for services rendered or expense incurred by the INSURED for ... remedies necessitated by a CLAIM" squarely exempts from coverage amounts attributable to defective or incomplete work.

Moreover, the court continued, a setoff is uninsurable as a matter of law. "New York law is clear that the refund of monies to which a party is not entitled is not an insurable loss," it stated.

Finally, the court rejected the CM's argument that the setoff arose from a claim of professional negligence and so was covered by the policy's professional liability provision. The provision states that the policy applies to:

> any act, error or omission in PROFESSIONAL SERVICES rendered or that should have been rendered by the INSURED *or by any person for whose acts, errors or omissions the INSURED is legally responsible*, and arising out of the conduct of the INSURED's profession. (Italics added.)

The CM argued that it is the "insured" and that it has coverage for the negligent design of the engineering firm who, as a subcontractor, was a "person for whose acts, errors or omissions the INSURED is legally responsible." The court disagreed, pointing out that the CM

> has overlooked the crucial portion of the provision that requires the acts, errors or omissions to arise from "the conduct of the insured's profession." ... [The CM] and [engineer] are two separate corporate entities; and the acts, errors and omissions did not arise out of [the CM's] profession, which is construction management. ... [H]aving taken the benefits of separate corporate form, [the CM] could not set it aside and claim the affiliate's [i.e., engineer's] profession as its own. While it is possible Engineers, as named insured, might have a claim under its policy, this is not at issue here.

Comment

In a footnote the court noted that, because the additional insured and named insured are separate corporate entities, the lower court erred in applying the "own work" exception to the CM's claim since the engineer, not the CM, had performed the faulty work. // Schneier

Agents & Brokers

Insurance Brokers Have No Fiduciary Duty to Disclose Payment Arrangements with Carriers

Governmental Regulation Requiring Disclosure Was Not in Effect When Policy Was Sold

People v. Wells Fargo Services, Inc. __ N.E.2d __, 2011 WL 534198 (N.Y. 2011)

Case at a Glance

An insurance broker had no fiduciary duty to disclose to insureds the existence of contingent commission agreements between it and several insurers, under which insurers agreed to pay cash compensation to the broker based on volume of business the broker brought to insurers, absent special relationship between the broker and insureds.

Summary of Decision

Facts & Pleadings. The Attorney General for State of New York accused a large insurance brokerage of breaching fiduciary duties it owed its customers by accepting special monetary rewards, in addition to normal commissions, for bringing an insurer business without disclosing such an arrangement to its customers. Significantly, however, the AG did not allege any of the following: (1) that the brokerage made any positive misrepresentations; (2) that any customer suffered demonstrative harm; or, (3) that any customer was persuaded to purchase an inferior or overpriced insurance product and that it was overcharged. In essence, the complaint boiled down to a claim for breach of fiduciary duty.

Procedure and Results. The trial court granted the defendant's motion to dismiss. The next appellate court up affirmed. And in the case reported here, the New York Court of Appeals, which in most state

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jurisdictions is called the Supreme Court of [the State], affirmed again, holding that brokers have no duty to disclose payment arrangements.

Arguments. The AG relied on three principles. (1) An insurance broker is an agent of the insured. (2) The agent-to-principal relationship is, by its very nature, a fiduciary relationship. (3) "[A] fiduciary must disclose any interest in a particular transaction that causes the fiduciary's loyalties to be divided." The Court of Appeals remarked that there is some truth in all of (1)-(3), but the relationship between a broker and its customer is not as simple as the AG would suggest. "A broker is the agent of the insured, but it customarily looks for compensation to the insurer, not the insured, and it is sometimes the insurer's agent also–for example, when collecting premiums," observed the court. On the basis of this complexity, Court of Appeals held that brokers do not have the duty of disclosure proposed by the Attorney General.

Then again, finished the court, although the challenged practices are customary in the insurance industry, "non-disclosure may be a bad practice." It has even been condemned by a recently adopted regulation of the Department of Insurance, which now requires disclosure fitting the situation here. See 11 NYCRR §30.3[a][2]. At the same time, said the court, one must remember: that regulation—significant and transformative, though it may be—was not in effect at the time relevant to this case. // Quinn

Automobile Insurance/ UM/UIM Coverage

Insurer Not Required to Translate Mandatory Written Offer of UM/UIM Coverage into Spanish

Use of Department of Insurance's Approved Form Satisfied Statutory Requirement

Ballesteros v. American Standard Ins. Co. of Washington, __ P.3d __, 2011 WL 166319 (Ariz. Jan. 20, 2011)

Case at a Glance

An insurer was not required to provide a written notice of offer of UM/UIM coverage to a Spanish-speaking insured in Spanish. Whether an offer was made turns only on whether a reasonable person would understand that a proposal of terms was made. The offeree's subjective understanding of the offer form is not relevant to the inquiry. The legislature included a Spanish translation requirement in other statutes and could have done so for UM/UIM offers had it intended to impose such a requirement.

Summary of Decision

In this case, the Arizona Supreme Court interpreted Arizona Revised Statutes (A.R.S.) section 20-259.01 (Supp. 2009), which requires insurers to offer uninsured motorist (UM) and underinsured motorist (UIM) coverage to their insureds by giving them a "written notice." A.R.S. 20-259.01(A) reads in relevant part as follows:

> Every insurer writing automobile liability or motor vehicle liability policies shall make available to the named insured thereunder and by written notice offer the insured and at the request of the insured shall include within the policy uninsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy. The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director is valid for all insureds under the policy.

Section (B) imposes the same requirements for UIM coverage.

Luis Ballesteros, whose primary language is Spanish, purchased an auto insurance policy from American Standard. A Spanish-speaking member of the insurance agent's office helped Ballesteros complete the application. The agent gave Ballesteros an English-language form, approved by the Arizona Department of Insurance (DOI), on which to select or reject UM/UIM coverage. Ballesteros signed the form, indicating on it that he declined such coverage.

Ballesteros subsequently made a claim for UM coverage, which was denied. He sued for breach of contract, claiming that because American Standard failed to comply with A.R.S. § 20-259.01, UM coverage

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