Actions Against Insurance Agents or Brokers

By **Norman H. Dachs** | And **Jonathan A. Dachs**

Several recent appellate decisions have dealt with important issues pertaining to actions against insurance agents or brokers. We summarize below those recent decisions that set forth and apply well-settled general propositions of law regarding the duties of an insurance agent or broker to its customer/insured, and then focus specifically on an issue that appears to be somewhat unsettled, but is soon to be addressed by the Court of Appeals—the issue of the customer/insured's duty to read the policy and its effect upon the agent's or broker's liability for failing to procure requested coverage.

Agent/Broker's Duty

In *Obomsawin v. Bailey, Haskell & Lalonde Agency Inc.*, 85 A.D.3d 1566 (4th Dept. 2011), the court noted that "'[A]n insurance agent's duty to its customer is generally defined by the nature of the customer's request for coverage' (*M&E Mfg. Co. v. Frank H. Reis Inc.*, 258 A.D.2d 9, 11 (1999); see *Madhvani v. Sheehan*, 234 A.D.2d 652, 654 (1996))." As the Second Department explained in *Axis Constr. Corp. v. O'Brien Agency Inc.*, 87 A.D.3d 1092 (2d Dept. 2011), "An insurance agent or broker has a common-law duty to obtain requested coverage for a client within a reasonable amount of time or to inform the client of the inability to do so (see *Hoffend & Sons Inc v. Rose & Kiernan Inc.*, 7 N.Y.2d 152, 157 (2006); *Murphy v. Kuhn*, 90 N.Y.2d 266, 270 (1997); *Core-Mark Intl. v. Swett & Crawford Inc.*, 71 A.D.3d 1072 (2010); *Verbert v. Garcia*, 63 A.D.3d 1149 (2009)."

In both *Obomsawin*, supra, and *Axis Constr. Corp.*, supra, the courts observed that "Absent a specific request for coverage not already in a client's policy or the existence of a special relationship with the client, an insurance agent or broker has no continuing duty to advise, guide or direct a client to obtain additional coverage [citations omitted]." And, in *Axis Constr. Corp.*, supra, the court further noted that "A special relationship which gives rise to a duty to advise may exist, inter alia, where 'there is a course of dealing over an extended period of time which would have put objectively reasonable insurance agents on notice that their advice was being sought and specifically relied on' (*Murphy v. Kuhn*, 90 N.Y.2d at 272)." See also, *Golub v. Tanenbaum-Harber Co. Inc.*, 88 A.D.3d 622 (1st Dept. 2011).

> Several courts have recognized exceptions to the general rule of conclusive presumptive knowledge of a policy's terms.

In *148 Magnolia, LLC v. Merrimack Mutual Fire Ins. Co.*, 81 A.D.3d 572 (1st Dept. 2011), an action against an insurance broker for failure to obtain adequate and appropriate insurance coverage, the court held that issues of fact as to whether the defendant broker breached its duty to plaintiffs were raised by plaintiffs' witnesses' testimony that the defendant was aware of their intention to renovate the subject premises and that they relied on the defendant's expertise as an insurance broker to obtain the appropriate policy.

Duty to Read the Policy

In *Hoffend & Sons Inc. v. Rose & Kiernan Inc.*, 7 N.Y.3d 152 (2006), the Court of Appeals rejected an action by a policyholder against its insurance broker for failure to obtain a policy that would have covered its loss, in the absence of proof of a specific request for the coverage in question, and in the absence of proof that the policyholder had a "special relationship" with the broker sufficient to impose upon the broker any additional duties with regard to the procurement of insurance.

The Appellate Division decision in *Hoffend* (19 A.D.3d 1056 (4th Dept. 2005)), which also dismissed the insured's complaint, was based, at least in part, on the fact that the insured had received the subject policy nine months before the loss, and was, therefore, "charged with 'conclusive presumptive knowledge of the terms and limits of [the policy],' thus defeating [its causes of action for negligence and breach of contract] as a matter of law." The Court of Appeals, however, specifically declined to address the important question of whether, in an action by an insured against a broker for failure to procure proper and necessary insurance coverage, the insured is barred from recovery because, "having received and had an opportunity to read the policy, it requested no changes in it."

Insured's Knowledge

In numerous early cases, the courts held that an insured is presumed to know the contents of a policy in his or her possession and, therefore, has no valid cause of action against an insurance broker or agent for failing to procure satisfactory coverage. See, e.g., *Rogers v. Urbanke*, 194 A.D.2d 1024 (3d Dept. 1993) ("plaintiffs had conclusive presumptive knowledge of the terms and limits of the...policy for over a year prior to the accident—and took no action to increase coverage"); *Madhvani v. Sheehan*, 234 A.D.2d 652 (3d Dept. 1996) ("once a declarations page and insurance policy has been received, it constitutes 'conclusive presumptive knowledge' of the terms and limits of a policy"); *Brownstein v. Travelers Cos.*, 235 A.D.2d 811 (3d Dept. 1997) ("Plaintiffs had such policy in their possession for approximately three years and admit-

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NORMAN H. DACHS and JONATHAN A. DACHS are partners at Shayne, Dachs, Corker, Sauer & Dachs, in Mineola.

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tedly never read or reviewed any part of it, ...in the absence of fraud or other wrongful act on the part of the other contracting party, [plaintiffs are] conclusively presumed to know its contents and to [have] assent[ed] to them"); *M&E Manufacturing Co. Inc. v. Frank H. Reis Inc.*, 258 A.D.2d 9 (3d Dept. 1999) ("plaintiff does not dispute that it received the subject policy,..and, thus, plaintiff's representatives are presumed to have known its contents and to have assented to them"). See also, *Chase's Cigar Store Inc. v. The Stam Agency Inc.*, 281 A.D.2d 911 (4th Dept. 2001); *Busker on the Roof Limited v. M.E. Warrington*, 283 A.D.2d 376 (1st Dept. 2001); *Catalanotto v. Commercial Mutual Ins. Co.*, 285 A.D.2d 788 (3d Dept. 2001); *LaConte v. Bashwinger Insurance Agency*, 305 A.D.2d 845 (3d Dept. 2003); *Noroian v. Cohen*, 7 A.D.3d 288 (1st Dept. 2005); and *McGarr v. The Guardian Life Ins. Co. of America*, 19 A.D.3d 254 (1st Dept. 2005).

One question that naturally arises in the context of such a general rule is whether the presumption of conclusive knowledge of the contents of an insurance policy was intended to circumvent the common law liability of insurance procurers regardless of the surrounding circumstances. In this regard it must be noted that some insurers furnish copies of their policies to their insureds even before the commencement of the policy period. In such instances, the policyholder would receive the policy prior to any loss covered by the policy, and, therefore, would always be subject to a preclusive presumption. Unless the general rule is tempered, insurance brokers could conceivably avoid common law liability and be free to conduct themselves in a negligent manner with impunity by the simple expedient of providing advanced copies of the policies they procured.

Exceptions to General Rule

Perhaps in recognition of this potential pitfall, several courts have recognized exceptions to the general rule of conclusive presumptive knowledge of a policy's terms where, for example, there is an affirmative misrepresentation made by an insurance agent regarding coverage, or a failure by such agent to correct a clear misimpression created by the agent's issuance of a binder or policy containing inaccurate information. *Laconte v. Bashwinger Ins. Agency*, 305 A.D.2d 845 (3d Dept. 2003).

In *Kyes v. Northbrook Prop. & Cas. Ins. Co.*, 278 A.D.2d 736 (3d Dept. 2000), for example, the insured alleged that after he read the policy's declarations page, the property insurance policy and the binder sent to him by his insurance agent, he "specifically questioned the scope of the coverage obtained in light of his business practices." The agent assured him that he "was all set for what [he] did." The insured thereafter renewed the policy twice without changing the amount or scope of coverage.

> In 'Golub v Tanenbaum-Harber Co.,' the court noted that "an omission does not constitute fraud unless there is a fiduciary or 'special' relationship between the parties." Moreover, the court noted that the plaintiff was given a copy of the policy and was "presumed to have read and understood his policy."

Subsequently, the insured sustained a loss during the course of his business operations. The insurer denied the claim, prompting the insured to bring an action against the agent. In denying the agent's motion for summary judgment, the court held that "the insured has met his burden to demonstrate the existence of a viable question of fact pertaining to whether or not he had the right to rely upon the agent's] 'presumed obedience to his...instructions.'" Thus, the court held that reliance could, under the appropriate circumstances, supersede the insured's "conclusive presumptive knowledge of the terms and limits of the policy." Id at 737-738.

In *Arthur Glick Truck Sales Inc. v. Spadaccia-Ryan-Haas Inc.*, 290 A.D.2d 780 (3d Dept. 2002), the agent, with whom the insured had a 10-year relationship, procured property insurance with specific policy limits during the policy periods of January 1996 to January 1997 and January 1997 to January 1998. Prior to January 1998 the insured requested the agent to procure alternate coverage from an insurer with "less onerous reporting requirements." Id. at 780-781. The agent procured the requested coverage and issued a binder that reflected coverage with the same limits as the prior policies. However, the actual policy afforded lesser limits. The insured's business was destroyed by fire on Jan. 31, 1998. The insured admitted that it received the policy in November or December 1997—before the loss.

In affirming the denial of the agent's summary judgment motion, the court held that an exception to the conclusive presumptive knowledge of a policy's terms was applicable because the agent "knew that a binder had been issued to plaintiffs with specific coverages yet never informed [the insured] that this binder was itself inaccurate or that the policy was issued with limits different than those recited in the binder." Id. at 781-782. The court further noted that, "[n]one of the many cases cited by [the agent] in support of the general proposition that receipt of an insurance policy constitutes 'conclusive, presumptive knowledge' of the terms of the policy are analogous to the facts of this case where plaintiffs may have been misled by defendant's conduct as to the amount of policy limits. Notably, the general rule that an insured is presumed to know the contents of a policy in its possession is not without exception. Under the circumstances of this case, we find no basis to distinguish between the affirmative misrepresentation by an insurance agent regarding policy coverages...and the failure to correct a clear misimpression created by defendant's issuance of a binder in the case at bar." Id. at 782.

In *Baseball Office of the Comm'r v. Marsh & McLennan Inc.*, 295 A.D.2d 73 (1st Dept. 2002), the insured's broker failed to obtain personal injury coverage as part of the standard-form general liability policy. The insured alleged that the broker

accepted the carrier's elimination of personal injury coverage and failed to advise it of that elimination or procure other coverage. In fact, the broker forwarded the subject policy with a note reading "We have checked the policies for accuracy and have found everything to be in order." Id. at 75. When asked about procuring other coverage, the broker testified "It was something I had intended to get to but didn't." Id. at 79. The insured claimed that it suffered a loss as a result.

In reversing the grant of summary judgment to the broker, notwithstanding that the insured received a copy of the policy prior to the loss, the court noted that "An insured has a right to look to the expertise of its broker with respect to insurance matters. And, it is no answer for the broker to argue, as an insurer might, that the insured has an obligation to read the policy. It is precisely to perform this service as well as others that the insured pays a commission to the broker. While an insured's failure to read or understand the policy or to comply with its requirements may give rise to a defense of comparative negligence in a malpractice suit against the broker, the insured's conduct does not, as the motion court held, bar such an action." Id. at 82 [internal citations omitted].

In *Reilly v. Progressive Ins. Co.*, 288 A.D.2d 365 (2d Dept. 2001), the court observed that "in a case such as this, where the insureds allegedly made an explicit request for a specific amount of coverage, the mere fact that the plaintiffs had ample time yet failed to read the policy to discern the actual liability limit...is not a superseding cause precluding liability as a matter of law [citations omitted]." See also, *Hersch v. DeWitt Stern Group Inc.*, 43 A.D.3d 64 (1st Dept. 2007) ("Although plaintiff admittedly received and read the policy procured by defendant brokerage, he was allegedly assured that the requested coverage had been obtained and he had 'a right to look to the expertise of [his] broker with respect to insurance matters' [citing *Baseball*, supra]."

More recently, in *American Building Supply Corp. v. Petrocelli Group Inc.*, 81 A.D.3d 531 (1st Dept. 2011), lv. to appeal granted 17 N.Y.3d 711 (2011), an action alleging that the defendant broker was negligent and in breach of contract based on its failure to procure insurance coverage specifically requested by the plaintiff, the trial court denied the broker's motion for summary judgment because issues of fact existed as to whether the information provided by the plaintiff to the broker should have alerted the broker that the general liability policy it obtained, which contained a particular exclusion, may not have provided the requested coverage. Moreover, the court held that the insured's failure to review the policy procured by the agent did not alter the court's conclusion, citing and relying upon *Baseball*, supra. 2010 N.Y. Slip Op. 30611 (U), 2010 WL 1219508 (Sup. Ct. N.Y. Co. 2010).

On appeal, the First Department agreed that issues of fact existed regarding the sufficiency of the insured's request for coverage, but went on to dismiss the claim against the broker because "the presumption that a policyholder read and understood a policy of insurance duly issued to him or her precludes recovery in this action [citations omitted]. Although the presumption may be overcome if there is wrongful conduct on the part of the broker, such as when the broker affirmatively misrepresents or fails to correct a misimpression regarding coverage [citation omitted], there is no evidence of such an affirmative misrepresentation here."

In *Page One Auto Sales Inc. v. Brown & Brown of New York Inc.*, 83 A.D.3d 1482 (4th Dept. 2011), the plaintiff, an automobile dealership, sued its insurance broker for the alleged breach of its duty to procure an insurance policy containing "false pretense coverage," which is intended to cover losses in the event that plaintiff purchased automobiles with defective titles. The court noted, "In New York, the duty owed by an insurance agent to an insurance customer is ordinarily defined by the nature of the request a customer makes to the agent [citations omitted]. 'Where...there is a specific request for insurance, the agent has a duty to obtain the requested coverage or to inform the client of his or her inability to do so' [citation omitted]. 'In such

a case, it must be demonstrated that the coverage could have been procured prior to the occurrence of the insured event' [citations omitted]." The court then held that there were triable issues of fact whether defendant breached its duty to procure the insurance requested by plaintiff.

The court added that "although the insured's receipt of the insurance policy at issue may in some cases provide a complete defense to the insured's action against an agent or broker for failing to procure certain coverage [citations omitted], it does not provide such a defense in this case. Where, as here, there is evidence establishing that the insured made requests for the missing coverage subsequent to receipt of the policy, the broker has a renewed 'duty to obtain the requested coverage or to inform the client of [its] inability to do so [citation omitted].'"

In *Golub v. Tanenbaum-Harber Co. Inc.*, 88 A.D.3d 622 (1st Dept. 2011), the court held that the plaintiff failed sufficiently to plead causes of action against an insurance agent for fraudulent inducement, unjust enrichment and violation of General Business Law §349. Insofar as the fraudulent inducement claim is concerned, which was based upon the defendant's alleged failure to provide the plaintiff with certain information relating to insurance policies it was offering, the court noted that "an omission does not constitute fraud unless there is a fiduciary or 'special' relationship between the parties." Moreover, the court noted that the plaintiff was given a copy of the policy and was "presumed to have read and understood his policy"—thus defeating his claim that he did not know that the policy contained certain coverage or that he was fraudulently induced into agreeing to such coverage.

And, in *Motor Parkway Enterprises Inc. v. Loyd Keith Friedlander Partners, Ltd.*, 89 A.D.3d 1069 (2d Dept. 2011), an action to recover damages for negligent procurement of insurance coverage, the defendants' motion to dismiss the complaint was granted because "[t]he documentary evidence submitted by the defendants, including the application for insurance signed by the plaintiff's president and the resulting policy of insurance furnished by the defendants to the plaintiff, conclusively disposed...of the plaintiff's claims that the defendants procured insurance coverage in an amount other than that requested by the plaintiff [citations omitted]." Moreover, the court relied upon the well-established principle that "the plaintiff is 'conclusively presumed to have read and assented to the terms of the...policy [citations omitted], and therefore cannot claim that it believed that it possessed greater coverage than that set forth in the policy."

Court of Appeals Review

As previously noted, the Court of Appeals has granted leave to appeal in *American Building Supply Corp. v. Petrocelli Group Inc.*, supra. Thus, although the Court was apparently not ready to settle the law on this particular issue in *Hoffend*, supra, because it was not necessary to do so in that case, the issue is now squarely before the Court, on its own initiative. We look forward to the high Court's clarification of the current confusing state of the law and its determination of the issue of whether the insured's failure to read and understand the terms of the insurance policy will be deemed fatal to a negligence claim against the agent or broker, or simply an issue of comparative negligence—or, perhaps, of no effect whatsoever.