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Expert Analysis

Insurance Broker Liability: A Tale of Two States

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New York and New Jersey courts have adopted radically different approaches to the liability of insurance brokers to their customers. In New York, a broker is a salesperson who, in the absence of a special relationship, has no obligation to the customer except to sell it the insurance product that the customer requests. *Murphy v. Kuhn*, 90 N.Y.2d 266, 273 (N.Y. 1997). The special relationship is the exception to the rule—and no reported New York case has ever found a special relationship. The closest that a court ever came was *Voss v. Neth Ins. Co.*, 22 N.Y.3d 728 (N.Y. 2014), where the New York Court of Appeals reversed the lower court's grant of summary judgment to the insurance broker on the question of whether there was a special relationship. 22 N.Y.3d at 735.

New Jersey has taken the opposite path, holding that an insurance broker is a fiduciary with a heightened duty to its customer. *Aden v. Fortsh*, 169 N.J. 64, 78 (N.J. 2001). Following *Aden*, numerous New Jersey decisions have held brokers to be liable in a wide variety of circumstances.

The recently decided case of *Holborn Corporation v. Sawgrass Mut. Ins. Co.*, No. 16-cv-09147 (AJN), 2018 U.S. Dist. LEXIS 7848 (S.D.N.Y. Jan. 17, 2018) involved facts which seemingly could lead a court to find a special relationship. *Holborn* concerned an insurance company as the customer and a reinsurance broker. Sawgrass alleged that Holborn had acted negligently and breached its fiduciary duty because it did not recommend a specific type of reinsurance. Specifically, Sawgrass alleged that Holborn stated that it would "design a specific reinsurance program custom tailored to Sawgrass' unique business needs;" that the relationship between the companies was one of "trust and confidence;" that Holborn made "a series of representations concerning its expertise," similar to the representations on Holborn's website; that Holborn recommended a reinsurance policy "that it represented was the most advantageous for Sawgrass;" and that Sawgrass "relied on Holborn's analysis and recommendations." Id. at *3-5.

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Thus, Sawgrass essentially alleged in its complaint against

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Holborn that Holborn represented that it would use its expertise to craft a unique and advantageous insurance program for Sawgrass. This was not a case where a consumer went to an insurance agent and asked for an auto policy.

Yet the court dismissed the complaint on the pleadings, finding no special relationship between Holborn and Sawgrass. The court reasoned that every insurance customer wants "the most advantageous policy," and that a "discussion generally about what policy will be the most advantageous does not suggest that the Plaintiff enjoyed anything other than an ordinary consumer-agent insurance relationship." Id. at *30. If Sawgrass' reliance on Holborn's expertise to create a unique insurance product does not qualify as a special relationship on the pleadings, it is difficult to know what would.

The facts of *Holborn* make for an interesting comparison with those alleged in a complaint just filed in New Jersey state court in *Avenel Pharmacy & Surgical v. Colonial Insurance Management* (N.J. Sup. Ct. Law Div. Middlesex Cnty. March 12, 2018). The complaint begins with a quote from the insurance broker's website: "We will help you manage and plan for all your potential risks. As professionals, we assess your needs and offer you a variety of insurance products to choose from." Id. at ¶8.

The basic facts of *Avenel* are straightforward. The complaint alleges that Colonial was required to possess reasonable knowledge of insurance policies and terms of coverage available to Avenel, and "had an obligation to procure the necessary insurance for the Plaintiff or to advise Plaintiff of any inability to do so." Id. at ¶¶39-40. The complaint alleges that the broker had the affirmative duty to identify the appropriate insurance for its customer. Id. at ¶42. The broker failed to provide Avenel with Employment Practices Liability Insurance (EPLI), and a former employee filed an employment complaint against Avenel. Id. at ¶¶20-29.

Nothing in the *Avenel* complaint suggests a special relationship or a basis for a court to find the broker liable under New York law. Under New Jersey law, however, *Avenel* presents a colorable claim. New Jersey courts take seriously an insurance broker's representation that it will provide the "necessary" coverage for a business. Fact issues will arise over just what the broker said. Other fact issues will arise that may require expert testimony, such as: Is EPLI a necessary coverage, especially for a very small business? Would the business have paid extra for such coverage? Regardless, there is little doubt that *Avenel* presents a claim that will survive a motion to dismiss before a New Jersey court.

The difference between New York and New Jersey law is significant when it comes to broker liability. Both policyholders and brokers in these states should be aware of these differences. In New York, policyholders relying on a broker for insurance advice should be aware of the stringent requirements that must be met in order for there to be a special relationship warranting broker liability. In New Jersey, brokers must take precaution not to over-promise what the broker can deliver. The law on broker liability is ever evolving, but policyholders and brokers in New York and New Jersey should be aware of the contours of liability in those states so that they can protect their interests and control risk accordingly.

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