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Clarity Over Insurance Broker Liability Comes To NY, NJ

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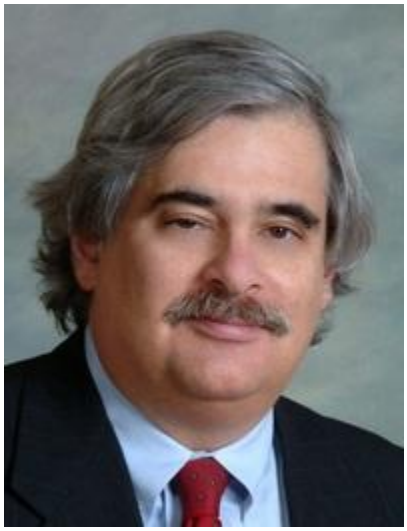

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New York and New Jersey law have taken different approaches when determining broker liability. New Jersey law has proven more protective of policyholders when they use brokers to purchase insurance.

New Jersey law broadly protects policyholders against errors by their insurance agents and brokers and also provides considerable scope for findings of broker liability. In Aden v. Fortsh, the Supreme Court of New Jersey held that a policyholder need not even read its insurance policy, but rather can rely upon its broker. 169 N.J. 64 (1999). Importantly, the court also held that an insurance broker is in a fiduciary relationship with a policyholder.

After Aden, however, New Jersey courts were quiet on issues of broker liability until recently, when two Appellate Division decisions revisited the issue of broker liability and provided additional guidance to brokers on the obligations they owe policyholders. See Huggins v. Liberty Mut. Ins. Co., No. A-1187, 2014 N.J. Super. Unpub. LEXIS 1102 (N.J. App. Div. May 14, 2014); Duffy v. Certain Underwriters at Lloyds of London, No. A-5797, 2014 N.J. Super. Unpub. LEXIS 1789 (N. J. App. Div. July 21, 2014).

In Huggins, the homeowner requested from the sales agent the most inclusive coverage available. The homeowner testified that she wanted "all beneficial coverage options" and advised the agent that the house had a sump pump. The policy that Liberty Mutualultimately sold did not provide sump pump coverage, although such coverage was available by endorsement. The following year, the policyholder's sump pump failed, resulting in a $35,000 loss.

The homeowner sued Liberty Mutual not for coverage, but for failure to advise them of the availability of sump pump coverage. Liberty Mutual's sales agent testified that the homeowner had been offered such an endorsement, but had decided not to purchase sump pump coverage. While the agent claimed he had taken notes regarding this discussion, on his initial interview questionnaire he testified that he had lost those notes. Liberty Mutual prevailed on summary judgment, but the appellate division reversed. The appellate division found that "[t]here [wa]s no dispute that [the homeowner] did not specifically ask for the sump pump option, but there [wa]s a factual dispute as to whether it was offered" to the homeowner. Huggins, 2014 N.J. Super. Unpub. LEXIS 1102 at *4.

Huggins heightened the burden on agents and brokers in New Jersey when offering and issuing insurance policies. The Huggins decision is rooted in the homeowner's request for "the most inclusive" coverage available. Similarly, it is not unusual for an agent or broker to offer, for example, to examine a policyholder's operations and risks and advise the policyholder regarding what insurance coverage the policyholder should purchase. Such commitments by agents or brokers in effect make them risk managers, who must be knowledgeable of all a policyholder's risks and the insurance remedies that are needed and available.

If Huggins enlarged an agent's and broker's duty in some circumstances, Duffy narrowed it in others. In Duffy, the policyholder changed brokers and insisted that the new broker issue a policy that would not increase the policyholder's premium. The policyholder gave information during the insurance application process, but much of the information was inaccurate. That issued policy offered coverage in the amount of $150,000, yet when the policyholder's house burnt down, the damage was valued at $460,000. The policyholders sued the broker for professional negligence as a result of procuring inadequate insurance coverage, but both the trial court and the appellate division negated the claim. The appellate division reasoned that the amount of insurance coverage was "clearly and prominently stated and easily understood. Were plaintiff dissatisfied with the extent of coverage, an opportunity to raise such concerns presented itself with each annual renewal." Duffy, 2014 N.J. Super. Unpub. LEXIS 1789, at * 18-19. The trial court granted the broker's summary judgment motion and the appellate division affirmed. The appellate division explained, "[T]he facts reflect [the policyholder's] desire to obtain a level of homeowner's coverage that was consistent with her expired ... policy; she did not desire modifications that would raise her premium[.]" Id. at *21.

Both Huggins and Duffy offer lessons for policyholders, brokers and agents. Policyholders should seek the broadest coverage possible and look to hold their brokers liable should it turn out that the broker or agent failed to provide the coverage that was promised. Policyholders should confirm in writing that they are seeking the broadest or most comprehensive coverage. For their part, insurance brokers and agents need to listen to policyholders and offer the requested coverage. In order to better protect their interests, brokers and agents also need to keep detailed records to demonstrate that they offered coverage options in accordance with their customers' needs. Company checklists and proper filing of records are essential tools in this regard.

The law in New York is more favorable to insurance brokers. In Murphy v. Kuhn, the New York Court of Appeals held that a broker was not a "professional" in that a special relationship does not automatically exist between an agent and his or her clients. 90 N.Y.2d 266 (1997). Under New York law, an agent has "no continuing duty to advise, guide or direct a client to obtain additional coverage." Id. at 270. The court noted that there are exceptions or "particularized situations [which] may arise in which insurance agents, through their conduct or by express or implied contract ... may assume or acquire duties." Id. at 272.

The court identified three exceptional situations that have been identified by other jurisdictions where a special relationship may arise: (1) the agent is separately compensated for consulted and premium payments; (2) dialogue in which the policyholder relies on the agent's expertise; and (3) where there is an ongoing course of dealing over an extended period of time making a reasonable agent aware that their advice was being sought and relied upon. Id. Still, the court did not outline what elements should be considered in determining whether or not a special relationship exists.

New York courts have since elaborated on what scenarios may create a special relationship between a

client and his or her broker. Voss v. Netherlands Insurance Company, 22 N.Y.3d 728 (2014). In Voss, plaintiff provided her broker with sales figures and other information so that he could calculate the necessary business interruption coverage that she required. The broker promised his client he would monitor the policyholder's insurance needs each year as plaintiff's businesses grew. In fact, plaintiff questioned her broker about the limits he suggested — which ultimately proved to be extremely low and inadequate — but was assured that each year the limits would be revisited as plaintiff's businesses evolved. Plaintiff brought an action against her broker, claiming that a special relationship existed between her and the brokerage company and that the company negligently secured inadequate business interruption insurance. The brokerage company moved to dismiss the complaint alleging, in part, that no special relationship existed between the broker and plaintiff. By a 4-3 vote, the court denied the motion finding that whether a special relationship existed could not be decided on summary judgment.

Regardless of the distinctions under New York and New Jersey insurance broker liability law, Huggins specifically underscores the best broker and agent risk management device — keep records. Write down what coverage was offered, and what coverage the policyholder refused.

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