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Alerts

Insurance Agency Potentially Liable for Use of a Cost Estimator Program to Calculate Replacement Cost

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Professional Lines Alert

Plaintiff, the owner of a bed and breakfast (the "Owner"), met in July 2008 with an agent from defendant insurance agency for a policy covering her Victorian-era house. The agent used a cost-estimator computer program and physically measured the property to calculate the coverage. The cost estimate was $435,000 and the carrier issued a policy in that amount. The Owner signed a "policy limits acceptance" form that stated she accepted the policy limits applied for and understood that higher limits were available for an additional premium, and that she declined higher limits.

After the policy was procured, the carrier dispatched its own field inspector to review the bed and breakfast. The carrier sent the policy to the Owner with a cover letter suggesting that she read the policy in its entirety and to contact the carrier with any questions. The Owner never read the policy. By 2010 - 2011, the coverage limits had increased to $489,500.

In October 2010, a fire occurred and there was a total loss to the bed and breakfast. The carrier paid $517,525 to the Owner under the policy, but the Owner brought an action alleging that the insurance agency was negligent in calculating the necessary insurance amount because the amount received was insufficient to cover her losses. The insurance agency moved for summary judgment, which the U. S. District Court for the Western District of New York granted in part and denied in part.

Questions Before the Court

Can insurance agents be held liable for calculating replacement-cost coverage? Yes. The court cited approvingly to *Stevens v. Hickey-Finn & Co.,* 261 A.D.2d 300 (N.Y. App. Div. 1st Dept. 1999), in which the Appellate Division of the Supreme Court of the State of New York held that once an agent in response to plaintiff's request for proper and adequate coverage undertook to estimate the replacement value of the property to be insured, the agent owed plaintiff a duty to perform that estimation with a reasonable degree of care and accuracy. In the Owner's case, the insurance agency argued that its agent spoke only infrequently with the Owner, that they did not have a long-term relationship, and that the Owner had not asked for full replacement value coverage. The court found that there was a material issue of fact regarding whether the insurance agency took on the obligation to estimate the value of the bed and breakfast so

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that it would be properly insured by using the computer program and conducting a visual inspection of the property, which the Owner relied on and which then turned out to be woefully undervalued.

Did the Owner's failure to read the insurance policy bar her claim?

No. The court cited *American Building Supply Corp. v. Petrocelli Group,* 19 N.Y. 3d 730 (2012), where the New York Court of Appeals held that receipt and presumed reading of a policy does not bar an action for negligence against the broker, but was merely a defense. The Owner had argued that because its own agent specifically recommended the amount of coverage in the policy, and the Owner relied on that recommendation, reading the policy would only have confirmed that it contained coverage in the same amount as recommended by the agent.

Can the insurance agency as the agent of a disclosed principal be held liable if it acted within the scope of its authority in estimating the replacement cost?

No. The court cited to the general rule that where a duly constituted agent discloses his or her principal and contracts in his or her name and does not exceed his or her authority, the principal is responsible and not the agent. Even though an agent acts for a disclosed principal, however, that does not relieve the agent of liability for his or her own negligent acts.

The Owner argued that the insurance agency failed to show how the acts of its employee agent in estimating the replacement cost for the property using the computer program fell within the scope of the authority granted by the carrier. The insurance agency argued that its agent's use of the computer program to estimate the replacement cost was within the scope of its authority granted by the carrier. The court held that there was a material issue of fact that precluded summary judgment on this issue as well, finding that if the insurance agency took on the duty to estimate the value of the Owner's property and if the agency was acting within the scope of its agency with the carrier, then the insurance agency might escape liability altogether. If not, a jury might find the insurance agency liable for its agent's negligence in performing the estimate using the computer program.

What the Court's Decision Means for Practitioners

The district court here ruled that this insurance agency could be held liable for its agent's use of a computer program to estimate the replacement value of the property, if the jury found that use of such a program was beyond the scope of its authority from the carrier and was negligently performed. The court also cited with approval to *American Building Supply Corp.* which held that the "duty to read the policy" defense would not bar an insured's action for negligence against an insurance agent or broker.

Ambroselli v. C.S. Burrall & Son, Inc., 2013 WL 441058 (W.D.N.Y. Feb. 5, 2013)

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