

Outside Counsel

Expert Analysis

Insurance Broker Liability: What Constitutes a ‘Special Relationship’?

By: Robert D. Chesler and Finley T. Harckham

In the wake of a storm such as Sandy, New Jersey law makes it feasible for a policyholder to assert a claim against its insurance broker for damages arising as a result of the broker’s failure to procure flood insurance. Is such an action sustainable in New York?

New York law on broker liability is in transition, but it begins with the well-settled principle that “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.” *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (N.Y. 1997). Courts, however, are examining other duties of brokers that arise when the policyholder requests specific coverage or when the policyholder and broker have a special relationship.

Most recently, the New York Court of Appeals favorably ruled for policyholders in situations where they request specific coverage. In *American Bldg. Supply v. Petrocelli Group*, 19 N.Y.3d 730 (2012), the court held that the



Robert D. Chesler



Finley T. Harckham

policyholder did not have an obligation to read its policy, but could rely on the broker where it had requested specific coverage. The court quoted approvingly from *Baseball Office of the Comm’r v. Marsh & McLennan*, 295 A.D.2d 73 (1st Dept. 2002) that “an insured should have a right to ‘look to the expertise of its broker with respect to insurance matters.’” *American Bldg.*, 19 N.Y.3d at 736 (citing *Baseball*, 295 A.D.2d at 82). The dissent vigorously attacked the majority decision as a departure from established New York law.

New York courts have also suggested that a broker could assume additional duties where it has a special relationship with the policyholder. In *Murphy v. Kuhn*, the Court of Appeals ruled that an insurance broker was not a professional or a fiduciary, and had no duty to advise its client on other available coverages: “[Insurance agents] are not personal financial counselors

and risk managers, approaching guarantor status.” 90 N.Y.2d at 273. The court did recognize, though, that a “special relationship” might exist that would expand the broker’s liability: “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.

Hoffend & Sons v. Rose & Kiernan, 7 N.Y. 3d 152 (N.Y. 2006), reaffirmed *Murphy v. Kuhn*. In *Hoffend*, the policyholder claimed, among other things that it had a special relationship with R&K because R&K “reviewed Hoffend’s operations, provided advice regarding insurance, bonding, banking, contracts and product development, and aided Hoffend in creating its business plan and corporate information statement.” *Id.* at 156. The court did not find a special relationship because “Hoffend, a sophisticated commercial entity, did not compensate R&K for its insurance advice apart from its payment of premiums, nor did it delegate its insurance decision-making responsibility to R&K.” *Id.* at 158.

What constitutes a “special relationship,” therefore, remains a murky issue because New York courts have not

ROBERT D. CHESLER is a shareholder in the Newark, N.J., office of Anderson Kill & Olick. FINLEY T. HARKHAM is a senior shareholder in the New York office of the firm. They can be reached at rchesler@andersonkill.com and fharkham@andersonkill.com. MATTHEW F. PUTORTI, an attorney in the firm’s New York office, contributed to this article.

clearly outlined the elements. The *Murphy* court “refrain[ed] from determining when the special relationship analysis may apply in the insurance context,” 90 N.Y.2d at 273, and *Hoffend* clarified that simply purchasing insurance from the same agent for several years did not create a special relationship.

Other State Courts

Other state courts have addressed the issue of what constitutes a special relationship between the policyholder and the insurance broker, and jurisdictional examples illustrate the different factors that courts consider. *Fitzpatrick v. Hayes*, 57 Cal.App.4th 916 (Cal. Ct. App. 1997), a California appellate case, provides a good summary of the “special relationship”:

[A]s a general proposition, an insurance agent does not have a duty to volunteer to an insured that the latter should procure additional or different insurance coverage.... The rule changes, however, when—but only when—one of the following three things happens: (a) the agent misrepresents the nature, extent or scope of the coverage being offered or provided..., (b) there is a request or inquiry by the insured for a particular type or extent of coverage..., or (c) the agent assumes an additional duty by either express agreement or by “holding himself out” as having expertise in a given field of insurance being sought by the insured.

Id. at 927. In *Zaremba Equip. v. Harco Nat’l Ins.*, 280 Mich.App. 16, 28 (Mich. Ct. App. 2008), a Michigan court states there is a special relationship when:

(1) the agent misrepresents the nature or extent of the coverage offered or provided, (2) an ambiguous request is made that requires a clarification, (3) an inquiry is made that may require advice and the agent, though he need not, gives

advice that is inaccurate, or (4) the agent assumes an additional duty by either express agreement with or promise to the insured.

These factors are similar to the ones used by the Supreme Court of Alaska in *Peter v. Schumacher Enters.*, 22 P.3d 481, 486–87 (Alaska 2001). And in Washington state, there can be a special relationship when “(1) the agent holds himself out as an insurance specialist and receives additional compensation for consulting or advice, or (2) there is a long-standing relationship, some type of interaction on the question of coverage, and the insured relied on the agent’s expertise to the insured’s detriment.” *McClammy v. Cole*, 158 Wash.App. 769, 774 (Wash. Ct. App. 2010).

What constitutes a ‘special relationship’ remains a murky issue because New York courts have not clearly outlined the elements.

Some of these factors that courts use in finding a special relationship are consistent with New York law, such as that a misrepresentation or a failure to purchase specifically requested insurance will expose the broker to liability. The bigger question, though, is under what circumstances does a broker hold itself out as having expertise—thereby possibly establishing one type of special relationship upon which the broker assumes additional duties.

Two Poles in New York

Brokers often take actions that should establish a special relationship. Some policyholders, particularly homeowners, simply go to an insurance broker or agent and request a policy. However, insurance brokers compete for business; when they do

so, they make representations. They do not simply sell the requested policy; rather, brokers promise to examine their clients’ businesses and advise them as to what they need.

The broker’s marketing materials underscore the broker’s particular expertise, which is beyond the expertise of the layperson. In such instances, the broker affirmatively assumes the position of an expert whose job it is to tell the insured what insurance to purchase. Many brokers thus become essentially outsourced risk managers or risk consultants who take it upon themselves to tell their clients what insurance the clients need. And the client is relying on the broker to tell it what insurance to purchase. This creates a special relationship, and once the broker assumes that duty, the broker should be liable if he or she fulfills it negligently.

The two poles of New York broker liability law are clear. If a policyholder specifically asks for flood coverage, the broker is liable if he or she failed to procure it—and the policyholder is not obligated to read its policy. At the same time, if a policyholder solely asks for general coverage, such as a homeowners’ policy, the broker may have no duty to advise its client that it should also buy flood insurance, absent a special relationship. The actions that brokers often take, however, should be understood to constitute a special relationship.