

# Q PROFESSIONAL LIABILITY DEFENSE QUARTERLY

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## Handling a Trust Fund Recovery Penalty Case, The Basics.

**Eris Bryan Paul and Justin Nolen**

*Clark, May, Price, Lawley, Duncan & Paul, LLC*

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At some point in our careers, all lawyers either voluntarily or by necessity, handle a new type of case with which they are not intimately familiar. In my personal practice, I have represented accounting professionals in one form or another for approximately 10 years. Most of these cases have arisen out of audit disputes, assist with responding to nonparty subpoenas, or deal with accounting clients who may disagree with a tax decision made by an accounting professional. However, around two years

ago I had a new client who walked into my office facing a situation with which I was unfamiliar.

This particular accounting professional handled the books for a North Alabama business which like most all employers, withheld federal employee, Social Security, and income taxes. In this case, unlike most employers, this employer had failed to pay these “withholding” taxes to the United States, specifically the Department of the Treasury.

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## Letter from the President

**Lisa Tulk, Kessler Collins, P.C.**

Hello there! I hope everyone has been having a lovely and busy autumn and has settled back in after September’s excellent Annual Meeting in Chicago. As always, we enjoyed an incredibly rich and diverse series of topics for CLE/CE credit that, while spanning specific practice areas, provided valuable insights to defending any type of malpractice claim.

We had literal fireworks, got in some valuable CLE, and had the opportunity to meet up with friends both old and new from across the country.

For those members who have never attended an annual meeting, we hope that you will consider joining us next year for the **2020 PLDF Annual Meeting** in

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domination doctrine did not toll the statute of limitations and the case was properly dismissed by the trial court. *Id.* ¶ 85.

## Conclusion

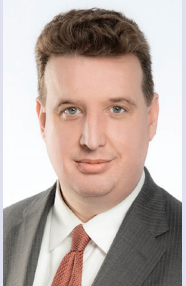
In certain cases, a plaintiff may try to use the doctrine of adverse domination to avoid the effect of the statute of limitations. Courts across the country vary widely as to whether and how they apply the doctrine in legal malpractice cases. In order to succeed in overcoming the rebuttable presumption of the knowledge of the entity, it is likely that defense counsel will need to explore the agreements under which the entity is organized and the applicable state statutes governing the entity. It is a fact intensive analysis that, while it worked in the *Schrock* case on a motion to dismiss, may, in other cases, require discovery and a motion for summary judgment or a jury trial to prevail. ■



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# The Importance of “Persons Most Knowledgeable” in Defense of Broker Liability Claims

**Frederick J. Fisher, J.D., CCP**  
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Over the years, the development of how to defend insurance agents or brokers has evolved to a fine science. That said, there are still numerous issues that are often missed when reviewing an insurance agent or broker professional liability claim. In a recent case in which I was surprisingly retained early, I was able to consult on it to the extent that after 18 months of litigation, the case settled. I was never deposed. What happened in the case, even though I was acting as a plaintiff’s expert, is quite significant for defense counsel. That is to say, there are numerous issues with respect to how an insurance agency’s structure and how they operate can affect the case from what had been originally perceived as “defensible.” Given that counsel are not always conversant with day to day operations of a brokerage, factual issues are often missed. Expert advice may be too late if retained just prior to the time disclosure is required given that discovery may be closed.

## Facts of the Case

The case above in which I was retained at the start illustrates the point. This particular claim involved a very large multinational insurance retail brokerage. A large contractor sought insurance for a large downtown metropolitan project. Needless to say, environmental liability coverage immediately comes to mind. Unfortunately, this brokerage provided a policy that only covered half the exposure, i.e. claims arising from pollution created by the contractor. What was not covered is a fairly standard exposure

with respect to unknown pollution that may already exist. In fact, in this case, an underground storage room filled with asbestos had been there for decades. This created quite a construction problem. The insurer denied coverage. The insurance broker allegedly kept representing to the contractor that they would get the carrier to pay it.

The fact that the broker provided an “Executive Vice President” to handle the account was quite telling. No doubt the insured was quite impressed with the fact that a corporate officer was chosen to represent them. This is where insight into insurance brokerage operations came in quite handy especially given the fact that the retention of the expert was early in the game.

This all begs the question as to what could be done irrespective of whether it’s a small insurance agency, or a large international organization. The questions which follow may give rise to answers that the Person Most Knowledgeable (“PMK”) may be the same person for small agencies, but with respect to large exposure claims and large purchases may be quite a different, yet compelling story.

What is important to know is who the persons are that are most knowledgeable as to data systems, internal structure and organization, file maintenance, internal review, quality control and audit processes, continuing education, policy and account marketing, claims advocacy, and quoting procedures. While the foregoing may not be a complete list, it certainly highlights the most important

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Nearly every data system around also allows for there to be a report that prints out the audit trail report for that client file or for that client policy. Then, by looking at the dates and access, one can quickly determine what was done and by whom and one can line that up against the documents produced.

aspects that were reviewed in the loss mentioned above, which recently settled for several million dollars.

### Data Systems

Data systems have become extremely important given the fact that for many years, there are very few, if any insurance agencies today, that don't have some sort of agency management system in place. Yet, with notices to produce a “copy of the policy file,” it becomes very difficult to determine what in fact has been produced and whether it truly represents a complete data dump from the data system. In addition, almost every data system has an audit trail report. This report documents the date, the person who accessed the client file (or policy file), and perhaps a brief description of what it was such as email, quote, invoice, etc.

Nearly every data system around also allows for there to be a report that prints out the audit trail report for that client file or for that client policy. Then, by looking at the dates and access, one can quickly determine what was done and by whom and one can line that up against the documents produced. It is amazing how infrequently this is obtained. In addition, sophisticated agency management systems contain imaging systems whereby all emails and all documents obtained can be actually stored in the

agency management system itself as opposed to a hard copy file. More and more agencies have gone paperless.

Screen shots too are important. Often notes, comments and other information such as important contacts or instructions for all to see are on the Client screen. Yet, how often are screen shots produced?

### Internal Structure & Organization

In addition to data systems, is the internal structure and organization of the brokerage. As mentioned above, no doubt the policyholder was quite impressed that an Executive Vice President was being provided to handle the account. Of course, was that person really a corporate officer? It is not uncommon for many brokerage firms, whether retail or wholesale, to provide titles to individuals based solely on the amount of revenue they produce. Thus, it is not uncommon for someone to have the title of Executive Vice President simply because they generate \$1 million in revenue. The same would be true of a Senior Vice President. Determining how titles are provided, and whether they truly represent a corporate officer or simply someone who really provides revenue is important to note.

More importantly, is how internal structure and sharing of accounts might take place. For instance, again, the Executive Vice President on the account

mentioned above was not a specialist in environmental liability. That person worked in another city. However, the brokerage firm had a prohibition against the sharing of commission revenue between two different brokers. In other words, the procuring broker who brought in the account is the one who will get all the commission. Why would the expert in another city want to be involved if he's not going to receive any remuneration? That's significant and was in this case. In fact, it became a significant factor in the settlement of the case. Clearly the firm had significant expertise and yet, based on internal rules and procedures, was unable to provide the expert or expertise to review what was being done.

### Policy Review and Account Marketing

The person most knowledgeable as to policy review and account marketing could be a function of internal review. Thus, it is even a more important person to identify and interview that person. Is there such a process or procedure taking place? If there had been such a policy in place, would they have discovered that improper coverage was provided to the customer in the matter above? In addition, policy review and account marketing is equally important as to what is meant by marketing.

In the case above, due to volume, the large brokerage only dealt with those insurance companies with whom they could deal directly and receive large commissions. If they couldn't deal direct, in the sense of having to go through an intermediary or MGA, they simply would not obtain a quote from that insurer. Of course, that ignored numerous insurance companies that could provide the kind of coverage needed, it would yield a lower commission. At the same time, though, the customer's needs might be better satisfied.

The customer’s needs were ignored. In other words, the entire structure of the agency together with the way brokers received compensation, their titles, and what insurers they could go to, was designed to maximize the revenue for the agency to the detriment of the client.

### File Maintenance

Another person most knowledgeable to interview would be that person who is involved in file maintenance. There are numerous “files” that one might be concerned with beyond the transaction file, and the policy file. Files containing agreements with “MGU”s and Insurers come immediately to mind. How are these maintained and when are they deleted? As everyone knows, most states do require file maintenance, the State Insurance Department standard being current year plus four years back. IRS best practices are even longer. Yet, when everything is stored electronically, and given the low cost of electronic file maintenance, it is difficult to believe that documents and or records would be purged after five years.

### Internal Review, Quality Control, and Audit Processes

Another person to be interviewed is that person who is most knowledgeable as to internal review processes, quality control, and audit processes. Are client files routinely audited for quality control to see that appropriate coverage and services were given? Who does that and how often is it done? It is also needed not only for large accounts, but small ones. The amount of revenue brought in on the single account should not determine the amount of attention it receives.

In other words, an \$800,000 premium for Professional Liability is no less dangerous from an error and omission

standpoint than a \$3,500 premium for a builders risk policy. In such a case, the failure to provide proper coverage under the builders risk form cost the policyholder over \$7 million, and the broker over \$3.1 million as a result (the contractor ended up paying the balance). In other words, its not the premium that creates the E&O risk, it’s the coverage.

### Continuing Education

Continuing education processes and procedures are equally important, and thus you must discuss with the person most knowledgeable what those are. For instance, given that many brokers may have particular lines of business expertise, are they involved in continuing education classes that deal with that or are they simply taking continuing education courses to get the hours necessary to renew a license.

### Claims Advocacy

Is there any person most knowledgeable as to claims advocacy? It is not uncommon for an insurance broker who represents a policyholder, to advocate on the clients behalf in the event of a claim problem or denial. Is there such a person, and at what point do they get involved? How active or aggressive are they in attempting to resolve a problem on behalf of the client. These are all important questions, especially given the fact the most larger agencies do have such a person in place, and often they may be an attorney.

### Quoting Procedures

Quoting procedures are important. Who is the person most knowledgeable as to how that is done? Are policy forms reviewed for ambiguities and other inconsistencies? Is a complete copy of the

policy and all forms and endorsements provided the policyholder at the time the quote is released? Is an unlicensed Clerical person releasing it over the Broker’s signature? This too is important, as how can the insured make an informed decision without having the materials available to review.

### Conclusion

Thus, there are at least eight persons most knowledgeable that should be contacted and interviewed for purposes of identifying the potential problems and pitfalls in defending any particular brokerage firm. Depending on the answers, what may be deemed to be a defensible case might suddenly turn out to be not so true. Nonetheless, the faster the matter can be developed, the faster the liability and damages might be determined. Something that ends up being good for everyone. ■



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**Frederick Fisher, J.D., CCP** is a specialist in professional liability. He is a member of the Editorial Board for *Agents of America*, a faculty member of the Claims College, School of Professional Lines sponsored by the Claims & Litigation Management Association, Senior Technical Advisor for Professional Liability Insurance, published by the International Risk Management Institute, a founding member of PLUS and a past President, and an author of numerous articles in journals and publications.

Mr. Fisher’s expertise started with a 20-year career as a Professional Lines Claims Adjuster, which included qualitative claim auditing, risk management and loss control services, and acting as a TPA. He then founded ELM insurance Brokers and served as CEO for another 20 years.

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