The Expansion of Liability to Third Parties -- Common Sense? Or Scary Trend?

Timing being everything, as it usually is, our last two posts dealt with issues arising from an insured's commitments under contract and the insurance that endeavors to support those commitments. Those topics cannot be discussed without also touching on an insurance agent's duty to provide the coverages that purport to fulfill those requirements.

Gazing into my crystal ball over the last few years, I have anticipated an ever-expanding theory of liability, that will result in a well-established standard regarding insurance agents duty not only to the insured, but also to those people who rely upon the insured having the correct coverage in place as they have required the insured to do.

Because of restrictions on liability, such as the privity of contract requirement in many cases, this trend has been exceedingly slow in developing I provided an example of liability to a third-party a couple of weeks ago, but it was newsworthy. However, I'm happy to say that the February edition of Goldberg Segalla's Professional Liability Monthly newsletter [here], has as its feature article a review of the evolution of liability to third parties as it pertains to attorneys. Some of the circumstances detailed are only a stone's throw away from the scenarios of reliance upon work product in which agents often find themselves. I note that the February edition is not posted on the Goldberg Segalla website as of this printing. If you would like a copy, please e-mail me at ChrisC [at] usrisk [dot] com, and I'll forward it to you.

One of the most interesting things I noticed in this article was that for many years the courts found that the defendant had no liability to the third-party claimant not because there was a lack of proximate cause, or lack of damages, but rather because they did not want to dismiss the privity of contract requirement out of a concern that a looser standard would result in a flood of claims against all manner of defendants for all manner of reasons. I find that more than a little disturbing on several levels.

The other observation worthy of note is that my philosophy that the plaintiff bar never, ever gives up is borne out in this review. Time and time again, without regard to previous decisions, multiple precedents and many, many past failures, the plaintiff bar has been creative, persistent, and dogged in its determination to press on and find ways for the aggrieved parties to be made whole, even in the absence of privity of contract.

Speaking of being made whole, one of the landmark cases was decided in favor of the plaintiff specifically because there was no other place from which the plaintiff could recover. The court felt it would be unfair to enforce the privity of contract requirement to the detriment of an innocent party who had no other hope of recovery.

I think it is wise for us to take lessons from the deterioration of the privity requirement in the lawyers professional liability world. Agents' liability will not be far behind. It may be one year, it may be 10 years, but it will be.