Developments in Insurance Agent/Broker Professional Liability 2015: The Year in Review, Part I

by Peter J. Biging, Esq.

Introduction

In the latter part of 2013, and in 2014, enormously significant decisions in Indiana, Florida and New York were issued which dramatically altered the landscape—now and going forward—with respect to how courts will consider claims asserting the existence of a “duty to advise” based on allegations of facts purporting to evidence a “special relationship.” While the year 2015 was arguably not nearly so dynamic, there were still a number of rulings of interest. Of particular note were decisions regarding agent/broker liability to parties with whom they are not in privity, as well as decisions providing further explication as to when a duty to advise regarding coverage can arise. Other decisions of note addressed: when a fiduciary relationship has been created; whether there is a baseline duty to procure “adequate coverage”; applicability of the “duty to read” as a defense to coverage misrepresentation claims; and the continuing viability of the economic loss rule as a defense to agent/broker negligence claims.

Part one of this article, in this month’s volume of the PLUS Journal, will focus on the cases touching upon the increasing efforts by third-parties to the agent/broker-client relationship to pursue claims against the agent/broker when it turns out that insufficient insurance was purchased or is available to cover their injuries/claims. The article will also examine several interesting decisions concerning the duty to advise, including a decision which set out to answer the question of “whether an insurance broker may be deemed negligent when an insured’s policy excludes coverage that the insured never requested but later needed.”

Part two of this article, to be published in March’s volume of the PLUS Journal, will discuss a variety of issues, including: case decisions touching on when a fiduciary relationship has been created; the question of whether a duty exists as a general matter to obtain “adequate coverage”; the continuing applicability of the “duty to read” as a defense to coverage misrepresentation claims; and the continuing viability of the economic loss rule as a defense to agent/broker professional negligence claims.

Liability to Third Parties With Whom There is No Privity

A growing issue of concern in the area of insurance agent and broker E&O is the threat of liability to parties with whom they are not in privity, based on the allegation that they were understood to be the beneficiaries of the agent’sbroker’s work in placing coverage. The vast majority of the cases that have considered the issue have held that agents/brokers should generally not be deemed to owe a duty of care to anyone beyond the client for whom they were asked to procure coverage. But cases testing the boundaries in this regard keep cropping up, especially where the underlying facts are bad, and the beneficiaries of the absent/insufficient coverage engender sympathy. And the analytical framework through which the courts are approaching the issue continues to evolve.

A significant decision on this issue was rendered in 2015 by the Sixth Circuit Court of Appeals. In Johnson v. Doodson Ins. Brokerage, LLC, the Cleveland Indians hired National Pastime Sports to
Last month in the PLUS Journal, 2016 PLUS President Heather Fox discussed some of the priorities and objectives for PLUS in 2016, as well as highlighted some benefits that members may not be aware of, such as the free daily news feed and the archive of past conference educational sessions. PLUS will focus on these and other priorities in 2016 and continue to look for ways to enhance value from and create experiences with PLUS.

Let’s talk for a moment about the idea of an association “creating experiences.” These experiences are often one of the most compelling reasons people join and continue to belong to associations. Associations don’t just give members benefits; they also help members to create lasting, valuable, and meaningful memories. I love the quote from speaker Simon T. Bailey “[a]ssociations are more than just a product, service or membership offering. An association is a memory, a connection, and a collection of moments. Those moments create the glue that creates something amazing.” I entirely believe this, and I believe PLUS is a great example of how an association can successfully help members create memories and build a collection of moments throughout their careers. Undoubtedly these collections of moments with PLUS have created “something amazing”. And, in 2016 and beyond, PLUS is committed to continuing to help you create memories, build connections, and be part of “something amazing”.

I encourage you throughout this year to build your own collection of moments with PLUS. If you are new to PLUS, you can begin to build those connections and memories by attending a Symposium or the annual Conference, perhaps for the first time. Members rave about the connections they have made at past Conferences and often share stories about the wonderful memories of being “on-site.” Make it a point to build new connections and memories this November in Chicago. If you can’t make it to the Conference, I urge you to attend a local chapter event. Chapters in your area have numerous educational sessions, networking events, and social functions throughout the year. The relationships and memories you can make at these local PLUS events can last a lifetime and be very important to your business and your career.

Perhaps this is the year you get your RPLU designation and build a memorable experience by joining your peers at a special conferment ceremony at Conference. More than 2,000 industry professionals have earned the RPLU designation to date, and 2016 is the perfect time for you to become a member of this exclusive group.

There are also a number of opportunities to make moments and connections by being a speaker or panelist at a PLUS event. Many members have expressed to me what a tremendous experience it is to speak or be a panelist at a PLUS Conference, symposium, educational event, chapter meeting or webinar, and how it is often one of their fondest memories of being involved with PLUS. We are always looking for topic and speaker submissions for our events and webinars, so I encourage you to submit an idea today.

You may consider building memories by volunteering. PLUS has numerous committees, sub-committees, task forces, and chapter committees that provide volunteer opportunities. Additionally, one of the fondest memories I hear about from members is about their moving and often emotional experiences they have had when participating in Conference Cause or volunteering with a chapter charity fundraiser. PLUS members give thousands of dollars and hundreds of hours every year to help others while also building cherished memories.

So while PLUS certainly provides you with many tangible benefits and is a tremendous value, it also is here to help you build memories, connections, and creates a collection of moments throughout your career. And, by getting involved and being engaged you are part of creating something amazing. Something amazing for you, your peers, and your industry. If you want to know more about how you can start or add to your collection of moments with PLUS, I encourage you to call me or any member of the PLUS staff.
Known Unknowns: The Uncertain State of Religious Discrimination Claims in the Wake of EEOC v. Abercrombie & Fitch


In 2002, then-Defense Secretary Donald Rumsfeld famously categorized the possibilities of war into “known knowns,” “known unknowns,” and “unknown unknowns.” Rumsfeld’s formulation provides a pithy summary of the limits of risk assessment in nearly any endeavor. It goes without saying that in evaluating any risk, one must consider the facts on hand, those facts which are identifiably absent, as well as the likely existence of facts unavailable for consideration.

Employers wishing to avoid discrimination claims based on religious practices have recently been faced with uncertainties following the Supreme Court’s decision in Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores, Inc. It has long been well-understood that the federal civil rights laws prevent intentional discrimination based on a religious practice. As discussed in more detail below, however, Abercrombie requires employers to make reasonable accommodations for practices even where they merely suspect, though they do not know for sure, that those practices are motivated by a sincerely held religious belief. The Abercrombie majority reserved decision on whether an employer may be liable for discrimination if it does not even suspect that a practice is religious in nature.

This holding has potential consequences for all employers. Although religious discrimination cases have generally constituted only a small percentage of the EEOC’s total Charges of Discrimination in the past, enforcement is growing in this area. The total number of EEOC Charges for religious discrimination has increased by about 44% over the past ten years in absolute terms, while the total number of Charges has increased by only about 12%. Given the increasing diversity of religious groups in the U.S., commentators have predicted a further increase of similar lawsuits. Understanding the state of the law is crucial to resolving these claims before they are brought, especially in a world where employers may be held liable even if they did not receive clear notice of the religious practice.

The Recent Spotlight on Employers’ Obligations to Accommodate Religious Practices

A. EEOC v. Abercrombie & Fitch Stores, Inc.

The Equal Employment Opportunity Commission’s suit against Abercrombie & Fitch Stores generated considerable press owing primarily to the melting-pot image of a young Muslim woman in a hijab seeking a job at the Abercrombie chain, which sells apparel usually found on what Justice Alito termed “the mythical preppy.” But the case raises the specter of significant uncertainty for employers in how to treat religious practices which may raise tension with their established policies and practices.

In Abercrombie, Samantha Elauf, an applicant for a position in sales at the popular retail clothing chain, was denied the position based on the fact she regularly wears a headscarf, known as a hijab, as part of her religious practices as a Muslim. Elauf wore the hijab to her interview for the position. Though she received high marks, the store manager was unsure of what to do because the hijab conflicted with Abercrombie’s “look policy,” which called for a “classic East Coast collegiate style” and contained many restrictions, including prohibitions against wearing caps. The term “caps” was not defined in the policy. The store manager who interviewed Elauf did not know for certain that she had been wearing the hijab for religious purposes, and did not ask. The store manager later informed a district manager that she believed Elauf wore the headscarf for religious reasons, but did not know for sure; the district manager directed her not to hire Elauf because the headscarf conflicted with the “look policy.”

Therefore, while Abercrombie suspected that the hijab was worn as part of the applicant’s religious practices, it did not have “actual knowledge” of that fact.

The Equal Employment Opportunity Commission (“EEOC”) filed a lawsuit against Abercrombie, asserting it failed to accommodate the applicant’s religion by refusing to hire her in violation of Section 703 of Title VII of the Civil Rights Act of 1964. Section 703 makes it unlawful for employers to “fail or refuse to hire . . . any individual . . . because of such individual’s race, color, religion, sex, or national origin.” Section 701(j) of Title VII defines ‘religion’ to include all aspects of religious observance and practice, “unless the employer demonstrates that accommodation would result in undue hardship on the conduct of its business.” In other words, as Justice Alito’s concurrence in Abercrombie summarized: “[a]n employer may not take an adverse employment action against an applicant or employee because of any aspect of that individual’s religious observance or practice unless the employer demonstrates that it is unable to reasonably accommodate that observance or practice without undue hardship.”

After the U.S. District Court for the Northern District of Oklahoma granted summary judgment for the EEOC, Abercrombie appealed. The Tenth Circuit dismissed Elauf’s claim, holding that, in order to establish the second element of their prima facie case under Title VII’s religion-accommodation theory, a plaintiff must ordinarily establish that (s)he initially informed the employer that (s)he engages in a particular practice for religious reasons and that (s)he needs an accommodation for the practice. Because Elauf had not notified Abercrombie that she required an accommodation—i.e., an exemption from the “look policy”—for her religious practice of wearing a hijab, the Tenth Circuit reasoned, she could not satisfy this requirement.

The Supreme Court reversed. The Court, in a relatively brief majority opinion,

continued on page 12
Cyber-terrorism: What Will it Mean for Insurance?
By Hans Allnutt, Rhiannon Webster, Patrick Hill & Helen Nuttall

"If such exclusions are successfully applied in non-cyber insurance lines, this raises the question of whether the cyber insurance market is prepared to step in, and if so, whether it can do so with financial security."

David Cameron presented the National Security Strategy and Strategic Defence and Security Review (SDSR) to Parliament last month. He reported that the world is more dangerous and uncertain than five years ago and that a “full-spectrum approach” is required to counter threats that do not recognise national borders. The approach includes “offensive cyber” actions and it would seem that the cyber war, which is often mentioned but rarely seen, is now firmly established and underway.

The prospect of cyber-based terrorist attack is a modern reality. Speaking recently at GCHQ, Chancellor George Osborne said that while ISIL have not yet been able to use cyber attacks to kill, “we know they want [that capability], and are doing their best to build it…If our electricity supplier, or our air traffic control, or our hospitals were successfully attacked online, the impact could be measured not just in terms of economic damage but of lives lost”.

Whilst it is instinctively uncomfortable to turn to commercial considerations following such announcements and recent tragic terrorist acts, it is the stark reality that the insurance industry must constantly assess how it will respond to such events.

Insurance policies routinely exclude coverage for losses resulting from acts of war or terrorism. Cyber-attacks, particularly those involving non-state actors, raise questions of whether such incidents would fall within the scope of such exclusions.

Chancellor Osborne’s comments also raise the prospect of cyber-attacks causing damage outside the digital dimension. There are a number of market-wide exclusions (including those recently released by the LMA in November) which might be used to exclude losses from bodily injury, physical damage, pollution, or similar matters arising from a cyber-related incident. Notwithstanding the effectiveness of such exclusions, insurers must first overcome the commercial pressures against applying such exclusions.

If such exclusions are successfully applied in non-cyber insurance lines, this raises the question of whether the cyber insurance market is prepared to step in, and if so, whether it can do so with financial security. The issue is being debated and scrutinized. Lloyd’s is now assessing Managing Agents’ oversight of accumulation risk to cyber risks.

The implications are so great that certain insurance and political leaders have argued for the creation of a Government backed cyber reinsurance scheme. Such a scheme would be similar to Pool Re, which was created in 1993 to provide property insurance following terrorist attacks. Stephen Catlin, the deputy executive chairman at XL Catlin has raised his concern that cyber is “the most systemic risk that I’ve ever encountered in my insurance career” (Post, 4 December 2015).

Cyber terrorism is a genuine threat to businesses and governments globally. Whilst it represents a threat to the insurance market in that it will test the boundaries of existing coverage, it is also a huge opportunity for insurers to innovate in product design, pricing and underwriting. Whether the UK Government’s commitment to combating cyber terrorism should extend to providing a reinsurance backstop in the form of Cyber Re, looks set for further debate.

Be Published in the PLUS Journal
As a PLUS member you have tremendous insight on the hot topics in professional liability insurance. Why not share your knowledge by writing an article for the PLUS Journal?

If you have a topic you’re considering, or a full article you’d like to submit for consideration, please email Lance Helgerson at lhelgerson@plusweb.org.
Walking the Tightrope: The Delicate Balancing Act of Defending Low Limit Legal Malpractice Cases

By Vincent S. Green

Vincent S. Green heads the Professional Liability department of the Los Angeles office of Kaufman Dolovich & Voluck, LLP. His practice group specializes in defending professionals including lawyers, accountants and other financial professionals, real estate agents and brokers, and insurance agents and brokers. He may be reached at vgreen@kdvlaw.com.

What are the most difficult legal malpractice defense cases? They are not what you think. It is not the high exposure case or the overly involved client. Rather, it is the very low (usually $100,000) depleting limits policy cases.

A depleting limits policy means the cost of defense is deducted from the amount available to fight the case. The more vigorously an attorney defends the case, the less there is available to settle or try the case. This is especially tricky when there may not be enough money left on the policy to try the case to the end or to cover a damage award and the financial burden then falls on the attorney client.

These policies require hard decisions at the outset concerning discovery and motion practice. For example, how much pre-trial discovery can be done and yet still maintain enough money on the policy to cover a damage award. Likewise, should the policy be spent working up a summary judgment in the hopes of disposing of the case knowing that if it is unsuccessful, the client may be bare of coverage once the matter proceeds to trial. Also, once the policy is depleted, the attorney will need to arrange for the client to pay his or her fees.

We generally take the approach in these cases of focusing less on written discovery, while concentrating instead on critical witnesses’ depositions with a demand for production of documents. If the case is complex and documents are critical to uncover what occurred, this requires a hard conversation with the client explaining why the discovery is necessary and that he or she may be required to pay out of pocket for defense and damages. Filing a motion for summary judgment in these cases requires a higher prediction of success than a normal case. A dispositive motion can eat up a quarter, possibly more, of the available policy limit. The attorney client wants a very high degree of probability of prevailing before bringing the motion, and, of course, no guarantees can be made as to how the court will rule. Even if a motion for summary judgment only has a fifty-fifty chance of prevailing, it may still be worthwhile for leverage in settlement discussions. However, that option may not be available with these low limit policies.

The low limit policy can be ripe for an exaggerated policy limit demand by the plaintiff. If the plaintiff can pencil out damages greater than the policy limits and makes a demand for the policy, the plaintiff may try to create a wedge between the carrier and the policy holder. It is also the reason it may be prudent to make a very early settlement offer before significant discovery is conducted.

These cases require an early discussion with the client about available options as well as the client’s ability to pay fees and damages if the policy is depleted. Cases in which the client normally might want to fight the claims and clear their name simply may not be financially feasible.
Thank You, 2016 Sponsors!
Your support makes events like this possible.
Sponsor list as of 1/13/16

DIAMOND:

ALLIANZ GLOBAL CORPORATE & SPECIALTY
AXIS
BEAZLEY
CNA
ENDURANCE INSURANCE
HISCOX
TRAVELERS

PLATINUM:

AEGIS
DLA PIPER
EUCLID EXEC
EUCLID FINANCIAL
STARR COMPANIES

GOLD:

AMWINS Brokerage
ARCH Insurance
BERKSHIRE HATHAWAY SPECIALTY INSURANCE
BH
CHUBB
CLYDE&CO
Hudson Insurance Group
KBR
KAUFMAN DOLOWICH VOLUCK
LIBERTY
Sedgwick
STARSTONE
W. B. BERKLEY INSURANCE GROUP
WILEY
ZURICH

SILVER:

• Allianz Global Corporate & Specialty
• Ambridge Partners LLC
• Aon
• BatesCarey LLP
• BEECHER CARLSON
• Great American Insurance Group
• Ironshore Insurance
• Lane Powell PC
• Markel

• Nationwide Insurance Company
• Navigators Pro
• Ropers Majeski Kohn & Bentley, P.C.
• Skarzynski Black LLC
• Swiss Re Corporate Solutions
• Tokio Marine HCC
• Troutman Sanders LLP
• Walker Wilcox Matousek LLP
• White and Williams LLP
• XL Catlin

BRONZE:

• AIG
• ARC EXCESS & SURPLUS, LLC / PROFESSIONAL RISK FACILITIES, INC.
• Loss, Judge & Ward, LLP

• Marsh
• RT ProExec
• Rivkin Radler LLP
• Wilson Elser LLP
Meet Clayton Rhoades, RPLU, ASLI

Clayton Rhoades, RPLU, ASLI is Vice President at Kinsale Insurance in Richmond, Virginia. Clay has over 18 years of underwriting experience and was nice enough to take time out of his day to talk with PLUS and share his story.

PLUS: How did you get started in the professional liability insurance industry?
Clay: I entered the insurance industry as an underwriter handling general liability accounts. Soon, I transitioned to a division within that company underwriting professional liability lines and I consider it to have been a lucky break in my career. I was mentored by a manager who was a great underwriter and also provided the opportunity to launch and manage professional liability products.

PLUS: What do you like about working in professional liability insurance?
Clay: I like the intellectual challenge of underwriting what can be very difficult accounts and the fact that the coverage forms and endorsements are generally drafted by each insurance company rather than a standard, one-size-fits all approach.

PLUS: Earning the RPLU designation is a tremendous accomplishment – what made you want to seek the designation?
Clay: Early in my career, my manager at the time suggested that if I wanted to become an expert at underwriting professional liability insurance then I should immediately begin pursuing the RPLU designation. I followed his advice forthwith.

PLUS: What is your opinion of the PLUS Curriculum?
Clay: I think it is an invaluable resource for those in our industry to take advantage of the accumulated knowledge of the experts in our field who contributed to the modules. I recommend it to anyone wanting to enter insurance or those already in professional liability looking to improve their skill set.

PLUS: Did you have a favorite module? Why did you like it?
Clay: When I pursued my designation, the modules were packaged in five parts and the exams were all essay. I recall enjoying the Lawyers Professional Liability section as it was a product I was handling then (and still now) and everything I was reading was directly applicable to accounts I was underwriting each day. More recently, although I already have the RPLU designation I have been reading the current version of the Private/Non-Profit Directors & Officers Liability Insurance module as part of developing new products for my company. This module is very informative in the process of developing a new product.

PLUS: How long did it take you to complete the RPLU program?
Clay: It took me two years to complete the RPLU program.

PLUS: How has earning your RPLU designation impacted your career in the industry?
Clay: I think earning the designation demonstrated to my employer that I was serious about my career and earnest about professional liability as my field of focus. Studying the RPLU material was also a great complement to the work I was doing each day in the office. With the added knowledge gained from the modules applied to the work each day, hopefully those around me observed appreciable strides in the contribution I was making to the company. The manager who gave me the advice early in my career to pursue the RPLU provided me with good counsel.

PLUS: What advice would you give to someone considering pursuit of the RPLU designation?
Clay: First, the sooner you start, the better. The material will have immediate applicability to what you do every day in your business career. Second, I realize some people may study material at a minimal level sufficient to simply pass a test. Do not do this with the RPLU material as you will be short-changing yourself in the long run. Take time to master the material and really absorb the content as the knowledge gained will increase your long-term potential.

PLUS: What else would you like to share about the PLUS Curriculum or RPLU program?
Clay: Having been in the industry approximately 19 years, I have seen the RPLU modules improve over time. The material is relevant to professionals whether they are on the insurance company side as an underwriter or claims professional, insurance agent/broker, risk manager, legal professional, or others in the industry. Also, it opens doors to career opportunities. As a hiring manager, I ask our Human Resources team to automatically forward me the resume of any job candidate who has earned the RPLU designation or is actively pursuing it. This step by the candidate shows a commitment both to their own personal development and our industry and is someone that I would want to meet.

PLUS: What do you like to do when you’re not working?
Clay: I have three kids that keep me and my wife quite busy with the usual activities of soccer, mountain biking and other sports. I also enjoy taking in the various historical sites around my home state of Virginia and trying to play the guitar and banjo.

Thanks to Clayton Rhoades for sharing his story with PLUS Journal readers.😊
produce Kids Fun Day Events at Indians baseball games. The Kids Fun Day events had attractions designed to appeal to children, including an inflatable bouncy castle and inflatable slide. Pursuant to the terms of the contract between the Indians and National Pastime, National Pastime was required to purchase comprehensive general liability coverage with limits of $5 million. National Pastime submitted an application to its insurance broker, Doodson Insurance Brokerage, stating that the Kids Fun Day Events would include inflatable attractions. Nonetheless, Doodson procured coverage excluding coverage for injuries caused by inflatables.

While attending an Indians game in June 2010, Douglas Johnson was crushed and killed by an inflatable slide that collapsed on him. Because coverage of injuries caused by inflatables was excluded, there was no coverage for the claim.

In the ensuing litigation, Johnson’s Estate won a default judgment for $3.5 million against National Pastime. Thereafter, having failed to collect on the default judgment, Johnson’s Estate brought suit against Doodson in Michigan federal district court, asserting claims for negligence and breach of contract.

Applying Texas law, because the insurance was procured in Texas, the district court found that the negligence claim could not proceed because there was no allegation that Johnson was in privity of contract with Doodson.

Then, applying Michigan law, because it saw no meaningful distinction from Texas law as regards the breach of contract claim, the Court dismissed that claim as well, because in order to proceed under a third-party beneficiary theory Johnson’s estate would have to have alleged that Doodson’s promised performance was made directly for Johnson’s benefit, which it had failed to do.

On appeal, the Sixth Circuit affirmed. In doing so, the Circuit Court noted that the Cleveland Indians had separately pursued a negligence claim against Doodson under a third-party beneficiary theory, and that claim had been held to be valid. Nonetheless, the Court found that the claim before the Court in this case was distinguishable because there was deemed to be a “special relationship” as between the Indians and Doodson arising from the fact that the broker clearly knew that the insurance was being purchased for the purpose of covering the Kids Fun Day events being hosted by the Indians, and the broker sent a Certificate of Insurance directly to the Indians listing the dates of the Kids Fun Days, while also listing the Indians as an additional insured. In contrast, here, the Sixth Circuit (applying Michigan law) concluded that it was not foreseeable that the public would rely on and expect protection from voluntarily purchased liability insurance.

A contrary determination was made in Lat v. Soriano, with the court reversing a trial court dismissal of a professional negligence claim against an insurance agent by the intended beneficiaries of a life insurance policy that had been cancelled for non-payment of premiums. The policy provided that if the insured became totally disabled and advised her insurer, the monthly premium payments due under the policy could be waived. After the insured was diagnosed with cancer, she became totally disabled, and failed to make the requisite premium payments, but apparently never advised the insurer of her disability. In August 2013, she contacted the agent and asked if the policy could be reinstated, and he advised her that it could not. She died in September, and her beneficiaries received no insurance proceeds. Alleging the agent had provided her with negligent advice, the insured’s adult children—who were named as the primary beneficiaries under the policy—brought suit against the agent.

The agent moved to dismiss the case at the pleading stage, arguing that the agent owed a duty of care solely to his customer, the insured, and not the beneficiaries named in the policy. The trial court granted the motion but on appeal the decision was reversed.

In reinstating the claim by the insured’s beneficiaries, the appellate court noted that “[i]n connection with the procurement of insurance, California courts have found that under certain circumstances the limited duty of an intermediary may extend to third party beneficiaries of the policy.” In so doing, the court quoted from the Nouelon v. Koram Ins. Center, Inc. decision’s conclusion that “[t]he broker’s negligence here was just as detrimental to the third party as to the insured.”

In a decision rendered just before year end, the pendulum swung back in the other direction. In Emerald Coast Finest Produce Co., Inc. v. Sunrise Fresh Produce, LLC, a Mississippi federal district court considered a claim by the owner of a building used as a warehouse against the insurance agent for the company it had leased the building to. The owner alleged the agent had failed to procure sufficient coverage for the building, which was destroyed by a fire. In pursuing its claim, the owner argued that it had a right to sue the agent on the grounds that it was an intended third-party beneficiary of the coverage. In doing so, the owner noted that while the lease agreement required the lessee to provide and keep in force fire and extended property damage insurance providing insurance equal to 100% of the replacement value of the building, the insurance put in place on the building provided only $5 million in coverage, and the cost to repair or replace it exceeded $15 million.

In pursuing its claim against the agent, the owner argued that the agent owed it a duty to determine the replacement cost of the building before placing coverage, to properly inspect the premises in order to do so, and to procure insurance coverage equal to the replacement cost of the building. The agent moved to dismiss on summary judgment, on the grounds that the owner had no legal right to sue it as a third party beneficiary, and the court granted the motion. In doing so, the court concluded that under Mississippi law, any right to pursue a claim as a third-party beneficiary “must spring from the terms of the contract.” And because any such rights the owner may have had must spring from the contract, it could therefore have no rights against the agent in regards to procurement of the policy, as any rights it had as a third-party beneficiary didn’t exist until after the policy was procured.

**Duty to Advise**

In the context of agent/broker E&O claims arising out of the absence of coverage for a claim, or insufficient limits, claims are often made that the agent/broker had a duty to advise the insured about the coverage even though under the law in the vast majority of states agents/brokers are not considered fiduciaries, and only owe a duty to advise about coverage in “special circumstances” or if the parties have a “special relationship.” Accordingly, the question of whether there is a “duty to advise” is a key litigation battleground. Through a combination of increasingly savvy lawyering by the plaintiffs’ bar and a growing recognition by the Courts of agents and brokers as experts operating in a specialized field who are necessary to interpret, guide and advise insureds with respect to what can often be complex insurance policy language, the courts’ acceptance of arguments for at least leaving it to the jury to decide if there is a duty to advise has expanded significantly. But litigation continues with regard to the parameters of what can be considered a viable basis for a “duty to advise” claim, and 2015 had its share of these cases. And with a growing number of broker service fee agreements being put in place to replace or supplement
traditional commission based compensation arrangements, and brokers agreeing to serve as risk management advisors, insureds have been given additional ammunition to argue that the brokers have assumed additional duties and responsibilities either expressly or implicitly laid out in the terms of their service agreements.

An example of how this can play out can be seen in *O&G Indus. v. Litchfield Ins. Group, Inc.* In this case, the Plaintiff had entered into an agreement to perform construction services in connection with the development of a power generation facility, and pursuant to the terms of the agreement had been required to maintain $102 million in liability insurance. Although it already had a tower of insurance in place (purchased by its insurance broker LIG) which complied with the contract requirements, it investigated using a Contractor Controlled Insurance Program ("CCIP") because of the cost savings it could provide. Further to this, Plaintiff ended up using Aon—which represented itself as an expert in CCIP Programs—to replace $51 million of the insurance via the CCIP.

The construction project was already under way and the existing corporate policies making up the tower had “wrap-up” exclusions which excluded coverage for any operations subject to a CCIP policy. Thus, it was going to be necessary for O&G to procure excess of wrap-up endorsements on the corporate policies so that the wrap-up exclusions would not apply and the corporate policies would become excess insurance above the CCIP. Although O&G had allegedly requested that LIG procure the excess of wrap-up endorsements, LIG failed to do so. As a result, the corporate policies did not provide coverage for O&G in the event the CCIP policies were exhausted, and instead of having $102 million of liability insurance in place, O&G had only $51 million in place. Subsequently, there was an explosion at the project site, causing multiple deaths and injuries, as well as millions of dollars in property damage and project delays.

In addition to suing LIG for failing to procure the wrap-up endorsements, O&G brought suit against Aon for professional negligence and breach of contract. O&G alleged that Aon was aware that the excess of wrap-up endorsements would have to be procured before the CCIP could be placed, but went ahead and placed the CCIP without first confirming that they had been obtained.

Aon moved to dismiss the claims against it on summary judgment. It argued that the court could find that, as a matter of law, it had no duty to confirm that the corporate insurance program LIG was responsible for contained the necessary excess of wrap-up endorsements before it purchased the CCIP insurance. Aon contended the court could reach this conclusion because it was not the broker of record of O&G’s corporate program, and O&G never authorized it to touch that program in any respect. Further, Aon argued that the service agreement it had entered into with O&G limited Aon’s responsibility to the CCIP. In response, O&G argued that it was not seeking to hold Aon responsible for LIG’s negligence; instead, it was arguing that Aon had owed and breached a duty of care to confirm that the necessary excess of wrap-up endorsements that Aon had advised O&G were needed on the corporate program were in place before it purchased the CCIP insurance, in light of its knowledge of the contract O&G was a party to requiring it to have $102 million of insurance in place for the project.

The court denied Aon’s motion for summary judgment, finding that there were genuine issues of material fact regarding the role played by Aon. Critically, the Court noted, while Aon claimed it was only hired to place the CCIP, O&G contended that Aon was hired as an advisor, to render advice concerning the structure and sufficiency of insurance for the project, to eliminate any gaps in coverage, and to place the CCIP.

Another example as to how this can come into play, but in a more favorable ruling for agents/brokers, can be seen in *TLM Realty Corp. v. Phil Glick.* In *TLM Realty,* at around the same time the insured realty company TLM Realty Corp. ("TLM") purchased a directors and officers insurance policy through the defendant Citizens Clair Insurance Agency, LLC ("Citizens Clair"), TLM entered into a written agreement whereby Citizen’s Clair agreed to act “as an outsourced risk and claim management department for TLM Realty for an annual fee.” Among the responsibilities Citizen’s Clair agreed to assume pursuant to this Agreement were:

---

**February 2016 PLUS Journal**

---

**PLS Medical PL Symposium**

**&**

**PLUS Professional Risk Symposium**

April 20 & 21, 2016 | Hyatt Regency | Chicago, IL

Don’t miss these great events returning to Chicago in the spring.

Register now at www.plusweb.org.
The PLUS Foundation is pleased to announce Financial Aid College Scholarships, made possible by the personal donations of leaders in our industry:

- **Constantine “Dinos” Iordanou Scholarship**
- **H. Seymour Weinstein Scholarship**

Up to four scholarships will be awarded and scholarships will be for up to $12,000 each, payable in increments over four years.

**ELIGIBILITY:**

Children of any PLUS member or employee of a PLUS corporate sponsor company are eligible to apply.

Note that children of any company employee are eligible even if their parent is not a direct member of PLUS. Please share this information with your support staff that have children heading off to college that could use some support.

- Post the information in your company newsletter.
- Have your human resources department distribute to employees with children entering college next year.
- Distribute the information via company email lists or bulletin boards—though it is a PLUS Foundation program, you do not need to be a PLUS member to qualify!

**APPLICATION SCHOLARSHIP REQUIREMENTS:**

Awarded based on family financial need and proof of average to above average high school performance.

Consistent with our mission of philanthropy and the advancement of education, the PLUS Foundation Board of Directors aims to support families and students who have greater financial needs. This step expands on our record of service to and on behalf of the professional liability community.

- The success of the PL industry relies on many employees who may be of limited financial means—the assistants, clerks and other entry level and support staff who move our business forward.
- With the cost of education rising dramatically, many deserving students struggle to attend the college of their choice...or any college at all.
- Most of the Foundation’s giving goes to highly worthy charitable organizations. This new scholarship is an opportunity to direct resources to the colleagues and families of our members, creating more personal and closer connections within our PLUS community.

**APPLICATIONS & DEADLINES:**

Applications will be available online at on the Foundation website January 4 to March 15, 2016.

---

**2016 GILMARTIN SCHOLARSHIPS**

**Eligibility:** Children of any PLUS member or any employee of a PLUS corporate sponsor company

**Applications & Deadlines:** Applications will be available online starting January 4, 2016. Applications are due March 15. Complete information is available at www.plusfoundation.org.

**Leo Gilmartin Scholarship:** Scholarships are awarded for scholastic merit and extracurricular activity. Application requirements include, but are not limited to:

- College entrance exam scores
- G.P.A. and class rank
- Essay and letters of recommendation
- Extracurricular and community service activities
- Recipients must be full time students and meet GPA requirements to be eligible for subsequent years

**General Details & Requirements:**

- Up to four scholarships will be awarded
- Scholarships will be for up to $12,000 each, payable in increments over four years
- Applicants must be a child of a current PLUS member or employee of a PLUS corporate member
- An applicant is required to be in his/her senior year of high school
- A recipient must successfully complete high school and enroll in an accredited school in the fall

For more information on all scholarships, please go to: www.plusfoundation.org
“Reviewing the insurance related provisions of any contracts entered into by TLM”

Conducting “[a]n in-depth review of the insurance provisions of construction, maintenance, supply and services contracts and leases”

“Conducting review meetings to keep you apprised of the current status of claims”

“Meeting with you on a frequent basis to discuss any new exposures which may exist and provide appropriate insurance coverage for those exposures as may be needed”

Subsequently, TLM, its owner and President, and related companies were sued by several limited partner investors in a real estate project, alleging they had been sold the assets of the project (a mall) for less than fair value. The TLM CFO failed to report the claim to Citizens Clair, believing it didn’t fall within TLM’s D&O coverage. Because the claim was consequently never reported to CLM’s D&O insurer, the individual and entities named as defendants ended up having to pay $750,000 in legal defense costs and $1.45 million to settle.

They then brought suit against Citizens Clair for breach of contract and negligence, alleging, among other things, that TLM should be liable to them for these exposures because the reason they had not timely reported the lawsuit was because Citizens Clair had failed to make adequate efforts to educate personnel at TLM regarding the full scope of the coverage afforded under the D&O policy.

In granting Citizens Clair summary judgment dismissing the claims against it, the Court noted that the simple fact was that TLM was denied coverage for the lawsuit due to its failure to provide timely notice of the lawsuit. And “[w]hy would TLM fail to report to its D&O insurer a concern, please let us know immediately”—to which no response was supplied.

The failure to advise customers to purchase uninsured or underinsured motorist coverage is also a frequent source of negligent failure to advise claims, and one case where this claim was made was Watson v. Elswick, where, after their son was injured in a car accident, and the driver did not have sufficient coverage to address his severe injuries, a couple sued their longstanding insurance agent for failing to advise them to purchase underinsured motorist coverage. In pursuing their claim against the agent, they noted he had been their agent for 26 years, alleged that they had requested he purchase “full coverage” for them, and claimed to have been assured that they had “the best insurance money can buy.” Based on this, they argued he should have advised them to purchase UIM coverage. The trial court nonetheless granted the agent summary judgment dismissing their negligence claim, a decision which was upheld on appeal. In affirming, the appellate court noted that there was no evidence that the agent had been paid consideration over and above his commission on premiums, and that the relationship, though lengthy, was not one that would have put an objectively reasonable agent on notice that his advice was being sought and specially relied upon, and there had been no request for coverage advice.

In D’Agostino v. AllState Ins. Co., after AllState denied a property claim arising from vandalism because the home was not the insureds’ residence, the insureds brought suit against the insurer for, inter alia, breach of contract, and against their agent for failing to purchase the correct coverage (i.e., insurance for property intended to be rented to others, as opposed to homeowner’s insurance). At the conclusion of the presentation of evidence at trial, the agent moved for a directed verdict dismissing the claims against him, arguing he had purchased the requested coverage, which had been renewed for 10 years. The plaintiffs argued in response that the agent should have checked and been aware that Plaintiffs had more than one homeowners policy. Had they done so, Plaintiffs contended, they would have been aware of a need to inquire as to which was the actual residence. In rejecting this argument, the court noted that people can own more than one residence, and this alone was not sufficient to create a duty to advise.

In Schlossberg v. B.F. Satul Ins. Agency of Ms., Inc., the court posed and considered a rather frightening question: “whether an insurance broker may be deemed negligent when an insured’s policy excludes coverage that the insured never requested but later needed.” The case involved a company (“DTM”) which provided security guards and related services to its clients. Its general liability policy excluded coverage for “liability arising out of, or caused or contributed to by the sale, leasing, rental, installation, maintenance or service of any alarm, alarm device, alarm component or alarm system,” and its umbrella policy had a similar exclusion. However, after several years, the umbrella coverage was procured from a different insurer, and the alarm exclusion in that policy also excluded coverage for bodily injury or property damage arising out of, or caused or contributed to by the monitoring of any alarm, alarm device, alarm component or alarm system.

Each year the general liability policy application included a question that required DTM to itemize the services performed by its security guards, with a subcategory labeled “Burglar/Fire Alarms” including a notation stating “separate alarm application must be completed if this coverage is desired”. Each year DTM filled in the notation “N/A”. Additionally, when the GL and umbrella policies were renewed for the 2008–09 policy year, the broker sent DTM a letter advising them to include exclusions for work with canines and alarm systems, and asked “[i]f this is a concern, please let us know immediately”—to which no response was supplied.

Subsequently, a client facility at which DTM’s guards were responsible for monitoring the facility’s heat sensor alarm system suffered a $3.6 million loss to specialized computer systems when the guards failed to follow proper procedures after a heat system was activated. Although the claim was covered under the GL policy, it was declined under the umbrella policy, and DTM argued that the broker was negligent in failing to warn DTM of the differences between the GL policy and the umbrella policy as it related to the alarm exclusion.

The broker moved to dismiss the professional negligence claim against it, and the court granted the motion. In doing so, the court concluded that “even assuming that an insurance broker has a . . . duty to provide notice of changes to a policy, that duty only arises upon a significant change in the policy.” In renewing a policy, a

continued on page 15
by Justice Scalia, rejected the notion that the applicant/EEOC was required to prove that Abercrombie had actual knowledge of her need for a religious accommodation, given Abercrombie’s concession that it had a suspicion that the hijab was worn for religious purposes. Writing for an 8 to 1 majority (Justice Thomas dissented), Justice Scalia wrote, “the intentional discrimination provision of Title VII prohibits certain motives, regardless of the state of the actor’s knowledge. Motive and knowledge are separate concepts.” In reading the opinion from the bench, Justice Scalia added that this reasoning applies “whether this motive derives from actual knowledge, a well-founded suspicion or merely a hunch.”10 In other words, even if an employer does not know for sure that a practice is religious, the employer is barred from refusing to hire an applicant for the purpose of avoiding an accommodation for that practice. Arguably, the Court placed the onus for determining whether or not a prospective employee’s behavior is a religious practice in need of accommodation under Title VII on the employer, rather than the employee.

However, the Court also stated in a footnote that “it is arguable that the motive requirement itself is not met unless the employer at least suspects that the practice in question is a religious practice—i.e., that he cannot discriminate because of a religious practice unless he knows or suspects it to be a religious practice.” But the majority reserved decision on this point, as it was not presented by Elauf’s case.11 Justice Alito’s concurrence discusses this concept at length, noting his view that the answer is “obvious”: that employers must have at least some inking that the practice is religious or else they cannot be held liable.

Leaving aside the question of whether the majority should or should not have decided this question, Justice Alito’s concurrence alone, in addition to the majority’s emphasis on the employer’s state of mind with respect to religious practice, makes it likely that the lower courts will require at least some level of awareness on the employer’s part in order to demonstrate intentional discrimination. Abercrombie suggests that the requisite level of awareness may be a mere suspicion or hunch. In any event, however, where even the possibility of a religious accommodation is raised internally, Abercrombie requires the employer to act to protect it.

The Court held that, as long as the employer has a suspicion that an employee or applicant’s need for an accommodation is based on a religious belief, the employee/applicant “need only show that his need for an accommodation was a motivating factor in the employer’s decision.” Ultimately, the Court remanded the case to the Tenth Circuit for consideration of the issue under the “motivating factor” standard.

Abercrombie had also argued in the District Court that providing an accommodation would have imposed an undue hardship on it because the “look policy” was neutral, insofar as secular headgear would be also barred, leaving the hijab at no relative disadvantage. The majority rejected this argument because Title VII obligates employers not to fail to hire anyone because of their religious practices unless an accommodation would cause an undue hardship. To that extent, the statute gives religiously motivated practices “favored treatment. . . . An employer is surely entitled to have, for example, a no headwear policy as an ordinary matter. But when an applicant requires an accommodation as an aspect of religious practice, it is no response that the subsequent failure to hire was due to an otherwise-neutral policy.”12

Finally, Abercrombie argued in the District Court that exceptions to its “look policy” would create an undue hardship because of the critical role the personal appearance of employees plays in its branding. The Court rejected this argument because Abercrombie had not conducted any study supporting that position, and the record showed that it had made similar accommodations for other employees. Accordingly, the appeals court held that Abercrombie failed to show that allowing the hijab would have created an undue hardship on the company.

B. EEOC v. United Parcel Service complaint

Another kind of uncertainty inheres in the EEOC’s recent suit against UPS. On July 15, 2015, the EEOC sued United Parcel Service Inc., for discriminatory practices dating back to 2004 against job applicants and workers whose religious practices conflicted with the company’s uniform and appearance policies. The lawsuit is based on UPS’s “appearance policy,” which prohibits male supervisors and male employees who interact with customers from wearing beards and/or growing their hair below collar length. The EEOC alleges that UPS has, since at least 2004, failed to hire or promote employees whose religious practices conflict with this policy, and has also required its employees to shave their beards and cut their hair in order to comply with the policy.

UPS has protocols in place for employees to request religious accommodations, including variations for appearance and grooming guidelines. While UPS contends that these protocols demonstrate its policy and practice of accommodating religious practices, the EEOC charges that the process involves lengthy delays—sometimes consisting of several years—in processing requests for religious accommodations, which are tantamount to a denial of an accommodation, particularly as the employees are required to shave their beards or cut their hair for the duration of the delay.

The suit is a reminder that formalities cannot rescue an employer from the prospect of religious discrimination suits. The EEOC scrutinized beyond UPS’ facially-compliant written policy to examine employees’ actual ability to secure exceptions to the grooming policy. The suit now alleges that religious exemptions, despite being theoretically available, are too hard to get from UPS. Similarly, the EEOC successfully asserted in Abercrombie that an employer could not rely on the lack of a formal notification to avoid confronting the need for an accommodation; the Supreme Court required Abercrombie to accommodate Elauf’s hijab even though the company had not been given a notice it could react to by rote, according to a standard set of procedures.

The Requirements of Title VII of the Civil Rights Act of 1964

In addition to the notice and knowledge issues presented by Abercrombie, a thorough understanding of the full framework for discrimination claims is key to decreasing the risk of lawsuits and liability.

As discussed above, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against people because of their religious beliefs or practices. Section 701(j) of Title VII includes an employee’s “bona fide” religious beliefs and practices, unless providing a reasonable accommodation would impose an undue hardship on the employer. For purposes of Title VII, “religion” is defined very broadly and covers a wide range of faiths. The prohibition against religious discrimination also protects employees who have no religious beliefs, such as atheists.

A. The “Bona Fide Religious Belief” Standard

Upon learning about a religious requirement, employers need only afford an accommodation if the religious belief is “bona fide,” meaning sincerely held. “Bona fide religious belief” has been defined as one that is “religious within the plaintiff’s own scheme of things” and “sincerely held.”14 The key inquiry is whether
the employee’s belief is a matter of conscience, or rather, is spurred by deception and fraud, or a mere personal preference. While the employee’s perspective is given great weight, courts will look closely at the facts to determine whether a request for an accommodation arises from a bona fide religious relief.

For example, in Cloutier v. Costco Wholesale Corp., 311 F. Supp. 2d 190 (D. Mass. 2004), the U.S. District Court for the District of Massachusetts expressed serious doubts as to whether an employee’s claim for an accommodation based on facial piercings was based on a “bona fide religious practice.” The employee in Cloutier was a member of the Church of Body Modification (CBM), a religious organization whose members engage in piercing, tattooing, branding, cutting, and body manipulation as part of a belief in spiritual growth through body modification. The court found that even assuming arguendo that the CBM were a bona fide religion, its principles (as stated on its web site) did not require a display of facial piercings at all times. As such, the court found that the employee’s stated requirement that she openly display her piercings at all times represented her own “personal interpretation of the stringency of her beliefs.” The court also questioned the sincerity of the employee’s personal interpretation, given that she had initially offered to cover her piercing with a band-aid, an alternative that she later claimed would violate her religion.

Here, again, employers encounter a “known unknown”—how to judge the sincerity of an unusual religious belief or practice of which management may have little experience or knowledge. Ultimately, even courts may often prefer not to wade into these murky waters. The District Court in Cloutier declined to answer the question of bona fide belief, instead holding that the accommodation Cloutier requested was not a reasonable one.16 Costco was not required to grant the accommodation sought by the employee, who would not accept any accommodation short of an outright exemption from the dress code. The First Circuit affirmed,17 on the alternative ground that Costco had demonstrated that providing the accommodation requested by Cloutier would work an undue hardship on Costco as a loss of control over its public image as manifested by its employees.

B. What Is an “Undue Hardship”? Courts have held that an accommodation constitutes an “undue hardship” if it would impose more than a de minimis cost on the employer. The term “cost” here refers to both economic costs, such as lost business or having to hire additional employees to accommodate an employee who cannot work on certain days due to religious beliefs, and non-economic costs, such as compromising the integrity of a seniority system. According to the EEOC, an accommodation may cause an undue hardship if it is costly, compromises workplace safety, decreases workplace efficiency, infringes on the rights of other employees, or requires other employees to do more than their share of potentially hazardous or burdensome work.18

The burden is on the employer to show an undue hardship. As noted above, in the Abercrombie case, the employer failed to conduct any study supporting its belief that an accommodation would impose an undue hardship, and made similar accommodations in other markets. Accordingly, the Court held that Abercrombie failed to show that accommodating the applicant’s hijab would have created an undue hardship on the company.

One fairly straightforward example of an undue hardship would be a dress or grooming code implemented due to health or safety concerns. For example, in Bhatia v. Chevron U.S.A., Inc., 734 F.2d 1382 (9th Cir.1984), the court granted summary judgment to an employer who refused to exempt a Sikh employee from the requirement that all machinists be clean-shaven, where the policy was based on the necessity of being able to wear a respirator with a gas-tight face seal because of potential exposure to toxic gases.

This issue has come into play in the context of police officers’ uniforms. For example, in Daniels v. City of Arlington, 246 F.3d 500 (5th Cir.2001), the court held that Title VII did not require a police department to permit an officer to wear a gold cross pin on his uniform. Noting that, “[v]isibly wearing a cross pin—religious speech that receives great protection in civilian life—takes on an entirely different cast when viewed in the context of a police uniform,” the court granted summary judgment to the police department, concluding that “[t]he only accommodation Daniels proposes [i.e., permitting him to wear his pin at all times] is unreasonable and an undue hardship for the city as a matter of law.” Id. at 506.

However, as the discussion above makes clear, the question of what type of evidence an employer has to muster to show an undue hardship can vary with the court. The District Court in Abercrombie rejected Abercrombie’s argument that Elauf’s hijab would compromise its “look policy” because it had conducted no studies to demonstrate this. However, the First Circuit in Cloutier concluded that the body modifications Cloutier sought to display would deprive Costco of the ability to present a professional-looking workforce without requiring any empirical data to prove it.

C. What Kind of Accommodation Is Necessary?

Determining reasonable accommodation involves communication between the employee and employer. The employer need not always have to provide the exact accommodation sought by the employee, but it should consider the employee’s preference. For example, an employer need not remove another employee from his/her position in order to accommodate the religious practices of another employee. However, allowing someone to adjust their hours to accommodate a Saturday Sabbath might be reasonable. For example, the EEOC filed a lawsuit in September 2015 on behalf of a Seventh-Day Adventist nurse whose job offer at a Minnesota hospital was revoked after she requested such a schedule.19

If accommodations are reasonable and not inordinately expensive, the employer must offer an accommodation. However, a court will consider the good faith efforts made by an employer and an employee to reach an accommodation in considering the undue hardship issue. For example, in the Cloutier and Daniels cases noted previously, the employees’ refusal to accept any accommodation other than an outright exemption was integral to the courts’ holdings that affirming the accommodations sought would cause the employers an undue hardship.

Suggestions for Employers

Given the Abercrombie decision’s deferral of the question whether an employer with “no knowledge” of an employee’s need for a religious accommodation may be held liable for a failure to make such an accommodation, employers may feel they are in a strange position, stuck between wanting to avoid lawsuits based on their knowledge of an employee’s religious beliefs and practices, and lawsuits arising from their ignorance of such beliefs and practices. Employers typically avoid asking job applicants about their religious belief to avoid the “known known” of intentional discrimination, but even where the question is not asked, if the suspicion is raised internally that a practice is religious in nature, the employer is obliged under Abercrombie not to base employment action on that practice. In short, if an employer knows that
it does not know whether an offending practice is a religious one, it must be prepared to accept the practice if doing so would not present an undue hardship. Moreover, when it comes to unusual or little-known religious practices like the body modification in Cloutier, the employer may be faced with an additional question as to the legitimacy of the practice or belief involved. In this fashion, the law places the burden of the “known unknown” on the employer.

In negotiating this minefield, what can employers do to avoid claims like those asserted in the Abercrombie suit? First, objective assessment of job applicants should, of course, be afforded the highest weight in making hiring decisions. If practices or beliefs which may plausibly be religious are not considered in taking employment action, liability is unlikely. And granting accommodations to such practices, while often bearing costs, can be cheaper in the long run than inviting litigation by the employee or the EEOC.

Second, educating personnel on the relevant law by the employee or the EEOC. For example, the EEOC offers a detailed guide on its website entitled, “Religious Garb and Grooming in the Workplace: Rights and Responsibilities.”

Third, interactive dialogues which keep the channels of communication open on discrimination issues may be helpful. If personnel are presented with a situation where an applicant’s possible religious or other protected characteristics conflict with company policy, it is appropriate for an employer to ask an applicant whether, if hired, s/he would be able to comply with company policies with or without accommodation. This applies to current employees as well. Such a policy ensures engagement in the interactive process and that any potential needs for a reasonable accommodation are being addressed early.

Additionally, questions that any employees who are involved in the hiring process may have should be promptly presented to the company’s human resources department. Human resources can offer guidance on how best to approach an uncertain employment decision and, ultimately, can help in avoiding liability in the future. As always, employee interactions with human resources should be documented, so as to protect the company in a litigious area. Legitimate, nondiscriminatory reasons for hiring decisions, as well as requests for accommodation, are especially worth recording if present.

Finally, as discussed in Abercrombie, a neutral employment policy does not defeat a claim for religious accommodation. Religious practices occupy a “privileged” position in the legal landscape and cannot be denied on the basis that non-religious instances of the same practice are also barred. Before implementing a specific employment policy, it would be invaluable for a company to consult with either employment counsel or human resources experts to assess whether its employment policies comply with current employment law.
broker is not required to point out every formal change and linguistic revision. Because DTM consistently wrote “N/A” on the GL policy application as it related to alarms, and failed to respond to the broker’s letter inquiring as to whether it had any concern about the alarm policy exclusion, the broker “had no way of knowing that the addition of the word ‘monitoring’ to the Umbrella Policy’s knowing that the addition of the word ‘monitoring’ to the Umbrella Policy’s formal change and linguistic revision.

Lastly, in a case to take particular note of, a Missouri federal district court found that a claim for negligent failure to advise had been stated based on the alleged duty to advise created by language contained in the insurance policy! The policy provided that Allstate “uses local agencies to assist customers with their insurance decision-making process by providing customers with information and high quality service.” Because the plaintiff alleged reliance on this, but receipt of no such assistance, the court concluded a viable negligent failure to advise claim had been stated.

Endnotes
2. National Pastime also sued Doedson for negligence, resulting in a confidential settlement.
3. Id. at 677.
4. Id. at 678–79. Further, as to the breach of contract claim, the Circuit Court noted that under Michigan law a third-party beneficiary claim must be based on an allegation that the plaintiff was an intended beneficiary of the contract, and Michigan courts look to the contract itself, requiring that as a prerequisite of a third-party beneficiary breach of contract claim there must be evidence that the plaintiff was “directly referred to in the Contract.”
6. Id. at *13–14.
9. Id. at *7 (quoting Rein v. Benchmark Constr. Co., 865 So. 2d 1134, 1136 (Miss. 2004)).
10. Id. at *8–9.


13. Id. at *10–11. 14. Id.
16. Id. at *15. 17. Id. at *21.
22. Id. at *1. 23. Id. at *24 (emphasis original). 24. Id. 25. Id. at *25
Chapter Events*

Canada Chapter
- May 2016 • Educational Seminar • Toronto, ON & Montreal, QC

Eastern Chapter
- February 23, 2016 • Industry Leaders’ Luncheon • New York, NY
- April 2016 • Spring Break Reception • New York, NY

Hartford Chapter
- March 2016 • Networking Reception • Hartford, CT
- May 2016 • Educational Seminar • Hartford, CT

Mid-Atlantic Chapter
- March 2016 • Networking Reception • Wayne, PA
- May 2016 • Educational Seminar • Philadelphia, PA

Midwest Chapter
- February 25, 2016 • Future PLUS Trivia Night • Chicago, IL
- April 2016 • Networking Reception • Indianapolis, IN
- May 12, 2016 • Networking Reception • Cleveland, OH
- May 18, 2016 • Educational Seminar • Chicago, IL

New England Chapter
- April 13, 2016 • Networking Reception • Boston, MA

Northern California Chapter
- March 17, 2016 • Future PLUS w/EIP • San Francisco, CA
- Spring 2016 • Educational Seminar • San Francisco, CA

Northwest Chapter
- March 17, 2016 • Education seminar w/CPCU&RIMS • Seattle, WA

Southeast Chapter
- March 10, 2016 • Educational Seminar • Tampa, FL
- May 19, 2016 • Educational Seminar • Atlanta, GA

Southwest Chapter
- April 14, 2016 • Educational Seminar • Denver, CO

*Many Chapter event dates will be finalized and reported in future issues. Please visit the PLUS website at www.plusweb.org to view the most up-to-date information.

International Events

2016 Medical PL Symposium
- April 20-21 2016 • Chicago, IL

2016 Professional Risk Symposium
- April 20-21 2016 • Chicago, IL

2016 Cyber Symposium
- September 27, 2016 • New York, NY

2016 PLUS Conference
- November 9-11, 2016 • Hyatt Regency • Chicago, IL

THANK YOU, DIAMOND SPONSORS!

The mission of the Professional Liability Underwriting Society is to be the global community for the professional liability insurance industry by providing essential knowledge, thought leadership and career development opportunities.

As a nonprofit organization that provides industry information, it is the policy of PLUS to strictly adhere to all applicable laws and regulations, including antitrust laws. The PLUS Journal is available free of charge to members of the Professional Liability Underwriting Society. Statements of fact and opinion in this publication are the responsibility of the authors alone and do not imply an opinion on the part of the members, trustees, or staff of PLUS. The PLUS Journal is protected by state and federal copyright law and its contents may not be reproduced without written permission.

PLUS
Professional Liability Underwriting Society
5353 Wayzata Blvd., Suite 600
Minneapolis, MN 55416-4758
phone 800.845.0778 or 952.746.2580
www.plusweb.org