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Absent "Special Circumstances," An Insurance Agent Owes No Duty to Ensure Adequate Insurance Coverage

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Perreault v. AIS Affinity Ins. Agency of New England, Inc., 2018 Mass.App. LEXIS 99 (Ma.App.Ct. Aug. 2, 2018)

Brief Summary

As part of the settlement of a malpractice action against an attorney, he assigned any claims he had against his insurance agent/broker and/or liability insurer to his former client, the plaintiff in this action. The trial court granted summary judgment against the plaintiff on his claims against the insurance broker for negligence, breach of contract and violation of a Massachusetts consumer protection statute. The appellate court affirmed, finding that there was no "special relationship" between the attorney and the broker, such that the broker had a duty to ensure that the attorney had insurance to cover all of his work as an attorney, either in the form of prior acts coverage or a "tail."

Complete Summary

The Underlying Action

In September 2008, plaintiff retained defendant to represent him in a wrongful death action against tobacco companies arising from death of his wife due to cancer. Plaintiff's wife died in March 2006, and the statute of limitations on a wrongful death action in Massachusetts is three years. In May 2009, defendant obtained a medical opinion regarding the likelihood of success of the action. A registered nurse retained by defendant opined that the case had merit but questioned whether the statute of limitations had run. Defendant withheld the report from plaintiff. In July 2009, defendant sent plaintiff a letter stating there was no likelihood of success on the wrongful death claim and terminating the representation. Plaintiff retained subsequent counsel, who sued defendant for legal malpractice.

Insurance Coverage

There were three policies at issue, covering the three firms that defendant was involved with during period he represented plaintiff. Each of the policies was a "claims made and reported" policy from the same insurer, Liberty Insurance

Attorneys

Terrence P. McAvoy

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Underwriters, Inc. ("Liberty"). The parties agreed that coverage was available only when both the alleged misconduct and resulting claim arose during the policy period — *i.e*., if the alleged malpractice arose before the policy period, coverage would only be available if the malpractice arose on or after a policy's "prior acts" date, or fell within an "automatic extended reporting period" of sixty days after the policy terminated. While defendant had the option of purchasing an additional period of extended reporting—a "tail"—he did not.

Policy 1: In 2006, defendant was an associate at Arnowitz & Goldberg ("AG"). The firm was covered by a professional liability policy ("AG Policy") but defendant had no involvement in procuring the policy.

Policy 2: In 2007, defendant became one of three managing members of Arnowitz, Goldberg & Mann LLC ("AGM"). Defendant procured liability insurance coverage for AGM ("AGM Policy"), claiming to have relied "exclusively" on the broker's (AON) advice.

Policy 3: In late December 2009, defendant withdrew from AGM and opened his own firm ("Mann Firm"). He contacted the same broker to obtain a malpractice policy for the Mann Firm, again claiming that he relied upon the broker, and requested that the insurance commence January 4, 2010. Defendant did not disclose plaintiff's claim, but in an email exchange with the broker stated that "he needed coverage for all my past work since I first became an attorney in 2006."

The broker advised defendant to pay the AGM Policy payment in December 2009, "so that [it] does not cancel so we can offer you prior acts." Defendant made the payment but a few days later, he instructed the broker to cancel the AGM Policy, and did not purchase extended reporting coverage for the Mann Firm. The AGM Policy was canceled as of December 31, 2009.

Thereafter, a new policy issued for the Mann Firm ("Mann Firm Policy") effective from January 4, 2010 to January 4, 2011, with a prior acts date of January 4, 2010, and no tail.

Broker Malpractice Action

In March 2010, plaintiff sent a demand letter to defendant pursuant Mass. G.L. c. 93A, and commenced a malpractice action against him. Defendant sought insurance coverage from Liberty for plaintiff's claims. Liberty declined coverage under two of the three policies: the AGM Policy because it was canceled as of December 31, 2009; and the Mann Firm Policy because it was not in effect until January 4, 2010, and did not have prior acts coverage before that date or a tail. Liberty did, however, agree to provide a defense under the AG Policy. Defendant settled with plaintiff, assigning all of his rights to any claims against Liberty and AON to Plaintiff.

Plaintiff commenced separate actions against Liberty and AON; the Liberty action concluded prior to the appeal. As against AON, plaintiff alleged causes of action for negligence, breach of contract and violation of G.L. c. 93A. AON was granted summary judgment and plaintiff appealed.

Negligence. The court noted that absent "special circumstances," there is "no general duty of an insurance agent to ensure that the insurance policies . . . provide coverage that is adequate for the needs of the insured." An agent may acquire a greater duty of investigation, advice or assistance or of "due care" based upon factors creating "special circumstances," such as (i) a prolonged business relationship; (2) the complexity and comprehensiveness of the customer's coverages; (3) the frequency of contact between a customer and agent to attend to the customer's needs; and (4) the extent to which the customer relies on the advice of the agent by reason of the complexity of the policies. Enhanced duties can also arise "when the agent holds himself out as an insurance specialist, consultant or counselor and is receiving compensation for consultation and advice apart from premiums paid by the insured."

The appellate court concluded that "no rational finder of fact" would conclude that special circumstances existed such that AON owed defendant a duty of care. Defendant did not have a prolonged business relationship with AON, and no involvement in procuring the AG Policy. He did not personally communicate with AON until 2007, and then in 2009 when he opened the Mann Firm. Further, defendant's insurance needs were not complex but were limited to basic malpractice liability insurance, and AON was not requested to provide risk management services regarding the scope of insurance that each of the firms might need. Moreover, neither statements on AON's website nor in defendant's email that he needed coverage for all his past work as an attorney created a special relationship.

In fact, defendant failed to take AON's advice not to cancel the AGM Policy, requested that the prior acts coverage for the Mann Firm Policy commence as of January 4, 2010, and did not request a tail, despite AON's advice to read the pertinent provisions regarding coverage extensions. Absent a special relationship, defendant was obligated to read the policy, which he conceded that he did not, rather than rely upon representations of the insurance agent. Because there was no duty running from AON to defendant, summary judgment was properly granted on the negligence claim as a matter of law.

Breach of Contract. Plaintiff argued that even if there was no special relationship, AON's failure to procure prior acts coverage was a breach of contract. Plaintiff again relied upon defendant's e-mail exchange with AON, wherein he stated that he needed coverage for all his past work as an attorney since 2006. But AON had responded that defendant should make sure that the AGM Policy was not canceled so that prior acts coverage could be offered. The court concluded that this exchange did not set forth the material terms of an agreement. Further, defendant requested that the AGM Policy be canceled and never requested a tail or prior acts coverage going back to 2006. Consequently, no contract was made.

Unfair or Deceptive Acts (Chapter 93A). In the absence of a special relationship, there was no merit to plaintiff's claim under Chapter 93A. Viewed in the light most favorable to plaintiff, he simply failed to present any evidence that AON's handling of the insurance requests constituted an unfair or deceptive act under the statute. The trial court's decision granting summary judgment was thus affirmed in its entirety.

Significance of Opinion

It is imperative that the party responsible for procuring professional liability insurance for you or your firm know what is in the policy, how claims are made and whether prior acts are covered when you or your firm change insurers. Likewise, attorneys should know what coverage will be provided after they leave the firm, or if the firm dissolves. While your insurance agent or broker is familiar with various policy provisions and can provide advice and pricing options, it may not know your firm's particular circumstances. Whether adequate coverage has been procured should be confirmed by a comprehensive review of the actual policy language.