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PROFESSIONAL INSURANCE WHOLESALERS ASSOCIATION OF NEW YORK STATE, INC.

HOT HINTS FROM THE HOTLINE
A SUMMARY OF SOME RECENT ARTICLES AND CASES OF INTEREST TO WHOLESALE BROKERS

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SCORE ONE FOR THE GOOD GUYS! – NO LIABILITY FOUND AGAINST THE WHOLESALE BROKER WITH RESPECT TO OBTAINING COVERAGE FOR A CONTRACTOR BECAUSE AN "INDICATION" IS NOT A "QUOTE"

In this interesting case decided in April, 2016, the proposed insured, DeFoe, was a contractor who did a lot of work for public entities like the NY State Department of Transportation, the NYS Thruway Authority and the Port Authority of NY and NJ. DeFoe's retail broker, which it used for a number of years, was USI. DeFoe claimed it relied on USI to price and obtain appropriate insurance policies that were required by law or by contract for DeFoe to perform its work.

In connection with the preparation of a bid to do a major project for the NY State Department of Transportation, DeFoe asked USI to obtain prices for project-specific insurance coverage, a CGL policy, an OCP policy and umbrella coverage. The specifically-requested policies were to provide cover for the entire five year life of the job. DeFoe alleged that USI agreed to obtain the requested coverage and to provide prices for all the policies. Thereafter, USI asked the wholesale broker, Hartan to obtain "indications" for the CGL and umbrella coverages. Hartan

contended that it had no direct communications with DeFoe and that all its communications were with USI.

In the next several days, Hartan provided USI with premium "indications" for the primary and excess policies. USI passed the indications along to DeFoe but did not advise DeFoe that the indications were non-bindable and subject to additional information about the job. Thereafter, DeFoe provided USI with the requested details about the project which USI passed along to Hartan and Hartan gave to the potential insurers. The CGL carrier and the excess carriers advised Hartan that they could not write the coverage within the indications and when this information was passed along to DeFoe by USI, DeFoe claimed it had to pay substantially higher premiums to obtain the coverages it needed for the project.

DeFoe sued USI and Hartan claiming negligent misrepresentation and negligence on the part of the defendants in connection with securing insurance coverage for the project. DeFoe settled with USI and Hartan then made a motion to dismiss the complaint. In deciding the motion, the court made a point of distinguishing between an "indication" and a "quote." To court said:

"An 'indication' is a term of art in the insurance industry and among insurance brokers. An 'indication' is an estimate of the premium an insurance company may ultimately charge for a policy. An 'indication' is different than a 'quote' which is also a term of art in the insurance industry and among insurance brokers. A 'quote' is a specific premium at which the insurance company is willing to issue a policy. Thus, if the insured accepts a quote, there is a meeting of the minds with respect to issuance of the policy for the quoted premium. By contrast, a broker never guarantees that the insurance company which provided an 'indication' will be able to issue the policy for a premium based on that indication."

The court granted Hartan's motion to dismiss DeFoe's action finding that there was no negligent misrepresentation or negligence on the part of Hartan, pointing out that Hartan had no direct communications with DeFoe at any time. It followed, said the court, that there was no privity-like relationship between DeFoe and Hartan and the wholesale broker could not be held to account for providing allegedly incorrect information to DeFoe.

The lesson we learn from the case is that the wholesale broker, Hartan, acted properly throughout the process of attempting to secure the requested coverage. It did not communicate directly with the insured but dealt only with the retail broker. When it provided an "indication" to USI, it was clear that it was an "indication" and not a "quote."

As a wholesale broker, you can be a "good guy" if, when advising a retail broker of a potential premium level, be sure it is properly labeled as an "indication" or a "quote," as the case may be. And stay clear of any communications with the insured, either directly or by copying the insured on your communications with the retail broker. The wholesale broker in this case was able to convince the court that it had no "privity-like" relationship with the contractor because it never communicated with the insured and communicated only with the retail broker with respect to obtaining the requested coverages.

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A "CERTIFICATE OF INSURANCE" DOES NOT CONFER COVERAGE – ANOTHER EXAMPLE OF HOW A CONTRACTOR WHO RELIED ON A CERTIFICATE OF INSURANCE GIVEN BY A SUBCONTRACTOR WAS LEFT HOLDING THE BAG

In another recent case, the subcontractor, Teji, provided the general contractor, Vikram, with a certificate of insurance attesting to the fact that Teji had liability insurance with Atlantic Casualty Ins. Co. and that Vikram was an additional named insured. The certificate was dated December 13, 2008 and stated a policy number and that the coverage was effective from December 13, 2008 through December 13, 2009. The certificate contained the usual disclaimer that it was "issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below."

As luck would have it, an employee of the subcontractor claimed to have been injured on the job on November 13, 2008 (a full month before the alleged effective date of the "certificate") and sued Vikram. Vikram sought coverage from Atlantic Casualty based on the certificate. Atlantic Casualty denied coverage on the ground that it never issued a policy to Teji; that the purported policy number on the certificate was not a policy number it ever used or issued and that the accident happened before the alleged effective date of the certificate.

In response to Vikram's action for a declaratory judgment seeking coverage, the court granted Atlantic Casualty's motion for summary judgment dismissing the complaint. The court referred to the legend on the certificate itself to the effect that it did not confer any rights on the certificate holder (Vikram); that the policy

number stated on the certificate did not exist and that the alleged injury occurred before the certificate even became effective.

The decision did not say whether the general contractor sued the retail broker as well, but, under the circumstances, it is a good bet the retail broker who issued the defective certificate was named or sued in a separate action. But the case brings to mind the discussion that developed when the ACORD 855 form was first promulgated almost two years ago. Some TIPS we imparted at that time are worth repeating:

- make sure the retail brokers with whom you do business, especially in the construction industry, are "educated" about not issuing a certificate that contains misinformation;
- any written "quote" you issue should state that the retail broker is not authorized to act on your behalf or that of the insurer in the absence of specific written confirmation;
- don't let the facts surrounding your relationship with the retailer make it appear that the retail broker is your agent or has authority to act on your behalf or that of the insurer;
- exercise due diligence – know who you are doing business with and stay aware of the retailer's business practices – especially with respect to issuing certificates of insurance.

  Finally, if you suspect that a claim may be made against you because the retail broker issued a defective certificate, it is time to notify your E&O carrier.

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