

OPENING STATEMENT

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While Professional Liability lawsuits have been commonplace for many years, the frequency with which attorneys and insurance brokers and agents, in particular, are being sued appears to be steadily increasing. Lawsuits against attorneys by disgruntled clients are, unfortunately, nothing new. The recent negative publicity of the insurance marketplace as a result of the Spitzer investigations and lawsuits has, apparently, also added fuel to the fire with respect to lawsuits against insurance brokers and agents. This edition of Cases & Points will summarize recent decisions of New York's State and Federal Courts in cases involving those areas of professional liability, as well as insurance coverage issues related to them.

RECENT PROFESSIONAL LIABILITY CASE DEVELOPMENTS

By Michael E. Gorelick

New York's Appellate Courts are reviewing cases alleging professional malpractice on an ever more frequent basis. These cases often involve issues pertaining to the professional liability claims, themselves, or to insurance coverage issues arising out of them. The following recent cases involving attorney malpractice and insurance broker and agent Errors and Omissions claims provide examples of the increasing frequency with which New York's Courts are called upon to determine these issues.

Attorney Malpractice

- **The Duty to Defend the Insured Law Firm Is Extremely Broad. The Burden Is Upon the Insurer to Establish that the Underlying Malpractice Claim is Wholly Outside Coverage**

Mandel, Resnik, Kaiser, Moskowitz & Greenstein, P.C. ("MRK") v. Executive Risk Indemnity Inc., decided July 15, 2005, involved a situation where a long-time client of MRK's (American Tissue) was involved in bankruptcy proceedings when MRK made an application to recover fees owed to MRK. American Tissue objected to MRK's application, alleging that more than \$7 million in work charged to it by MRK was actually performed for a non-debtor affiliate of American Tissue. MRK immediately advised Executive Risk, its malpractice insurer, of American Tissue's objection and requested defense coverage under its policy, seeking permission to retain outside counsel.

Three months later, the insurer advised MRK that the filing of American Tissue's objection "meets the definition of a claim" and that MRK has "the right and duty to defend claims and to

retain qualified counsel of their choosing to represent them". The letter also provided that "as we discussed, ERII consents to their engagement". Subsequently, American Tissue filed suit against MRK. MRK informed its insurer immediately and asked for the insurer's consent to continue using the retained attorneys to defend the action. Executive Risk did not reply in writing. Three months after the lawsuit was filed, Executive Risk, for the first time, suggested to MRK that it would not cover the costs of defense. MRK filed suit alleging breach of contract and, thereafter, moved for summary judgment on the ground that the policy obligated Executive Risk to cover its defense of the claim. Executive Risk made its own motion for judgment on the pleadings and a declaratory judgment that MRK is not entitled to coverage.

The insurer argued that it was not obligated to defend MRK because the substance of the underlying adversary proceeding is not covered under the policy as it "does not allege any Wrongful Act in the performance of professional services, but rather is simply a billing dispute." The policy did not specifically exempt billing disputes from coverage. It provided coverage for Wrongful Acts which are defined by the policy as "the actual or alleged act, error, omission, breach of contract or duty, liable or slander . . . but only in connection with the performance of, or actual or alleged failure to perform, Professional Services."

The Court found that, although MRK undertook its defense in reliance on Executive Risk's initial approval, MRK had not made a successful estoppel claim against the insurer since, to do so, the insured must show it was prejudiced by the insurer's actions. In this case, MRK undertook its own defense of the action and, thus, had not been deprived of the opportunity to defend itself.

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However, the Court noted that the insurer bears an extremely heavy burden in seeking to avoid the duty to defend. Evaluating the facts in the light most favorable to the non-moving party, the Court found that no genuine issue of material fact had been presented which established that the underlying malpractice action was wholly outside the coverage of the policy. As a result, the Court declared that Executive Risk was required to provide a defense of the underlying action to its insured, MRK, as a matter of law. 2005 WL 1712024 (S.D.N.Y., 2005)

- **Insured Attorneys Are Required to Provide Prompt Notice of Potential Malpractice Claims. The Failure to Do So Voids Coverage.**

Wilson v. Quaranta, decided May 19, 2005, was a malpractice suit where the defendant/attorney had failed to provide notice of plaintiff's claim against a municipality in the prescribed time and, furthermore, failed to accurately set forth the place of the injury. After plaintiff's suit against the City of New York was found to be barred, a legal malpractice action was commenced against the attorney. The attorney then commenced a third-party action against his insurer, seeking a declaration that the insurer was obligated to defend and indemnify him in the malpractice action.

The Supreme Court, New York County, granted the insurer's motion for summary judgment and dismissed the third-party complaint.

On appeal, the Appellate Division, First Department, found that the Court had correctly granted summary judgment to the insurer based upon the defendant/attorney's failure to give the insurer notice of plaintiff's potential malpractice claim against him as soon as practicable, as required by the policy. In doing so, the Court found that the uncontroverted evidence established that the attorney had been discharged by the plaintiff 8 ½ months earlier and that his motion to serve an amended Notice of Claim against the City had been denied. The Court flatly rejected the attorney's argument that until he was specifically advised of plaintiff's intent to sue him for malpractice, it was reasonable for him to delay in giving his insurer notice of the potential malpractice claim. 795 N.Y.S.2d 532 (1st Dep't, 2005)

- **Claims Arising from Actions of an "Of Counsel" Attorney Prior to Employment by the Insured Law Firm Are Excluded From Coverage. I**

In Senate Insurance Company v. Tamarack American, decided January 20, 2005, a law firm sought coverage under its claims made professional liability policy for a claim of legal malpractice against an attorney who was "of counsel" to it when the claim was made but who, at the time the services were rendered, was employed full-time by a corporation as its general counsel.

In 1996, the attorney who was then employed full-time by the Lawrence Group, Inc. as general counsel, represented the plaintiff (Senate Insurance Company) when it purchased real property for \$2.6 million. The sale was consummated by a quitclaim deed and the seller (who was related to a principal of the Lawrence Group) allegedly loaned the proceeds of the sale to Lawrence Group. The Lawrence Group and the seller later filed for bankruptcy. Because of the lien on the property, the purchaser was left with nothing in return for its \$2.6 million.

In 1997 the attorney left the Lawrence Group and became "of counsel" to the insured law firm. The underlying malpractice law suit was started in September 1999. The insurer, Tamarack, denied coverage on two grounds: first, coverage for an attorney "of counsel" to the firm was

the Named Insured" and, second, since the attorney rendered services as an employee of a corporation separate from the Named Insured, his acts fell within a specific exclusion in the policy.

The Supreme Court, Albany County, granted the insurer's motion for summary judgment. The Third Department affirmed, finding that although the term "of counsel" was not separately defined in the policy, it was defined by the State's Code of Professional Responsibility. The Code provides that the term "of counsel" may be used "if there is a continuing relationship with a lawyer or law firm other than as a partner or associate". The Court also looked to the ordinary and accepted meaning of the term "of counsel", which is defined in Black's Law Dictionary as a "lawyer who is affiliated with a law firm, though not as a member, partner or associate". Accordingly, the Third Department concluded that there was no ambiguity in the way the term "of counsel" was used in the insurer's policy and, thus, the claim against the attorney was excluded as a matter of law. 786 N.Y.S.2d 481 (3^d Dep't, 2005)

Insurance Broker and Agent Errors & Omissions

- **Insured Who Fails to Read Its Policy is Precluded from Recovering Against Its Insurance Broker on a Claim that the Broker Did Not Obtain the Proper Coverage**

In Hoffend & Sons, Inc. v. Rose & Kiernan, Inc., decided June 10, 2005, the plaintiff, a theatrical stage and rigging equipment installer, sued its insurance broker for failure to procure insurance coverage for damage sustained to the plaintiff's work product during its installation of theatrical stage and rigging equipment in Argentina. In addition to claims for negligence and breach of contract, the insured brought claims for fraud and breach of fiduciary duty based upon alleged misrepresentations by the broker that the damage was covered by insurance and that plaintiff would be indemnified for its loss.

Defendants moved for summary judgment dismissing the Complaint. Plaintiff cross-moved for summary judgment on its negligence causes of action and for leave to amend its Complaint to add a cause of action for negligent misrepresentation and to increase its *ad damnum* from \$1 million to \$15 million. The lower court denied defendant's motion to dismiss and granted that portion of plaintiff's motion which sought to increase its *ad damnum*. On appeal, the Appellate Division, Second Department, dismissed the Complaint against the insurance broker, in its entirety. In doing so, the Appellate Division first noted that, as a general rule, there is no fiduciary relationship between an insurance broker and its customer. Thus, the Complaint's cause of action for breach of fiduciary duty was dismissed.

The Court then noted that while the causes of action for negligence and breach of contract could have raised triable issues of fact, they were barred because the plaintiff/insured received the insurance company's policy months before the loss. Because the lack of coverage for the claim was clearly evident from that policy, the Court dismissed plaintiff's causes of action, holding that the insured is charged with "conclusive presumptive knowledge of the terms and limits of the policy" thus "defeating its causes of action for negligence and breach of contract as a matter of law".

Accordingly, had the policy, itself, not been received by the insured, a question of fact would have existed as to the negligence and breach of contract of the broker in failing to obtain coverage for the loss.

However, since the insured actually received the policy and failed to act to have the policy changed or corrected, it cannot claim to have reasonably relied on the broker's promise to obtain insurance. 746 N.Y.S.2d 790 (4th Dep't 2005).

- **An Insurance Broker is the Agent of the Insured, not the Insurance Company. Notice of Loss to the Broker, Absent Exceptional Circumstances, Is Not Notice to the Insurer.**

Philadelphia Indemnity Insurance Co. v. Horowitz, Grainer & Stengel, LLP., et al., decided July 13, 2005, involved a declaratory judgment action brought by a professional liability insurer seeking a declaration that its policy issued to the defendant law firm was void and that the policy did not cover a claim against the law firm alleging malpractice by one of its members. The law firm brought a third-party action against its insurance broker alleging that the broker failed to obtain the proper insurance and, further, that the broker was the agent of the insured for receipt of notice of loss. All the parties moved and cross-moved for summary judgment.

In December, 2002, a client of the firm brought an action against it for legal malpractice. The insurer provided a defense, subject to a reservation of rights, and commenced a declaratory judgment action seeking a declaration that it was not obligated to defend or indemnify the insured law firm, alleging: (1) failure to provide prompt of the occurrence; (2) misrepresentation of facts in their renewal application; (3) that the loss is excluded from coverage based upon the insured's failure to disclose circumstances, incidents, acts or omissions which they knew or could have reasonably foreseen could result in a claim; and (4) dishonesty in failing to disclose to the Firm's client the dismissal of his claim in December 2001, which voided the insurer's 2002-2003 policy, as a matter of law. The defendant/law firm then filed a third-party Complaint against its broker, Lustgarten, Inc., alleging that Lustgarten was an agent of the insurer and that notice to the broker thus constituted notice to the insurer and alleging that the broker was negligent.

The Court granted the insured law firm's motion for summary judgment in part, dismissing the claim against it which sought rescission of the insurer's policy based upon the insured's alleged misrepresentation. The Court, however, found the existence of questions of fact as to whether the actions of the defendants constituted a sufficient act of dishonesty so as to void the policy.

However, the Court did grant the broker's motion for summary judgment holding that, under New York law, an insurance broker is the agent of the insured, not the insurance company. Thus, notice to an insurance broker, absent exceptional circumstances, is not notice to the insurer. The Court found no such exceptional circumstances in this case.

The Court also found that under New York law an insurance broker has the duty to obtain the requested coverage within a reasonable time or to inform the client of its inability to do so. Absent a specific request to do so, an insurance agent or broker is not liable to an insured for failure to procure a particular type or amount of coverage not already in the policy. Furthermore, the Court found that insurance agents have no continuing duty to advise, guide or direct a client to obtain additional coverage.

The Court rejected the insured law firm's argument that a "special relationship" existed between them and the broker such that the broker owed the client additional duties beyond that of the normal

insurance broker relationship. The Court declared that the law firm had provided no evidence of such a relationship and thus, the Court found that there was no duty for the broker to review the insured's applications for completeness or accuracy before submitting the same to the insurer. Accordingly, the suit against the broker was dismissed in its entirety. 2005 WL 1660961 (S.D.N.Y., 2005)

- **Broker's Liability for Placement of Insurance with Insolvent Non-Admitted Insurer**

In East Coast Management, Ltd. v. Genatt Associates, Inc., decided June 30, 2005, the defendant insurance broker was sued for negligence for wrongfully placing plaintiff's liability insurance for its motel with Legion Indemnity Company, an insurance carrier not admitted in the State of New York which was subsequently declared insolvent.

The case arose out of a bodily injury claim against the plaintiff/motel by one of its patrons who fell and was injured during the term of the Legion Indemnity policy. After that suit was started, Legion filed for bankruptcy. Based upon its insolvency, the attorneys it had assigned to represent East Coast in the bodily injury lawsuit were permitted to withdraw. East Coast then hired its own attorneys to defend the action and claimed to have incurred approximately \$50,000 in defense expenses.

East Coast sued its broker, Genatt, alleging that it was negligent in placing its policy with Legion and sought a declaratory judgment that Genatt was obligated to indemnify the plaintiff for all legal, investigative, settlement or judgment expenses in connection with that bodily injury action and to reimburse plaintiff the premiums it paid for the Legion policy. The Complaint also alleged breach of contract and fraud and sought recovery of punitive damages.

Although New York's Insurance Law prohibits an insurance broker from placing coverage for a New York resident with a non-admitted insurer, it provides an exception to this rule if the broker is a member of the Excess Line Association of New York and files three declinations from licensed insurance company underwriters that the risk was submitted to them and that they refused to issue coverage. The broker must also provide a written acknowledgement from the insured that it was aware that its policy had been placed with a non-admitted insurer.

Plaintiff claimed, however, that Genatt submitted false affidavits to the Excess Line Association and, further, that it failed to give plaintiff the required written notice prior to the placement of coverage that Legion was unlicensed and not admitted in New York. The defendant broker moved to dismiss the Complaint, contending that it met all the statutory and regulatory requirements permitting placement of this insurance with a non-admitted carrier.

In reviewing the evidence, the Court agreed with the broker that the documentary proof presented demonstrated that plaintiff was made aware that the insurer was not licensed in New York prior to the issuance of the policy. However, the Court also found that the proof demonstrated that the broker did not strictly comply with the applicable provisions of the Insurance Law. In that regard, although the Insurance Law required the broker to provide a sworn affidavit attesting to a search for more secure coverage, the individual whose name appeared on the form denied signing it. Furthermore, one of the underwriters identified as employed by an admitted carrier who declined coverage denied that she ever did so. The Court held that the defendant insurance broker's failure to strictly comply with the provisions of the Insurance Law constituted a breach of fiduciary duty to

the plaintiff/insured, as a matter of law. Thus, the Court granted the insured's motion for summary judgment. 2005 WL 181900 (N.Y. Sup., 2005)

- **Employee of Negligent Broker Cannot Be Held Personally Liable to the Insured**

Ali v. Pachekov, decided June 13, 2005, was a personal injury action in which the defendant commenced a third-party action against its insurer, its insurance broker and an employee of its broker, seeking a declaration that they were obligated to defend and indemnify defendant in connection with the bodily injury action commenced against her by plaintiff, Ali.

The third-party defendant broker, Marc Agency, Inc., moved for summary judgment dismissing the third-party complaint on the ground that it was in so close a relationship with its client, Pachekov, as to approach that of privity, so as to defeat liability for its alleged failure to obtain the insurance coverage she requested. Eric Kaplan, an employee of Marc Agency, was also sued and moved for summary judgment on the basis that, at all times, he acted within the course and scope of his employment and, thus, may not be held liable in his individual capacity. That motion was denied by the Supreme Court, as well.

On appeal, the Appellate Division, Second Department, affirmed the finding below that the broker, Marc Agency, had failed to make a *prima facie* showing of entitlement to judgment as a matter of law. However, it reversed as to the broker's employee, Kaplan, finding that he could not be held liable in his individual capacity for errors made while acting within the course and scope of his employment. 797 N.Y.S.2d 101 (2d Dep't, 2005)

- **UPDATE: Federal Legislation Preempts New York's Vicarious Liability Law**

In the last edition of *Cases & Points*, we reported on the status of New York's vicarious liability law (Vehicle & Traffic Law § 388), as it applied to automobile leasing companies.

On August 10, 2005, Congress enacted the Transportation Equity Act. The primary purpose of this law is to provide funding for substantial highway improvements throughout the nation. In addition, the Act contains several ancillary provisions. One such provision in the Act eliminates vicarious liability as it applies to rental car and leasing companies. This Federal Act has the effect of preempting any State law to the contrary (e.g.: VTL § 388). Thus, with respect to lawsuits filed after August 10, 2005, automobile leasing companies and rental companies will not be vicariously liable for the acts of the drivers of their vehicles.

The Act, while barring claims of vicarious liability for rental and leasing companies as "owners" of the vehicle within the meaning of VTL § 388, does not entirely eliminate their potential liability. They may still be exposed to suits alleging negligent entrustment of motor vehicles to incompetent drivers when cars are leased or rented to people with poor driving records.

In addition, automobile rental companies are still required to maintain insurance on their vehicles, at least to the extent of New York's Minimum Financial Responsibility Limits (\$25,000 per person and \$50,000 per accident for bodily injury; \$10,000 for property damage; \$50,000 additional limits for each death, (subject to a total limit of \$100,000 for all deaths). In addition, the Act does not prevent States from imposing higher Financial Minimum

The impact of the Act upon automobile rental and leasing companies in New York will be closely followed and, in all likelihood, will be the subject of future Updates. If you have any questions about the Act, VTL § 388 or the liability of automobile lessors or rental companies in New York, contact mgorelick@agfj.law.

AGFJ DEVELOPMENTS

- John Fronce obtained a directed verdict for AGF&J's clients in the Supreme Court, Bronx County, in the case of Luis Gonzalez v. New York City Transit Authority, Tu Ba Nguyen and Tuan Ba Nguyen.

Plaintiff claimed serious injuries, including one requiring a cervical fusion, stemming from a motor vehicle accident. The accident occurred when our clients' vehicle crossed over the double yellow dividing line and struck the plaintiff's vehicle head on, after it tried to avoid two adolescents on bicycles riding recklessly against traffic.

After a two week trial before Justice Lucy Billings, the Court granted our motion for a directed verdict predicated upon the Insurance Law "serious injury" threshold. AGF&J's primary defense in the case had been the "emergency doctrine", i.e., that the Nguyen defendants were reacting to an unexpected emergency beyond their control. However, during the trial, evidence revealed plaintiff had been in a previously undisclosed motor vehicle accident involving a neck injury. The Court agreed with our contention that this prior accident called into question whether that accident was the cause of the injuries claimed, and dismissed the case.

- Len Kamlet obtained a unanimous defendant's verdict for AGF&J's client in a jury trial held before Justice Lucy Billings in Bronx County, Supreme Court. The case involved a claim brought by Natalio Martinez, a resident in our client's building that was operated as government subsidized senior citizen housing.

The plaintiff alleged that he slipped and fell on a wet lobby floor being stripped by the building superintendent. The case hinged on the stark credibility dispute between the parties as to whether warning signs had been present. A non-party visitor to the building testified as an eyewitness in support of plaintiff's version.

Despite the lack of any apparent connection between plaintiff and the witness, the jury accepted our contention that the testimony of plaintiff and the eyewitness was not entirely compatible and that the testimony of our client's superintendent was more credible.

Plaintiff had suffered a serious wrist fracture, which had left him with documented deficits in motion and grip.

Coincidentally, Len's victory in the trial before Justice Billings was pre-ceeded immediately, by John Fronce's in the case discussed above.

- We are pleased to announce that James E. Kimmel has joined us as a litigation associate. James is a 2002 graduate of New York Law School and earned his B.A. in 1999 from Ohio State University.

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It is our policy to appear as speakers at seminars, business and professional meetings, as well as before industry groups. In addition, whenever possible we attempt to fulfill requests for articles from industry publications. We will also make presentations on a variety of legal issues to claim and risk management departments. For further information, please contact Michael Gorelick at (212) 422-1200.

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