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Brokers Beware: You May Assume a Duty to Act... Carefully

In *The Right Connection Plumbing & Heating, Inc. v. Illinois Union Insurance Co.*, et al., (Index No. 24918/07) (N.Y. Sup. Queens Co. May 30, 2008), a New York State Supreme Court dismissed an insured's case against a wholesale insurance broker, Brooks Insurance Agency, Inc. ("Brooks") based upon documentary evi-

dence. The action arose after plaintiff was informed by letter dated May 16, 2007 that an individual had been scalded by excessively hot water at a hotel where plaintiff had set the water temperature. On June 13, 2007, the plaintiff met with its retail insurance broker and provided notice of the claim. That same day, the retail broker

transmitted the notice to the wholesale broker, Brooks, requesting that it process the claim.

One day later, on June 14, 2007, Brooks faxed notice of the claim to the insurer, ACE Westchester. However, ACE Westchester (on behalf of Illinois Union Insurance

Company) did not acknowledge receipt of the claim until August 2, 2007, and disclaimed liability on the basis of late notice of the occurrence.

Plaintiff then commenced an action against its insurers for breach of contract, and asserted negligence claims against its insurance broker as well against, Brooks, the wholesale broker, with whom plaintiff had no direct relationship. Plaintiff alleged that Brooks failed to transmit a notice of occurrence to Illinois Union Insurance Company in a timely manner.

Prior to serving its answer, Brooks moved to dismiss the action based upon documentary evidence, which included the fax confirmation of its June 14, 2007 transmittal of the claim to ACE Westchester, an Affidavit from Brooks' Underwriting Manager, and the Illinois Union Policy which expressly

provided: "Claims or Loss Notices related to this policy should be reported to the following: . . . ACE Westchester Specialty Group . . ." Brooks also asserted that plaintiff had failed to state a cause of action against it because in the absence of privity between plaintiff and the wholesale broker, Brooks owed no duty to plaintiff. Since a legal duty, a breach, and injury proximately resulting from the breach are essential elements of a negligence claim, Brooks contended it could not be liable to the insured.

Interestingly, the Court noted that an insurance broker who undertakes for an insured the sending of a notice to an insurance company "is under a duty of care and can be held liable to the insured for negligence." Notably, the Court went a step further to find "[e]ven in the absence of privity between the plaintiff and defendant Brooks, 'one who assumes to act, even though not obligated to do so, thereby becomes subject to the duty to act carefully.'"

However, despite its finding that Brooks owed a duty to the plaintiff, the Court still ruled in Brooks' favor. The Court held that since Brooks transmitted the claim to ACE Westchester one day after it received the notice from plaintiff's broker, the documentary evidence "establishes that the acts of Brooks could not be the proximate cause of an injury to the plaintiff." Accordingly, the Court dismissed the case against Brooks in finding plaintiff's claim had no merit. [A]

Editor's Note: As we go to press we have learned that the insurers have filed a Notice of Appeal so that a higher court may rule on this in the near future.

Gabay-Rafiy & Bowler LLP represented Brooks Insurance Agency. This article is for information purposes only and is not intended to give legal advice. For more information, contact (212)941-5025 or gabay@gabaybowler.com



Sari Gabay

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