Understanding an Insurance Brokers Duty of Care

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Introduction

Insurance law is a wide ranging field which arises predominantly, but not exclusively, from the law of contract. Statutory and regulatory provisions, for example, can establish legislatively mandated obligations and duties of care. Although insurance “bad faith” might appear to be a tort driven cause of action, the New Jersey Supreme Court, in the context of bad faith failure to settle, observed that the cause of action “sounds in both tort and contract.” Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 504 (1974). When establishing the standard for a bad faith cause of action for failure to pay a claim, the Supreme Court ultimately concluded that the cause of action is best understood as one that sounds in contract. Pickett v. Lloyd’s, 131 N.J. 457, 470 (1993). Claims against insurance brokers, however, move the analysis from contract to tort law.

Insurance intermediaries are often referred to as “insurance brokers” or “insurance agents.” The fundamental distinction between an agent and a broker is that the “broker” represents the policyholder’s interests whereas the “agent” customarily represents the interest of the carrier pursuant to a written contract. See Weinisch v. Sawyer, 123 N.J. 333, 339-40 (1991). In New Jersey, insurance intermediaries are referred to collectively as producers. See N.J.S.A. 17:22A-28. Moreover, when acting for the benefit of a client, the duties of an agent and a broker are the same.

The case law discussed below has defined and refined the unexpectedly complex issue of a broker’s common law duty, the circumstances under which the duty can be expanded, as well as the defenses to a claim that a duty has been breached. In examining the nature and breadth of the duty owed by a producer to a client, courts have considered that as holders of a state-issued license, producers are holding themselves out as possessing certain expertise. Courts have also considered the specific facts in a given case concerning the nature and duration of the relationship between the insurance broker and his client.

The seminal case establishing an insurance producer’s common law duty is Rider v. Lynch, 42 N.J. 465 (1964). After 50 years and dozens of reported decisions, important issues concerning the nature and breadth of broker duty remained unresolved. Those issues included: (1) whether the insurance broker-client relationship, in and of itself, created a fiduciary duty of care and (2) whether a broker’s specific relationship with its client can (in the absence of expert testimony) create a heightened duty of care. In the context of the New Jersey Affidavit of Merit statute, the Appellate Division, in Triarsi v. BSC Group Services, LLC, 442 N.J. Super. 104 (App. Div. 2011) has provided answers to these unresolved issues.
Insurance Producer's Common Law Duty of Care

RIDER V. LYNCH

The “base-line” standard against which an insurance producer’s conduct is measured was set down in Rider v. Lynch, 42 N.J. 465 (1964) and remains the law today. An insurance producer has a duty to: (1) have the degree of skill and knowledge requisite to his or her employment responsibilities, (2) exercise good faith and reasonable skill, care and diligence in the execution of his or her employment responsibilities, (3) possess reasonable knowledge of available polices and terms of coverage in the area in which the insured seeks protection; and (4) either procure the coverage necessary for the client’s exposures or advise the client of his or her inability to do so. Rider, 42 N.J. at 476-477.

In Rider, Air Force airman Gerald Day was stationed at Fort Dix and insured his Ford automobile through the Guenther Agency in Mount Holly, New Jersey. When he was deployed to Alaska, Day left his car with his 18-year-old fiancée, Tomiko Lynch. Tomiko drove to Guenther’s office to renew the auto policy and explained she had a learner’s permit, not a license, and that she wanted the policy to cover her. The application which Guenther filled out, had Tomiko sign, and then submitted to the carrier, General Insurance Company, specifically noted that she did not have a driver’s license.

According to Tomiko, Guenther said she could not have insurance on the car because she did not own it, and that the best he could provide her with was “non-owner's” insurance.

Apparently, Guenther did not offer any explanation as to the scope of coverage on the policy or how it would protect her. Guenther did tell her, however, that he would try to obtain insurance “so she could drive safely.”

Tomiko’s father was in an accident while operating the car for family purposes, General Insurance denied coverage for the resulting claim because the vehicle did not fit within the policy definition of “non-owned automobile.” On appeal, General Insurance Company’s coverage decision was affirmed by the New Jersey Court.

The Court was highly critical of Guenther’s actions, finding:

It is likewise clear, however, that the automobile had been furnished by Day for the regular use of his fiancée, Tomiko Lynch, during his assignment in Alaska. Therefore, the car did not qualify for coverage as a non-owned vehicle, and neither it nor Vernon Lynch was within the policy protection at the time of the accident. But more than this, the policy provided no protection for Tomiko Lynch either on that day or at any other time since its inception. It was completely worthless to her and her father in connection with their use of Day's car—the only purpose for which it was sought from Guenther and paid for. The purpose of non-ownership coverage of the kind included in General's policy is to provide protection for an insured for the occasional or infrequent driving of an automobile other than his own, but not to take the place of insurance on automobiles which are furnished for his regular use.

[Rider, 42 N.J. at 474.]

The court set down the common law duty of an insurance intermediary and remanded the matter for further proceedings against the broker.
In Brill v. Guardian Life Insurance Company of America, 142 N.J. 520 (1995), the New Jersey Supreme Court concluded that a broker’s common law duty to act with reasonable skill and diligence includes an obligation to tell a client about the availability of immediate insurance coverage through a binder. In Brill, a widow brought suit against her husband’s insurance broker, Gould, and his agency for failing to advise her husband, a prospective insured, of the possibility of securing immediate, temporary life insurance coverage upon completion of a life insurance application. When the plaintiff’s husband died, the life insurance application seeking a $750,000 death benefit was still under review, and no policy had been issued.

In discovery, Gould admitted that he never advised Brill that he could obtain coverage immediately in the form of a conditional receipt. Due to the fact that coverage was not effectuated immediately by the use of a conditional receipt, when Brill died, there was no coverage for a life insurance policy with a $750,000.00 benefit. Based upon the defendant producer’s admission that he failed to advise of the availability of immediate coverage, the trial court granted summary judgment in favor of plaintiff in the amount of $750,000.

The Supreme Court affirmed the trial court’s decision. Referring to Rider v. Lynch, the Court noted that the common law had long recognized that an insurance broker owes a duty to the insured to act with reasonable skill and diligence in performing the services of a broker. Brill, 142 N.J. at 542. In Brill, the Court found as a matter of law that the duty owed by a broker to an applicant for insurance includes the duty to inform the potential insured of the availability of immediate insurance coverage through a temporary binder. Thus, if a broker does not inform the prospective insured of the availability of a temporary binder option, the broker has committed professional negligence. Id. Furthermore, no expert testimony is necessary.

In Aden v. Fortsh, 169 N.J. 64 (2001), the Supreme Court held that the comparative fault defense is unavailable to an insurance producer who asserts that the client failed to read his or her insurance policy. In the course of the opinion, the Court made statements which have engendered confusion for the past ten years.

In Aden, the client contacted his broker to procure insurance for a newly-purchased condominium. The client advised the broker that he paid $50,000 for the condominium and that the contents inside the unit were worth $16,000. The policy procured by the broker, however, provided only $1,000 in coverage for dwelling damage, an amount clearly insufficient under the condominium master deed. While the trial record was silent as to how the $1,000 limit was established, Fortsh testified that he believed the condominium association policy would provide Aden with dwelling coverage. Aden failed to read his policy and was unaware of the coverages provided by the association property policy.

After a fire damaged Aden’s condominium unit, he discovered that the association policy covered only the building exterior. Because of the $1,000 limit in his policy, Aden suffered a $20,000 uninsured loss from the damage caused by the fire. Examination of the policy would have alerted Fortsh to the gap in his coverage.

At trial, the court denied the broker’s request for a comparative negligence charge based upon Aden’s admitted failure to read his policy. The jury returned a verdict in favor of the insured. The Appellate Division reversed, holding that the trial
court erred in refusing to instruct the jury that the insured’s failure to read the policy could support a comparative negligence defense. The New Jersey Supreme Court granted certification, reversed and reinstated the jury’s verdict.

In analyzing the broker liability issue, the Court looked to professional liability case law stating “[t]he view that comparative or contributory negligence generally may not be charged when a professional breaches his or her duty to a client reflects our heightened expectations of professional services in this State.” Aden, 169 N.J. at 75. Accordingly, the majority decision found:

[T]he comparative negligence defense is unavailable to a professional insurance broker who asserts that the client failed to read the policy and failed to detect the broker’s own negligence. It is the broker, not the insured, who is the expert and the client is entitled to rely on that professional’s expertise in faithfully performing the very job he or she was hired to do. Id. at 69-70.

The holding in Aden was limited to the issue before the Court, that is, whether under the facts of that particular case, the producer could assert a comparative negligence/failure to read defense. In the opinion, however, Justice Zazzali made several references to the “special relationship” and to the “fiduciary relationship” between an agent and a broker. See, e.g., Id. at 75, 78-80. After the Aden decision was issued in 2001, counsel representing policyholders pointed to the Court’s reference to a “fiduciary relationship” and argued to trial court judges that Aden expanded the duties owed by an insurance broker. Arguing that producers were fiduciaries, they asked for a charge which included the duty owed a fiduciary. The New Jersey Supreme Court has described the elements of a claim for breach of fiduciary duty as follows:

The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position. A fiduciary relationship arises between two persons when one person is under a duty to act for or give advice for the benefit of another on matters within the scope of their relationship. The fiduciary’s obligations to the dependent party include a duty of loyalty and a duty to exercise reasonable skill and care. Accordingly, the fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship.


Thus, the language referencing a “fiduciary relationship” in Aden engendered confusion with regard to the outside limits of a broker’s common law duty to its client.

**Insurance Producers & Affidavits of Merit**

The Affidavit of Merit (AOM) statute, N.J.S.A. 2A:53A-27, was enacted by the Legislature in 1995. Courts have interpreted the statute as providing a mechanism to “require plaintiffs in malpractice cases to make a threshold showing that their claim is meritorious, in order that meritless lawsuits readily could be identified at an early stage of litigation.” In Re: Petition of Hall, 147 N.J. 379, 391 (1997). As such, in an action involving “malpractice or negligence by a licensed person in his profession or occupation,” the plaintiff must file the Affidavit of Merit within 60 days after the filing of an answer. N.J.S.A. 2A:53-27. In the affidavit, a similarly licensed professional must swear to an opinion that the defendant’s conduct failed to conform to a professional standard of care.
That the law of producer liability in New Jersey arises from that of professional liability, rather than contract law, is illustrated by the application of the AOM statute to insurance producers. Indeed, the statute, as amended, specifically states it applies to insurance producers, defining such producers as those “required to be licensed under the laws of [New Jersey] to sell, solicit or negotiate insurance.” Boerger v. Commerce Ins. Svcs., No. Civ. A. 04-1337 2005 WL 2901903, *2, n.2 (D.N.J. 2005) (quoting N.J.S.A. 17:22A-26 (Nov. 1, 2005)).

Although it is clear that the AOM statute applies to claims against insurance producers, counsel must consider the recurring question of when due to the facts of claim or the nature of a specific professional relationship, a claimant is not obligated to file an affidavit of merit.

**TRIARSI V. BSC GROUP SERVICES, LLC**

In Triarsi v. BSC Group Services, LLC, 422 N.J. Super. 104 (App. Div. 2011), the trustee of a trust sued an insurance producer for wrongfully permitting the lapse of a $1.15 million life insurance policy. The complaint set forth three causes of action, all of which were dismissed by the trial court for failure to timely file an affidavit of merit. The procedural history of the case not only serves as a cautionary tale for counsel representing claimants in professional liability claims in New Jersey, but also serves to answer some of the open questions of broker liability in New Jersey.

A businessman, Halpin, employed a broker, Wright (who worked at BSC Group), to procure a life insurance policy. For estate planning purposes, Halpin created a trust, and the life insurance policy was payable to the trust upon his death. The policy was the sole asset of the trust.

In 2008, Halpin’s health declined and he became seriously ill. At the same time, bills for renewal premium with regard to the life insurance policy were disregarded and the policy lapsed. After an opportunity for reinstatement of the policy passed, Halpin died at the end of December of 2008.

In April of 2009, the trustee, Triarsi, filed a complaint against BSC and Wright. The complaint set forth the following three causes of action:

- Breach of defendant’s alleged fiduciary duty to Halpin and the trustee;
- Breach of defendant’s duty of reasonable care in performing their duties as life insurance agent and broker; and
- Breach of the special relationship between insurance agent and client in connection with life insurance policies.

In decisions which later became very important, counsel made specific fact allegations when he drafted the complaint. Thus, the complaint alleged that the broker regularly arranged for Halpin’s needs, that he was familiar with the Halpin family, that the defendant knew that the life insurance policy was the only trust asset and was therefore critical, that the broker and the decedent met regularly to review and maintain his “insurance needs” and, on at least one prior occasion, that the defendant broker advanced the premium for the policy.

After Triarsi failed to timely serve an affidavit of merit, the defendant broker filed a motion to dismiss. The trial court ultimately rejected Triarsi’s arguments on the motion as well as on a motion for reconsideration and dismissed all counts of the complaint with prejudice.
On appeal, Triarsi argued that the trial court erred because an affidavit of merit was not required for the breach of fiduciary duty and breach of special relationship counts in the complaint. As such, the Trust essentially conceded that an AOM was necessary for the negligence allegations set forth in the second count.¹

**FIDUCIARY DUTY**

In writing for the Appellate Division Panel, Judge Waugh recognized that the issue before the court required the panel to analyze whether there is a separate common law cause of action in New Jersey against an insurance broker for breach of fiduciary duty. The complaint cast Wright as a fiduciary and alleged a breach of the fiduciary’s duty. Upon review of the case law, the Appellate Division concluded:

Consequently, both counts one and two focus on defendants’ failure to advise Halpin and Triarsi of the impending cancellation of the policy and how to maintain or reinstate the policy. Both legal theories are premised on defendants having a duty to do so, although the duty is referred to as a fiduciary one in count one and a professional one in count two. However, as a matter of law, there is actually a single duty and it is essentially one sounding in negligence.

[id. at 115 (emphasis added).]

Having carefully read the line of cases which preceded Aden v. Fortsh, the court observed that “the fiduciary relationship gives rise to a duty owed by the broker to the client ‘to exercise good faith and reasonable skill in advising insureds.’” Id. at 115 (quoting Weinisch v. Sawyer, 123 N.J. 333, 340 (1991). An insurance producer is, after all, a professional, not a fiduciary.

The court then returned to the fundamental issue of whether the facts of the case made necessary the establishment of the duty of care through expert testimony. Given that the predominant communication was directly between the carrier and the insured with regard to premium payments, the court concluded that expert testimony would be required to establish that a broker has a duty with regard to the payment of renewal premiums, avoidance of cancellation and reinstatement. Id. at 116. As such, an affidavit of merit was necessary with regard to both counts one and two of Triarsi’s complaint and the dismissal of count one was affirmed.

**SPECIAL RELATIONSHIP**

Triarsi was now down to his final count which alleged a “special relationship” between the broker and the decedent and the trustee. The Appellate Division found support for the existence of a duty arising from such a relationship in Glezerman v. Columbian Mutual Life Insurance Company., 944 F.2d 146 (3d Cir. 1991). Glezerman, which applied New Jersey law, held:

An insurance agent may assume duties in addition to those normally associated with the agent-insured relationship, and New Jersey courts regularly review the record for evidence of greater responsibilities. The prior conduct of and length of relationship between the parties can create or negate the existence and scope of the duty owed to the insured. Ibid. at 150-151.
Accepting Glezerman as sound authority for the concept that a broker’s duty can be expanded based upon the specifics of its relationship with a client, the Court turned to facts alleged in the complaint. At this point, Triarsi was aided by the specific allegations in his complaint. The allegations of a long, close relationship and the advancement of premium were sufficient, at the motion to dismiss stage of the litigation, to sustain a claim for breach of a heightened “special relationship” duty. As such, the Appellate Division found that “because the claim in count three does not require expert testimony to establish the existence of a professional standard of care” the AOM statute was not applicable to count three. *Id.* at 117. The trial court’s dismissal was reversed and the matter remanded “for further proceedings consistent with this opinion.” *Ibid.*

*Triarsi v. BSC Group* will be cited in the future predominantly for its holding with regard to application of the affidavit of merit statute to insurance producers as well as for the *Ferreira* conference holding. As to insurance brokers, *Triarsi* has much greater meaning. The question raised by *Aden* concerning a broker’s alleged duties as a fiduciary has been squarely resolved. There is only one duty, a duty of professional care as defined in *Rider v. Lynch*. The reference to the “fiduciary relationship” is merely one fact in the analysis leading to the imposition of the duty. Moreover, the decision established that when there are facts to show a broker assumed a role of greater trust with his client’s affairs, a separate duty – attendant to the undertaking – arises. Moreover, this duty can be identified by the facts themselves and not necessarily by an industry expert.

*Triarsi* also includes an important lesson with regard to experts and the Affidavit of Merit statute. The application of the Affidavit of Merit statute is closely linked to the question of whether counsel representing the policyholder in a claim against an insurance producer needs to retain an expert to identify an applicable standard of care. Unless the facts speak for themselves or the broker has essentially admitted liability, (see *Brill v. Guardian*, supra), it is likely that an expert will be necessary to establish an applicable duty of care and perhaps address other issues such as causation. *(See Harbor Commuter Service, Inc. v. Frankel & Co., Inc., 401 N.J. Super. 354 (App. Div. 2008)*). Since an expert will be needed to meet the burdens imposed by the law, the expert should be retained early on so that the affidavit of merit required by N.J.S.A. 2A:53-27 can be served.

1 The second issue before the Appellate Division was whether the failure of the trial court to conduct a Ferreira conference excused the failure to file the Affidavit of Merit. Although this paper will not discuss that portion of the opinion, it should be noted that the Appellate Division held, based on *Paragon Contractors v. Peachtree Condominium Association*, 202 N.J. 415 (2010), that the absence of an Affidavit of Merit conference does not excuse a failure to comply with the statute.

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