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Court of Appeals: Deciding and Deciding Not to Decide

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When the state's highest court speaks on the subject of insurance law, we listen very carefully. This is particularly so when the Court of Appeals issues three interesting, instructive and important decisions within the span of six days, as it did in June 2006.

Although former Chief Judge Sol Wachtler once protested, in response to an oral argument we made before the Court of Appeals many years ago in which we may have overstated the significance of our particular case, that "there are no interesting insurance law cases," we find that decisions by the Court of Appeals on matters of insurance law are usually very interesting, instructive and important to practitioners and litigants alike.

No Decisions

• ***Interesting for What They Do Not Decide.*** In fact, sometimes, as in the first two cases discussed below, these decisions are as interesting for what they do not decide as for what they do decide.

In *Hoffend & Sons, Inc. v. Rose & Kiernan, Inc.*,—NY3d—,—NYS2d—, 2006 WL 1547708 (June 8, 2006), the Court 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—a prerequisite to the trigger of the common-law duty of a broker either to obtain the coverage that a customer requests or to inform the customer of an inability to do so (see *Murphy v. Kuhn*, 90 NY2d 266 [1997]), 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.

In *Automobile Insurance Company of Hartford v. Cook*, —NY3d—,—NYS2d—, 2006 WL 1547725 (June 8, 2006), the Court held that a wrongful death claim arising from a shooting committed by the insured in self-defense was covered by the terms of a homeowners policy notwithstanding the fact that the insured conceded that he knew that the shot from his gun would injure the man who broke into his home and came towards him in a menacing and threatening fashion, because he "had to stop him," but he did not anticipate that it would kill him.

In *New York Central Mutual Fire Ins. Co. v. Aguirre*, —NY3d—,—NYS2d—, 2006 WL 1593955 (June 13, 2006), the Court denied an insurer's petition to stay an uninsured motorist arbitration based upon a claim of a breach by the insured of the "Notice and Proof of Claim" condition of the policy by failing "immediately" to complete and return the "Notice of Intention to Make Claim" form sent to him because the insured failed to disclaim coverage on that ground within a reasonable time after it knew or should have known that the form had not been returned.

We have no doubt that each of these decisions will, in the weeks and months to come, generate a substantial amount of critical discussion and analysis by those who are pleased, disturbed, puzzled, or just plain intrigued, by the nuances or implications of the answers given by the Court of Appeals to the interesting and important questions raised therein. Indeed, we suspect that we, ourselves, may, at some time in the future, be among those offering commentary on the various holdings of the Court in these cases.

Issues Raised by Court of Appeals

For present purposes, however, we find ourselves more interested and concerned with the fact that in the first two of these cases, the Court of Appeals raised, but elected specifically not to address or decide, certain issues.

In *Hoffend & Sons, Inc.*, supra, the Court declined to address whether, inaction 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." In *Automobile Insurance Company of Hartford*, supra, the Court left unanswered the question of "whether acts of self-defense are intentional acts precluding coverage under a homeowner's policy."

Taking our cue from the Court itself, we have no intention of trying to provide the answers to these questions. Instead, we wish simply to clarify the debate on these important issues by elucidating the positions of both sides to each dispute.

In the interests of time and space, we will address only the first issue herein, and will discuss the second issue in a future article.

Insured's Duty to Read the Policy

Although, as noted, the *Hoffend* Court declined to address this issue, the Appellate Division decision in that case (19 AD3d 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."

This concept appears to originate in an earlier Court of Appeals decision, in *Metzger v. Aetna Ins. Co.*, 227 NY 411 (1920). In that case, involving an action to reform a policy of fire insurance and to recover upon the policy as reformed, the Court of Appeals, in rejecting the plaintiff's claim, observed that "If the insured obtained or held a mistaken view or belief concerning the agreements of the policy, the fault or negligence of its president and representative was the cause. A mere reading of the policy would have made him and the plaintiff know the agreements the plaintiff was accepting and entering into. To hold that a contracting party, who, through no deceit or overbearing inducement of the

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other party, fails to read the contract, may establish and enforce the contract supposed by him, would introduce into the law a dangerous doctrine. Of course, the doctrine does not exist." The Court further observed that, "He who signs or accepts a written contract, in the absence of fraud or other wrongful act on the part of another contracting party, is conclusively presumed to know its contents and to assent to them, and there can be no evidence for the jury as to his understanding of its terms [citations omitted]. This rule is as applicable to insurance contracts as to contracts of any other kind [citations omitted]." The Court of Appeals reaffirmed the validity of the *Metzger* rule on four subsequent occasions.[1]

Presumptive Knowledge

• ***Conclusive Presumptive Knowledge.*** In numerous cases that followed, the courts have 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 AD2d 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 AD2d 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 AD2d 811 (3d Dept. 1997) ("Plaintiffs had such policy in their possession for approximately three years and admittedly 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 AD2d 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").[2]

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.[3]

In *Kyes v. Northbrook Prop. & Cas. Ins. Co.*, 278 AD2d 736 (3d Dept. 2000), the insured alleged that after he read the 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. 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, supercede the insured's "conclusive presumptive knowledge of the terms and limits of the policy." Id. at 737-738.

'Arthur Glick Truck Sales'

In *Arthur Glick Truck Sales, Inc. v. Spadaccia-Ryan-Haas, Inc.*, 290 AD2d 780 (3d Dept. 2002), the agent, with whom the insured had a ten year relationship, procured property insurance with specific policy limits during the policy periods of 1/96-1/97 and 1/97-1/98. 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.

'Baseball Office of Comm'r'

In *Baseball Office of the Comm'r Marsh & McLennan, Inc.*, 295 AD2d 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 the fact that the insured received a copy of the policy prior to the loss, the court noted that "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 it the opportunity to procure the insurance elsewhere". Id. at 79-80 (citing *Murphy*, 90 NY2d 266).

Furthermore, "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 AD2d 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 superceding cause precluding liability as a matter of law [citations omitted]."

Finally, it is interesting to note that the courts in other jurisdictions appear to be fairly equally split on the issue of whether an insured's receipt of the policy before a loss bars a lawsuit against the agent or broker.[4]

Although the Court of Appeals was apparently not ready to settle the law on this particular issue because it was not necessary to do so in the particular case before it, it is likely that this issue will be presented again in an appropriate case. At that time, the Court will determine which of the opposing views presented above should prevail.

1. See *Royal Indemnity Co. v. Heller*, 256 NY 322 (1931); *Level Export Corp. v. Wolz, Aiken & Co.*, 305 NY 82 (1953); *Gillman v. Chase Manhattan Bank, N.A.*, 73 NY2d 1 (1988); *Fiore v. Oakwood Plaza Shopping Center, Inc.*, 78 NY2d 572 (1991).

2. See also, *Chase's Cigar Store, Inc. v. The Stam Agency, Inc.*, 281 AD2d 911 (4th Dept. 2001); *Busker on the Roof Limited v. M.E. Warrington*, 283 AD2d 376 (1st Dept. 2001).

3. See *Laconte v. Bashwinger Ins. Agency*, 305 AD2d 845 (3d Dept. 2003).

4. Compare *Polly Drummond Thriftway, Inc. v. W.S. Borden Co.*, 95 FSupp2d 212 (D. Del. 2000); *Hampton Roads Carriers, Inc. v. Boston Ins. Co.*, 150 FSupp 338 (D. Md. 1957); *Ursini v. Goldman*, 118 Conn. 554 (Conn. 1934); *Shapiro v. Amalgamated Trust & Sav. Bank*, 283 Ill. Spp. 243 (Ill. App. Ct. 1935), with *National Council on Compensation Ins. Inc. v. Strickland*, 241 Ga. App. 504 (1999); *Motors Ins. Co. v. Bud's Boat Rental, Inc.*, 917 F.2d 199 (5th Cir. 1990) (applying La. law); *Rumpza v. Larsen*, 1996 S.D. 87 (S.D. 1996); *General Ins. of Roanoke, Inc. v. Page*, 250 Va. 409 (1995).