to the agent. *See Galea v. Burgess*, 685 Fed. Appx. 561, 563 (9th Cir. 2017).

In general, the majority rule appears to be that insurance producers do not owe duties to strangers to the transaction. It is said that the duty of care owed by an insurance agent or broker is owed solely to the customer/insured, who retains the services to secure insurance on its behalf. *Conquest v. WMC Mortg. Corp.*, 247 F. Supp. 3d 618, 635 (E.D. Pa. Mar. 30, 2017). Where an insurance agent's negligence causes an insured to be without coverage, the agent cannot be held liable for damages sustained by an injured third party if the third party is not in privity with the agent and is not an intended beneficiary of the insurance contract. *Vestal v. Pontillo,* 158 App. Div. 3d 1036 (N.Y. 2018) (but ruling a life insurance beneficiary has standing to sue for agent E&O on intended beneficiary grounds).

In New York, an insurance agent or broker owes no duty to a property owner or contractor that was supposed to be named as an additional insured by a subcontractor, regardless of whether the broker acted recklessly. A broker's duty is to its customer and not to additional insureds. *Mosqueda v. Aristin Dev. Grp.*, 2018 N.Y. Slip Op 31715 (Mar. 26, 2018). In Indiana an agent will not be found to owe a duty to third parties where the agent made no misrepresentations to the insured in the process of procuring insurance, and where it was not foreseeable the insured would operate a vehicle in the manner involved in the case. *See ONB Ins. Grp., Inc. v. Estate of Megel,* 2018 WL 3558911 *8 (Ind. App. July 25, 2018).

Contributory Negligence of the Insured

When the claim asserted is based on negligence rather than breach of contract, the customer's negligence should also be placed into evidence in the case. *See, e.g., Brown v. State Farm Fire & Cas. Co.*, 2017 WL 492992 *7, *11 (N.D. Ala. Feb. 2, 2017) (finding that insured's contributory negligence in not reading policy prevents recovery on negligent procurement claim as a matter of law); *but see Holmes v. Sheppard*, 805 S.E.2d 371, 376 (N.C. App. 2017) (ruling failure to read the policy did not establish contributory negligence as a matter of law where the agent may have mislead the insured or put the insured off his or her guard). The insured has the duty to examine the policy, know the extent of its coverage, and notify the agent if the coverage is inadequate. *Rose v. Landen*, 2005 Ohio 1623 (App. 2005).

Some courts have held that an insured's failure to read the insurance policy precludes a negligent-procurement claim as a matter of law. Others have refused to hold that the insured's failure to read

the policy precludes a negligent-procurement claim as a matter of law and instead hold that the issue regarding the insured's failure to read the policy is properly submitted to a jury for a comparative-negligence analysis. *Robson v. Quentin E. Cadd Agency,* 179 Ohio App. 3d 298, 306 (2008). But while an insured has a duty to read his or her policy, an insured is not "bound to comprehend every term and condition in the policy." *Baker v. Rural Mut. Ins. Co.*, 2017 WI App. 71 (2017).

Insurer, Not Agent, Liability

Some courts evaluate whether an agent's liability can be foisted upon the insurer. *See, e.g., Pullen v. Transguard Ins. Co.*, 2018 WL 791151 *3 (C.D. Cal. Feb. 8, 2018) (noting that in California, when an insurance agent contracts in the insurer's name and does not exceed her authority, "the insurer is liable and not the agent"); *Walker v. American Nat'l Ins. Co.*, 2017 WL 3605222 *2 (N.D. Cal. Aug. 22, 2017) (holding agents in California cannot be sued when they are acting only within the scope of the agency). But West Virginia rules that the agent has a personal liability for errors and omissions, as does the insurer based upon the principal's vicarious liability for the agent's acts. *See Bible Baptist Church v. Brotherhood Mut. Ins. Co.,* 2018 WL 3650270 *3 (S.D. W. Va. Aug. 1, 2018). However, an insurer has no vicariously liability for the acts of an agency's subproducer when the agreement between the agency and the insurer prohibited the agency from delegating binding authority to the subproducer. *See Forrest v. Hawaiian & Gty. Co*., 2018 WL 437684 *7 (Cal. App. Sept. 14, 2018).

Damages

What is the measure of damages in insurance agent/broker E&O claims? It is well settled that a broker who negligently fails to procure a policy stands in the shoes of the insurer and is liable to the insured, with said liability being limited to that which would have been borne by the insurer had the policy been in force. *Tower Ins. Co. v. Artisan Silkscreen & Embroidery, Inc.,* 2017 NY Slip Op. 30046(U) (Jan. 11, 2017). The rule is known as the benefit of the bargain rule of compensatory damages in agent and broker claims. *See Schurmann v. Neau,* 624 N.W.2d 157 (Wis. App. 2000).

Florida case law – mirroring the general rule - provides that the measure of damages in a negligent procurement of insurance case is what would have been covered had the insurance been properly obtained. *Lexington Club Comm. Ass'n v. Love Madison, Inc.,* 2018 WL 3912070 *2 (Fla. App. Aug. 15, 2018). An insurance agent or broker who agrees to obtain insurance for another but negligently fails to do so is liable for the damage proximately caused by such negligence; the measure of damages is the amount that would have been due under the policy if it had been obtained by the agent or broker. *Hanson v. McCawley,* 2016 WL 7094134 *3 (Neb. App. Dec. 6, 2016) (rejecting claim as too vague that a request for "the best there is" or "full" coverage would satisfy the customer's burden of proof).

Ordinarily, in the absence of a contractual or statutory obligation, attorneys' fees may not be recovered by successful clients against their agents. *See, e.g., First Ala. Bank v. First State Ins. Co.,* 899 F. 2d 1045, 1070 (11th Cir. 1990).

Reviewed next are some statutory defenses that may apply in agent/broker cases.

Statute of Limitations

Every state passes legislation that bars claims after certain periods of time ("statutes of limitations") to achieve finality in dispute existence, and to prevent stale claims from being litigated when evidence and memories have faded. Several recent cases evaluate the availability of such statutes as a defense in A&B E&O claims. Applying the period of limitations is not difficult (is the claim barred after three years? Or six years?). The key focus is at what point does the time period begin to run or accrue? Does the claim accrue when the coverage is sold? When the problem is discovered? When some damage occurs?

Ohio focuses on when the policy was sold. *See LGR Realty, Inc. v. Frank & London Ins. Agency,* 2018 Ohio 334, (2018) (holding the limitations period accrues when the policy containing the claim-causing exclusion was sold; rejecting the delayed damages rule). New York agrees that a negligence claim against an insurance agent or broker does not accrue when the wrongdoing is discovered; it accrues when the act takes place. *Spinnato v. Unity of Omaha Life Ins. Co.*, 2018 WL 3038507 *4 (E.D.N.Y. June 19, 2018) (adding also that insurance agents have no continuing duty to advise, guide or direct a client to obtain additional coverage).

Other states also agree. In an action for negligence against an insurance agent, the three-year limitations period begins to run, absent concealment of the wrong, on the date that the negligent act was committed, rather than on the date it was discovered. *Commercial Credit Grp. Inc. v. Allianz Global Corp. & Specialty N.A.* 2018 WL 1575823 (E.D. Ark. Mar. 30, 2018) (interpreting Arkansas law); *Hill v. Hartness,* 536 S.W.3d 649, 652 (Ark. App. 2017) (referencing Arkansas occurrence rule); *see also Penn v. 1st Southern Ins. Srvs., Inc.,* 2018 WL 3468366 *7 (E.D. Va. July 18, 2018) (finding in the failure to procure insurance context the period begins to run when the duty is violated in some fixed manner, such as when a deficient policy is signed or placed).

But other states apply a "discovery rule" in which the statute of limitations begins to run when the insured knew or should have known of a defect in the policy. *See RVP, LLC v. Advantage Ins. Services, Inc.*, 82 N.E.3d 619, 626 (Ill. App. 2017). Others apply a "some damage" rule. For example, in Alabama the statute of limitations period for a negligent procurement claim begins when a loss that would trigger liability under the policy occurs and when the insurer notifies the insured that it will not honor the claim. *See Brawley v. Northwestern Mut. Life Ins. Co.,* 288 F. Supp. 3d 1277, 1294 (N.D. Ala. Dec. 21, 2017).

Affidavit of Merit

Some states, through "tort reform" processes, try to limit frivolous suits against insurance agents or brokers by requiring customers to have expert opinion support for their claim before suit may be brought. They may require the service of an Affidavit of Merit in conjunction with the service of suit papers that lays out the standard of care and breach presented by the facts of the case. The purpose of the Affidavit of Merit statute is to weed out frivolous lawsuits at an early stage and to allow meritorious cases to go forward by requiring a plaintiff in a malpractice case to make a threshold showing that the claims asserted are meritorious. *See New Hampshire Ins. Co. v. Diller,* 678 F. Supp. 2d 288, 307 (D.N.J. 2009) (finding the common knowledge exception to the AOM requirement did not apply because the agent's professional duty and breach required expert opinion

testimony). New Jersey law does not set a deadline in which an affidavit of merit must be filed in an insurance producer E&O case, but the customer should not delay in doing so. *See Hanover Ins. Co. v. Avalon Risk LLC,* 2018 WL 3384435 *2 (S.D.N.Y. July 10, 2018) (refusing to dismiss the case for delay in AOM service where the producer delayed filing the motion to dismiss).

Courts have recognized that not all lawsuits against licensed professionals require an AOM. Case law has applied a "common knowledge" exception to the AOM requirement in discrete situations where expert testimony is not needed to establish whether the defendants' "care, skill or knowledge . . . fell outside acceptable professional or occupational standards or treatment practices." *Ehrhardt v. Amguard Ins. Co.,* 2017 WL 6048119 *4 (N.J. App. Dec. 7, 2017) (agreeing the claim against the agent required expert opinion support and an AOM). The rationale for the common knowledge exception to the AOM requirement is that some errors or omissions are so clear that lay juries can discern the standard of care breach without expert opinion testimony.

Note, however, that in a special relationship case an AOM may not be necessary because such a claim may not require proof of a deviation from a professional standard of care. *See Triarsi v. BSC Grp. Services, LLC,* 27 A.3d 202, 210 (N.J. App. 2011).

Where both sides to the dispute present competing expert opinion testimony on the standard of care and breach, the case is not ordinarily amenable to summary disposition. *See, e.g., C.F.C.S. Investments, LP v. Transamerica Occidental Life Ins. Co.,* 2018 WL 3870084 (E.D. Mo. Aug. 15, 2018). In other words, the case requires a jury trial.

Website Evidence

Insurance sales people, being sales people, use words and sentences to advocate for the purchase of their products. Nowadays that advocacy often occurs through the producer's website, which typically is among the first things checked by customer attorneys when a potential claim is first introduced. A recent case focused on this type of evidence:

> Broker's claims handling webpage included the following representations: (1) "An insurance policy is a promise. It's a promise that someone will be there to assist when you've had an accident, experienced a loss or been sued"; (2) "Anyone can sell you an insurance policy. The true measure of your insurance agent is what happens when you report a claim"; (3) "We're there to be an advocate for our client throughout the claims process"; and (4) "At John O. Bronson Company, we keep our promises." Broker held itself out on a YouTube video as providing "personal care and service," and "attention to detail," in order to "recommend the right coverage." Broker had provided specialized treatment to plaintiff in 2008 by writing a letter to the adjuster handling plaintiff's 2007 claim. That letter explained that Monterey Insurance Agencies had handled plaintiff's gallery and exposition insurance needs for over 20 years, and that plaintiff was "one of [its] most important clients." The letter urged the claims adjuster to convince the insurer "to do something special" for plaintiff to assure his continued business.

Koeppel v. John O. Bronson Co., 2017 WL 3446424 *5 (Cal. App. Aug. 11, 2017).

Agency/Insurer Indemnification

Breach of contract and professional negligence claims against insurance agents and brokers frequently trigger consideration of the terms of the producer's agency agreement with the carrier. This is so because agency agreements often include indemnity clauses that require the agent to indemnify the carrier when the agent is sued for error or omission. (It is often the case the customer's attorney sues both the agent and the coverage-denying insurer in the lawsuit.) *See, e.g., Gemini Ins. Co. v. Pelican Gen. Ins. Agy, LLC,* 2018 WL 2728499 (June 6, 2018) (requiring agent who bound coverage on an unacceptable trucking risk to indemnify the insurer per the agency agreement). A trial may be required over whether the agent must indemnify the insurer if facts are disputed about the agent's alleged negligence or whether the agent's conduct caused the loss. *See Electric Ins. Co. v. Great Southern Fin. Corp.,* 2016 WL 1452338 (D. Mass. Apr. 13, 2016). In *Preferred Contractors Ins. Co. v. Sherman,* 2018 WL 3544855 (Pa. Super. July 24, 2018) the court ruled that under Pennsylvania law the economic loss doctrine bars indemnification claims by an insurer against the agent in negligence E&O cases. (The economic loss doctrine precludes recovery under a negligence theory for solely economic losses. Recovery in such cases requires proof of breach of contract or warranty.)

Going the other way, in New Jersey generally, so separate are the broker and the insurer that when the insured recovers against the broker, the broker may not obtain indemnification from the insurer. However, where a broker can establish that the insurer is negligent, the insurer owes a duty of contribution to the broker. *Loyle, LLC v. Greater N.Y. Mut. Ins. Co.,* 2017 WL 3861289 *18 (N.J. App. Sept. 5, 2017).

E&O Coverage

Finally, it is elementary that insurance producers need E&O insurance. Being experts in their professions, brokers and agents should seek the broadest E&O coverage possible. A California court recently held the agent's professional liability insurer had no duty to defend an agency from E&O claims arising from the agent's role in selling a tax avoidance product that triggered tax, because, per the policy, an exclusion required the actions of the agent to relate to a "covered product." *See Lindsey Financial, Inc. v. American Auto. Ins. Co.,* 2018 WL 2111979 (Cal. App. May 8, 2018).

Conclusion

Professional negligence claims against insurance producers are increasing in counts and severity. Traditional rules that tended to favor producers in such claims (the law emphasized the customer's duty to read the policy, and the producer's duty was merely to follow instructions) have largely given way to more expansive approaches tending to favor customers, and in some situations, third-parties. Enhanced duties based upon special relationship or fiduciary duty advocacy are often presented. Claim allegations may be fueled by marketing representations or puffery set out in agency websites. Securing early all electronic messaging and paper documentation of the agency-customer relationship is vital to claim defense because communications may contradict lawsuit allegations and show customer attentiveness to insurance details and instructions given to

producers. Such evidence typically favors the producer, buttressing its position in the "he-said/she-said" evidence confrontation that always is present. Securing able expert witness support on agency standard of care and compliance, preparing a defense on causation (i.e., the loss was not caused by the agent's conduct), and proof of customer insurance sophistication to prove customer negligence set the foundation for how these cases achieve defense verdicts.