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NY High Court Chips Away At Broker Liability Shield

By **Bibeka Shrestha**

Law360, New York (March 03, 2014, 8:24 PM ET) -- New York's top court last week allowed a lawsuit against an insurance broker to proceed because of a potential “special relationship” between the broker and its client, the latest ruling to gnaw away at protections that brokers have long enjoyed against lawsuits from unhappy policyholders.

The majority of judges on the New York Court of Appeals nixed CH Insurance Brokerage Services' quick victory in a fight with a business owner who claimed the broker had steered her toward a policy with inadequate business interruption coverage.

Policyholders that find themselves with less-than-ideal coverage usually can't hold their insurance brokers liable for negligence in New York, but there are a few exceptions. The majority held last week that the lawsuit against CHI could fall into one of those exceptions because of a potential “special relationship” between the broker and business owner Deborah Voss.

The state high court's decision to revive Voss' lawsuit against CHI caught the attention of attorneys.

“This is the first time that I'm aware of that the Court of Appeals has allowed the issue of the existence of a special relationship between a broker and insured to go to a jury,” said Chris St. Jeanos, a Willkie Farr & Gallagher LLP partner who represents insurance brokers.

Voss claimed she had questioned the level of business interruption coverage provided by the policy the broker had suggested, but the broker had persuaded her it would be enough. The broker also promised to re-evaluate her coverage needs as her businesses grew, which he did not do, according to Voss.

The majority ruled that this could be enough to establish a special relationship that allowed Voss to bring suit, much to the displeasure of three judges who dissented. The dissent said the majority had taken an “unjustifiable” step toward making an agent a sort of back-up insurer, which would be unfair.

Colleen Murphy, the leader of Goldberg Segalla's insurance agents and brokers practice, said last week's ruling was indeed troubling because there didn't appear to be any documentation to back up Voss's allegations against CHI.

Moreover, a business owner is in a better position than an insurance agent to know how much the company would likely lose if it couldn't operate for an extended period, Murphy argued.

“It seems to me that there would be a higher threshold. It would have to be more than alleging just a promise.” Murphy said. “That should not be enough to impose additional duty. It's going to open the floodgates of litigation, and more of these [suits] will go to trial.”

Many policyholders haven't bothered to bring lawsuits against their brokers because of tough requirements under New York law, but the Voss ruling may encourage them to think twice, according to Anderson Kill PC shareholder Robert Chesler.

“It's not a total change, it's an incremental change,” Chesler said. “I think it opens the door enough for people to bring broker malpractice actions, especially in the wake of Sandy.”

The ruling against CHI comes a little more than a year after the New York Court of Appeals held that a policyholder's failure to review insurance coverage does not bar it from suing insurance agents and brokers over insufficient coverage.

The court's November 2012 holding in American Building Supply Corp. v. Petrocelli Group Inc. was expected to invite more businesses and property owners to sue brokers, especially those that have suffered losses from Superstorm Sandy. The Voss decision has now revived worries about a lower threshold for lawsuits against brokers in New York.

“When you look at this case, in combination with American Building Supply, it points to an erosion of what had been a very, very difficult standard,” said Peter Biging, a partner at Goldberg Segalla.

It follows a series of recent rulings in Kansas and other states, where courts have sent to the jury the question of whether a broker has a special relationship with a policyholder or whether the broker has taken on additional duties that created liability, according to St. Jeanos.

“It does appear that the bar has been slightly lowered,” St. Jeanos said.

Still, the Court of Appeals majority emphasized that special relationships in the insurance brokerage context are the exception, not the norm.

“I don't think the court was intending to signal that it's now going to be easier,” St. Jeanos said. "Every one of these determinations is fact-specific.”

But according to Murphy, the Voss ruling could pave the way for other policyholders to argue they have special relationships with their brokers merely because they asked whether the coverage they were taking out was sufficient.

To avoid being targeted in suits, brokers should document their interactions with clients and inform policyholders that they are not providing advice about whether insurance policies provide adequate coverage.

“There's going to have to be some built in disclaimers,” Biging said. “I think that's where we're heading.”

At the same time, brokers will have to do more than just understand and revisit their agreements with clients, according to St. Jeanos.

“It's understanding the impact that their words and conduct may have when they deal with their

clients," St. Jeanos said.

Voss and her businesses were represented by Dirk J. Oudemool.

CH was represented by Thomas Witz of Wilson Elser Moskowitz Edelman & Dicker LLP.

The case is Deborah Voss et al. v. The Netherlands Insurance Co. et al., case number 11, in the New York Court of Appeals

--Editing by Kat Laskowski and Philip Shea.
