Caveat Broker: Court of Appeals Clarifies Insured's Duty to Read the Policy

By **Norman H. Dachs** And **Jonathan A. Dachs**

In a previous article,[1] we discussed a number of then-recent appellate decisions regarding important issues pertaining to actions against insurance agents or brokers for failure to procure desired and/or requested insurance coverage. We summarized several decisions that set forth and applied well-settled general propositions of law regarding the duties of an insurance agent or broker to its customer/insured, including the important concepts that "[a]n insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so"; "an insurance agent's (or broker's) duty to its customer is generally defined by the nature of the customer's request for coverage"; and "[a]bsent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide or direct a client to obtain additional coverage." See e.g., *Obomsawin v. Bailey, Haskell & LaLonde Agency*, 85 AD3d 1566 (4th Dept. 2011); *Axis Constr. v. O'Brien Agency*, 87 AD3d 1092 (2d Dept. 2011), and cased cited therein.

We also focused, more specifically, on an important issue that we characterized as "somewhat unsettled but soon to be addressed by the Court of Appeals"—the issue of the customer/insured's duty to read the policy, and the effect of that duty upon the agent's or broker's liability for failing to procure requested coverage. The post-Hurricane Sandy increase in potential claims and/or actions against insurance agents or brokers (for failure to procure flood insurance), as well as the fact that the Court of Appeals has recently resolved the conflict among the departments and settled the issue of the effect of the insured's failure to read the policy and complain of its deficiencies make this topic ripe for revisiting at this time.

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More Recent Cases

In *Sawyer v. Rutecki* 92 AD3d 1237 (4th Dept. 2012), lv. to appeal denied, 19 N.Y.3d 804 (2012), an action against the plaintiff's insurance agent for breach of contract, breach of fiduciary duty and negligence premised upon an alleged failure to notify the plaintiffs that the insurance policy for their premises had been cancelled prior to a fire, and a failure to procure new coverage, the court observed that "Although 'insurance agents have a common-law duty to obtain requested coverage for their clients within a reasonable time or inform the client of the inability to do so[,]...they have no continuing duty to advise, guide or direct a client to obtain additional coverage' (*Murphy v. Kuhn*, 90 N.Y.2d 266, 270). 'Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law' (id. at 272). For instance, where a 'special relationship' develops between an agent and the insured, the agent may be held to have assumed duties in addition to merely 'obtain[ing] requested coverage' (id. at 270). Such a special relationship may arise where '(1) the agent receives compensation for consultation apart from payment of the premiums...(2) there was some interaction regarding a question of coverage, with the insured relying on the expertise of the agent...; or (3) there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specially relied on (id. at 272).'"

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The court affirmed the dismissal of the complaint against the agent because there was no proof of any ongoing or special relationship between it and the insured under which the agent would be liable for the insured's failure to replace its coverage. The court also rejected the plaintiff's contention that the agent was negligent in failing to inform it that the policy was canceled. The proof established that the insurer notified the plaintiff by certified mail, and plaintiff did not rebut the presumption of receipt of that notice.

In *Radford v. Ladd's Agency*, 93 AD3d 1354 (4th Dept. 2012), the plaintiff sued her insurance broker under the theories of negligence, breach of contract, negligent misrepresentation and breach of fiduciary duty arising from the agent's alleged failure to procure certain insurance on her behalf. With respect to the negligent misrepresentation claim, the court noted that "it is well settled that 'liability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified' [citations omitted]." There was no proof that the agent possessed any unique or specialized expertise.

With respect to the negligent misrepresentation and breach of fiduciary duty claims, the court found that the agent established that he did not have a special relationship with the plaintiff and did not owe a fiduciary duty to plaintiff [citing, inter alia,

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Sawyer v. Rutecki, supra]. With respect to the remaining claims, the court held that there was no special relationship, and, in any event, the plaintiff did not make a specific request for coverage beyond that which the agent procured for her. Her "general request for [additional] coverage will not satisfy the requirement of a specific request for a certain type of coverage." Finally (and most pertinently), the court concluded that those claims were barred by the plaintiff's receipt of an amended policy prior to the loss.

In *Voss v. The Netherlands Insurance*, 96 AD3d 1543 (4th Dept. 2012), the plaintiffs brought an action against their insurer and insurance broker alleging, inter alia, negligence and breach of contract in connection with business interruption coverage obtained for them by the broker, which they contended was inadequate and had been improperly reduced following two previous losses. The court held that the negligence and breach of contract claims were "defeated as a matter of law" because the subject (renewed) policy was in effect for approximately nine months at the time of the loss and "[p]laintiffs [are] charged with conclusive presumptive knowledge of the terms and limits of [the policy]." Indeed, the court noted that the evidence established that the plaintiff admitted that "she knew that the policy limit had been reduced from $75,000 to $30,000 and that, although she had contacted defendant to question the reduction, she did not hear back from defendant's representative and did not again contact defendant's representatives."

In a dissenting opinion, Justice Edward Carni asserted that it was "incongruous" to conclude simultaneously, as the majority had done, that plaintiff had a "special relationship" with the defendant and relied upon the defendant's expertise and assurance regarding the appropriate level of insurance to protect the corporate plaintiffs in the event of a loss, and that the plaintiff's cause of action was defeated by the conclusive presumption of knowledge of the terms and limits of the policy.

In Carni's view, "if plaintiffs in fact relied upon defendant's expertise and assurance regarding the appropriate level of insurance coverage, 'it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy' [citations omitted]." Interestingly, Carni further observed that "Indeed, the doctrine that an insured is presumed to know the terms and limits of the policy has its genesis in actions against insurers—not agents with whom a special relationship with the insured has been alleged or established (see *Metzger v. Aetna Ins.*, 227 NY 411, 414-417)."

Duty to Read the Policy

As we noted in our previous article on this subject, in *Hoffend & Sons v. Rose & Kiernan*, 7 N.Y.3d 152 (2006), the Court of Appeals rejected an action by a policyholder against its insurance broker for failure to obtain a policy that would have covered its loss, in the absence of proof of a specific request for the coverage in question, and in the absence of proof that the policyholder had a "special relationship" with the broker sufficient to impose upon the broker any additional duties with regard to the procurement of insurance.

The Appellate Division decision in *Hoffend* (19 AD3d 1056 [4th Dept. 2005]), which also dismissed the insured's complaint, was based, at least in part, on the fact that the insured had received the subject policy nine months before the loss, and was, therefore, "charged with 'conclusive presumptive knowledge of the terms and limits of [the policy],' thus defeating [its causes of action for negligence and breach of contract] as a matter of law." The Court of Appeals, however, specifically declined to address the important question of whether, in an action by an insured against a broker for failure to procure proper and necessary insurance coverage, the insured is barred from recovery because, "having received and had an opportunity to read the policy, it requested no changes in it."

Several appellate courts have held that once an insured has received his or her policy, he or she is presumed to have read and understood it and cannot rely on the broker's word that the policy covers what was requested, and, thus, have precluded actions against the agents or brokers. See e.g., *Rotanelli v. Madden*, 172 AD2d 815 (2d Dept. 1991), lv. denied, 79 NY2d 754 (1992); *Rogers v. Urbanke*, 194 AD2d 1024 (3d Dept. 1993); *Madhvani v. Sheehan*, 234 AD2d 652-655 (3d Dept. 1996); *Brownstein v. Travelers Cos.*, 235 AD2d 811 (3d Dept. 1997); *M&E Manufacturing v. Frank H. Reis, Inc.*, 258 AD2d 9 (3d Dept. 1999); *Chase's Cigar Store v. Stam Agency*, 281 AD2d 911, 912 (4th Dept. 2001); *Busker on the Roof v. M.E. Warrington*, 283 AD2d 376 (1st Dept. 2001); *Catalanotto v. Commercial Mutual Ins.*, 285 AD2d 788 (3d Dept. 2001); *Laconte v. Bashwinger Insurance Agency*, 305 AD2d 845 (3d Dept. 2003); *Norotan v. Cohen*, 7 AD3d 288 (1st Dept. 2005); *McGarr v. The Guardian Life Ins. of America*, 19 AD3d 254 (1st Dept. 2005); *Golub v. Tananbaum-Harber Co.*, 88 AD3d 622 (1st Dept. 2011); *Motor Parkway Enterprises v. Lloyd Keith Friedlander Partners*, 89 AD3d 1069 (2d Dept. 2011).

On the other hand, several other appellate courts have been more forgiving and have held that receipt and presumed reading of the policy does not bar an action for negligence against the agent or broker, recognizing exceptions to the general rule of conclusive presumptive knowledge of a policy's terms where, for example, there is an affirmative misrepresentation made by an insurance agent regarding coverage, or a failure by such agent to correct a clear misimpression created by the agent's issuance of a binder or policy. See, e.g., *Kyes v. Northbrook Prop. & Cas. Ins.*, 278 AD2d 736 (3d Dept. 2000); *Reilly v. Progressive Ins.*, 288 AD2d 365 (2d Dept. 2001); *Arthur Glick Truck Sales v. Spadaccia-Ryan-Haas*, 290 AD2d 780 (3d Dept. 2002); *Hersch v. DeWitt Stern Group*, 43 AD3d 644 (1st Dept. 2007); *Page One Auto Sales v. Brown & Brown of New York*, 83 AD3d 1482 (4th Dept. 2011).

In *Baseball Office of the Commissioner v. Marsh & McLennan*, 295 AD2d 73 (1st Dept. 2002), in denying the broker's motion for summary judgment dismissing a negligence action against it, the court stated that "An insured has a right to look to the expertise of its broker with respect to insurance matters. And, it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker. While an insured's failure to read or understand the policy or to comply with its requirements may give rise to a defense of comparative negligence in a malpractice suit against the broker, the insured's conduct does not, as the motion court held, bar such an action." Id. at 82 [internal citations omitted].

> The court in 'Petrocelli' held that the alleged fact that the "plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint" did not constitute a bar to the plaintiff's action.

'Petrocelli': Definitive Word

This brings us to *Petrocelli*.

In *American Building Supply v. Petrocelli Group*, 81 AD3d 531 (1st Dept. 2011), rev'd 19 NY3d 730 (2012), an action alleging that the defendant broker was negligent and in breach of contract based on its failure to procure insurance coverage specifically requested by the plaintiff, the trial court denied the broker's motion for summary judgment because issues of fact existed as to whether the information provided by the plaintiff to the broker should have alerted the broker that the general liability policy it obtained, which contained a particular exclusion, may not have provided the requested coverage. Moreover, the court held that the insured's failure to review the policy procured by the agent did not alter the court's conclusion, citing and relying upon *Baseball*, supra.

On appeal, the broker argued, inter alia, that a plaintiff's failure to fulfill its duty to read the policy coupled with the conclusive presumption of knowledge of the terms and limits of the policy charged to a plaintiff after receipt of the policy, was a complete bar to its causes of action, including negligence and breach of contract,

asserted against insurance agents and/or brokers.

In response, the insured argued, inter alia, that an insured has a right to look to the expertise of its insurance broker with respect to insurance matters, and it is no defense in a malpractice or negligence action for a broker to argue, as an insurer might, that the insured has an obligation to read the policy. Moreover, the insured argued that a presumption that one knows the terms and conditions of the policy does not apply where an insurance agent or broker affirmatively misrepresents or fails to correct a misimpression regarding coverage, or where the customer or client has made a specific request for coverage and assumes that the broker has fulfilled that request.

The First Department agreed with the Supreme Court that issues of fact existed regarding the sufficiency of the insured's request for coverage, but went on to dismiss the claim against the broker because "the presumption that a policyholder read and understood a policy of insurance, duly issued to him or her precludes recovery in this action [citations omitted]." As explained by the First Department, "[A]lthough the presumption may be overcome if there is wrongful conduct on the part of the broker, such as when the broker affirmatively misrepresents or fails to correct a misimpression regarding coverage [citation omitted], there is no evidence of such an affirmative misrepresentation here."

Court of Appeals Decision

Upon the grant of leave to appeal by the Court of Appeals, the high court considered the question of whether "an action for negligence and breach of contract lies against an insurance broker for failure to procure adequate insurance coverage where the insured received the policy without complaint," and held that "where issues of fact exist as to a request for specific coverage, ...the insured can maintain such an action," and, thus, reversed the First Department and denied the broker's motion for summary judgment.

After repeating the general concepts set forth above regarding the limited duty of agents and brokers to obtain requested coverage (see *Murphy v. Kuhn*, supra; *Hoffend & Sons v. Rose & Kiernan*, supra), the Court of Appeals agreed with the courts below that issues of fact existed as to whether the plaintiff specifically requested coverage and whether the defendant, being aware of such request, failed to procure the requested coverage.

The court went on, however, to address the defendant's contention that the plaintiff's claim was barred by its receipt of the insurance policy without complaint—the very issue left open by the court in its earlier *Hoffend* decision. On that critical issue, the court held that the alleged fact that the "plaintiff requested specific coverage and upon receipt of the policy did not read it and lodged no complaint" did not constitute a bar to the plaintiff's action.

As explained by Judge Carmen Beauchamp Ciparick, writing for the majority (over a strong dissent by Judge Eugene Pigott),[2] "While it is certainly the better practice for an insured to read its policy, an insured should have a right to 'look to the expertise of its broker with respect to insurance matters.' [citing *Baseball*, supra, 295 AD2d at 82]. The failure to read the policy, at most, may give rise to a defense of comparative negligence but should not bar, altogether, an action against a broker [citing *Baseball*, supra]."

Conclusion

Thus it appears that brokers will no longer be able to rely, as before, upon summary disposition of the cases against them. Under the *Petrocelli* rule, there will, of necessity, be a factual inquiry into the circumstances surrounding the request for coverage, the reasons for the insured's failure to appreciate the deficiency of the policy, the specifics of the relationship and course of conduct, as well as the communications between the agent/broker and the client, and an apportionment of the relative culpability of the parties—all of which will likely preclude summary judgment in the broker's favor.

Brokers beware.

1. See Dachs, N. and Dachs, J., "Actions Against Insurance Agents or Brokers," NYLJ, March 13, 2012, p.3, col.1.

2. In his dissenting opinion, Pigott wrote: "It seems to me elementary that before you can complain about the contents of any contract, you should at least have read it.... The majority offers no compelling reason why this basic requirement, i.e., that you read the thing, should not obtain in cases involving an insurance broker."