AN INTRODUCTION TO AN INSURANCE AGENT/BROKER'S DUTY AND THEIR NOTICE OBLIGATIONS TO THEIR POLICY HOLDER CLIENTS

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I. General Duty of an Insurance Agent/Broker:

New Jersey insurance policies are sold either directly by insurance companies or through middlemen, known as "producers"[1] An insurance "producer" is defined as " a person required to be licensed under the laws of this State to sell, solicit or negotiate insurance."[2] . New Jersey insurance producers are required to be licensed for each type of insurance they intend to sell.[3] Both insurance agents and brokers come within the definition of an insurance producer. An "insurance agent" is a licensed insurance producer authorized, in writing, by an insurance company to act as it's agent. [4] The written contract between the insurer and agent must specify the "duties, responsibilities and limitations of authority" of the agent. [5] In conjunction with the written contract, an insurer must file with the NJ State Insurance Commission a "notice of appointment form" which must contain a list and business address of all of the insurer's agents and include any limitations on the agent's authority.[6]

Both insurance brokers and agents owe a fiduciary duty of care to their policy holder clients.[7] There is no difference between the duty of care owed by an insurance agent or broker to their insured client, namely they are both required to exercise good faith and reasonable skill. The distinction between these two designations is only relevant if a broker or agent is negligent in that it may impact the remedy available to the insured. [8] If an agent is negligent while acting within the scope of his agency relationship with the insurance carrier, his negligence may bind coverage on

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[1] N.J.S.A. 17:22A-27.

[2] N.J.S.A. 22A-28.

[3] N.J.S.A. 17:22A-29

[4] TWBCIII, Inc v. Certain Underwriters at Lloyd's London Subscribing to Policy No. 894, 323 N.J. Super. 60, 65 (App.Div.1999)

[5] N.J.S.A. 17:22A-42a

[6] N.J.S.A. 17 22A-42c.

[7] President v. Jenkins, 357 N.J. Super. 288, 307 (App.Div. 2003) rev'd in part on other grounds, 180 N.J. 550 (2004)

[8] Weinisch v. Sawyer, et al, 123 N.J. 333 (1991); Avery v. Arthur E. Armitage Agency, 242 N.J. Super. 293, 299 (App.Div.1990)

behalf of the insurance carrier.[9] However, if a broker is negligent, the client will not be able to bind the insurance company but instead will be entitled to money damages. Whether the negligence of the agent will bind the insurance carrier is fact sensitive and will depend on what the agent was doing at the time of the negligence, i.e., was he advising/procuring insurance on behalf of his client or acting on behalf of the insurance carrier. To avoid liability for acts of the agent, the insurer must be able to establish it would have not insured the loss had the agent acted properly.[10]

The agent/broker's duty requires them to use reasonable care, skill and judgment in the placement of a policy with a financially stable insurer.[11] Specifically, this duty requires the agent/broker to:

1. procure insurance requested by a client;
2. ensure that the policy they obtain, if available, is neither void nor materially deficient and;
3. supply the coverage that he or she undertook to supply. [12]

The New Jersey Supreme Court set forth the minimum standards applicable to insurance professionals in the case of Bates v. Gambino.[13] The broker in Bates was unaware that he could have bound coverage through a temporary binder 10 days prior to the policy holder's fire loss. An application for fire insurance was submitted by the defendant broker but not approved until after the plaintiff's loss. The appellate division found and the New Jersey Supreme Court agreed that this constituted negligence as a matter of law. The Supreme Court ruled that because the broker's conduct fell below the standard of competence, the plaintiff did not need to present evidence of what similarly situated brokers would have done under the circumstances.[14]

II. Notice Obligation(s) of a New Jersey Insurance Agent/Broker

One part of a agent/broker's duty to exercise the requisite level of skill and diligence as to his/her client is to provide proper notice under certain specific circumstances. In contrast to insurance carriers, the agent/broker's notification obligations are much narrower.

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[9] Regino v. Aetna Cas. & Sur. Co, 200 N.J. Super 94 (App.Div 1985)

[10] Regino, supra. at 94; Mazur v. Selected Risk Ins. Co, 233 N.J. Super 219 (App.Div.1989)

[11] Carter Lincoln-Mercury, 261 N.J.Super at 250.

[12] Rider v. Lynch, 42 N.J. 465 (1964); Bates v. Gambino, 72 N.J. 219, 225 (1977).

[13] 72 N.J. 219, 225 (1977)

[14] Id, at 225

For example, an insurance agent and broker have the obligation to provide an insured notice if they are unable to supply the requested coverage. [15] "The fiduciary relationship gives rise to a duty owed by the broker to the client 'to exercise good faith and reasonable skill in advising insureds'" Aden v. Fortsh, 169 N.J. 64, 79 (2001)(quoting Weinisch, supra., 123 N.J. at 340).

Liability for failure to advise an insurance client of the lack of available coverage is demonstrated in DiMarino v. Wishkin, 195 N.J. Super. 390 (App.Div. 1984). In DiMarino, the appellate division determined that an insurance broker was liable for his client's damages where the client requested and the broker agreed to obtain insurance but the broker failed to procure the insurance and did not inform the client of the failure. Defendant/third party plaintiff, Wishkin, operated a laundromat. The third party defendant Katz was an insurance agent and had been obtaining liability insurance for Wishkin since 1970. In November 1978 Wishkin's insurance company was taken over by the Superintendent of Insurance of the State of New York and all policies, including Wishkin's, were cancelled effective December 13, 1978. Katz received notice of this event on November 27, 1978.

The plaintiff's accident occurred January 19, 1979. Prior to the accident, Wishkin's wife discussed with Katz the cancellation of the liability policy and requested that he obtain a replacement policy. Katz failed to obtain the policy and advised the Wishkins that the coverage was difficult to obtain because it was not part of a "broader coverage package". [16] Katz never, however, advised the Wishkins that he did not obtain the requested coverage.

The Appellate Court held that under these circumstances Katz was liable as a matter of law for not advising his client that he was unable to obtain the requested coverage. The Court agreed with the Wishkins that expert testimony was unnecessary to establish the broker's breach of his duty since Katz' actions were such that they failed to meet the minimum standard for insurance brokers as set forth in Bates, supra.

The importance of the broker keeping his client informed and the negative consequences of not doing so is evident in the Dimarino case. Had the defendant broker merely informed the Wishkins that he was unable to obtain the requested coverage on a timely basis he clearly would not have been found to have committed any act of malpractice.

A. Special relationship between an insured and agent/broker resulting in enhanced duty of care

In determining whether an agent/broker had a duty to notify a client of information

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[15] Weinisch v. Sawyer, 123 N.J. 333, 340 (1991)(citing Sobotor v. Prudential Prop.& Cas. Co., 200 N.J. Super 333, 337-41(App.Div. 1984))

[16] Id. at 393

related to their insurance coverage, the court's analysis will focus on prior dealings between the agent/broker and the insured and whether the agent/broker invited reliance on behalf of the insured. Generally, neither an insurance carrier nor its agent has a duty to give notice to a policy holder of the cancellation of an insurance policy without explicit statutory, regulatory or a contract provision that requires same. [17] However, if a agent/broker has assumed duties above and beyond those normally associated with this role, this prior conduct may enlarge the duty owed to an insured beyond those normally associated with an insurance agent/broker. As a result, agents/brokers who have provided additional notice to an insured of a pending premium, expiration date of a policy and of cancellation have found themselves to be viable defendants in cases where such notice was not provided and the insured incurred an uncovered loss.

For instance, if the insurance carrier provides its insured with a notice of premium and the deadline by which said premium must be received, the broker may be liable for a lapse in coverage if the broker had a prior practice of reminding the insured of the pending expiration of the grace period for payment of the policy's premium.[18] The plaintiff in Glezerman acknowledged receiving notice of an outstanding life insurance premium (which included the due date, the amount of the outstanding premium and the expiration of the grace period during which payment could be made after the due date and the policy would be reinstated) for her husband's life insurance policy from Columbian Mutual Life Insurance Company via CMS Companies, the firm that serviced the policy. She received this notice in the spring of 1986, prior to her husbands death on September 14, 1988. Glezerman's broker, Spivak, had handled all of the Glezerman's insurance needs for the 20 years prior to Mr. Glezerman's death. Because the premium involved a large sum of money, CMS, Spivak and the Glezermans had a procedure in place whereby CMS would notify Mrs. Glezerman of the grace period so that the premium could be paid at the last minute. CMS would monitor Glezerman's premium payments. Spivak and CMS were closely associated in that Spivak authored letters on CMS letterhead, Spivak shared staff with CMS and his office was in the same building as CMS. Mrs. Glezerman thought Spivak was a partner with CMS.

Spivak contacted Mrs. Glezerman close in time to her receipt of the premium notice in the spring of 1986 and advised her not to worry about the payment since she still had time to pay it. There were no additional communications between Glezerman and Spivak prior to the lapse of the policy. CMS and Spivak received notice of the lapse of the Glezerman policy, however, no action was taken after receiving this notice. The notice included notice of a late payment offer which would have allowed reinstatement of the policy.

In a summary judgment motion, Spivak argued that he did not breach his duty of care

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[17] President v. Jenkins, 357 N.J.Super. 288, 312 (App.Div.2003), *rev'd in part on other grounds,* 180 N.J. 550 (2004)

[18] Glezerman v. Columbian, et al, 944 F.2d 146 (3rd Cir.1991)

based on the fact that the Glezermans acknowledged receiving a premium notice from the insurance company which advised them when the premium was due. The third circuit did not find this fact dispositive and instead looked at the nature of the relationship between the Glezermans and Spivak . In doing so, they found that there was an issue of fact that precluded summary judgment due to the past agent-insured relationship between Spivak and the Glezermans. Specifically, Mrs. Glezerman had established evidence of a "special relationship" with Spivak whereby his prior conduct may have created a broader duty of care on behalf of Spivak. They concluded that the district court erred when it concluded that even if Spivak had a practice of reminding Mrs. Glezerman about the expiration of the grace period, that Spivak had no legal duty to provide such a reminder. To the contrary, the third circuit concluded that it was precisely Spivak's prior custom of providing a reminder of the pending expiration of the grace period that supported a finding of a legal duty to provide continued notice by the broker. [19]

B. How will the New Jersey Court decide whether a "special relationship" exists between the insured and agent/broker and therefore find a higher duty of care

In determining whether a "special relationship" exists between an agent/broker and their client and therefore an enhanced duty of care, the New Jersey courts have stated that this is a very fact specific analysis and that they will decide each case on "its own peculiar facts."[20] The court will analyze the relationship between the insurance broker and client to see if the broker's conduct invited reliance or if the client's conduct exhibited or justified a claim of reliance. Clearly, if a broker sets up a pattern and practice of reminding his client of pending expiration of a policy and then fails to do so, the court will find that the broker had an heightened duty of care to the insured. Likewise, I believe the court will reach a similar conclusion if the broker has a history of providing similar "reminders" concerning other key dates/events involving their insurance coverage.

C. Documentation recommendations for the insurance agent/broker

When an agent/broker is confronted with a client that rejects their recommendations regarding the type or amount of coverage, the agent should memorialize their recommendations in writing. In this way, the agent/broker remedies any possible misunderstanding on behalf of an insured and protects themselves in case of a loss that is not adequately covered by the coverage requested.

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[19] An insured client's claim of a "special relationship" and negligence based on same by an insurance broker will not require an affidavit of merit nor expert testimony. Triarsi v. BSC Group Services, LLC, 422 N.J.Super. 104, 116 (App.Div. 2011)

[20] Sobotor v. Prudential Property & Casualty Ins. Co, 200 N.J. Super. 333, 338 (App.Div.1984)

Moreover, in case of a loss, the insurance agent/broker must be able to prove that they provided notice to their client of available coverage and confirmation of the client's decision to decline the agent/broker's recommendation(s). The insurance professional cannot merely rely on telephone conversations or other informal means of communication. Therefore, any time the insured declines the recommendations of the agent/broker they would be wise to document their recommendations with the insured. These circumstances can arise when the insured requests less or inadequate coverage as was the case in Aden v. Fortsh, supra., or the client rejects a recommendation to increase coverage or change coverage due to changes in the needs of the client. Ideally, you should have acknowledgment from the insured of your recommendations and that the insured is declining your advice.

In a case in which a confirming letter to the insured would have reduced if not eliminated any cause of action against the broker is Lancos v. Silverman. In Lancos, the broker neglected to document in correspondence to the insured the changes to their coverage for a beach front property as not including personal liability coverage. The broker testified that it was her practice to have discussed this change with the insured, however, her file did not contain any proof of same. Further, the broker testified that it would have been her practice to give the insured their options in order to maintain the necessary coverage on the property. Additionally, that her recommendation would have been to merely extend the homeowners coverage on their personal residence to the beach property for minimal cost. Although the yearly application completed and signed by the insured warned them of the limitations of coverage provided, the insureds testified that they did not read the application. Although the agents were successful at trial, arguably litigation could have been avoided had the broker verbally explained the coverage provided under the FAIR plan and confirmed this conversation in writing with acknowledgment of same from the insured.

D. Availability of the defense of comparative negligence to the agent/broker

An agent/broker can not successfully assert that notice of the content of an insurance policy, however deficient or inconsistent with the requests of the insured, is provided by merely providing a copy of the policy to the client. [21]. In Aden, the plaintiff asserted that after purchasing a condominium in 1994, he contacted Robert Fortsh, his insurance agent since 1979 and requested he obtain a policy that would cover losses associated with the condominium. Aden and Fortsh disputed the content of the discussion with Fortsh asserting that Aden requested a minimal policy and that Aden rejected a policy with a premium of $120.00 as too expensive. Thereafter Fortsh obtained a quote for a less expensive policy from Hartford Insurance that required a premium of $98.00. Fortsh claimed that he advised Aden to check with the condominium association to ensure that any loss not covered under the Hartford policy would be covered by the association's policy.

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21 Aden v. Fortsh, 19 NJ 64 (2001)

In June, 1996, Aden's condominium was damaged by a fire and although damage to the exterior was covered under the condominium policy, only $1,000 of the interior damage was covered under the Hartford policy. Aden was therefore required to pay $20,000 for interior damage not covered under the policy procured by Fortsh. Aden sued Fortsh for the uncovered damages and was awarded $18,566.00 in damages by the jury. On appeal, the Appellate Division reversed and concluded that the trial court had erred by not instructing the jury on Aden's comparative negligence in failing to read their policy (and thereby discover the amount of coverage provided under the policy).

The New Jersey Supreme Court granted certification and overturned the Appellate Division's ruling in this regard. Specifically, they held that comparative negligence is not an available defense to a broker who alleges that the insured client should have read the policy and detected the broker's negligence. "It is the broker, not the insured, who is the expert and the client is entitled to rely on that professional's expertise in faithfully performing the very job he or she was hired to do."[22] Accordingly, although keeping a client informed about available coverage is an important and integral aspect of an agent/broker's responsibility, it can not be used by the agent/broker as a defense when deficient coverage is allegedly obtained.

The notice obligations of an insurance professional are narrower and more limited than that of the insurance carrier. An agent/broker does not have a duty to notify the insured of the cancellation, non-renewal or of the insured's outstanding premium without evidence of a prior practice or custom of the agent/broker. The duty to provide such notice lies exclusively with the insurer. Moreover, in the context of fire insurance, the New Jersey Appellate Division squarely rejected an insurance carrier's attempt to argue that the agent/broker shared in the insurer's duty to notify the insured of the carrier's intent to not renew the insured's policy and characterized the insurance carrier's duty to be non-delegable.[23] .

Attempts by insurance carriers or insureds to assert malpractice claims against an agent/broker for failure to provide notice of a pending cancellation, non-renewal, outstanding premium, etc, should be unsuccessful absent evidence of a "special relationship" between the insurance professional and client. That is, did the agent/broker's acts invite reliance by the client so as to impose a heightened standard of care on the agent/broker. If not, the insurance professional's notice obligations lie strictly in keeping the client apprised of the available insurance options/ limitations regarding same and obtaining the requested coverage on a timely basis from a viable insurance company. The New Jersey courts have made it clear that attempts to shift the burden to insurance agents/brokers from insurance companies

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22 Id. at 69

23 See e.g. Barbara v. Maneely, 197 N.J. Super. 339, (the Court determined that the insurer has the exclusive duty to notify an insured regarding carriers decision to not renew a fire insurance policy pursuant to N.J.S.A. 17:29C-1.)

to provide notice of cancellation/nonrenewal, outstanding premium will be rejected.

Accordingly, agents/brokers should be cognizant that providing "reminders" of such events will potentially expose them to liability.

Lisa A. Green has been associated with the firm since 2004. Before concentrating in insurance defense litigation, she served as a law clerk with the Office of Administrative Law and as an Assistant District Attorney in Monroe County, Pennsylvania. While at the Monroe County District Attorney's Office, Ms. Green tried many cases to verdict including major felony and misdemeanor cases. Ms. Green also supervised the investigation of child sexual assault cases and provided domestic violence training to the police.