COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

M&O AGENCIES, INC., an Arizona corporation, dba THE MAHONEY GROUP,

v.

Petitioner/Defendant,

HON. PAUL E. TANG, Judge of the Superior Court of Arizona, in and for the County of Pima,

Respondent Judge,

and

RAMON MURILLO JR., and BARBARA MURILLO, individually and as husband and wife, and CACTUS MELON DISTRIBUTING, INC., an Arizona corporation,

Respondents/Real Parties in Interest.

No. 2 CA-SA 2021-0010

Pima County Superior Court
No. C20202209

(Hon. Paul E. Tang)

AMICUS CURIAE BRIEF

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Amicus Curiae respectfully submits this brief.

Legal Argument

1. The 2016 and 2019 amendments to A.R.S. § 20-259.01(A) and (B) purported to create a safe harbor barring common-law clams for professional negligence against insurance agents and brokers.

In 2016 and 2019, the Arizona Legislature amended the relevant offer-and-selection language for "insurance producers" in the uninsured-motorist coverage statute. That created a safe harbor for insurance producers if they used an approved form in offering UM coverage:

A.R.S. § 20-259.01(A) as amended by Ariz. Laws 2016, ch. 180, § 1	**A.R.S. § 20-259.01(A)** as amended by Ariz. Laws 2019, ch. 301, § 1
The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director is valid for all insureds under the policy. **An insurance producer that uses such a form in offering uninsured motorist coverage and confirming the selection of limits or rejection of coverage by a named insured or applicant satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of uninsured motorist coverage.** (Bolding added.)	The offer of limits to a named insured or applicant shall be made at the time of the application on a form approved by the director. **An insurance producer that uses such a form in offering uninsured motorist coverage satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of uninsured motorist coverage.** (Bolding added.)

In 2016 and 2019, the Arizona Legislature also amended the relevant offer-

and-selection language for "insurance producers" in the underinsured motorist coverage statute. That created a safe harbor for them if they used an approved form in offering UIM coverage.

A.R.S. § 20-259.01(B) as amended by Ariz. Laws 2016, ch. 180, § 1	**A.R.S. § 20-259.01(B)** as amended by Ariz. Laws 2019, ch. 301, § 1
The selection of limits or rejection of coverage by a named insured or applicant on a form approved by the director is valid for all insureds under the policy. **An insurance producer that uses such a form in offering underinsured motorist coverage and confirming the selection of limits or rejection of coverage by a named insured or applicant satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of underinsured motorist coverage.** (Bolding added.)	The offer of limits to a named insured or applicant shall be made at the time of the application on a form approved by the director. **An insurance producer that uses such a form in offering underinsured motorist coverage satisfies the insurance producer's standard of care in offering and explaining the nature and applicability of underinsured motorist coverage.** (Bolding added.)

In 2001, the Arizona Legislature replaced the previous statutory distinction between insurance "agents" and "brokers" with a single category of "insurance producer." *See* Ariz. Laws, ch. 205, § 12 (2000). An "insurance producer" is "a person required to be licensed under [Article 3 ("Insurance Producer Licensing") of Chapter 2 ("Transaction of Insurance Business") of Title 20 ("Insurance") of the Arizona Revised Statutes)] to sell, solicit or negotiate insurance." A.R.S. § 20-

281(5). Generally stated, an "insurance producer" is an insurance agent or broker.

In their pre-2016 form, neither A.R.S. § 20-259.01(A) nor (B) barred—or purported to bar—common-law professional-negligence causes of action against insurance agents or brokers who violated the standard of care by failing to procure the UM and/or UIM coverage that their customers had asked for or needed for protection against uninsured and/or underinsured drivers. *Manobianco v. Wilks*, 237 Ariz. 443, 446 ¶ 9 (2015).

2. In response to the *Manobianco* case, the Arizona Legislature amended A.R.S. § 20-259.01(A) and (B) in 2016 to abrogate certain common-law claims against insurance producers. The amendments violate the anti-abrogation clause and are thus unconstitutional.

Manobianco's authors knew the Arizona Legislature might be tempted to amend A.R.S. § 20-259.01(A) and (B) to circumscribe insurance-producer liability. "If the legislature wants to amend the statute to include agents, limit their duties, or circumscribe their liability regarding UM or UIM coverage," *Manobianco* said, "it must do so clearly and within constitutional bounds." *Id*. at 447 ¶ 13.

In 2016, in a rapid response to what may have been seen as an invitation in *Manobianco*, the Arizona Legislature amended A.R.S. § 20-259.01(A) and (B) to provide an unassailable safe harbor for insurance producers from well-known, long-established, common-law professional-negligence claims.

Under the 2016 amendment to A.R.S. § 20-259.01(A) and (B), the insurance producers could purportedly attain iron-clad immunity merely by using a standard

Arizona Department of Insurance form when offering UM and/or UIM coverage or when confirming the selection of limits or rejection of UM and/or UIM coverage by a named insured or applicant. As a matter of statutory law, once an insurance producer uses the form, that would supposedly satisfy "the insurance producer's standard of care in offering and explaining the nature and applicability of" UM and/or UIM coverage. A.R.S. § 20-259.01(A) and (B).

The statute is unconstitutional. Article 18, § 6 of the Arizona Constitution, after all, provides in relevant part that:

> The right of action to recover damages for injuries shall never be abrogated, and the amount recovered shall not be subject to any statutory limitation.

In crafting the 2016 safe-harbor language for A.R.S. § 20-259.01(A) and (B), the Arizona Legislature was not subtle. It sought to abrogate certain common-law negligence actions against insurance agents and brokers. It tried to wipe out those causes of action. But it cannot do that.

Article 18, § 6 was "intended to take the right to justice out of executive and legislative control, preserving the ability to invoke judicial remedies for these wrongs traditionally recognized at common law." *Boswell v. Phoenix Newspapers, Inc.*, 152 Ariz. 9, 17 (1986). The anti-abrogation clause's "simple, explicit and all-inclusive" language "cannot be misunderstood." *Kilpatrick v. Superior Court*, 105 Ariz. 413, 419 (1970). "Without limitation," Article 18, § 6 "confers the right to

recover damages for injuries as existing under the common law." *Id.*

The anti-abrogation clause bars "'abrogation of all common law actions for negligence, intentional torts, strict liability, defamation, and other actions which trace origins to the common law.'" *Baker v. University Physicians Healthcare*, 231 Ariz. 379, 388 ¶ 34 (2013) (quoting *Cronin v. Sheldon*, 195 Ariz. 531, 538 ¶ 35 (1999)). "A court may not, consistent with the Arizona Constitution, prohibit a plaintiff from bringing a common law tort action." *Baker*, 231 Ariz. at 388 ¶ 36.

"A statutory regulation that completely abolishes a right of action," as the Arizona Legislature tried to do in 2016, "is an abrogation." *Duncan v. Scottsdale Medical Imaging, Ltd.*, 205 Ariz. 306, 314 ¶ 33 (2003). "A statute that completely abolishes a right of action is by definition an unconstitutional abrogation." *State Farm Ins. Cos. v. Premier Manufactured Systems, Inc.*, 217 Ariz. 222, 228 ¶ 32 (2007). A statute abrogates a cause of action if it bars it before it can even be brought. *Watts v. Medicis Pharm. Corp.*, 239 Ariz. 19, 27 ¶ 26 (2016).

Under any approach or analysis, the safe-harbor language the Arizona Legislature inserted into A.R.S. § 20-259.01(A) and (B) was a deliberate attempt to abrogate common-law professional-negligence claims against insurance agents and brokers before they could even be brought. That is just the sort of legislative overreaching that the Framers of the Arizona Constitution wanted to prevent.

In summary, the 2016 amendments to A.R.S. § 20-259.01(A) and (B) seek to

abrogate a cause of action against insurance producers for professional negligence associated with procuring, offering, or explaining UM and/or UIM coverage for their customers. There is no regulation of the common-law cause of action for professional negligence. There is no subtlety. There is abrogation. That is precisely what the Arizona Legislature wanted. And that is precisely what it cannot do.

3. For centuries, American courts have allowed common-law negligence actions against insurance agents and brokers who fail to procure the insurance that their clients want and need.

The American common-law professional-negligence tort action against insurance agents and brokers has deep roots. When Arizona was still an insignificant and overlooked outpost of Pimería Alta and Nuevo México, American common law had recognized the existence and importance of that tort action. For the agent or broker, the consequences of a breach could be dire.

"The law is clear, that if a foreign merchant, who is in the habit of insuring for his correspondent here, receives an order for making an insurance, and neglects to do so, or does so differently from his orders, or in an insufficient manner, he is answerable, not for damages merely, but as if he were himself the underwriter." *De Tastett v. Crousillat*, 7 Fed. Cas. 542 (Cir. Ct. D. Pa. 1807). "The basis of the suit is the negligence of the defendants in not procuring a policy to be effected." *Miner v. Tagert*, 3 Binn. 204, 208 (Pa. 1810).

The duty is broad. For instance, in an 1840 case, a plaintiff consigned books

to the defendant for sale on commission. The defendant agreed to cause them to be insured, but neglected to procure the insurance, and the books were destroyed while in his possession. The New Hampshire Supreme Court held that, for the breach of that promise, the plaintiff was entitled to recover the value of the lost books. *Ela v. French*, 11 N.H. 356, 358-59 (Super. Ct. 1840).

In 1842, the Louisiana Supreme Court explained that, if "an agent, who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence." *Strong v. High*, 1 Rob. (La.) 103 (La. 1842) (citation and internal quote marks omitted). An insurance agent who agrees to procure insurance for a customer and fails to do so becomes liable in damages to the customer. *Criswell v. Riley*, 30 N.E. 1101, 1103 (Ind. App. 1892).

An insurance broker who "holds himself out to the world as possessing sufficient skill requisite to his calling, and, if he does not exercise the proper and customary care and skill in effecting the insurance of the property of the person for whom he is acting, under his instructions and agreement with such person, the neglect of such skill and diligence is actionable, if it proximately results in loss or damage to the insured by whom he is retained and employed." *Milliken v. Woodward*, 64 N.J.L. 444, 446 (N.J. 1900).

4. Legal commentators have also long recognized existence of a tort duty for insurance agents and brokers to procure the insurance that their clients want and need.

Before Arizona became a State, legal commentators had recognized the existence of a common-law tort cause of action arising from an insurance broker's or agent's failure to procure insurance for a customer. For instance, in 1850, a respected treatise on insurance law, first published in 1783, explained that: "The agent is responsible for his errors *in omittendo* as well as those *in committendo*: If he has omitted to effect the prescribed insurance, he is responsible for the loss, not in the light of an insurer, but as a mandatary who has failed in his duty. . . . And he will be held to make good to the principal the loss he has sustained through the want of insurance." Balthazard Marie Emerigon, *Treatise on Insurances* Ch. V, § VIII at 119 (1850).

"If an agent bound to insure neglects to procure insurance, or the policy is void through his fault, he is himself liable to the principal as an underwriter in such a policy as he was bound to procure, and could have procured." Willard Phillips, 2 *Treatise on the Law of Insurance* § 1892 at 565 (1854).

"So, if an agent, who is bound to procure insurance for his principal, neglects to procure any, and a loss occurs to his principal from a peril ordinarily insured against, the agent will be bound to pay the principal the full amount of the loss occasioned by his negligence." Joseph Story, *Commentaries on the Law of*

Agency § 218 at 278 (1874).

The same principles appear in Twentieth Century treatises. In 1900, an insurance law commentator stated that an insurance "agent employed to effect insurance, it scarcely need be said, is responsible to his principal for every negligence in the performance of his duties." John Wilder May, I *The Law of Insurance* ¶ 124 at 228 (1900).

And in 1903, another expert added: "An agent instructed to insure must effect insurance within a reasonable time, or notify his principal of his inability to do so, and must use reasonable care in selecting a sufficient insurer and in securing a sufficient policy; and if he fails in this regard he is liable to the same extent as the underwriters would have been had the insurance been duly effected." Francis B. Tiffany, 1 *Handbook of the Law of Principal and Agent* § 106 at 407-08 (1903).

That is still the American common-law rule. "Insurance agents are," after all, "licensed professionals who should be held to a high standard of care and practice similar to attorneys, accountants, and physicians." Jeffrey Lipman and Greg Noble, *Agent-Broker Negligence Actions: Pitfalls for Insurance Providers and Ammunition for Consumers*, 44 Drake L. Rev. 835 (1996). Insurance brokers also owe common-law tort negligence duties to the insured client. *See* Jason Sumbaly, *An Insurance Broker's Duty: Adopting California's Approach*, 43(1) Seton Hall Legis. J. 195, 198 (2019).

For neglect or breach of the duty to procure or renew insurance, the insurance broker or agent may be sued in tort. Lawrence Sager, *Insurance—Negligence—Duty of Broker to His Client*, 38 Temple L.Q. 350, 351 (1965). Across the nation, insurance agents and brokers are increasingly subject to a broad array of claims and expanded liability to policyholders claiming the benefit of intended insurance coverage. Barbara A. O'Donnell, *An Overview of Insurance Agent/Broker Liability*, 25 Brief 34 (Summer 1996).

"An insurance agent or broker who undertakes to procure insurance for another has a duty to use reasonable care to place the requested coverage or to notify prospective insured promptly of a failure to do so." Bethany K. Culp, *The Right Coverage: When an Insurance Agent or Broker Fails to Procure Adequate Insurance*, 21 Brief 14, 15-16 (Fall 1991).

Conclusion

The safe-harbor provision that the Arizona Legislature added to A.R.S. § 20-259.01(A) and (B) is an effort to abrogate a long-recognized tort cause of action for professional negligence that existed before Arizona became a State, throughout its territorial era, and to the present day.

The Arizona Legislature cannot abrogate that established tort cause of action. The purported safe-harbor clause of A.R.S. § 20-259.01(A) and (B) is thus unconstitutional and invalid.

DATED this _____ day of March, 2021.

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