Cray • Huber

Illinois Coverage Basics

When the Broker is at Fault: Special Statute of Limitations Frustrates Efforts to Reach Insurance Producers in Illinois Coverage Litigation

In most coverage cases, a court decides whether the insured is right or the insurer is right, but in some cases both the insured and the insurer are right. Where an insured wishes to purchase a particular coverage, but the policy issued to the insured does not provide the desired coverage, fault may lie with the broker. An insured who is injured by the negligence of a broker may have a cause of action against the broker to recover the loss. Similarly, an insurer that incurs liability due to the misfeasance of a broker may also have a cause of action to recover its loss.

An insurance broker (also called a "producer") must exercise reasonable skill and diligence when negotiating and procuring an insurance policy. Industrial Enclosure Corp. v. Glenview Insurance Agency, Inc., 379 Ill.App.3d 434, 437 (1st Dist. 2008). The theories under which an insurance broker may be held liable are generally: breach of contract, negligence, breach of fiduciary duty, and fraud. AYH Holdings, Inc. v. Avreco, Inc., 357 Ill.App.3d 17, 32 (1st Dist. 2005).

While the general rules of broker liability are not unusual or complex, there is a complication in Illinois law that often frustrates efforts to reach culpable insurance producers. It is this: the statute of limitations that governs actions against insurance brokers is significantly and surprisingly shorter than the statutes of limitations that apply to actions against everyone else in coverage litigation. As a result, insureds and insurers wishing to bring legal actions against at-fault insurance producers often find that their actions against the producers are time-barred.

Illinois' Statute of Limitations Governing Actions Against Producers

The Illinois statute that sets the time limitation for filing suits against insurance brokers is 735 ILCS 5/13-214.4, which provides as follows:

> All causes of action brought by any person or entity under any statute or any legal or equitable theory against an insurance producer, registered firm, or limited insurance representative concerning the sale, placement, procurement, renewal, cancellation of, or failure to procure any policy of insurance shall be brought within two years of the date the cause of action accrues.

Courts have emphasized that section 13-214.4 means that *all* causes of action brought by *any* person or entity under *any* theory against an insurance producer must be brought within two

years of the date that the cause of action accrues. Indiana Insurance Co. v. Machon & Machon, Inc., 324 Ill.App.3d 300, 303 (1st Dist. 2001).

The problem with section 13-214.4 is that it does not define when a cause of action against a producer accrues. Case law defines when such a cause of action accrues, but the courts' answer is not self-evident. Courts hold that the accrual date for an action against a broker is the date when the *breach* occurs, not when a *loss results*. Machon & Machon; State Farm Fire & Casualty Co. v. John J. Rickhoff Sheet Metal Co., 394 Ill.App.3d 548 (1st Dist. 2009). Under this rule, the limitations period for a claim against an insurance broker will normally begin to run when the insurer first takes a position that is at odds with the insured's expectations (e.g., as to the type of insurance, scope of coverage, who is insured, or indemnity limits). However, this measurement of the accrual date creates practical difficulties in the third-party insurance context.

When an insured and insurer are litigating coverage issues, the limitations period against the broker may run before the court rules on whether the insured or the insurer will prevail on the coverage issue. *See* John J. Rickhoff Sheet Metal Co. In fact, the statute of limitations for an action against a broker can expire before a coverage action can even be commenced between an insured and insurer, because a dispute between an insured and insurer on an indemnity issue is not ripe until the underlying claim has been resolved by settlement or judgment. Yet, because section 13-214.4 period of limitations is triggered on the date of the breach and not on the date of the loss, claims against brokers are not only permitted before the underlying claim has been resolved; in many cases they will be time-barred if they are not filed befor the underlying claim has been resolved. Oddly enough, the courts' interpretation of section 13-214.4 also means that an insurer must bring an action against a culpable broker several years before an aggrieved broker would have to bring an action against the insurer. *See* Machon & Machon. The courts' interpretation of the statute has been criticized for requiring unnecessary, prophylactic actions against brokers, but such practical problems have not motivated the courts to change the law. *See* Broadnax v. Morrow, 326 Ill.App.3d 1074, 1083 (4th Dist. 2002) (Cook, J., dissenting).

The section 13-214.4 two-year statute of limitations applies to disputes involving first-party insurance (*see* Machon & Machon) and also to disputes involving third-party insurance (see John J. Rickhoff Sheet Metal Co.). It applies to actions brought by insureds (see Restoration Specialists, LLC v. Hartford Fire Insurance Co., 2011 WL 332510 (N.D. Ill. 2011) and also to actions brought by insurers (*see* Machon & Machon). Nonetheless, the federal District Court's recent ruling in Restoration Specialists indicates that when a liability insurer brings a third-party action against a broker in a coverage case, the statute of limitations governing contribution and indemnity actions should apply, rather than section 13-214.4. The significance of the Restoration Specialists ruling is that the statute of limitations for contribution and indemnity actions is triggered by the event of the *loss*, while the limitations period under section 13-214.4 is triggered by the event of the *breach*. Consequently, in most cases the Restoration Specialists analysis would extend the statute of limitations for actions against brokers. Although the Restoration Specialists ruling is not binding on other courts at this time, it suggests a rationale for extending the time period for bringing third-party actions against insurance producers.

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