Insurance contours clarified: agency relationships in premium financing

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Today's insurance professionals and legal practitioners know that the insurance market can be unpredictable and volatile. With external factors such as natural disasters, war, cyberattacks, and economic uncertainties, insurance professionals can find reprieve in increased certainty from the courts.

In assessing business strategies and competitive advantages for 2024, insurers should take note of a recent New Jersey Superior Court decision that supports a narrowing of the agency relationship between insurers and independent insurance agents and brokers.

Overview

In *CEBV, LLC v. Clear Blue Specialty Insurance Company, et. Al.*, the New Jersey Superior Court dismissed a premium finance company's last remaining claim against numerous insurance companies for allegedly aiding and abetting the unlawful acts of their independent insurance agents. The authors represented Clear Blue Specialty insurance group in this matter.

The court's decision indicates that an insurer has no duty to investigate whether its agents and policyholders have used fake insurance policies to seek premium finance loans, even though the insurer received unsolicited notices about the loan applications from the premium finance company. This appears to be a very rare aiding-and-abetting case premised on the alleged inaction of one party (*e.g.*, an insurer) upon receiving an unsolicited notice or request from the other party (*e.g.*, a premium finance company) when neither has a statutory or contractual duty to the other.

The court previously dismissed with prejudice the premium finance company's claim for breach of the premium finance loan contracts against the same insurers. The court concluded that the policyholders and the agents — not the insurers — entered into the loan contracts.

The agents' mere authority to issue insurance policies on the insurers' behalf did not extend to entering into premium finance loan contracts on the insurers' behalf.

At a national level, insurers can use this case as persuasive authority that certain acts of an independent agent are not attributable to the insurer. Because the court's decision was based on the extent of agency authority, the rationale of this case applies beyond claims for breach of contract and aiding and abetting.

Background

Insurers typically issue insurance policies to their policyholders through independent agents and agencies. Policyholders make periodic premium payments on their insurance policies. They can then file claims to seek recovery for insurable losses.

A recent New Jersey Superior Court decision supports a narrowing of the agency relationship between insurers and independent insurance agents and brokers.

Premium financing gives a policyholder a potential means to buy and pay for insurance in more manageable periodic payments plus a finance charge. To seek the financing, the policyholder can apply for a loan from a premium finance company. The policyholder may use an agent to do so. If approved, the company provides a loan (often to the policyholder's agent) to pay the premium payment, and the policyholder repays this loan over time.

According to the complaint, certain policyholders and insurance agents submitted fake insurance policies to a premium finance lender to fraudulently obtain loans. The agents allegedly then kept the loan proceeds to "fund their personal lavish lifestyles."

The plaintiff asserted that the insurers (1) were parties to the premium finance contracts because their independent agents signed the contracts and (2) aided and abetted their agents' conversion and violations of New Jersey Racketeer Influenced and Corrupt Organizations Act (NJ RICO).

As for breach of contract, the plaintiff claimed that the insurers were liable based on the actions of their independent agents. As for aiding and abetting, the plaintiff asserted that the insurers "did not respond" to the premium finance company's unsolicited notices. Those notices asked the insurers to confirm the validity of the purported insurance policies underlying the loans. The plaintiff argued that the insurers' alleged "inaction" — the mere failure to respond to the company's unsolicited notices — amounted to substantial assistance.

The court's decision

In dismissing the breach-of-contract claim, the court held that the agency relationship between insurer and agent did not extend to the agent's role in the premium finance transactions, and therefore, the insurer was not liable for the agent's acts.

Because the court's decision was based on the extent of agency authority, the rationale of this case applies beyond claims for breach of contract and aiding and abetting.

In dismissing the second claim for aiding and abetting conversion and violations of NJ RICO, the court found that an insurer's mere inaction did not suffice for aiding-and-abetting liability. To plead a claim for aiding and abetting under common law, plaintiffs must plead:

(1) the performance of a wrongful act that causes an injury;

(2) the general awareness of the defendant of its role as part of an overall illegal or tortious activity at the time; and

(3) that the defendant knowingly and substantially assisted in the wrongful act.

The court agreed with the insurers that their alleged failure to respond to the premium finance company's unsolicited notices (i.e., their mere inaction) could not amount to substantial assistance (element #3).

Broad Implications

The court's ruling provides one important data point in the outer contours of aiding-and-abetting liability — an area of the law that remains murky — as well as further clarifying the extent of an independent insurance agent's relationship with an insurer.

Although this decision helps insurers, the concept that alleged inaction cannot be substantial assistance clarifies the scope of aiding and abetting liability and would apply to any person or entity accused of aiding and abetting. A plaintiff must either plead a defendant's particular duty to act or plead more than mere inaction.

Looking ahead, potential plaintiffs and defendants alike would benefit from more developed case law on aiding-and-abetting liability, particularly as it relates to insurers. This decision does not address certain contours of aiding-and-abetting liability. The below issues, although specific to New Jersey law, represent the complexity of this type of matter in any jurisdiction:

- Whether a premium finance company's sending of unsolicited notices to the insurer can be a basis for pleading that the insurer *knowingly* assisted a premium finance fraud scheme carried out by independent insurance agents.
- Whether a party can aid and abet a RICO violation. Since the 1998 3rd U.S. Circuit Court of Appeals' decision in *Rolo* v. *City Investing Co. Liquidating Tr.*, a party cannot be liable for aiding and abetting a violation of the federal RICO statute (18 U.S.C § 1961, et seq.). The NJ RICO statute does not explicitly contemplate aiding-and-abetting liability.
- Whether aiding-and-abetting liability can attach where the alleged aid occurred after completion of the tortious conduct.

Despite the questions that still linger, this decision is relevant for insurers across the nation, as it signals a continued narrowing of the agency relationship between insurers and their independent insurance agents/brokers.

It also may serve as persuasive authority that pleading the insurer's constructive knowledge of fraud without pleading that the insurer affirmatively assisted the fraud, outside some special duty, does not suffice to meet even the most liberal pleading standard. And for good reason: To hold otherwise would establish a broad common-law duty to prevent the wrongs of others.

If this decision indicates the direction of aiding-and-abetting law, insurers need not examine and track every unilateral notice or unsolicited disclosure about third-party contracts for fear of liability.

About the authors



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