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The Professional Lines ALERT

Insurance Broker Can Be Liable to Insured Who Did Not Read the Insurance Policy

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Plaintiff insured had a building lease which required that a policy providing $5 million in coverage for bodily injury and property damage be procured. The insureds' existing policy did not contain this coverage.

The insured hired defendant as its new insurance broker and told the broker that general liability with personal injury coverage for its employees was required by the lease. The insured also informed the broker that only its employees — and never customers — entered the premises. The broker visited the premises and informed the landlord, the New York City Industrial Development Agency, that prior deficiencies in the insured's insurance coverage would be corrected when the policy was up for renewal. The renewed policy obtained by the broker excluded any coverage for bodily injury and property damage just as the prior policy did. Neither the insured's representative nor the broker read the renewed insurance policy.

When one of the insured's employees was injured, the carrier denied coverage. In a consequent action against the insurer, the trial court held that the carrier had no duty to defend or indemnify based on the exclusion. The insured then sued the broker for negligence and breach of contract for failure to procure adequate coverage. The trial court denied the broker's motion for summary judgment and the intermediate appellate division reversed, holding that the insured's failure to read and understand the policy precluded recovery. The New York Court of Appeals reversed.

Question Before the Court

Did the insured's failure to read the insurance policy bar recovery against the broker?

No. The general rule in New York is 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. A plaintiff must establish that a specific request was made to the broker for the coverage that was not provided. A general request for coverage will not satisfy this requirement.

The Court found that there was a conflict among the appellate courts as to whether an insured was presumed to have read and understood the policy once having received it, and could not rely on the broker's word that the policy covered what was requested. The Court cited approvingly to recent decisions holding that receipt and presumed reading of the policy did not bar an action for negligence against the broker. The Court held that while the better practice was for an insured to read the policy, an insured should have a right to look to the expertise of its broker with respect to insurance matters.

The failure to read the policy, at most, may give rise to a defense of comparative negligence, but should not bar an action against a broker altogether.

The Court also found that the evidence supported the insured's claim. The lease required the coverage, no one but employees ever entered the premises, and the coverage the broker had obtained — which excluded coverage for injuries to employees — hardly made any sense. The Court found that issues of material fact as to whether the broker failed to secure a policy as requested precluded summary judgment. A dissenting justice argued that agents and brokers are not personal financial counselors and risk managers approaching guarantor status, and that the relationship between a broker and an insured is an ordinary commercial relationship that does not give rise to a duty to provide ongoing guidance.

What the Court's Decision Means for Practitioners

This decision appears to be a departure from established law that there is a presumption that if an insured receives its insurance policy and does not object to the coverage contained therein, it is presumed to know the contents of the policy and to have assented. Such a holding may lead to, as the dissent forecasts, claims made years later that result in a "he said/she said" battle of what occurred during coverage discussions. The Court of Appeals found compelling the fact that the broker knew about the provisions in the lease, had visited the premises, and was aware that only employees ever entered the premises.

American Building Supply Corp. v. Petrocelli Group Inc., 19 N.Y.3d 730, 979 N.E.2d 1181 (N.Y. Nov. 19, 2012)

For further information, please contact Donald A. O'Brien or your regular Hinshaw attorney.
