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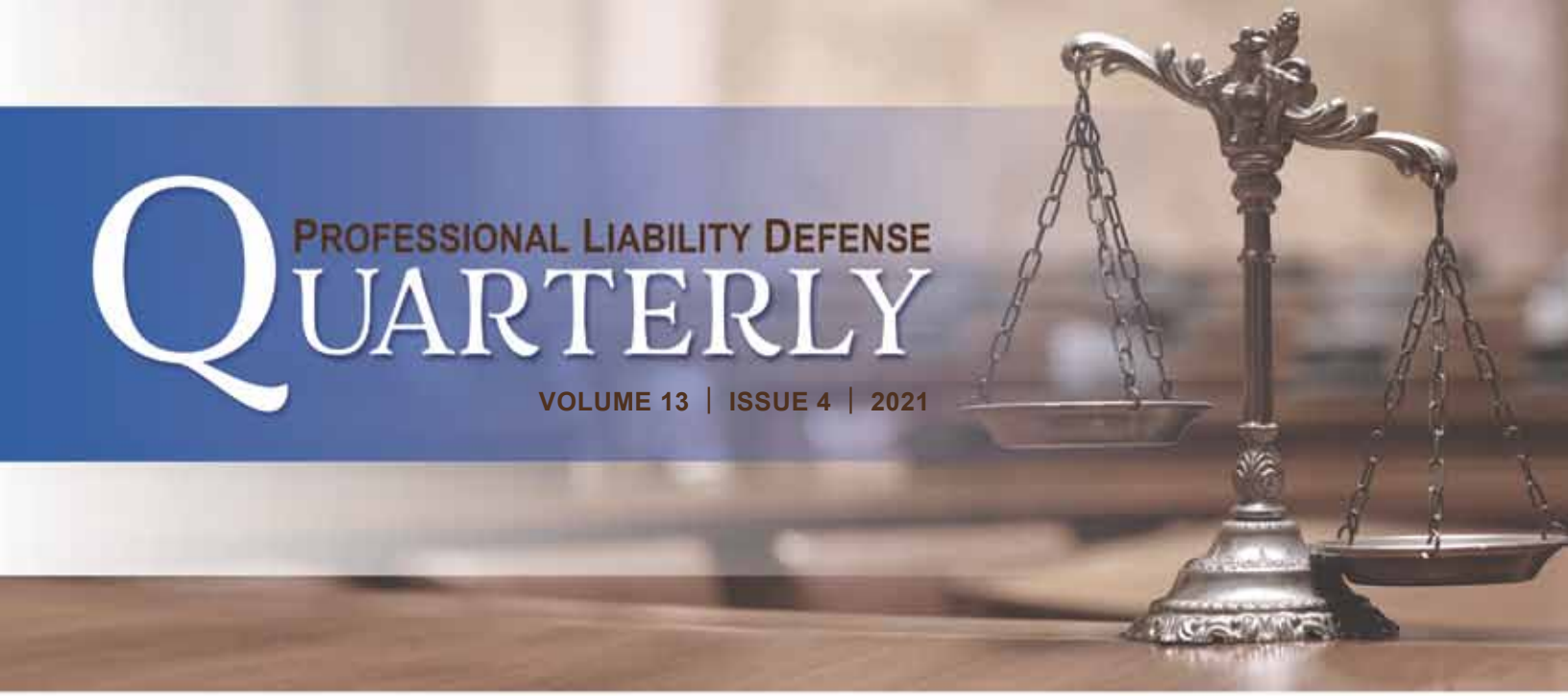

Insurer Subrogation: The Changing Landscape of Legal Malpractice

Richard B. Bush and **Timothy J. Ross II**
Bush and Augspurger, P.A.

The landscape of legal malpractice has changed in recent years, with new opinions coming out of numerous high courts in states around the country. Notably, the relationship between insurers and attorneys for the insured, hired by the insurer, is seeing major changes around the United States. The most recent upheaval comes out of Florida, in the landmark decision by a unanimous Florida Supreme Court in *Arch Insurance Co. v. Kubicki Draper, LLP*, 318 So.3d 1249 (Fla. 2021).

In *Arch Insurance Co.*, the Court held that insurers have standing to sue attorneys hired to represent an insured, despite a lack of privity between the two parties, through contractual subrogation. Now, in Florida, insurers can sue attorneys hired to represent their insured for legal malpractice if they have included a provision in the policy agreement estab-

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Letter from the President

Andrew R. Jones, Esq. | *Furman Kornfeld & Brennan, LLP*

Hello and welcome to my first Presidential Message! I am honored to step into this prestigious role and excited to tell you about my vision for the coming year.

I feel so lucky to have served in multiple committee and leadership positions during my eight years at PLDF. I really valued the perspectives I gained there as I planned for the year ahead.

As President, my goals for this coming year focus on: (1) Foundation; (2) Inclusion (DEI); and (3) Support.

Foundation

Supporting each other, sharing in-

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The Role of the Wholesale Broker in Procurement of Coverage: What Duties Are Owed and to Whom?

Frederick J. Fisher, J.D., CCP | *Fisher Consulting Group, Inc.*
Peter J. Biging | *Goldberg Segalla, LLP*

Introduction

Fred Fisher is a consultant who has spent decades in the insurance industry, and who has regularly written regarding and lectured on the duties and responsibilities of insurance agents and brokers. He is the current Co-Chair of the Professional Liability Defense Federation ("PLDF") Insurance Agent/Broker Claims Committee. **Peter Biging** is an attorney at *Goldberg Segalla, LLP*, where he devotes a substantial portion of his practice to the representation of insurance agents and brokers, and a past chair of the Insurance Agent/Broker Claims Committee. PLDF has asked Fred and Peter to provide a point-counterpoint discussion of the duties and responsibilities of the wholesale insurance broker in the context of the procurement of insurance, and their potential liability to the customer when the requested insurance has not been procured. They are NOT in agreement! After you have had a chance to review the discussion below, we look forward to hearing your comments. Who's right? Who's wrong? Let the debate begin!

Point: Not "Just a Conduit": the Myth of the Wholesale Broker Debunked

Frederick J. Fisher, J.D., CCP

Like most businesses, wholesale brokers advertise their services on the Internet and in print media, social networking sites and email blasts. Many profess their expertise (as can be seen from some of the following snippets of marketing materials culled from a review of wholesale broker websites; names have been replaced with generic references to fictitious corporate entities for the purposes of this discussion):

> "From autonomous vehicles to zip-line courses, from chemical companies to schools, the industries that require special insurance coverage are countless. … That's where the 47 specialist wholesale brokers featured on the following pages come into play. . . ."

"ABC Networks are specialists in Environmental Insurance and Risk Management."

"Director & Officer Liability is one of the more difficult and complex lines of business we handle at Smith & Associates. Due to the intricacies of the various forms, a retail insurance broker **would** be wise to choose their D&O wholesaler carefully. A generalist will not be equipped to properly market an account or provide the coverage and form guidance that only a D&O specialist can provide, someone such as one of Smith's financial services brokers. ….

"WXYZ is known for doing the right thing even if it means referring business to a competitor. We set our standards high …. With a skilled team of first-class professionals with unrivaled expertise in their specialties… we guided and consulted insurance agents on the best products for companies like yours. Contact us, or have your insurance agent, contact us today so we can get to work on making sure you are properly protected, (signed)John Doe, President"

Yet, when sued for professional negligence, they typically claim they are just a conduit, sometimes proclaiming they have no duty to anyone.

Rubbish!

A wholesale insurance broker is a licensed broker providing specialized insurance products to retail insurance agents and brokers ("retail agents") and supporting those products with specialized expertise as above. To my knowledge, there is not one State that requires a special license. In fact, they are licensed as brokers, producers or intermediaries depending on the State

in which they reside. They also have surplus lines licenses allowing them to place coverage with non-admitted or surplus lines insurers. Some may also have special licenses for re-insurance and railroad rights of way insurance placements.

So do many retail brokers. Simply put, possession of a surplus lines license does not mean one is following a wholesale brokerage model. In essence, being a wholesale broker is nothing more than a business decision that one makes. One wants to place insurance but does not want to have direct contact with the consumer, preferring to work with the customer's representative, commonly referred to as the retail broker/producer, instead. The other works directly with the customer. That's it, that's the distinction. It's simply a business model. Also true is the fact that a "broker" is a representative of the insured, either by statute or by common law.

There are, of course, several models a wholesale firm may follow, just like there are several models retail facilities can adopt. A wholesale brokerage may elect to operate as a 100% wholesale firm so they may shop an account to as many insurers as may be needed. They may also have binding authorities in a separate "division" involving certain specific lines of coverage. However, doing so would probably bar them from" brokering" the risk to other insurers as the others would perceive the submission as an attempt to "block the market" or be perceived as adverse selection, i.e., a poor risk they do not want to place within their own facility. Others may create a separate entity to "exclusively" place business within many different binding authorities they may have for specific types of coverage. Thus, the wholesale organization may be competing with others to get into the binding facility first.

One thing is for certain. It is not true that a wholesale broker is synonymous with being a managing general underwriter, a.k.a. managing underwriter (not to be confused with a managing general agent, a.k.a MGA, as is commonly used. This is because an MGA is usually statutorily defined as an entity with underwriting and binding authority on behalf of an admitted insurer, where the premium is greater than 5% of the capital surplus of said insurance company. This is consistent with the NAIC Model MGA Act of 2005 and adopted by most States).

It is universally held that an insurance broker represents the insured. The standard of care is generally that of being an order taker, i.e., to diligently obtain the coverage requested. There are exceptions that could elevate one to a higher standard of care, such as holding oneself out as an expert as so many do in their advertising as above. Yet, in my opinion, irrespective of whether one is operating in a wholesale or retail capacity, one is a representative of the insured. Thus, one's obligations are to the insured, even if one is not in direct contact with anyone other than the insured's designated representative. This, of course, would be the retail producer. In my opinion, a wholesale brokerage has at least the same obligations to the insured as a retail producer, and often, sometimes more. This is due to the fact that many producers are "a generalist," and the wholesaler may profess its expertise in a given line of coverage. This is not uncommon; the vast majority of retail producers do not necessarily profess their expertise and may often use wholesalers as their "back office" to market the account accordingly.

Numerous articles over the years have been written specifying that the usage of a broker is often twofold. One reason is due to the fact wholesalers may have access to markets the retail broker may not be able to approach for any number of reasons. Number two is the fact that often, as above, wholesale brokers profess to have expertise in a particular line of coverage. Thus, a retail broker may use a wholesaler not only to obtain access to markets the retailer cannot get to, but also to be provided expertise that the retail producers do not themselves have. This is quite common, even when the insurer is admitted, and the retail producer could go directly to that insurer but chooses not to due to their lack of expertise.

In fact, in 2014, the executive director of the National Association of Professional Surplus Lines Offices (NAPSLO) wrote:

> "For the insured, it's important that a retail agent have a relationship with wholesalers so that when a hard-to-place risk walks through the door, the retailer is ready to respond with the help of that wholesale broker. For many agents, beginning with a NAPSLO member is all the due diligence required…NAPSLO-member wholesale brokers streamline and add value to the process of insuring the most complex risks. Just as a medical patient expects a general practitioner to collaborate with a specialist, insurance clients should expect their agent will seek out an expert solution that's tailor-made. Wholesalers fill that role of specialist. They routinely deal in business that is nuanced and as a result are able to help efficiently discern not only what needs to be covered in a policy but also what is of highest importance to the client."

(Please note that in 2017, NAPSLO merged with the American Association of Managing General Agents. Said organization is now known as the Wholesale

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> "…[I]n my opinion, irrespective of whether one is operating in a wholesale or retail capacity, one is a representative of the insured. Thus, one's obligations are to the insured, even if one is not in direct contact with anyone other than the insured's designated representative."

& Specialty Insurance Association (WSIA)).

Generalist producers at the retail level use wholesalers for one of two reasons or both. They want access to markets, and they want expertise. This is well known in the industry and is another reason why the idea of a wholesaler being simply a conduit is nonsense. Given the foregoing, I doubt any wholesale broker would want their competitor to know they lack "expertise" or would take a "conduit" approach in the event of an E&O suit against both the retail producer and wholesale firm. Given the advertising quoted above, more telling is the lack of any advertising that states, in effect, we are not here to help you or educate you, we are here to simply get quotes and place coverage that you order for the insured. Somehow, I seem to have missed such marketing and advertising communications.

As I wrote in a previous PLDF article:

> "I'll be happy to have that one lawsuit where we failed to deliver expertise as opposed to the 500 other lawsuits we did not have where we did…We made recommendations to our retail brokers as what may be needed by the insured after reviewing the application, or even asked deeper questions in order to determine what else might be needed. In other words, we were interested in providing the Insured financial protection, as opposed to simply selling them some insurance. After all, we were in fact experts in Professional Liability and Specialty lines. We would provide guidance and counsel with respect to 'gotcha's' that existed in the policies whether it be in the definition of 'claim,' insuring agreement issues, the usage of absolute exclusions, or onerous conditions or the lack of liberal 'conditions.' We would give advice and counsel to our insurance customers. The result was that, after 20 years, I can represent that not one insurance broker we did business with ever got sued for professional liability for anything my firm did or failed to do. Why? Because we delivered our expertise…After all, what is better, successfully defending a lawsuit, or not having one at all?" ■

About the **AUTHOR**

Frederick J. Fisher, J.D., CCP is President of *Fisher Consulting Group, Inc.* in El Segunda, CA. He is Vice Chair of the PLDF Insurance Agent/Broker Claims Committee; Member of the Editorial Board for Agents of America; a Faculty Member of the Claims College, School of Professional Lines; a founding member and past president of PLUS; and, a prolific author. He has taught or presented over 100 CE classes and lectures concerning Specialty Lines Insurance Issues and coverage. He is an A.M. Best's recommended expert, and has been testifying as an Expert witness for over 30 years. He may be reached at fjfisher@fishercg.com.

Counterpoint: Why the Wholesale Broker Typically Owes No Duty of Care to the Insured in Procuring Coverage

Peter J. Biging, Esq.

I respectfully disagree with the above argument. In making this statement, I note that I don't disagree with the proposition that wholesale brokers may not necessarily in all instances be properly referred to as a mere "conduit." The role of the wholesale broker in any particular transaction will be fact specific. What I do take issue with—to the extent that is the point of the above argument—is the contention that a wholesale broker typically will owe duties of care to the underlying insured with respect to the procurement of insurance.

The duties any professional may owe to another with regard to the provision of its professional services are typically governed by whether there was, in fact, a professional-client relationship in place. Alternatively, a duty of care may arise

even where there is no direct professional-client relationship in cases where the professional knew or reasonably should have understood that a party was going to be relying on its representations or its services. In the context of a retail broker and the insured/customer, the connective tissue between the broker and its client is fairly simple and straightforward. To the extent the customer has requested that the broker procure insurance coverage, and the broker has agreed to do so, a professional-client relationship arises. The broker, in the capacity of the professional, is thus tasked with at the very least either procuring the requested coverage or advising within a reasonable period of time of the inability to do so. (The temporal requirement of advising of the inability to procure the coverage within a reasonable period of time exists because it is not unreasonable that, having engaged a broker to purchase insurance, a customer will expect and anticipate that the coverage will either be purchased or the customer will be told that the coverage could not be procured. Conversely, it would be unfair to subject customers to the risk that a broker could just never get around to either purchasing the requested coverage or letting the customer know that the coverage hasn't been purchased.)

In a very small number of states (e.g., New Jersey), there may be additional, fiduciary duties to provide advice and guidance with regard to the coverage to purchase. In the vast majority of other states, such a fiduciary duty of care does not automatically attach. In those states, a fiduciary duty of care to provide advice and guidance regarding the coverage to purchase, rather than just a duty to take the order and procure what was requested, can typically be found to arise where there are "special circumstances" or where a "special relationship" has arisen between the broker and its customer. Such special circumstances can arise where, for example, the broker is charging consulting fees in addition to receiving compensation via commissions on the premium charged for the insurance or has entered into a contract with the insured to provide risk management services. Another example of circumstances that may give rise to a duty to advise is where the broker and the customer have had an extended course of dealings such that a reasonable person in the broker's position would understand that the customer is placing special trust and reliance in the broker to provide such advice and guidance. Still another example where special circumstances may give rise to a fiduciary duty of care with regard to the procurement of coverage is where the broker has had an interaction with the insured with regard to a question of coverage, with the insured relying on the broker's expertise.

Assuming there are no "special circumstances," however, the normal retail broker standard of care in regards to the procurement of insurance for a customer is, as noted above, to procure the coverage that has been requested or advise of the inability to do so within a reasonable period of time. How does the wholesale broker fit into this? In many, if not most, instances, the wholesale broker only comes into the picture after the retail broker has been requested to purchase coverage, and the retail broker has determined that it will be unable through its insurer contacts to purchase the requested coverage at all, or at a price point that will be acceptable to the customer. In such instances, the retail broker will then typically seek to "market" the insurance request by reaching out to a wholesale broker with contacts with a broader range of insurers, including non-admitted and surplus lines insurers.

When the retail broker reaches out to the wholesale broker in such instances, the retail broker typically makes no mention of this to its customer. It doesn't advise the customer that it is going to be using a wholesale broker. It doesn't request permission to do so. It isn't given authorization by the customer to do so. The retail broker just goes ahead and seeks the assistance of the wholesaler. Assuming the wholesaler comes up with a viable option, a quote will be provided to the retail broker, who will then pass the quote onto the customer for its approval. Assuming the quote is accepted, the wholesale broker is then advised by the retail broker to bind the coverage. Significantly, the wholesale broker will typically not only be wholly unknown to the customer; the wholesale broker will typically have no contacts of any kind with the customer.

> "I don't disagree with the proposition that wholesale brokers may not necessarily in all instances be properly referred to as a mere 'conduit.'…What I do take issue with …is the contention that a wholesale broker typically will owe duties of care to the underlying insured with respect to the procurement of insurance."

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For this reason, if the coverage isn't procured, or it isn't procured in a timely manner, or the wrong coverage is procured and the customer is left uninsured or underinsured for a loss, if a lawsuit is commenced the wholesale broker will typically take the position that the customer has no standing to pursue claims in either contract or common law negligence against the wholesaler because they owed the customer no duty of care. The reason for the wholesaler taking this position is rooted in the law of agency. If for some reason at the outset of the customer's interactions with a retail broker regarding the purchase of insurance the retail broker were to tell the customer that it intended to utilize a wholesale broker, identify the wholesale broker it intended to use, and obtain the customer's consent to make use of that wholesale broker, the retail broker would effectively have been granted the authority to appoint a sub-agent for the purpose of fulfilling its agreed obligation to procure coverage.

But where the customer has no idea that a wholesale insurance broker is going to be utilized, has not given instructions to use a wholesaler or specifically assented to the use of a wholesaler, and has no interactions of any kind with a wholesaler, the retail broker generally cannot be deemed to have been granted authority to appoint a sub-agent to act on behalf of the principal (i.e., the customer) in regards to the transaction. So while it would certainly be fair to argue that the wholesale broker might owe a duty of some sort to the retail broker, it would not be fair to state that the wholesale broker—in the ordinary course of events—would owe any duty of care to the customer.

The significance of this as it plays out in the context of lawsuits based on alleged failure to procure the correct coverage is that a wholesaler will have a strong basis for arguing that the customer typically should not have standing to pursue a claim against the wholesale broker used in the transaction. Further, even if coverage differing from what was originally requested has been purchased, that is no guarantee that the retail broker can pursue a viable claim for its part against the wholesale broker. If, as is typically the case, the wholesale broker can point to a quote provided to the retail broker matching with the coverage procured, the wholesale broker will have the ability to argue that any failure on its part to purchase what was originally requested was rendered moot by the fact that the retail broker was provided with a coverage option, and, presented with that option, chose to ask the wholesaler to bind the quoted coverage.

Ultimately, therefore, while I don't disagree that a wholesale broker taking the position that it is a mere conduit is not always going to be a viable argument, I disagree with the notion that the wholesaler will owe a duty of care—either contractually or under common law—to the customer except in specific circumstances. Where the wholesale broker cannot be fairly characterized as having been appointed indirectly by the customer, through its duly authorized agent (as that term is used in the context of the law of agency), it should, in my humble opinion, have a strong argument to make that it should bear no liability to the insured for any alleged failure to procure. And in those instances where the insurance that was purchased was preceded by the offering of a written quote, listing all of the policy forms to be included in the offered coverage, which the retail broker had the ability to review and chose to instruct the wholesale broker to bind, the wholesale broker will have a strong argument that it should face no liability to anyone involved in the transaction, including the retail broker.

Conclusion

While there may be no meeting of the minds as between Fred and Peter, they have definitely provided food for thought in the context of this ongoing debate. What do you think? Please provide your comments to Sandra Wulf, at sandra@pldf.org. We will publish some of the responses on the PLDF website and include them in the next *PLD Quarterly*. ■

About the **AUTHOR**

Peter J. Biging is a partner in the law firm *Goldberg Segalla, LLP*, where he heads up the firm's New York metro area Management and Professional Liability practice. He is also Vice Chair of the firm's nationwide M & PL practice group. Mr. Biging was assisted in the preparation of this article by **Ryan McNagny**, a commercial litigation and professional liability associate in the firm's Manhattan office. Portions of the content of this article will also appear in the American Bar Association *TIPS Journal Year in Review* Winter issue, covering a broad range of professional liability and D&O developments in 2018. Mr. Biging may be reached at pbiging@goldbergsegalla.com.

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PO Box 588 | Rochester, IL 62563-0588