
Agents & Brokers

Broker Presenting Legal Malpractice Insurance Business to an Insurer May Be Sued by the Carrier, under Florida Law, for Negligence and Deliberate Misrepresentation When the Broker Failed to Disclose to the Insurer Civil Actions, of Which it Knew, Against the Law Firm

*Restatement (Second) Torts § 552
Applied to Insurance Brokers*

Liberty Surplus Insurance Corporation, Inc. v. First Indemnity Insurance Services, Inc., __ So.3d __, 2010 WL 711712 (Fla. App., 4th Dist., 2010)

Case at a Glance

Under Florida law, an insurance broker may be individually liable to the insurer, no matter whose legal agent the broker is, if the broker misrepresents facts to the insurer—whether by misfeasance or nonfeasance—and thereby induces the insurer to sell insurance on a risk the insurer would not otherwise have accepted.

Summary of Decision

The law firm of Brinkley, Mc Nerney, Morgan, Solomon & Tatum sought professional liability insurance in 2003. It sent an application to its agent, who forwarded it to the broker in this case. As usual, the application required the law firm to provide information about its litigation history. There had been 14 professional liability claims and disciplinary proceedings against the law firm in the last 5 years, and the firm reported them to the broker. Several insurers rejected the application submitted by the broker. In its application to Liberty Surplus Insurance Company (Liberty), the broker cut 14 claims and proceedings down to 3. According to the pleadings, neither the law firm nor the agent that referred the application to the broker knew of the omission of the 11 cases.

Liberty entered into a contract of insurance with

the firm for the period from March 2003 to March 2004, and the contract was renewed for another year. In January 2005, a lawsuit was initiated against the law firm stating that it sought \$500 million in damages. Thereupon, the broker disclosed 7 more of the 11 undisclosed lawsuits. Subsequently, Liberty found out about even more of them. The law firm provided its insurer with evidence that it had provided the broker with all requested information.

Apparently, the new lawsuit needed to be settled. Liberty demanded that the broker participate, but it refused. Liberty paid \$3 million to settle the lawsuit. Thereafter, Liberty sued the broker. The third amended complaint sought the amount paid in settlement based upon the following theories: “negligent misrepresentation, common law indemnity, intentional misrepresentation, nondisclosure, fraudulent concealment, fraud, and negligence.”

The broker moved to dismiss based upon a “myriad of arguments.” The most significant of its arguments was based on the following principle: If an insurer sells insurance in reliance upon information provided by a given broker, then the broker cannot be liable for misinformation it provided, or how it provided that information, since the broker is the legal agent of the insured and not the insurer. The trial court granted the broker’s motion to dismiss, but the Florida Court of Appeal, Fourth District, reversed. The court of appeal wrote at length to instruct the trial court on what causes of action, other than fraud itself, the insurer might have against the broker.

Agent Liability. The following is virtually universal law, whether in Florida, or anywhere else in the United States. “An agent is individually liable to a third person for the agent’s tortious conduct [, assuming the third person is the person injured or in his shoes].” The same proposition, of course, is true with respect to fraud, said the court.

Theories of Liability. The key theory in contexts like this one is to be found in § 552 of the RESTATEMENT (SECOND) OF TORTS, which was adopted by the Florida Supreme Court in 1997. Under § 552, if someone supplies false information for the guidance of another in business transaction in which the supplier has a pecuniary interest, the supplier may be liable for the monetary losses of the receiver of the information. The broker argued that § 552 does not apply to insurance brokers, but the court of appeal rejected this view both upon the grounds of a 1985 Florida

Supreme Court case applying it to real estate agents and court decisions from other jurisdictions applying the section to insurance brokers. The court of appeals also demonstrated that the pleaded facts placed the broker squarely within the language of § 552.

As its final effort to avoid the application and consequences of § 552, the broker argued that § 552 applies only to false assertions, and not to nondisclosures of any kind. The court of appeals rejected this contention on the basis of § 551(1) of the same RESTATEMENT. That section states that nondisclosure under at least some circumstances is equivalent to misstatement and carries the same liability. Moreover, the Florida Supreme Court held pretty much the same thing in 1985.

Hence on the basis of applying § 552 the court of appeal entered a significant holding: “[A]n insurance broker is liable for its own negligence in supplying false information on which an insurer justifiably relies in issuing a policy and suffers pecuniary loss.” In addition, the court held that the complaint stated a cause of action for negligent misrepresentation. And it stated another one for fraud, held the court.

Common Law Indemnity. The court of appeal agreed with the broker that Liberty did not have a cause of action against it for common law indemnity. For there to be such a cause of action, in the end, Liberty would have had to pay a debt which the broker owed, and Liberty would have had to pay it on behalf of the broker. Of course this did not happen, and it could not have happened that way. The settlement of the case against the law firm was not a debt the broker itself and by itself owed. It was a debt the law firm owed, if there was ever an actual debt at all. // Quinn

Automobile Insurance/ Diminished Value

Coverage of Direct Loss Includes Diminished Value of Automobile after Accident

Obligation to Repair or Replace with Other of like Kind or Quality Covered Diminished Value

Moeller v. Farmers Insurance Company of Washington, __ P.3d __, 2010 WL 927989 (Wash. App., Div. 2, Mar. 16, 2010)

Case at a Glance

An automobile policy that covered loss that was “direct and accidental loss of or damage” to the insured car included the diminished value of the car resulting from its repair after a collision. Absent an intervening cause, diminished value was a loss proximately caused by the collision and thus was covered. Policy limits providing that the insurer’s liability for loss would not exceed “[t]he amount which it would cost to repair or replace damaged ... property with other of like kind and quality, or with new property less an adjustment for physical deterioration and/or depreciation” did not preclude coverage of diminished value.

Class certification of claims against an automobile insurance company for failure to cover diminished value of automobiles attributable to their repair after being damaged in collisions was upheld when common issues predominated over individual issues. The claims involved a common nucleus of operative facts: class members shared the same insurance policy, potentially suffered damage, and were allegedly harmed by the insurer’s course of conduct. Because each claim had a *de minimus* value, individuals were unlikely to pursue separate actions, and the presence of individual claims would not preclude class certification

Summary of Decision

David Moeller owned a vehicle that Farmers insured, covering loss from collision and comprehen-