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Alerts

Broker Liable for Failure to Obtain Excess Defense Cost Coverage for CCIP Program

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Professional Lines Alert

Defendant insurance broker entered into a services agreement with a developer to procure insurance for a power plant project under a contractor controlled insurance program (CCIP). Under the agreement the broker was to secure commercial general liability coverage and umbrella/excess liability insurance coverage that included defense cost coverage in excess of the primary CCIP policy. The services agreement with the developer contained a third-party beneficiary disclaimer, but provided for a list of subcontractors who were to receive the addendum which listed the various coverages. The broker obtained the proper defense cost coverage for the primary policy, but the excess policies did not provide for payment of defense costs. The broker issued to plaintiffs, and provided to each of the participants, a CCIP insurance manual that described the coverages and stated that the excess policies followed the same form as the primary policy, and that to the extent such information conflicted with the actual insurance policies, the provisions of the policies would govern. None of the CCIP participants reviewed the actual policies.

There was an explosion at the project and it caused multiple deaths, injuries and losses. A number of wrongful death, personal injury and property damage lawsuits were brought against the CCIP participants. Within a short time the primary CCIP and the first-excess and second-excess policies were exhausted. Because of the lack of defense cost coverage under the excess policies, the contractors involved all incurred substantial costs related to defending themselves in the actions related to the explosion.

The developer, the contractor and two subcontractors sued in the U.S. District Court for the District of Connecticut for a declaratory judgment, breach of contract, negligence, professional malpractice and misrepresentation as a result of the broker's failure to procure coverage that included defense cost coverage in excess of the CCIP policies. The broker moved to dismiss and the court granted the motion in part and denied it in part.

Questions Before the Court

Did the contractor and subcontractors have standing to sue the broker as third-party beneficiaries of the CCIP agreement despite a disclaimer against such claims?

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Yes. The court found that the language in the agreement whereby the developer was to provide the broker with a list of subcontractors to receive the contractual addendum that spelled out the coverages was enough to show that the broker intended to assume a direct obligation to the contractor and the subcontractors who were participants in the CCIP program so that they had standing as third-party beneficiaries. The court held that the provision that "there are no third party [sic] beneficiaries to this agreement" did not preclude the third-party claims by these CCIP participants.

Were plaintiffs' allegations sufficient to state claims for negligence, professional malpractice and negligent misrepresentation?

Yes. The court held that the broker here had a duty to obtain defense cost coverage in excess of the primary policy, and the CCIP manual it issued to the participants represented that the excess policies followed the form of the primary policy wording, which meant that it included the same defense cost coverage as included under the terms of the primary policy.

The broker argued that because plaintiffs failed to review the policies that it had procured to make sure they fit their insurance needs, the broker did not have a duty to make sure that coverage was sufficient and could not have been the proximate cause of the lack of excess defense cost coverage. The court dismissed this argument, citing to the recent New York state opinion, *American Building Supply Corp. v. Petrocelli Group, Inc.,* 19 N.Y.3d 730, 736-37, 955 N.Y.S.2d 854, 979 N.E.2d 1181 (2012), in which the New York Court of Appeals held that when a plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint, "the failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker."

The district court also held that plaintiffs had sufficiently alleged a claim for negligent misrepresentation. The broker argued that plaintiffs could not have justifiably relied on its CCIP manual because it was only meant as an outline. The court found that the allegations that the broker explicitly informed them in the CCIP manual that the excess policies followed the form of the primary policy meant that the excess policies also included defense cost coverage.

What the Court's Decision Means for Practitioners

The district court here found that there was little Connecticut law on the issues having to do with broker negligence and it was willing to rely on New York law cited by both parties in deciding this motion to dismiss. The court found that these participants in the CCIP program could sue as third-party beneficiaries based on representations on policy wording made in the CCIP manual and held that this action was not precluded because plaintiffs only read the manual and not the underlying policies.

O&G Industries, Inc. v. Aon Risk Services Northeast, Inc., 2013 WL 424774 (D. Conn. Jan. 29, 2013)

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