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Insurance Broker Not Liable to Estate of Patron Crushed by Inflatable for Failure to Procure Coverage

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Kimberly Johnson v. Doodson Insurance Brokerage, LLC, No. 14-1379 (USCA, 6th Cir. July 15, 2015)

The Cleveland Indians Baseball Team (the Team) hired National Pastime Sports (Pastime) to produce events at its baseball games that included kids' attractions such as inflatable slides. The production contract required Pastime to secure a $5 million CGL Policy and they submitted an application to their insurance broker, Doodson, for the Kids Fun Days events advising that inflatable attractions would be included. The broker arranged for Pastime to obtain a policy that excluded coverage for injuries caused by inflatable slides. A patron attending a ballgame in June 2010 was crushed by collapse of an inflatable slide and died of his injuries. When Pastime gave notice of the accident, the broker replied that accidents caused by inflatables were not covered under the policy. Several different lawsuits were filed in both state and federal courts in Ohio. The deceased patron's estate won a $3.5 million default judgment against Pastime in Ohio state court. The patron's estate then filed an action against the broker in the U.S. District Court for the Eastern District of Michigan alleging negligence and breach of contract for failure to procure coverage on inflatables. The District Court granted motions to dismiss for failure to state a claim under both theories on grounds that under Michigan law, there was no privity of contract between the patron and the broker and thus there could be no breach of a duty to the patron that would form the basis for either a negligence or a breach of contract claim on a third party beneficiary theory. The patron's estate appealed to the U.S. Circuit Court of Appeals for the Sixth Circuit which affirmed.

Questions Before the Court

Whether the Broker owed a Tort Duty to the Patron for Failure to Perform its Contractual Obligation to Procure Insurance coverage on the inflatables?

No. The Court of Appeals held that the broker owed no independent tort duty to the patron to obtain liability insurance. The legal issue, according to the Court, was whether, aside from the contract, the defendant owed an independent legal duty to the plaintiff. The Court found that a broker's failure to perform a contractual obligation to procure insurance did not implicate a risk of harm that the broker had any common law duty to prevent. The

Court found that courts in six other states had declined to hold insurance agents and brokers liable in negligence to injured third-parties and found that it was unlikely that the Michigan state courts would rule otherwise. The Court emphasized that this was voluntary liability insurance and not coverage that was mandated by law, where it could be said that the claimants had an expectation that coverage would be provided.

Whether the Patron was a Third-Party Beneficiary of the Contract between Pastime and the Broker to procure liability insurance coverage?

No. The Court of Appeals also affirmed the District Court's ruling that the patron was not a third-party beneficiary of the contract between Pastime and the broker. The Court pointed that there was no written contract between Pastime and the broker and it looked to Pastime's application to the broker, the policy issued and the production agreement between the Team and Pastime. The Court found that neither the patron nor the class of which he was a member was directly referred to in any of these documents as required by Michigan law in order to be an intended third-party beneficiary. Rather the application and the production agreements simply required "general liability" insurance. The Court found that the beneficiary class was "the public-at-large" which Michigan courts had previously held to be too broad a class to qualify for third-party beneficiary status. Thus the patron could also not bring a breach of contract action against the broker individually or a class member.

What the Court's Decision Means for Practitioners

This opinion follows the established law that injured third parties cannot hold an insurance agent or broker liable in negligence for failure to procure insurance coverage that would have provided them with compensation for their loss. It should be noted that the Team had earlier brought a negligence action against the broker in the same District Court. That action was dismissed, but was reversed by the same Sixth Circuit Court of Appeals because the Court found that the Team was mentioned in the deficient insurance policy and there was a "special relationship" between the broker and the Team concerning these Kids Fun Days events with the broker providing a Certificate of Insurance for the events listing the Team as an additional insured and as the certificate holder.

For more information, please contact your regular Hinshaw attorney.