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Special Relationship Existed Between Insurance Broker and Insured for Business Interruption Coverage

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Professional Lines Alert

Voss v. The Netherlands Insurance Company, Court of Appeals of New York, 2014 N.Y.Slip Op. 01259 (February 25, 2014)

Plaintiff first met with a representative of defendant insurance broker in 2004 to discuss coverage for her building and her two companies, including business interruption insurance. The broker's representative asked her to disclose her sales figures and other pertinent information to enable him to calculate an appropriate level of business interruption coverage. The representative expressed that the broker would reassess and revisit her coverage needs as her businesses grew. When defendant insurance carrier issued a policy with $75,000 coverage limit for business interruption losses, the plaintiff questioned the broker on whether this limit was adequate and the broker's representative assured her that it would suffice based on the condition of her building as well as the size of her businesses. The representative again emphasized that each year the broker would take it up as the business evolved. In 2006, one of Plaintiff's entities purchased a new building and she moved her existing businesses in and established two new businesses there. Plaintiff discussed the move with the same broker's representative and renewed the policy with the same $75,000 business interruption limit for the new location and all of her entities.

In 2007, two instances of leakage stemming from a defective roof on the new building required Plaintiff to close her businesses for various periods of time. The carrier treated this as two separate occurrences under the business interruption policy, but delayed making any payments. In 2007, while the leakage problems were still ongoing, Plaintiff met with a new representative of the broker to discuss renewal of the same policy. When the new representative informed her that the business interruption coverage would be reduced from $75,000 to $30,000, Plaintiff questioned this reduction and the new representative stated that she would take a look at it. Plaintiff never heard back from the new representative and when the policy was renewed in 2007, it reflected the reduced limit of $30,000 for business interruption coverage.

In 2008, when the roof on the new building failed for a third time causing further disruption of Plaintiff's businesses, Plaintiff commenced an action against the carrier, the insurance broker, and her roofing contractor. Plaintiff alleged that a special relationship existed between herself and the broker who had negligently

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secured inadequate levels of business interruption coverage. The broker moved for summary judgment denying that a special relationship existed and that in the absence a special relationship it could not be held liable for failing to recommend or obtain higher limits. The broker also contended that Plaintiff's negligence claim failed because Plaintiff had reviewed the policies and was well aware of the policy limits. Finally, the broker alleged that the proximate cause of the Plaintiff's injuries was the failure of the carrier to timely pay the policy limits. The trial court granted the broker's motion for summary judgment and the Appellate Division affirmed. The New York Court of Appeals reversed.

Question Before the Court and How the Court Ruled

Did a special relationship exist between this broker and the insured for purposes of business interruption coverage?

Yes. The general rule is that in an ordinary broker/client setting, a client can only prevail in a negligence action where it can establish that it made a particular request to a broker and the requested coverage was not procured. Where a special relationship develops between the broker and the client, the broker may be liable even in the absence of a specific request for failing to advise or direct the client to obtain additional coverage. New York courts had previously held that a particularized situation might arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, assumed duties in addition to those fixed by common law such as where there was some interaction regarding a question of coverage where the insured relies on the expertise of the agent. The Court found that in this case, the evidence suggested that there was some interaction regarding the question of business interruption coverage with the Plaintiff relying on the expertise of the broker. The broker's representative had requested sales figures and other relevant data in order to calculate the proper level of coverage and when the policy included a $75,000 limit, Plaintiff questioned him and was assured that it was adequate based on his review of her businesses' finances as well as her building. The Court commented that this $75,000 limit had been placed in 2004 before the Plaintiff even moved to her new building and expanded the number of businesses that she was operating. The Court also focused on Plaintiff's testimony that the representative repeatedly pledged that the broker would review her coverage annually and recommend adjustments as her business grew.

The Court also held that the Plaintiff's awareness of the $75,000 and later $30,000 reduced limits in her policy did not defeat her cause of action as a matter of law. The claim that a special relationship existed made her knowledge of the policy limits wholly irrelevant in determining whether the broker was negligent in failing to recommend higher limits and that Plaintiff had relied on the broker in setting the coverage amounts. Finally, the court found that there was a material question of fact to be resolved as to whether it was the broker's negligence, Plaintiff's own failure to procure more business interruption coverage or the carrier's failure to pay the claims that was the proximate cause of Plaintiff's losses.

What the Court's Decision Means for Practitioners

This harsh result occurred because a promise by a broker's representative to review Plaintiff's coverage was not followed-up over a period of years and resulted in a reduction in coverage. The New York Court of Appeals in *American Building Supply Corp. v. Petrocelli Group, Inc.*, 19 N.Y.3d 730, 735 (2012), found that the insured's presumptive knowledge of the terms and coverage in its insurance policy was not sufficient as a matter of law to defeat a claim against an insurance broker for negligence. This Court was not reluctant to find the existence of a special relationship based on testimony on interaction between the Plaintiff and the broker's representatives over a period of years as to the amount of business interruption coverage.

For more information, please contact your regular Hinshaw attorney.

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