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Insureds may recover purely economic damages from negligent insurance broker

by Rana Abbasi

The First District of the Appellate Court of Illinois recently allowed insureds to recover for economic losses incurred as a result of their insurance broker's negligence. ***Kanter v. Deitelbaum*, 648 N.E.2d 1137 (Ill. App. Ct. 1995)**. In a reversal of the lower court decision, the appellate court found that the plaintiffs' claims were exempt from the economic loss doctrine since the insurance broker had breached the extra contractual duty to provide competent service as a professional. Under the economic loss doctrine, an action for purely monetary damages cannot be recovered when the plaintiff proceeds under a theory of negligence. This doctrine, however, only applies to a service industry when the duty that is breached is defined by a contract.

Insurance broker fails to procure proper insurance

Plaintiffs Natalia Kanter and Felix Tsipris ("plaintiffs") alleged that their insurance broker, Louis Deitelbaum ("Deitelbaum") falsely represented that he had procured insurance for them, and then subsequently insured them through an insurance company not licensed in Illinois. The trial court dismissed the plaintiffs' claims, which alleged professional malpractice, since the plaintiffs sought to recover damages only for economic loss. The plaintiffs contacted Deitelbaum in order to obtain health insurance for themselves and their two minor

children in January of 1991. Upon receiving the plaintiffs' biographical records, Deitelbaum agreed to procure adequate medical insurance for the plaintiffs. Deitelbaum requested a sum of money to cover the cost of the insurance. Deitelbaum informed the plaintiffs in February of 1991 that he had made arrangements for their coverage through American Medical Security ("AMS"). When the plaintiffs requested documentation of their insured status, Deitelbaum responded by sending them falsified insurance identification cards.

Plaintiff Kanter required medical services in August of 1991. Deitelbaum was promptly informed of Kanter's hospitalizations. Subsequently, Deitelbaum asked the plaintiffs for extra payments which he claimed were necessary to cover additional insurance policy costs. The plaintiffs paid Deitelbaum the additional sum and duly submitted all relevant medical receipts to AMS. The insurance company refused to pay Kanter's medical bills, citing the nonexistence of any health insurance contract with the plaintiffs.

Deitelbaum claimed that he obtained insurance for the plaintiffs through Atlantic Healthcare Benefits Trust ("AHBT") in March of 1992. The insurance broker sent insurance identification cards and the policy to the plaintiffs as proof of their insured status. The plaintiffs sent medical bills to AHBT for the various health services they re-

quired. Although the plaintiffs paid AHBT directly for their policy, the company denied their coverage. The plaintiffs subsequently discovered that AHBT was not licensed to operate in Illinois. The company did not possess the mandatory certification for insurance businesses as required by the State of Illinois.

Extra contractual duties exempt from economic loss doctrine

At the trial court level, Deitelbaum successfully argued that the *Moorman* doctrine barred the plaintiffs' counts alleging negligence because the plaintiffs sought to recover for purely economic losses. The Supreme Court of Illinois adopted the *Moorman*, or economic loss, doctrine, when it held that "purely economic losses cannot be recovered under a negligence theory." *Moorman Mfg. Co. v. National Tank Co.*, 435 N.E.2d 443 (Ill. 1982). On appeal, the plaintiffs argued that the *Moorman* doctrine did not apply to liability involving insurance brokers, and, alternatively, if the doctrine did apply, the facts of their case fell within the doctrine's exemptions.

The court found that an insurance broker's duty to his clients stems from the implicit professional duty to render competent service rather than from agency or contract principles or the insurance policy itself. "The economic loss doctrine applies to a service industry only

where the duty of the party performing the service is defined by the contract between the [party] and [the] client." *Kanter*, 648 N.E.2d at 1139. In this case, the court concluded that Deitelbaum's duty to the plaintiffs to provide the requisite

competent service fell outside of the scope of duties imposed by the written contract and that this additional contractual professional duty is not subject to the economic loss doctrine. The court held that the plaintiffs could proceed with their

charges of negligence and were not barred from recovering damages for purely economic losses. The court reversed the lower court's ruling and remanded the case for a ruling in concert with the appellate court opinion.

LDDL contraceptive manufacturer has no duty to warn that use of "The Pill" during pregnancy may cause birth defects

by *Lessie A. Gerhold-Lepp*

In *Martin by Martin v. Ortho Pharm. Corp.*, 661 N.E.2d 352 (Ill. 1996), the Illinois Supreme Court held that, under the learned intermediary doctrine, a pharmaceutical manufacturer who fails to directly warn a patient of the possible side effects of an oral contraceptive is not liable despite a federal regulation requiring such warnings. The court stated that a manufacturer's duty ends when the manufacturer furnishes the necessary warnings to the prescribing physician.

Clyntie Martin ("Martin") visited her physician, Dr. Sloniewicz ("Sloniewicz"), in April 1979, complaining of cramps and a missed menstrual period. During this appointment, Sloniewicz informed Martin she was not pregnant. At a subsequent appointment, Martin told Sloniewicz her concern about becoming pregnant, Sloniewicz reaffirmed that she was not pregnant. Sloniewicz prescribed Ortho-Novum 1/50, an oral contraceptive product of the Ortho Pharmaceutical Corporation ("Ortho"). Sloniewicz instructed Martin to begin use of the contraceptive at the end of her next menstrual cycle; however, Martin began use of the contraceptive seven days after her second visit to Sloniewicz. Martin discovered that she was pregnant after another missed menstrual period in July 1979. On December 8, 1979, Martin gave birth to Robert Lee Martin III ("Robert"). Robert was born with deformities to his arms, hands, and fingers.

In February 1981, Robert Lee Martin, Jr., and Clyntie

Martin ("the Martins") filed suit against Ortho on behalf of their son. The Martins sought damages against Sloniewicz for malpractice and against Ortho, alleging that the contraceptive caused Robert's deformities. Sloniewicz settled with the Martins in 1983. The Martins voluntarily dismissed their action against Ortho. However, the Martins refiled on January 7, 1991.

Courts apply learned intermediary doctrine to case

The Martins alleged Ortho-Novum 1/50 was "unreasonably dangerous" because it carried no warning to consumers that it would cause birth defects if taken during pregnancy. Ortho argued the learned intermediary doctrine applied and the doctrine limited its duty to warn the physician who prescribed the drug. Ortho argued that its warnings to Sloniewicz were adequate as a matter of law. The circuit court granted summary judgment in Ortho's favor.

The appellate court, reversing the lower court, found that the learned intermediary doctrine contained an exception which applied to oral contraceptive manufacturers. The Supreme Court granted Ortho's appeal and allowed amicus curiae briefs on behalf of both parties.

The Supreme Court of Illinois adopted the learned intermediary doctrine in *Kirk v. Michael Reese Hosp. & Med. Ctr.*, 513 N.E.2d 387 (Ill. 1987). The doctrine, an