Agents & Brokers

Insurance Intermediaries May be Sued by Their Customers for Both Negligence and Breach of Fiduciary Duties under Florida Law

Both Types of Causes of Actions Are Assignable, and Valid Assignments May Occur Simultaneously with Insured Assignor's Release of Claimant Assignee

Wachovia Insurance Services, Inc. v. Toomey, ___ So.2d ___, 2008 WL 4379587 (Fla., Sept. 29, 2008)

Case at a Glance

A settlement agreement that both assigns the insured defendant's rights against its insurance broker and releases the assignee's claims against the assignor insured validly confers standing on the assignee to sue the assignor insured's insurance broker for breach of fiduciary duty and negligence. Claims for breach of fiduciary duty against an insurance broker are assignable, and claims for breach of fiduciary duty and negligence are not mutually exclusive.

Summary of Decision

Factual and Procedural Background. Brian Holman ("Holman") and Richard Toomey ("Toomey") owned a mortgage business, Central Money Mortgage (CMM). IMC, a mortgage business based in Tampa, purchased CMM in 1997. Following the sale, Holman and Toomey became officers and employees of an IMC subsidiary. Each of them signed a five-year employment contract with an annual salary of $300,000 a year. Both employment contracts contained a severance clause requiring IMC to pay their full salary for the years remaining on the contract if IMC terminated Toomey or Holman without cause. Also in 1997 Wachovia Services, an insurance broker, sold ICC an "Employment Practices Liability Insurance Policy" ("Policy"). The Policy covered breaches of ICC or written employment contracts.

Under financial pressure, IMC decided to cease operations of its subsidiary and notified Holman and Toomey that it planned to terminate their employment contracts. Alleging that they had been terminated without cause in violation of their employment contracts, both Holman and Toomey sued IMC in the United States District Court for the District of Maryland. That litigation resulted in a $1.8 million judgment. IMC lacked the resources to satisfy the judgment, so settlement negotiations commenced. During these negotiations, IMC discovered that it no longer had coverage for employment contract claims. Because the policy was due to expire during the litigation, IMC had extended its coverage for several months through Wachovia to cover Holman's and Toomey's breach of contract claims. Alas, in extending coverage, Wachovia allegedly deleted coverage for breach of contract claims without IMC's consent or even awareness. Consequently, IMC satisfied at least part of the judgment by assigning its rights against Wachovia to Holman and Toomey. Under the terms of the agreement, Holman and Toomey, for consideration of $1.5 million, dismissed all their causes of action against IMC except the counts for breach of their employment contracts. Holman and Toomey, however, expressly reserved their claims against Wachovia. Additionally, IMC agreed to assign Holman and Toomey "all its rights, including its causes of action, which rights IMC may have under or because of the existence of [the Policy] ... to secure indemnification sufficient to satisfy" the $1.8 million judgment.

In 2003, Holman and Toomey sued Wachovia in United States District Court for the Middle District of Florida. They alleged 7,or so, causes of action. Two belonged to IMC. Pursuant to the assignment, they alleged that: (1) Wachovia breached fiduciary duties owed to IMC; and (2) Wachovia was negligent in its dealings with IMC. Holman and Toomey also alleged two direct claims against Wachovia: (1) the intentional interference with their rights under their employment contracts; and (2) the breach of fiduciary duties allegedly owed by Wachovia directly to them.

The District Court's Ruling. The district court significantly limited the scope of the litigation by granting Wachovia judgment as a matter of law on all claims except the assigned breach of fiduciary claim. The judge instructed the jury that a fiduciary relationship always exists, under Florida law, between insurance brokers and their customers, and he

explained that "the law forbids the fiduciary from acting in any manner adverse or contrary to the interests of the client, or from acting for the fiduciary's own benefit in relation to the subject matter of their relationship." Thus, he said that the jury must accept the existence of a fiduciary relationship between Wachovia and IMC. He then explained several ways how the duties of relationship might be violated, one of which was Wachovia's failure "to obtain proper approval from IMC to add the endorsement" deleting coverage for breaches of written employment contracts and another of which was its failure to explain the impact of the elimination of that coverage. The jury returned a verdict of $1,069,200.00.

Eleventh Circuit's Certified Questions to the Florida Supreme Court. Wachovia appealed to the Eleventh Circuit, and plaintiffs cross-appealed the district court's dismissal of claims based on duties owed directly to them. Finding dispositive questions of unsettled Florida law underlying Wachovia's appeal, the circuit court certified two questions to the Florida Supreme court:

> I. What is the effect of a settlement agreement between two parties that explicitly contains both an assignment of causes of action against a third party insurer and an immediate release of the insured on the same causes of action?
>
> II. Can a claim for breach of fiduciary duty against an insurance broker be assigned?

The Florida high court decided both questions, and one more that it posed itself. The third question the court posed to itself was whether the trial court properly dismissed the negligent failure to procure coverage claim as a matter of law based on based on *Moss v. Appel,* 718 So.2d 199 (Fla. 4th DCA 1998). As to the first certified question, Four justices—Chief Justice Quince, Justice Anstead, Justice Pariente, and Justice Bell—agreed that the settlement agreement constituted a valid assignment of IMC's claims against Wachovia to Toomey and Holman. As two the second certified question, four justices—Chief Justice Quince, Justice Anstead, Justice Pariente, and Justice Lewis—agreed that the cause of action for breach of fiduciary duty was assignable. However, Justice Anstead and Justice Lewis disagreed with the reasoning employed in the court's *per curiam* opinion. As the third question, all participating justices agreed that the district court erred as a matter of law in dismissing the negligence claim, which was assignable and which stated a cause of action for negligent failure to procure insurance coverage. Accordingly, the court answered the first and second certified questions in the affirmative and further explained that the negligence claim arising out of the insurance broker relationship should not have been dismissed.

Per Curiam Opinion. In addressing the first certified question, the court put to rest misunderstanding about whether a *simultaneous* release of a defendant and an assignment of the defendant's rights is legally possible. *Fidelity & Casualty Co. of New York v. Cope,* 462 So.2d 459 (Fla. 1985), the Florida Supreme Court had ruled that one party—say, a plaintiff—cannot release another party—say, a defendant—and then *later* receive via an assignment the defendant's rights against a third party—say, the defendant's liability insurer—if those rights were rights the defendant might have invoked if he had to pay the plaintiff something. This is because the defendant has no rights to assign after the plaintiff releases him from liability. That did not happen here: the release and the assignment were not only in the same agreement; they were in the same paragraph of that agreement. *Cope*, the court explained, prohibited an assignment of an insured defendant's rights against its liability insurer *after* the insured obtains a release of liability from the plaintiff assignee; it should not be "misunderstood to mean that an assignment of a claim cannot occur simultaneously with a release or satisfaction."

Turning to the second certified question, the court held that an insurance customer's claims against his insurance broker for breach of fiduciary duty are assignable. The court acknowledged that the nature of some fiduciary relationships, such as attorney-client relationships, precludes assignment. The court, however, pointed to differences between the nature of insurance broker-client relationships and attorney-client relationships justified permitting assignments with respect to the former but not the later: Attorney-client relationships involve confidentiality and while the broker-client relationships do not; and one lawyer cannot replace himself without the client's consent, while this sort of thing happens routinely in the work of insurance marketing and

servicing. In addition, the court noted that Wachovia's conduct in this case was at least analogous to bad faith conduct by an insurer, and these causes of action are assignable.

Finally, the court examined its own question in order to help clarify Florida law and perhaps help the Eleventh Circuit. Contrary to the decision of the district judge, the supreme court held that causes of action for breach of fiduciary duty and negligence can exist in the same case. Neither one kills off the other. Insurance brokers have both sets of duties running to their clients. Breach of fiduciary duty and negligence are alternative causes of action; they can both be pleaded; and they could both be tried together in the same case. Of course, there can be a knowing breach of fiduciary duties, and negligence usually requires a lack of relevant knowledge. In addition, negligence in this context usually has to do with procuring the wrong policy, failing to look hard enough, or failing to remember something, and a breach of fiduciary duties might have a much broader reach. Nevertheless they are not inconsistent. The supreme court expressly overruled *Moss v. Appel,* 718 So.2d 199 (Fla. App. 2006), on which the district court relied in holding otherwise. *Moss* may kiss itself good bye as an influential force in legal history.

Long Dissenting & Concurring Opinion. Justice Lewis wrote a long dissenting and concurring opinion rejecting the idea that there was a simultaneous release-and-assignment. The third judge who wrote the very short opinion agreed with the majority on this point. Justice Lewis disagreed with the "Contents of a Single Paragraph Argument" and pointed out that there was a distinct paragraph which contains the following language: "IMC will promptly execute the necessary documents to assign to Plaintiffs, without recourse and without representations or warrants whatsoever, all its rights, including its choses in action, which rights may have under or because of the existence of that policy against Chubb/Federal Insurance Company or others to secure indemnification sufficient to satisfy the $1.8 million judgment awarded Plaintiffs by the Court in the Litigation[.]" Justice Lewis concluded that the execution of these documents was necessary for there to be an assignment and that they were not executed at the time of the execution of the release.

If so, then the *Cope* case applies perfectly and is binding precedent. Besides, says Justice Lewis, *Cope* requires the assignment to precede the release, and indisputably that did not happen here. Thus, he says, Florida is stuck with *Cope* even though "it represents a poorly reasoned departure from longstanding precedent with regard to contract interpretation as well as prior decisions from this Court with regard to the rights of third parties to file actions against insurers."

Otherwise Justice Lewis agreed and concurred with the majority's conclusion, though not all of its arguments. In particular, he rejected the idea that Wachovia's conduct resembled insurance bad faith. Instead, he saw Wachovia's conduct as resembling negligent conduct.

Short Dissenting & Concurring Opinion. Justice Bell concurred with the majority about the timing of the assignment and setting the *Cope* decision to one side. He agreed with them about the two causes of action at issue living together in peace. However, he rejected the idea that breach of fiduciary duty causes of action should be assignable. Alas, he gives no argument.

Comment

The argument for simultaneous assignment validity seems sound to me, especially the way cases are often settled—all at once under heavy time pressures arising from a variety of causes. Granted, the second paragraph the dissenting justices emphasize is awkward; there are better and clearer ways to write that paragraph. Two points are clear, however.

First, the first paragraph discussed is not a complete and total release. IMC is not released with respect whatever the plaintiffs need in order to sue Wachovia, although it is agreed that no attempt will be made to collect from IMC. Thus, from a legal point of view, IMC is still liable, but only for the purpose of going after Wachovia.

Second, the second paragraph is for the purpose of getting whatever documents are necessary in order to pursue a court case against Wachovia, or—at least—convince it that it must pay. Substitute the word "any" for the work "the," and use the words "necessary to prove the existence of an assignment" where appropriate, and all questions disappear.

There are various situations in which one can obtain relief from a release. If so, there must be

remedies by means of which a release can be evoked for the sole purpose of redrafting it and achieving what the parties intended but did not formulate very well. I have never seen a case like this, and the AM. JUR.2D article entitled *Releases* does not discuss it. // Quinn

Louisiana's Peremption Statute for Civil Actions against Insurance Intermediaries Runs from the Date of Performance (No More than Three Years), From the Date of Discovery of the Error (One Year), or From the Date When the Mistake Should Have Been Discovered (One Year)

No Extensions Are Permitted

Burk Property Investments, LLC v. Alliance Insurance Agency, ___ So.2d ___, 2008 WL 4191138 (La. App. Sept. 10, 2008).

Case at a Glance

Burk bought insurance through Alliance for two properties it owned in Orleans Parish on or about June 13, 2005. Burk wanted flood insurance. Burk claimed that it was told that it indeed had exactly that. When Katrina came through on August 29, 2005, the buildings were damaged. Burk filed claims, and they were denied. Burk sued Alliance and the individual agent on August 29, 2006. The defendants moved for summary judgment on several grounds. The court granted it on the grounds of peremption by a statute, R.S. 9:5606, ¶¶ A & D, which is entitled *Actions for Professional Insurance Agent Liability.* Under that statute, Burk had no rights upon which to sue Alliance or its insurance agent/employee after mid-June 2006.

Summary of Decision

The facts here are very simple and have already been summarized. What is important is the nature of peremption and the applicable statute.

Peremption. According to BLACK'S LAW DICTIONARY, the term "peremption" in Civil Law—meaning Napoleonic Codes and Louisiana Law--means "a period of time fixed by statute for the existence of a right. If the right is not exercised during this period, it is extinguished." The verb "to perempt" means "to quash, do away with, or extinguish." In the common law tradition, the term "peremptory challenge" comes from this phrase. The difference between a statute of limitation and a statute of peremption is that the former does not wipe out a right; it simply bars a specific remedy.

Louisiana Statute. To understand what happened here, it is necessary to review R.S. 9:5606.A. Remember, this statute is designed for structuring lawsuits against insurance brokers. Paragraph A states that no action of any kind for damages can be brought against "any insurance agent, broker, solicitor, or other similar licensee under" Louisiana law which arises out of the engagement of any such person and involving any alleged "act, omission, or neglect," unless it is brought within one year of the date upon which it is "discovered or should have been discovered." However, these one year intervals may not stretch out longer than three years after the date of the performance of the act, omission or neglect. (Of course, these dates are not always easy to fix definitely and with certainty for omissions.)

Paragraph B of R.S. 9:5606 is also relevant. It states that the peremptive periods specified in 9:5606 are enacted in accordance with other significant sections of the Civil Code, in particular Articles 3458 and 3461 and therefore "may not be renounced, interrupted, or suspended." As was stated in another case, "once that peremptive period begins to run, it is not subject to *contra non valentum.*" *Huffman v. Goodman,* 784 So.2d 718, 725 (La. App. 2001). According to BLACK'S LAW DICTIONARY, this Latin phrase is to be understood in terms of the "Doctrine of *Contra Non Valentum,*" which is "the rule that a limitation or prescriptive period does not begin to run against a plaintiff who is unable to act, usually because of the defendant's culpable act, such as concealing material information that would give rise to the plaintiff's claim." In other words, under the law of Louisiana, someone treated wrongfully by an insurance intermediary needs to discover the error, no matter what, "or else"!

In this case, the plaintiff argued that he did not and could not discover the agent's failure to obtain flood insurance until after Katrina came through and he was denied coverage by other insurers. The court rejected this position because documents issued with or after both new policies—one for each of the two locations—had a blank line and no monetary amount listed as cost for flood insurance. This alone gave Burk