The Seen and the Unseen: Growing Distinctions in Application Statute of Limitations to Broker E&O Claims

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Introduction

In *RVP, LLC v. Advantage Insurance Services, Inc.*, 2017 IL App (3d) 160276, the Illinois Appellate Court, Third District, affirmed the grant of summary judgment in favor of an insurance broker based upon statute of limitations because the insured knew or should have known that the policy procured by the broker had insufficient policy limits. The Court rejected the plaintiff's reliance on *Perelman v. Fisher*, 298 Ill. App. 3d 1007 (1st Dist. 1998), which holds that an insured's mere receipt of a policy does not mean that the insured knows the contents of the policy, because the available policy limits in this case were clearly printed on the declaration page.

Facts of the Case

After procuring policies for the insured from Travelers and Universal Underwriters that were non-renewed or cancelled, the broker was instructed by the insured to obtain coverage in the same amount as the Travelers' policy. *RVP, LLC*, 2017 IL App (3d) at ¶¶ 2-8. The Travelers' policy provided blanket $3,000,000 coverage for insured's two buildings and that amount was subsequently increased to $1,545,000 for each building, but again with blanket coverage. *Id*. ¶ 6. The Universal Underwriters policy provided for $1,300,000 for blanket replacement cost coverage for equipment and $1,000,000 for stock and inventory. *Id*. ¶ 8.

On July 29, 2009, the broker completed an application to Erie for $75,000 for business personal property. *Id*. ¶ 11. The broker did not send the entire application to the insured and the insured did not review the application to confirm the application was for the requested amount of coverage. *Id*. On August 1, 2009, Erie issued the policy to the insured with a declaration page showing business personal property limits of $75,000. *Id*. This policy was renewed twice, on August 1, 2010 and August 1, 2011, and each time the policy showed the same business personal property limit. *Id*.

As to coverage for the buildings from Erie, the application was for $1,545,000 for one building and $545,000 for the second building, but without blanket coverage. *Id*. ¶ 13. Again, the insured was not provided the complete application. *Id*. That policy was issued on February 1, 2010 and sent directly by the insurer to the insured showing limits of inconsistent with the prior extent and type of coverage. *Id*. Those policies were renewed on February 1, 2011. *Id*.

On September 2, 2011, the insured suffered a fire loss that destroyed both buildings and the contents. *Id*. ¶ 15. The insured suffered losses that far exceeded the limits of the Erie policies. *Id*. On August 30, 2013, the insured filed a complaint for negligence and breach of contract against their insurance brokers. *Id*. ¶¶ 17-18. The brokers filed a motion to dismiss based upon the statute of limitations in 735 ILCS 5/13-214.14 that provides that a complaint against an insurance broker in Illinois must be filed within two years. *Id*. ¶ 20. The court found a question of fact as to when the insured had received the policies and denied the motion. *Id*.

Following discovery, the brokers filed a motion for summary judgment, which was granted based upon a showing that the insured had received the building policy no later than January 31, 2011 and the business personal property policy no later than July 31, 2010. *Id*. ¶¶ 22-23.

On appeal, the insured argued that summary judgment was improper because the insured did not discover the improper limits and suffer injury until after the loss of September 2, 2011 and, therefore, the filing of August

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30, 2013 was timely. *Id*. ¶¶ 25. In rejecting this contention, the Court held that the plaintiff reasonably should have known of the limits upon receiving the policies. *Id*. ¶ 32.

In addressing the insured's reliance on *Perelman*, in which there was a disability policy that did not have the requested cost of living increases, the Court found that the evidence showed that there was no ambiguity as the applicable policy limits in this case were printed clearly on the declaration page. *Id*. ¶¶ 34-36. Unlike the absence of an arcane provision of the policy in *Perelman*, the available policy limits in this case were printed clearly on the declaration page and no interpretation of the policy was needed. *Id*. ¶¶ 36, 40. As a result, the court did not reach the issue of whether the insured had a duty to read the policy and held that, based upon the fact of this case, the insured knew of should have known of the insufficient policy limits and the statute began to run at the time they received the policies. *Id*. ¶ 37.

Conclusion

This case provides a clear basis to seek dismissal or judgment based upon the statute of limitations in a case in which a plaintiff alleges insufficient policy limits were procured. The scope of this opinion might be able to be expanded to other obvious errors by brokers, such as the failure to include particular properties, automobiles, individuals, or even types of coverage (if the absence would be obvious from the declaration page).

This case is likewise distinguishable from another recent case, *American Family Mutual Insurance Company v. Krop*, 2017 IL App (1st) 161071, which held, like *Perelman*, that the statute of limitations did not begin to run until after the denial of coverage in a situation in which an insurance broker failed to obtain intentional acts coverage in a new policy of homeowner's insurance that had been included in the previous carrier's policy. ■