IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION-CIVIL

HAINES & KIBBLEHOUSE, INC. and READING MATERIALS, INC.,	:	January Term 2013
Plaintiffs,	:	No. 3742
v.	:	
IRONSHORE SPECIALTY INSURANCE COMPANY, EVANSTON INSURANCE COMPANY, RSUI INDEMNITY COMPANY, JOHN HANLON and SUSAN HANLON, METROPOLITAN SERVICES, INC., CURRENT CONNECTION ELECTRICAL CONTRACTOR, INC., and CBIZ BENEFITS & INSURANCE SERVICES, INC.,	:	Commerce Program
Defendants.	:	

DOCKETED
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R. POSTELL
COMMERCE PROGRAM

FINDING

AND NOW, this 30th day of December, 2015, after a bench trial before this court where testimony was received and exhibits were submitted into evidence and upon consideration of the parties' Proposed Findings of Fact and Conclusions of Law, it hereby is **ORDERED** that the court finds in favor of defendant CBIZ Benefits & Insurance Services, Inc. and against plaintiffs Haines & Kibblehouse, Inc. and Reading Material, Inc. on all claims.

BY THE COURT,

GLAZER, J.

Haines & Kibblehouse, I-WSFFD
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Findings of Fact and Conclusions of Law

A. Parties

1. Plaintiffs are Haines and Kibblehouse, Inc. ("H&K") and Reading Materials, Inc. ("RMI")(collectively referred to as "Plaintiffs").
2. H&K is a Pennsylvania corporation with its principal place of business at 2052 Lucon Road, Skippack, Pa. (Stipulated Facts 1-2).
3. RMI is a Pennsylvania corporation with a registered address at 234 North Sixth Street, Reading, Pa. (Stipulated Facts 1-2).
4. Defendant is CBIZ Benefits & Insurance Services, Inc. ("CBIZ").
5. CBIZ is a licensed property and casualty insurance broker with offices at 401 Plymouth Road, Plymouth Meeting, Pa. [1] (Stipulated Facts 3).

[1]CBIZ is the sole remaining defendant. Plaintiffs dismissed their claims against all other defendants in this action. CBIZ's cross claim against Ironshore Specialty Insurance Co. was dismissed with prejudice by court order on July 10, 2015.

B. Plaintiffs and CBIZ

6. Plaintiffs are part of a multiple-corporation organization which operate closely with one another in the construction industry. (N.T. August 12, 2015 pgs. 23-24, 52).
7. Plaintiffs also occasionally borrow employees from one corporate entity to another. (N. T. August 12, 2015 p. 24).
8. Plaintiffs had a long standing, multi-decade relationship with CBIZ as their insurance broker. (N.T. August 12, 2015 pgs. 25, 40; N.T. August 13, 2015 pgs. 13-16).
9. Julie Florian ("Florian") was employed by CBIZ and served as plaintiffs' account manager for many years. (N.T. August 12, 2015, p. 25; August 13, 2015, pgs. 13-16).
10. Florian was familiar with plaintiffs' business operations, including the interrelationships among the businesses, the leasing of equipment among the companies and the borrowing of employees. (N.T. August 12, 2015 pg. 25; N. T. August 13, 2015 pgs. 19-20).
11. Florian's primary contact at H&K was Joe Pyott ("Pyott") who served as H&K's risk manager. (N.T. August 13, 2015 p. 16).
12. Before becoming employed by H&K as risk manager, Pyott worked for a commercial insurance company as an insurance claims adjuster where he became familiar with commercial workers compensation (WL), Automobile liability (AL) and general liability (GL) policies. (N.T. August 12, 2015, p. 22).
13. As risk manager, Pyott was responsible for the management of plaintiffs' insurance risks, which included the identification and procurement of WL, AL and GL insurance needs. (N.T. August 12, 2015 pgs. 22, 26, 61, 62).

14. Pyott was directly responsible for conveying information about H&K's operations and insurance needs to CBIZ and plaintiffs' insurance companies. (N.T. August 12, 2015, pgs. 22, 26, 61).

15. Plaintiffs paid CBIZ a service fee for insurance consulting, advising and brokerage services. (N.T. August 13, 2015, pgs. 41-42).

16. Pyott and Florian worked together during the renewal period to ensure H&K's insurance needs were met.

17. Florian compared prices of different carriers, obtained price quotes from carriers, recommended which carriers offered superior coverage, presented proposals for additional types of coverage, reviewed policy language to ensure it was appropriate for plaintiffs, and negotiated terms and conditions with auto and general liability insurers. (N.T. August 13, 2015 pgs. 43-47).

18. Pyott would discuss claims history as well as adding new companies and deleting others with Florian regarding insurance. (N.T. August 12, 2015 pgs. 53-54).

19. H&K made the ultimate decisions on any recommendations made by Florian regarding insurance. (N.T. August 13, 2015 p. 44).

20. Prior to 2008, Pyott never expressed any concerns to Florian regarding insurance coverage for H&K's claims. (N.T. August 12, 2015 pgs. 62-63).

21. After the insurance was purchased, Pyott would receive full copies of the policies. (N.T. August 12, 2015 pg. 126).

C. Plaintiffs' Insurance Coverage- 2009-2010

22. Ironshore issued a Commercial Excess Liability Policy No. OWC 30913001 ("The Ironshore Policy") to H&K with effective dates of January 1, 2009 through January 1, 2010 for a premium of $100,000. (Stipulated Fact 11).

23. The Ironshore policy has limits of liability of $5 Million per occurrence and certain additional coverage of $5 Million per the aggregate excess $12 million in underlying coverage. (Stipulated Fact 13).

24. The Ironshore Policy contains the following coverage provision:

> I. Coverage
>
> A. This policy shall provide the Insured with Commercial Excess Liability coverage in accordance with the same warranties, terms, conditions, exclusions and limitations as are contained, on the Inception Date of this Policy, in the Controlling Underlying Policy, subject to the premiums, limits of liability, retention, policy period, warranties, exclusions, limitations and any terms and conditions of this Policy, including any and all endorsements attached hereto, inconsistent with or supplementary to the Controlling Underlying Policy. (Stipulated Fact 14).

25. The Controlling Underlying Policy is Everest National Insurance Company Policy No. 71C1000102-091. ("Everest Policy"). (Stipulated Fact 15).

26. The Everest Policy's insuring agreement provides as follows:

> 1. Excess Liability
>
> We will pay on behalf of the insured the amount of the "ultimate net loss" in excess of the "underlying limits of insurance" to which this insurance applies. The coverage provided by this policy will:
>
> a. Follow the terms, definition, conditions and exclusions that are contained in the "first underlying insurance", unless otherwise directed by this policy, including any attached endorsements; and
> b. Not be broader than that provided by the "first underlying insurance". (Stipulated Fact 1).

27. The applicable "first underlying insurance" policy to the Everest Policy is Pennsylvania Manufacturers Association Insurance Policy No. 300975-33-88-10-5 ("PMA Policy"). (Stipulated Fact 16).

28. The PMA Policy's insuring agreement provides as follows:

> a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit' seeking damages for "bodily injury" or "property damage" to which the insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:
>
> (1) The amount we will pay for damages is limited as described in Section III-Limits of Insurance; and
> (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.
>
> No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments-Coverages A and B. (Stipulated Fact 19).

29. The PMA policy contains the following exclusions, including the Worker's Compensation exclusion and the Employer's Liability exclusion:

> 2. Exclusions
>
> This Insurance does not apply to:
>
> d. Worker's Compensation and Similar Laws
>
> Any obligation of the insured under a worker's compensation, disability benefits or unemployment compensation law or any similar law.
>
> Employer's Liability
>
> "Bodily Injury" to:
>
> (1) An "employee" of the insured arising out of and in the course of:
> (a) Employment of the insured; or

(b) Performing duties related to the conduct of the insured's business; or

(2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract". (Stipulated Fact 21).

30. From 1998 to 2008, H&K's AL and GL policies contained an Employer's Liability Exclusion which excluded insurance coverage to the employer of an individual employee arising from the employee's work related injury. (N.T. August 13, 2015 p. 32).

31. The Employer's Liability exclusion is a common provision contained in every general liability policy. (N.T. August 13, 2015 p. 32).

32. The policies also contained a Separation of Insureds provision. A Separation of Insureds provision states the liability insurance would apply to each insured as if each of the named insureds was the only named insured. The liability insurance applied separately to each insured against whom a claim was made or suit was brought. (N.T. August 13, 2015 pgs. 38-39).

33. From 1998 to 2008, H&K received many WC, AL and GL claims which were covered losses. (N.T. August 12, 2015 pgs. 55-58).

34. Before October 21, 2008, liability claims or suits involving two incidents involving injured employees of one H&K company against another company were made to H&K's insurers. (N. T. August 12, 2015, pgs. 56-58; August 13, 2015 p. 32).

35. These claims were covered by H&K's liability insurance policies. (N.T. August 12, 2015, pgs. 56-58).

D. Reppert Accident and February 20, 2009 Denial Letter

36. On October 21, 2008, Ms. Reppert, an employee of an H&K company sustained a work related injury for which she brought a liability claim against another non employer H&K company. (N.T.August 12, 2015, p. 43, August 13, 2015, p. 25).

37. At the time of the accident, Reppert was an employee of RMI and was a passenger in an automobile being operated by an H&K employee. (N. T. August 13, 2015 p. 25).

38. On February 20, 2009, PMA denied coverage for said claim based on the Employers Liability exclusion in the 2008 policy. (N.T. August 12, 2015 pgs. 25, 44; August 13, 2015 pgs. 25-26).

39. Pyott received the denial letter and forwarded same to CBIZ. (N.T. August 12, 2015 p. 44-45).

40. Florian contacted the PMA underwriter regarding the letter and questioned the application of the exclusion. The underwriters reviewed the denial letter and the exclusion and informed Florian it was "never their intention." (N.T. August 13, 2015 pgs. 25-26).

41. PMA applied the Employer's Liability exclusion to the Reppert claim because Reppert was an employee of the named insured. (N.T. August 13, 2015 p. 26).

42. The Reppert matter proceeded to mediation between PMA, H&K and CBIZ where the matter was resolved by all parties contributing to the settlement without the coverage issue being resolved. (N.T. August 13, 2015 p. 27).

43. While the mediation was proceeding, Florian worked with PMA underwriters to obtain a manuscript endorsement which amended the Employer's Liability exclusion to allow coverage for situations similar to the Reppert claim where one H&K company employee sued another entity. (N.T. August 13, 2015 pgs. 27-28).

44. The amended endorsement took effect January 1, 2010, after the explosion which injured Hanlon but before the Hanlon claim was made and suit filed. (N.T. August 13, 2015 p. 28).

45. Florian asked PMA to allow the endorsement to be retroactive such that it would apply to the 2008 and 2009 policies but PMA refused the request. (N.T. August 13, 2015 p. 28).

46. After the Reppert claim, CBIZ, PMA and H&K were on notice that PMA was not interpreting the Separation of Insured provision as it had in the past to allow coverage in situations such as Reppert. (N.T. August 13, 2015 p. 29).

E. 2009 Hanlon Accident and 2011 Personal Injury Action

47. In 2009, John Hanlon ("Hanlon") was an employee of Haines & Kibblehouse, Inc. and James Cawthern was an independent contractor.

48. On October 9, 2009, John Hanlon and James Cawthern were involved in an electrical explosion on RMI property in Reading, Pa. (Stipulated Fact 4).

49. On June 21, 2011, Mr. Hanlon and his wife filed suit against Current Connection & Mechanical Services, Inc. ("CCMS"), Current Connection Electrical Contractor Inc. and Metropolitan Edison Company ("Met Ed") seeking to recover for Mr. Hanlon's alleged injuries in the Hanlon accident. (Stipulated Fact 5).

50. The Hanlon action was filed in 2011 almost two years after PMA's refusal in December 2009 to make the endorsement addressing the Employer's Liability exclusion retroactive to the 2008 and 2009 policies. (N.T. August 13, 2015 p. 67).

51. The Hanlon Action is captioned *John Hanlon and Susan Hanlon v. Current Connection & Mechanical Services, Inc. et. al.*, No. 11-24373 (Pa. Court of Common Pleas, Berks County). (Stipulated Fact 6).

52. On September 7, 2014, Met Ed filed a Joinder Complaint against RMI seeking to hold RMI liable to Met Ed to the extent Met Ed could be held liable to the Hanlons. (Stipulated Fact 8).

53. H&K was not a party to the Hanlon action. (Stipulated Fact 9).

54. At the time RMI submitted the Hanlon action to Ironshore, the primary layer of the 2009 PMA GL policy and several layers of excess liability coverage were exhausted in order to satisfy the liability claim brought by Mr. Cawthern. (Stipulated Fact 22).

55. In a reservation of rights letter dated October 26, 2012, Ironshore confirmed in writing that it would defend RMI with regard to the Hanlon action. (Stipulated Fact 23, Trial Exhibit "6").

56. Ironshore however reserved its rights to determine whether it was required to indemnify RMI with regard to the Hanlon action, invoked the language of the Employer's Liability exclusion in the applicable GL policy, and advised H&K that it required more information in order to determine whether or not coverage existed for the Hanlon action. (Id).

57. CBIZ was unaware that Ironshore intended to raise the Employer Liability exclusion in connection with its obligations in the Hanlon action until Ironshore issued its reservation of rights letter on October 26, 2012. (Stipulated Fact 23; N.T. August 13, 2015 pgs. 33, 36).

58. CBIZ was not copied on the Ironshore reservation of rights letter that was issued since the Ironshore policy was placed through a wholesaler. (N.T. August 13, 2015 p. 33).

59. The wholesaler places coverage for an insured on a brokers' behalf with insurers with whom the broker does not have contracts. In this case, CBIZ used Partner Specialty as the wholesaler. (N.T. August 13, 2015 p. 33-35).

60. A wholesaler was used because H&K was an intricate and large account which required layers of insurance. (N.T. August 13, 2015 p. 34).

61. Florian did not select Ironshore as the insurer for H&K and did not negotiate or communicate with Ironshore. (N.T. August 13, 2015 p. 34).

62. On December 3, 2012, Ironshore filed a declaratory judgment action against H&K and RMI in the United States District Court for the Eastern District of Pennsylvania seeking a declaration that it had no duty to either defend or indemnify RMI under the Ironshore Policy with respect to the Hanlon action. (Stipulated Fact 25).

63. Ironshore's declaratory judgment action was captioned *Ironshore Speciality Insurance Company v. Haines & Kibblehouse, Inc. and Reading Materials, Inc.*, Civil Action No. 5:12 cv-06710-LS. (Stipulated Fact 26).

64. Ironshore sought a declaration that the Workers' Compensation and Similar Laws exclusion and the Employers' Liability exclusion precluded coverage to H&K for the Hanlon action. (Stipulated Fact 28).

65. On January 20, 2013, plaintiffs filed their complaint in this action. (Stipulated Fact 29).

66. On February 4, 2013, plaintiffs moved in federal court to dismiss Ironshore's declaratory judgment action in favor of their complaint in this action. (Stipulated Fact 30).

67. On March 20, 2013, Ironshore filed Preliminary Objections to plaintiffs' complaint seeking to dismiss the complaint with prejudice on the grounds of misjoinder of parties and *lis pendens*. (Stipulated Fact 31).

68. On April 16, 2013, this court overruled Ironshore's preliminary objections and ordered Ironshore to answer Plaintiffs' complaint. (Stipulated Fact 32).

69. Ironshore filed a notice of appeal to the Superior Court appealing this court's April 16, 2013 order overruling its preliminary objections. (Stipulated Fact 33).

70. On March 13, 2014, plaintiffs' motion to dismiss the federal court action was granted and Ironshore's declaratory judgment action was dismissed. (Stipulated Fact 37).

71. Ironshore voluntarily discontinued the appeal to the Superior Court and on August 27, 2015, plaintiff filed a praecipe to dismiss their claims against Ironshore. (Stipulated Fact 40-41).

72. In the process of litigating the Hanlon and the Met Ed Property Damage claim, H&K incurred $176,894.34 in damages representing attorneys' fees and costs incurred by H&K in obtaining coverage under the Ironshore Policy for the Hanlon Action.

73. In 2014, Ironshore settled the Hanlon action after agreeing that RMI was entitled to indemnification under the Ironshore policy.

DISCUSSION

I. Plaintiffs failed to prove a breach of contract by CBIZ.

To successfully maintain a cause of action for breach of contract, the plaintiff must prove: (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract, and (3) resultant damages.[2] An insurance broker is under a duty to exercise the care that a reasonably prudent business person in the brokerage field would exercise under similar circumstances. If the broker fails to exercise such care and if such care is the direct cause of loss to his customer, then the broker is liable for such loss unless the customer is also guilty of failure to exercise care of a reasonably prudent business person for the protection of his or her own property and business which contributes to the happening of such loss.[3]

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[2] *Hart v. Arnold*, 884 A.2d 316, 332 (2005), citing *Gorski v. Smith,* 812 A.2d 683 (Pa.Super.2002), *appeal denied,* 579 Pa. 692, 856 A.2d 834 (2004).

[3] *Industrial Valley Bank & Trust Co. v. Dilks Agency,* 751 F.2d 637, 640 (3d Cir.1985) (citing *Consolidated Sun Ray, Inc. v. Lea,* 401 F.2d 650, 656 (3d Cir.1968)); *see also Swantek v. Prudential Property & Casualty Insurance Co.,* 48 Pa. D. & C.3d 42 (1988); *Peterson v. State Farm Insurance Co.,* 133 P.L.J. 437 (1985).

Applying the foregoing to the facts at hand, CBIZ as an insurance broker was required to exercise the skill and knowledge normally possessed by a member of that profession to make sure that the coverage sought by plaintiffs was in place.[4] According to plaintiffs, CBIZ breached their contract when they failed to recognize and advise plaintiffs of a potential gap in insurance coverage caused by the Employer's Liability exclusion and failed to negotiate an endorsement to protect them against this gap at the time of renewal for the 2009 term.[5] The record created at trial however, does not support plaintiffs' position. A potential gap in coverage in the 2009 policy was not reasonably foreseeable. In December 2008, during the negotiation of the 2009 AL and GL policies, CBIZ had no reason to believe that PMA or Ironshore would question their obligations to provide insurance coverage to H&K or any H&K group companies under the circumstances of Reppert and Hanlon. CBIZ had no reason to believe that PMA and Ironshore would not interpret the Separation of Insured provision to defeat the application of the Employer's Liability exclusion. At the time the 2009 policy was negotiated two previous work-related accidents and injuries to employees of the H&K companies resulting in liability suits or claims against non-employer H&K companies were covered by the AL or GL policies without invoking the Employer's Liability exclusion.

When PMA issued the reservation of rights letter and invoked the application of the Employer's Liability exclusion in 2009 for the Reppert claim, it was the first time that CBIZ and H&K became aware of a potential gap in coverage. Once the issue arose, CBIZ negotiated with PMA to address the issue and an amended endorsement was issued regarding the application of the Employer's Liability exclusion to claims similar to Reppert. Unfortunately, the amendment

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[4] *Pressley v. Travelers Prop. Cas. Corp.*, 817 A.2d 1131, 1134-35 (Pa. Super. 2003).

[5] Plaintiffs' proposed conclusion of law ¶ 15.

was not retroactive and therefore was not applicable to the Hanlon claim which occurred in 2009 but was not filed until 2011, two years after the Reppert matter was resolved and an amended endorsement issued. The Employer's Liability exclusion is a common exclusion in all general liability policies and in Ms. Florian's opinion would not be eliminated from any policy by any insurer.[6] To find that CBIZ breached its duty to H&K based on the facts before this court would create a situation where a broker guarantees that an insurer will cover all claims. CBIZ should not be held responsible for Ironshore's interpretation of the 2009 policy. While a broker does have a duty to provide the insurance requested by its client, a broker cannot guarantee that an insurer will interpret the policy consistently for all claims. Perhaps the Employer's Liability exclusion could have been changed during the 2008 renewal discussions, however, CBIZ and H&K had no notice that an issue existed. Plaintiffs' expert summed this up the best when he testified, "But I will tell you insurance carriers sometimes pay claims that shouldn't be covered, and sometimes they, you know, don't cover claims they should." (N.T. August 12, 2015 p. 106). CBIZ reasonably performed their contractual obligations by providing services to procure an adequate insurance program. When presented with a problem regarding a gap in coverage CBIZ addressed the matter to correct the issue and effectuate coverage in the future. As such, the court finds that plaintiffs failed to adduce any evidence that CBIZ breached its contractual duty to CBIZ by failing to exercise the reasonable skill, care and diligence required of an insurance broker in its dealings with plaintiffs.

II. The negligence claim is barred by the gist of action doctrine.

In order to state a cause of action for negligence, a plaintiff must establish a duty of the defendant, a breach of that duty, and a causal connection between the breach of the duty and an

[6] The court found Ms. Florian's testimony to be credible.

injury suffered by the plaintiff. [7] Here, plaintiffs assert that CBIZ failed to conform to the required standard of care by: (1) failing to recognize and advise plaintiffs of a serious gap in coverage posed by the Employer's Liability Exclusion; and (2) failing to negotiate an endorsement protecting against this gap before the Hanlon accident, despite CBIZ's awareness at that time that the exclusion was being used as a defense in situations where an employee of one H&K company sued another H&K company.[8] Plaintiffs' negligence claim is barred by the gist of the action doctrine.

"The gist of the action doctrine bars a plaintiff from re-casting ordinary breach of contract claims into tort claims."[9] Recently, our Supreme Court approved gist of the action doctrine and explained the doctrine as follows:

> If the facts of a particular claim establish that the duty breached is one created by the parties by the terms of their contract—*i.e.*, a specific promise to do something that a party would not ordinarily have been obligated to do but for the existence of the contract—then the claim is to be viewed as one for breach of contract. If, however, the facts establish that the claim involves the defendant's violation of a broader social duty owed to all individuals, which is imposed by the law of torts and, hence, exists regardless of the contract, then it must be regarded as a tort. [10]

In other words, a claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contracts, and not by the larger social policies embodied by the law of torts. Here, CBIZ's obligation to provide insurance coverage to plaintiffs to cover situations such as those presented by the Hanlon action and to review policies for potential gaps in coverage are defined by the terms of contract between plaintiff and CBIZ. Since, the parties'

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[7] *Petrongola v. Comcast Spectator, L.P.*, 789 A.2d 204, 209 (Pa. Super. 2001).

[8] Plaintiff's proposed conclusion of law p. 7.

[9] *Mirizio v. Joseph,* 4 A.3d 1073, 1079 (Pa.Super.2010) (citation omitted).

[10] Id.

obligations are defined by contract, the gist of the action is contract and not tort and the claim for negligence is dismissed.

Conclusions of Law

1. Plaintiffs failed to prove a breach of contract by CBIZ.
2. A gap in coverage did not exist at the time the policies were negotiated for the policy period 2009 through 2010.
3. CBIZ never represented to plaintiffs that any insurance policy would cover each and every claim made under a policy issued.
4. Prior to 2008, when an employee of one H&K company was injured in a work-related accident, the Separation of Insureds provision ensured that no gap in insurance coverage existed for a non-employer H&K company in the event that a liability claim was made or suit was brought against a non-employer.
5. A broker is not a guarantor that an insurer will cover all claims and interpret insurance provisions consistently.
6. A broker has no control over how an insurer will interpret an exclusion.
7. Ironshore did provide indemnify benefits for the Hanlon claim.
8. The negligence claim is barred by the gist of action doctrine.

FINDING

The court finds in favor of defendant CBIZ Benefits & Insurance Services, Inc. and against Plaintiffs Haines & Kibblehouse, Inc. and Reading Material, Inc. on all claims.

BY THE COURT,

GLAZER, J.