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Are Insurance Brokers Professionals?

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Are Insurance Brokers Professionals?

The Latest Word: 'Hoffend'

The Court of Appeals, on June 8, 2006, took occasion to explain the duties of insurance brokers in *Hoffend & Sons, Inc. v. Rose & Kiernan*, 2006 NY Slip Op. 04453, 2006 WL 1547708. In *Hoffend*, the Court of Appeals reaffirmed a line of earlier cases outlining the limited duties of insurance brokers and explained that brokers have no ongoing duty to advise their customers about insurance coverage. Rather, insurance brokers are only obligated to obtain the insurance coverage explicitly requested by their customers. In *Hoffend*, the customer was a theater design contractor with an international practice. The customer obtained, through its longstanding insurance relationships, coverage for foreign projects. The trial court granted summary judgment for the defendant. On appeal, the Court of Appeals held that the broker was only required to obtain the insurance specifically requested by the customer. The Court rejected the contractor’s claims because the customer’s “recollection of events was vague at best,” and because he “did not identify specific coverage obtained for any individual project....”

In light of the broker’s advice that foreign coverage should be negotiated on a case-by-case basis, the customer’s assertions as to what occurred at later meetings “are too vague to establish a specific request for coverage of the particular risk involved. His recollection that ‘we are covered’ is insufficient to impose liability on [the insurance broker].” Moreover, the customer’s chief financial officer undermined the president’s affidavit by admitting that he told the broker that his company would only be supplying the South American project and would not be actually performing services overseas. Since the customer was unable to establish that there had been a specific request for coverage, the Court affirmed the grant of summary judgment in favor of the insurance broker.

‘Chase’ and ‘Murphy’

The *Hoffend* decision follows earlier precedents which had held that an insurance broker is not a professional and cannot be sued for malpractice. The Court of Appeals, in *Chase Scientific Research v. NIA Group*, 96 NY2d 20 (2001), held that insurance brokers and agents are not professionals within the meaning of the three-year statute of limitations for malpractice in Civil Practice Law and Rules (CPLR) 214 (6). The Court of Appeals wrote that a profession is characterized by “extensive formal learning and training, licensure and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards.” Insurance agents and brokers, while subject to licensing requirements, are not subject to extensive training, and do not occupy a position of “trust and confidence,” one of the other hallmarks of a professional relationship.4

The leading discussion of the duties of insurance brokers is in *Murphy v. Kuhn*, 90 NY2d 266 (1997). In that case there was a longstanding relationship of 18 years between the policyholder and his insurance broker, who handled all of the customer’s insurance needs. The policyholder held substantial assets, including an interest in a country club. He also had a teenage son, who owned a car. The insurance broker, acting at the customer’s instructions, transferred title and insurance of the teenager’s car to the customer’s personal assets. The customer sued the insurance broker, claiming negligence because the car was underinsured.
In affirming a decision granting summary judgment in favor of the insurance broker, the Court of Appeals stated, in broad, sweeping language, that there was no duty on the part of the insurance broker to anticipate the customer's needs. Rather, the Court wrote: "Generally, the law is reasonably settled on initial principles 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; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage."

The Court of Appeals further noted that insurance agents "are not personal financial counselors, and risk managers, approaching guarantor status. Insureds are in a better position to know their personal assets and abilities to protect themselves more so than general insurance agents or brokers, unless the latter are informed and asked to advise and act."

Thus, the Court, in essence, held that an insurance broker, absent special relationship, not present on the facts of that case, ordinarily has no duty to volunteer advice to a customer about insurance coverage. Rather, the broker's duties are essentially limited to filling the customer's order. However, the Court suggested that additional duties might be imposed where the broker changed an advisory fee, or otherwise assumed a duty to give advice to the customer about insurance coverage.

Other decisions have accepted the principle that an insurance broker is obligated to obtain the specific insurance requested by an insured, but is not obligated to explain or give advice about coverage. In Brownstein v. Travelers Companies, 235 AD2d 811 (3rd Dept. 1997), the plaintiff homeowner specifically requested a homeowner's policy for his second home. The broker obtained a "home-saver policy," which covered a variety of perils, but not a flood due to burst pipes. Since this policy was designed for vacation homes, there was an exclusion for floods caused by burst pipes. When precisely that loss occurred, the claim was denied by the carrier. The plaintiff homeowner sued his insurance agency, that the type of insurance that it would procure for a seasonal or secondary residence would be a multiperil policy. With no evidence that Brownstein was specific in his request to insure against this type of loss or that there was a failure to procure specifically requested insurance, we find that plaintiffs failed to raise a triable issue of fact.

In other words, the court held that the onus is on the insured to make a specific request for a particular type of insurance.

In ‘Hoffend,’ the Court of Appeals outlined the limited duties of insurance brokers and said brokers have no duty to advise customers about coverage. Rather, brokers are only obligated to obtain the coverage requested by their customers.

### ‘Baseball v. Marsh’

The insurance broker was caught off base in Baseball Office of the Commissioner v. Marsh & McLennan, 295 AD2d 73 (1st Dept. 2002). In that case, the customer was Major League Baseball, the National Pastime itself. A spurned candidate for ownership of a major league baseball team brought a defamation case against MLB over some incendiary remarks about the former's lack of fitness to own the team.

The insurance broker, Marsh & McLennan, had previously obtained liability insurance covering defamation claims, but then the carrier subsequently called and wrote the broker to exclude that coverage, giving the broker 60 days in which to obtain replacement coverage for defamation claims. The broker dropped the ball, so to speak, by failing to notify Baseball of the new exclusion, or to take any action to obtain new coverage. The broker admitted that, "It was something I had intended to get but didn't."

As a result, the customer was left without liability insurance to protect it from the pending defamation suit. Compounding the error, the broker wrote a letter to her customer inaccurately representing that, "We have checked the policies for accuracy and have found everything to be in order."

The carrier denied coverage on two grounds: The defamation claim was excluded from the policy, and Baseball delayed two years in notifying the carrier of the claim. While things looked bleak for Marsh, it nonetheless won summary judgment in the trial court on a causation argument. Marsh argued, and the trial court determined, that the customer was responsible for delaying two years to notify the carrier of the claim. Since the carrier received late notice, the claim would have been denied anyway.

The Appellate Division, crying foul, reversed in extra innings and remanded the case for a jury trial. The First Department determined that the trial judge improperly resolved credibility issues at a nonjury evidentiary hearing held to determine the broker's causation defense. In addition, the Appellate Division, quoting Murphy, held that there was a fact dispute as to the broker's duty to the policyholder: "A broker who agrees to place insurance for a customer must exercise reasonable diligence to do so and if unable to make such a placement must timely notify the customer to afford the opportunity to procure the insurance elsewhere."

Moreover, Marsh had a duty to advise Baseball of the need to give notice to its carrier: "An insured has a right to look to the expertise of its broker with respect to insurance matters."

The insured, the court noted, is entitled to expect some advice from its broker in exchange for the premiums it pays.

### Conclusion

As discussed, the courts have tended narrowly to interpret the duties of insurance brokers to their customers, particularly in the commercial field. Insurance brokers are not professionals, and do not have the specialized education and training, or relationship of trust, that distinguish doctors and lawyers.

The courts have further held that insurance brokers have no ongoing duty, absent request, to advise their customers with respect to coverage. Rather, the broker is obligated to obtain the specific insurance requested by the customer.

However, the Baseball case can be read to impose a duty on brokers to advise their customers about giving notice to their carriers, and some of the language in that decision is broader still. On the other hand, it may ultimately prove to be that case that Baseball has limited precedential value, given the unique prestige of the customer, the egregious and admitted negligence of the broker, and the Court of Appeals’ subsequent ruling in Hoffend.

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2. 96 NY2d at 29.
3. 96 NY2d at 29.
4. 90 NY2d at 270 (citations omitted).
5. 90 NY2d at 273 (citations omitted).
6. 235 AD2d at 813 (citations omitted).
7. 295 AD2d at 79.
8. 295 AD2d at 75.
9. 295 AD2d at 79-80.
10. 295 AD2d at 81.

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