INSURANCE AGENT and BROKER E&O 2018: THE YEAR IN REVIEW

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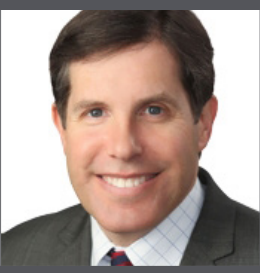

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I. INTRODUCTION

The evolution of insurance agent and broker errors and omissions ("E&O") law has been highlighted in recent years by: continued erosion of the "duty to read" defense; increasing perceptions of agents and brokers as possessive of specialized experience and expertise necessary to advise and guide their customers with respect to their insurance coverages and overall risk management; and ever expanding E&O risk concerns. In 2018, while these trends did not abate, there were a number of positive developments for insurance agents and brokers as well. These include: decisions touching on choice of law analysis in resolving conflict of law issues; accrual of failure to procure claims for statute of limitations purposes; the continued vitality of the "duty to read" defense in a number of states; and even the continued viability, in certain jurisdictions, of the absolute defense of contributory negligence on the part of the insureds.

Additionally, there were some helpful decisions in regards to defining the parameters of what constitutes an "interaction with regard to a question of coverage" sufficient to give rise to a duty to advise, and what is necessary to establish "special circumstances" or a "special relationship" based on an "extended course of dealing". Another decision addressed the limited exceptions to the requirement in states requiring the filing of an affidavit of merit as a prerequisite to commencement of a professional liability claim in the context of alleged agent/broker negligent failure to procure. There was also a decision that should be of particular note to agents/brokers forced to defend frivolous E&O claims based on alleged breach of contractual agreement to procure coverage, where the court relied on a state law providing for discretionary award of attorney's fees to victorious defendants in an agent/broker failure to procure lawsuit.

The following is a summary of some of the more interesting and significant developments in insurance agent/broker E&O in 2018.

II. SUMMARY OF THE YEAR'S HIGHLIGHTS

A. Choice of Law

In an important decision addressing the question of which state laws apply to claims against a broker where the alleged broker misconduct is claimed to have occurred in one state and the alleged injury occasioned thereby in another, the U.S. District Court for the Southern District of New York held that, under New York choice of law rules the court must look to the law of the state where the alleged misconduct occurred. This appears to have resolved some significant confusion on the issue, and is expected to clarify that no longer should federal district courts venued in New York look to the place of injury in determining choice of law for conduct-regulating based issues.

In Holborn Corp. v. Sawgrass Mut. Ins. Co.,[1] Sawgrass Mutual was an insurer which wrote homeowners insurance coverage in Florida. It retained Holborn to procure reinsurance for same, but terminated the agreement a couple of years later, after which Holborn brought suit for breach of contract, alleging Sawgrass had failed to pay its full share of brokerage on all reinsurance procured or placed. In response, Sawgrass asserted counterclaims alleging negligence, breach of fiduciary duty and breach of contract based on Holborn's alleged failure to recommend "Top and Drop" reinsurance coverage, a multi-layer insurance product which allows the insured to re-use the top excess-of-loss layer of reinsurance if it is not breached by the first loss event. Sawgrass alleged that had Holborn recommended this coverage, it would have saved hundreds of thousands of dollars.

Holborn moved to dismiss the first and second counterclaims on the grounds that they were barred by the economic loss doctrine under New York law. In opposition, Sawgrass argued that Florida law should apply, and thus that the economic loss rule should not apply in this instance (as under Florida law the economic loss doctrine only applies to product liability claims). Because the law at issue was "conduct regulating" as opposed to "loss-allocating," the court concluded that New York law should apply based on the alleged negligence and breach of fiduciary duty taking place in New York, where Holborn's brokers were located. In so doing, the court noted some confusion in past precedent on the issue, as a number of courts had previously concluded that conduct-regulating laws should be applied utilizing the law of the state where the last event necessary for liability took place: i.e., the situs of the injury. But applying the Second Circuit Court of Appeals' decision in Licci ex rel. Licci v. Leb. Can. Bank, SAL,[2] the court concluded that, in fact, where the alleged wrongful conduct and the alleged injury do not take place in the same jurisdiction, "[I]t is the place of the allegedly wrongful conduct that generally has superior 'interests in protecting the reasonable expectations of the parties who relied on [the laws of that place] to govern their primary conduct and in the admonitory effect that applying its law will have on similar conduct in the future.'"[3] Accordingly, because New York law applied, Sawgrass' counterclaims for

negligence and breach of fiduciary duty were barred by the economic loss doctrine, and the claims dismissed.[4]

B. Statute of Limitations

In American Fam. Mut. Ins. Co. v. Krop,[5] the Illinois Supreme Court dismissed a negligence claim against an agent for allegedly failing to procure homeowner's insurance providing coverage "equal" to the plaintiffs' prior coverage. Because the replacement policy only provided coverage for liability arising from bodily injury or property damage, the insurer (American Family) had denied coverage for claims alleging defamation, invasion of privacy and intentional infliction of emotional distress not involving any alleged bodily injury.

As the policy in issue had been received by the plaintiffs more than 2 years prior to the plaintiffs' lawsuit, the agent moved to dismiss the claim as barred by Illinois' two year statute of limitations provided for under 735 ILCS 5/13-214.4 (West 2014). After the motion was initially granted, then reversed on appeal, the Illinois Supreme Court reversed the appellate court ruling, and dismissed the claim.

In issuing its decision in this regard, the Illinois Supreme Court rejected the plaintiffs' argument that the claim against the agent shouldn't accrue until the discovery of the failure to procure the requested coverage occasioned by the denial of the insureds' claim. In so doing, the court noted that, under Illinois law, an alleged negligent failure to procure doesn't involve the breach of fiduciary duty.[6] And "[b]ecause a claim for negligent failure to procure insurance does not involve a fiduciary duty, insurance customers' obligation to read their policies controls."[7]

Detailing its rationale for why this constituted good public policy, the Court explained: Customers generally know their own goals better than an insurance agent does, but determining if a policy achieves those goals will be difficult when customers do not read their policies. Expecting customers to read their policies and understand the terms incentivizes them to act in good faith to purchase the policy they actually want, rather than to delay raising an issue until after the insurer has already denied coverage. Moreover, insurance customers frequently maintain the same insurance policy for years, perhaps decades, at a time. If the cause of action did not accrue until the insurance producer notified the customer of an uninsured liability, insurance customers would benefit from the policy throughout the intervening period, while evidence potentially relevant to the insurer's defense would be at risk of deterioration.[8]

In issuing this ruling, the Illinois Supreme Court noted that other courts in other states (including Alaska, Massachusetts, Maryland and Pennsylvania) had applied the "discovery rule," and still others had found that the cause of action only accrues when the insured incurs losses because of an uninsured liability.[9] However, the American Family Court stated that these courts had relied on two key premises which the Court rejected: "that the injury for which the plaintiffs sought a remedy was a liability that their policy did not cover and that the plaintiffs could not assert their claim until they encountered such a liability."[10] Instead, the Court held that the failure to procure insurance is a tort arising out of breach of contract, and thus should be treated as a tort which accrues when the breach occurs.[11]

Recognizing that there will be "a narrow set of cases in which the policyholder reasonably could not be expected to learn the extent of coverage simply by reading the policy," such as where the insurance policies contain contradictory provisions, fail to define key terms, or the circumstances of the loss in issue are so unusual that they could not likely have been imagined by the insureds when they purchased their policy, the Court indicated there could be exceptions to the rule.[12] But where, as here, the policy specifically contained a definitions section detailing the fact that "bodily injury" didn't cover emotional or mental distress, mental anguish or mental injury "unless it arises out of actual bodily harm to the person," the Court concluded no such exception should be applied.[13]

Applying a different approach, in Lederer v. Gursey Schneider LLP,[14] a California appellate court considered the question of when a negligent failure to procure claim accrued in connection with alleged failure to procure requested uninsured/underinsured automobile insurance. In Lederer, the evidence was undisputed that the insured had requested $5 million in limits, but a policy with a limit of only $1.5 million was purchased. This was discovered shortly after the policyholder's adult son was severely injured in a motorcycle accident. More than 2 years after this—but less than 2 years after the insurer for the other driver had tendered the $15,000 limits on the other driver's policy and the plaintiff's insurer had tendered the $1.5 million limit of the underinsured motorist policy—the plaintiff policyholder and her son brought suit against the agent. Because the statute of limitations was 2 years, the agent moved for summary judgment, arguing that the plaintiffs' cause of action had accrued when plaintiffs had been alerted to the fact that the insurance coverage that had been purchased was less than what had been requested. The trial court granted the motion. On appeal, however, the ruling was reversed.

In reversing the trial court on this issue, the appellate court concluded that the trial court had conflated the question of when the discovery of the alleged negligence had occurred with the question of when the plaintiffs had incurred actual injury. Because actual harm is required before a cause of action for negligence accrues, the appellate court concluded it was only when the plaintiffs suffered harm as a result of the failure to procure the requested coverage limits that the cause of action accrued. In this case, although the plaintiff son clearly suffered damages from the

motorcycle accident in February 2010, and plaintiffs discovered the negligent failure to procure shortly thereafter, the plaintiffs did not suffer damages caused by the agent's negligence until the son received the diminished benefit payment in June of 2012 — less than a year prior to the institution of the lawsuit. Significantly, in reaching this ruling the appellate court pointed to the fact that, under the governing statute, a right to underinsured motorist coverage does not accrue until the insured has reached a settlement or judgment exhausting the underinsured policy. In this case, the right to underinsured motorist coverage was not a given, because the cause of the accident was heavily disputed, and the police report of the accident wasn't favorable. It wasn't until the claim was settled with the underinsured motorist and the underinsured motorists coverage was tendered, in January 2012, that the injury caused by the failure to procure the requested underinsured motorist coverage limits was incurred.

In arguing in favor of affirmance of the trial court ruling, defendant argued that, in fact, the son had "suffered actual injury when he sustained severe bodily injuries exceeding his available insurance coverage, without any right to obtain any greater liability protection to fully compensate him for his injuries," and this "diminution of right" was sufficient to trigger the claim.[15] The appellate court rejected this argument, concluding that unless and until the son's right to receive any coverage under the underinsured motorist protections of the policy was extant, the mere "threat of future harm — not yet realized — does not suffice."[16]

In Jackson v. QBE Specialty Ins. Co.,[17] a Louisiana federal district court considered whether a case involving a dispute with respect to insurance coverage under a homeowners' policy for mold remediation was properly removed to federal court on the basis of fraudulent joinder of the homeowners' insurance agent. The plaintiffs had asserted claims against QBE for breach of contract in refusing to pay for the mold remediation, and against their insurance agent for failing to procure coverage for mold. The insurer (QBE) argued that the claim against the agent—whose presence destroyed diversity — was barred by the 1 year statute of limitations, given that the coverage was bound on July 12, 2016, the policy language clearly provided no coverage for mold, and the lawsuit wasn't filed until September 15, 2017. In opposing remand, plaintiffs argued that the defendant broker had voluntarily adopted a policy wherein an agent or other employee would review the entire insurance application with the prospective buyer and explain the available options for additional coverage; yet no such review had occurred in this instance. Plaintiff asserted that, had the agent followed this policy, they would have been told that a mold coverage rider was available and that most insureds purchase/obtain the rider given that homes in the area are at high risk for mold. Accepting this argument for purposes of the remand motion, the court concluded that, if an assumed duty was found to exist, the peremptive statutory period would not likely have begun to run until October 11, 2016, when plaintiffs only first became aware of the agent's policy in this regard.[18]

Lastly, in Penn v. 1st S. Ins. Servs., Inc.,[19] a Virginia federal district court, applying Virginia law, dismissed a claim for breach of contract in failing to procure the requisite minimum liability coverage for a truck engaged in interstate commerce. Although the federal minimum is $750,000, and it was alleged the owners relied on the broker's promised experience and expertise in insuring truckers to purchase the requisite coverage, the defendant broker purchased liability limits of only $100,000 for the truck. After two individuals were severely injured in an accident caused by the driver of the company's truck, they were awarded, collectively, $2.725 million in damages. The company assigned its claims against the broker to the injured parties, and the injured individuals brought suit against the broker for, among other things, breach of contract in failing to procure the required coverage. Because the claim was brought more than 5 years after the alleged breach of contract — i.e., the failure to purchase the correct coverage — on motion to dismiss the claim as time-barred, the court granted the motion. In reaching this holding, the court noted that, under Virginia law, a cause of action accrues when injury is sustained. In this case, the court concluded the owners of the truck sustained injury when they received the wrong coverage.[20]

As the lawsuit had been commenced within a year after the plaintiffs obtained their verdicts against the company, the plaintiffs argued that, because the company was being defended in the personal injury action, it didn't suffer an actual injury resulting from the alleged failure to procure the proper coverage until after judgments against it were obtained. However, in reasoning similar to that adopted by the Illinois Supreme Court in the American Family case discussed above, the Penn court pointed to the fact that, under Virginia law, in the case of a failure to procure a policy, the right to recover is fully matured when the agreement is violated and the insured has been harmed in paying premiums for coverage that wasn't obtained.[21] Accordingly, while further injury was suffered when the judgments were obtained for which there was only $100,000 in coverage, the claim against the broker had accrued years earlier, "When the legally insufficient policy was placed by Defendants."[22]

This ruling, and the American Family ruling, are significant in the ongoing debate about accrual of negligent failure to procure claims in that, as courts that have struggled with the issue have noted, the fact that the requested coverage was not obtained may not make itself readily known until a loss occurs. Not surprisingly, the rule in a number of states is that the statute of limitations does not begin to accrue on such claims until a loss occurs evidencing the lack of coverage, because

only then has the insured suffered injury. But the policy argument relied upon by the Illinois Supreme Court holds significant appeal, and the analysis in the Penn case supports the argument that, in fact, harm has been suffered immediately upon receipt of the wrong coverage. In light of the continuing evolution of the case law on this issue, it would not be surprising if, even in jurisdictions with apparently "settled" law on the issue, there may be further changes coming.

C. Defense of Unavailability of Coverage

In Madison Cnty. v. Evanston Ins. Co.,[23] the court considered the viability of a defense of unavailability of coverage to a failure to procure claim insofar as it is based on an alleged breach of a contractual promise to procure specific coverage under Alabama law. Finding this defense to be lacking, the court noted that in connection with breach of contract claims, Alabama "'has not recognized the defense of impossibility or impracticability. Where one by his contract undertakes an obligation which is absolute, he is required to perform within the terms of the contract or answer in damages, despite an act of God, unexpected difficulty, or hardship, because these contingencies could have been provided against by his contract.'"[24] Accordingly, under Alabama law, absent a contractual provision addressing the contingency of the requested coverage being unavailable, the defense that the coverage wouldn't have been available—which is regularly raised as a defense to negligent failure to procure claims—is apparently not a viable defense to a breach of contract based failure to procure claim.[25]

D. Duty to Read

As regular readers of this annual review will note, the defense of "duty to read" has been under assault, and there are fewer and fewer jurisdictions which continue to view the "duty to read" as an absolute defense to negligent failure to procure and fraud or negligent misrepresentation claims. But there are still some jurisdictions in which the defense remains alive and well. A couple of decisions in Mississippi and Georgia reflect this, while at the same time highlighting the availability of exceptions to the rule even where it remains in place.

In Am. Zurich Ins. Co. v. Guilbeaux,[26] the court reaffirmed that, under Mississippi law, claims of negligent procurement, or fraudulent or negligent misrepresentation against a broker or agent must fail, as a matter of law, if the insured received and had an opportunity to review its insurance policy and a review of same would have clarified the actual coverage procured, based on Mississippi's "duty-to-read" and "imputed-knowledge" doctrines. However, the court noted that, "[f]or an insurer to get the benefit of a presumption of receipt of an insurance policy, the insurer must tender evidence of mailing—such as an affidavit of an employee demonstrating the insurer's records acknowledging mailing."[27] As the insured claimed to have been misled that the builder's risk policy he purchased would provide coverage for more than 30% of the completed work on the home he was constructing and there was no documentary evidence he had been provided with a copy of the policy, the court denied the broker's motion to dismiss on summary judgment.

The duty to read as an absolute defense to an insurance agent/broker negligent failure to procure claims remains viable in Georgia as well. But there are exceptions. Bush v. AgSouth Farm Credit, ACA[28] provides an illustrative example.

As a general rule, Georgia law provides that: An insurance agent who undertakes to procure a policy of insurance for his principal but negligently fails to do so may be held liable to the principal for any resulting loss. However, where the agent does procure the requested policy and the insured fails to read it to determine which particular risks are covered and which are excluded, the agent is thereby insulated from liability, even though he may have undertaken to obtain full coverage.[29]

However:

an exception to this rule applies where the agent, acting in a fiduciary relationship with the insured, holds himself out as an expert in the field of insurance and performs expert services on behalf of the insured under circumstances in which the insured must rely upon the expertise of the agent to identify and procure the correct amount or type of insurance.[30]

In AgSouth Farm Credit, a farmer ("Bush") who had purchased crop insurance for his wheat and soybean crops, suffered a loss in 2013 to his wheat crop as a result of excessive moisture. He was paid $102,986 for his loss, which he assigned to AgSouth to put towards several loans he had received towards the purchase of farm machinery and equipment. Afterwards, the insurer conducted an audit of his claim, and determined that he had misrepresented his actual production history ("APH"), and he was not entitled to the claim payment he received. The insurer demanded repayment of same, in order for him to remain eligible to participate in the crop insurance program. Because he had used the funds to make payment towards his loan, he couldn't repay the insurer. Without the ability to purchase crop insurance, he contended he lost the ability to operate his farm in 2015 and 2016, had to sell off his cattle, and was forced to lease land and equipment to another farmer — causing him alleged damages of at least $145,000.

In pursuing claims for both negligence, negligent misrepresentation and fraud, Bush argued that the AgSouth agent he utilize to purchase crop insurance had agreed to calculate his APH each year beginning in 2011, and he presumed she had done so based on the "weight tickets" he had provided to her. The agent acknowledged she had prepared the APH calculations based on the information she was provided, and told him he was not required to submit supporting documentation with his policy application. But she claimed she had warned him that he would be subject to audit and if he was ever

audited he would "have to document" what was reported in the insurance application. Further, Bush had signed the insurance application certifying that to the best of his knowledge and belief the information contained therein was correct; he signed the production and yield report submitted therewith certifying its correctness; the application stated "I also understand that failure to report completely and accurately may result in sanctions under my policy, including but not limited to voidance of the policy"; and, in signing the production report, he acknowledged "this form may be reviewed or audited and that information inaccurately reported or failure to retain records to support information on this form may result in recomputation of the APH yield."[31] Based thereon, AgSouth and the agent moved for summary judgment dismissing the claims, and the motion was granted.

On appeal, the decision was reversed. Although Bush admittedly had not read the policy and other related documents, the court noted that Bush had alleged that the agent had held herself out as a crop insurance expert. Further, viewing the evidence in the light most favorable to Bush, the court concluded there was evidence the agent had undertaken to calculate the APH for him, and Bush had relied on her expertise in this regard because he knew nothing about crop insurance, having never previously farmed his land for the purpose of selling the produce, and thus never having previously purchased such insurance. As such, Bush depended on the agent to ensure that his crop was adequately insured against loss, which necessarily required the agent to properly calculate the APH based on proper documentation as governed by federal rules set out in a voluminous Crop Insurance Handbook with which the agent was quite familiar.[32] As such, the court determined "[i]t is for a jury to decide whether [the agent's] alleged failure to ask Bush for records to support the APH and her alleged failure to use written verifiable records to calculate the APH constituted negligence and/or negligent misrepresentation."[33]

Significantly, while the defendants argued that the documentation requirement was readily apparent on the face of the application documents and policy, and Bush's admitted failure to read these documents preclude recovery, the court concluded that the fact that the expert exception to the general "duty to read rule" applied took the legs out from under that argument. In fact, the court noted, the policy referred to "written verifiable records," and relied upon reference to a federal regulation to define the term. As such, the court determined, "[i]t would not have been readily apparent to Bush, on the face of the policy, that the weight tickets or other information he provided to Meeks were not adequate to meet the definition of 'written verifiable record.'[34] Moreover, "[e]ven if Bush had read the policy from beginning to end, he would not have known that the calculation was not properly done in accordance with federal regulations. Calculating the APH was up to the expert agent and governed by the rules set out in the Crop Insurance Handbook."[35]

E. Affidavit of Merit

In Ehrhardt v. Amguard Ins. Co.,[36] the court upheld the dismissal of broker negligence and breach of contract claims for failure to serve an Affidavit of Merit pursuant to N.J.S.A. 2A: 53A-26 to 29 attesting that defendants' conduct did not comport with applicable professional standards of care. What is significant about this is the court's rejection of the argument, under the particular facts of this case, that this was such a "common knowledge" negligent act that expert testimony, and thus an Affidavit of Merit, was unnecessary.

In Ehrhardt, plaintiffs were the owner/operators of a medical practice and nutritional business in New Jersey ("Body Mind Nutrition") who learned, after Superstorm Sandy struck in October 2012, that much of their losses caused by the storm—including for inventory and business personal property—would not be covered under the commercial general liability policy their broker had procured for them. In addition to suing their insurer (against whom the claims were at some point voluntarily dismissed), they sued their broker, alleging negligence and breach of contract based on failure to procure the coverage requested, and to inform and advise them about the coverage obtained. Among other things, plaintiffs alleged the broker had been requested and failed to obtain coverage comparable to the coverage they had to replace because their prior insurer had advised it would no longer be offering the coverage they previously had in place.

In New Jersey, before a lawsuit alleging professional negligence can be brought against a licensed professional, plaintiffs must obtain and serve an Affidavit of Merit ("AOM") on the defendant from an expert attesting that defendants' conduct did not comport with applicable professional standards of care, pursuant to N.J.S.A. 2A:53A-26 to 29. Because the plaintiffs had admittedly failed to serve an AOM on defendants, at the conclusion of discovery the defendants moved to dismiss the claims against them on summary judgment, and the motion was granted.

Citing to Hubbard ex rel. Hubbard v. Reed,[37] Plaintiffs appealed from the trial court decision on the grounds that, while suits against licensed professionals generally require service of an AOM in New Jersey, there is a "common knowledge" exception that applies where expert testimony is not needed to establish whether the defendants' "care, skill or knowledge . . . fell outside acceptable professional or occupational standards or treatment practices.'"[38] For example, in the Hubbard case, a jury didn't need an expert to explain that a dentist had been negligent in extracting the wrong tooth. Here, plaintiffs argued that, because the broker defendants had been asked to replace the coverage they previously had with coverage

"as comprehensive as those [in the policies] previously issued" to them and had failed to do so, no expert testimony was necessary.[39] The appellate court rejected this argument, noting that "the assessment of what coverage in a certain insurance policy is equally 'comprehensive' as the coverage provided in another insurer's policy can readily entail a sophisticated assessment of policy-specific language, definitions, exclusions, exemptions, and the like. Lay jurors are simply not equipped to make those assessments."[40] Further, the court rejected the argument that the breach of contract claim should be treated differently because plaintiffs had failed to offer evidence that they had requested identical coverage to what they previously had, nor a reciprocal promise by defendants to fulfill such requests. In fact, at least one of the emails exchanged between the parties "suggest[ed] a desire to explore a 'cheaper' premium, indicating a possible willingness by the insured to accept non-identical coverage for a lower cost."[41] As such, the court concluded, "[P]laintiffs have failed to demonstrate that these issues of replacement coverage can be litigated fairly and sensibly in the absence of supporting expert opinion."[42]

F. Recovery of Attorneys' Fees

In 11333, Inc. v. Certain Underwriters at Lloyd's, London,[43] the court considered an application by a victorious insurance broker (HUB) for reimbursement by plaintiff of its reasonable legal fees incurred in defending against allegations of professional negligence, breach of contract and breach of the duty of good faith and fair dealing pursuant to an Arizona statute providing that, "In any contested action arising out of a contract, the court may award the successful party reasonable attorney's fees."[44] Under this statute, the award of attorney's fees is discretionary, and the courts may consider a variety of factors in determining whether to award same, including: "the merits of the unsuccessful party's case, whether the litigation could have been avoided or settled, whether assessing fees against the unsuccessful party would cause an extreme hardship, the degree of success by the winning party, any chilling effect the award might have on other parties with tenable claims or defenses, [and] the novelty of the legal questions presented."[45]

In granting HUB fees totaling nearly $90,000, the court took note of the fact that plaintiff had alleged an oral agreement that HUB would procure insurance for the plaintiff's errors and omissions in overseeing an LLC which had taken ownership of an oceanfront subdivision in Galveston, Texas, and had failed to do so. Yet in the course of litigation, the plaintiff had failed to offer evidence that HUB had represented to Plaintiff that the policy it had procured for Plaintiff would provide such coverage, or that it would even have been possible for HUB to have obtained a mortgage bankers/brokers insurance policy that would have provided coverage for the loss (uncovered flood loss).[46] The court also noted that it need not try to allocate defense costs incurred as among the tort-based and contract based claims, because they were so inextricably intertwined.[47]

This decision is significant because it offers hope to brokers in states with similar such statutes that, where a wholly unmeritorious broker breach of contract claim based on alleged failure to procure has been brought, some measure of justice can be meted out to the broker for having to defend same.

G. Contributory Negligence

In Kane v. Atlantic States Ins. Co.,[48] the court issued a reminder of the fact that the contributory negligence doctrine is still alive and well in Pennsylvania in regards to negligent failure to procure insurance coverage claims against insurance agents and brokers. While, by statute, the courts must look to and apply the parties' respective comparative levels of negligence in cases involving alleged injuries to person or property,[49] this does not apply to the loss of an alleged right to an insurance recovery.[50] Thus, the contributory negligence of an insured found to have been a substantial factor in or proximate cause of the lack of insurance will serve to bar the insured from any recovery.[51]

H. Breach of Fiduciary Duty

In Trusted Transportation Solutions, LLC v. Guarantee Ins. Co.,[52] applying New Jersey law, a New Jersey federal district court dismissed a broker "breach of fiduciary duty" claim as duplicative of the plaintiff's broker negligence claim. The court held that "the sole duty of care owed by an insurance broker to an insured is to refrain from engaging in conduct giving rise to a claim for broker malpractice."[53] "To the extent an insurance broker owes a 'fiduciary duty' to an insured," the court stated, "such duty arises only in the context of a broker malpractice and/or negligence claim."[54] However, it should be noted that the court acknowledged a separate claim for failure to act in accordance with a higher duty of care can be brought where a "special relationship" can be shown.[55]

I. Duty to Advise

In Hansmeier v. Hansmeier,[56] the Nebraska Court of Appeals affirmed the dismissal of claims against an insurance agent on summary judgment asserting that the agent had been negligent in failing to advise a farmer regarding his coverage options. Although he had a right under Nebraska law not to purchase workers compensation insurance for his employees, he could only do so if he provided them written notice, signed by the employees, that they would not be covered by the Nebraska Workers Compensation Act. In this case, the farmer knew he didn't have to purchase such insurance if he had ten employees or less, but wasn't aware that he had to provide this notice, and failed to do so, thus opening himself up to liabilities for an employee whose thumb was detached while using an auger on the job.

The appellate court found that the insurance agent's failure to advise the farmer of this notice obligation could not give rise to a negligent failure to advise claim, because the agent had

no duty to anticipate what coverage the farmer should have. The court acknowledged the agent did not contradict the farmer when he advised he didn't think he needed workers' compensation insurance. But it concluded this did not amount to a negligent misrepresentation, because it was true. In other words, reading between the lines of the decision, while it certainly would have been helpful to raise the question of whether the farmer had taken the requisite steps necessary to lawfully proceed without workers compensation insurance, the agent had no duty to anticipate that the farmer wasn't aware of or properly complying with the law, and as such anticipate his coverage needs based thereon.

In Luzzi v. Hub International Northeast, Ltd.,[57] in denying summary judgment the defendant agent ("Fidelity") for alleged negligence in providing advice to an insured with regard to renter's insurance for her personal property, the court noted that under New Jersey law, both insurance agents and brokers owe a duty of care in connection with the procurement of insurance coverage beyond merely procuring the insurance he or she undertook to supply. Quoting from the New Jersey Supreme Court decision in Aden v. Fortsh,[58] the court pointed out that "[l]iability resulting from the negligent procurement of insurance is premised on the theory that a broker 'ordinarily invites [clients] to rely upon his expertise in procuring insurance that best suits their requirements."[59] Thus, because plaintiff alleged failure on the part of the agent to ask about the types and value of the personal property she owned, plaintiff had a right to a jury determination of whether the agent breached her duty of care. The court so ruled notwithstanding the fact that plaintiff had been provided with a policy containing a declarations page evidencing only $15,000 in property limits, and plaintiff knew she was paying only $126 in annual premiums. The question of her credibility in believing this entitled her to coverage for $270,000 in alleged losses was deemed to be one for the jury to determine.[60]

In Sesztak v. Great Northern Ins. Co.,[61] the court concluded that, in addition to there being "no common law duty of a carrier or its agents to advise an insured concerning the possible need for higher and higher policy limits upon renewal of a policy,[62] "[w]e see no reason why such a duty would arise when an insured is [first] obtaining coverage" absent a 'special relationship', such as where "an insured 'knew nothing about the technical aspects of insurance policies, [and] placed faith in,' and relied on, the broker's expertise."[63] Accordingly, the court affirmed a trial court ruling finding for the broker after trial that the broker could not be found liable for failing to advise a homeowner to purchase greater than $1.5 million in homeowner's insurance when the evidence made clear the homeowner was well aware that the home—which the plaintiff had listed for sale at over $3 million—was valued at substantially more than the limits requested.

J. Special Relationship/Duty to Advise

In New York, there are three "exceptional situations" recognized by the courts as giving rise to a "special relationship:" "(1) [where] the agent receives compensation for consultation apart from the payment of the premiums; (2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on."[64] While this is fairly straightforward and has long been the law in New York, the precise contours of what may constitute an "interaction with regard to a question of coverage" have not been specifically defined. As a result, arguments have been made that all sorts of "interactions" can form the basis of a special relationship, and the courts have had to grapple with this issue. Two federal court decisions applying New York law in 2018 have offered some guidance.

In Holborn Corp. v. Sawgrass Mut. Ins. Co.,[65] discussed above with regard to the choice of law issue, above, the court considered an alleged negligent failure to advise claim against a broker ("Holborn") for failing to advise an insurance company with a homeowner's insurance program to purchase "Top and Drop" reinsurance, a multi-layer insurance product which allows the insured to reuse the top excess-of-loss layer of reinsurance if it is not breached by the first loss event. As above noted, Sawgrass alleged that, had Holborn recommended this coverage, it would have saved Sawgrass hundreds of thousands of dollars. In rejecting Sawgrass' argument that there was a special relationship based on an "interaction regarding a question of coverage," the court noted that, "In order to satisfy this requirement, courts have generally required that the insured make a specific request about the feature of the proposed insurance at issue in the subsequent suit."[66] Yet, here Sawgrass had failed to allege that a particular conversation about the insurance coverage at issue had ever occurred, or that it had relied on Holborn to procure that coverage. Sawgrass had merely alleged that it had required the broker "to carefully analyze Sawgrass' potential exposure . . . [and] design a specific reinsurance program custom tailored to Sawgrass' unique business needs."[67] Similarly, the court noted, Sawgrass argued that Holborn had recommended a reinsurance policy "that it represented as having been the most advantageous for its unique business needs."[68] In rejecting this as an appropriate basis for a "special relationship" claim, the court stated: An alleged conversation in which the parties discussed 'the most advantageous' policy—without either party specifically mentioning Top and Drop insurance—is insufficient to create a special relationship . . . . All insurance customers are seeking the most advantageous insurance policy, and as a result, a discussion generally about what policy will be the most advantageous does not suggest 'that the Plaintiff enjoyed anything other than an ordinary consumer-agent insurance relationship.'[69]

Subsequently, in Spinnato v. Unity of Omaha Life Ins. Co.,[70] the court cited Holborn in dismissing a claim based on alleged negligent advice by an insurance agent, who allegedly had advised the plaintiffs to purchase insurance policies they ultimately couldn't afford, and caused them to be harmed as a result. In rejecting their special relationship claim based on an alleged interaction with regard to a question of coverage, the court noted that "[t]he Plaintiffs have failed to allege that a conversation occurred between themselves and [the agent] regarding the applicability of the policies to their particular financial situation, the affordability of the premiums, or the suitability of the death benefits."[71] Further, the court stated, the vague allegation that the Plaintiffs agreed to purchase the policies at issue based on the agent's recommendations was "too vague and common to create a special relationship."[72] If the court was to rule otherwise, it concluded, the courts would be compelled to find a special relationship in nearly every instance, and "'th[is] exception would swallow the general rule.'"[73]

K. Measure of Damages

In Lexington Club Cmty. Ass'n, Inc. v. Love Madison, Inc.,[74] two condominium associations had paid the premiums on a performance bond purchased in connection with repair work to be done after Hurricane Wilma. In violation of the specific contractual requirements for the purchase of such a bond, the bond had been issued by a surety that wasn't licensed to do business in Florida. While there ended up being no cause to collect on the bond, the associations sued to recover the cost of the premiums from both the contractor and the insurance agent that had procured the bond, with the claim against the agent based on alleged negligence in failing to procure the requisite coverage.

At trial, the parties disputed the applicable jury instruction to be given on damages, with the associations contending that the jury should be instructed that, "[I]n an action for negligent procurement of insurance, . . . [w]hen no loss has occurred that would have been covered, if the insurance had been properly obtained, the measure of damages is the amount paid for the premium."[75] In contrast, the agent argued that the jury should be instructed that the measure of damages should be solely limited to the amount of uncovered loss that would have been covered had the insurance been properly obtained.[76] Because the court gave the insurance agent's instructions and there had been no loss, the jury concluded the associations had suffered no damages based on the agent's negligent failure to procure.

On appeal, the appellate court concluded the jury instruction was proper. The court noted that both Louisiana, Mississippi and Virginia had concluded the insured's damages in such instance should be measured by the amount paid in premium for the deficient coverage. However, the court found that by statute Florida provides that if a loss occurs under a policy issued by a non-authorized insurer, the policy would still be enforceable.[77] Thus, because the Florida Legislature had "expressly made the unauthorized insurer's policies enforceable in a negligent procurement action," the associations could not be held to have been injured by the purchase of the surety bond in issue.[78] In so finding, the court stated, "We decline to adopt the damages law of foreign states where our Legislature has provided statutory remedies."[79]

L. Applying the Factors to Assess Special Relationship Claims

Lastly, a couple of decisions this past year are noteworthy for the manner in which they analyzed the question of whether "special circumstances" or a "special relationship" existed sufficient to give rise to a duty to advise.

First, in an unpublished decision by the California Court of Appeal, Second District in Randle v. Farmers New World Life Insurance Co.,[80] the court considered the question of the ongoing duties and responsibilities of an insurance broker to provide advice and guidance to the beneficiary of a life policy after her divorce from the individual whose life was being insured. In Randle, it was alleged that, in 2004, 12 years after the policy had been issued, the plaintiff, Judy Randle, had divorced her husband, Alan McConnell, but continued to be the named beneficiary of the policy. While the terms of her divorce decree provided that she would only be entitled to a ¼ interest in the policy proceeds, and the couple's 3 children would be entitled to the remainder, it also provided that should Mr. McConnell choose to discontinue paying his share of the premiums, and Ms. Randle pick up the payments, Ms. Randle would be entitled to 100% of the policy proceeds. She subsequently did so, in 2008, and believed that, as a result, she was the sole beneficiary. However, apparently, unbeknownst to Ms. Randle, in 2006 Mr. McConnell had filled out a policy form changing the beneficiaries to her and the couple's 3 sons, dividing their beneficial interests in the policy proceeds into equal parts. While the change didn't take effect immediately, because he failed to provide the insurer with a full copy of the divorce decree, by the policy's terms it was to take effect upon the insurer's receipt of same, even if after Mr. McConnell's death.

When Ms. Randle began making all the premium payments on the policy, she claimed to have discussed with her broker, Mark Hebson of defendant Hebson Insurance Agency, Inc. ("Hebson"), the fact that, per the terms of her divorce decree, since she was paying all of the premiums she would be the sole beneficiary. She also claimed to have repeatedly contacted Mr. Hebson to confirm she was the sole beneficiary under the policy, and received confirmation each time that this was the case. However, after Mr. McConnell died the sons sent Farmers a complete copy of the divorce decree. Because this now triggered the policy form providing for equal ¼ division of the beneficial interests of the policy as among Ms. Randle and her 3 sons, Farmers paid out the policy proceeds in that fashion.

In her suit as against Hebson, Ms. Randle asserted a claim for negligence as against Hebson for failing to advise her, after her divorce, that it was necessary to change the ownership of the policy to ensure that she would remain the sole beneficiary. The claim was dismissed, on the grounds that Hebson owed no duty to advise in this regard. On appeal, the decision was affirmed. In reaching this decision, the California Court of Appeals noted that "a broker's duty is limited, even in the procurement context, absent special circumstances. And plaintiff offers no evidence of any special circumstances in this case."[81] "That is, there is no evidence the broker misrepresented the terms of the policy, or expressly agreed to assume an additional duty to plaintiff, or held himself out to plaintiff as an expert in life insurance."[82] The court concluded that "[a] client cannot, merely by telling her broker about changed circumstances after her divorce, impose on the broker a duty to give what amounts to legal advice on how best to protect her interests, unless the broker has held himself out as a life insurance expert."[83] And while Ms. Randle attested that Mr. Hebson had held himself out as an expert, and always gave advice on specific questions and concerns raised about her and her husband's various policies, this averment, alone, was not sufficient to raise an issue of fact on this point.[84] There was no evidence, beyond her allegation in this regard, that he had held himself out as an expert on life insurance.

Interestingly, Randle argued that a duty should be found to have arisen because the cases in California (and throughout the U.S. generally) hold that once an insurer or agent elects to respond to an insured's questions about coverage, a special duty arises which requires them to use reasonable care to provide accurate information. Nonetheless, the court stated that this didn't help Randle in this instance because the cases giving rise to this duty of care all involved misrepresentations about the coverage of policies at the time of purchase or renewal that induced the insured to purchase the policy. And "[n]othing in these cases suggests the existence of a duty, for the duration of a life insurance policy, to advise clients how to protect their interests in those policies."[85] "That," the court stated, "is the job of a lawyer, not an insurance broker."[86]

Because this is not a published decision, it cannot be relied upon as precedent, and thus is of limited utility to defense lawyers in insurance agent/broker E&O cases. Nevertheless, the case is noteworthy in the manner in which it analyzed the issues, and specifically the question of whether there were ongoing duties to advise on the part of the broker in the circumstances presented. But even in this regard, the analysis may not hold up to close scrutiny. The fact is that, in responding to the question as to whether she remained the sole beneficiary, without investigating whether a form had been filed with Farmers that could conceivably effect a change of her beneficial interest, the broker made a representation that lulled Ms. Randle into a false sense of security, based on partial information that was misleading, if not inaccurate, at the time given. Arguably, in agreeing to respond to the request for information on this issue, the defendant broker undertook a duty to exercise reasonable care to determine if the information being provided might be rendered inaccurate based on filed forms with Farmers in the event a triggering event occurred.

Second, in Bear, LLC v. Marsh USA, Inc.,[87] after the bottom of the hull of his yacht (the "Polar Bear") was damaged, the owner of the yacht had it brought to a shipyard for repairs. His insurance policy contained a maintenance and repair clause ("Repair Clause"). The Repair Clause provided that as a condition precedent to coverage for any "hot work" done at a shipyard or work done where the shipyard requires the owner to sign a waiver of subrogation agreement, the owner must first obtain agreement from the underwriters. The repairs required welding, and after the yacht was brought to the shipyard the ship's captain signed an agreement containing a waiver of subrogation provision. While welding work was being performed, the yacht caught on fire and was destroyed. Although the owner was able to collect $9.2 million in settlement from the shipyard, it was unable to collect on any portion of its $17.25 million agreed value hull coverage policy because the claim was denied by its insurer based on violation of the Repair Clause. In denying the claim, the insurer relied on the fact that the yacht owner had agreed to a waiver of subrogation provision in its contract with the shipyard for the repairs, and performance of hot work on the vessel without receiving prior agreement from the participating insurers underwriting the coverage. In the course of litigation of the denial, the denial was upheld on the grounds that the owner had breached conditions precedent to coverage for the loss.

In an effort to recoup the lost insurance, the owner sued his insurance broker (Marsh), alleging that Marsh had been negligent in failing to advise and recommend that the owner purchase a different policy that wouldn't have included the Repair Clause's provisions with regard to coverage for "hot work" and waiver of subrogation, or a separate Ship Repairer's Liability Policy. After a bench trial, the court found for Marsh.

In reaching its findings, the court discussed the fact that, under the applicable Florida law, Marsh would have no duty to advise absent evidence of a special relationship. Examining the evidence presented, the court concluded that the plaintiff had failed to meet its burden in demonstrating a special relationship with Marsh.

What's particularly interesting about this decision is how it discusses the evidence presented on the special relationship issue, and how the court weighed the competing evidence in reaching its determination. For example, the court looked at the evidence that the parties had had a long-term relationship, with Marsh acting as the owner's broker for nearly 10 years prior to the loss. While the court acknowledged that there were a number of communications in connection with the procurement of coverage for the Polar Bear, the court found that "a review of those communications reveals that it was not a deep working relationship beyond what is expected between an insurance

broker and his or her client."[88] It was not disputed that the broker assigned to the account had made a number of inquiries regarding the progress of the construction of the Polar Bear and its anticipated delivery date. However, the court concluded that these were "routine" inquiries to ensure that Marsh went to market for terms and secured insurance in time for the delivery date.[89] Otherwise, the broker generally only spoke with the owner and captain of the vessel, (who was designated as the broker's contact by the owner) via email, during the annual renewal process, once a year. In fact, she never met the owner in person, and only met the captain once in nearly 10 years of work on the account.[90] And while the broker visited the shipyard where the Polar Bear was being constructed in 2010, she and a colleague were already in town to visit other shipyards for marketing purposes.[91]

The plaintiff pointed to the fact that Marsh held itself out as an expert on yacht insurance and prepared a Risk Management Review and Yacht Insurance Proposal for the owner and captain of the vessel to review which discussed a number of insurance options for the Polar Bear when it was being constructed, as well as yearly insurance proposals thereafter and the broker held the title of "client advisor". However, the court discounted the value of these facts in establishing a special relationship. The court noted that Marsh provided these services to all it clients, and every broker in Marsh's Yacht Practice holds the same "client advisor" title.[92] Significantly, the court noted, "[a]t every step during the original placement and subsequent renewals, [the broker] checked in with [the owner and the captain] and acted only after being directed to do so."[93]

Additionally, the court addressed the argument that "the mere nature of the policy, namely its complexity and the need for a broker to serve as a liaison between an insurer and insured, should demand a finding of a special relationship."[94] In rejecting this argument, the court concluded that "Bear is effectively asking the Court to find that all brokers within Marsh's Yacht Practice maintain a special relationship given the nature of the policy and the services rendered."[95] Mindful that a special relationship is the exception, not the rule, found in only rare circumstances, the court concluded that "such a categorical finding would contravene the purpose of the exception."[96]

III. CONCLUSION

As 2018 has again shown, like its predecessors, the law of insurance agent/broker E&O continues to evolve in ways that provide both opportunity and peril for both sides of the "v" in agent/broker E&O litigation. Where there may be obvious mistakes made, defenses — even complete defenses — may still be available. And the statute of limitations battleground appears far from fully resolved, with the "discovery rule" enduring some setbacks. On the other hand, where the coverage issues are complex, the agent/broker has touted his expertise, and reliance thereon can be credibly argued, agent/brokers continue to face increasing risk. This said, courts that have confronted the issues of when "special circumstances" or a "special relationship" exist giving rise to a duty to advise have consistently shown that they will, in fact, consider and carefully weigh each factor necessary to reaching this determination. Blanket assertions of "special relationships," and reference to an extended course of dealing, by themselves, will not be sufficient. This provides a vivid reminder of the need for insurance agents and brokers to watch what they promise, make sure they have done all they can to confirm the understanding and acceptance of the coverage offered, and consistently document their interactions in this regard.

Endnotes

1. 304 F.Supp.3d 392 (S.D.N.Y. 2018).
2. 739 F.3d 45 (2d Cir. 2013).
3. Holborn, 304 F.Supp.3d at 399 (quoting Licci, 739 F.3d at 50–51).
4. Interestingly, a different analysis applies with respect to loss-allocating rules. Under New York law, there is a three step analysis to consider. See Newmeier v. Kuehner, 31 N.Y.2d 121, 612 N.E.2d 177 (NY 1972). There is still another analysis to consider with regard to applicable statutes of limitations. See N.Y. Civ. Prac. Law § 202 (2018).
5. Docket No. 122556, 2018 WL 5077145 (Ill. Oct. 18, 2018).
6. Id. at *5.
7. Id. at *6.
8. Id.
9. Id.
10. Id.
11. Id. at *7.
12. Id.
13. Id.
14. 22 Cal.App.5th 508 (Cal. Ct. App. 2018).
15. Id. at 522.
16. Id. at 522–523 (quoting Adams v. Paul, 904 P.2d 1205, 1208 (Cal. 1995).
17. No. 17-11730, 2018 WL 3408182 (E.D. La., July 13, 2018).
18. Id. at *9.
19. 324 F.Supp.3d 703 (E.D. Va., 2018).
20. Id. at 713.
21. Id. at 710–711 (citing Autumn Ridge, L.P. v. Acordia of Virginia Ins. Agency, 613 S.E.2d 435, 440 (Va. 2005).
22. Id. at 712.
23. No. 5:15-cv-01997, 2018 WL 4680213 (N.D. Ala., Nov. 2, 2018).
24. Id. at *31 (quoting Silverman v. Charmac, Inc., 414 So. 2d 892, 894 (Ala. 1982) (internal quotations omitted).
25. Id.
26. No. 2018 WL 1661629, 2018 WL 1661629, at *5 (S.D. Miss., Apr. 5, 2018).
27. Id.
28. 816 S.E.2d 728 (Ga. 2018).
29. Atlanta Women's Club v. Washburne, 207 Ga. App. 3, 4, 427 S.E.2d 18 (1992) (citations omitted).
30. Id.
31. AgSouth Farm Credit, 816 S.E.2d at 733.
32. Id. at 736.
33. Id.
34. Id.
35. Id.
36. No. A–2128–16T2, 2017 WL 6048119 (N.J. Super. Ct., App. Div., Dec. 7, 2017).
37. 168 N.J. 387, 390 (N.J. 2001).
38. Ehrhardt, 2017 WL 6048119 at *3 (quoting Hubbard, 168 N.J. at 390).
39. Id. at *4.
40. Id. at *4.
41. Id.
42. Id.
43. No. CV-14-02001, 2018 WL 1576863 (D. Ariz., Mar. 30, 2018).
44. A.R.S. § 12-341.01(A).

Endnotes

45. 11333, Inc., 2018 WL 1576863 at *2.
46. Id. at *4.
47. Id. at *3.
48. No. 1242 MDA 2017, 2018 WL 5725238 (Pa. Super, Nov. 1, 2018).
49. 42 Pa. C.S.A. §7102(a).
50. 2018 WL 5725238 at *4 (citing to Wescoat v. Nw. Sav. Ass'n.., 548 A.2d 619 (Pa. Super. Ct. 1988)).
51. Id. at *5. There aren't many left, but additional jurisdictions where the contributory negligence of the insured can be offered as a complete defense to the alleged negligence of the insurance agent/broker include North Carolina and Alabama. SeePiraino Bros. v. Atl. Fin. Grp., Inc., 712 S.E.2d 328, 334 (N.C. Ct. App. 2011); William v. Delta Int'l Mach. Corp., 619 So.2d 1330, 1333 (Ala. 1993).
52. No. 16–7094, 2018 WL 2926167 (D. N.J. June 11, 2018).
53. Id. at *4.
54. Id.
55. Id. at *5.
56. 25 Neb. App. 742 (Ct. App. NE, Apr. 10, 2018).
57. Civ. No. 15-6064, 2018 WL 3993450 (D. N.J., Aug. 21, 2018).
58. 169 N.J. 64 (2001).
59. 2018 WL 3993450 at *7 (quoting Aiden, 169 N.J. at 79).
60. Id.
61. No. A-2846-15T4, 2018 WL 5930554 (N.J. Super. Ct. App. Div., Nov. 14, 2018).
62. Id.at *8 (quotingWang v. Allstate Ins. Co., 125 N.J. 2, 11–12 (1991)).
63. Id. (quoting Sobor v. Prudential Prop. & Cas. Ins. Co., 200 N.J. Super. 333, 339 (N.J. Super. Ct. App. Div. 1984)).
64. Voss v. Netherlands Ins. Co., 22 N.Y.3d 728, 735 (2014).
65. 304 F.Supp.3d 392 (S.D.N.Y. 2018).
66. Id. at 404.
67. Id.
68. Id. at 405.
69. Id. (quoting Long Beach Road Holdings, LLC v. Foremost Ins. Co., 75 F.Supp.3d 575, 590 (E.D.N.Y. 2015)).
70. 322 F.Supp.3d 377 (E.D.N.Y. 2018).
71. Id. at 393.
72. Id.
73. Id. (quoting Holborn, supra, 304 F.Supp.3d at 405).
74. 253 So.3d 632 (Fla. Dist. Ct. App., 2018).
75. Id. at 635.
76. Id.
77. Id. at 636 (referencing Fla. Stat. §§ 626.901(3) and 627.418(1) (2017)).
78. Id.
79. Id. at 637.
80. 2018 WL 2276347 (Cal. Ct. App., Second Dist., Div. 8, May 18, 2018).
81. Id. at *4.
82. Id.
83. Id.
84. Id. at *5.
85. Id. at *6.
86. Id.
87. No. 15-cv-00630, 2018 WL 1905458 (S.D. CA, Apr. 20, 2018).
88. Id. at *5.
89. Id.
90. Id.
91.Id.
92. Id. at *6
93. Id.
94. Id.
95. Id.
96. Id.
97. Id.