RECENT DEVELOPMENTS AFFECTING PROFESSIONALS,' OFFICERS,' AND DIRECTORS' LIABILITY

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I. DEVELOPMENTS IN LEGAL MALPRACTICE

A. *Attorney-Client Privilege Between a Firm and Its In-House Counsel Concerning a Claim by a Current Firm Client*

If a law firm confers with in-house counsel about a potential claim against the firm by a current client, are the firm's communications with in-house counsel protected by the attorney-client privilege in a subsequent legal malpractice action brought by the client? Two recent decisions by state courts of last resort, the Supreme Court of Georgia and the Supreme Judicial Court of Massachusetts, have both held that confidential communications to in-house counsel about a current client's claim are privileged if certain requirements are met.

In *St. Simons Waterfront, LLC v. Hunter, Maclean, Exley & Dunn, P.C.*,[1] the Georgia Supreme Court considered whether in a legal malpractice action by a client against its former law firm, the attorney-client privilege protected communications between the firm's attorneys and the firm's in-house general counsel that took place while the firm was still representing the client and which were made in anticipation of a potential legal malpractice claim by the client.[2] The trial court determined that the attorney-client privilege did not apply because the communications concerned the defense of the firm against claims by a client it had continued to represent, resulting in an undisclosed conflict of interest.[3]

The Supreme Court of Georgia acknowledged the ethical issues arising from the firm's continued representation of a client who may assert a claim against it.[4] Nevertheless, it observed that the Georgia Rules of Professional Conduct are not intended to affect the legal duties or rights of attorneys beyond the disciplinary context.[5] Accordingly, the court concluded that the "potential existence of an imputed conflict of interest between in-house counsel and the firm client is not a persuasive basis for abrogating the attorney-client privilege between in-house counsel and the firm's attorneys."[6] For similar reasons, the court also rejected the suggestion that at-

1. 746 S.E.2d 98 (Ga. 2013).
2. *Id.* at 102.
3. *Id.* at 103.
4. *Id.* at 105–06.
5. *Id.*
6. *Id.* at 106.

torneys' fiduciary duties to their clients trump an otherwise valid claim of privilege."[7]

Because there are no special barriers to privilege in these circumstances, the Supreme Court of Georgia held that communications between a law firm and its in-house counsel regarding a possible claim by a current client will be privileged if those communications meet the standard requirements for the attorney-client privilege: "(1) there is an attorney-client relationship. . . ; (2) the communications . . . relate to the matters on which legal advice was sought. . . ; (3) the communications have been maintained in confidence. . . ; and (4) no exceptions" apply.[8]

In the context of a consultation with in-house counsel, determining whether the first of these requirements, the existence of an attorney-client relationship, has been met will be a fact-based determination that turns on whether the in-house counsel and the firm treat the advice and communications concerning the potential claim as separate and distinct from the underlying representation.[9] Measures such as billing procedures recognizing the firm as a separate client and maintaining a separate file promote this distinction and increase the likelihood that an attorney-client relationship exists.[10] Also relevant to determining whether there is an attorney-client relationship between the firm and the in-house counsel is the formality associated with the in-house position.[11] "The less formality associated with the position," the greater the importance attached to billing and record-keeping in determining whether there is an attorney client relationship between the firm and its in-house counsel.[12]

In discussing the requirement that no exceptions apply, the court observed that it had rejected any exception based on a breach of fiduciary duty or a conflict of interest.[13] The court also rejected the "fiduciary duty" exception, which holds that "one . . . acting in a fiduciary capacity cannot assert privilege . . . [against] the beneficiary of the fiduciary relationship."[14] One rationale for the exception, that the beneficiary is the "real client" of the attorney for the fiduciary, does not apply because there is no mutuality of interest between the firm and the client with respect to a malpractice claim.[15] Therefore, with respect to the communications about a possible claim, the outside (non-firm) client cannot be said to be the "real client" of the in-house counsel.[16]

7. *Id.* at 108.
8. *Id.* at 104.
9. *Id.* at 104–05.
10. *Id.* at 105.
11. *Id.*
12. *Id.*
13. *Id.* at 108.
14. *Id.* at 107–08.
15. *Id.*
16. *Id.*

Like the Supreme Court of Georgia, the Supreme Judicial Court of Massachusetts recently concluded that communications about a claim by a current client between a firm and its in-house counsel may be protected by the attorney-client privilege. In *RFF Family Partnership, LP v. Burns & Levinson, LLP*,[17] the court concluded that, where a firm is faced with an apparent conflict of interest arising from a possible claim from a current client, candid disclosures to in-house counsel without fear of later disclosure in a subsequent legal malpractice action should be encouraged, observing that a firm facing a potential claim from a current client would be well-advised to consult with counsel designated to assist the firm in meeting its ethical obligations.[18] Moreover, this consultation may ultimately benefit the client because it will assist the firm in making considered and ethical decisions about how to proceed (or whether to proceed) forward with the underlying representation, or whether and how the firm should withdraw from the representation.[19] The court rejected as impractical and undesirable the client's contention that communications with in-house counsel should not be protected by the attorney-client privilege unless the firm either first withdraws from the underlying representation or advises the client about the conflict of interest and obtains the client's consent to engage in protected communications with in-house counsel.[20] The court reasoned that the first of these proposed options would pose the risk that the firm, "without the benefit of expert advice, may unnecessarily withdraw from a representation where the apparent conflict was illusory or reparable, or withdraw without adequately protecting the client's interests."[21] The second option poses the risk that "the law firm may advise the client about the conflict before itself obtaining the advice that would enable it better to understand the conflict."[22]

Instead of a rule requiring a firm to take action without the benefit of legal advice, the Massachusetts Supreme Judicial Court

> prefer[s] a formulation of the attorney-client privilege that encourages attorneys faced with the threat of legal action by a client to seek the legal advice of in-house ethics counsel before deciding whether they must withdraw from the representation to one that would encourage attorneys to withdraw or disclose a poorly understood potential conflict before seeking such advice.[23]

Turning from policy considerations to legal doctrine, the court rejected the client's argument that the "fiduciary exception," or the "current

17. 991 N.E.2d 1066 (Mass. 2013).
18. *Id.* at 1072–73.
19. *Id.* at 1073.
20. *Id.* at 1073–74.
21. *Id.* at 1074.
22. *Id.*
23. *Id.* at 1080.

client" exception, should apply.[24] Like the Georgia Supreme Court, the court held that the fiduciary exception does not apply when the attorney-client communications are for the benefit of the fiduciary, rather than the beneficiary.[25] In rejecting the fiduciary exception, the Supreme Judicial Court stressed that preserving the firm's attorney-client privilege "does not affect a law firm's duty to provide a client with 'full and fair disclosure of *facts* material to the client's interests'. . . even if those facts were disclosed or learned" during the confidential communications with in-house counsel.[26] "Nor does [it] affect [the] law firm's obligation to provide the client with [sound] advice, even if that advice was the result of its legal consultation with in-house counsel."[27]

The court also rejected the "current client exception," which holds that the privilege is waived because there is a conflict of interest between the firm and the client that is imputed under the ethical rules to the firm's in-house counsel as well.[28] The court observed that the rule of imputation (i.e., conflicts of one firm attorney are imputed to all of the firm's attorneys) safeguards the duty of loyalty to the client by precluding the firm from representing clients whose interests are adverse.[29] Where the conflict arises between the firm and a current client, however, "the potential conflict between the law firm's loyalty to the client and its loyalty to itself cannot be avoided," and a firm "is not disloyal to a client by seeking legal advice to determine how best to address the potential conflict."[30] "The rule of imputation also protects the confidentiality of client information by eliminating the risk that information provided by one client will be misused to the advantage of an adverse client," but where "the adverse client is the law firm itself," imputing the conflict to in-house counsel will not protect the client's information "because the . . . firm already possesses the . . . information and it has a right to defend itself against the outside client's adversarial claims even to the point of disclosing information given to the law firm in confidence."[31] In sum, the policies underlying the imputation rule are not applicable when a firm seeks advice from in-house counsel about a claim asserted by a current client.

Like the Supreme Court of Georgia, the Massachusetts Supreme Judicial Court also held that while a conflict of interest may have disciplinary consequences, it should not vitiate an otherwise valid claim of privilege.[32]

24. *Id*. at 1074–79.
25. *Id*. at 1075.
26. *Id*. at 1076 (emphasis in original).
27. *Id*.
28. *Id*. at 1076–80.
29. *Id*. at 1078.
30. *Id*.
31. *Id*. at 1079.
32. *Id*.

Moreover, the court noted the "black-letter law" that where there is a conflict of interest between two current firm clients, the confidential information of both clients must be protected.[33] Applying this "black-letter law," a conflict of interest should not vitiate a client's privilege, "even if that 'client' is a law firm and the 'attorney' is an in-house counsel within that same law firm."[34]

Although the court recognized the privilege, it "is not without . . . limits. The court sets forth four prerequisites for the privilege. First, the law firm must . . . formally or informally [designate] an attorney or attorneys within the firm [who will] represent [it] as in-house or ethics counsel."[35] Second, the in-house counsel cannot have performed any work on the underlying client matter.[36] Third, the communications between the firm and in-house counsel must not be billed to the client.[37] Fourth, as is true for all attorney-client privilege claims, the communications "must be made in confidence and kept confidential."[38]

B. *Recovery of "Lost" Punitive Damages*

Among the most contested issues in legal malpractice law over the past decade is whether a legal malpractice plaintiff may recover from its attorney punitive damages it could have won in an underlying litigation. A decision from the Supreme Court of Kentucky is a recent example of an emerging trend by courts over recent years concluding that such "lost punitive damages" are not recoverable in a legal malpractice action.

Osborne v. Keeney[39] involved a legal malpractice suit against an attorney for missing the statute of limitations for an underlying negligence claim against a pilot who crashed a plane into the client's home. The malpractice jury awarded the client over $5 million in damages, including $750,000 for punitive damages the client "lost" as a result of the attorney's failure to timely file the claim against the underlying defendant.[40]

Among the issues raised by the parties on appeal was the award for lost punitive damages.[41] The Supreme Court of Kentucky observed "jurisdictions that have dealt with the issue are split on whether recovery of these lost punitive damages should be allowed with the recent trend appearing to prohibit them."[42] In following those jurisdictions that prohibit the recov-

33. *Id.*
34. *Id.*
35. *Id.* at 1080.
36. *Id.*
37. *Id.*
38. *Id.*
39. 399 S.W.3d 1 (Ky. 2013).
40. *Id.* at 7–8.
41. *Id.* at 8.
42. *Id.* at 19 (collecting cases).

ery of lost punitive damages in legal malpractice actions, the court observed that, unlike compensatory damages, which are designed to make the plaintiff whole for the loss he or she has suffered, punitive damages are meant to punish the wrongdoer and deter other parties from engaging in similar conduct in the future.[43] Awarding punitive damages against the attorney would not punish the underlying wrongdoer or deter others in the wrongdoer's position.[44] Accordingly, allowing a legal malpractice plaintiff to recover "lost punitive damages would not advance the policy underlying punitive damages in any way. In fact, allowing recovery would be antithetical to what punitive damages stand for, untying 'the concept of punitive damages from its doctrinal moorings.' "[45]

Although the court held punitive damages lost from the underlying claim are not recoverable in a legal malpractice action, it observed that a legal malpractice plaintiff may, where applicable, "seek punitive damages from the attorney for the attorney's *own* conduct."[46]

II. DEVELOPMENTS IN ACCOUNTING MALPRACTICE

A. *Assignment of Accounting Malpractice Claim: Is an Anti-Assignment Clause Effective?*

In *In re MF Global Inc.*,[47] the bankruptcy court approved the debtor trustee's motion seeking approval of an assignment agreement that assigned claims against PriceWaterhouseCoopers (PwC), among others, to certain customer representatives. The court overruled all the objections to the assignment of claims except PwC's objection on which it took additional briefing. PwC's objection was based on the anti-assignment clause in its engagement agreement: "The Companies agree that they will not, directly or indirectly, agree to assign or transfer this engagement letter or any rights, obligations, claims or proceeds from claims against PricewaterhouseCoopers LLP arising under this engagement letter to anyone . . ."[48]

After establishing that under section 363(b) of the Bankruptcy Code, a trustee using sound business judgment can use, sell, or lease estate property and that courts "repeatedly approve trustee requests to assign claims to creditor representatives," the court ultimately rested its approval of the assignment of the claim on the fact that the anti-assignment clause applied only to contract claims against PwC.[49] The court concluded that New

43. *Id.* at 20.
44. *Id.*
45. *Id.* (quoting Tri-G, Inc. v. Burke, Bosselman & Weaver, 856 N.E.2d 389, 417 (Ill. 2006)).
46. *Id.* at 23 (emphasis in original).
47. 478 B.R. 611 (S.D.N.Y. 2012).
48. *Id.* at 615.
49. *Id.* at 616–17.

York law not only recognizes a potential contract claim against professionals, but "an action for professional malpractice or negligence may be maintained."[50] Although a clause referring to claims "arising out of *or relating to*" would be construed to include both contract and tort claims, the anti-assignment clause at issue only mentioned claims "arising under" the engagement letter.[51] Thus, the court concluded that the MF Global trustee could enter into an assignment of the estate's malpractice or tort claims against PwC.

The district court affirmed the decision stating that the anti-assignment clause did not cover torts and that under New York law,[52] "tort claims, when based on the violation of an independent legal duty, arise independently from breach of contract claims, even where they are based on the same underlying facts."[53]

B. *Imputation Defenses: How Do They Fare Against the FDIC?*

In *FDIC v. PricewaterhouseCoopers, LLP*, the Federal Deposit Insurance Corporation (FDIC), as receiver for the failed Colonial Bank, brought claims against the bank's parent holding company's internal auditors, Crowe Horwath, and its external auditors, PwC, for breach of contract, negligence, gross negligence, and negligent misrepresentation. Certain bank employees were alleged to have conspired with employees of a mortgage company that was the bank's largest customer to conceal a "double- and triple-pledging fraud" benefitting those employees, but the auditors did not detect the fraud.[54]

Both defendants raised multiple grounds in motions to dismiss, but several of PwC's defenses apparently depended upon the imputation of Colonial Bank's insiders' fraudulent conduct to the bank.[55] Although the imputation-based defenses were not clearly denominated in the opinion, the court specifically mentioned contributory negligence, and the underlying briefing alluded to the popular defense of *in pari delicto*, which requires imputation of the fraudulent conduct in the first instance.[56] First, the court addressed whether state or federal law would govern the issue of imputation, holding that Alabama state law would determine the issue. The court found that it could not reach a decision as to what Alabama law

50. *Id.* at 620.
51. *Id.* at 620–21.
52. *In re MF Global, Inc.*, 496 B.R. at 315, 321.
53. *Id.* at 322–23.
54. F.D.I.C. v. PricewaterhouseCoopers LLP, No. 2:12-CV-957-WKW, 2013 WL 4851613, at *3 (description of employees' involvement), *7 ("double- and triple-pledging fraud") (M.D. Ala. Sept. 10, 2013).
55. *Id.* at *2.
56. *Id.* at *2, 4; FDIC's Sur-Reply to Defendant PwC Reply in Support of Its Motion to Dismiss, 2013 WL 2434893, at *3 (M.D. Ala. Apr. 5, 2013).

was as to imputation because the parties did not brief that issue—only the issue of which law should apply.[57]

Nonetheless, the court denied the motion on the imputation-dependent defenses because it found that even under the imputation rule PwC suggested, the FDIC's pleadings presented questions of material fact on the issue of imputation, specifically a question as to whether the allegedly malfeasant employees were "act[ing] within the scope of their employment when they participated in or failed to discover the fraud."[58] The court somewhat cryptically concluded: "the fact question, if disputed, is one a jury must resolve under Alabama law" and "four of the nine articulated grounds for PwC's motion to dismiss require a conclusion the court could not reach at the Rule 12(b)(6) stage" and that it would not grant PwC's motion on those grounds.[59]

C. *Securities Fraud: When Is a Red Flag Red Enough?*

In late 2012 and early 2013, courts in the Central District of California and the Southern District of New York reinforced how difficult it is for a plaintiff to adequately plead scienter against an outside auditor under the Private Securities Litigation Reform Act (PSLRA) by rejecting several formulations of auditor recklessness.[60] "It is undeniable that plaintiffs alleging auditor scienter and securities fraud face an uphill battle, given the particularity with which they must plead such claims."[61] To plead a claim against an outside auditor for violation of Rule 10b-5 under the Securities Exchange Act of 1934, a plaintiff is required to prove either motive and opportunity ("concrete and personal benefit[s]" to the auditor) or that the defendant's conduct is at least "highly unreasonable" and "represents an extreme departure from the standards of ordinary care to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it."[62] This type of recklessness is adequately alleged if the complaint demonstrates that the "accounting practices were so deficient that the audit amounted to no audit at all, or an egregious refusal to see the obvious, or investigate the doubtful" or that "no reasonable

57. *F.D.I.C.*, 2013 WL 4851613, at *4.

58. *Id.*

59. *Id.*

60. Iowa Pub. Emps. Retirement Sys. v. Deloitte & Touche, LLP, 919 F. Supp. 2d 321 (S.D.N.Y. 2013); Buttonwood Tree Value Partners, LP v. Sweeney, 910 F. Supp. 2d 1199 (C.D. Cal. 2012); Dobina v. Weatherford Int'l Ltd., 990 F. Supp. 2d 228 (S.D.N.Y. 2012) (holding several purported red flags were in fact not red flags or were insufficiently connected to auditor, and others did not demonstrate any meaningful contemporaneous knowledge held by auditor); *In re* Longtop Fin. Techs. Ltd. Sec. Litig., No. 11 Civ. 3658, 2013 WL 1410147 (S.D.N.Y. Apr. 8, 2013).

61. *Iowa Pub. Emps. Retirement Sys.*, 919 F. Supp. 2d at 332.

62. *Id.* at 331 (quoting Honeyman v. Hoyt (*In re* Carter-Wallace, Inc. Sec. Litig.), 220 F.3d 36, 39 (2d Cir. 2000)).

accountant would have made the same decisions if confronted with the same facts."[63]

In recent cases, courts have found red flags, even those found to be very serious, deficient to infer recklessness. For example, in some instances, brightly flying red flags were found to be outside the scope of the auditor's duty and thus failed the recklessness pleading standard. Emblematic of this phenomena is *Iowa Public Employee's Retirement System v. Deloitte & Touche*, where the underlying fraud was a "classic Ponzi scheme" utilizing transactions between two companies[64] and the plaintiff argued that the auditor's work "amounted to no audit at all" because of the myriad of danger signs that were ignored, including that: (1) "neither entity was 'individually profitable or sustainable' . . . nor were they . . . stand-alone entities' "; (2) all 'accounting processes and internal controls were performed by the same employee' "; (3) the entities "received funds from each other's investors"; (4) various intercompany advances and transfers were not treated as such; and (5) there were questionable transactions between the two entities, including tax abnormalities and commingling of investor funds, all of which amounted to the two entities being operated as a single entity.[65] The plaintiff also pleaded that by virtue of the SEC's ease in discovering the fraud (the Commission having stated that the fraud was "not that hard to uncover"), it could be inferred the auditor must have been reckless to miss it.[66]

The court in *Iowa Public* found that because the auditor did not, nor did it have the obligation to, audit both entities but only one, and the fact that it may have had access to the information by which it could have discovered the fraud was not sufficient to establish recklessness.[67] It found that although the SEC had easily found the fraud, it had examined both entities involved in order to do so and that its "investigation was prompted by suspicious activity" and a refusal to submit to an audit by the entity that Deloitte did not audit or have a duty to audit.[68] Since the SEC did not specifically make any findings as to the entity that Deloitte audited, and the plaintiff did not allege that Deloitte had access to the related entity but only that it "should have" reviewed its books, the court found the pleading was "couched in terms of a negligence rather than a recklessness standard."[69]

Also, where the auditors pointed to, wrote about and warned of the red flags, their conduct was deemed insufficient to establish the recklessness

63. *Id.* (setting forth full statement of these tests for scienter).
64. *Iowa Pub. Employee's Ret. Sys.*, 919 F. Supp. 2d at 333, 326–27.
65. *Id.* at 328–29.
66. *Id.* at 328.
67. *Id.* at 336.
68. *Id.* at 335.
69. *Id.* at 335–36.

standard, even if failing to follow the trail of those signs to their perhaps logical conclusion constituted a "seriously botched audit."[70] In *Buttonwood Tree Value Partners*, the court was faced with allegations of red flags concerning Deloitte's audit of a financial services company and its subsidiary bank including multiple reports from the FDIC concerning the bank's lending, collections, and reserves policies and a cease and desist order as well as "dozens of red flags arising from regulators' concerns."[71] Nonetheless, the court gave an extensive discussion of how Deloitte recognized the danger signs, raised them, and even included mention of them in at least one of its opinions such that the pleadings could not establish that it was as if there were no audit at all.[72]

The court in *In re Longtop Financial Technologies* applied aspects of both the auditor's limited scope of duty and its diligence in pointing out the red flags at issue to not only conclude the pleadings did not establish recklessness, but also to criticize the pleadings as failing to identify "the steps a non-reckless auditor would have taken under the circumstances."[73] The court held that the investors did not adequately plead scienter despite allegations describing, inter alia, red flags from multiple outside sources, the company's CFO and the auditor's observations regarding internal control weaknesses.[74] The court observed that the pleadings did not indicate what a non-reckless auditor would do, in particular, in response to outside source (analyst) reports that plaintiff argued should have caused the auditor to increase its level of scrutiny. The court suggested that "this lapse [was] probably explained by the [analyst reports'] lack of specificity. In sum, as to allegations that the analyst reports were essentially red flags, the court rejected the inference of recklessness, holding that "generalized speculations hedged within generally positive reports are not red flags indicative of auditor scienter."[75] This follows recent opinions on the subject of auditor scienter under the PSLRA that have concluded that allegations of red flags are inadequate if they are simply not red enough.

III. Recent Developments in Directors' and Officers' Liability

The survey period presented a fascinating year in directors and officers (D&O) liability. Ironically, some of the most interesting and significant

70. *Buttonwood Tree Value Partners*, 910 F. Supp. 2d at 1208 (quoting DSAM Global Value Fund v. Altris Software, 288 F.3d 385, 387 (9th Cir. 2002)).
71. *Id.* at 1207.
72. *Id.*
73. *In re Longtop Fin. Techs. Ltd. Sec. Litig.*, 2013 WL 1410147, at *15.
74. *Id.* at *13–21.
75. *Id.* at *20.

decisions of the past year did not arise out of newly crafted policy forms, but out of what many consider to be the most common provisions found in a standard D&O policy.

A. *Insured versus Insured Exclusions*

A standard insured versus insured (IVI) exclusion in a D&O policy typically excludes coverage for any matter arising out of a claim brought with the assistance of, or the active participation of, one insured against another insured. However, there is often "more than meets the eye" when considering when such a provision will successfully bar coverage.

The difficulties in determining when an IVI exclusion applies to a given claim were best illustrated in the past year by two very similar cases in which the Federal Deposit Insurance Corporation acted as a receiver for two separate failed banks and brought suit against each bank's former directors and officers. Despite the factual similarities underlying each case, and despite the fact that both decisions arose out of the same judicial district, namely, the U.S. District for the Northern District of Georgia, two courts interpreting two similar IVI exclusions reached diametrically opposite conclusions.

1. *Progressive Casualty Insurance Co. v. Federal Deposit Insurance Co.*

On January 4, 2013, in *Progressive Casualty Insurance Co. v. Federal Deposit Insurance Co.*,[76] Judge Robert Vining held that an IVI exclusion in a D&O policy was ambiguous and therefore denied an insurer's motion for summary judgment in a declaratory judgment action.

When Omni National Bank closed its doors in March 2009, the Office of the Controller of the Currency (OCC) appointed the FDIC as its receiver.[77] The FDIC then brought an action against ten former directors, officers, and employees of Omni, asserting claims for negligence, gross negligence, and failing to properly supervise certain commercial loans made by the bank.[78] The officers sought coverage from Progressive Casualty, Omni's D&O insurer. Progressive initiated a declaratory judgment action, seeking a declaration that its policy did not provide coverage for the FDIC's lawsuit.[79]

In its motion for summary judgment, Progressive argued, among other things, that the policy's IVI exclusion barred the FDIC's lawsuit from coverage.[80] The IVI exclusion provided, in relevant part, "[t]he Insurer shall not be liable to make any payment for Loss in connection with any Claim by, *on behalf of*, or at the behest of the Company, any affiliate

76. 926 F.Supp.2d 1337 (N.D. Ga. 2013).
77. *Id.* at 1338–39.
78. *Id.*
79. *Id.*
80. *Id.* at 1339.

of the Company or any Insured Person in any capacity."[81] Progressive asserted that as Omni's receiver, the FDIC "steps into the shoes" of the failed bank; and therefore, its lawsuit against Omni's former directors and officers was "by" or "on behalf of" the bank.[82]

However, in a brief opinion, Judge Vining found that it was "unclear" whether the FDIC brings claims "by" or "on behalf of" a failed bank. In so holding, he noted that pursuant to the Financial Institution Reform, Recovery, and Enforcement Act of 1989 (FIRREA), the FDIC is "tasked . . . with [both] bringing claims to recover losses suffered by the federal Deposit Insurance Fund and a bank's depositors, creditors, and shareholders."[83] As such, the court ruled that the FDIC acts in "multiple roles" when pursuing claims. Therefore, Judge Vining concluded that because the policy's IVI exclusion was capable of being reasonably interpreted in at least one way that did not provide coverage, the provision was ambiguous. Accordingly, the court denied Progressive's motion for summary judgment.

2. *St. Paul Mercury Insurance Co. v. Miller*

In contrast to Judge's Vining's holding, a little over eight months later, in *St. Paul Mercury Insurance Co. v. Miller*, U.S. District Judge Richard Story took a much different view of a similarly worded IVI exclusion and granted an insurer's motion for summary judgment on the grounds that its IVI exclusion successfully barred coverage for an action brought by the FDIC against the directors and officers of a different failed bank.[84]

The Georgia Department of Banking and Finance closed Community Bank & Trust (CB&T) in Cornelia, Georgia, on January 29, 2010. As with all of the other failed banks in the country, the FDIC then became CB&T's receiver. In 2012, the FDIC commenced a lawsuit against two former officers of the bank, Charles Miller and Trent Fricks, in connection with their roles in improperly approving loans while employed at CB&T.[85] Miller and Fricks provided notice of the FDIC's lawsuit to CB&T's D&O insurer, St. Paul Mercury Insurance Co. St. Paul agreed to provide coverage subject to a reservation of its rights and then initiated a declaratory judgment action, seeking a court ruling that coverage for the FDIC's underlying suit was precluded as a matter of law.[86]

St. Paul moved for summary judgment on several grounds, contending, among other things, that coverage for the FDIC's lawsuit against Miller and Fricks was excluded pursuant to the terms of the IVI exclusion in its

81. *Id.* at 1340 (emphasis added).
82. *Id.*
83. *Id.* (citing 12 U.S.C. §§ 1821(d)(2)(A)(i), (d)(10)–(11), (d)(3)(A)).
84. No. 2:12-cv-0225-RWS, 2013 WL 4482520 (N.D. Ga. Aug. 19, 2013).
85. *Id.* at *1.
86. *Id.*

policy.[87] The IVI exclusion stated in relevant part, "[the insurer] shall not be liable for Loss on account of any Claim made against any Insured . . . brought or maintained *by or on behalf* of any Insured or Company in any capacity."[88]

Like Judge Vining eight months earlier, Judge Story examined the language of FIRREA in issuing his decision. However, unlike Judge Vining, Judge Story found that FIRREA conclusively determined that the FDIC effectively "steps into the shoes" of any failed bank because FIRREA states "the [FDIC] shall . . . by operation of law, succeed to all rights, titles, powers, and privileges of the insured depository institution."[89] Additionally, he noted that in *O'Melveny & Meyers v. FDIC*, the U.S. Supreme Court "held that in [a] litigation by the FDIC as a receiver asserting claims of a savings and loan, any defense that the defendants in that action could successfully have raised against the savings and loan are also good against the FDIC."[90] Accordingly, Judge Story ruled that because the IVI exclusion would have applied to preclude coverage if the bank brought the action, the exclusion should apply equally to an action brought by the FDIC as receiver of the bank.[91]

In issuing his ruling, Judge Story rejected a number of counterarguments raised by the FDIC, including that several courts previously held that a D&O policy's IVI exclusion did not apply to bar coverage for suits brought by the FDIC in its capacity as receiver.[92] However, the court noted that none of those cases, unlike the Supreme Court's ruling in *O'Melveny*, were considered binding precedent. Additionally, Judge Story also noted that resolving insurance coverage disputes are often dependent upon on the language of the policy provisions at issue and that none of the long list of cases cited by the SEC contained similar language excluding coverage for suits "on behalf of" other insureds.

The fact that both Judge Vining and Judge Story came to opposite conclusions with respect to similar clauses in separate D&O policies, both of which excluded coverage for lawsuits "on behalf of" other insureds, highlights the difficult nature of interpreting a very common D&O policy provision. As Judge Story pointed out, interpreting insurance policy provisions often comes down to scrutinizing the particular language at issue. It seems to be inevitable that disputes over how to apply IVI exclusions, particularly in the context of FDIC receivership, are far from a settled matter.

87. *Id.*
88. *Id.* at *3 (emphasis added).
89. *Id.* at *4 (internal citations omitted).
90. *Id.* at *4–5 (citing O'Melveny & Meyers v. FDIC, 512 U.S. 79 (1994)).
91. *Id.* at *6.
92. *Id.*

B. *Interrelated Wrongful Acts*

As any D&O practitioner knows, the issue of whether two or more wrongful acts qualify as a series of interrelated wrongful acts is often a close call, requiring careful scrutiny of the facts underlying multiple claims that may span several years. If so, interrelated wrongful acts will typically be considered a single claim in the earliest policy year in which the insurer received notice. During the past year, two significant rulings addressed the complexities involved with such provisions.

1. *Carolina Casualty Insurance Co. v. Omeros Corp.*

In *Carolina Casualty Insurance Co. v. Omeros Corp.*,[93] Judge Richard Jones of the U.S. District Court for the Western District of Washington rejected an argument by an insurer that two claims which were deemed to be a single claim under a D&O policy because they contained "related wrongful acts" must also be a single claim with respect to determining the applicability of the policy's exclusions.[94]

Carolina Casualty Insurance Co. issued a management insurance liability policy to Omeros Corp., containing coverage for both employment practices liability (EPL) and D&O liability. The policy's EPL coverage "expired on July 19, 2009, and . . . the policy's D&O [c]overage expired on October 8, 2009."[95] In April 2009, Omeros' former chief financial officer, Richard Klein, notified Omeros that he considered himself wrongfully terminated for reporting certain "financial irregularities" to the National Institutes of Health.[96] Klein subsequently filed an employment litigation case against Omeros in September 2009, which contained various allegations that Omeros violated the anti-retaliation provisions of the federal False Claim Act.[97] Carolina Casualty agreed to defend the retaliation action under its policy's EPL coverage part, subject to a reservation of rights.[98]

In November 2010, Klein sought to amend his complaint to include a *qui tam* action asserting that Omeros had violated the False Claims Act.[99] Carolina Casualty provided coverage for the *qui tam* action under its policy's D&O coverage part, once again subject to a reservation of rights.[100] In February 2012, Carolina Casualty filed a declaratory action seeking a declaration, in part, that the policy's D&O coverage part did not apply to the *qui tam* causes of action.[101]

93. No. C12-287RAJ, 2013 WL 5530588 (W.D. Wash. Mar. 11, 2013).
94. *Id.* at *1.
95. *Id.*
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at *2.

Carolina Casualty's policy provided that "[a]ll Claims based upon or arising out of the same Wrongful Act or any Related Wrongful Acts, or one or more series of any similar, repeated or continuous Wrongful Acts or Related Wrongful Acts, shall be considered a single Claim" made on the earliest date Omeros provided notice.[102] The Carolina Casualty policy also defined "Related Wrongful Acts" as "Wrongful Acts which are logically or causally connected by reason of any common fact, circumstance, situation, transaction, casualty, event, or decision."[103]

Omeros argued that the *qui tam* causes of action and the retaliation causes of action constituted a single claim because they were both based on the same allegations set forth in Klein's initial complaint. In response, Carolina Casualty contended that the two claims were separate because, among other things, the anti-retaliation counts sought to redress wrongs on behalf of Klein, while the *qui tam* counts sought to redress wrongs on behalf of the United States. Ultimately however, the court ruled that "Omeros' alleged false reporting is a common event that logically connects the anti-retaliation and *qui tam* claims."[104]

Carolina Casualty then asserted that even if both matters were related and constituted a single claim, they were both excluded from coverage because the policy's D&O coverage part contained an exclusion prohibiting coverage for any claim arising out of "any past, present or future actual or potential employment relationship."[105] However, he disagreed with the insurer and ruled that Carolina Casualty could not retroactively seek to treat the anti-retaliation and *qui tam* claims as a single claim with respect to the policy's exclusions.[106] In doing so, he noted that under Carolina Casualty's interpretation, it could theoretically deny coverage for a single claim comprised of an interrelated valid employment claim and a non-employment claim.[107]

2. *BioChemics, Inc. v. Axis Insurance Co.*

In August 2013, Judge Rya Zobel of the U.S. District Court for the District of Massachusetts held that an insurer was entitled to discovery of extrinsic evidence in connection with defending its decision to deny coverage pursuant to the interrelated wrongful acts provision of the insureds' D&O policy.[108]

102. *Id.* at *3.
103. *Id.*
104. *Id.*
105. *Id.* at *4.
106. *Id.* at *4–5.
107. *Id.*
108. BioChemics, Inc. v. AXIS Reins. Co., Case No. 13-10691, 2013 WL 4011123 (D. Mass. Aug. 7, 2013).

In May and September 2011, as part of a formal investigation, the SEC served document subpoenas to BioChemics, Inc., seeking information on a variety of matters concerning the company's internal operations.[109] BioChemics' D&O policy in effect during that time subsequently expired in November 2011. AXIS Insurance Co. then issued a claims-made and reported D&O policy to BioChemics for the policy period November 13, 2011, through November 13, 2012.[110] In January and March 2012, the SEC served additional deposition and document subpoenas to BioChemics and John Masiz, the company's CEO.[111] Significantly, the new subpoenas contained the same "SEC Matter Identification" number as the 2011 subpoenas.[112] Additionally, Masiz's subpoena indicated that it would not be necessary to resubmit any documents that had previously been produced in 2011.[113]

BioChemics notified AXIS of the subpoenas it received in January and March 2012, but AXIS denied coverage, asserting that the all of the 2011 and 2012 subpoenas were based on interrelated wrongful acts. The AXIS policy defined "interrelated wrongful acts" to mean "any and all Wrongful Acts that have as a common nexus any fact, circumstance, situation, event, transaction, cause, or series of causally or logically connected facts, circumstances, situations, events, transactions, or causes."[114] The policy also provided that all claims "arising from . . . Interrelated Wrongful Acts . . . shall be deemed to [have been] made on the earli[est] date that . . . any . . . Claim[ ] is first made . . . under [its] [p]olicy, or any prior policy.[115] Accordingly, AXIS concluded that the subpoenas constituted a single claim first made in 2011, prior to the inception of the AXIS policy.[116]

Subsequently, in December 2012, the SEC filed an enforcement action against BioChemics and Masiz; BioChemics again provided notice of the same to AXIS.[117] Once again, AXIS denied coverage asserting that the enforcement action was part of the same related claim deemed to have been first made in May 2011.[118]

BioChemics and Masiz then filed a declaratory judgment action against AXIS, seeking a declaration that they was entitled to coverage. BioChemics and Masiz immediately moved for summary judgment, and AXIS cross-moved to conduct discovery. More specifically, AXIS sought

109. *Id.* at *1.
110. *Id.*
111. *Id.* at *2.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at *1.
116. *Id.* at *2.
117. *Id.*
118. *Id.*

discovery of all communications between the insureds and the SEC, contending that it was entitled to conduct such discovery in order to defend its position.[119]

The plaintiffs argued that it was well-established under Massachusetts law that "insurers [generally] cannot rely on extrinsic evidence to deny [a] duty to defend."[120] Similarly, BioChemics and Masiz contended that AXIS was only entitled to avoid coverage by reviewing the four corners of the subpoenas and the complaint in making coverage determinations. In contrast, AXIS countered that the general rule that an insurer is not entitled to extrinsic evidence "applies only where the insurer seeks to challenge the allegations of [a] third party's complaint, not where the insurer is challenging an 'extrinsic fact . . . that will not be litigated at the trial of the underlying action.' "[121]

Although noting that the decision was "close," Judge Zobel acknowledged that while insurers are not allowed to use extrinsic evidence to avoid challenging allegations of an underlying complaint, an insurer is entitled to use extrinsic evidence to deny its duty to defend "based on facts irrelevant to the merits of the underlying litigation."[122] Since the discovery sought by AXIS would not have an impact on the underlying merits of the claim, but could conceivably affect the outcome of the plaintiffs' summary judgment motion, Judge Zobel denied BioChemics' partial motion for summary judgment and directed discovery to commence.

C. *Coverage for Attorney Fees*

Finally, in one of the more notable opinions of the past year, the Seventh Circuit held in *Carolina Casualty Insurance Co. v. Merge Healthcare Solutions Inc.*, that a D&O policy provided coverage for the multiplied portion of an attorney fee award, despite the fact that the policy's definition of "loss" specifically did not cover "the multiplied portion of multiplied damages."[123]

The underlying dispute arose out of a merger objection lawsuit, seeking to block a proposed merger transaction between Amicas, Inc. and Thoma Bravo, LLC. After the deal was announced, Amicas shareholders brought an action contesting the sufficiency of the proxy statement setting forth the terms of the transaction to shareholders.[124] The shareholders successfully obtained a preliminary injunction to enjoin a vote on the proposed Amicas-Thoma Bravo merger.[125] The lawsuit was subsequently

119. *Id.*
120. *Id.* at *3.
121. *Id.* at *4 (citing Farm Family Mut. Ins. Co. v. Whelpley, 767 N.E.2d 1101 (Mass. App. Ct. 2002).
122. *Id.*
123. Carolina Cas. Ins. Co. v. Merge Healthcare Solutions Inc., 728 F.3d 615 (7th Cir. 2013).
124. *Id.* at 616.
125. *Id.*

settled when Merge Healthcare, Inc. made a larger tender offer to purchase Amicas, providing for an additional $26 million for the benefit of Amicas shareholders.

The plaintiffs' lawyers obtained an attorney fee award based on the difference between the bids of Merge and Thoma Bravo and ultimately were awarded $3.15 million.[126] In determining the amount of the fee award, the state court computed a lodestar of $630,000 and multiplied that amount by five in order to reflect the "risk of nonpayment" and "an exceptionally favorable result."[127]

Carolina Casualty, Amicas' D&O insurer, acknowledged coverage for the $630,000 lodestar amount, but refused to pay the balance of the fee award on the grounds that the definition of loss in the policy specifically did not include "the multiplied portion of multiplied damages."[128] In other words, Carolina Casualty contended that because the state court used a multiplier to calculate the amount of the plaintiffs' fees, the multiplied portion of the fee award was not covered. Carolina Casualty brought a declaratory judgment action in the Northern District of Illinois, seeking a declaration that was it only obligated to cover the non-multiplied portion of the attorney fee award, or $630,000. The District Court ruled against Carolina Casualty, and the insurer appealed.

In a relatively short opinion written by Chief Judge Frank Easterbrook, a unanimous panel of the Seventh Circuit upheld the ruling of the district court, concluding that the multiplied portion of a plaintiffs' attorney fee award did not qualify as "multiplied damages" under Carolina Casualty's D&O policy. First, Judge Easterbrook noted that attorney fees were not synonymous with the term "damages."[129] He also noted that there was no case law that addressed the issue of whether the "multiplied portion of multiplied damages" would include the multiplied portion of an attorney fee award.[130] Instead, Judge Easterbrook noted that the intent of the policy was to exclude treble damages, punitive damages, and criminal penalties—in his words, "a category of losses that insurers regularly exclude to curtail moral hazard—the fact that insurance induces the insured to take extra risks."[131] Judge Easterbrook reasoned that the multiplied portion of an attorney fee award provided compensation for an attorney's risk in taking on the case and in no way "entail[s] [any] moral hazard" undertaken by the insured.[132] Finally, Judge Easterbrook pointed out that multiplying

126. *Id.*
127. *Id.* (citation omitted).
128. *Id.*
129. *Id.* at 617.
130. *Id.*
131. *Id.* at 618.
132. *Id.*

the lodestar was only one method of computing an attorney fee award, and the state court could have just as easily have computed the award as a percentage of the shareholders' gain, which would not run afoul of the policy's definition of "loss."[133] Accordingly, the Seventh Circuit upheld the ruling of the lower court.

IV. DEVELOPMENTS IN AGENT/BROKER MALPRACTICE

As in past years, significant 2013 developments in insurance agent and broker errors and omissions law focused on the continuing evolution of agent/broker responsibilities as to procuring coverage and advising and guiding clients with regard to insurance coverage being purchased. Courts continued to recognize and enforce the obligation of insureds to understand the value of their insurable assets or their potential exposures, understand their financial capacity to pay for coverage and absorb uninsured losses, and determine their willingness to accept or attempt to limit risk. Courts also continued to place responsibility on insureds to read their policies, and courts apply the presumption that receipt of a policy without objection demonstrates acceptance of the coverage provided. Nonetheless, the errors and omissions landscape for insurance agents and brokers continues to evolve with the courts increasingly viewing agents/brokers as "experts" practicing in a specialized field, evidencing a willingness to recognize circumstances that give rise to heightened duties of care.

A number of decisions this year in a variety of states provide valuable insight into how the courts attempt to fairly and pragmatically deal with the competing concerns presented in the context of "duty to advise" cases. A review of these decisions helps illuminate the specific paths that must be carefully tread by agents and brokers.

In *Mandina, Inc. v. O'Brien*,[134] five days before Hurricane Katrina hit, the broker for a popular restaurant on Canal Street in New Orleans had his annual meeting with the owner to review his insurance coverages. In light of the impending hurricane, the broker recommended, and the owner agreed, to increase the business interruption/extra expense (BI/EE) coverage from $400,000 to $500,000 under the restaurant's existing fire/windstorm policy. Although the restaurant also had flood coverage under a policy provided through the National Flood Insurance Program (NFIP), that policy did not include BI/EE coverage, and there was no discussion about adding it. Nonetheless, the owner claimed he left his conversation with the broker believing the broker was putting in all necessary

133. *Id.*
134. No. 2013-CA-0085, 2013 WL 3945030 (La. Ct. App. July 31, 2013).

coverage to protect the restaurant from a business interruption loss that might arise from the hurricane.[135]

When Katrina hit, the restaurant suffered severe windstorm and flood damage, which resulted in a substantial business interruption loss. When the owner learned he had no business interruption coverage under the flood policy, he brought suit against the broker, alleging that the broker had owed a "fiduciary duty to accurately and completely explain and disclose the insurance coverage available" when they had met to discuss the restaurant's coverages, "and to insure that the coverage purchased [for the restaurant] provided the types and amounts of coverage sought. . . , including for flood-related business interruption loss."[136]

After discovery was taken, the broker's motion for summary judgment was granted. However, the trial court subsequently reversed itself, finding a question of fact existed as to what the restaurant owner believed following his meeting with the broker to review his coverages. The court certified the matter for an interlocutory appeal, which the appellate court heard as a "supervisory writ." Upon review, the appellate court reinstated the summary judgment award and dismissed the case.[137]

In reaching this determination, the court took note of the Louisiana Supreme Court's holding in *Isidore Newman School v. J. Everett Eaves, Inc.*,[138] in which the court stated:

> An agent has a duty of "reasonable diligence" to advise the client, but this duty has not been explained to include the obligation to advise whether the client has procured the correct amount of insurance coverage. It is the insured's responsibility to request the type of insurance coverage, and the amount of coverage needed. It is not the agent's obligation to spontaneously or affirmatively identify the scope or the amount of insurance coverage the client needs. It is also well settled that it is the insured's obligation to read the policy when received, since the insured is deemed to know the policy contents.[139]

The owner's contention was that during the course of his conversation with the broker, he understood them to be talking about getting him business interruption coverage generally, not only for the windstorm policy. However, he "acknowledged" that he had the windstorm and flood policies for years, "he never asked [the broker] if the BI/EE coverage included flood-related losses and . . . [the broker] never told him that it did."[140] In finding for the broker, and concluding that the restaurant owner's subjec-

135. *Id.* at *1.
136. *Id.*
137. *Id.* at *13.
138. 42 So. 3d 352, 359 (La. 2010).
139. *Mandina, Inc.*, 2013 WL 3945030, at *2 (citing *Isidore Newman Sch.*, 42 So. 3d 352).
140. *Id.* at *10.

tive belief regarding coverage was irrelevant, the court placed great emphasis of these facts, and the owner's duty to read his policies.

In *Express Oil Change, LLC v. ANB Insurance Services, Inc.*,[141] after a company switched to a self-funded health benefits plan for its employees, one of the covered individuals had a child born prematurely who suffered from severe health issues.[142] While the company's executives believed the plan had a maximum per individual coverage limit of $1 million, that maximum only applied with respect to certain types of benefits, but did not apply to in-network services. Although the insured had a $1 million stop loss insurance policy per individual insured, when the covered claims exceeded that amount, the company was faced with a substantial and continuing uninsured obligation.[143]

Before moving to the self-funded plan from the prior plan, the company's executives received advice from their broker. In suing the broker for breach of fiduciary duty, they alleged he failed to properly advise them with regard to the type of benefits plan to put in place.[144] After discovery, the broker moved for summary judgment seeking to dismiss, among other things, the breach of fiduciary duty claim against him. The court denied the motion, noting the lack of clarity in what was and was not subject to the maximum lifetime benefit available.

Without going into great depth, the court readily accepted that facts sufficient to establish a fiduciary relationship had been presented, given the fact that the company had viewed the broker's personnel as "trusted advisors," rather than "merely insurance salesman," and they had served as their brokers for their property insurance, casualty insurance, and workers compensation coverage, as well as assisting in their efforts to develop the self-funded health plan and procure the appropriate stop loss insurance to protect the company under the plan.[145]

In *Ambroselli v. C.S. Burrall & Son, Inc.*,[146] using a cost estimator, an agent valued a Victorian era home the plaintiff operated as a bed and breakfast at $433,991, which he rounded up to $435,000. At the insured's instruction, he then purchased property coverage for this amount, which over the next two years was "automatically increased . . . to guard against inflation." Although these were far higher limits than those purchased through a prior agent ($250,000), and the limits were paid in full after a fire, the insured sued the agent and his agency after it turned out that the policy was insufficient to cover her losses.[147]

141. 933 F. Supp. 2d 1313 (N.D. Ala. 2013).
142. *Id.* at 1317.
143. *Id.*
144. *Id.* at 1320–21.
145. *Id* at 1352.
146. 932 F. Supp. 2d 431 (W.D.N.Y. 2013).
147. *Id.* at 432–33.

Following discovery, the defendants moved for summary judgment on the grounds that the agent had procured the requested coverage and had assumed no duty to advise regarding the coverage to purchase because there was no long term relationship between the agent and the plaintiff, and plaintiff had not requested full replacement coverage. The court denied the motion, holding that "the evidentiary proof raises a material question of fact as to whether [the agent] took on the obligation to estimate the value of the B&B so that it would be properly insured."[148] In so holding, the court took particular note of the fact that "plaintiff did not ask [the agent] to estimate the value of [the building], and he "voluntarily assumed th[is] task,"—which the plaintiff alleged she relied on.[149]

In another New York case, in *South Bay Cardiovascular Associates, P.C. v. SCS Agency, Inc.*,[150] the plaintiff was a cardiovascular medical group that had for a number of years purchased commercial property and liability coverage through the SCS Agency, including coverage for employee dishonesty with a $250,000 limit. In the middle of the 2005 policy year, the insurer merged with another insurer and made changes to its commercial liability policies, including reducing its coverage for employee dishonesty to $25,000. Notice was sent to the medical group and received by the person responsible for insurance coverage. However, she testified that she did not read the document, but instead relied on SCS to inform her about "anything that I needed to know, any change [or] updated information." The policies were then renewed. Thereafter, it was learned that an employee of the group "had misappropriated funds over the course of several years," and a claim for this loss was submitted.[151]

While the medical group accepted $25,000 in settlement of the claim from its insurer, it sought recovery for the uninsured potion of the loss in excess of $25,000 from the broker. The medical group alleged that it would have had more coverage but for the broker's failure to advise of the reduction in the employee dishonesty limit.

The broker moved for summary judgment, on the grounds, among other things, that the medical group had admitted receiving notice of the change in coverage. However, the court denied the motion, and the Appellate Division affirmed, on the grounds that there was an issue of fact as to whether there was a special relationship sufficient to give rise

148. *Id.* at 435.

149. *Id.* In reaching this decision, it is noteworthy that the court rejected the defendants' argument that the insured had a duty to read her policy, and having accepted it without objection she should not be heard to argue that it was not sufficient. Quoting last year's landmark New York Court of Appeals decision in *American Building Supply Corp. v. Petrocelli Group, Inc.*, 979 N.E.2d 1181 (N.Y. 2010), the court noted that "receipt and presumed reading of the policy does not bar an action for negligence against the broker." *Id.* at 436.

150. 105 A.D.3d 939 (N.Y. App. Div. 2013).

151. *Id.* at 940–41.

to a duty of care owed by the broker to advise the insured of the coverage change. In affirming the trial court's decision, the Appellate Division also made reference to last year's New York Court of Appeals decision in *American Building Supply Corp. v. Petrocelli Group, Inc.*, for the proposition that: "While it is certainly better practice for an insured to read its policy, an insured should have the right to 'look to the expertise of its broker with respect to insurance matters.' "[152] The court noted that not only had the medical group's employee testified that she did not read policy language and notices (instead relying on the broker), but she also pointed out "that she had no special training in procuring insurance and . . . did not choose coverage on her own," and the broker had told her he "did not expect her to read the insurance policies" purchased for the group.[153]

152. *Id.* at 942 (quoting 19 N.Y.3d 730, 736 (N.Y. 2012) (quoting Baseball Off. of Commr. v. Marsh & McLennan, 742 N.Y.S.2d 40, 48 (N.Y. App. Div. 2002)).

153. *Id.* at 942.