

## PIWA HOTLINE CASE SUMMARY

By: Milton Thurm, Esq., PIWA HOTLINE CONSULTANT.

ACCOUNT EXECUTIVE FOR WHOLESALER-BROKER-INTERMEDIARY  
PERSONALLY RESPONSIBLE FOR HIS ACTIVITIES PERFORMED ON  
BEHALF OF HIS EMPLOYER AND THE E&O RAMIFICATIONS.

Generally speaking, an employee acting in the course and scope of his employment will not have personal liability for activities performed on behalf of his employer. In a recent case, however (decided on August 4, 2014), an employee of a wholesaler broker-intermediary (wholesaler) asked the court to dismiss claims brought against him in his individual capacity by a retail broker (retailer) arising out of the employee's conduct.

Sometime in 2011 the wholesaler and the retailer entered into a Producer Agreement and the wholesaler assigned an account executive to service all the retailer's needs. Within the first year of the Agreement, the retailer experienced problems with the account executive: delays in receiving quotes, binders and policies; misinformation about effective dates and cancellation dates of policies and receipt of documents that were altered in one way or another. After informing the wholesaler's management about the problems, the account executive was "shut down." The retailer determined that a number of its clients were negatively impacted by the wholesaler's activities, including situations where no coverage

was in place, where policies were cancelled for non-payment or underwriting reasons and policies that did not provide the coverages requested by the client.

The retailer brought an action against the wholesaler and named the account executive as a defendant as well, claiming that as a result of the conduct of the account executive the retailer lost clients and was otherwise damaged. The account executive made an application to dismiss the claims against him, claiming that since he was an employee of the wholesaler acting in course of his employment (an agent for a disclosed principal), he could not be **personally** liable to the retailer for any damages it allegedly sustained. The court referred to the different **claims** made against the account executive based on the **same set of facts**. For instance, the retailer alleged that the account executive breached the common law duty owed by insurance agents to their clients; that he was guilty of negligence and gross negligence in the manner in which he handled the retailer's account; that he negligently misrepresented the facts to the retailer; that he owed a fiduciary duty to the retailer which he breached and that he was guilty of fraud. The retailer also sought punitive damages and attorneys' fees from the account executive.

The court concluded that the retailer could not recover from the account executive on claims based on theories of negligent misrepresentation or breach of fiduciary duty, since, in essence the retailer did not claim that it relied on the

account executive for advice or that it was influenced by him in choosing which policies to secure. Neither could the retailer obtain punitive damages or attorneys' fees from him. But the retailer could pursue its other claims against him, based on the breach of the common law duty owed by insurance agents to their clients, negligence, gross negligence and fraud.

Please note that this case was decided by a lower court so it does not yet have substantial value as a precedent. It did not award any damages to the retailer but said that the retailer could pursue its remaining claims against the account executive in a trial.

Having seen that an employee of a brokerage **might** incur personal liability for his conduct, even if he is acting in the course and scope of his employment, the question arises as to what extent, if any, the employee would have coverage under the employer's E&O policy. Generally, a professional E&O policy defines

**Covered Persons and Entities** as including:

Any present or former principal, partner, officer, director or employee of the Named Insured, but only as respects professional services rendered on behalf of the Named Insured.

Certainly, the account executive would be a **Covered Person** and coverage would attach. However, such policies normally exclude claims arising out of:

Dishonest, fraudulent, criminal or intentional acts, errors or omissions

committed by or at the direction of any insured.

The court dismissed the claims sounding in negligent misrepresentation and breach of fiduciary duty but allowed the claims alleging negligence, gross negligence and fraud to proceed. The negligence and gross negligence claims would trigger a duty to defend (and perhaps indemnify) on the part of the E&O carrier but, since “fraud” is excluded, the insurer would no doubt reserve its rights to indemnify in the event a jury made an award based on fraud. In addition, when faced with a situation where the claims made against an insured and its employee create a conflict, separate counsel for each insured would have to be appointed by the E&O carrier. Again, generally, where there are claims against an insured which are covered under a policy and one or more that are not covered (on their face), the insurer has the duty to defend both the covered and the uncovered claims. Since many professional E&O policies provide that claim expenses are included in any applicable deductible and also erode the limits of coverage, an insured may think twice about tendering a claim to its E&O insurer, depending on the nature and significance of the allegations.

But (and it’s a big “but”), by opting to not notify the insurer when “the claim is first made against” it, an insured is probably waiving its rights to coverage, even if the claim turns out to have more substance and subject the insured to more damages than originally thought.

The lesson to be learned, we suppose, is that when management (either wholesale or retail) entrusts an account or series of accounts to a single account manager, there should be systems and safeguards in place to ensure that the clients are being properly serviced in accordance with the company's practices and protocols. Failure to do so, may expose both the employer and the employee to claims for substantial damages. Of course, the PIWA Hotline is always available for guidance: 844 FOR PIWA (844 367-7492) or [piwahotline@piwa.org](mailto:piwahotline@piwa.org).

### **NOTE**

No attorney-client relationship is or will be established between the Hotline consultant and any PIWA Member as a result of this case summary or any call or submission to the PIWA Hotline. Nor will ELANY or PIWA be liable or responsible with respect to any action taken or not taken as a result of this case summary or any guidance given in response to calls or submissions to the Hotline.