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ing that it get more liability coverage. The district court granted the defendants summary judgment, and AGA appealed. The First Circuit panel affirmed in routine opinion written by Senior Circuit Judge Tashima. The ground was that ASA had not proved the existence of “special circumstances.” This was true even though the person who was their agent for some years indicated that they were not well educated, did not understand insurance, and needed extra assistance. Even the intermediary who replaced him testified that the couple that owned the boat and business were “simple and unsophisticated,” and that he knew that their “entire fortune was wrapped up on AGA.”

The key to this opinion and its reasoning was what it took to prove a “special circumstance” under already articulated Massachusetts case law. To be sure, the length of the relationship between the intermediary or the insurer and the customer as well as the kind of public representations the insurer and/or the intermediary may support the proposition that there are “special circumstances,” but they are not sufficient by themselves. There must be at least one relevant assertion by the insurer or the intermediary, and the “special circumstances” case is easier to make if there are (i) “frequent recommendations” over time, (ii) “a recommendation of coverage in particular amount[,]” or (iii) “assertions that [a particular] coverage is sufficient[,]” when it is not. No agent made any such recommendation to AGA. Furthermore, AGA never asked for this sort of advice. Hence, the defendants and appellees were entitled to summary judgment and the affirmation thereof.

Comment

The key to the reasoning in this case is the requirement of reliance. Arguably, if AGA has read the Flagship website, the latter’s silence in the sales process would have been something AGA could have relied upon to infer that it did not need larger policy limits. Even so, it is difficult to see why an intermediary’s silence in the sales process can be justified when the agent knows that the customer needs information and help. Of course, this is strikingly true when selling a larger policy is in the interest of both the insurer and the intermediary.

Isn’t there a paradox between insurance brokers on the one hand wanting to classify themselves as

professionals and to classify their work as a profession but at the same time to argue that they have to responsibility (and hence no duty) to try and help those who come to them with insurance needs. Insurance brokers are not shoe salesmen, or anything of the sort—at least given their self conceptions and self descriptions.

Perhaps part of the problem lies in the way Massachusetts law describes a necessary condition for the kind of duties and hence responsibilities which lead to possible liability. The jurisprudence of that state uses the phrase “special circumstance.” Some states use the phrase “special relationship.” Might there be a significant difference? // Quinn

Agent & Broker/Surplus Lines

Provision in Florida Statute Requiring Surplus Lines Liability Carriers to Deliver Policies to the Named Insured Is Met if the Policy Is Delivered to the Insured’s Broker

Florida Surplus Lines Statute Does Not Change Common Law on Delivery of Insurance Policies

Essex Ins. Co. v. Zota, 985 So.2d 1036 (Fla. 2008)

Case at a Glance

Florida statutes do not require surplus-lines carriers to deliver the policies they issue or evidence thereof to the insureds that have purchased them. Under Florida statutes, delivery to the broker (or, independent agent) representing the insured is sufficient.

Summary of Decision

The insured was a builder of “spec homes.” One of its subs, Zota, was a painter of murals; she fell from scaffolding while working on a second story ceiling; she sued the insured, among others in state court. Thereafter, the insured’s CGL carrier, Essex, brought a declaratory judgment action in federal court. The party defendants included the insured and Zota.

Surplus Lines Issues. Essex was a surplus lines carrier. The insurance had been issued by an agent for Essex to a broker who was the producing agent for the insured. As a matter of routine, it received copies of the various policies issued, reviewed them for accuracy, and then sent them on to the insured. In this case, no one provided the insured with a copy of the CGL policy. According to the court, surplus lines insurers are out-of-state, "unauthorized" insurers used to cover risks when state approved companies are not willing to issue coverage. Of course, intermediaries are legally required to investigate and see if an authorized carrier can be found before they turn to the surplus-lines market. Intermediaries turn to the surplus-lines market by using statutorily authorized "surplus-lines agents." They "serve as middlemen between surplus-lines insurers and 'producing agent/general lines agents,' who, in turn, provide surplus-lines policies to the insureds." Sometimes these "surplus-lines agents" are virtually managing general agents for this or that geographical district; sometimes they are not.

Procedural History. In its declaratory relief action, Essex contended that the policy it issued precluded coverage. The details of those contentions are not at issue or even described in this case. They are, however, described in the opinion of the district court leading to this case. In response, the defendants contended that Essex was precluded from denying coverage since it failed to provide the named insured with a copy of the policy, as is literally required by applicable Florida statutes.

The district court granted summary judgment to the defendants: Essex could not deny coverage. Consequently, Zota's arguments need not be considered. Essex appealed to the Eleventh Circuit. It sent the case to the Florida Supreme Court to answer five questions. The Supreme Court answered only the first one, since that answer would determine answers to the other questions, unless they involved questions of fact. The question upon which the Florida Supreme Court focused is this: Do either Fla. Stat. § 626.922, or § 627.421, or both, "require delivery of evidence of insurance directly to the insured, so that delivery to the insured's agent is insufficient[?]"

Surplus Lines Issues Again. One of the central issues pertains to a Florida statute-§ 627.021-requiring that insurers see to it that the policies they sell be delivered to the purchasing insured. Essex argued

that this section does not apply to surplus-line insurers. After all, chapter 627 begins with a provision-§ 627.021(2)(e)-explicitly stating that the chapter does not apply to surplus lines companies like Essex. The Florida Supreme Court disagreed with this view. To be sure, this is what the language of the statute literally says, but—says the Court—this is not what it means when taken as a whole. The exclusion-from-the-statute paragraph does not actually apply to the whole of chapter 627 but only to a part of that chapter, namely, the one having to do with rate regulation. That the whole-chapter-application of § 627.021(2)(e) is not what the legislature intended, and hence not what the section means, can be proved by several considerations: (1) the logic of the situation, (2) the legislative history, and (3) one of the Florida Supreme Court's own previous opinions. First, surplus lines carriers are generally taken to be outside the legislative and regulatory domain of given states when it comes to policy content and rates, but not with respect to fair treatment of customers. There is a discrete section, or part, of chapter 627 which pertains to rates. Thus, the legislature intended to exempt surplus lines carriers from those parts of the chapter, not from its entirety. This proposition is proved by the "structure and organization" of chapter 627 itself. Second, existing legislative history of the statute and revisions of it explicitly indicate that the intent pertained to rate only. One of the most interesting parts of this opinion is its review of various Florida Supreme Court cases on statutory construction. Together they support the view that ultimately the meaning of a statute is to be determined in the end by the intent of the legislature and not simply by the language of the statute itself. Third, this very issue was decided over 20 years ago by the Florida Supreme Court. *National Corporation Venezolana, S.A. v. M/V Manuare* V, 511 So2d 968, 970-71 (Fla. 1987). That decision remains decisive authority.

Thus, surplus lines carriers are required to deliver the policies they sell, or, at least evidence thereof. But to whom? Directly to the insureds alone, or will the independent insurance broker functioning as a representative of the insured suffice? In the Florida Supreme Court's view, the "common-law presume[es] that an insurance representative, serving as an independent insurance broker, acts on behalf of the insured for the purposes of procuring insurance coverage[.]" and that this presumption has not been

altered by any Florida statute.

Intermediary Issues. The common-presumption is Florida law and, indeed, standardly received law. This proposition is provable based upon two significant sources. The first one is *Almerico v. RLI Insurance Co.*, 716 So.2d 774 (Fla. 1998), which is quite clear on this point. The second source is chapter 45 of the famous COUCH ON INSURANCE. (Chapter 45 is entitled "Brokers, Agents, and Similar Parties as Representing Insurer or Insured.") Significantly, as the Court now states: "It is important to note that 'insurance broker' and 'insurance agent' are not synonymous terms[.]" In general, the phrase "insurance broker" refers to representatives of insureds, while, in contrast, the phrase "insurance agent" refers to a middleperson representing "an insurer under an exclusive employment agreement[.]" Insurance brokers are not legal agents of insurers. This is a standard, across-the-board presumption. It is subject to a variety of exceptions, but it holds unless various "special circumstances" which constitute the "indicia of [legal] agency" are present, unless the insurer characterizes the broker as its representative, unless a license independent insurance agent has a written agreement with an insured to transact business on its behalf, unless insurers "contemplate broker solicitation of their products using the insurer's application and sales brochures[.]" and so forth.

Thus, under some circumstances, a licensed insurance middle person can end up being the agent for those at both ends of an insurance transaction, but the logical starting point is that this is not the case. The burden of proof with respect to proving an exception to the presumption rests upon any party denying the application of the presumption, i.e., asserting an "unless clause." Here it rests upon the insured and/or Zota. Irrespective of that procedural rule, in this particular case, there was no evidence that the broker was an agent for the insurer, and there was lots of evidence that it was representing the insured. Perhaps, most significantly, said the court, the broker filled out applications for the insured and procured different kinds of insurance from several different sources. Thus, the broker "did not have any type of exclusive relationship with any one surplus-lines insurer." In addition, the broker did not deal directly with the insurer but went through a surplus-lines agent. Obviously, the broker did not use an

application supplied by the plaintiff insurer, assuming it was sent to several, as apparently it was.

Zota and the insured argued that a Florida statute requires that policies be delivered to the insured and not to the broker. Section 626.922(1) does require that "[u]pon placing a surplus lines coverage, the surplus lines agent shall promptly issue and deliver to the insured evidence of the insurance consisting of either of the policy as issued by the insurer, or, if such policy is not then available, a certificate, cover note, or other confirmation of insurance." This section goes on to assert that a "surplus lines agent may not delegate the duty to issue any such document to producing general lines agents without prior written authority from the surplus lines insurer." Obviously, the statute distinguishes between *issuance* and *delivery*, and there is no reason to think that the legislative intent was any different. Under Florida law, "[s]tatutes in derogation of the common law are to be construed strictly A statute, therefore, designed to change the common law rule must speak in clear, unequivocal terms, for the presumption is that no change in the common law is intended unless the statute is explicit in this regard." *Carlile v. Game & Fresh Water Fish Comm'n*, 354 So.2d 362, 364 (Fla. 1977). Finally, legislative history coming from a Senate Staff Analysis and Economic Impact Statement (1998) makes it clear that the main thrust of § 626.922(1) was intended to pertain to the issuance of new policies and not the delivery of already issued policies.

Thus, direct delivery is not required. Delivery of policies or explanatory material to an insured's broker-representative meets the statutory requirements. Of course, under some circumstances an intermediary that appears to be a broker may actually be an agent. That last point has not been proved in this case. Hence, the answer to the question certified to the Florida Supreme Court was negative. Delivery of appropriate material to the agent is good enough under the statutes.

Comments

(1) It is not the case that Florida law regarding agents and brokers, or regarding the semantics of the language of intermediaries is the same throughout the country. The case does not explicitly assert this, but it is a tempting inference.

(2) The law set forth in this case is not clear about

what would happen if a plaintiff proved that an entity which was its broker was also the legal agent of the insurer. Some years ago, the Florida Supreme Court decided this issue in the context of contract-formation. The rule decided there was that delivery to an entity which was both an insured's broker and an insurer agent was good enough to have the insurance contract formed. *Jefferson Standard Life Insurance Co.*, 165 So. 351 (Fla. 1936). But it refused simply to extend that rule to the *Zota* case, where the issue was what exclusions, if any, apply. It is reasonable to hypothesize that the rule would be the same.

(3) One wonders whether the insured in this case would have a cause of action against its own broker. If the insured did not get what it asked for and did not get any sort of warning, then the broker should have liability based on professional negligence. Then again, the key events happened several years ago, and the statute of limitations may have run. On the other hand, perhaps there is some sort of waiver.

(4) It is amazing how many lawyers appeared as amici curiae. It looks like there were there on behalf of the surplus-lines carrier.

(5) The regulation of surplus-lines carriers is currently before Congress, and a number of influential Senators are trying to get a bill through. Mark A. Hofmann, *Time Running Short for Regulatory Reform*, 42 BUSINESS INSURANCE 3, 26 (August 4, 2008). (The name of the statute is "Nonadmitted and Reinsurance Reform Act," while the discussion focuses on Senator Christopher Dodd, D-Conn., who is chairman of the Senate Banking, Housing, and Urban Affairs Committee.) There is also an editorial in the *Opinion* section of the same issue. The paper apparently would prefer a different act, but of this one it says, "It would streamline the regulation of both the surplus lines and reinsurance markets in a way that's stirred little controversy." So why has it not been passed by the Senate when it has already been passed by the House? // Quinn

Bad Faith

Where Policy Did Not Include a "Consent to Settle" Clause, UIM Insurer's Representations to Insured That it Refused to Consent to a Settlement of the UIM Claim with the Third Party Tortfeasor and Representation That the Insured Was Required to Pursue a Judgment Against the Tortfeasor Created an Issue of Fact as to the Insured's Subsequent Bad Faith Claim

Material Issue of Fact Remained as to Bad Faith Claim Where Insurer Refused to Consent to a Settlement and Required its Insured to Pursue a Judgment against the Tortfeasor, Where its Policy Did Not Provide for Either Action

Guajardo v. AIG Hawaii Insurance Company, Inc., 118 Hawaii 196, 187 P.3d 580 (2008)

Case at a Glance

Following a UIM claim, AIG refused to consent to a policy limits settlement between the insured and the third party tortfeasor and required the insured to file suit against the third party tortfeasor in order to protect AIG's subrogation rights. Although the policy did require the insured not to take any action to prejudice AIG's subrogation rights, the policy did not contain a "consent to settle" clause, nor did the policy give AIG a right to demand that the insured file suit against the tortfeasor to preserve AIG's subrogation rights. Accordingly, the Hawaii Supreme Court held that a genuine issue of material fact remained as to the insured's subsequent bad faith claim against the insured, based on AIG's misrepresentations of the policy and the delay and litigation thereby caused.

Summary of Decision

Facts: Mrs. Guajardo was a pedestrian on May 23, 2002, when she was struck by a vehicle driven by Gary Senaga and severely injured. She and her husband had a UIM policy through AIG with limits of \$100,000. Senaga was insured for another \$100,000 in liability coverage through Progressive Ins. Co.